

# AN ARGUMENT FOR MULTI-DISTRICT CLIMATE LITIGATION

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## I. INTRODUCTION

Climate change is no longer an abstract problem for future generations. It is an immediate threat to human life and health, the tangible effects of which can be seen and felt around the world. The news is teeming with examples of climate disasters. In March 2022, an Antarctic ice shelf the size of Rome collapsed due to abnormally high temperatures.<sup>1</sup> In 2021, there were four major disasters that cost over \$20 billion each.<sup>2</sup> The average temperatures from 2010 to 2019 were the highest on record,<sup>3</sup> and July 2021, was the hottest month in recorded history.<sup>4</sup> Nearly one third of the world's population is exposed to deadly heat waves for more than twenty days out of the year.<sup>5</sup> These are just a few examples of how climate change is already having a disastrous impact on the world. In its 2021 report, the United Nations' Intergovernmental Panel on Climate Change warned that many of the changes to our climate caused by carbon emissions will be irreversible for hundreds or thousands of years to come.<sup>6</sup> The World Health Organization has dubbed climate change as the biggest threat to humanity, and climate change is projected to lead to an additional 250,000 deaths per year between 2030 and 2050.<sup>7</sup> Climate litigation is one strategy being used to address the impacts of climate change.

While climate litigation has seen some success in other countries, climate

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1. Donna Lu, *Satellite Data Shows Entire Conger Ice Shelf Has Collapsed in Antarctica*, GUARDIAN (Mar. 24, 2022), <https://www.theguardian.com/world/2022/mar/25/satellite-data-shows-entire-conger-ice-shelf-has-collapsed-in-antarctica> [https://perma.cc/9BZC-DQ8X].

2. *Id.*

3. *Facts about the Climate Emergency*, UN ENV'T PROGRAMME, <https://www.unep.org/news-and-stories/speech/one-people-one-planet-peace> [https://perma.cc/3SFP-87D4] (last visited Mar. 21, 2022).

4. Jeff Masters, *The Top 10 Global Weather and Climate Change Events of 2021*, YALE CLIMATE CONNECTIONS (Jan. 11, 2022), <https://yaleclimateconnections.org/2022/01/the-top-10-global-weather-and-climate-change-events-of-2021/> [https://perma.cc/SU96-YXNC].

5. *Id.*

6. Richard P. Allan et al., *Climate Change 2021: The Physical Science Basis*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 17 (2021), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_Full\\_Report.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf).

7. *Climate Change and Health*, WORLD HEALTH ORG. (Oct. 30, 2021), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> [https://perma.cc/UW6Q-TVJP].

cases have struggled in the United States. U.S. climate litigation often faces procedural obstacles that have prevented climate cases from being resolved on the merits.<sup>8</sup> A recent trend in climate litigation involves cities suing oil companies in state court, primarily using tort law.<sup>9</sup> Similar approaches led to success in the past with tobacco and opioid litigation, both of which resulted in large settlements. These city-led climate cases were having more success than previous climate litigation strategies in overcoming procedural hurdles. In four of these cases, the U.S. Courts of Appeals resolved jurisdictional issues in favor of keeping the cases in state court.<sup>10</sup> This momentum was short lived because in May 2021, the Supreme Court gave a procedural win to oil companies in *BP P.L.C. et al. v. Mayor and City Council of Baltimore* by leaving the door open for these city-led cases to be removed to federal court.<sup>11</sup>

Procedural issues have already taken up three years in the *Baltimore* case, and the Supreme Court's refusal to decide the case on the merits shows it could take years before any of these city-led climate cases are resolved on the merits.<sup>12</sup> While the future of climate litigation is unclear, there is hope that climate litigation can reach the same success as past social policy torts such as tobacco and opioid litigation. The success of climate litigation is vital because it would provide financial support to redress harms, raise awareness of the need for climate action, and mitigate or prevent future harm to the environment.

This Note will analyze the potential of these city-led climate cases, concluding that these cases have the best chance at making meaningful change through multi-district litigation in federal court. Section II provides relevant background on climate change's impact on public health and the federal response to climate change in the legislative, executive, and judicial branches. Section III explores the recent city-led climate cases and the utility of using a state court approach to climate litigation. Section IV compares climate, tobacco, firearm, and opioid litigation, and analyzes the strengths and weaknesses of climate litigation compared to these past social policy torts. Section V analyzes the benefits of consolidating the city-led climate cases through multi-district litigation in federal court. Section VI considers how on-going climate advocacy is necessary to ensure that money recovered from climate cases is allocated to climate-related purposes.

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8. See discussion *infra* Section III.

9. Norman W. Spindel et al., *Circuit Courts Give Climate Change Litigation New Life in State Court*, LOWENSTEIN SANDLER (Aug. 3, 2020), <https://www.lowenstein.com/news-insights/publications/client-alerts/circuit-courts-give-climate-change-litigation-new-life-in-state-court-environmental> [<https://perma.cc/S4VA-JNHY>].

10. *Id.*

11. Ellen M. Gilmer, *Supreme Court's Climate Case Focuses on Procedure, Not Policy*, B.L. (Oct. 5, 2020, 6:00 AM), <https://news.bloomberglaw.com/environment-and-energy/supreme-courts-climate-case-focuses-on-procedure-not-policy> [<https://perma.cc/BW5J-4YQ8>].

12. Emma F. Blake, *Kicking the Climate Can Down the Road: BP v. Baltimore and Chevron v. Oakland*, HAUSFELD (July 20, 2021), [https://www.hausfeld.com/en-us/what-we-think/perspectives-blogs/kicking-the-climate-can-down-the-road-bp-v-baltimore-and-chevron-v-oakland/#\\_cdn5](https://www.hausfeld.com/en-us/what-we-think/perspectives-blogs/kicking-the-climate-can-down-the-road-bp-v-baltimore-and-chevron-v-oakland/#_cdn5) [<https://perma.cc/38VL-9QMK>].

## II. BACKGROUND

To understand the future of climate change litigation, it is important to understand why climate litigation is necessary in the first place. To do so, this Section explores the impacts climate change has on public health, and the lack of a comprehensive federal approach to climate change policy in the United States.

*A. Climate Change's Impact on Public Health*

Climate change and public health are inextricably linked. Climate change impacts “many of the social and environmental determinants of health – clean air, safe drinking water, sufficient food and secure shelter.”<sup>13</sup> Climate change worsens the existing disease burden and further impedes healthcare access, which makes it harder to implement universal health coverage.<sup>14</sup> It also exacerbates existing inequalities in healthcare.<sup>15</sup> Even though climate change has global consequences, it impacts communities differently.<sup>16</sup> For example, a report by the Environmental Protection Agency found that in the United States, climate change disproportionately affects underserved communities, and “racial and ethnic minority communities are particularly vulnerable to the greatest impacts of climate change.”<sup>17</sup>

The Intergovernmental Panel on Climate Change (“IPCC”) is the United Nation’s body dedicated to climate change research.<sup>18</sup> The IPCC was created in 1988, to provide governments “with scientific information that they can use to develop climate policies.”<sup>19</sup> The 2021 report from the IPCC explains that human influence has caused the atmosphere, land, and air to warm, and it explains that without serious intervention the earth will warm by at least 1.5°C or 2°C before 2100.<sup>20</sup> Climate-related risks to health, livelihoods, food security, and water supply are projected to increase with global warming of 1.5°C and increase further with warming of 2°C.<sup>21</sup> Climate change affects the transmission of disease, increases the frequency of extreme weather events, and may cause food

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13. *Climate Change and Health*, *supra* note 7.

