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CLIMATE TORTS BELONG IN A NUMBER OF HANDS: LOOSENING THE FEDERAL GRIP OF PREEMPTION, ADMINISTRATIVE CONTROL, AND DILATORY PROCEDURE

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I. Introduction

“We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹ Carrying this banner, the Supreme Court’s new vision of a limited *Chevron* deference, tightened preemption, and reinforced federalism will create new opportunities for the state courts to crawl out from beneath the Clean Air Act (CAA) to regain control of climate torts. Once in control, states are well-equipped to implement a variety of powerful solutions.²

The Climate Crisis is expensive. Local governments rely on state-law theories of liability related to emissions and misinformation—hereafter referred to as “climate torts”—to extract relief from oil and gas companies. In turn, oil and gas companies employ court-engineered doctrines to subdue

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1. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation omitted)).

2. See generally Noah Star, *State Courts Decide State Torts: Judicial Federalism & the Costs of Climate Change, a Comment on City of Oakland v. BP P.L.C.* (9th Cir. 2020), 45 HARV. ENVTL. L. REV. 195 (2021) (arguing against a trend of courts recharacterizing state-law climate actions as federal because the implicated issues are “too big to abate,” and contending that the state courts offer advantages over the answers provided by the federal courts).

these state-law claims. The swollen doctrines that lie beneath these suits conceal a dangerous federal imbalance. “At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and separation of powers.”³ The Supreme Court is sending dire signals to the lower federal courts—what the oil industry understands as a pressure kick—either regain balance or risk a blowout. As the pressure builds to find a solution, doctrinal fractures draw widening reservoirs of climate plaintiffs into the courts. A stable outcome requires reevaluating the legal assumptions at the intersection of preemption, deference, and procedure.

There is a deceptive simplicity to climate suits. A plaintiff brings state law claims against a non-diverse defendant in state court. Which court has jurisdiction? And what law does it apply? Easy answer—the state court and the state’s law. But what if the claim involves climate torts? The simple answers fall away and judges are left with shaky precedent to piece together a result. As these cases drill onward, the pressure builds and collective problems arise; the log of the legal arguments exposes faults and unconformities in preemption, deference, administrative exhaustion, and procedure.

Two lines of cases flesh out these faults: an older line of climate torts related to oil and gas companies’ greenhouse gas emissions⁴ and a newer line related to companies’ misinformation campaigns underrepresenting the harmful impacts of greenhouse gas emissions.⁵ These lines accompany this article’s analysis as it surveys three boundary conditions that dictate climate torts. For each condition, this article analyzes the foundational cases in light of recent Supreme Court guidance and argues that climate torts belong to the states.⁶ Part II reflects on a previously overbroad preemption, which allowed climate defendants to “federalize” and nullify climate torts. Part III focuses on returning power to the state courts through waning administrative deference and exceptions to administrative exhaustion. Part IV dissects appeals of remand and stays to dig into compounding delays created under *BP P.L.C. v. Mayor and City Council of Baltimore*.⁷

3. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022).

4. *See, e.g., City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021).

5. *See, e.g., Massachusetts v. Exxon Mobil Corp.*, 462 F.Supp.3d. (D. Mass. 2020).

6. *But see* Alexa Austin, *Cleaning Up the Confusion: Climate Change Litigation and Preemption*, 10 *JOULE* 6 (2022) (arguing that the Clean Air Act provides a valid preemption defense to state-law climate torts).

7. *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532 (2021).

II. How Climate Defendants Control State Law Emissions Claims

Climate-tort defendants exert control through jurisdiction and law. First, defendants seek to control jurisdiction. Defendants fabricate arguments to “federalize” the plaintiff’s state-law causes of action and seek removal.⁸

Removal is straightforward. To punch a ticket out of the state court and into the federal court, a defendant oil and gas company need only file a notice giving a “short and plain statement of the grounds for removal.”⁹ However, to remain out of the state court’s reach, the federal court must be able to find that it possesses original jurisdiction over the plaintiff’s claims.¹⁰ As relevant here, a federal court is able to find original jurisdiction over claims that come under an express Act of Congress, present complete diversity between the parties, or if the claim involves a constitutional question.¹¹ In climate torts, defendants ground at least a portion of their removal on the federal court’s original jurisdiction under an express Act of Congress, often the Clean Air Act (CAA). From here, the court’s long-chain inquiries of jurisdiction and law can be refined into a single question: “does the CAA preempt the plaintiff’s state-law claims?”

To use oilfield parlance, courts use preemption as a judicial blowout preventer, a federal safety measure that holds down climate suits and keeps state court decisions from destabilizing federal interests. But neither preemption nor blowout preventers are meant to replace a sustainable balance. The Supreme Court has suggested the solution, “[t]o preserve the proper balance between the States and the Federal Government . . . courts must be certain of Congress’s intent before finding that it legislated in areas traditionally regulated by the States,” and that an agency’s regulations disrupt a stable balance of federalism where it regulates functions “traditionally associated with the police power of the States.”¹² Courts use

8. See Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383 (2020) (unpacking and analyzing climate tort defendants’ use of “federalization” via federal common law on the “new wave” of state claims); See also Steven Kahn, *Displacing an Incomplete Complete Preemption and Displacement Analysis: Doctrinal Errors and Misconceptions in the Second Wave of State Climate Tort Litigation*, 35 J. LAND USE & ENVTL. L. 169 (2020) (reviewing various approaches to ordinary and complete preemption in “new wave” climate torts).

9. 28 U.S.C. § 1446

10. *Id.* § 1441

11. *Id.*

12. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 459-460 (1991)) (internal quotation marks omitted).

preemption analysis to determine and apply Congress's intent to state powers.

A. Extraordinary Preemption Transmutes State to Federal

1. Complete Preemption Using Federal Statutory Law

Complete preemption allows the defendant to control both the jurisdiction and the law, but the doctrine is an ill fit for climate torts. As a popular phenomenon, climate-tort defendants argue that the CAA completely preempts all state-law emissions claims.¹³ If successful, complete preemption would transmute the plaintiff's state-law claims into necessarily federal causes of action that the defendant may then remove into federal court.¹⁴

Complete preemption is an extraordinary exception, an "independent corollary to the well-pleaded complaint rule."¹⁵ It provides that if a statute contains the requisite "extraordinary" preemptive force, that force overhauls the plaintiff's state claims and turns them into federal ones.¹⁶ But courts are meant to use complete preemption sparingly; to maintain stable federalism and preserve the independence of state governments, federal courts are asked to "scrupulously confine [federal] jurisdiction to the precise limits which the statute has defined."¹⁷ However, the analysis for complete preemption in climate torts often fails to meet this "scrupulous" standard. One reason may be that the Supreme Court has provided only elementally-incomplete instructions for applying complete preemption.

Lower courts are left to fill in the gaps of complete preemption analysis. Recently, the Ninth Circuit denied oil companies' arguments for removal by way of complete preemption in *City of Oakland v. BP P.L.C.* There, the court denied the CAA's authority to completely preempt the plaintiff's state-law emissions claims, articulating that for a federal statute to

13. *See, e.g., City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 2021).

14. *See, e.g., Defendants' Opposition to Mayor and City Council of Baltimore's Motion to Remand, Mayor of Balt. v. BP P.L.C. (Baltimore I)*, 388 F. Supp. 3d (D. Md. 2019) (No. 1:18-cv-2357 ELH), 2018 WL 5019802. ("Plaintiff's claims are completely preempted by the CAA, which 'provide[s] the exclusive cause of action for the claim asserted.'") (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)).

15. *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2430 (1987) (internal citations omitted).

16. *Id.*

17. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting) (internal citations omitted).

completely preempt state law claims, the “federal statute must ‘provide[] the exclusive cause of action for the claim asserted *and* also set forth procedures and remedies governing that cause of action.’”¹⁸ That is, federal removal through complete preemption requires that the preempting statute *both* (1) was intended to displace the state-law cause of action; *and* (2) provides a substitute statutory remedy and cause of action.

Decades on, the Court has not settled whether complete preemption requires the second element. Thirty-five years ago in *Caterpillar Inc. v. Williams*, Justice Brennan tried to clarify whether a federal statute has the power to completely preempt state law.¹⁹ There, the Justice cut against the need for a substitute cause of action.²⁰ The court below had held that the federal statute could not completely preempt the state-law claim because the federal statute did not provide an alternative remedy.²¹ Justice Brennan disagreed, stating the lower court’s “analysis is squarely contradicted by our decision in *Avco Corp. v. Machinists*,” which ignored the need for any substitute cause of action.²²

Justice Brennan’s clarification does not hold up. The implied remedy present in *Avco* suggests the opposite, that a statutory remedy *is* necessary. To elaborate, in *Avco*, the Court considered a federal statute’s substitute remedies to decide whether the defendant could use the statute to completely preempt and remove the plaintiff’s state-law claims into federal court, stating:

The *nature* of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy [T]he *breadth or narrowness* of the relief which may be granted under [the federal statute] is a distinct question from whether the court has jurisdiction over the parties and the subject matter.²³

18. *City of Oakland v. BP P.L.C.*, 969 F.3d 895, 905 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021) (quoting *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (emphasis added)).

19. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987).

20. *Id.*

21. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987) (“a case may not be removed to federal court on the ground that it is completely preempted unless the federal cause of action relied upon provides the plaintiff with a remedy.”)

22. *Id.* (quoting *Avco Corp. v. Machinists*, 390 U.S. 557, 561 (1968)).

23. *Avco Corp v. Machinists*, 390 U.S. 557, 561 (1968) (emphasis added).

Avco's doctrine ignores only the *disparity* between the state and federal statutory relief—by disregarding the “breadth or narrowness”—but does not go so far as to disregard whether or not the federal, preempting statute denies relief whatsoever.

Taking a step back, why would a substitute federal cause of action be necessary to preempt a state's law? There is more context to consider. One month before *Caterpillar*, Justice O'Connor contemplated the same elemental issue in *Metropolitan Life Insurance Co. v. Taylor*.²⁴ There, the plaintiff pursued state common law causes of action that clearly fell within the scope of a federal statute.²⁵ Although the Court found the federal statute had the requisite extraordinary power to transform the state-law claims into federal ones under complete preemption, it admitted that “[i]n the absence of explicit direction from Congress, this question would be a close one.”²⁶

Why was it a close call? Here, Congress was as explicit in its preemptive intent as ever, providing in the statute that “all actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those [in *Avco*].”²⁷ What made it a razor-close case was not the first element—whether or not the plaintiff's claim fell under the statute, it clearly did, or whether Congress intended complete preemption, it clearly did. Instead, preemption here turned on a second set of elements: the sufficiency of the federal statute's substitute cause of action and policy concerns for state actions unsettling the federal scheme.²⁸ Adding to Justice O'Connor's reasoning in *Met. Life*, Justice Brennan supplied ground rules for a complete preemption analysis, first providing that Congress's preemptive intent “bec[omes] effective when [the federal statute] bec[omes] law,” and insisted that “the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court.”²⁹

24. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

25. *Id.* at 62-63 (Plaintiff, Taylor brought state common law causes of action for the reimplementation of employee benefits against General Motors, the employer, and Metropolitan Life Insurance, Co., the employee-insurance provider. The Supreme Court held these claims “fall directly under” the Employee Retirement Income Security Act and that the statute “provides an exclusive cause of action.”)

26. *Id.* at 64.

27. *Id.* at 65 (quoting H.R.Conf.Rep. No. 93—1280, p. 327) (1974).

28. *See Id.* at 64-65 (arguing that ERISA's complete preemption is a close call even after establishing the statute's “extraordinary preemptive power” and that the claim at hand comes “within the scope” of the civil suit provision “at the heart of [the] statute”).

29. *Id.* at 67 (Brennan, J., concurring).

Despite the Court's attempted instruction, the lower courts perennially struggle to apply complete preemption. Since its decision, *Avco* has been the target of well-qualified criticism. For one, Justice Scalia excoriated *Avco*'s underlying reasoning as an "unprecedented act of jurisdictional alchemy" that "summon[s] forth a federal claim where none had been asserted" and "magically transform[s]" a state-law claim into a federal one.³⁰

Although statutory complete preemption is imprecise, the result for climate torts is crystal clear—the CAA does not have the power to completely preempt climate torts and cannot draw state-law claims out of the state courts. The statute fails all elements. Nothing in the Act expresses a clear intent to preempt all state-law causes of action,³¹ and the CAA provides no substitute remedy or adequate cause of action to climate plaintiffs.³² To heed Justice Brennan's ground rules, it would be imprudent for the CAA to preempt state law without clear language. Next, after a court dispatches complete preemption it must navigate through more complexity; federal common law preemption is equally as powerful, and perhaps more plagued.

2. Preemption Through Federal Common Law

Instead of statutory alchemy, federal common law arguments use sleight of hand to switch away from state-law claims. Although—as shown above—the CAA lacks the "exceptional force" required to *directly* completely preempt state-law causes of action, the Act may still pass through federal common law and *indirectly* preempt emissions claims.

At least for now,³³ a key difference between complete statutory preemption and federal common law preemption is that federal common law preemption does not allow a defendant to remove itself from state

30. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 14-15 (2003) (Scalia, J. dissenting) (joined by Justice Thomas).

31. *See City of Oakland v. BP P.L.C.*, 969 F.3d 895, 907-8 (9th Cir. 2020) (holding that the CAA does not intend to preempt all state-law causes of action because of the Act's savings clause and delegation of primary responsibility to the states).

32. *See Id.* at 908 (holding that the CAA does not provide causes of action able to remedy climate change nuisances).

33. *See* Petition for Writ of Certiorari, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder County*, (asking whether federal common law has exclusive jurisdiction over emissions claims and whether that exclusive jurisdiction grants the federal courts original jurisdiction under 28 U.S.C. § 1331), https://www.supremecourt.gov/DocketPDF/21/21-1550/227457/20220608123839418_Suncor_cert_petition.pdf (last visited Aug. 29, 2022).

court,³⁴ a key similarity is that it superimposes federal law to hold down state-emissions claims. Courts apply federal common law only when “Congress has not spoken to a particular issue” and the issue poses a “significant conflict between some federal policy and the use of state laws.”³⁵ In the “few and restricted enclaves” where federal common law applies, it “preempts and replaces state law.”³⁶

In the climate-tort context, when a state court enforces emissions standards, that enforcement conflicts with the federal government’s emissions policies; “[s]tripped to its essence, then, the question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under [state] law. Our answer is simple: no.”³⁷ In short, courts apply federal common law because state laws are too narrow to accommodate inherently national emissions policies. And because federal common law applies, the CAA—which was previously shown as insufficient for direct preemption—takes over and preempts the federal common law.

Naturally, *federal* common law claims are subject to statutory displacement, too. Where federal common law addresses an issue, Congress may create a federal statute that preempts and displaces the federal common law claim.³⁸ Federal common law is just a temporary fix, “legal duct tape” that prevents state-court interference until Congress enacts a more permanent statutory solution.³⁹ Congress enacts a long-lasting statutory solution to replace the federal common law when it “speak[s] directly to the question” raised by the federal common law claims.⁴⁰ This “direct speech” standard is less rigorous than the “exceptional preemptive force” standard for determining whether federal law preempts state law.⁴¹ The difference between the standards is that where displacement of a state-law cause of action requires evidence of clear, express congressional intent, the

34. *See* *Mayor and City Council of Balt. v. BP P.L.C.*, 31 F. 4th 178, 200-208 (4th Cir. 2022); *City of Oakland v. BP P.L.C.*, 969 F.3d 895, 907-908 (9th Cir. 2020).

35. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1984) (internal quotations and citations omitted).

36. *City of New York v. Chevron Corp.*, 993 F.3d 81, 89-90 (2d Cir. 2021) (internal quotations and citations omitted).

37. *Id.* at 91.

38. *Id.* at 95.

39. *Id.* at 89-90 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)).

40. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (quoting *Amer. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011)).

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

displacement of a federal common law claim does not.⁴² Rather, it requires only that Congress has provided a sufficient legislative solution to the problem; that Congress has taken the field and made federal common law unnecessary.⁴³

Congress has spoken directly to *some* climate torts. In *American Elec. Power Co. v. Connecticut (AEP)*, the Supreme Court held that the CAA “speaks directly” to greenhouse gas emissions from stationary sources, such that the Act and EPA actions authorized by the Act displace *any* federal common law right—such as the right to bring an action for public nuisance—to abate greenhouse gas emissions from those sources.⁴⁴ Unlike for complete preemption, the Supreme Court clearly “severed” the analyses of a statutes’ available remedies and its ability to displace federal common law.⁴⁵ However, the lower courts have since synthesized these holdings such that if a statute displaces a federal common law cause of action, it also displaces all of its remedies—including relief through damages or abatement.⁴⁶

Federal common law provides a convenient preemptive workaround that allows defendants to pay a lower cost of entry for the same desired effect. Because state law is not equipped to contribute to national emissions policies, federal common law steps in; then, the CAA preempts the federal common law. The CAA’s roundabout application through federal common law adds strange legal repetition to state-law emissions-based tort claims.

The Second Circuit ran this course in *City of New York v. Chevron Corp.*⁴⁷ In the wake of Hurricane Sandy, New York City began a \$20 billion-plus climate resiliency program, and sought to hold oil and gas companies liable under state-law tort theories to foot the bill.⁴⁸ Unconvinced, the Circuit scolded New York for “sidestepping” and “replac[ing]” an “interlocking framework” of regulations, federal statutes, and international treaties.⁴⁹

42. *Id.*

43. *Id.*

44. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011).

45. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256 (1984)).

46. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (“Thus, under Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.”).

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

48. *Id.* at 86.

49. *Id.* at 85.

