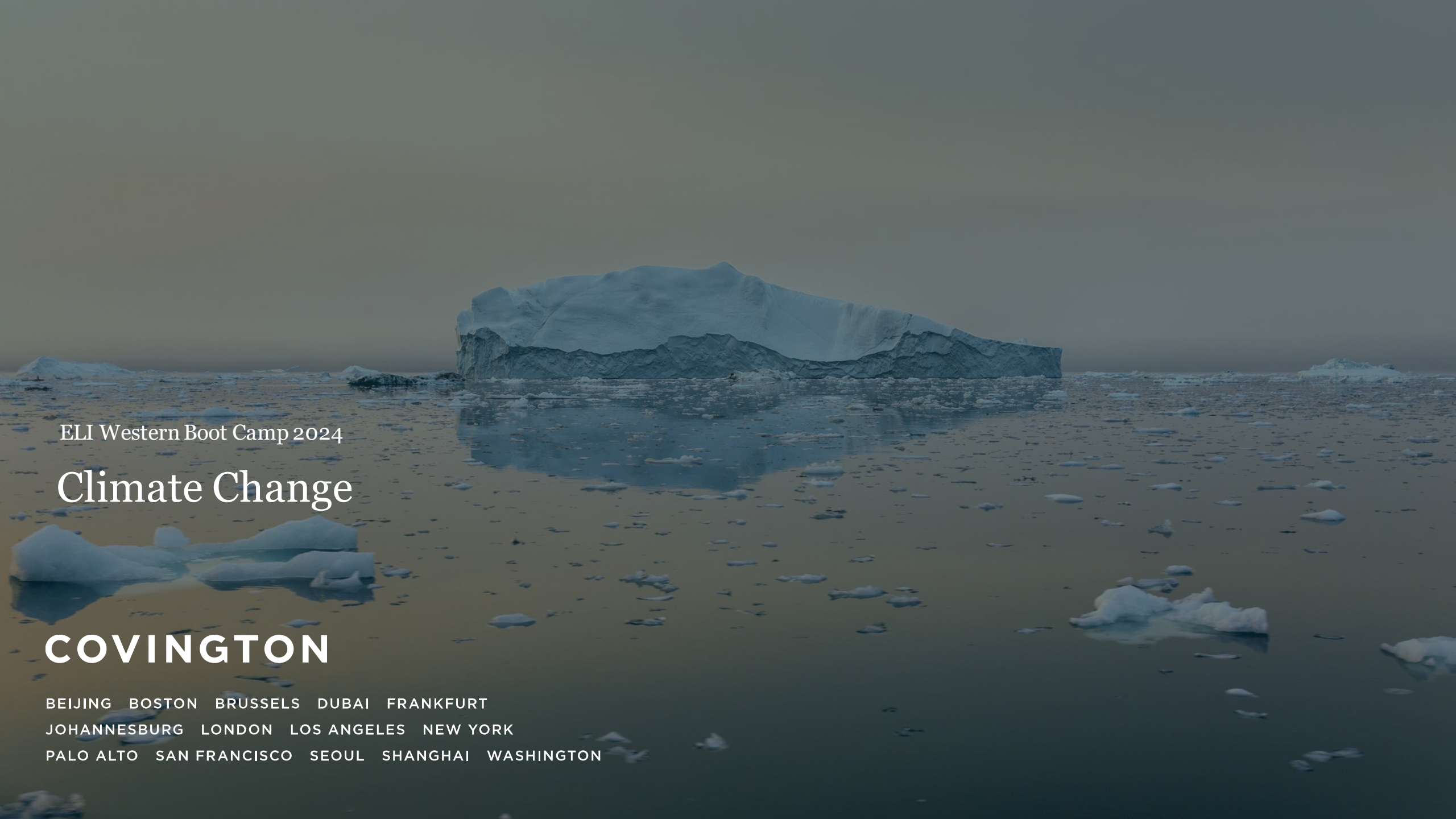

ELI Western Boot Camp 2024

Climate Change

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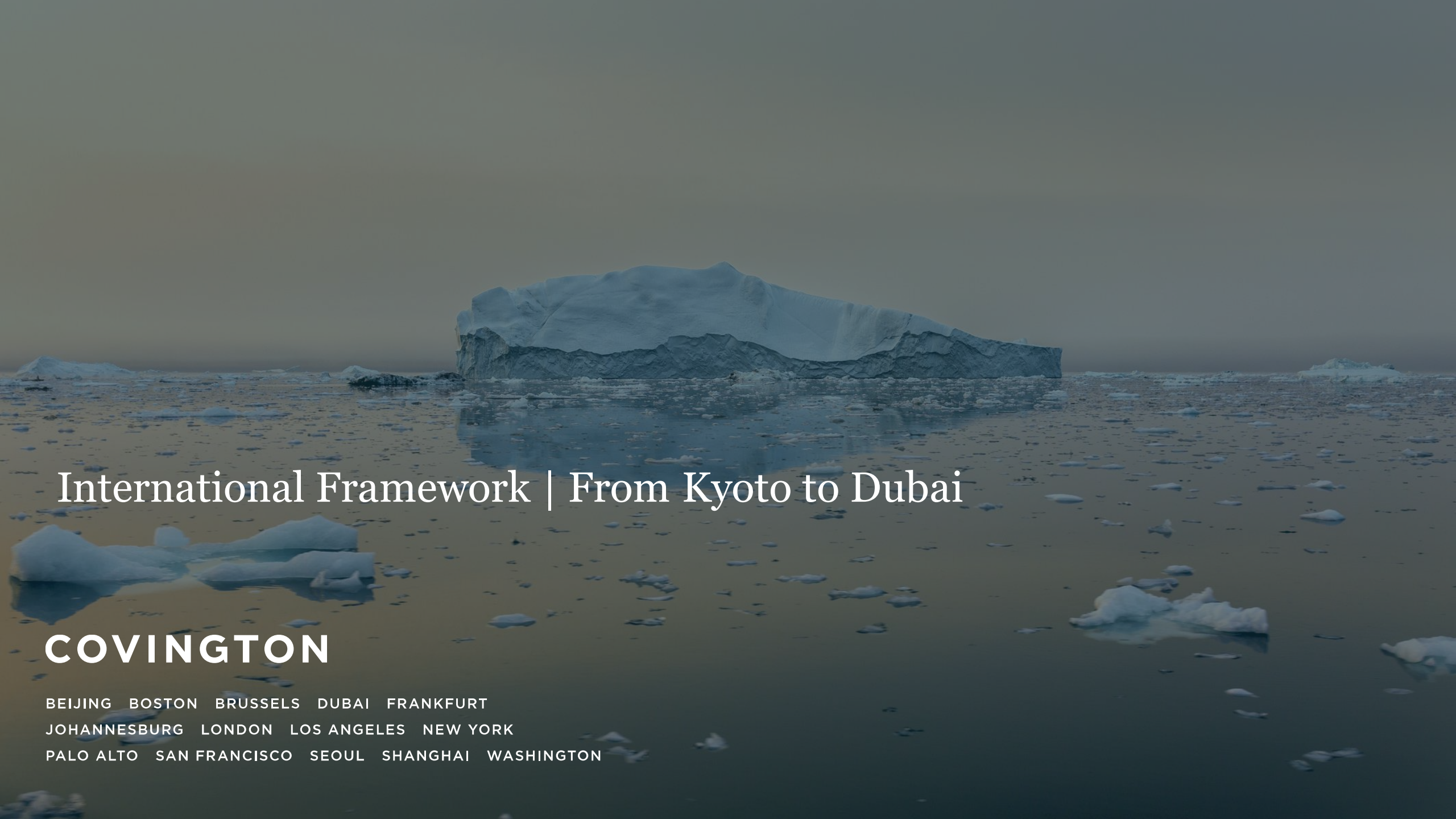