14. *Id.*

15. *Id.*

16. *CDC Policy*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/climateandhealth/policy.htm> [<https://perma.cc/PWE6-ZKVD>] (last updated Sept. 9, 2019).

17. Press Release, U.S. Env’t Prot. Agency, EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable> [<https://perma.cc/852C-48NQ>].

18. *About the IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/about/> [<https://perma.cc/5VRL-8NTY>] (last visited Oct. 15, 2021).

19. *Id.*

20. Allan et al., *supra* note 6, at 17.

21. *Id.*

shortages and malnutrition by disrupting patterns of food production.<sup>22</sup> Climate change already accounts for approximately 150,000 deaths annually.<sup>23</sup>

While people tend to view climate change as a national or international issue, there are tangible harms that can be seen in individual communities. An example of the local health impacts of climate change can be seen in Baltimore, Maryland. Baltimore is a coastal city with sixty miles of waterfront land, which makes it particularly vulnerable to climate change.<sup>24</sup> The sea level in Baltimore rose thirteen inches between 1902 and 2006, and it rose at a rate higher than the global average.<sup>25</sup> Average temperatures in Maryland have increased by 1.8°F, and intense precipitation events have increased by twenty percent in the last century.<sup>26</sup> These figures are projected to worsen over the course of the next century. Baltimore's average annual temperatures are projected to increase by 12°F before 2100.<sup>27</sup> Heavy storm events will become more frequent, and Baltimore's Sea levels are expected to rise another thirteen inches by 2050.<sup>28</sup>

These climate-change-related issues began to impact the health of Baltimore residents, according to a study of Maryland data from 2000-2012. During this time period, extreme heat events increased the risk of hospitalization for heart attack among Baltimore residents by forty-three percent.<sup>29</sup> Exposure to extreme heat and precipitation significantly increased the risk of Salmonella infections in Maryland, and the risk was even stronger in coastal communities such as Baltimore.<sup>30</sup> Exposure to extreme precipitation during the summer increased the risk of hospitalization for asthma by sixteen percent in Baltimore.<sup>31</sup> While these numbers are already alarming, it is projected that by 2040, increases in extreme weather will lead to another large increase of heart attack and asthma hospitalizations in Baltimore.<sup>32</sup> Climate change already has tangible effect on the health of Baltimore residents.

The public health impacts of climate change, both locally and globally, are only going to become more palpable in the future. Rather than trying to prevent

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22. *Climate Change*, WORLD HEALTH ORG., <https://www.who.int/heli/risks/climate/climate-change/en/> [<https://perma.cc/EF2W-54JN>] (last visited Oct. 15, 2021).

23. *Id.*

24. *Disaster Preparedness and Planning Project: A Combined All Hazards Mitigation and Climate Adaptation Plan*, BALT. OFF. SUSTAINABILITY 1, 26 (Oct. 2013), [https://www.baltimoresustainability.org/wp-content/uploads/2015/12/Chapter-1\\_Introduction.pdf](https://www.baltimoresustainability.org/wp-content/uploads/2015/12/Chapter-1_Introduction.pdf) [<https://perma.cc/46KY-MN5W>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Maryland Climate and Health Profile Report*, MD. DEP'T HEALTH & MENTAL HYGIENE 1, 19 (Apr. 2016), <https://mde.maryland.gov/programs/Marylander/Documents/MCCC/Publications/Reports/MarylandClimateandHealthProfileReport.pdf> [<https://perma.cc/Z483-HTA5>].

30. *Id.*

31. *Id.*

32. *Id.*

or slow climate change, some countries have found it easier to simply adapt.<sup>33</sup> Many countries have tried to limit damage from climate change by spending massive amounts of money on adaptation measures.<sup>34</sup> However, the reality is that climate change is beginning to outpace the human ability to adapt.<sup>35</sup> This makes it more imperative than ever that individual countries, and the world as a whole, take substantial action to prevent further harm. Without substantial action, the impact of climate change on human health will only worsen.

### *B. Climate Policy in the United States*

The United States is one of the top four countries responsible for global carbon emissions, and in 2019, the United States was responsible for fifteen percent of the world's total emissions.<sup>36</sup> Unfortunately, despite being one of the world's biggest carbon emitters, the United States has not managed to make any meaningful federal plans to address the problem. Congress has failed to enact any significant legislation to address climate change. Starting in 1997, the Senate unanimously adopted a resolution refusing to ratify the Kyoto Protocol, the first international treaty to cut greenhouse gases.<sup>37</sup> In 2009, a sweeping climate bill was introduced into the House that sought to lower carbon emissions using a cap-and-trade system, whereby the government would give polluting companies a limited number of allowances to emit greenhouse gases and slowly reduce the number of allowances given over time.<sup>38</sup> While the bill narrowly passed in the House, it did not reach a vote in the Senate.<sup>39</sup> This failure was followed by a decade of legislative inaction on climate change.<sup>40</sup>

The Executive Branch has tried to act, but changing administrations has led to revolving climate change regulation. Because the legislature has been unable to pass climate legislation, temporary executive orders and regulations have been the main mechanisms to bypass partisan gridlock.<sup>41</sup> But executive orders and

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33. Brad Plumer & Raymond Zhong, *Climate Change Is Harming the Planet Faster Than We Can Adapt*, *U.N. Warns*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/climate/climate-change-ipcc-report.html> [https://perma.cc/V4CA-ASN7].

34. *Id.*

35. *Id.*

36. Max Sarinsky, *U.S. Domestic Climate Policy – Looking Back*, 11 EUR. ASS'N ENV'T & RES. ECONOMISTS 1, 31 (2021), <https://www.eaere.org/wp-content/uploads/2021/03/EAERE-Magazine-N.11-Winter-2021.pdf> [https://perma.cc/SL3J-M4MZ].

37. Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NAT'L PUB. RADIO (Oct. 27, 2021, 10:35 AM), <https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why> [https://perma.cc/H7D5-324F].

38. *Id.*

39. *Id.*

40. Sarinsky, *supra* note 36, at 31.

41. Pierre & Neuman, *supra* note 37.

regulations have been swiftly overturned by subsequent administrations.<sup>42</sup> For example, President Trump rescinded countless regulations from the Obama administration that were aimed at cutting carbon emissions.<sup>43</sup> More recently, President Trump pulled the United States out of the Paris Climate Agreement, and President Biden immediately rejoined it when he came into office. The ebb and flow of executive climate regulation does not provide a stable foundation to prevent further climate disruption.

Changing leadership is not the only issue that prevents climate action. Even when legislative or executive action starts to gain traction, there is often political backlash from the public. While most scientists can agree that the earth has warmed since the Industrial Revolution, some scientists are skeptical that this warming is attributable to human influence.<sup>44</sup> Other scientists who do believe climate change is caused by humans still argue about which human activities are causing it.<sup>45</sup> While most scientists believe greenhouse gases are to blame, some scientists have blamed “black soot, land use changes, and more.” It can be difficult for the legislative and executive branch to provide solutions to climate change when the cause of the problem is still disputed.<sup>46</sup>

There is further political debate regarding the economic implications of climate change that can prevent action. Danish author Bjørn Lomborg argued that “efforts to reduce greenhouse gas emissions by eighty percent by 2050... would cost trillions of dollars and inflict more pain than climate change itself.”<sup>47</sup> It is unsurprising that many governments, not just the U.S. government, are reluctant to take action to remedy climate damage and prevent future climate harm when such action would be very costly.<sup>48</sup> These arguments about the underlying science behind climate change and the cost of acting only create more obstacles for the legislative and executive branch.

