On the Hook-Can the Commercial Fishing Industry Hold Big Oil Accountable for Climate Change?

MATTHEW K. BOWEN*

TABLE OF CONTENTS

 J.D. 2023, University of San Diego School of Law; 2020 California State University, Chico. Special thanks to the *San Diego Journal of Climate and Energy Law* Editors and Associates, Alexandra Cumberland, J.D. 2023, University of San Diego School of Law, Denise and Kevin Bowen, Eric Rennert, J.D., Esq., and Christina Fisher, Educator, Chico Unified School District.

I. INTRODUCTION

"All these impacts we're dealing with have nothing to do with abundance of the stock or overfishing . . . . They're driven by ocean warming and these blooms of toxin-producing algae."

-Noah Oppenheim, Executive Director of the Pacific Coast Federation of Fishermen's Associations.[1]

In the fall of 2015 and again in 2018, state officials in California and Oregon delayed the opening of Dungeness crab fishing season by several months due to unsafe concentrations of domoic acid in ocean waters.[2] Domoic acid, a product of algae that blooms in warm seas, renders shellfish toxic for human consumption.[3] Experts link the warm seas that cause domoic acid blooms to recent climate extremes.[4]

In 2018, The Pacific Coast Federation of Fishermen's Associations ("the Federation") sued several oil companies over these domoic-acid-related closures during the Dungeness crab fishing season.[5] The Federation alleges the underlying reason for the closures is climate change, which brought warmer seas (and, in turn, algae blooms that release domoic acid) because of greenhouse gas emissions.[6] The Federation is pursuing legal action in response to the economic harms its members have faced from the fishing season closures. In a 2018 article from NPR,[7] Mr. Oppenheim (quoted above) stated that the 2015 to 2016 crab fishing closure caused some boats to leave the fishing industry altogether.[8] It is further alleged that the oil companies knew sea temperature would rise and made efforts to hide this information to avoid regulation.[9]

Additionally, in 2017, one year prior to the Federation's action, lawsuits alleging very similar causes of action in connection to economic harms

---

1. Alastair Bland, *Fishermen sue big oil for its role in climate change*, NPR (Dec. 4, 2018), https://www.npr.org/sections/thesalt/2018/12/04/671996313/fishermen-sue-big-oil-for-its-role-in-climate-change [https://perma.cc/HER5-JLE5].

2. *Id*.

3. *Domoic Acid (a marine biotoxin) in fish and Shellfish,* CAL. OFF. OF ENV'T. HEALTH HAZARD ASSESSMENT (July 15, 2019), https://oehha.ca.gov/fish/general-info/domoic-acid-marine-biotoxin-fish-and-shellfish [https://perma.cc/4RA9-UK9Z].

4. Vera Trainer et al., *Climate Extreme Seeds a New Domoic Acid Hotspot on the US West Coast*, FRONTIERS (Dec. 14, 2020), https://www.frontiersin.org/articles/10.3389/fclim.2020.571836/full [https://perma.cc/5YJV-WUK6].

5. Bland, *supra* note 1.

6. *Id*.

7. *Id*.

8. *Id*.

9. KATHY MULVIN ET AL., THE CLIMATE DECEPTION DOSSIERS (The Union of Concerned Scientists, 2015).

from sea level rise were filed by the County of San Mateo[10] and the City of Oakland, joined by the City and County of San Francisco.[11] As a result, the Federation's lawsuit is currently stayed, pending the resolution of those two cases.[12]

The Federation's case will hinge on many of the factors previously considered by courts in similar actions where oil companies were sued over their role in climate change. Whether the case can be heard and whether it should be heard in state or federal court are often the two largest obstacles for litigants to overcome when suing oil companies over climate change. This Comment will center around the Federation's claims, and their strength and weaknesses considering past cases against the oil companies. Specifically, this Comment analyzes: (1) threshold issues that typically arise in common law actions related to climate change; (2) the differences between the California Cities' ("the Cities") cases and the Federation's case; and (3) the likely outcome of the Federation's case.

II. WILL THE FEDERATION EVER HAVE THE OPPORTUNITY TO PRESENT A SUBSTANTIVE CASE? AN ANALYSIS OF THE THRESHOLD ISSUES: REMOVAL, PREEMPTION, STANDING, AND JUSTICIABILITY

Considering previous common law actions over oil companies' role in climate change, the Federation will have to overcome several procedural barriers to present a substantive case against the oil companies. First, removability will be an important issue because the Federation and defendant oil companies have agreed to stay their case, pending the outcome of the removability issue in *San Mateo*.[13] Second, the Federation's suit will likely have to overcome preemption challenges because Federal law preemption

10. *See* Cnty. of San Mateo v. Chevron Corp., No. 18-15499 (9th Cir. June 30, 2022) (Sabin Center) [hereinafter *San Mateo*] (joined by the City of Imperial Beach and Marin County, and then County of Santa Cruz, City of Santa Cruz, and City of Richmond in 2018).

11. City of Oakland et al. v. BP P.L.C. et al., No. 3:17-cv-6011-WHA (N.D. Cal. Oct. 20, 2017) (joined by City and Cnty. of San Francisco et al. v. BP P.L.C. et al., No. 3:17-cv-6012-WHA (N.D. Cal. Oct. 20, 2017)). Case now appears in the docket for: City of Oakland v. BP P.L.C., No. 3:17-cv-06012-WHA (N.D. Cal. Oct. 24, 2022), 2022 BL 379905.

12. Order Granting 47 Stipulation to Stay Proceedings, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., No. 3:18-cv-07477 (ND Cal. Jan. 2, 2019) (PACER).

13. *Id*.

under the Clean Air Act is a common challenge to common law actions over climate change issues. Third, based on challenges faced by others who have sued oil companies over their role in climate change, the Federation's suit will likely have to survive challenges regarding standing. Finally, the Federation will likely face the justiciability issues that are associated with standing.

A. The Cities' Removal Saga

First, this analysis considers the removability issues encountered by the Cities in their cases, *City of Oakland v. BP P.L.C.*[14] and *County of San Mateo v. Chevron Corp.*,[15] as the Federation and defendant oil companies have agreed to a stay pending the resolution of the Cities' removal issues.[16] The Cities are seeking to be heard in state court, while the oil companies are arguing for removal on several grounds.[17]

Initially, the district court in *Oakland*, overseen by Judge Alsup, determined that the case should be dismissed.[18] However, a Ninth Circuit panel granted the plaintiff's motion for remand, which was affirmed by Judge Alsup in October of 2022,[19] leaving *Oakland* in state court at the time of this article.[20] In May of 2021, the Supreme Court granted the defendant oil companies' petition for writ of certiorari in *San Mateo*, then remanded the case to the Ninth Circuit for consideration of other grounds for removal.[21] This occurred after the Supreme Court ordered the Fourth Circuit to do the same in an analogous case, *BP P.L.C.*[22]

As of July 1, 2021, the defendant oil companies in *San Mateo* were denied the opportunity to submit briefs of supplemental authorities and accompanying oral arguments to the Ninth Circuit regarding the removal

---

14. City of Oakland v. BP P.L.C., No. 20-1089, (N.D. Cal. June 14, 2021) (Sabin Center) (currently under Docket # 3:17-cv-06012 and docket # 3:17-cv-06011) [hereinafter *Oakland*]).

15. Cnty. of San Mateo v. Chevron Corp., No. 18-15499, (9th Cir. Mar. 27, 2018).

16. *Id*.

17. *Id*.

18. John Schwartz, *Judge Dismisses Suit Against Oil Companies Over Climate Change Cost.*, N.Y. TIMES, June 25, 2018, https://www.nytimes.com/2018/06/25/climate/climate-change-lawsuit-san-francisco-oakland.html [https://perma.cc/WRL6-RUHL].