International Framework | From Kyoto to Dubai

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UNFCCC (1992)

Common but differentiated obligations

- The largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.

Applying standards may result in unwarranted economic and social cost to some countries (developing nations)

- All countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow.

Paris Agreement (2015)

TO LIMIT WARMING TO 1.5°C EMISSIONS MUST PEAK BEFORE 2025

NATIONALLY DETERMINED CONTRIBUTIONS

MITIGATION/ADAPTATION

LOSS AND DAMAGE

FINANCE

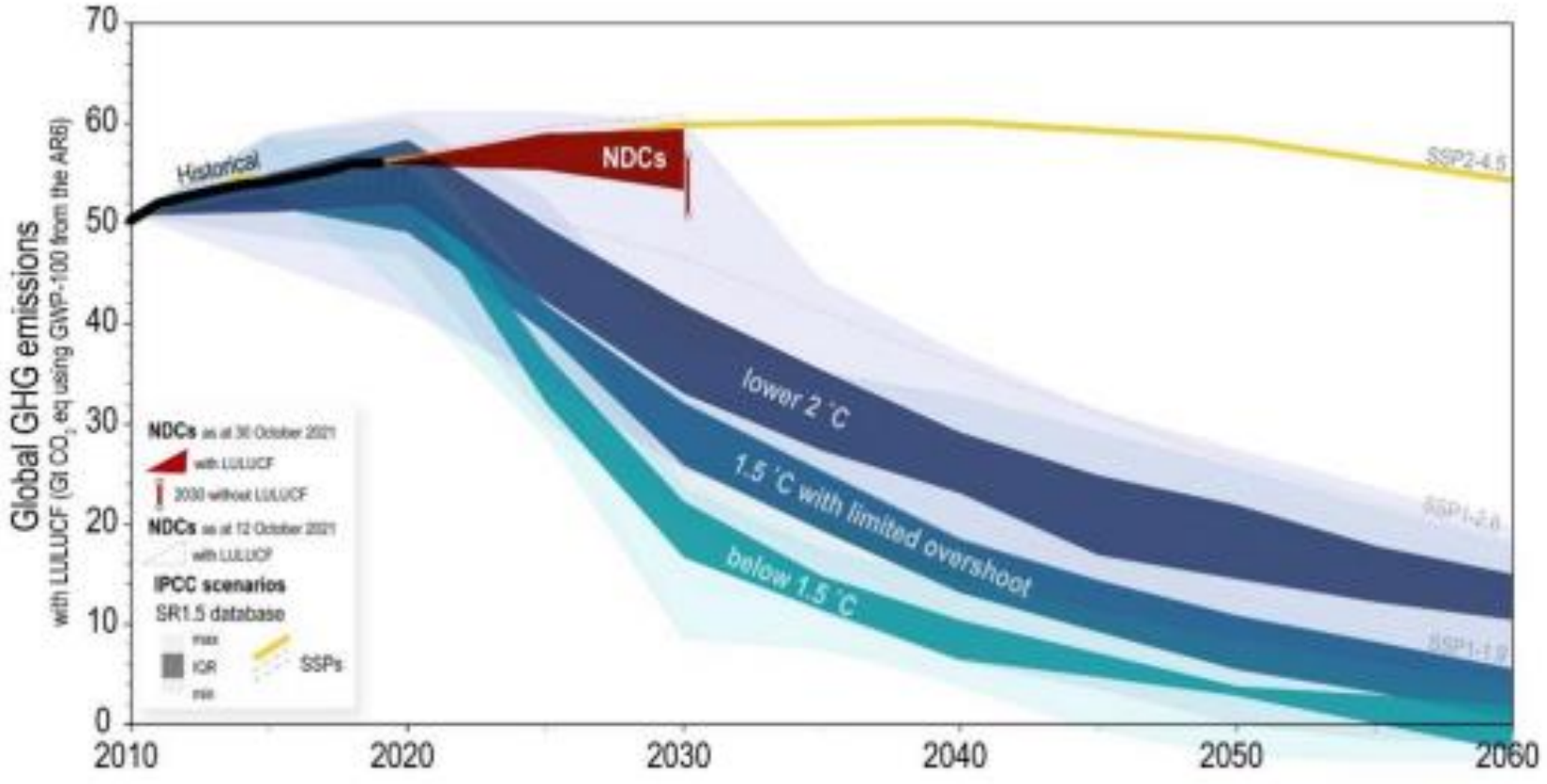
TECHNOLOGY DEVELOPMENT AND TRANSFER

CAPACITY BUILDING

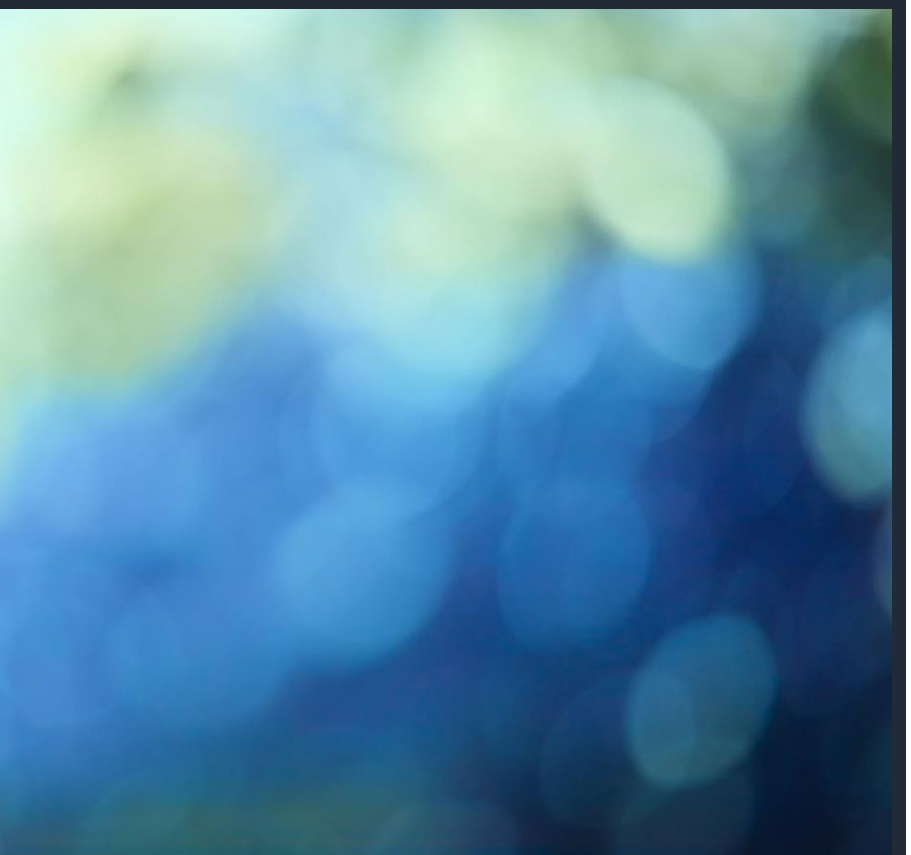
GLOBAL STOCKTAKE

NDCs/Synthesis Report

- Source: UN Climate Change Secretariat, Message to Parties and Observers, Nationally determined contribution synthesis report, Nov. 4, 2021, https://unfccc.int/sites/default/files/resource/message_to_parties_and_observers_on_ndc_numbers.pdf