Because the United States lacks a comprehensive federal approach to climate change, states have had to fill in the gaps and create their own climate change policy. For example, twenty-five states have already committed to emission reduction goals in line with the standards set forth in the Paris Climate Agreement.<sup>49</sup> Additionally, fifteen states and territories have “taken legislative or executive action to move toward a 100 percent clean energy future.”<sup>50</sup>

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42. *Id.*

43. *Id.*

44. Charles W. Schmidt, *A Closer Look at Climate Change Skepticism*, 118 ENV'T HEALTH PERSP. A536, A538 (2010).

45. *Id.* at A538-A539.

46. *Id.* at A539.

47. *Id.*

48. *Id.*

49. Morgan Higman et al., *Clean Resilient States: The Role of U.S. States in Addressing Climate Action*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 9, 2021), <https://www.csis.org/analysis/clean-resilient-states-role-us-states-addressing-climate-action> [<https://perma.cc/Z8F9-9JDF>].

50. Sam Ricketts et al., *States Are Laying a Road Map for Climate Leadership*, CTR. FOR AM.

This state leadership on climate change is not a recent development. In 1983, Iowa was the first state to pass legislation encouraging and setting standards for the use of renewable energy, which prompted twenty-eight states and Washington, D.C., to enact similar policies.<sup>51</sup> California was the first state to adopt a comprehensive and economy-wide climate program in 2006.<sup>52</sup> In fact, there were twelve states that sued the federal government in the landmark *Massachusetts* case.<sup>53</sup> States have shown far more willingness to address climate issues. While state climate leadership is a crucial step, the severity of climate change requires a federal and global collaboration to truly make the necessary changes. The lack of a substantial federal climate initiative and the growing health impacts of climate change have led people to turn to the courts for reprieve.

### *C. History of Climate Litigation*

The United States Supreme Court first acknowledged climate change in *Massachusetts v. EPA*, admitting that “the harms associated with climate change are serious and well recognized.”<sup>54</sup> In *Massachusetts*, states, local governments, and private organizations filed suits against the EPA.<sup>55</sup> Prior to the lawsuit, the EPA had denied a rulemaking petition asking the agency to regulate vehicle emissions.<sup>56</sup> As a result, the petitioners alleged that the EPA “abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases.”<sup>57</sup> The Supreme Court reversed the EPA’s decision to decline rulemaking, determining that the EPA’s reasons for regulating vehicle emissions were arbitrary, and that its denial of the petition for rulemaking needed to be grounded in the Clean Air Act.<sup>58</sup> The Supreme Court’s decision did not require the EPA to regulate vehicle emissions, but the EPA did start regulating and studying vehicle emissions after the case.<sup>59</sup> *Massachusetts* “shows that the Court can encourage agencies to regulate under already enacted statutes but does not ensure the Court can provide its own relief to parties harmed by climate change.”<sup>60</sup>

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PROGRESS (Apr. 30, 2020), <https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/#content> [https://perma.cc/P4F9-5HSB].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Elizabeth W. De Leon, Note, *The Opioid Crisis or Climate Change: Which is More Likely to Succeed Under the Tobacco Litigation Model?*, 8 TEX. A&M L. REV. 27, 59-60 (2021).

60. *Id.*

Since *Massachusetts*, climate litigation in the United States has been far less successful. Many lawsuits seeking to hold government entities and corporations responsible for climate change have faced significant setbacks in federal courts due to issues with standing and preemption by the Clean Air Act. For example, in *American Electric Power Company v. Connecticut*, three states and New York City brought public nuisance claims against electric companies under federal common law alleging that “the defendants’ carbon-dioxide emissions created a ‘substantial and unreasonable interference with public rights.’”<sup>61</sup> The Supreme Court held that the Clean Air Act preempts any federal common law right to relief for carbon emissions.<sup>62</sup>

Similarly, in *Juliana v. United States*, twenty-one young citizens tried to seek relief from climate change against the United State Government.<sup>63</sup> The plaintiffs claimed the government “violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a ‘climate system capable of sustaining human life.’”<sup>64</sup> The plaintiffs sought remedies such as, a declaration that the government was violating the Constitution, and an injunction requiring the government to “cease permitting, authorizing, and subsidizing fossil fuel use... [and] to prepare a plan subject to judicial approval to draw down harmful emissions.”<sup>65</sup> The Ninth Circuit determined that the claims were nonjusticiable.<sup>66</sup> The Court indicated that the requested remedies were unlikely to mitigate the plaintiffs’ injuries because the bulk of emissions come from non-governmental sources.<sup>67</sup> The Court further determined that it is beyond the power of an Article III court “to order, design, supervise, or implement the plaintiffs’ requested remedial plan.”<sup>68</sup> Ultimately, the Ninth Circuit remanded the case to the District Court with instructions to dismiss, explaining that the Court is not the proper branch of government to enact climate policy.<sup>69</sup> These cases illustrate that federal courts in the United States are often reluctant to get involved in climate litigation.

While climate litigation has faced obstacles in the United States, there has been success in other countries. Globally, climate cases have almost doubled in the last three years with at least 1,550 cases filed in thirty-eight countries during 2020.<sup>70</sup> Climate cases against governments have had success in other countries. In 2018, the Supreme Court of Colombia ruled in *Future Generations v. Ministry*

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61. *Am. Elec. Power Co., et al. v. Connecticut*, 564 U.S. 410, 418 (2011).

62. *Id.*

63. *See Juliana et al. v. U.S.*, 947 F.3d 1159, 1164 (9th Cir. 2020).

64. *Id.*

65. *Id.* at 1170.

66. *Id.* at 1175.

67. *See id.* at 1170.

68. *Id.* at 1171.

69. *See id.* at 1169-75.

70. *Climate litigation spikes, giving courts an ‘essential role’ in addressing climate crisis*, UNITED NATIONS (Jan. 26, 2021), <https://news.un.org/en/story/2021/01/1083032> [<https://perma.cc/3Y3B-DTV3>].



*of the Environment and Others* that “the constitutional rights to life, health, minimum subsistence, freedom, and human dignity were substantially linked to the environment and the ecosystem and ordered the government to develop and implement a plan to halt deforestation in the country.”<sup>71</sup>

Similarly, in a landmark 2019 case against the government, *State of the Netherlands v. Urgenda Foundation*, the Supreme Court of the Netherlands determined the government was obligated “to take steps to reduce carbon emissions consistent with limiting warming to an average of 1.5°C.”<sup>72</sup> Finally, a Dutch court gave a huge win to climate activists in *Milieudefensie et al. v. Royal Dutch Shell* by ruling that oil giant Royal Dutch Shell “must reduce its greenhouse gas emissions to forty-five percent by 2030.”<sup>73</sup>

There are several factors that contribute to climate change litigation seeing less success in the United States than in other countries. One difference is that most countries in the world have guarantees to a clean environment within their constitutions, while the United States does not.<sup>74</sup> This can make it more difficult for U.S. climate litigants to bring successful constitutional claims because the right to a healthy environment is not explicitly guaranteed. Similarly, some countries with successful climate cases, like the Netherlands, expressly allow interest groups to bring class actions.<sup>75</sup> These kinds of laws can prevent the standing issues that U.S. climate litigants have faced in cases like *Juliana*. Additionally, countries that have a separation of powers doctrine like the U.S. have to overcome the additional hurdle of a judiciary that is unwilling to encroach on legislative or executive power.<sup>76</sup> These differences between U.S. climate litigation and climate litigation in other countries has forced U.S. climate litigants to get creative in their strategies.