The question before us is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse emissions. Given the harm and the existence of a complex web of federal and international environmental law regulating such emissions, we hold that the answer is “no.”⁵⁰

Supported by a string of legislative history and case law, the court held that “[interstate air] quarrels often implicate two federal interests that are incompatible with the application of state law: (i) the overriding . . . need for a uniform rule of decision on matters influencing national energy and environmental policy, and (ii) ‘basic interests of federalism.’”⁵¹

The tension between these two federal interests presents a familiar imbalance. To the first point, there is no well-understood uniform rule of federal common law; the Court has thus far avoided clarifying its extent. For example, the Court in *AEP* declined to decide whether a plaintiff would be able to bring a federal common-law emissions claim in the absence of the CAA—describing it as an “academic question.”⁵² To the second point, the basic interests of federalism demand balance, not federal absolutism. Justices Gorsuch and Alito agree; in the administrative blockbuster *West Virginia v. EPA* the two concurred that the EPA’s proposed CAA overreach “unquestionably ha[d] an impact on federalism, ‘as the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.’”⁵³

Paradoxically, the CAA has become emitters’ greatest defense, fueled by the courts’ application of an unclear federal common law. Decisions relying on an unbound federal common law to compensate for the shortcomings of the CAA overthrow Congress’s intent. Congress intended for the CAA to protect the public against emissions. Instead, the “overriding rule” instituted by the courts has become preempting and dismissing emissions claims with no alternative means for relief. Each climate tort that follows this path reinforces a federal imbalance and frustrates the States’ ability to protect the public.

50. *Id.*

51. *Id.* at 92 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)).

52. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423 (2011).

53. *West Virginia v. EPA*, 142 S. Ct. 2587, 2622 (Gorsuch, J., concurring).

B. Ordinary Preemption Taken to Extraordinary Lengths

A climate defendant does not need complete preemption or to go through a federal common law analysis to win. If a court remands the defendant back to the state court, the defendant may lose the preferred federal venue but may still exert control over the suit by arguing for federal statutory law to preempt state-law claims. Specifically, defendants may argue that Congress, through the CAA, has intentionally stepped in, passed legislation, and taken over the state law. Although not complete preemption, the outcome is functionally the same. Ordinary preemption achieves the same result because “[w]hen a State creates a private right and a federal statute [ordinarily] preempts that state law, ‘the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.’”⁵⁴ That is, where a court finds that federal law preempts state law, the exclusive application of the federal law provides an affirmative defense to the state-law claims. In effect, even if the defendant is liable for its conduct under the State’s laws, if that conduct does not satisfy the federal law a court will dismiss the claim.

In both the emissions and misinformation lines of climate torts, courts must determine whether the CAA ordinarily preempts a plaintiff’s state-law claims. Preemption is an incursion into a State’s sovereign immunity. “To enforce [sovereign immunity], courts have consistently held that ‘nothing but express words, or an insurmountable implication’ would justify the conclusion that lawmakers intended to abrogate the States’ sovereign immunity.”⁵⁵ However, within the bounds of the Constitution, Congress may preempt State authority if it expressly states its intent to do so.⁵⁶

In practice, finding Congress’s “intent” in their “express words” is not as easy as it may sound. The meaning of so-called “express terms” is not written in stone, rather it has evolved over time and currently means expressive intent with more clarity than a “brooding federal interest.”⁵⁷ This translates into a requirement that the defendant must be able to “point

54. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 n.5 (2021) (citations omitted).

55. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616-2617 (2022) (Gorsuch, J., concurring) (citing *Chisholm v. Georgia*, 2 Dall. 419, 450 (1793) (Iredell, J., dissenting)).

56. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

57. *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quoting *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019)).

specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law.”⁵⁸

Lacking a “crystal clear formula,” “infallible constitutional test,” or an “exclusive constitutional yardstick,” the Supreme Court has nonetheless developed methods to identify preemption.⁵⁹ Although their preemptive outcome is the same, the Court has devised a fleet of fluid categories called “express-”, “field-”, and “conflict-” preemption to describe the different modes of displacing state laws through “ordinary” preemption.⁶⁰

1. Express Preemption

Express preemption occurs when Congress expresses its intent to preempt state statutes within the plain statutory text.⁶¹ However, Congress rarely does this for environmental issues. Nuclear production facilities exemplify the rare case and warrant exclusive federal control due to their overwhelming national security, public health, and safety interests.⁶² The Atomic Energy Act expressly preempts the States’ authority to regulate uranium enrichment facility construction and operation, as well as the export, import, or disposal of nuclear material.⁶³ But even here in its most compelling sphere, Congress also expressly preserved many of the States’ powers to regulate state activities associated with nuclear powerplants.⁶⁴ Express preemption provides balance through the transparent, clear delineation between preempted and non-preempted State powers.

58. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (citing *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)) (internal quotation marks omitted).

59. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

60. *Virginia Uranium, Inc.*, 139 S. Ct. at 1901 (“[t]his Court has sometimes used different labels to describe different ways in which federal statutes may displace state laws—speaking, for example of express, field, and conflict preemption. But these categories are “not rigidly distinct.”) (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

61. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

62. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 550 (1978).

63. 42 U.S.C. § 2021(c)(1)-(4)

64. *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 208 (1983) (preserving the state’s authority to regulate production, transmission, and sale of the produced electricity).

2. Conflict Preemption

Barring the telltale language of express preemption, Congress may nevertheless preempt State authority where state laws get in its way.⁶⁵ That is, a court will interpret a federal law to supersede a state law where the goals and obligations of the laws seem to share the same purpose.⁶⁶ A court finds conflict preemption when it is impossible to comply with both the state and federal laws or when the state law is an obstacle to achieving Congress's intent.⁶⁷

However, conflict preemption does not require a positive conflict; a conflict between state and federal law may arise even where federal officials don't exercise their full authority.⁶⁸ A federal official's decision to use less-than-full authority signals that such authority is not appropriate or approved by the policy of the statute, and this silent signal stops states from stepping in with regulations under their police powers.⁶⁹ Although courts hold that conflict preemption may arise out of federal inaction, it is also true that "the existence of a hypothetical or potential conflict is insufficient to warrant preemption of state laws."⁷⁰ These paradoxical standards—unrealized and non-hypothetical—keep conflict preemption doctrine in tension.

To bring into view how conflict preemption arises in climate suits, *United States v. Locke* paints a picture of its operation in the environmental-administrative context. In that case, the state of Washington under the governorship of Gary Locke enacted state laws to regulate oil tanker design

65. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (Federal law preempts State law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

66. *Fidelity Federal Sav. And Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (holding that the Federal Home Loan Bank Board regulations preempt conflicting state common law doctrine).

67. *U.S. v. Locke*, 529 U.S. 89, 109 (2000) (holding that the federal government has the exclusive regulatory authority of tanker vessels under the Ports and Waterways Safety Act, preempting the state's tanker regulations that conflicted with the Act's purpose of uniform tanker regulation).

68. *Id.* at 110 (citing *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

69. *Id.*

70. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 634 (2011) (Sotomayor, J., dissenting) (joined by Justices Ginsburg, Breyer, and Kagan) (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)) (internal quotations omitted).

following the infamous *Exxon Valdez* oil spill.⁷¹ A trade association of oil tankers sought injunctive relief from Locke's regulations and argued that the federal regulations preempted the State's scheme.⁷² On appeal, the United States intervened to argue on the tanker association's behalf. In a unanimous decision, the Court held that where a federal agency acts within the scope of its congressionally delegated authority, it may preempt state regulations that conflict with a Congressional intent to make *uniform* regulation.⁷³ But how exactly did Washington's state tanker-design regulations conflict with the federal regulations? It's important to note that the conflict arose from a mandate in the text of the federal Ports and Waterways Safety Act (PWSA), which "mandated *uniform* federal rules on the subjects or matters there specified."⁷⁴

Locke provides two takeaways for conflict preemption as it relates to climate torts. For one, it was not necessarily impossible to comply with the federal and state laws, but rather that Locke's laws were different from the federal standards which conflicted with the Congressional mandate for *uniform* federal rules. And for two, the *Locke* Court based its preemption on the *scope* of the PWSA—it held that the federal statute's scope occupied the field of oil-tanker regulation, and therefore, the Washington regulations were impliedly preempted.⁷⁵ Mirroring express preemption's careful, baked-in federalism balance, the Court noted that the PWSA carved out room for the States to enforce their police interests.⁷⁶

The Supreme Court is on a path to recognizing the potential of a State-led, non-uniform climate solution, tightening conflict preemption, and shrinking the scope of the CAA. Under such a change, state climate and emissions regulations would bypass any conflict with the federal government's regulations. Once bypassed, state regulations that were

71. *See Id.* at 94 ("[i]n 1989, the supertanker *Exxon Valdez* ran aground in Prince William Sound, Alaska, and its cargo of more than 53 million gallons of crude oil caused the largest oil spill in United States history Today we must determine whether these more recent state laws can stand despite the comprehensive federal regulatory scheme governing oil.")

72. *Id.* at 89.