Glasgow Climate Pact: Keep 1.5 alive?

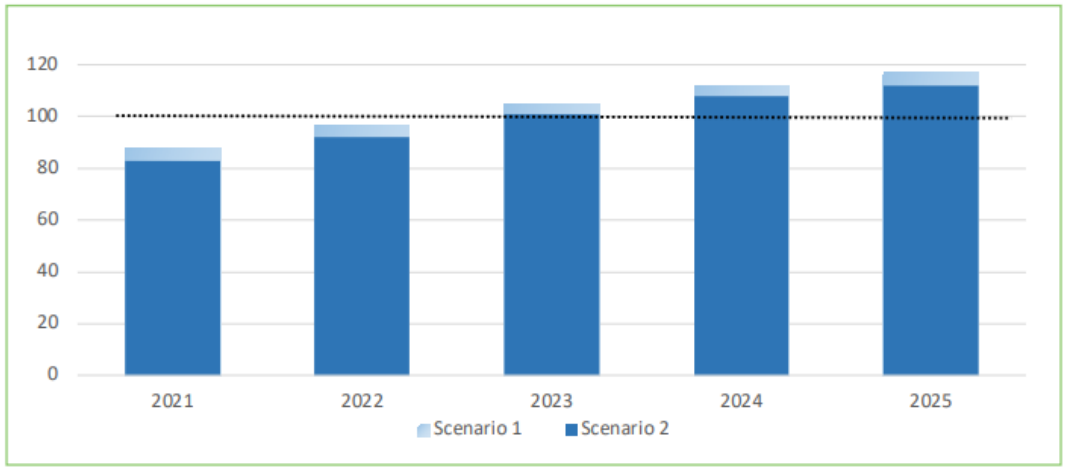


3. Expresses alarm and utmost concern that human activities have caused around 1.1 °C of warming to date, that impacts are already being felt in every region and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted;

25. Notes with serious concern the findings of the synthesis report on nationally determined contributions under the Paris Agreement, according to which the aggregate greenhouse gas emission level, taking into account implementation of all submitted nationally determined contributions, is estimated to be 13.7 per cent above the 2010 level in 2030;

Glasgow Climate Pact: Finance

Figure 1. Annual Projections Towards the US$100 billion goal



Source: Climate Finance Delivery Plan: Meeting the US$100 BIllion Goal, https://ukcop26.org/wp-content/uploads/2021/10/Climate-Finance-Delivery-Plan-1.pdf.