### III. STATE TORT LAW AND CLIMATE CHANGE

In response to obstacles in federal court, climate litigants begun suing large oil companies in state court. This new wave of litigation involves oil companies being sued by cities, including Baltimore, that have experienced tangible harm caused by climate change. These cities are bringing their claims in state court using theories such as “nuisance, trespass, failure to warn, damage to property,

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71. *Global Climate Litigation Report: 2020 Status Review*, UNITED NATIONS ENV'T PROGRAMME 1, 15 (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y> [<https://perma.cc/49VD-X2GU>].

72. *Id.*

73. Jeff Brady, *In A Landmark Case, A Dutch Court Orders Shell to Cut its Carbon Emissions Faster*, NAT'L PUB. RADIO (May 26, 2021, 11:08 AM), <https://www.npr.org/2021/05/26/1000475878/in-landmark-case-dutch-court-orders-shell-to-cut-its-carbon-emissions-faster> [<https://perma.cc/EPX7-Y7NE>].

74. *Global Climate Litigation Report: 2020 Status Review*, *supra* note 71, at 42.

75. *Id.* at 39.

76. *Id.* at 40.

and various consumer protection and deceptive trade practices claims.”<sup>77</sup> These climate suits are unique in that they focus on corporate wrongdoing as the basis for relief rather than bringing claims for emissions.<sup>78</sup> The lawsuits are “underpinned by accusations that the industry severely aggravated the environmental crisis with a decades-long campaign of lies and deceit to suppress warnings from their own scientists about the impact of fossil fuels on the climate and dupe the American public.”<sup>79</sup> Information has come to light, showing Exxon knew about the dangers of climate change caused by fossil fuels since the 1970s or 1980s, but paid over \$31 million to block climate change solutions and spread misinformation to the public.<sup>80</sup> Exxon gave money “to members of Congress who denied the expert climate consensus and acted to obstruct climate policies... [and] outside scientists who published some of the 2–3 percent of shoddy research that disputed the global warming consensus.”<sup>81</sup>

These city-led cases are unique because they emphasize local harm. Past cases in the United States – like *Juliana* and *American Electric Power Company* – were focused on pollution as a violation of rights more generally. While courts have been unwilling to establish the right to a pollution-free environment, they appear more open to providing remedies for demonstrable harm caused by pollution. These city-led cases are brought by plaintiff cities like Baltimore that can demonstrate actual harms such as sea level rise and increased climate related hospitalizations.

By using a tort-based approach rather than a rights-based approach, these cases could allow courts to provide relief to climate litigants without causing too much political backlash. Because these city-led cases are based on tort law, the cases do not necessarily require courts to deal with the more political and polarizing aspects of climate change. These cases can be decided narrowly on whether oil companies knew of the dangers associated with carbon emissions and if they failed to warn of them and engaged in deceptive trade practices. Unlike *Massachusetts* and *Juliana*, state climate torts do not seek to force agency action or establish a right to a clean environment. Because of this, state climate torts can be resolved in state court in a way that avoids making broad climate policy changes that would interfere with national and international approaches to climate change.

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77. Dylan Bruce, *Climate Change Litigation Plaintiffs Have Struck Oil*, B.L. (Nov. 16, 2020, 4:39 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-climate-change-litigation-plaintiffs-have-struck-oil> [<https://perma.cc/3FNH-R67B>].

78. De Leon, *supra* note 59, at 63-65.

79. Chris McGreal, *Big Oil and Gas Kept a Dirty Secret for Decades. Now They May Pay the Price*, *GUARDIAN* (June 30, 2021, 3:00 PM), <https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment> [<https://perma.cc/3DAE-KXGR>].

80. Dana Nuccitelli, *Two-Faced Exxon: The Misinformation Campaign Against its Own Scientists*, *GUARDIAN* (Nov. 25, 2015, 6:00 PM), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2015/nov/25/two-faced-exxon-the-misinformation-campaign-against-its-own-scientists> [<https://perma.cc/9UXB-8VYP>].

81. *Id.*

These cases have not been fully litigated on the merits yet, but they provide hope that state tort law may be able to provide relief to climate litigants in the United States. While state tort law may not be able to create comprehensive federal climate change policy, it has several potential benefits. It works to fill in the gaps left by a federal government that refuses to take necessary action to protect the public health from impending climate disaster. State tort law has historically served as an alternative to redress harm when federal law is inadequate.<sup>82</sup> State-based climate cases have the potential to repay those who have been harmed by climate change; any money won through these cases could be used to mitigate the damage already done to local communities.<sup>83</sup> Additionally, holding oil companies and other major corporate polluters accountable and making them pay has the potential to deter them from further wrongdoing.<sup>84</sup> State climate torts can also serve as a catalyst to foster the much needed legislative and executive action required to create a comprehensive federal climate plan.<sup>85</sup>

While these city-led cases are a unique new strategy with potential benefits for the climate, they still must overcome the same obstacles that have plagued past climate litigation to be successful. The common strategy for defendant oil companies in climate cases is removal to federal court. As discussed above, federal courts have shown a clear unwillingness to decide climate cases on the merits. This means that the federal court is more favorable to oil companies because it allows them to easily escape liability in climate cases. In the recent city-led climate cases, the defendant oil companies predictably attempted to remove to federal court, but the Fourth, Ninth, and Tenth Circuits all ruled in favor of litigating the cases in state court.<sup>86</sup> One of these cases, *Mayor & City Council of Baltimore v. BP P.L.C.*, was recently heard by the U.S. Supreme Court. In *Baltimore*, the defendants were removed to federal court invoking several statutes.<sup>87</sup> The district court decided that none of the statutes authorized removal and remanded the case back to state court.<sup>88</sup> Typically, these remand orders are not appealable.<sup>89</sup> However, 28 U.S.C. § 1447 states that an order remanding a case to state court is not reviewable on appeal unless the case was removed using the federal officer removal statute.<sup>90</sup> Because the defendants

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82. Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1438 (2020).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* *City of Oakland v. BP PLC*, 969 F.3d 895, 911 (9th Cir. 2020); *Bd. of Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 827 (10th Cir. 2020); *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 603 (9th Cir. 2020); *City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 471 (4th Cir. 2020).

87. *BP P.L.C. v. City Council of Baltimore*, 141 S. Ct. 1532, 1536 (2021).

88. *Id.*

89. *Id.*

90. 28 U.S.C. § 1447.

invoked the federal officer removal statute, § 1447 opened the door for appellate review in *Baltimore*.

However, the Court of Appeals for the Fourth Circuit interpreted 28 U.S.C. § 1447 as giving it limited authority to review only the part of the district court's remand order that involved the federal officer removal statute.<sup>91</sup> Based on this, the Fourth Circuit affirmed the district court's decision without reviewing the defendants' other arguments for removal.<sup>92</sup> The Supreme Court reviewed the case and determined that the Fourth Circuit's interpretation of § 1447 was too narrow. The Court held that § 1447 gave the appellate court not only the power to review the portion of the remand order involving the federal officer removal statute, but also the authority to review the entirety of the remand order including the defendants' other removal arguments.<sup>93</sup>

The case was remanded back to the Fourth Circuit Court of Appeals for further consideration,<sup>94</sup> opening the door for the Fourth Circuit to reverse the district court's decision and allow the case to proceed in federal court. This narrow procedural ruling again illustrates the reluctance of federal courts, including the Supreme Court, to rule on the merits in climate cases. *Baltimore* is a setback to climate litigation because it delays, or may prevent, the adjudication of climate cases on the merits. Considering *Baltimore*, several U.S. Courts of Appeals must reconsider whether to allow these city-led cases to remain in state court.