19. Order Granting Renewed Motion to Remand and Vacating Order Dismissing Certain Defendants, City of Oakland v. BP P.L.C., No. c.17-06011 WHA No. C17-06012 (N.D. Cal. Oct. 24, 2022), 2022 BL 379905.

20. *Oakland*; *San Mateo*.

21. Order Granting Petition for Writ of Certiorari, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. May 24, 2021), ECF No. 12122651.

22. BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021); *San Mateo*.

issue.[23] Nonetheless, in September of 2021, the attorneys for the plaintiffs (City of San Mateo) filed a notice of supplemental authority arguing in favor of the remand order, citing *City of Hoboken v. Exxon Mobil Corp*,[24] which ruled that similar climate cases (like *San Mateo*) belong in state court.[25] The defendant oil companies responded, arguing that removal would still be proper under federal question jurisdiction via the Outer Continental Shelf Lands Act.[26]

Next, the attorneys for San Mateo filed another notice of supplemental authority on January 13, 2022, asserting that *Delaware v. BP America Inc.*[27] also supports remand to state court.[28] The defendant oil companies responded on January 20, 2022, asserting that the decision in *Delaware* was incorrect and still pending appeal.[29] On February 16, 2022, attorneys for San Mateo filed another citation of supplemental authorities,[30] which the defendant oil companies responded to on February 28, 2022.[31] San Mateo's attorneys asserted that the newly decided case of *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*[32] supported state court jurisdiction, while the oil companies responded that the case *Ford Motor Co. v. Montana Eighth Judicial District Court*[33] supported removal.[34]

---

23. Order Denying Appellants' Consent Motion for Supplemental Briefing and Oral Argument, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. July 1, 2021), ECF No. 12160902.

24. City of Hoboken v. Exxon Mobil Corp., 558 F.Supp.3d 191 (D. N.J. 2021).

25. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Sept. 20, 2021), ECF No. 12233779.

26. *Id*.

27. Del. ex rel. Jennings v. BP Am. Inc., 578 F. Supp. 3d 618 (D. Del. 2022).

28. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Jan. 13, 2022), ECF No. 12339753.

29. Defendants-Appellants' Response to Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Jan. 20, 2022), ECF No. 12346580.

30. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Feb. 16, 2022), ECF No. 12372793.

31. Defendants-Appellants' Response to Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Feb. 28, 2022), ECF No. 12382039.

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

33. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

34. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Feb. 16, 2022), ECF No. 12372793; Defendants-Appellants' Response to Plaintiffs-Appellees' Citation of Supplemental

On April 12, 2022, the attorneys for San Mateo provided additional supplemental authorities.[35] This letter included the Fourth Circuit's holding in *BP P.L.C.*[36] after it was remanded by the Supreme Court for consideration of other grounds for removal.[37] This holding supported the Cities' arguments for state court jurisdiction,[38] and, on April 19, 2022, the court in *San Mateo* remanded the case to state court.[39] On May 17, 2022, the oil companies in *San Mateo* petitioned for rehearing, but it was denied on June 27, 2022.[40] Nonetheless, on June 30, 2022, the defendant oil companies were granted a ninety-day stay to file a petition for writ of certiorari in the Supreme Court.[41] On November 22, 2022, the oil companies filed their petition.[42]

In the Federation's case, a case management conference was set for June 9, 2021, pending the defendants' filings of two writs of certiorari and a resolution of the removability issue.[43] The case management conference was then vacated;[44] another was set for December 8, 2021, it was vacated;[45] another was scheduled for June 22, 2022, but it was also vacated.[46] Since the defendant oil companies in *San Mateo* are still arguing for removal, it

---

Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Feb. 28, 2022), ECF No. 12382039.

35. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Apr. 12, 2022), ECF No. 12419378.

36. Mayor of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022).

37. Plaintiffs-Appellees' Citation of Supplemental Authorities, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Apr. 12, 2022), ECF No. 12419378.

38. *Id*.

39. Opinion by Judge Ikuta Affirming Remand from the United States Supreme Court, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Apr. 19, 2022), ECF No. 12424998.

40. Order Denying Appellants' Petition for Rehearing En Banc, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. June 27, 2022), ECF No. 12480246.

41. Order Granting Appellants' Motion to Stay the Mandate, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. June 30, 2022), ECF No. 12484276.

42. Appellants Notifying the Court of the Filing of a Petition for a Writ of Certiorari. Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Nov. 25, 2022), ECF No. 12595995.

43. Notice Continuing Case Management Conference, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., No. 3:18-cv-07477 (ND Cal. Nov. 30, 2020) (PACER).

44. Order Vacating Case Management Conference, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., No. 3:18-cv-07477 (ND Cal. June 4, 2021) (PACER).

45. Order Vacating Case Management Conference, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., No. 3:18-cv-07477 (ND Cal. Nov. 17, 2021) (PACER).

46. Order Vacating Case Management Conference, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp., No. 3:18-cv-07477 (ND Cal. June 20, 2022) (PACER).

seems that more continuances are likely. Therefore, it must be considered whether the Supreme Court will find grounds for removal in *San Mateo,* what they are, and what this means for the Federation's case.

1. Will San Mateo *be Removed, and What Would This Mean for the Federation?*

While the *Oakland* case is effectively "stuck" in state court following the Supreme Court's denial of certiorari to review the Ninth Circuit's remand order,[47] *San Mateo* could still be removed to federal court by the Supreme Court based on grounds for removal in the analogous case, *BP P.L.C*.[48] Thus, it is important to analyze how *San Mateo* reached its current status, what grounds for removal remain viable following the Fourth Circuit's decision in *BP P.L.C.,*[49] and what this could mean for the Federation's case if *San Mateo* is removed on those grounds.

In *San Mateo,* the district court, followed by review from a Ninth Circuit panel overseen by Judge Ikuta, came to this conclusion:

> The district court granted plaintiffs' motions to remand, rejecting all eight of the grounds on which the energy companies relied for subject-matter jurisdiction. Dismissing in part, the panel held that under 28 U.S.C. § 1447(d), it had jurisdiction to review the removal order only to the extent the order addressed whether removal was proper under § 1442(a)(1). The panel concluded that the nonreviewability clause of § 1447(d) applied because the district court remanded based on a lack of subject-matter jurisdiction.[50]

In response, the defendant oil companies in *San Mateo* petitioned for a writ of certiorari.[51] The Supreme Court held, following *BP P.L.C. v. Mayor*

47. Order Denying Petition for Writ of Certiorari, Chevron Corp. et al. v. City of Oakland et al., No. 20-1089 (June 14, 2021) (SCOTUS).

48. Mayor of Baltimore v. BP PLC, 31 F.4th 178, 199 (4th Cir. 2022) (citing eight grounds for removal: "(1) federal common law; (2) substantial issues of federal law, including foreign affairs under *Grable*; (3) complete preemption under the CAA, 42 U.S.C. §§ 7401-7671q; (4) federal enclaves; (5) the OCSLA, 43 U.S.C. § 1349(b)(1); (6) the bankruptcy removal statute, 28 U.S.C. § 1452(a); (7) the admiralty jurisdiction statute, 28 U.S.C. § 1333(1); and (8) the federal officer removal statute, 28 U.S.C. § 1442(a)(1).").

49. *Id*. at 238 ("Because we do not discern a proper basis for removal that permits a federal court to entertain Baltimore's action, the district court's order granting Baltimore's Motion to Remand is affirmed.").