- 44. *Notes with deep regret* that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation has not yet been met and welcomes the increased pledges made by many developed country Parties and the Climate Finance Deliver Plan: Meeting the US$100 Billion Goal and the collective actions contained therein;

Sharm el-Sheikh Implementation Plan

- Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

Loss and damage

- Welcomes the consideration, for the first time, of matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change
- Recognizes that one third of the world, including sixty per cent of Africa, does not have access to early warning and climate information services

Dubai (COP28) The UAE Consensus

Includes an unprecedented reference to **transitioning away from all fossil fuels in energy systems**, in a just, orderly and equitable manner in this critical decade to enable the world to reach net zero emissions by 2050, in keeping with the science.

Offers a new, specific target on tripling renewables and doubling energy efficiency by 2030.

Loss and damage fund

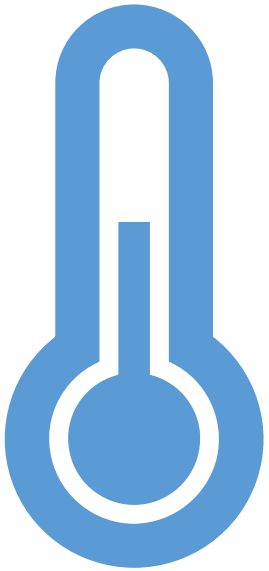
Hosted by **World Bank** for initial period of four years

Minimum percentage allocated to least developed countries and **Small Island Developing States**

19 countries committed $792MM

Global Stocktake (1)

- Expresses serious concern that 2023 is set to be the **warmest year on record** and that impacts from climate change are rapidly accelerating, and emphasizes the need for urgent action and support to keep the 1.5 °C goal within reach and to address the climate crisis in this critical decade
- Expresses concern that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and acknowledges that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 °C;



West Virginia v. EPA and EPA's Methane and Tailpipe Standards

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Clean Power Plan

Long-Anticipated Regulation of Existing Power Plants under CAA Section 111(d) (2015)

- Section 111(a)(1) - "best system of emission reduction . . . adequately demonstrated"
- Section 111(d)(1) - state plan procedure "similar to . . . section [110]"
- Premised upon generating shifting between coal, gas and renewables, 32% drop by 2030

West Virginia v. EPA (D.C. Circuit)

- Unprecedented stay granted days before Scalia's death
- Unprecedented 6+ hr initial en banc oral argument

American Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021)

Rather than defend its interpretation as a reasonable interpretation CAA's requirement for EPA to determine the "BSER" (at Chevron Step 2), EPA argued that the statute *unambiguously* forbids EPA from considering anything other than what can be accomplished onsite within the four corners of a power plant (at Chevron Step 1).

Court holds that ACE Rule rests squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source.

Court rejects coal petitioners' claims that EPA's regulation of mercury under Section 112 bars regulation of CO2 under Section 111.

West Virginia v. EPA

- Court announces the "major questions doctrine" under which Congress is presumed not to have delegated to agencies authority to resolve "major questions."
  - In cases of political or economic significance, courts will *not* defer to an agency's interpretation that would authorize the agency to regulate in transformative ways, without a clear statement from Congress.
  - Had recently applied the cases in striking down the Center for Disease Control and Prevention's (CDC) promulgation of an eviction moratorium and staying OSHA's vaccine mandate, in both cases motivated by the pandemic. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *NFIB v. Dep't of Labor*, No. 21A244, 2022 WL 120952, at *1, *3 (U.S. Jan. 13, 2022) (per curiam), following *Utility Air Reg. Group v. EPA* (2014).
- Court grants that generation shifting as part of the "best system" was a plausible interpretation, but not a clear enough authorization from Congress.
  - *AEP v Connecticut* (2011)?
  - Court characterized the Clean Power Plan as basically a cap-and-trade system promulgated by the Administration after Congress already tried and failed to enact such a measure through Congress.

West Virginia v. EPA

- Court did not decide:
  - that EPA doesn't have the authority to regulate greenhouse gases or overturn *Massachusetts v. EPA*;
  - that the Trump Administration's view of the statute was correct – that, in setting the standard, EPA is only limited to actions that can be done at or to an individual generating unit;
  - whether the best system refers exclusively to measures that improve the pollution performance at individual sources, such that all other actions are ineligible;
  - that standard resulting in "incidental generation shifting" is prohibited.
- All the Court decided was that the way the best system was set in the Clean Power Plan and the way generation shifting figured there amounted to an arbitrary determination on the appropriate amount of coal generation, which was not rooted in any scientific basis or objective standard.

Methane: EPA Final Rule

Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review

Methane Rule: Overview

- The administration announced the final methane rule at COP28 in Dubai on December 2, 2023
  - The Section 111 rule aims to reduce methane emissions from the oil and gas industry and includes existing and new sources
  - The administration noted that the oil and gas industry is the largest industrial source of this "super pollutant," which is responsible for 1/3 of greenhouse gas warming today
- The rule complements the EPA's proposed Waste Emissions Charge (discussed below).

80%

Reduction in methane emissions under the rule, compared with future expected emissions absent the rule.

58 million

Estimated tons of methane emissions that will be prevented by the rule.

985,000

Approximate number of comments submitted in response to EPA's November 2021 Proposed Rule and its December 2022 Supplemental Proposal.