73. *Id.* at 110 (citing *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988)).

74. *Id.* at 91 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978) (emphasis added)).

75. *Id.* at 111-112 ("conflict preemption under Title I [of the statute] will be applicable in some, though not all, cases.").

76. *Id.* at 104 (citing the savings clauses of the Oil Pollution Act of 1990, which carves out of preemption to preserve the states' right to impose additional liability for "the discharge of oil or other pollution by oil within such State.")

carved away by preempting federal statutes would return to the States' authority. That is, if the regulations are not also impliedly preempted.

3. Implied/Field Preemption

Recent cases have held that state laws may be impliedly preempted.⁷⁷ In this way, preemption arises “by virtue of restrictions or rights that are inferred from statutory law.”⁷⁸ Congress’s intent to preempt state law in an area may be implied where the field of law contains a “federal interest that is so dominant that the federal system will be assumed to preclude enforcement” of state laws in the same area.⁷⁹ This occurs in the uncommon situation where the federal regulatory scheme is so pervasive as to imply Congress’s intent to leave no room for the states to supplement it.⁸⁰

But implied preemption must be implied from some concrete source, not pulled from thin air.

Federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress. “There is no federal preemption in vacuo,” without a Constitutional text, federal statute, or treaty made under the authority of the United States.⁸¹

The Court has resolved preemption doctrine’s blurry outer edge by focusing its analysis. In *Kansas v. Garcia*, the Court provided three preemption touchstones⁸² to prune the lower courts’ preemption jurisprudence: (1) Direct Issue. Identifying the metes and bounds of the federally occupied field in *Garcia*, Justice Alito’s majority rejected a “relating to” argument that “conflated” the preempted conduct.⁸³ (2) Alignment with federal interest. Justice Alito warned against an unlimited rule, that the federal

77. *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (citing *Arizona v. U.S.*, 567 U.S. 387, 400-408 (2012); see also *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 630-631 (2012); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617-618 (2011)).

78. *Garcia*, 140 S. Ct. at 801 (citing *Osborn v. Bank of United States*, 9 Wheat. 738, 865 (1824)).

79. *Fidelity Federal Sav. And Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

80. *Id.*

81. *Garcia*, 140 S. Ct. at 801 (quoting *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

82. These touchstones develop *Wyeth v. Levine*’s “two principles [that] guide all preemption analysis,” which are (1) congressional intent and (2) an assumption that historically-state police powers belong to the state. 555 U.S. 555, 565 (2009).

83. *Garcia*, 140 S. Ct. at 805.

system would be “turned upside down” if federal law preempted state law whenever there was overlap, and that allowing states to prosecute is generally consistent with federal interests.⁸⁴ (3) Ordinary meaning of the text. Justices Thomas and Gorsuch opined their hopes to abandon the Court’s “purposes and objectives” preemption jurisprudence, and instead return to discerning conflict from the ordinary meaning of state and federal text.⁸⁵ From these Justices’ perspectives, the Court’s current doctrine of “purposes and objectives” preemption impermissibly rests on judicial guesswork about “broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of the federal law.”⁸⁶

Before checking in on *Garcia*’s forecast for climate torts, it’s important to note how the Court has curated Clean Air Act preemption to this point. In *American Electric Power Co. v. Connecticut (AEP)*, eight states brought federal common-law public nuisance claims and alternative state law claims against power corporations for their multi-state emissions and contributions to climate change.⁸⁷

There, the Court gave texture to the appropriate preemption standard by contrasting displacement of federal common law and preemption of state law.⁸⁸ The Court held that the language of the CAA spoke directly to the question of regulating pollutants and sufficiently displaced the State plaintiffs’ federal common-law claims.⁸⁹ Moreover, the Court acknowledged the CAA’s purpose is to establish emissions standards for emissions that “caus[e] or contribut[e] significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.”⁹⁰ This purpose could include climate change regulation,⁹¹ and regulations that consider competing international policy interests.⁹² Recall, the CAA gives

84. *Id.* at 806.

85. *Id.* at 807-808 (Thomas, J., concurring) (citing *Wyeth v. Levine*, 555 U.S. 555, 590 (2009)).

86. *Id.* at 808 (Thomas, J., concurring) (citing *Wyeth v. Levine*, 555 U.S. 555, 587 (2009)).

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

88. *Id.* at 423 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)).

89. *Id.* at 424 (2011).

90. 42 U.S.C. § 7411(b)(1)(A).

91. *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) (holding that because carbon dioxide is an air pollutant under the CAA, the EPA cannot ignore carbon dioxide regulation without reasoned denial of its effects on climate change).

92. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011).

this wide-scope authority to the EPA even if it has so far declined to exercise it to this extent.⁹³

Looking forward to how the Court will reapply *AEP*'s interpretation in new climate torts, it's important to note that not all of the Justices were willing to cosign *AEP*'s expansive reading of the CAA. Three of the architects of *West Virginia v. EPA*—Chief Justice Roberts, Justice Thomas, and Justice Alito—joined in *AEP*'s dissent. And although the Court has left it an open question whether the CAA is sufficient to preempt state tort law,⁹⁴ Between *Garcia*'s preemption touchstones and *AEP*'s analysis of the CAA, the Court has provided enough information to make an educated guess about the CAA's preemptive effect over state climate torts.

Putting it together, how might the Court strictly apply the *Garcia* touchstones to restructure state climate torts concerning the CAA? (1) Direct issue. Does the CAA directly address state-law climate torts? No. The CAA speaks directly to protecting the health and welfare of citizens by regulating air pollution. A conservative Court may find that although regulating emissions is “in relation” to climate change and “protecting the health and welfare of citizens” relates to damages suffered by states and cities, the language of the statute makes no *direct* mention of regulating climate change, and without such direct mention, these interpretations rely on waning administrative deference. (2) Alignment with federal interest. Do the state torts align with the federal interests behind the CAA? By its terms which encourage state governments to control air pollutants, the CAA aligns the federal interest with state-court climate plaintiffs who seek to enforce against emitters. (3) Ordinary meaning of the text. Does the ordinary meaning of the CAA's text preempt state climate torts? The ordinary meaning of the CAA's text sets out a strategy to achieve an air quality safe for human health, which does not plainly conflict with State climate recovery or disaster prevention.

Going forward, *Garcia* unequivocally instructs that structure and purpose are no longer sufficient to strap federal law to state-law claims. With this, the Court's interpretation of the CAA swings away from *AEP*'s deference and broad duties toward *West Virginia v. EPA*'s skepticism and limited scope. Powered by *Garcia*'s new touchstones, the Court's preemption jurisprudence underscores the CAA's inability to continue preempting state climate torts. Preemption is just a means to an end; to

93. *Massachusetts v. EPA*, 549 U.S. 497, 503 (2007).

94. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011).

effectuate the changes to preemption doctrine, the Court will need to reshape or abandon long-held administrative law doctrines.

*III. Addressing the Administrative State Atmosphere:
Deference, Non-Delegation, and Exhaustion*

“If nature knows of such equipoise in legal arguments, the courts at least do not.”⁹⁵ A pair of rules have helped the administrative agencies tip the scales in their favor—*Chevron* deference and administrative exhaustion. For climate torts, these rules map the border between the EPA’s federal territory to regulate and a state court’s territory to enforce its laws and protect its citizens’ interests. Unchecked, these doctrines allowed agencies to seize areas of state law far afield of their initial authority. But as *Chevron* recedes under the checks of non-delegation and major questions doctrines, and plaintiffs recycle exceptions to administrative exhaustion to fit climate suits, courts must reevaluate whether the EPA remains the singular authority for all climate torts that come under state causes of action.

A. Chevron Deference

Chevron deference is the cap rock of climate torts—that is, *Chevron* allows the EPA to expand its interpretation of the CAA’s text; this simultaneously expands the statute’s preemptive scope and further suppresses State control of emissions-related climate torts. *Chevron* deference provides that a court must defer to an agency’s reasonable interpretation of statutory ambiguity or its authoritative scope where Congress leaves statutory ambiguity or statutory silence.⁹⁶

In 1984, the Supreme Court created *Chevron* deference when it deferred to the EPA’s “bubble concept” interpretation of the term “stationary source” within the Clean Air Act.⁹⁷ There, the Court reasoned that because the CAA implements a complex regulatory scheme, and because judges are not experts qualified to analyze the scheme’s scientific support, the court must “rely upon the incumbent administration’s views of wise policy” to resolve the statutory ambiguity “in light of everyday realities.”⁹⁸ The Court was careful to point out that “[t]he responsibilities for assessing the wisdom

95. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2429-2430 (2019) (Gorsuch, J., concurring) (quoting Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520.).

96. *Chevron v. NRDC*, 467 U.S. 837, 842-843 (1984).