50. Filed Opinion, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. May 26, 2020), ECF No. 11700225.

51. Filed Letter to Petition for Writ of Certiorari, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. May 26, 2020), ECF No. 11978069.

of Baltimore,[52] that section 1447(d) did not limit the court to considering only the federal officer removal[53] issue.[54] The Supreme Court held that the Ninth Circuit should consider the same removal grounds on which it had remanded *BP P.L.C.* to the Fourth Circuit.[55]

The *BP P.L.C.* court reasoned that section 1447(d) did not limit it to considering only the federal officer removal issue because:

> To our minds, the first telling clue lies in the statute's use of the term 'order.' Whether we look to the time of § 1447(d)'s adoption or amendment, a judicial "order" meant then what it means today: a "written direction or command delivered by . . . a court or judge." So an "order remanding a case" was (and is) a formal command from a district court returning the case to state court. In this case, the district court's remand order rejected all of the defendants' grounds for removal. For good reason too. Normally, federal jurisdiction is not optional; subject to exceptions not relevant here, "courts are obliged to decide cases within the scope of federal jurisdiction" assigned to them. . . . So the district court wasn't at liberty to remove the City's case from its docket until it determined that it lacked any authority to entertain the suit. . . . From this it would seem to follow that, when a district court's removal order rejects all of the defendants' grounds for removal, §1447(d) authorizes a court of appeals to review each and every one of them. After all, the statute allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces.[56]

Since the court held that section 1447(d) allowed the district court to review each ground for removal, the question becomes: based on the court's analysis, which of these grounds may become viable in the Federation's case? Recently, much of this question was resolved when the Fourth Circuit Court, in *BP P.L.C.*, held that the case belonged in state court, despite considering the additional grounds for removal.[57]

Nonetheless, exploring grounds for removal is imperative to analyzing the Federation's success. The defendants' supplemental briefs in *San Mateo*[58] are useful for exploring grounds for removal because the same grounds for removal will be considered in the Federation's case, and there is a stay in the Federation's case to allow the defendants in *San Mateo* to petition the Supreme Court for writ for certiorari on the removal issue.[59]

---

52. BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021).
53. Federal officer removal is defined at 28 U.S.C. § 1442.
54. *BP P.L.C.*, 141 S. Ct. 1532, 1533 (2021); *Cnty. of San Mateo*, 294 F. Supp. 3d at 939.
55. *BP P.L.C.*, 141 S. Ct. at 1533.
56. *Id.* at 1537 (citations omitted).
57. Mayor of Balt. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022).
58. Appellants Consent Motion for Supplemental Briefing and Oral Argument, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. June 23, 2021), ECF No. 12152776.
59. Order Granting Joint Stipulation to Stay Proceedings, Cnty of San Mateo v. Chevron Corp. et al., No. 3:18-cv-07477-VC (9th Cir. Jan. 12, 2019).

While the court in *San Mateo* ultimately denied the defendants' motion for supplemental arguments and briefs,[60] their motion to file supplemental briefs shows which strategies are likely to be pursued for removal in their petition for writ of certiorari.[61] The defendants raised seven grounds for removal:

1. that Plaintiffs' claims are governed by federal common law;
2. that Plaintiffs' claims necessarily raise disputed and substantial federal questions;
3. that Plaintiffs' claims are completely preempted by the U.S. Constitution, the Clean Air Act, and other federal statutes;
4. that the district court had original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA");
5. that federal-officer removal is authorized under 28 U.S.C. § 1442(a);
6. that Plaintiffs' claims are based on alleged conduct on federal enclaves; and
7. that removal is authorized under the bankruptcy-removal statute, 28 U.S.C. § 1452(a).[62]

Since the court had previously considered only the federal-officer removal provision, the oil companies could be granted removal based on one of their other six claims.[63] Nonetheless, the Ninth Circuit denied rehearing these claims in *San Mateo*,[64] and the Supreme Court in *Chevron Corp. v. City of Oakland* denied the defendant's petition to challenge the Ninth Circuit's remand order.[65] Based on these factors, the San Mateo court appeared to be "waiting on" the Fourth Circuit's decision in *BP P.L.C.*, which considers similar additional grounds for removal. The Fourth Circuit decided that *BP P.L.C.* belonged in state court, and shortly thereafter, the Ninth

60. Order Denying Appellants Consent Motion for Supplemental Briefing and Oral Argument, Cnty of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. July 1, 2021), ECF No. 12160902.

61. Appellants' Consent Motion for Supplemental Briefing and Oral Argument, Cnty of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. July 1, 2021), ECF No. 12160902.

62. *Id*.

63. *See id*.

64. *Id*.

65. City of Oakland et al. v. BP P.L.C. et al., No. 3:17-cv-06011 (ND Cal. 2017), *cert. denied*, Chevron Corp. et al. v. City of Oakland et al., No. 20-1089 (2021).

Circuit in *San Mateo* agreed.[66] Now, the oil companies are petitioning for writ of certiorari, but it is unlikely that *San Mateo* will be removed. Moreover, based on the supplemental authorities submitted by the plaintiffs in *San Mateo*, analogous cases are being remanded to state courts.[67] Therefore, unless the Supreme Court grants the defendant oil companies' writ of certiorari and overrules the Fourth Circuit by finding that state common law actions over climate change harms are removable, *San Mateo* will not be removed.

The Cities' removal issues in *Oakland* and *San Mateo* are a suitable proxy to analyze what may happen in the Federation's action. They suggest the Federation's action belongs in state court. However, the removal issues faced by *San Mateo* may persist if the oil companies' petition for writ of certiorari is granted—even considering the Ninth Circuit's decision to follow the holding in *BP P.L.C*. Therefore, while the Cities' cases seem to point to state court as the Federation's ultimate destination, much of this will rely on how the Supreme Court will view the Fourth Circuit's earlier consideration of very similar grounds for removal in *BP P.L.C*.[68]

B. Preemption

Federal law preemption under the Clean Air Act is a very common challenge to common law actions over climate change issues.[69] However, with state law causes of action, such challenges are likely unfounded.[70] The Federation's action is not preempted under federal law because *American Electric Power Co.*[71] discussed that state law actions are not preempted under the Clean Air Act.[72] Here, the Federation's complaint contains five state law causes of action: (1) nuisance, (2) strict liability for failure to warn, (3) strict liability for a design defect, (4) negligence, and

66. Mayor of Balt. v. BP P.L.C, 31 F.4th 178, 196 (4th Cir. 2022); Opinion Affirming Remand, Cnty. of San Mateo v. Chevron Corp. et al, No. 18-15499 (9th Cir. Apr. 19, 2022), ECF No. 12424998.

67. Plaintiffs Letter Submitting Supplemental Authority, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Sept. 20. 2021), ECF No. 12233779; Plaintiffs Letter Submitting Supplemental Authority, Cnty. of San Mateo v. Chevron Corp. et al., No. 18-15499 (9th Cir. Feb. 16, 2022), ECF No. 12372793.

68. *See* Mayor of Balt. v. BP P.L.C, 31 F.4th 178, 196 (4th Cir. 2022).

69. *See* Conn. v. Am. Elec. Power Co., 582 F.3d. 309, 329 (2011); *see also Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (2012).

70. *See* Kevin A. Gaynor et al., Comment, *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENV'T. L. REP. NEWS & ANALYSIS 10845 (2010).

71. Conn. v. Am. Elec. Power Co., 582 F.3d. 309, 329 (2011).

72. *Id.*; Gaynor et al., *supra* note 70, at 10851.

(5) negligent failure to warn.[73] However, in *American Electric Power Co.,* preemption was mentioned in dicta only, as the case was decided on displacement rather than preemption grounds.[74] Thus, some valid argument remains that this action is preempted. Nonetheless, the dicta in *American Electric Power Co.* will likely be accepted due to the lack of decisions on this topic. Therefore, it is unlikely the Federation's action would be preempted because it only asserts state common law causes of action.