Methane Rule: Key Points

- Standards for both new and existing sources
  - Standards for methane and volatile organic compounds from new or modified oil and gas sources
  - Emissions guidelines for states to follow in creating implementation plans covering *existing* sources
    - First time methane requirements are imposed on all sources
    - States and tribes have until March 8, 2026, to submit implementation plans

- "Super Emitter" program
  - Authorizes local agencies and EPA-certified third parties to notify EPA of detected "super-emitter" events (more than 100 kilograms of methane an hour)
  - EPA notifies the operator if the report is accurate, and the operator must investigate within 5 days and submit a report to EPA within 15 days

- Addressing flaring and leaks
  - The rule phases out most routine flaring of natural gas from wells
  - Leak detection and repair requirements are imposed on facilities, including quarterly inspections at single wellhead sites, optical gas imaging inspections at multiple wellhead sites, etc.
  - The rule provides flexibility for operators to use more advanced monitoring technology with EPA approval

EPA Waste Emissions Charge

Inflation Reduction Act: CAA section 136: Facilities must pay charge for emissions above threshold:

$900 in 2024	$1,200 in 2025	$1,500 in 2026 and later years

Exemption for facilities subject to and in compliance with standards under sections 111, but only if standards in effect in *all* states and just as stringent as EPA's proposed methane rule

Waste Emissions Charge

The Inflation Reduction Act provides new authorities under the Clean Air Act to reduce methane emissions from the oil and gas sector through the creation of the Methane Emissions Reduction Program. As required by Congress, EPA has proposed to impose and collect an annual charge on methane emissions that exceed specified waste emissions thresholds from applicable oil and gas facilities.

The Waste Emissions Charge (WEC) for methane applies to petroleum and natural gas facilities that emit more than 25,000 metric tons of CO_2 equivalent per year as reported under Subpart W of the Greenhouse Gas Reporting Program, that exceed statutorily specified waste emissions thresholds set by Congress, and that are not otherwise exempt from the charge. The WEC starts at $900 per metric ton for 2024 reported methane emissions, increasing to $1,200 per metric ton for 2025 emissions, and $1,500 per metric ton for emissions years 2026 and later. The proposal would implement calculation procedures, flexibilities, and exemptions related to the WEC.

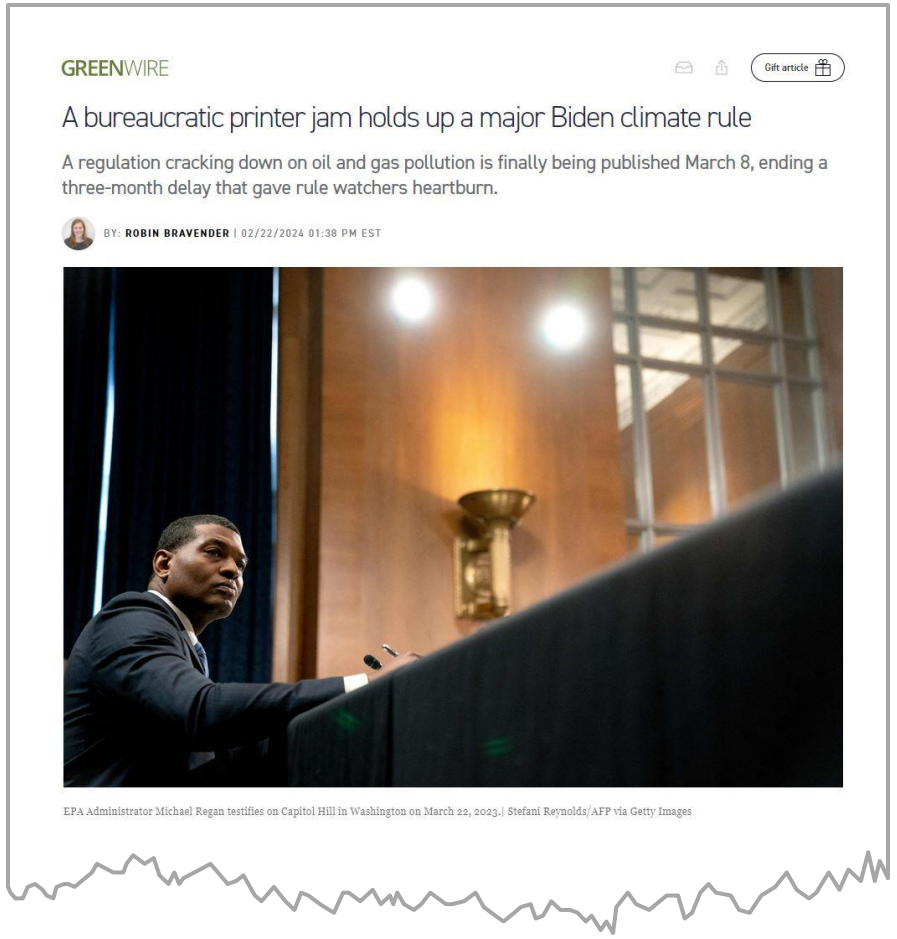
The WEC complements other efforts to measure and reduce emissions from the U.S. oil and gas sector:

Latest Announcements

- January 12, 2024 – Biden-Harris Administration Announces Proposed Rule to Reduce Wasteful Methane Emissions

Methane Rule: Legal Challenges and Delays

- The rule was published on March 8, 2024
- Texas challenged the rule in the D.C. Circuit that same day, which has been consolidated with a subsequent challenge by 24 more Republican-led states
  - Likely arguments include the major questions doctrine and violation of the states' authority
  - Coalitions of Democratic attorneys general and environmental groups have moved to intervene to defend the rule
  - No companies have moved to intervene on the side of the petitioners (so far)



GREENWIRE

Gift article

A bureaucratic printer jam holds up a major Biden climate rule

A regulation cracking down on oil and gas pollution is finally being published March 8, ending a three-month delay that gave rule watchers heartburn.

BY: ROBIN BRAVENDER | 02/22/2024 01:38 PM EST

EPA Administrator Michael Regan testifies on Capitol Hill in Washington on March 22, 2023.| Stefani Reynolds/AFP via Getty Images

EPA Final Vehicle Rule

Multi-Pollutant Emissions Standards for Model Years 2027-32 Light-Duty and Medium-Duty Vehicles

Existing Light-Duty GHG Emissions Standards

- 2021 Rule promulgated for MY 2023-2026:
  - Set a fleetwide CO2 average (g/mile) with 5%-10% annual stringency increases per year
- Penetration of EVs (including both plug-in hybrid and battery electric) projected to increase from 7% to 17% from 2023 to 2026.