97. *See Id.*

98. *Id.* at 865-866.

of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”⁹⁹

Tacking on to *Chevron*’s deference to administrative experts, the Court validated *Seminole Rock* in *Auer* where it deferred to interpretations of the agency’s own regulations.¹⁰⁰ Thirteen years after *Chevron*, the *Auer* Court swelled administrative deference to its high water mark after it held that courts must defer to an agency’s reasonable readings of its own ambiguous regulations.¹⁰¹ But recently, a divided Court sapped *Auer* in *Kisor v. Wilkie*, stating that *Auer* deference “retains an important role in construing agency regulations,” but cabined its application within several demanding factors.¹⁰² Unsatisfied with mere cabining, Justice Thomas has set himself squarely against the entire idea of agency deference that was expanded by *Auer*, opining that deference doctrine directly conflicts with a judge’s constitutional duty to give the law a faithful and independent interpretation.¹⁰³ Justice Thomas does not stand alone; four Justices in *Kisor* advocated to outright retire *Auer* deference. Instead, doctrinal disfavor, split opinions, and restricted applicability surrender *Auer* to persist in a “zombified” state.¹⁰⁴

Just as *Auer* deference rested on the expert-agency logic—or “brains”—of *Chevron*, the zombification of *Auer* is a warning that the Court will take the same approach to over-restrict *Chevron* and rescind agencies’ expansive authority. Justice Thomas has already laid the groundwork. In *Michigan v. EPA*, Justice Thomas wrote separately in a concurrence that would apply his revocation of *Auer* to *Chevron*’s deference, noting that “[the EPA’s] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.”¹⁰⁵ Congruent with his *Auer* reasoning, he argues that the Constitution’s Vesting Clauses prohibit Congress from delegating the

99. *Id.* at 866.

100. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019); *see also* *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

101. *Kisor*, 139 S. Ct. at 2415 (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991)).

102. *See Id.* at 2408, 2415-2418 (explaining that *Auer* deference applies where an agency regulation is ambiguous after exhausting the traditional tools of construction, comes within a reasonable zone of ambiguity, independent inquiry entitles it to controlling weight, implicates the agency’s substantive expertise, and reflects fair and considered judgment).

103. *VF Jeanswear LP v. Equal Emp. Opportunity Comm’n*, 140 S. Ct. 1202, 1204 (2020) (Thomas, J., dissenting from denial of grant of certiorari).

104. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

105. *Michigan v. EPA*, 576 U.S. 743 (2015) (Thomas, J., concurring).

authority necessary for an agency to regulate within textual ambiguity or ambiguous statutory silence.¹⁰⁶ He argues that such deference “wrests from Courts the ultimate authority to ‘say what the law is.’”¹⁰⁷

Even a small change to *Chevron* deference will withdraw swaths of the CAA’s statutory interpretation and allow states to reclaim authority over emissions regulations and climate torts. And if Justice Thomas can convince a cadre of conservative Justices, the Court could depart from agency deference in its entirety. The departure may be happening already. *Chevron* was conspicuously absent from the Court majority’s analysis of the EPA’s statutory interpretation in *West Virginia v. EPA*.¹⁰⁸

B. Non-Delegation and Major Questions

Without a Court decision out-and-out overturning *Chevron*, “zombifying” its doctrine à la *Auer* may happen less by cabining its application and more by reinforcing its restrictions: non-delegation and major questions. First, the Supreme Court is limiting *Chevron* by tightening its enforcement of the non-delegation doctrine. Where *Chevron* deference expands agency authority, non-delegation sets an upper limit. Non-delegation arises out of the principle that the Constitution prohibits Congress from giving carte blanche legislative power to an administrative agency. Unable to generate their own power, “[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.”¹⁰⁹ It emerges out of Article I of the Constitution, which provides that “[all] legislative Powers herein granted shall be vested in a Congress of the United States.”¹¹⁰ The Court has long held that this prevents Congress from wholly handing off its legislative power to another branch of the federal government, i.e., an executive-branch administrative agency.¹¹¹ But although Congress may not give away its full legislative power, it continues to orchestrate government programs by “confer[ring]

106. *Id.* at 761-62 (2015) (Thomas, J., concurring) (opining that the transfer of interpretive authority from the Legislature to the Executive is “in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.”).

107. *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

108. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

109. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022).

110. U.S. Const. art. I, § 1.

111. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)).

substantial discretion” to agencies which gives the agencies the necessary autonomy to coordinate the administration of complex federal statutes.¹¹²

To determine whether Congress has let an agency get hold of too much of its legislative power, the Court has usually asked whether Congress has supplied the administrative agency with a direction, an “intelligible principle” to guide the delegated action—a question answered by a “holistic endeavor”—asking whether Congress gave the agency sufficiently definite standards within the statute’s purpose, facts, and context.¹¹³ Keeping out of Congress’s way, the Court has viewed the “intelligible principle” standard as “not demanding” and almost always met.¹¹⁴ However, change is in the air here, too. In a recent case, *Gundy v. United States*, Justice Alito’s vote to the bare majority aired out his opinion that the Court’s non-delegation jurisprudence has been “extraordinarily capacious”—and in need of curtailment—and that he is willing to reconsider the Court’s non-delegation approach.¹¹⁵ This is important because where Congress confers less power to an agency, it leaves room for the States to exercise their own power.

In addition to non-delegation, the major questions doctrine raises the textual threshold for agencies to take on “major questions,” and the doctrine is already limiting agency action in the climate sphere. The “major questions” doctrine is a counter-*Chevron* “safety valve.”¹¹⁶ It provides an expectation for “Congress to speak clearly if it wishes to assign questions of vast economic and political significance.”¹¹⁷ Regulations addressing climate change are a clear candidate. In October 2021, the Supreme Court granted certiorari *West Virginia v. EPA* and its consolidated cases¹¹⁸ to answer whether the CAA gives the EPA authority to shift States away from coal generation—to address climate change—by regulating State emissions

112. *Id.* at 2123 (citing *Mistretta v. U.S.*, 488 U.S. 361 (1989)).

113. *Id.* at 2126.

114. *Id.* at 2129.

115. *Id.* at 2131 (Alito, J., concurring).

116. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent ‘Major Questions’ Doctrine*, 49 CONN. L. REV. 355, 359 (2016) (arguing for a robust, present Major Questions doctrine as a sustainable route to persevering *Chevron* deference).

117. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

118. These “consolidated cases” include *North American Coal Corp. v. EPA*, 2022 WL 199370 (mem.) (Jan. 24, 2022) (cert. granted); *Westmoreland Mining Holdings, LLC v. EPA*, 142 S. Ct. 418 (mem.) (Oct. 29, 2021) (cert. granted); *North Dakota v. EPA*, 142 S. Ct. 418 (mem.) (Oct. 29, 2021) (cert. granted); and *West Virginia v. EPA*, 142 S. Ct. 420 (mem.) (Oct. 29, 2021) (cert. granted).

programs.¹¹⁹ The States' arguments openly catered to the Roberts Court's inventive ideas about the "major questions" doctrine.¹²⁰ In their arguments, the State petitioners magnified the EPA regulation's economic and political consequences, shift of state-federal balance, and lack of clear Congressional authority.¹²¹ In response, the EPA planted its argument in the inherent logic of *Chevron*, that the agency's interpretation reflects agency experts' reasonable efforts to meet Congress's statutory intent.¹²²

To the detriment of the EPA's *Chevron* arguments, the Court sided with the States and brought major questions to life. The Court outlined "major questions" regulations as those that involve "great political significance," "a significant portion of the American economy," or "intrude into an area that is the particular domain of state law."¹²³ Critically, the Court advised that an agency may put these "major questions" regulations into effect only where Congress has made a "clear statement" in a recent statute that is free from former contradictory interpretations and matches the agency's "mission and expertise."¹²⁴ In her dissent, Justice Kagan points out that the Court's major questions doctrine is a bastardization of *Chevron* that "replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules" and uproots a history of functionally broad agency delegation that reaches back to the nation's founding.¹²⁵

The Court forewarned its departure from *Chevron*. Even before *West Virginia v. EPA*, the Justices clamped down on agency action and stretched their "major questions" legs in *National Federation of Independent Businesses v. Department of Labor*.¹²⁶ There, the appellant challenged the dissolution of a stay that had been preventing the Occupational Safety and

119. The question presented is phrased in *Westmoreland Mining Holdings v. EPA* as "[w]hether 42 U.S.C. § 7411(d) clearly authorizes EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system." 985 F.3d 914. <https://www.supremecourt.gov/qp/20-01778qp.pdf> (last visited Sep. 19, 2022).

120. See Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T'L L. & POL'Y F. 293 (2020) (analyzing Justice Kavanaugh's prior opinions to prognosticate his inclination to reshape *Chevron* using the Major Questions doctrine).

121. See Petition for Writ of Certiorari, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780), 2022 WL 216161, at *26-28.

122. See Brief for the Federal Respondents in Opposition, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780), 2021 WL 3468957 at *22-23.

123. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-2621 (2022).

124. *Id.* at 2622-2623.

125. *Id.* at 2634-35, 2641-42.

126. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022).