C. Standing

The Federation's action, like nearly all that came before it regarding common law causes of action for climate change harms, will encounter standing issues. First, the Federation will have to contend with the "fairly traceable" issues that defeated the plaintiffs in *Native Village of Kivalina v. ExxonMobil Corp*.[75] Second, because the Federation's individual members are not suing, they will have to show standing on the basis that their members were injured.[76] Third, following *Juliana v. United States*, the Federation will have to consider whether redressability will limit standing in their action.[77]

The Supreme Court has a long-established formula to determine whether a plaintiff has standing. "To establish standing under Article III of the Constitution, a plaintiff must show '(1) injury in fact; (2) causation; and (3) likelihood that the injury will be redressed by a favorable decision.'"[78] However, common law actions over climate change have not fit neatly into this formula. While some courts have found standing for these types of actions,[79] others have not.[80]

---

73. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

74. Conn. v. Am. Elec. Power Co., 582 F.3d 309, 315 (2009).

75. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854 (2012).

76. For association standing, *see AlohaCare v. Haw., Dep't of Hum. Services*, 572 F.3d 740, 747 (9th Cir. 2009).

77. *See* Juliana v. U.S., 947 F.3d 1159, 1169–70 (2016).

78. *Native Village of Kivalina,* 696 F.3d at 854 (quoting Am. Civ. Libr. Union of Nev. v. Lomax, 471 F.3d 1010, 1015 (9th Cir. 2006)); *see also* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1395 (2020).

79. *E.g.* Comer v. Murphy Oil USA, 585 F.3d 855, 1398 (2009); *see* Sokol, *supra* note 78, at 1398.

80. *E.g.* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854–58 (2012); *see Sokol*, *supra* note 78.

The first standing issue that will arise in the Federation's case is whether lost wages from fishing season closures caused by domoic acid release will constitute a harm that is "fairly traceable" back to the oil companies' role in climate change. The court in *Kivalina,* a similar action regarding sea level rise, found that the plaintiffs could not prove a fairly traceable harm:

> [T]he defendants' conduct that the plaintiffs complained of—greenhouse gas emissions—was not 'fairly traceable' to the climate harm of impending displacement faced by the villagers because those emissions became part of an 'undifferentiated' mass of greenhouse gases that have been accumulating for 'centuries' and to which 'a multitude of sources other than the Defendants' all over the planet contributed. Thus, the court understood 'the Plaintiffs' claim for damages as dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases.' Such an 'extremely attenuated causation scenario,' reasoned the court, is not sufficient to support standing to bring a federal common law nuisance claim.[81]

Therefore, the Federation could face standing issues regarding the traceability of the injury to the defendants, because the accumulation of greenhouse gases is what causes the ocean to warm and, in turn, causes algae to release domoic acid.[82] Following the logic of the court in *Kivalina*, which also considered an undifferentiated mass of gases from a multitude of sources, it may be argued that because an accumulation of greenhouse gases caused oceans to warm, resulting in domoic acid release into shellfish, the Federation's case lacks standing.

However, in *American Electric Power Co.*, the "fairly traceable" bar was not set very high.[83] The court found that the argument stating defendant oil companies only accounted for 2.5 percent of emissions did not defeat the requirement.[84] Moreover, *Comer v. Murphy Oil*[85] may be more analogous to the Federation's case, because it advanced private nuisance claims under state common law and it found standing for the plaintiffs under their tort claims.[86] While this decision was eventually vacated, leaving in place the non-precedential district court holding of no legal

---

81. *See* Sokol, *supra* note 78, at 1396; *Native Village of Kivalina*, 696 F.3d at 854.

82. Cal. Off. of Env't Health Hazard Assessment. *Domoic Acid (a marine biotoxin) in fish and shellfish*, OEHHA (July 15, 2019), https://oehha.ca.gov/fish/general-info/domoic-acid-marine-biotoxin-fish-and-shellfish [https://perma.cc/4RA9-UK9Z]; *see also* Morgaine McKibben et al., *Climactic regulation of the neurotoxin domoic acid*, 114 PNAS 239 (Jan. 10, 2017).

83. Conn. v. Am. Elec. Power Co., 582 F.3d. 309, 329 (2011).

84. Gaynor et al., *supra* note 70, at 10845.

85. *See* Comer v. Murphy Oil USA, 585 F.3d 855, 879 (2009).

86. *See* Sokol, *supra* note 78, at 1399; *see also* Comer v. Murphy Oil USA, 585 F.3d 855, 879 (2009).

standing,[87] the appeals court did find legal standing that would have had precedential affect had a judge not recused himself. This may increase the Federation's ability to achieve standing based on the similar nature of their tort claims to those in *Comer*.[88]

The Federation faces *Kivalina* as Ninth Circuit precedent, so the court may be less likely to grant standing. However, advancements in law and science since this 2004 holding may create new avenues for the Federation's case. For example, data now shows that Chevron is responsible for greater than 2.5 percent of total emissions.[89] Because the court in *American Electric Power Co*. held that being responsible for 2.5 percent of emissions satisfied the "fairly traceable" standard, the Federation can likely show standing.

Second, the Federation will likely have issues meeting the first prong of standing: injury in fact. This is largely because the Federation, as an entity, was not injured–its members were. Thus, the Federation must derive standing from its members' injuries, which is possible if the Federation can show that its members individually meet the injury in fact prong of standing. The Federation can likely achieve this associational standing.[90] Under *AlohaCare*, an entity has associational standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[91]

In the Federations case, each individual member was injured when the crab fishing season closed and put them out of work, so they would have standing to sue in their own right. Also, the interest the suit seeks to protect is the livelihood of crab fisherman, which is germane to the Federation's purpose. Finally, the fisherman need not participate in the lawsuit to effectuate the claim or receive relief. The fishermen joined the case to help the Federation further their interest in maintaining the fisheries and in turn, their livelihoods, and the Federation is pursuing those interests with

87. Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (2012).
88. *Id*.
89. Richard Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, 122 CLIMATE CHANGE 229, 237 (2014).
90. AlohaCare v. Haw., Dep't of Hum. Services, 572 F.3d 740, 747 (9th Cir. 2009).
91. *Id*.

this suit.[92] As a result, the Federation will be able to show associational standing. However, the Federation will still have to hurdle the previously mentioned traceability and redressability issues.

Third, the Federation must contend with the issue of redressability. To show redressability, the plaintiffs must show the relief they ask for is "(1) substantially likely to redress their injuries; and (2) within the district court's power to award."[93] In *Juliana*, the court failed to find redressability when the plaintiffs requested an injunction against the government for climate related harms because such a broad injunction would not be in the purview of the court to issue.[94] Nonetheless, the Federation is better suited to show redressability than the plaintiffs in *Juliana* because the remedy sought by the Federation is compensatory damages for lost wages during closed fishing seasons, which were attributed to domoic acid releasing algae blooms.[95] Unlike *Juliana*, compensatory damages are within the purview of the court to administer; therefore, it is unlikely that redressability will hamper the Federation as it did the plaintiffs in *Juliana*.[96]

Finally, it is worth noting that in *Comer*, a procedural labyrinth unfolded when a judge who owned shares of stock in one of the defendant oil companies decided to recuse himself after the conclusion of *en banc* review.[97] Since the Federation's case considers several companies in which a judge could unknowingly possess individual shares of stock, the Federation's case could encounter a similar issue. However, careful screening for any conflicts could prevent such an outcome. Therefore, careful screening measures must be followed in state common law actions against numerous oil companies, otherwise an outcome similar to the "back and forth" rulings on standing in *Comer* could repeat.