In February 2022, the Tenth Circuit reviewed a case brought by multiple Colorado cities against oil companies in light of the Supreme Court's decision in *Baltimore*.<sup>95</sup> The Tenth Circuit determined for a second time that the case should be heard in state court.<sup>96</sup> The Tenth Circuit is the first to rule on this jurisdictional issue since *Baltimore* was decided.<sup>97</sup> The *Baltimore* case was also re-argued to the Fourth Circuit in January 2022.<sup>98</sup> At the time this Note was written, the decision in *Baltimore* and several other city-led climate cases was still pending.<sup>99</sup>

While the recent win in Colorado provides hope that state courts will be able to hear and decide these cases, there is still the chance that the cases will be removed to federal court. In federal court, different Circuit Courts of Appeal

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91. *BP P.L.C.*, 141 S. Ct. at 1537.

92. *Id.*

93. *Id.*

94. *Id.*

95. Sebastien Malo, *10th Circuit Hands Boulder's Climate Lawsuit the Home Court Advantage*, REUTERS (Feb. 8, 2022, 6:44 PM), <https://www.reuters.com/legal/litigation/10th-circuit-hands-boulders-climate-lawsuit-home-court-advantage-2022-02-08/> [<https://perma.cc/G8NU-38BR>].

96. *Id.*

97. *Id.*

98. Kate Fried, *Appeals Court Confirms that Historic Climate Lawsuit Will Proceed in State Court*, BOULDER (Feb. 8, 2022), <https://bouldercolorado.gov/news/appeals-court-confirms-historic-climate-lawsuit-will-proceed-state-court> [<https://perma.cc/5RQ8-6XYD>].

99. *Id.*

could reach different decisions on the issues, which could create a circuit split on the substantive issues like the procedural circuit split in *Baltimore*. Further, even if all these cases go back to state court, the oil companies will use their vast resources to delay the cases and make it a long time before substantive arguments will be heard. While these cases are waiting for a resolution and dealing with these delays in federal and state courts, climate change is only getting worse. People and communities are suffering, and the goal of climate litigation is to compensate for these harms and help deter future harm. Because of this, it is necessary to look for alternative litigation strategies that could resolve climate litigation more efficiently.

#### IV. COMPARING PAST SOCIAL POLICY TORTS WITH CLIMATE LITIGATION

To analyze how these city-led climate torts can be resolved more efficiently, it is beneficial to compare them to past social policy torts. Social policy torts allow litigants to use adjudication as the “first step to encourage new legislation, change public opinion, and uncover the truth about wrongful corporate conduct.”<sup>100</sup> Many social policy torts such as tobacco, firearm, opioid, and now climate litigation involve issues that impact public health. Social policy torts are controversial, as some claim they threaten the democratic norms of society and bypass the legislative process.<sup>101</sup> However, advocates of this strategy argue that social policy torts “are responding to a failure of government to meet its responsibilities to its citizens.”<sup>102</sup>

Tobacco litigation is considered the first and most successful social policy tort.<sup>103</sup> Tobacco litigation began in the 1950s and had little success due to issues proving causation.<sup>104</sup> By the 1990s, tobacco litigants began to use corporate wrongdoing as the nexus for their lawsuits as more information came to light showing that tobacco manufacturers “willfully ignored evidence of the harm caused by tobacco products.”<sup>105</sup> By this time, there was more evidence proving the causal relationship between smoking and lung cancer, which helped eliminate public support for tobacco manufacturers.<sup>106</sup> Nearly every state attorney general brought suit against tobacco manufacturers, and a settlement was reached in 1998 where tobacco companies agreed “to fund anti-smoking programs and to curtail objectionable marketing practices.”<sup>107</sup>

Firearm litigation has not had the same success as tobacco litigation. In the

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100. De Leon, *supra* note 59, at 28.

101. Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy - Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 496 (2001).

102. *Id.*

103. De Leon, *supra* note 59, at 32.

104. 2 LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 18:1 (2021).

105. *Id.*

106. *Id.*

107. *Id.*

late 1990s, individuals and cities tried to sue gun manufacturers for harm caused by third parties using state consumer protection laws and the public nuisance theory.<sup>108</sup> But these attempts were unsuccessful and were either dismissed before trial or lost on the merits.<sup>109</sup> Unlike tobacco litigation, firearm litigation has “yet to yield a core body of repetitive, probative expert testimony that may be reliably used from one case to the next.”<sup>110</sup> Additionally, state attorney generals have not shown interest in pursuing firearm litigation, and there have not been enough cases to necessitate the kind of consolidation that makes a mass tort.<sup>111</sup> A recent case brought by the relatives and survivors of the Sandy Hook Elementary School shooting against the gun manufacturer Remington has shown some potential. The plaintiffs claimed that the gun manufacturer violated Connecticut consumer protection laws by wrongfully advertising guns for “for civilians to carry out military-style actions against perceived enemies.”<sup>112</sup> The plaintiffs had a narrow win in 2019 when the Connecticut Supreme Court allowed the litigation to proceed.<sup>113</sup> After this win, Remington offered to settle the lawsuit for around \$33 million in 2021, and the Sandy Hook Families ultimately settled with Remington for \$73 million in February of 2022.<sup>114</sup> This case provides hope that similar consumer protection statutes in other states could be an avenue for relief for victims of gun violence.<sup>115</sup>

In contrast, opioid litigation has shown success following a similar strategy to tobacco litigation. Opioid litigation used the public nuisance doctrine to sue pharmaceutical companies who manufactured and marketed opioids in state court. Misleading marketing by pharmaceutical companies is remarkably similar to the marketing campaigns undertaken by tobacco companies prompting tobacco litigation. Opioid litigants recently reached a \$572 million settlement against Johnson & Johnson in Oklahoma state court in 2019.<sup>116</sup> The District Court of Oklahoma found that Johnson & Johnson’s false and misleading marketing about the risk of opioid addiction made it liable under state public nuisance law.<sup>117</sup> Three U.S. drug distributors and drug manufacturer Johnson & Johnson are

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108. Linda S. Mullenix, *Outgunned No More?: Reviving Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390, 398-99 (2021).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Rick Rojas et al., *Sandy Hook Families Settle with Gunmaker for \$73 Million Over Massacre*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html> [<https://perma.cc/S89Y-W263>].

115. Mullenix, *supra* note 108, at 398.

116. Anthony Juzaitis, *Analysis: The Public Nuisance Doctrine is Having a Moment*, BLOOMBERG (Nov. 4, 2019, 6:04 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-public-nuisance-doctrine-is-having-a-moment> [<https://perma.cc/3GYE-ERAH>].

117. Judgment After Non-Jury Trial at 12, *Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929 (Okla. Dist. Ct. Aug. 26, 2019).

currently working out a twenty-six-billion-dollar settlement with forty-two states.<sup>118</sup> A federal jury trial also recently found that pharmacies such as CVS, Walgreens, and Walmart, helped fuel the opioid epidemic in Ohio under the same public nuisance theory.<sup>119</sup> These recent opioid wins again demonstrate the power of mass social policy torts.

A lot can be learned from these three examples. When comparing climate litigation to these examples, it has similarities to both the successful tobacco and opioid cases, and the less successful firearm litigation. One key factor distinguishing climate litigation and firearm litigation from opioid and tobacco litigation is political polarization. While tobacco and opioid use is more politically neutral, climate change and guns can be more divisive topics. Most states and local governments took part in the tobacco and opioid settlements. On the other hand, few state attorney generals were willing to pursue firearm litigation. In this sense, climate litigation is more like firearm litigation because many states have expressed opposition to the city-led climate cases proceeding in state court. Indiana and seventeen other states filed a brief with the Supreme Court in opposition to letting the cases continue in state court.<sup>120</sup> Similarly, Indiana filed a brief along with twelve other states in the *Baltimore* case, which argued that climate change is a global issue that states have no business deciding on.<sup>121</sup> These briefs illustrate that states are not unified about climate litigation in the way that they were about tobacco and opioid litigation.