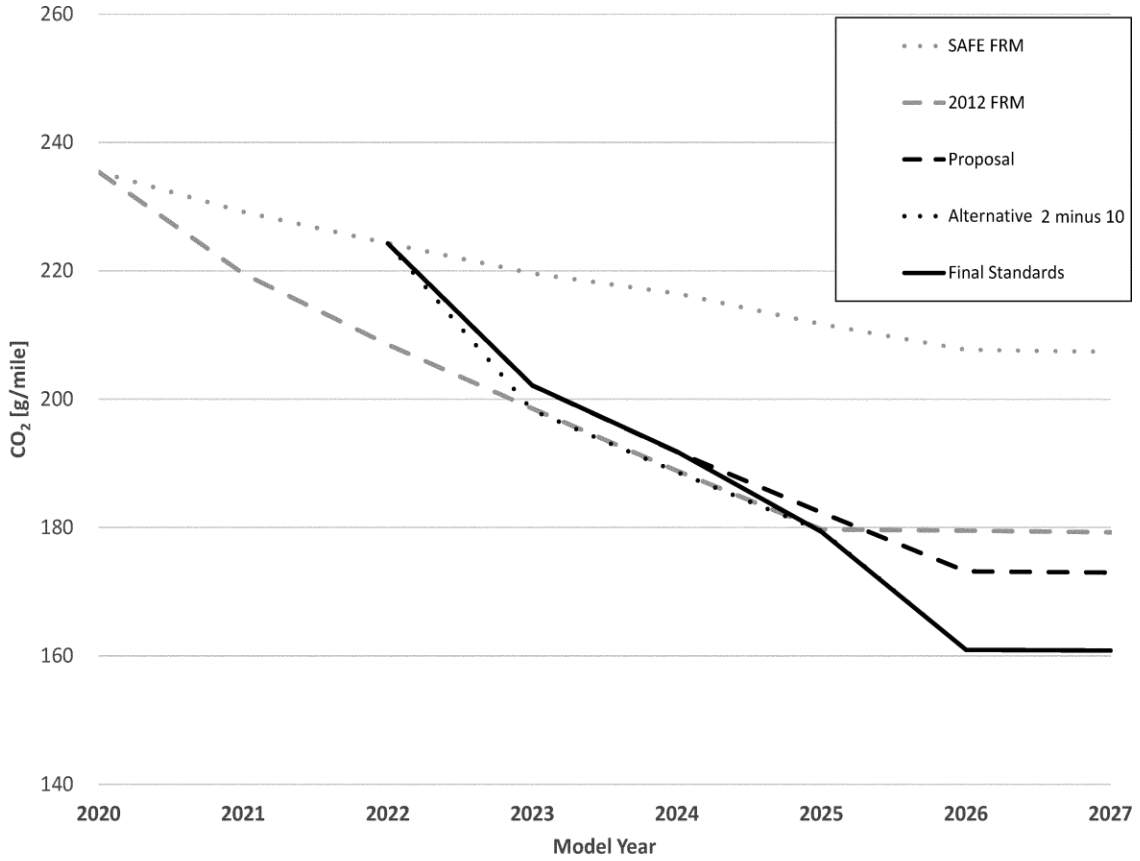


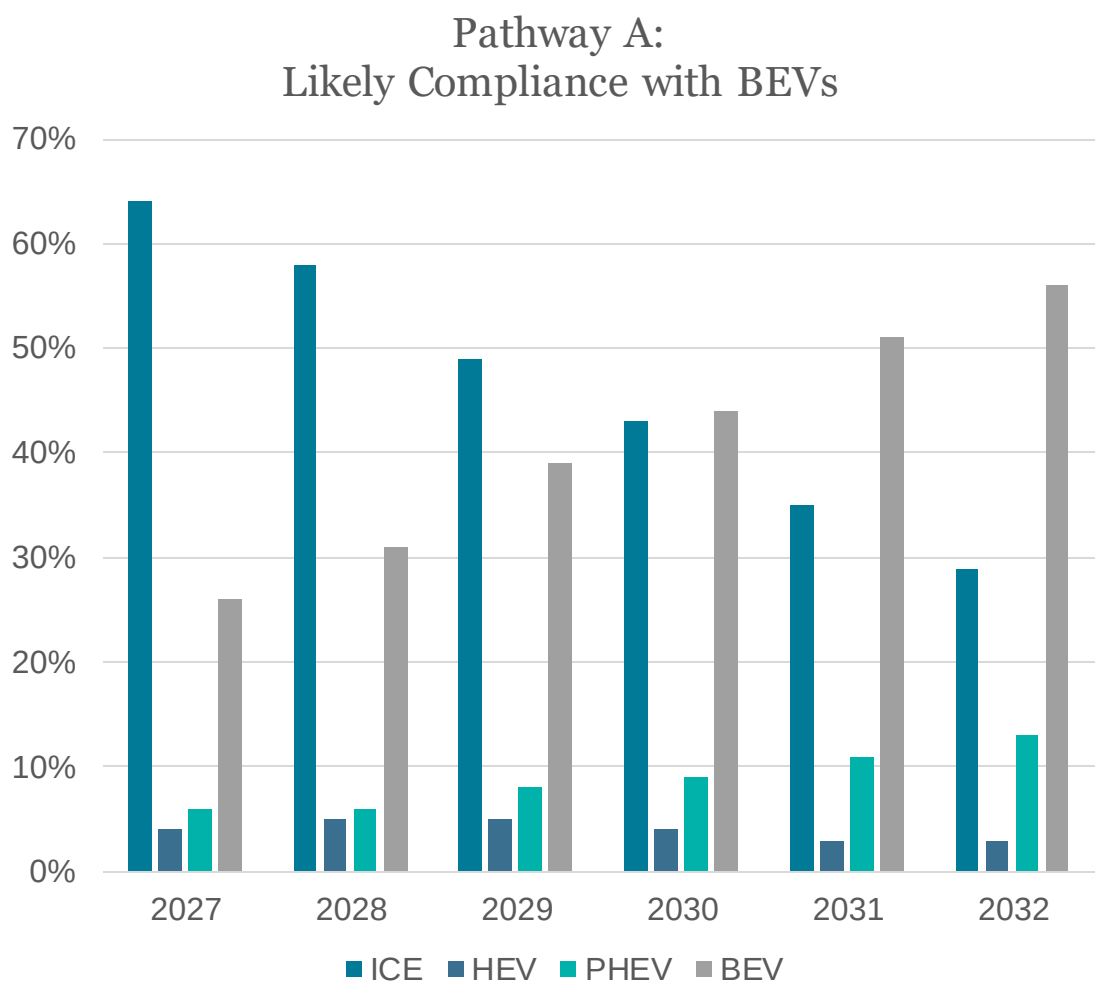
Figure 1 EPA Final Industry Fleet-Wide CO_2 Compliance Targets, Compared to 2012 and SAFE Rules, the Proposal and Alternative 2 minus 10, g/mile, MYs 2020-2026 and later