Health Administration (OSHA) from issuing an emergency standard that mandated certain employers to require vaccination or mask-and-test policies in response to the COVID-19 pandemic.¹²⁷ OSHA's standard expressly preempted conflicting state laws.¹²⁸ In a per curiam opinion, the Court held that such a standard and mandate was outside of OSHA's statutory authority.¹²⁹ Congress granted OSHA the authority to create standards "reasonably necessary or appropriate to provide safe or healthful employment."¹³⁰ But the Court held the statutory grant could not support OSHA's "blunt instrument" standard because it would "encroach[] into the lives of a vast number of employees."¹³¹ Furthermore, the Court considered "what [OSHA] was built for," the plain language of the agency's organic act, the agency's sphere of expertise, and the agency's history to determine OSHA's preemption of vaccination mandates was outside its statutory purpose.¹³²

Either by burying *Chevron* or building up non-delegation and major questions, administrative authority has changed and climate torts must change with it. Just as the *Kisor* Court zombified *Auer* deference by stacking harder-to-satisfy elements, for climate torts, the Court has replaced *Chevron* with major questions doctrine and instituted harder-to-satisfy elements. Because of this, States will have to overcome less administrative deference and may be able to leverage favorable answers to the "academic question" posed in *AEP*.¹³³ For starters, the Court held in *West Virginia v. EPA* that the CAA does not grant the EPA authority to "generation shift." Expressly not under CAA authority, this regulatory power then returns to the State. And if a State may require companies to generation shift, then then it may follow that a State's courts may issue orders to enjoin and "de facto" regulate generation shifting. Though preemption and displacement are in flux, environmental law is conserved; weakening agencies' *Chevron* deference by way of robust non-delegation and major questions doctrines inversely strengthens plaintiffs' footing for judicial relief in state climate torts.

127. *See Id.*

128. *Id.* at 664 (citing 86 Fed. Reg. 61402, 61437).

129. *See Id.* at 665 ("The question, then, is whether the [Occupational Safety and Health Act] plainly authorizes the Secretary's mandate. It does not.")

130. *Id.* at 663 (quoting 29 U.S.C. § 652(8)).

131. *Id.* at 665.

132. *Id.* at 665-666 (what claims a plaintiff may bring "in the absence of the Clean Air Act and the EPA actions the Act authorizes.")

133. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423 (2011).

C. Administrative Exhaustion and Its Relevant Exceptions

Whether or not changes in doctrine redraw CAA boundaries, administrative agencies and administrative exhaustion will continue to play a central role in climate torts. Climate torts fit several exceptions to administrative exhaustion that could allow plaintiffs to bypass administrative agencies and seek relief directly from the courts. These exceptions are necessary; the EPA stands in the way of most climate-related claims because “[u]sing perhaps the most unambiguous language possible, Congress has limited judicial review of EPA rules by requiring all potential petitioners to present their challenges first to the EPA itself.”¹³⁴ This grant at the center of EPA authority is likely to remain a key defense for E&P companies that climate plaintiffs will continue to try and engineer around. Areas to keep an eye on—for their potential to shift climate torts into state courts—are the exceptions to administrative exhaustion.

Administrative exhaustion is a gateway to the courts; before a plaintiff is entitled to judicial relief, he must first exhaust his administrative remedies through their conclusion and obtain a final outcome.¹³⁵ Administrative exhaustion avoids premature interruption and allows the agency to apply its expertise and develop the factual record.¹³⁶ For emissions claims, it ensures that “the EPA—as the entity with greatest expertise in environmental matters—takes the first shot at resolving all issues with its regulations.”¹³⁷ However, there are exceptions to the administrative exhaustion doctrine that allow a plaintiff through the gate and into a judicial court before obtaining a final agency outcome.¹³⁸ A handful of these exceptions may allow the courts to intervene in climate-torts before exhausting agency remedies and give climate-petitioners an end-around to causes of action that remain covered under environmental statutes: (1) administrative action without statutory jurisdiction; (2) national interest; (3) unconstitutional administrative action coupled with irreparable injury.¹³⁹

134. *Arizona ex rel. Darwin v. EPA*, 852 F.3d 1148 (9th Cir. 2017) (citing 42 U.S.C. § 7607(d)(7)(B)).

135. *McKart v. U.S.*, 395 U.S. 185, 193 (1969) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

136. *Id.* at 194.

137. *Arizona ex rel. Darwin v. EPA*, 852 F.3d 1148, 1158 (9th Cir. 2017).

138. See Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-331 (1967).

139. *Id.* at 322-326.

1. Lack of Statutory Jurisdiction

First, a plaintiff is not required to exhaust administrative remedies where administrative action is without statutory jurisdiction.¹⁴⁰ In such a case, the courts may enjoin administrative order before seeking relief from an administrative procedure.¹⁴¹ As shown in the analysis above, an agency's statutory jurisdiction is a function of *Chevron* deference, which is being downsized under non-delegation and major questions. The CAA gives the EPA statutory jurisdiction over regulating greenhouse gas emissions and displaces the federal common-law right to seek abatement.¹⁴² This statutory jurisdiction prevents judicial conduct—such as injunction—that “operate[s] as de facto regulation.”¹⁴³ However if this Court reformulates or abandons *Chevron* deference—thereby drawing back the CAA—climate plaintiffs will have the opportunity to remap which actions fall within or outside of the EPA's statutory jurisdiction. A change in statutory interpretation and jurisdiction would empower a court to enforce climate relief while ignoring the CAA by finding that its lack of jurisdiction no longer requires climate tort plaintiffs to wait for the EPA to exhaust its administrative remedies before seeking judicial relief.

2. National Interests

Second, the Supreme Court created a limited exception to protect national interests within an inherently international environment in *McCulloch v. Sociedad Nacional de Marineros de Honduras*.¹⁴⁴ There, the Court granted a judicial remedy instead of “follow[ing] [administrative] procedure to the ultimate.”¹⁴⁵ In that case, the Court justified its intervention on behalf of the national interest.

The representation of foreign seamen aboard vessels under foreign flags has *aroused vigorous protests from foreign governments and created international problems for our Government*. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly

140. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919).

141. *Id.*

142. *See Amer. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011).

143. *City of New York v. Chevron Corp.*, 993 F.3d 81, 96 (2d Cir. 2021).

144. *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 U.S. 10 (1963); *see also* Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 324.

145. *Id.* at 19.

high in the scale of our national interest because *of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power.*¹⁴⁶

In *McCulloch*, the Court held that although the National Labor Relations Board regulations referred to foreign commerce, it did not legislate extraterritorially because Congress had not intended for the statute to induce any power over foreign nations.¹⁴⁷

It should be noted that the Court in *McCulloch* intervened to set the jurisdictional bounds of the NLRB pursuant to the National Labor Relations Act, a task which in modernity would be wholly dispatched by or at least formulated according to *Chevron* deference. Furthermore, here the exception allowed the *federal* court to intervene in the administrative process.¹⁴⁸ However, after potential *Chevron* restrictions—where a court is made to redraw jurisdictional boundaries—climate torts bear an uncanny resemblance to *McCulloch's* “vigorous protest,” “international problem,” and “international complexion” characteristics of *McCulloch's* national interest exception and justify judicial intervention before administrative exhaustion.¹⁴⁹

3. *Unconstitutional Action and Irreparable Injury*

Third, administrative exhaustion is superseded where there is unconstitutional administrative action coupled with irreparable injury, whereas these often arise together when agency action amounts to an unconstitutional taking pursuant to the Fifth Amendment.¹⁵⁰ Forcing citizens and municipalities to pay for climate disasters or disaster-prevention measures may rise to a taking. A federal court may cut into a

146. *Id.* at 17 (emphasis added).

147. *See Id.* at 21.

148. *Id.* at 15.

149. *Compare* *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963) (characterizing the regulation foreign of ships' flags, as a problem of public interest because of its “international complexion” providing a “uniquely compelling justification for prompt judicial resolution”), *with* *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011) (considering how regulation of greenhouse gas is a question of “international policy” informed by an assessment of “competing interests”) *and* *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (sidestepping emissions enforcement because “federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches.”).

150. U.S. Const. amend. V provides in relevant part: “[Nor] shall private property be taken for public use, without just compensation.”

State's administration to prevent unconstitutional takings because "rules of comity or convenience must give way to constitutional rights."¹⁵¹ But, where Congress clearly intended to require administrative determination before judicial action, intervening against its intent requires a strong showing of both the inadequacy of the administrative procedure and the impending harm before a court may short circuit the administrative process.¹⁵² In climate actions, the current federal administrative procedure under the CAA is ill-equipped to handle an imminent wave of hurricanes, droughts, wildfires, whose foreseeable damages could amount to takings.