Climate change is a highly politicized and deeply partisan issue, with more Democrats than Republicans agreeing that “human activity is contributing a great deal to climate change (72% vs. 22%), that it is impacting their own local community (83% to 37%), and that the government is doing too little to reduce the effects of climate change (89% to 35%).”<sup>122</sup> While nicotine and opioid

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118. Nate Raymond, *Drug Companies Say Enough U.S. States Join \$26 Billion Opioid Settlement to Proceed*, REUTERS (Sept. 7, 2021, 2:04 PM), <https://www.reuters.com/world/us/drug-companies-say-enough-us-states-join-26-bln-opioid-settlement-proceed-2021-09-04/> [https://perma.cc/VK5Y-QUXY].

119. Nate Raymond, *Pharmacy Chains Including CVS Helped Fuel Opioid Epidemic, U.S. Jury Finds*, REUTERS (Nov. 23, 2021, 9:56 PM), <https://www.reuters.com/legal/litigation/cvs-other-pharmacy-chains-found-liable-their-first-trial-over-us-opioid-epidemic-2021-11-23/> [https://perma.cc/5UET-AQBE].

120. Sarah Bowman, *Indiana AG Todd Rokita Files Brief to Stop California Cities from Setting Climate Policy*, INDY STAR (Mar. 22, 2021, 7:40 AM), <https://www.indystar.com/story/news/environment/2021/03/22/indiana-tries-stop-california-setting-climate-policy/4735937001/> [https://perma.cc/ACV4-HU4S].

121. Brief of Indiana, Alabama, Alaska, Georgia, Kansas, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and Utah as Amici Curiae in Support of Petitioners at 24, *BP P.L.C. v. City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189).

122. Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), <https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/>

addiction are typically viewed as individual or community problems, climate change is often viewed as a global issue. In fact, the number of Americans who believe that their local area is impacted by climate change fell seven percent between 2020 and 2021 from twenty-four percent to seventeen percent.<sup>123</sup> This perception of climate change as an international issue makes federal courts less willing to decide climate issues. Any successful strategy for these city-led cases is going to have to overcome this obstacle.

Another characteristic that made the tobacco and opioid cases successful was their ability to prove harm. With opioid and tobacco litigation, there are specific people and communities who suffered severe harm and damages. However, proving firearm manufacturers are a cause of the harm is harder to prove in firearm litigation because there is the intervening actor that is the but-for cause of injury in cases of gun violence. Because of this, firearm litigation is more about preventing future harms caused by gun violence. Climate litigation falls in the middle of these examples. While climate change is already impacting human life, a substantial portion of the harm has not yet occurred. In this sense, climate change litigation is concerned with preventing or mitigating future harm like firearm litigation. Future harms are more difficult to definitively prove than past or present harms. However, the city-led climate cases have the benefit of being grounded in real, evidence-based local harms. This reasoning shows that any new climate litigation strategy should maintain this city-based approach to show severe harm.

Additionally, tobacco and opioid litigation were successful because both were able to gather substantial evidence relating to corporate wrongdoing and misleading the public. Similarly, in these city-led climate cases, there is proof of wrongdoing on the part of the defendant oil companies based on their knowledge of climate change and willful, continued use of deceptive marketing practices. As these climate cases continue and gather more information through discovery mechanisms, new evidence could also help garner more public support for climate litigation like in the tobacco litigation.

Finally, one of the most notable features of tobacco and opioid litigation that distinguishes them from firearm litigation is consolidation. Both tobacco and opioid litigation were mass torts where plaintiffs joined instead of pursuing their claims individually. Firearm litigation has been more focused on individual cases of gun violence, such as the Sandy Hook Elementary School case. These city-led cases are currently being pursued by individual cities, but there is nothing preventing these cases from consolidating into a mass climate tort. A mass climate tort may be the solution to successfully and more efficiently resolving climate litigation in federal court.

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[<https://perma.cc/L232-86VA>].

123. Alec Tyson et al., *Local Impact of Climate Change, Environmental Problems*, PEW RSCH. CTR. (May 26, 2021), <https://www.pewresearch.org/science/2021/05/26/local-impact-of-climate-change-environmental-problems/> [<https://perma.cc/PR2A-QCV8>].



## V. THE BENEFITS OF A FEDERAL CLIMATE MDL

Although federal court has not been welcoming to climate litigants in the past, these city-led climate cases could potentially succeed in federal court. First, there is federal district court precedent that these claims could avoid preemption by the Clean Air Act. Preemption has caused issue for climate cases in federal court, as seen in *American Electric*. These city-led cases focus on the wrongful conduct of the oil companies rather than the emissions themselves. Precedent from several federal district courts show that this argument may be able to survive preemption challenges.<sup>124</sup> For example, the District Court of New Jersey determined that product liability claims against a diesel engine manufacturer were “not preempted because they were based on problems with the product, rather than violations of an emissions standard.”<sup>125</sup> Similarly, in the *Baltimore* case, the district court actually disagreed with the defendants’ claims that Baltimore’s state law claims were preempted by the Clean Air Act, and the court declined to remove the case to federal court on preemption grounds.<sup>126</sup> Although this decision does not foreclose the possibility of the defendants’ using preemption as a state court defense,<sup>127</sup> it shows that these city-led torts may stand a better chance of surviving preemption challenges that have defeated past climate cases.

In addition to beating preemption obstacles, these city-led cases may also see success in federal court using the multidistrict litigation (“MDL”) model used in opioid litigation. MDLs allow consolidated pre-trial proceedings for civil actions with usual questions of fact.<sup>128</sup> MDLs are a great tool to address complex litigation because they allow “one judge to consider pre-trial motions and discovery of multiple cases filed in different courts.”<sup>129</sup> There are two procedures for creating an MDL. First, the judicial panel on multidistrict litigation (“JPML”) can initiate an MDL of its own accord.<sup>130</sup> In the alternative, parties can file a motion in district court seeking the creation of an MDL.<sup>131</sup> Regardless of which procedure is used, at least four out of seven JPML members must agree to create an MDL.<sup>132</sup>

MDLs differ from class actions because if the MDL cases are not settled or resolved, each case is sent back to its original court for trial.<sup>133</sup> There would be

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124. Rachel Rothschild, *State Nuisance Law and The Climate Change Challenge to Federalism*, 27 N.Y.U. ENV'T L. J. 414, 449 (2019).

125. *Id.*

126. *City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 563 (D. Md. 2019).

127. *Id.*

128. 28 U.S.C. § 1407.

129. De Leon, *supra* note 59, at 48-49.

130. 28 U.S.C. § 1407.