D. How Will the Political Question Doctrine Bear on the Federation's Action?

The political question doctrine considers whether an issue is within the court's purview to decide or if such questions fall under the domain of the Executive or Legislative branches.[98] Courts use the six-factor test from

92. THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, https://pcffa.org/about-pcffa/ [https://perma.cc/DN4Y-3DC3] (last visited Nov. 9, 2022).
93. Juliana v. U.S., 947 F.3d 1159, 1170 (9th Cir. 2020).
94. *Id*. at 1171.
95. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp. et al., No. CGC-18-571285, (ND Cal. Nov. 14, 2018) (Sabin Center).
96. *See Juliana*, 947 F.3d 1159.
97. Comer v. Murphy Oil USA, 585 F.3d 855 (2009).
98. *See* Gaynor et al., *supra* note 70, at 10847.

Baker v. Carr[99] to analyze whether an issue is a political question. The test considers:

1. whether there is textually demonstrable constitutional commitment to another branch of government;
2. the lack of judicially discoverable or manageable standards;
3. the impossibility of resolving the case without making an initial policy determination;
4. the impossibility of deciding a case without displaying a lack of respect to a coordinate branch of government;
5. an unusual need for unquestioning adherence to a prior political decision; and
6. the potential for embarrassment from different departments of government reaching different conclusions on the same question.[100]

While courts have found some of the common law actions concerning climate change to be political questions and other courts have not, it is unlikely that the Federation's case presents a non-justiciable political question.

The first factor of the *Baker* test considers whether the "political question" at hand was assigned to a specific branch of government under the Constitution.[101] While some statutes may charge another branch with regulating CO_2 emissions, it is well settled the Constitution does not. Additionally, the Federation's claims regard nuisance issues, and the Constitution does not charge a specific branch with regulating nuisances.[102]

While courts have easily rejected arguments that the first prong of *Baker* shows common law actions over climate change are non-justiciable political questions,[103] courts have welcomed arguments that the second prong of *Baker* leads to a finding of non-justiciability.[104] However, in *American Electric. Power Co*., the court found:

99. Baker v. Carr, 369 U.S. 186 (1962).
100. *Id*.
101. *Id*.
102. *Id*. at 10848–49.
103. *See id*. at 10847–48.
104. *See id*. at 10848.

> That the district court may be called upon to decide causation issues and apply a remedy does not remove the case from the ambit of nuisance actions. Federal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute.[105]

This holding established that while these highly nuanced and scientific considerations of climate change may be difficult to establish, they do not have a license to run afoul of the second *Baker* prong. However, this analysis led to federal preemption considerations by discussing emissions, which many thought were precluded from state actions by federal statutory law.[106] Thus, the analysis implicated concerns that the third through sixth prongs of *Baker* would apply because there would be federal common law in the context of emissions.

The strongest support for such a notion comes from *California v. GMC*,[107] because it was the first common law action regarding climate change after the Supreme Court decided Massachusetts had standing in *Massachusetts v. EPA*.[108] In *California*, the court held that standing in *Massachusetts* was a product of Massachusetts' rights as a state to challenge federal policy.[109] The court concluded that *California* presented a non-justiciable political question because federal law already existed in the context of emissions.[110]

However, standing in the Federation's case can be achieved in different ways than those from *California* because the Federation's suit was not filed under federal common law.[111] In *California*, the court explained their reasoning for finding the action was a political question:

> The third Baker indicator asks whether the Court can decide the case without [making] an initial policy determination of a kind clearly for nonjudicial discretion." Baker, 369 U.S. at 217. This factor largely controls the analysis in the current case due to the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiffs federal common law nuisance claim.[112]

Moreover, following *American Electric Power Co.*, the Clean Air Act likely allows for state common law actions.[113] Thus, the Federation is not bumping into federal policy determinations. Any areas of law that would

---

105. Conn. v. Am. Elec. Power Co., 582 F.3d. 309, 329 (2011).
106. *See*, e.g., Cal. v. GMC, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007) [hereinafter *California*].
107. *See generally id*.
108. *See generally* Mass. v. EPA, 549 U.S. 497 (2007).
109. Cal. v. GMC, 2007 U.S. Dist. LEXIS 68547, at *35 (N.D. Cal. Sept. 17, 2007).
110. *Id*. at *30–36.
111. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp. et al., No. CGC-18-571285, (ND Cal. Nov. 14, 2018) (Sabin Center).
112. Cal. v. GMC, 2007 U.S. Dist. LEXIS 68547, at *18 (N.D. Cal. Sept. 17, 2007).
113. *See* Conn. v. Am. Elec. Power Co., 582 F.3d. 309, 352 (2011).

require a policy determination, or factors 4, 5 and 6 of the *Baker* tests because these involve state courts handling state common law actions.[114] Therefore, it is unlikely the Federation's case will be considered a nonjusticiable political question.

III. HOW IS THE FEDERATION'S CASE SIMILAR OR DIFFERENT FROM THE CITIES' CASES?

It is likely that public entities (like the Cities) and private entities (like the Federation) have a similar path to achieving a favorable resolution. However, public entities may have an easier in-road to standing if they have supremacy over municipal affairs, such as charter cities.[115] Furthermore, the Federation's case presents causation issues that the Cities' cases do not.

The Cities may be able to achieve standing similar to the way Massachusetts did in *Massachusetts v. EPA.*[116] In *Massachusetts*, the Court held that the states achieved standing through "special solicitude," because they had relinquished their power as sovereigns to join the union.[117] The Cities may have a similar argument, but not all public entities are created equal–especially not all cities. The Cities in California suing under state common law would theoretically have an easier path to standing than the Federation, but only if they are considered charter cities. In California, "[a] General Law City has the authority to act locally, but its acts must be consistent with the California Constitution, state statutes, and state administrative regulations. A Charter City adopts a Charter, which is a document that outlines how a city is governed."[118]

Under the California Constitution, city charters are enforceable state law and grant the cities supremacy over municipal affairs, "subject only

114. *See* Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims,* 42 COLUM. J. L. & SOC. PROBS. 545, 585 (2009) ("State courts do not use the political question doctrine to keep other social problems, such as welfare and health care, beyond their grasp").

115. CAL. CONST. art. XI, § 5(a); THE CITY OF EL CERRITO, WHAT IS A CHARTER CITY?, https://www.el-cerrito.org/1273/Charter- [https://perma.cc/UZ8V-PB9P].

116. *See generally* Mass. v. EPA, 549 U.S. 497 (2007) [hereinafter *Massachusetts*].

117. *See id*. at 539 (Roberts, J., dissenting).

118. THE CITY OF EL CERRITO, WHAT IS A CHARTER CITY?, https://www.el-cerrito.org/1273/Charter- [https://perma.cc/UZ8V-PB9P].

to restrictions and limitations provided in their several charters."[119] Therefore, similar to *Massachusetts*, charter cities may be able to argue that they warrant "special solicitude" standing over the issues as "municipal affairs" pertinent to the Cities' landowning interests.[120] Thus, in California, charter cities may have more liberty to challenge the laws of the state or federal government[121] and achieve standing because they are more like the formerly sovereign states than private parties or general law cities.

Further, the Cities will likely have an easier time showing causation than the Federation because the Cities' causal chain from emissions to injury is shorter. The injury in the Cities' case is sea level rise.[122] Warmer temperatures lead to sea level rise through two main mechanisms:[123] "thermal expansion caused by warming of the ocean, since water expands as it warms, and increased melting of land-based ice such as glaciers and ice sheets."[124] Thus, the Cities need to demonstrate a short and easy-to-understand causal chain from (1) emissions to (2) sea temperature rise to (3) sea level rise, and finally to (4) the resulting economic costs of sea level rise.