Coupling with the unconstitutional taking, irreparable injury is that which "cannot be adequately measured or compensated by money."¹⁵³ Many courts have made exceptions for irreparable injury and administrative inadequacy where the statute otherwise expressly requires administrative exhaustion.¹⁵⁴ Such as in a suit seeking a preliminary injunction, factual allegations that a plaintiff will suffer imminent irreparable injury from a regulation barring court interference must be assumed to be true.¹⁵⁵ For climate torts, the protective assumptions are twofold as "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable" such that "the balance of harms will usually favor the issuance of an injunction to protect the environment."¹⁵⁶ Climate torts could foreseeably satisfy this exception as private citizens, cities, and states continue to undergo economic and environmental hardship, and because remedies under the CAA, as shown above, often preempt any meaningful relief and funnels climate claims into a futile result for the plaintiff.

151. *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 293 (1923) (here, the Oklahoma Corporation Commission denied a rate increase that the gas utility claimed was a confiscatory taking under the constitution causing irreparable economic damage. The gas utility appealed the issue to the State Supreme Court and applied for supersedeas. The State Supreme Court denied the supersedeas, and before the State heard the appeal, the Supreme Court of the United States granted certiorari).

152. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767 (1947).

153. Irreparable Injury Definition, *Black's Law Dictionary* (11th ed. 2019), available at Westlaw.

154. See, e.g., *Bannum, Inc. v. Samuels*, 221 F. Supp. 3d 74, 86 (D.C. Cir. 2016) (citing *Randolph-Sheppard Vendors of Am. V. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986)) ("The only recognized exceptions to the exhaustion requirement [of the Federal Tort Claims Act] are where administrative remedies are inadequate or where irreparable injury would result absent immediate judicial review.").

155. See *Petroleum Exploration v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 217 (1938).

156. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Although climate actions have not beaten down this path, *Arkansas Game and Fish Commission* may be instructive.¹⁵⁷ In that case, the Arkansas Game and Fish Commission sued the United States for damages related to government-induced flooding.¹⁵⁸ There, the Supreme Court stated that “the Takings Clause is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁵⁹ A court will determine a taking in light of foreseeability and causation.¹⁶⁰ In particular, flooding cases are determined as takings by the particular circumstances of a case, and a court must be mindful to avoid blanket exclusion.¹⁶¹ From this case, the Supreme Court held that government-induced, temporary flooding potentially violates the Takings Clause, considering: (1) “the degree to which the invasion is intended or is the foreseeable result of authorized government action;” (2) “the character of the land at issue and the owner’s reasonable investment backed expectations regarding the land’s use;” and (3) the severity and accumulative effect of the interference.¹⁶²

As these factors apply to climate torts, there is an ever-improving correlation and resulting foreseeability between government-regulated emissions, public spending, and detrimental land invasion from flooding. And those affected did not put themselves in harm’s way; the landowners impacted by climate change will not all be in a common flood plain, nor will the impacts of climate change be limited to areas of conspicuous natural hazards. Climate-related weather events will irreparably harm every community. Lastly, as these incursions, damages, displacements, and changed land uses accumulate, so too will the factors that plaintiffs can use to hold the government accountable as the regulating body for temporary and permanent emissions-related changes to private citizens’ property.

As applied to climate torts, any one of these exceptions could expedite a plaintiff’s arrival to the judiciary. Once there, plaintiffs have procedural battles to overcome.

157. Ark. Game and Fish Comm’n v. United States, 568 U.S. 23 (2012).

158. *Id.* at 26 (the Army Corps of Engineers revised the water release schedule of the Clearwater Dam, causing a higher water level downstream that interfered with the tree-growing season within the Dave Donaldson Black River Wildlife Management Area).

159. *Id.* at 31 (internal citations omitted).

160. *Id.* at 34.

161. *Id.* at 37.

162. *Id.* at 39.

IV. 1447(d) Appeal of Remand and its Staying Power

In climate torts, oil and gas defendants wield court procedures against plaintiffs that are otherwise intended to economize cases from inception through final judgment. The unique characteristics of climate torts—their complexity, gravity, and unclarity—act as a backstop for court-sanctioned delay tactics.

A. Overbroad Appeal of Remand

Appeal of remand has become a powerful tool for climate tort defendants. Where a climate-tort claim has threaded through both state and federal courts, as well as preemption, displacement, and administrative exhaustion, its progress to the merits may be delayed by a fulsome appeal of remand. In *BP P.L.C. v. Mayor and City Council of Baltimore*, the Fourth Circuit affirmed the district court's remand because the plaintiff—Baltimore—asserted only state-law causes of action related to oil companies' promotion of fossil fuels while concealing the magnitude of its environmental impacts.¹⁶³ There, the oil company defendants appealed the remand under a provision of 28 U.S.C. § 1447(d) which allows for an appeal where the removal is premised on § 1442 federal officer jurisdiction.¹⁶⁴ The Supreme Court held this appeal of remand requires a federal court to review not only the question of whether federal officer jurisdiction is warranted but also “the merits of all theories for removal that a district court has rejected.”¹⁶⁵ The result has a practical application; it gives climate tort defendants an easy delay.

For climate torts, appeal of remand has become unbound by legal standards, public policy, or judicial reprimand. In *Baltimore III*, the oil

163. *Mayor of Balt. v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

164. *BP P.L.C. v. Mayor of Balt. (Baltimore III)*, 141 S. Ct. 1532, 1533 (2021). Generally, federal officer removal is meant to protect federal interests by removing a federal officer under state prosecution into federal court. The removal also applies to an entity acting under color of a United States agency. 42 U.S.C. § 1442(a)(1). Oil companies with longstanding relationships with the federal government, such as Chevron and Exxon, argue that removal is satisfied by their work under close federal supervision toward national defense interests; the courts, however, are unanimously unmoved. *See, e.g.*, *City of Hoboken v. ExxonMobil*, 2021 WL 4077541 at *9-10 (D.N.J. Sep. 8, 2021); *City of Honolulu v. Sunoco LP*, 2021 WL 531237 at *4-5 (D. Haw. Feb. 12, 2021); *Rhode Island v. Shell Oil Prod.*, 979 F.3d 50, 59-60 (1st Cir. 2020), *vacated and remanded*, 141 S. Ct. 2666 (2021); *Mayor of Balt. v. BP P.L.C.*, 952 F.3d 452, 462 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021).

165. *Id.* at 1537.

companies claimed federal officer jurisdiction under the theory that “some of their challenged exploration, drilling, and production operations took place at the federal government’s behest.”¹⁶⁶ More specifically, (1) President Franklin D. Roosevelt contracted Chevron’s predecessor, Standard Oil of California, to produce 15,000 barrels of oil per day; (2) Chevron produced oil pursuant to the 1976 Naval Petroleum Reserves Production Act; (3) defendants “acted under” a Secretary of the Interior mandate to produce hydrocarbons per their Outer Continental Shelf Lands Act (OCSLA) leases;¹⁶⁷ and (4) CITGO was involved in fuel supply agreements with the United States Navy between 1988 and 2012.¹⁶⁸ In her lone dissent, Justice Sotomayor argued that appeal of remand for such stretched executive officer connections “swallow[s] the rule” that otherwise prevented jurisdictional quarrels from delaying arguments on the merits.¹⁶⁹

In these cases that involve large oil and gas companies, Justice Sotomayor has a point. In reality, this theoretically limited exception multiplies by mergers, acquisitions, and continuing government-industry contact. John D. Rockefeller’s Standard Oil Company provides a model example. Over a century ago, *Standard Oil Company of New Jersey v. United States* dissolved the oil titan’s monopoly into several regionalized companies.¹⁷⁰ Since then, these regional companies have gone forth and multiplied by acquiring and being acquired by non-Standard companies. The result is such that ExxonMobil, BP, Marathon Oil, ConocoPhillips, and Sunoco, who share a Standard ancestor, could copy *Baltimore*’s federal

166. *Id.* at 1536.

167. Federal jurisdiction via federal enclave and the OCSLA is often invoked on the grounds that a court injunction would necessarily reach offshore wells and upset the federal government’s interest in those operations. For torts, the location of a plaintiff’s injury determines whether the right to removal exists under such a federal enclave, and is only satisfied when all or most of the pertinent events occurred in OCSLA territory. *City of Hoboken v. Exxon Mobil*, 2021 WL 4077541 at *11 (D.N.J. Sep. 8, 2021). Further, the OCSLA grants exclusive jurisdiction to the federal government if the conduct satisfies two parts: (1) the conduct that caused the injury constituted operational conduct on the outer continental shelf that involved the exploration and production of minerals; and (2) the case arises out of, or in connection with the operation. *Id.* at *8. In these climate torts, courts have agreed that the second part of the analysis is unmet and that exclusive federal jurisdiction is not warranted pursuant to the OCSLA. *See Id.* at *9; *City of Honolulu v. Sunoco LP*, 2021 WL 531237 at *3.

168. *See* Defendants’ Opposition to Mayor and City Council of Baltimore’s Motion to Remand, *Mayor of Balt. v. BP P.L.C. (Baltimore I)*, 388 F. Supp. 3d (D. Md. 2019) (No. 1:18-cv-2357 ELH), 2018 WL 5019802.

169. *BP P.L.C.* 141 S. Ct. at 1543 (Sotomayor, J., dissenting).

170. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

officer removal argument and delay hearings on the merits using § 1447(d)'s broad and powerful right to appeal remand.

Beyond this large-but-closed family of oil giants, *Baltimore III* auctions off federal removal and appeal of remand to the highest bidder. Since 2017, no fewer than fifty oil and gas companies have acquired leases in the Gulf of Mexico.¹⁷¹ These offshore lease transactions between oil companies and the federal government gather even more climate-tort defendants beneath *Baltimore III*'s capacious federal officer removal umbrella, including Hess, Shell, Anadarko, and Murphy Oil.¹⁷²

Even Supreme Court Justices “can be wrong; even Homer nodded.”¹⁷³ Granting an unqualified right to appeal, Justice Gorsuch's majority opinion in *Baltimore III* does not question the sincerity or substance of the appeal's bases and leaves enforcement against superfluous appeal requests to the lower courts.¹⁷⁴ This approach created an imbalance in E&P companies' favor. The penalties for objectively unfounded removal “recognize[d] the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party”¹⁷⁵ In the second fiscal quarter of 2022, ExxonMobil alone reported earnings of \$17.9 billion.¹⁷⁶ The benefits realized through delay are orders of magnitude greater than the potential court costs and infractions. The lax standard for sincerity and substance provides an economic incentive for E&P companies to use § 1447(d) appeal in every case to prolong court processes and delay the possibility of a more costly injunction. Moreover, contrary to Justice Gorsuch's scheme, lower courts have not reprimanded oil and gas companies for their tenuous federal officer arguments. For example, the Minnesota District Court has found Defendant oil companies' arguments for federal officer removal—based on admittedly “undeveloped” arguments and merely colorable federal

171. See *2017-2022 Lease Sale Schedule*, Bureau of Ocean Energy Mgmt., <https://www.boem.gov/2017-2022-lease-sale-schedule> (last visited Feb. 13, 2022).

172. See *Id.*

173. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422-2423 (2019) (Gorsuch, J. concurring) (citing Larkin & Slattery, *The World after Seminole Rock and Auer*, 42 HARV. J. L. PUB. POL'Y, 625, 647).

174. See *BP P.L.C.*, 141 S. Ct. at 1542.

175. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005).

176. See *ExxonMobil announces second-quarter 2022 results*, ExxonMobil, https://corporate.exxonmobil.com/News/Newsroom/News-releases/2022/0729_ExxonMobil-announces-second-quarter-2022-results (last updated July 29, 2022).

associations¹⁷⁷—were “not objectively unreasonable” and denied Minnesota’s motion for attorney fees.¹⁷⁸ These delays propagate throughout court procedures.

B. The Law’s Delay and Staying Remand

Defendants leverage the legal murkiness, doctrinal development, and unknown boundaries to achieve delay. As with previous procedural steps, courts are uneasy to take the next step forward in climate torts. Chief Judge Tunheim of the United States District Court of Minnesota put this caution to words, stating: “[t]his is not a case of applying thoroughly developed law to well-tread factual patterns; when it comes to questions of the proper forum for adjudicating harms related to climate change, ‘the legal landscape is shifting beneath [our] feet.’”¹⁷⁹ Climate torts are stuck—lower courts and appellate courts are fearful to proceed—awaiting a Supreme Court jurisprudential jar to break the tension.

In particular, courts get stuck during motions to stay—unable to decide whether to move a case along or to wait and see. A stay is an inherent authority of the federal courts to put a case on hold and serves as a piece of “traditional equipment for the administration of justice.”¹⁸⁰ There is a four-factor standard for a stay pending judicial review: (1) the party moving to stay has made a strong showing that it is likely to succeed on the merits; (2) the moving party’s irreparable injury absent a stay; (3) whether a stay would cause substantial injury to the non-moving party; and (4) the public interest.¹⁸¹ Lacking climate-torts merits cases and enormous potential harms to both parties, these elements are exceptionally difficult to apply in climate torts.

The courts are reluctant, and the procedural mechanisms for action are outmoded. Here, an opportunity arises for the defendants. If you cannot win under the current law, the strategy is to delay losing and hope the law changes. For example, in *Minnesota v. American Petroleum Institute*, the State brought exclusively state-law causes of action sounding in consumer

177. See Defendants’ Opposition to Plaintiff’s Motion for Costs and Attorney’s Fees Pursuant to 28 U.S.C. § 1447(c), *Minnesota v. Am. Petrol. Inst.*, 2021 WL 3711072 (D. Minn. Aug. 20, 2021) (No. 20-cv-1636-JRT-HB), 2021 WL 9183579.

178. *Minnesota v. American Petroleum Institute*, 2021 WL 3711072 at *1 (D. Minn. Aug. 20, 2021).

179. *Minnesota v. American Petroleum Institute*, 2021 WL 3711072 at *4 (D. Minn. Aug. 20, 2021) (citing *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469 at *4 (D. Md. May 19, 2021)).

180. *Nken v. Holder*, 556 U.S. 418, 426-427 (2009).

181. *Id.* at 426.

protections against API, Exxon, Koch Industries, and Flint Hills Resources (a wholly owned subsidiary of Koch Industries).¹⁸² Immediately, the companies began to delay. First, the defendants noticed their removal to federal court, asserting seven specious grounds.¹⁸³ Next, the defendants filed for a motion to stay. They argued that to “conserve judicial resources” the court should stay its proceedings until the Supreme Court issues two pieces of guidance: its decisions toward appeal of remand in *Baltimore III*, and its decision on whether to grant certiorari in *Chevron Corporation v. City of Oakland*.¹⁸⁴ After thorough consideration of Defendants’ theories, the court found it that removal was improper because was without original jurisdiction and remanded the issue back to the State.¹⁸⁵ Then, the court denied the defendants’ motion to stay, finding that “neither pending matter relied on by [defendants] bear[s] upon the Court’s decision to remand the case for lack of federal jurisdiction.”¹⁸⁶ But then, more delay. The same day the court denied the motion to stay, the defendants filed and were granted a temporary administrative stay of the execution of the remand order, and appealed the remand order to the Eighth Circuit.¹⁸⁷ Finally, the defendants were rewarded with a delay. The court granted the Defendants’ motion to stay “as the Eighth Circuit determines whether state or federal court has jurisdiction over this matter,” buying the plaintiff as much as one year of reprieve.¹⁸⁸

Because of defendants’ numerous and confounding motions for delay, courts remain stuck downhole—unable to reach the merits in climate torts—paralyzed by the friction of going through overbroad, prolonged appeals of remand, and congested stays. Until the Supreme Court jars the

182. *Minnesota v. American Petroleum Institute*, 2021 WL 1215656 at *1 (D. Minn. Mar. 31, 2021) (Specifically, the plaintiff asserted violations of the Minnesota Consumer Fraud Act; failure to warn; fraud and misrepresentation; violations of the Minnesota Deceptive Trade Practices Act; and violations of the Minnesota False Statement in Advertising Act).

183. *Id.* at *1 (the defendant tried everything to gain jurisdiction: federal common law; *Grable* doctrine; federal officer removal; OCSLA; federal enclaves; Class Action Fairness Act; and diversity).

184. *Id.* at *3.

185. *Id.* at *13.

186. *Id.* at *13-14.

187. *Minnesota v. American Petroleum Institute*, 2021 WL 3711072 at *1 (D. Minn. Aug. 20, 2021).

188. *Id.* 3711072 at *4 (D. Minn. Aug. 20, 2021) (“the Court recognizes that the balance of factors will likely shift over time and therefore may reevaluate the propriety of the stay if Defendants’ appeal remains unresolved twelve months after the issuance of this Order.”).

courts loose, climate torts that make it through to the courts cannot move forward to the merits.

V. Conclusion

Climate torts must return to the States' authority because they no longer belong under an ineffective federal system. The States are the rightful legal authority for climate torts and are also the authority directly responsible for protecting the public by tailoring their climate responses to the regionally-unique impacts of climate change; "[t]he Constitution, too, placed its trust not in the hands of 'a few, but [in] a number of hands, so that those who make our laws would better reflect the diversity of the people they represent and have an 'immediate dependence on, and an intimate sympathy with, the people.'"¹⁸⁹

The CAA can no longer act as a federal barrier to environmental protection; the law no longer supports a model of preemption that overtakes the national array of climate actions. As shown above, the Act lacks both sufficient remedies and Congress's express intent to do so. What's more, the Court's diversion away from *Chevron* deference and into non-delegation and major question doctrines further thins the CAA's structure and reduces its capacity to hold back state-court intervention. Independent of the administrative state's size, exceptions to administrative exhaustion provide pathways for climate torts to travel around the EPA and into the judiciary. Together, this confluence of overlapping doctrine overburdens the courts and leads to abusive delay. Law and policy forming the bedrock of climate torts are undergoing metamorphic change, and the stable balance of federalism depends on the adjudication of climate torts changing with it.

189. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (citing *The Federalist* No. 52, p. 327 (C. Rossiter ed. 1961) (J. Madison)) (internal citations omitted).