131. *Id.*

132. *Id.*

133. Rachel Abrams, *Multidistrict Litigation Consolidation: Pros and Cons*, PLAINTIFF MAG., at 1, 2 (Jan. 2016), available at <https://www.levinsimes.com/wp-content/uploads/2016/01/>

several benefits to MDLs in climate litigation. First, they often encourage settlement because the judge overseeing the MDL is “expected to work with the parties in finding a resolution.”<sup>134</sup> In fact, “most MDL cases are resolved through aggregate settlements in the transferee courts or are finally resolved in other ways there without ever returning to the transferor court.”<sup>135</sup> MDLs also provide more consistent rulings by lessening the “risk of contrary legal opinions from different districts, even when the defendants and representative plaintiffs are dealing with the same underlying facts and apply the same legal analysis.”<sup>136</sup> MDLs help give plaintiffs leverage by allowing them to collaborate to show defendants the scope and seriousness of the claims against them, thus encouraging defendants to settle.<sup>137</sup> Finally, it can also be argued that the publicity surrounding the formation of an MDL is good for public health since it allows for public awareness of potential health hazards.<sup>138</sup>

There are three statutory requirements the cities in these climate cases would need to prove to create an MDL. First, civil actions must involve one or more common questions of fact.<sup>139</sup> Second, the consolidation of the cases must be for the convenience of the parties and the witnesses on balance.<sup>140</sup> Finally, the MDL must promote the just and efficient conduct of the cases.<sup>141</sup> These factors often overlap, and the JPML does not tend to weigh each factor equally when deciding whether to form an MDL.<sup>142</sup> The party motioning for consolidation has the burden of proving these elements.<sup>143</sup> While these three factors are the only statutorily required conditions for creating an MDL, the JPML would have considerable discretion in determining whether to form a climate MDL and could consider other factors not explicitly mentioned in the statute.<sup>144</sup>

The first requirement of commonality is not usually sufficient on its own to create an MDL, but if a movant fails to prove this requirement, the JPML will usually deny the consolidation.<sup>145</sup> The JPML has interpreted common questions

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Abrams\_Multidistrict-Litigation-consolidation\_Pro-s-and-cons\_Plaintiff-magazine.pdf [https://perma.cc/X2ME-DH7N].

134. De Leon, *supra* note 59, at 49.

135. WEN SHEN, CONG. RESEARCH. SERV., LSB10365, OVERVIEW OF THE OPIOID LITIGATION AND RELATED SETTLEMENTS AND SETTLEMENT PROPOSALS 1, 2 (Nov. 25, 2019), (available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10365> [https://perma.cc/5GAK-VCVC]).

136. Abrams, *supra* note 133, at 2.

137. See Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938, 966-67 (2019).

138. Abrams, *supra* note 133, at 2.

139. 28 U.S.C. § 1407.

140. *Id.*

141. *Id.*

142. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3863 (4th ed. 2021).

143. *Id.*

144. *Id.*

145. *Id.*

of fact broadly to include “important or dispositive questions of law, as well as factually similar cases involving the assertion of different legal theories.”<sup>146</sup> This means it is not necessary for the parties and facts of the different cases to be identical to create an MDL.<sup>147</sup> While an MDL can involve common questions of law, “if the common questions are purely legal, the statutory requirement for transfer literally is not satisfied.”<sup>148</sup>

City-led climate litigation meets this first MDL requirement. Although each city has different questions of fact when proving the local impact of climate change on each city, they also share many common questions of fact. All cities must prove corporate wrongdoing by defendant oil companies and show that the companies knew about the environmental impact of their activities and actively spread misinformation to the public. There are also common questions of causation because cities must prove that the conduct of the defendant oil companies led to these local harms. Also, since all these climate cases are based on the same public nuisance theory, there is a clear commonality when it comes to questions of law. These common questions of law and fact are likely to pass the JPML’s low bar for the commonality requirement.

The second requirement for MDLs, convenience for the parties and witnesses, carries the least weight.<sup>149</sup> The JPML takes the position that the time and costs saved through consolidation will outweigh any inconvenience caused to some lawyers that have to travel to the MDL court.<sup>150</sup> Further, if the other two MDL requirements are met, the JPML will normally consolidate the cases because any “inconvenience can be mitigated by efficient management of the coordinated actions.”<sup>151</sup>

The second requirement is met in city-led climate cases because an MDL will be more convenient for both the plaintiffs and defendants. As of June 2021, there were twenty-six cases involving cities and states suing oil and gas companies using the public nuisance theory.<sup>152</sup> For defendant oil companies such as Shell, BP, Exxon, and Chevron, who are defendants in most of these cases,<sup>153</sup> consolidating the cases will be more convenient because it will help avoid juggling various cases across several states during pretrial proceedings. Additionally, both the plaintiffs and defendants are likely to have costly expert

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146. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 52 (2007).

147. *Id.*

148. WRIGHT & MILLER, *supra* note 142.

149. Ostolaza & Hartmann, *supra* note 146, at 54.

150. WRIGHT & MILLER, *supra* note 142.

151. *Id.*

152. Chris McGreal & Alvin Chang, *How Cities and States Could Finally Hold Fossil Fuel Companies Accountable*, GUARDIAN (June 30, 2021), <https://www.theguardian.com/environment/ng-interactive/2021/jun/30/climate-crimes-fossil-fuels-cities-states-interactive> [<https://perma.cc/2SVX-58JT>].

153. *See id.*

witnesses testifying on their behalf to prove or disprove causation, the nature and extent of the harms, and other elements. Consolidation creates less of a burden on expert witnesses during the pretrial proceedings, and it would also save money by allowing plaintiffs to cost share when hiring expert witnesses. Furthermore, MDLs often lead to successful dispute resolution prior to trial. If the cases end up resolved in an MDL, both the plaintiffs and defendants would save significant amounts of time and money by avoiding the drawn-out litigation in multiple jurisdictions that is likely to continue if these cases proceed individually. All these considerations point towards the convenience of a climate MDL.

The third factor for creating an MDL, which is that the MDL must promote the just and efficient conduct of the cases, is the most important factor.<sup>154</sup> It is essential to show that consolidation will make the use of party and judicial resources more efficient to fulfill this requirement.<sup>155</sup> If the movant can show “separate actions will lead to duplicative discovery (including expert discovery), the need for coordination becomes more persuasive and such a showing does not depend on total identity of the parties or claims.”<sup>156</sup> However, the efficiency of an MDL is reduced if the individual cases have had significant rulings or are already nearing trial.<sup>157</sup>

Yet again, city-led climate cases present a compelling case for creation of an MDL under this third and most crucial factor. Because there are twenty-six cases alleging similar facts under the same legal theory that name the same few defendant oil companies, allowing the cases to proceed separately would clearly lead to duplicative discovery for the defendant oil companies to complete. Additionally, combining these twenty-six cases is also going to conserve judicial resources by having the pretrial proceedings supervised in one court by one judge. Having one judge in charge of pre-trial climate case proceedings would also increase consistency in outcomes across climate cases from varying districts. Finally, due to procedural delays, there have not been any significant rulings on the merits of these cases, and they are unlikely to reach trial soon. Because of this, it would be more efficient just to consolidate these cases into an MDL because they successfully meet all three of the statutory prerequisites.

Creating an MDL for city-led climate cases could help avoid many obstacles currently preventing the individual cases from progressing quickly enough. The MDL created for opioid litigation based on similar claims for corporate wrongdoing led to the pending twenty-six-billion-dollar opioid settlement previously discussed.<sup>158</sup> If these cities could agree to litigate as an MDL and get approval from the JPML, climate litigation could see similar success. The JPML might be open to creating a climate MDL because it could help address the

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154. Ostolaza & Hartmann, *supra* note 146, at 54.

155. *Id.*

156. *Id.*

157. *Id.*

158. *MDL 2804: National Prescription Opiate Litigation*, U.S. DIST. CT. N. DIST. OHIO, <https://www.ohnd.uscourts.gov/mdl-2804> [<https://perma.cc/G248-WS8A>] (last visited Oct. 17, 2021).

unique concerns presented by city-led climate cases. The consistency in rulings associated with MDLs would help alleviate concerns by some states that these city climate suits would produce conflicting results and interfere with federal policy on climate change.<sup>159</sup> Having a consistent starting point through a climate MDL could make climate litigation easier to accept for people who view climate change as a national issue.