Conversely, the Federation's route to causation is less direct, since its injury is the economic impact of fishing season closures. The Federation must show that sea temperature rise caused algae blooms, which led to the release of domoic acid, which then caused fishing season closures.[125] Thus, the Federation must show causation along a longer causal chain from sea temperature rise to their injury than the Cities. Therefore, it will be more difficult for the Federation to show causation than the Cities because emissions are more attenuated as the proximate cause of the Federation's injuries than the Cities' injuries.

In sum, state common law actions over climate change are very similar, regardless of whether brought by public or private entities. However,

---

119. CAL. CONST. art. XI, § 5(a).

120. *See generally* Mass. v. EPA, 549 U.S. 497 (2007).

121. Eve Batey, *Federal judge dismisses restaurant lobby lawsuit against Berkeley's natural gas ban*, NOSH (July 27, 2021, 9:20 AM), https://www.berkeleyside.org/2021/07/07/berkeley-gas-ban-lawsuit-cra [https://perma.cc/Y46D-E97J].

122. *See generally* Cnty. of San Mateo v. Chevron Corp., No. 18-15499 (9th Cir. Mar. 27, 2018).

123. Nat'l Ocean Services, *What is eutrophication?*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COM. (Oct. 5, 2017), https://oceanservice.noaa.gov/facts/eutrophication.html [https://perma.cc/RX3J-HMJS].

124. *Id.*

125. *See e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) ("The right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized on numerous occasions."); *see also* Pruitt v. Allied Chemical Corp., 523 F. Supp. 975, 979–80 (E.D. Va. 1981) (while not directly applicable precedent, this case relies on *Union Oil* to establish that indirect harms to navigable waters that cause fishermen to lose wages are not too indirect to be recoverable).

private entities may have weaker arguments for standing. Finally, state common law actions over sea level rise may be significantly more provable than individual industry-specific harms, like that of the Federation's case.

IV. THE FEDERATION'S SUBSTANTIVE CASE

If the Federation can jump through the necessary procedural hoops to present its substantive case, then it will argue five separate causes of action: nuisance, failure to warn (both on negligence and strict liability theories of liability), strict liability for design defect, and negligence.[126] This section evaluates those causes of action against the oil companies' likely defenses.

A. The Federation's Nuisance Claim

The first claim that the Federation asserts is a public nuisance claim.[127] The Federation's claimed factual background is as follows:

> Defendants, and each of them, by their acts and omissions, created a condition and permitted that condition to persist, which constitutes a nuisance in the form of increased mean sea surface temperature and intense marine heatwaves, which caused recurring *Pseudo-nitzschia* algal blooms unprecedented in their range and toxicity, which caused and will continue to cause domoic acid to contaminate Dungeness crabs at potentially dangerous concentrations, all of which resulted in past injuries and will cause future injuries to Plaintiff. The condition created by Defendants substantially and negatively affects the interests of the public at large. In particular, increased mean sea surface temperature, marine heatwaves, harmful algal blooms, and domoic acid contamination: (1) are harmful and dangerous to human health; (2) are indecent and offensive to the senses of the ordinary person; and (3) obstruct and threaten to obstruct the free use of natural resources held in the public trust, so as to interfere with the comfortable enjoyment of life and property.[128]

The Federation is not the only party to observe these harms, nor the first to attribute them to oil companies. Richard Heede, a climate scientist and co-founder of the Climate Accountability Institute, studies the world's

126. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

127. Judicial Council of California Civil Jury Instructions, 1 CACI 2020 (2021) ("While a private nuisance is designed to vindicate individual land ownership interests, a public nuisance is not dependent on an interference with any particular rights of land.").

128. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477, at *77 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

largest emitters.[129] His findings reveal that, "[b]etween 1751 and 2010, Chevron, USA alone accounted for 3.52% of global CO[2] and CH[4] emissions, the highest of any investor- or state-owned entity."[130] Additional studies indicate that many oil companies are aware that these emissions have caused the sea to warm beyond safe levels.[131]

Despite the findings of these climate studies, the Federation will have to prove that these emissions caused a nuisance,[132] and that the nuisance was unreasonable.[133] California law defines a nuisance as:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.[134]

Following California law[135] and the study from Richard Heede,[136] the Federation may have a reasonably clear path to establishing a nuisance occurred, and it was caused by oil companies. The Federation can show that Chevron and similar companies played a significant role in warming the oceans through greenhouse gas emissions,[137] which caused the release of domoic acid.[138] Domoic acid is likely a nuisance under California law because it disrupts "use, in the customary manner"[139] (i.e. shell-fishing) of navigable waters.

On the other hand, defendant oil companies will likely assert that a nuisance claim also requires the defendant's conduct to be unreasonable, insofar that "it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it."[140]

---

129. Reeva Dua, Comment, *Driving on Empty: The Fate of Fossil Fuel Companies in Climate Nuisance Litigation*, 4 HUMAN RIGHTS L. REV. ONLINE 1, 5–6 (2019), https://hrlr.law.columbia.edu/files/2019/11/Reeva-Dua-Driving-on-Empty.pdf [https://perma.cc/4JMD-QCPV].

130. *Id*.

131. *See generally* KATHY MULVEY & SETH SHULMAN, THE CLIMATE DECEPTION DOSSIERS: INTERNAL FOSSIL FUEL INDUSTRY MEMOS REVEAL DECADES OF CORPORATE DISINFORMATION (Union of Concerned Scientists 2015), https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf [https://perma.cc/9X4S-UACQ].

132. *See* Gaynor et al., *supra* note 70, at 10854.

133. *Id*.

134. CAL. CIV. CODE § 3479.

135. *Id*.

136. Heede, *supra* note 89, at 229, 237.

137. Dua, *supra* note 129.

138. Bland, *supra* note 1.

139. CAL. CIV. CODE § 3479.

140. Gaynor et al., *supra* note 70, at 10854.

Whether the oil companies were so unreasonable is a question that will likely be left for a jury.[141] The form jury instructions will likely reflect similar considerations to those that the jury will make based upon the parties' requests in The Federation's case. First, the jury will be asked whether a nuisance occurred, then whether:

1. That [name of defendant], by acting or failing to act, created a condition or permitted a condition to exist that [insert one or more of the following:]
   [was harmful to health;] [or]
   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]
2. the condition affected a substantial number of people at the same time;
3. an ordinary person would be reasonably annoyed or disturbed by the condition;
4. the seriousness of the harm outweighs the social utility of [name of defendant]'s conduct;
5. [name of plaintiff] did not consent to [name of defendant]'s conduct;]
6. [name of plaintiff] suffered harm that was different from the type of harm suffered by the general public; and
7. [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.[142]

While juries are unpredictable, it is possible these elements would weigh in favor of finding a nuisance occurred. First, a nuisance occurred because the oil companies obstructed use of a navigable water in its customary way (i.e., crabbing), and the condition they created (i.e., warm seas) are harmful to health when domoic acid events occur. Second, it will affect a substantial amount of people because it will affect an entire industry. Third, it will affect ordinary people through scarcity and possible elimination of certain seafoods.[143] Fourth, the harm to fishermen will outweigh the social utility of oil when the social utility of oil is viewed in light of clean

141. *Id*.
142. Judicial Council of California Civil Jury Instructions, 1 CACI 2020 (2021) (irrelevant elements omitted).
143. Bland, *supra* note 1.

technology advancements. Fifth, the Federation did not consent to oil companies polluting and concealing the facts surrounding the impact their pollution was having on the water. Sixth, the Federation, through its members, suffered from lost wages that the public did not. Seventh, the oil companies are undoubtedly a substantial factor in the warming of oceans.[144] Therefore, there is a plausible path to victory for the Federation.