Texas v. EPA, No. 22-1031

- Republican-led states and liquid-fuel industry groups challenged the rule in the D.C. Circuit
  - Vehicle manufacturers, including the trade group Alliance for Automotive Innovation, intervened to defend the rule.
- At oral argument in September 2023, petitioners argued that the rule is a "mandate" that "forces" automakers to build more EVs because compliance is not feasible with gas-powered cars, and therefore violates the "major questions" doctrine.
  - Compare to *West Virginia v. EPA* (i.e., "forcing" generation shifting)
- The panel appeared skeptical.
  - A Trump-appointed judge suggested that the rule seemed to be a difference of "degree, not of kind" from prior vehicle rules.
  - The panel also observed that the rule did not "force" electrification; manufacturers could choose how to meet the standard, and the record indicated Subaru was going to comply exclusively with gas-powered vehicles.
- No opinion has yet issued.

Final Vehicle Emissions Rule

- Light-Duty: 85 g/mile CO2 (same stringency by 2032, but slower in the initial years)
  - Added flexibilities to address concerns in the early years of the program
  - By 2032, EPA predicts 68% EVs, relative to baseline of 47% (consisting of 55% battery electric and 13% plug-in hybrid electric)
- Medium-Duty: 274 g/mile CO2, though more gradual, increase in stringency
  - By 2032, EPA predicts 43% EVs, relative to baseline of 8% (consisting of 32% BEVs and 11% PHEVs)
- Rule also includes standards for criteria pollutants (non-methane organic gases, NOx, and PM)



Reactions

"As much as the President and EPA claim to have 'eased' their approach, nothing could be further from the truth. This regulation will make new gas-powered vehicles unavailable or prohibitively expensive for most Americans."

- *American Petroleum Institute and American Fuel & Petrochemical Manufacturers*

"The future is electric. … But pace matters. Moderating the pace of EV adoption in 2027, 2028, 2029 and 2030 was the right call because it prioritizes more reasonable electrification targets in the next few (very critical) years of the EV transition. …It buys some time for more public charging to come online, and the industrial incentives and policies of the Inflation Reduction Act to do their thing."

- *Alliance for Automotive Innovation*

Legal Challenge

- 25 Republican-led states challenged rule. *Kentucky v. EPA*, D.C. Cir. No. 24-1087
  - They will argue that the increase in stringency "forces electrification" by pushing manufacturers toward EVs (considerably more than did the 2021 rule), without clear authorization.
  - However, the final rule emphasizes that companies can choose any method of compliance (i.e., with EVs or otherwise)
    - Example: Manufacturers can comply without increasing production of battery electric vehicles (BEVs) beyond what is expected in the "No Action" scenario by increasing hybrid and plug-in hybrid production

Constitutional Rights to Climate Action/Protection and State and Local Nuisance Claims

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Juliana v. U.S., 947 F.3d 1159 (9th Cir. 2020)

- US unsuccessfully sought a writ of mandamus. *In re U.S.*, 884 F.3d 830 (9th Cir. 2018)
- SCOTUS denied US's motion for a stay of proceedings. *U.S. v. U.S. Dist. Court for Dist. of Or.*, 139 S.Ct. 1, 201 (2018).
  - Although finding stay request "premature," SCOTUS noted that the "breadth of respondents' claims is striking … and the justiciability of those claims presents substantial grounds for difference of opinion."
  - Instructed district court to take concerns into account in assessing burdens of discovery and trial and desirability of prompt ruling on dispositive motions.
- Upon considering second mandamus petition, Ninth Circuit then invited district court to certify for interlocutory appeal.
- On appeal (Jan. 2020), the Ninth Circuit ruled "reluctantly" that plaintiffs asserting due process right to a "climate system capable of sustaining human life" did not have Article III standing.
  - Declaration that US violating Constitution, "although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action."
  - Injunction against federal leasing and permitting of fossil fuels would not suffice to stop catastrophic climate change or ameliorate plaintiffs' harms.
  - Is beyond power of court to order, design, supervise and implement plaintiffs' requested remedial plan.

Juliana v. U.S. (cont'd)

Biden admin urges court to stop Juliana lawsuit from moving to trial

Attorneys for young climate activists accused the Justice Department of using the "shadowy maneuvers of the Trump administration" in a bid to halt the case.

BY: **PAMELA KING** | 01/22/2024 06:43 AM EST

Kelsey Juliana, the lead challenger in *Juliana v. United States*, at a rally in 2019.| Steve Dipaola/AP

CLIMATEWIRE | The Biden administration is making the case that the federal courts need to quash a long-running youth climate case against the U.S. government once and for all.

- On remand, US moved to dismiss and, on December 29, 2023, District Court granted in part and denied in part, holding that 9th Circuit only held that Article III prohibited award of injunctive, but not declaratory relief.
  - Also denied US request for interlocutory appeal.
- On February 5, 2024, US sought mandamus in 9th Circuit.