Additionally, since MDLs encourage settlement, consolidating the cases could lead to a quicker resolution of the cases. Through an MDL, the plaintiffs can combine resources, evidence, and bargaining power. This in turn could be the leverage needed to get the defendant oil companies to negotiate. For this reason, an MDL may be more beneficial than city-led climate cases proceeding in state court. Even if the cases are successful in state court, it will take years for the cases to sort through procedural issues and be adjudicated on the merits. An MDL is more likely to reach a quick resolution like that of the opioid cases, which is critical because of the time sensitive nature of climate change.

Finally, the biggest benefit of a climate MDL is the publicity it would bring. A climate MDL could be the catalyst needed to push the federal government to enact a comprehensive climate plan. In fact, pushing the federal government to act may be the most important aspect of these cases. While monetary awards would allow these cities to counteract some of the damage climate change has caused, the money would not be a long-term solution to climate change. The publicity garnered from a climate MDL could help get the legislative and executive branches to finally take meaningful action on climate change. By putting public pressure on the legislative and executive branches, a climate MDL could help lead to the creation and enforcement of important climate regulations.

This publicity is especially important considering the Biden administration's commitment to the environment and the potential for federal legislation. In an executive order from January 2021, President Biden explains:

It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; [and] to bolster resilience to the impacts of climate change.<sup>160</sup>

With a narrow Democratic House majority for the first time in a decade, this could be the perfect time to push for more comprehensive federal environmental protections. This means that the publicity garnered from a climate MDL could

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159. Brief of Indiana, Alabama, Alaska, Georgia, Kansas, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and Utah as Amici Curiae in Support of Petitioners at 24, *BP P.L.C. v. City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189); see also Bowman, *supra* note 120.

160. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

make a stark difference in pushing the federal government to finally take much needed climate action.

A climate MDL would not only put pressure on the federal government, but also on the oil companies. One of the main goals of social policy torts is to “reveal companies’ wrongdoings to the public so they are forced to change.”<sup>161</sup> These city-led cases have already been making headlines, especially the *Baltimore* case when it was heard by the Supreme Court. If these cities band together to create a climate MDL, this is likely to attract more public attention. As these cases progress through the court system, discovery is likely to produce more information regarding oil companies’ knowledge of the environmental impacts of carbon emissions as well as the deceptive practices the companies engaged in to hide this information from the public. This kind of publicity could help undo some of the damage created by oil companies’ decades long marketing campaigns that disseminated misinformation on climate change to the public. Information demonstrating oil companies’ misdeeds could further affect stock prices for these companies, which could put added pressure on the companies to take steps to remediate the harm they have caused and mitigate any future harm. Publicity is a valuable tool to help force oil companies to stop their harmful behavior.

#### VI. THE NEED FOR SETTLEMENT SAFEGUARDS

While the success of past social policy torts provides hope that a climate MDL could reach a historic settlement, that is only half of the battle. A mass climate tort may succeed in court, but a climate tort’s ability to make meaningful change can be limited by how recovered money is used. An issue with social policy torts pursued by state and local governments is that the use of the funds will be determined by governors, attorney generals, and legislators.<sup>162</sup> While most people assume that these settlement funds would have to be appropriated to climate related projects, this is not necessarily the case. The tobacco settlement provides a cautionary tale.

The tobacco settlement did not legally require states to use their payments for smoking-related purposes, but many states pledged to do so anyway.<sup>163</sup> For example, Massachusetts passed legislation in 2000 allocating seventy-percent of settlement funds to a trust fund and thirty-percent to health care services.<sup>164</sup> However, by 2003 the state was instead using the entirety of its tobacco payment

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161. De Leon, *supra* note 59, at 33.

162. *Principles for the Use of Funds from the Opioid Litigation*, N.H. DEP’T HEALTH & HUM. SERV., <https://www.dhhs.nh.gov/dcbcs/bdas/documents/opioid-settlement-report.pdf> [<https://perma.cc/72QJ-XAHE>] (last visited Feb. 13, 2022).

163. Vanessa O’Connell, *States Siphon Off Bigger Share of Tobacco-Settlement Money*, WALL ST. J. (Oct. 9, 2003, 12:53 AM), <https://www.wsj.com/articles/SB106565273470749100> [<https://perma.cc/G2RC-3REU>].

164. *Id.*

for general budget purposes.<sup>165</sup> States have repeatedly spent less than three-percent of their tobacco settlement money on tobacco prevention and cessation.<sup>166</sup> Rather than being earmarked to promote antismoking initiatives, states increasingly funneled tobacco money into general funds to help deal with budgetary gaps.<sup>167</sup> Tobacco settlements have essentially become a substitute for state revenue rather than a means to improve public health.<sup>168</sup>

With this in mind, public health scholars and coalitions are urging states to avoid repeating the same mistake with the recent opioid settlements.<sup>169</sup> In October 2021, the Office of National Drug Control Policy announced the release of a model law for state legislatures to use to prevent opioid funds from being similarly appropriated.<sup>170</sup> There is hope that this guidance from the White House will lead states to use the opioid settlement money for its intended purposes, but this is not a guarantee. This demonstrates that even if these climate cases are won in state or federal court, the fight is not over. Ongoing climate advocacy will be necessary to ensure that these funds are used appropriately to mitigate climate change, counteract existing climate damage, ameliorate the climate burden on minority communities, and prevent future harm.

## VII. CONCLUSION

Climate change is a pressing issue that is already having detrimental effects on the health of people all over the world. The lack of substantial climate action by the legislative and executive branches has led people to use litigation to combat climate change. Climate litigants in the United States have had limited success due to procedural obstacles and preemption issues. City-led climate cases are the most recent strategy in the ongoing fight for successful climate litigation in the United States. While these cases could find success in state court, it may be more beneficial for them to proceed in federal court through multi-district litigation.

A climate MDL provides several benefits that could make these city-led cases the next successful mass social policy tort. A climate MDL would allow the

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165. *Id.*

166. *Coalition Publishes Principles to Guide State and Local Spending of Opioid Litigation Settlement Funds*, JOHNS HOPKINS U. (Jan. 27, 2021), <https://hub.jhu.edu/2021/01/27/principles-for-spending-opioid-settlements/> [<https://perma.cc/9P52-X837>].

167. O'Connell, *supra* note 163.

168. *See id.*

169. *Coalition Publishes Principles to Guide State and Local Spending of Opioid Litigation Settlement Funds*, *supra* note 166.

170. Press Release, White House, ONDCP Announces Model Law for States to Help Ensure Opioid Litigation Settlements Funds Address Addiction and Overdose (Oct. 21, 2021), <https://www.whitehouse.gov/ondcp/briefing-room/2021/10/21/ondcp-announces-model-law-for-states-to-help-ensure-opioid-litigation-settlements-funds-address-addiction-and-overdose/> [<https://perma.cc/LLG6-8NAC>].

dozens of cities that have initiated tort-based lawsuits against oil companies to combine their resources during pre-trial proceedings. This combined power has the potential to lead to a quicker resolution of climate cases and could help garner publicity surrounding the alleged misconduct of many large oil companies. This new wave of climate litigation may be enough to force oil companies to help repair the harm carbon emissions have done to the environment and mitigate future harm. However, ongoing climate advocacy is necessary alongside these climate litigation efforts to ensure meaningful change is realized.