The Federation will likely have difficulty proving that the harm to the fishermen outweighs the social utility of oil. While a jury could reasonably side with the Federation, arguments that oil has advanced society could sway a jury to side with the oil companies instead. Here, the oil companies will likely argue that oil has advanced the productivity of every American through several generations, via the numerous improvements in transportation, industry, and infrastructure. Moreover, the oil companies will argue that fishing closures have affected only a small percentage of Americans. Thus, oil companies could state the social utility of oil vastly outweighs the social utility of the entire fishing industry, because oil has aided nearly every American in nearly all aspects of society.

To combat this plausibility, the Federation will argue "the social benefit of placing fossil fuels into the stream of commerce, if any, is outweighed by the availability of other sources of energy that could have been placed into the stream of commerce that would not have caused" a nuisance.[145] Thus, the Federation may be able to defeat the oil companies' social utility argument. Nonetheless, even if the Federation were to argue that alternative fuel sources would not have caused a nuisance, they would have to prove that these fuel sources were viable replacements for oil, which, in many cases, has still not occurred.[146]

While the Federation has a viable nuisance claim that may prevail, a jury could seize on the social utility of oil and defeat the claim entirely. Both outcomes are plausible, but it is more likely that the Federation will prevail, due to the oil companies' failure to disclose the harms of oil,[147] and, as a result, prevented better alternatives that would not have caused a nuisance from being discovered. Thus, the Federation may ultimately defeat the oil companies' social utility defense.

---

144. Dua, *supra* note 129; Heede, *supra* note 89, at 237 (describing 3.52% of emissions as "substantial").

145. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477, at *78 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

146. Samantha Gross, *Why are fossil fuels so hard to quit?*, BROOKINGS (June 2020), https://www.brookings.edu/essay/why-are-fossil-fuels-so-hard-to-quit/ [https://perma.cc/2V3G-QK4C?view-mode=server-side].

147. *See generally* MULVEY ET AL., *supra* note 131.

B. The Federation's Claim for Failure to Warn

The Federation asserts both a strict liability and negligent failure to warn claim.[148] While these are two separate claims, they are substantively similar. Failure to warn shifts from a negligence liability standard to a strict liability standard only when the defendant is aware of the harms their products could cause, and the defendant does not provide the public with adequate warnings.[149] In 2015, the Union of Concerned Scientists, a group of policy experts, compiled a report of oil companies' internal studies that demonstrated oil companies possessed knowledge of the harms climate change would bring, and made efforts to conceal those harms from the public to avoid regulations.[150] Here, the Federation likely has a successful claim against the oil companies for negligent failure to warn and for strict liability failure to warn, because the companies knew of the harms, yet made efforts to obfuscate them.[151]

On the other hand, several obstacles impede a successful failure to warn claim. While the oil companies' knowledge is sure to increase the odds that they will be found liable, the question of liability will largely depend on the jury. Their decision will likely hinge on the following factors:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. That the [product] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale];
3. That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [product] is used or misused in an intended or reasonably foreseeable way;
4. That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];
5. That [name of defendant] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];

148. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

149. Judicial Council of California Civil Jury Instructions at 738 (2021), CACI No. 1205; Judicial Council of California Civil Jury Instructions at 761 (2021), CACI No. 1222.

150. *See generally* MULVEY ET AL., *supra* note 131.

151. *Id*.

6. That [name of plaintiff] was harmed; and
7. That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [name of plaintiff]'s harm.[152]

On its face, the Federation's claim would likely meet all of the elements for failure to warn. First, the oil companies intimately knew the side effects of oil emissions on the environment.[153] Second, these side effects make shellfish poisonous to humans, which was foreseeable and is a result of the normal use of the product (oil).[154] Third, ordinary consumers would not have recognized this risk because the oil companies hid the science.[155] Fourth, the oil companies failed to warn when they downplayed their product's effect on the environment and hid their knowledge of its contribution to climate change.[156] Finally, this failure to warn harmed the Federation because it closed their fishing seasons for a significant period.[157] Therefore, the Federation could likely assert a successful failure to warn claim with strict liability.

On the other hand, for the jury to find all seven of these elements, jurors would have to understand and believe that the companies were in some way responsible for climate change. Given the oil companies' lengthy, egregious, and highly effective misinformation campaigns,[158] such a finding may not be likely. Moreover, juries are generally unpredictable and may see these facts in numerous different ways that would not fit an attorney's view of the law. Finally, the Federation will have the duty to show that the oil companies' failure to warn about emissions was a substantial factor in the Federation's injuries. The Federation can show the oil companies' products caused the harm its members suffered, and the oil companies failed to warn the public about that harm. But, the Federation may not be able to show that the *failure to warn* was a substantial factor in its members' injuries. Oil companies will likely argue the public already knew of the harms of oil; thus, a warning would have been redundant or ineffectual. Therefore, their failure to warn was not a substantial factor in the Federation's injuries since the public already knew about the harms of oil.

Such a defense will imply that the oil companies themselves also knew of these harms, yet failed to warn the public. Thus, oil companies may not be able to support this defense. Therefore, it is likely the Federation will

152. Judicial Council of California Civil Jury Instructions at 53 (2021), CACI No. 1222.
153. *See generally* MULVEY ET AL., *supra* note 131.
154. Bland, *supra* note 1.
155. *See generally* MULVEY ET AL, *supra* note 131.
156. *See id*.
157. Bland, *supra* note 1.
158. *See generally* MULVEY ET AL., *supra* note 131.

be successful in their failure to warn claim because the oil companies will struggle to defend this claim without showing they knew of the harms that emissions were causing and did not warn the public.

C. The Federation's Strict Liability for Design Defect Cause of Action

The fourth claim in the Federation's complaint is strict liability for design defect[159] Here, the Federation's complaint takes a unique direction. Nuisance and failure to warn are common claims pursued in climate change litigation, with nuisance claims representing the lion's share of state common law causes of actions regarding climate change.[160] In addition, the state of Minnesota,[161] the Federation, and the Cities are suing oil companies for climate related harms under theories of products liability.[162]

While these so called "second wave" cases have not yet been heard on their merits, the question of whether they will advance a successful products liability claim will be a matter for a jury to decide. If this is the case, the jury is required to follow instructions similar to or identical to the form jury instruction.[163] The form jury instructions for strict liability for design defect are as follows:

1. That [name of defendant] [manufactured/distributed/sold] the[product];
2. That the [product] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;
3. That [name of plaintiff] was harmed; and
4. That the [product]'s failure to perform safely was a substantial factor in causing [name of plaintiff]'s harm.[164]

159. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

160. Sokol, *supra* note 78, at 1416–17.

161. Complaint, State of Minn. v. American Petroleum Inst., No. 62-CV-20-3837, at *79 (D. Minn. June 24, 2020) (pending in the procedural stages like the Federation and the Cities).

162. *Id*.; Cnty. of San Mateo v. Chevron Corp., No. 18-15499 (9th Cir. Mar. 27, 2018); Sokol, *supra* note 78, at 1416–17.

163. Judicial Council of California Civil Jury Instructions at 727 (2021), CACI No. 1203.

164. *Id*.

The second prong of these instructions allows for a jury to find the defendants liable under both theories of products liability. First, they could be liable under the "consumer expectation" test; and second, they could be liable under the "risk-benefit" test.[165] The instructions direct that the theories are not mutually exclusive. Thus, defendants could be found liable for meeting the elements of either test.[166]

Under the "consumer expectation" test, the plaintiff must show that the defendant distributed the product, and the product did not perform to the level of safety that an ordinary consumer would expect.[167] Even a reasonably foreseeable misuse of a product would satisfy this test.[168] Alternatively, the "risk-benefit" test is a balancing test that weighs the risks of a product against the benefits the product brings to its user, and, in turn, to society at large.[169] The Federation will likely meet at least one of these tests. The consumer expectation test is arguably met because an ordinary consumer would not expect that using gasoline in the way it is intended would put an end to Dungeness crab fishing seasons in the Pacific Northwest. Under the risk-benefit test, a reasonable juror should find that this risk, which affects thousands of livelihoods, outweighs the benefits of the oil companies' crude oil energy products. Therefore, the Federation might succeed with this claim.

The oil companies may defeat the "consumer expectation" test by arguing that climate change is widely studied, so an ordinary consumer should expect burning fossil fuels would cause sea temperatures to increase. Under the "risk-benefit" test, the social utility of oil becomes an issue. A jury could reasonably find that the social utility of oil use outweighs its risks because of oil's contributions to technological and industrial advancements. The oil companies will likely argue that fossil fuels contributed to societal progress, including airplanes, cars, highways, the fishing industry itself, and more. These contributions outweigh the risks oil poses to the fishing industry, defeating the risk-benefit test. Therefore, it is plausible that a jury will find the Federation does not meet either test.

Furthermore, the "substantial factor element" could prove troublesome for the Federation. In *American Electric Power Co.*, the Second Circuit held that the "fairly traceable" requirement from *Kivalina* to achieve standing could be met by showing a 2.5% contribution to total emissions.[170] Here,

---

165. *Id*.
166. *Id*.
167. *Id*.
168. *See id*.
169. *See id*.
170. Gaynor et al., *supra* note 70, at 10848 (citing Conn. v. Am. Elec. Power Co, 582 F.3d. 309, 347 (2011)).

the question becomes whether that contribution will, in the eyes of a juror, be a "substantial factor." In this case, such a finding could be a battle between the Federation's attorneys and the oil companies' misinformation campaigns against the reality of climate change.[171] For example, while the evidence to support the Federation's claim exists, the average juror is susceptible to widespread misinformation from "advertorials" (advertisements designed to look like editorials) spread through national newspapers by oil companies and, as a result, might decide against the Federation's claim.[172]

Here, the claim is design defect. So, the jury will likely be informed of the oil companies' misinformation campaigns when the Federation attempts to show the companies should have foreseen the risks. The oil companies' defense on what a consumer should expect, when considering the oil companies' misinformation campaigns, will show that the oil companies understood the harms of climate change and failed to warn the public. Thus, the Federation will likely prevail on their failure to warn claim.

D. The Federation's Negligence Cause of Action

The final cause of action in the Federation's complaint is negligence. In a negligence cause of action, presence of duty, breach, causation, and harm determines liability.[173]

First, with respect to duty, it has not been established what an oil company's duty would be to prevent climate change.[174] Here, a court will likely find that the oil companies had a duty of care if the harms they cause were foreseeable because allowing a foreseeable harm to occur is the definition of negligence. The form jury instructions show the elements of negligence and address all of the elements except duty, as it is addressed in statute.[175] The form jury instructions for negligence in California are:

1. That [name of defendant] was negligent;
2. That [name of plaintiff] was harmed; and

171. *See generally* MULVEY ET AL., *supra* note 131.
172. *Id*. at 19.
173. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp. et al., No. CGC-18-571285, (N.D. Cal. Nov. 14, 2018) (Sabin Center).
174. Michael Burger & Albert Lin, Comment, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 49, 56 (2018).
175. Council of California Civil Jury Instructions at 230 (2021), CACI No. 400.

3. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm.[176]

In California, duty of care has been codified into the state's civil code.[177]

> [E]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.[178]

Here, "want of ordinary care or skill" pertains to the duty to prevent foreseeable harms.[179] Following *White v. Southern Cal. Edison Co.*:

> Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all of the circumstances, against the burden to be imposed. [citation]. In determining the existence of duty, ". . . the major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[180]

Because this is a state tort law claim in California, the relevant law is that each person or business has a general duty of care to prevent foreseeable harms. Thus, in the case at bar, analysis need only consider whether the oil companies breached their duty.[181]

In the Federation's case, it is plausible that a juror would find the oil companies negligent. The oil companies knew of ways to minimize or prevent these climate-related harms,[182] and not doing so violated their duty of care. However, the standard of ordinary care could be seen differently by a juror because the oil companies' business is to sell oil. So, the question would become: how much responsibility should one bear for the harms their products cause by their intended use? As a result, the duty element could be detrimental to the Federation's negligence claim.

Further, the Federation faces trouble with its negligence claim regarding causation. While the Federation's complaint shows ample evidence that the named oil companies played a significant role in the fishing season

---

176. *Id*.
177. CAL. CIVIL CODE § 1714.
178. *Id*.
179. White v. Southern Cal. Edison Co., 25 Cal. App. 4th 442, 447 (1994).
180. *Id*.
181. *See* § 1714.
182. MULVEY ET AL., *supra* note 131.

closures,[183] a juror would have to believe in the causal evidence of climate change to follow that evidence.

Finally, the oil companies will likely argue that they could not have foreseen the harms to the crab fishermen since those harms were so attenuated from the sale of oil. For the same reasons, the oil companies will likely argue that causation is more challenging than the other elements of negligence to prove for the Federation. While the oil companies may have foreseen rising sea temperatures, that does not mean they should have anticipated the resulting harm caused to the crab fishing industry. If the oil companies can show that some harms were unforeseeable, and their duty of care did not extend to the fishing industry, they will likely quash the Federation's negligence claim.[184] Therefore, the Federation's most problematic claim is its general negligence claim.

V. CONCLUSION

Ultimately, it is possible that the Federation will succeed if it is able to reach the trial stage. However, many obstacles currently stand in its way, ranging from achieving standing to proving its substantive causes of action. Much of the Federation's case bears on receiving a sympathetic jury and a sympathetic judge. The jury could believe that climate change is a hoax, partly due to the oil companies' misinformation campaigns. Thus, the Federation could be defeated by one of the very harms it alleges it is injured by. Nonetheless, the Federation is pursuing legitimate claims with viable causes of action, so it is plausible that the Federation will prevail.

Still, it is likely that the outcome of the Cities' cases will conclude before the Federation's case is tried. Thus, the Federation may be forced to remain in the shadow of the Cities' cases, even regarding substantive issues. Further, the Cities' case is easier to prove than the Federation's, so if they do not prevail it is unlikely the Federation will, either.

However, if the Cities and the Federation prevail, the floodgates could potentially open for litigation over climate change via state common law

183. Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns. Inc. v. Chevron Corp., No. 3:18-cv-07477, at *77 (N.D. Cal. Nov. 14, 2018) (Sabin Center).

184. Notably, this argument may be defeated by considering that oil companies understood their role in climate change was so great, they would have necessarily foreseen the harms they would cause to the fishing industry. *See generally* MULVEY ET AL., *supra* note 131.

actions. Beyond individual cities suing for climate change, more trade associations like the Federation could pursue claims against oil companies. Furthermore, other fishing industries may have causes of action if the Federation prevails.

In sum, as part of the "second-wave" of cases that pursue common law actions over climate change, the Federation's case has the potential to be incredibly influential and lead to future decisions holding oil companies accountable for climate change. However, if it loses, the Federation's case could be another example of how difficult it is to sue oil companies over climate-related harms. Ultimately, much of this rests on the Cities' cases and the procedural and substantive roadblocks that they will encounter before the Federation goes forth with their action.