"Without waiting for the District Court to rule, the DOJ then filed both another stay and a petition for a writ of mandamus with the 9th Circuit, to prevent evidence from being heard in the case," the Our Children's Trust statement says.

Olson called the legal tactics "an unprecedented and multi-pronged attack to end a case the DOJ fears it will lose at trial. . . . The Juliana youth are being singled out and targeted with unheard-of practices by the incredible power of the Justice Department. Every court to review their case has said that the lives of young people are at stake, the survival of the nation is at stake, and there is merit to their constitutional claims."

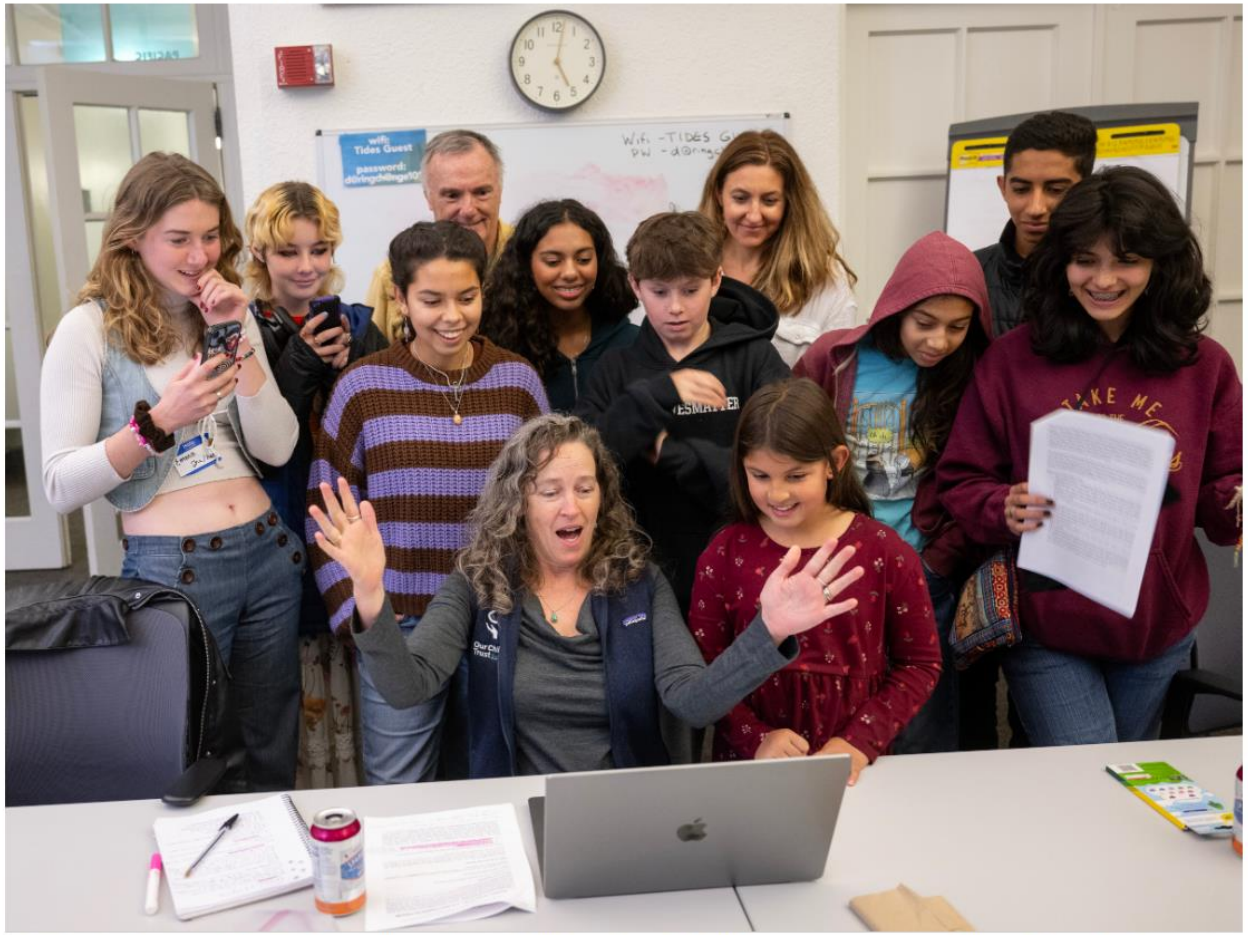
"For an administration that claims to stand for transparency, the rule of law, a safe climate, and protection for children, its attorneys at DOJ appear poised to continue the shadowy maneuvers of the Trump administration," Olson said in a Jan. 12 statement.

She later added: "It's been over eight years for the Juliana youth, and it's beyond time Biden puts an end to this obstruction of justice."

"All they seek after trial is a declaratory judgment of their rights and the government's wrongs, just as the students in Brown v. Board of Education did 70 years ago. But their government wants to hide the truth of the incriminating evidence from being presented at trial, circumvent the ordinary appellate process that would normally follow and would correct any mistakes by the lower courts, and wants at all costs to avoid a declaratory judgment that the defendants might have acted, and might still be acting, unconstitutionally."

Genesis B. v. EPA, C.D. Cal. No. 2:23-cv-10345

'Progress is going to happen'



Our Children's Trust founder Julia Olson (foreground) files the Genesis B. v. EPA lawsuit Dec. 10, flanked by the young climate activists behind the case. Attorneys Phil Gregory and Andrea Rodgers look on from the back row. | Robin Loznak/Courtesy of Our Children's Trust

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GENESIS B., a minor, by and through her Guardian G.P.; **MAYA W.**, a minor, by and through her Guardian R.W.; **MARYAM A.**, a minor, by and through her Guardian M.T.; **ZUBAYR**	**Case No.: 2:23-CV-10345** **COMPLAINT FOR DECLARATORY RELIEF AND**

COMPLAINT FOR DECLARATORY RELIEF

Held v. Montana

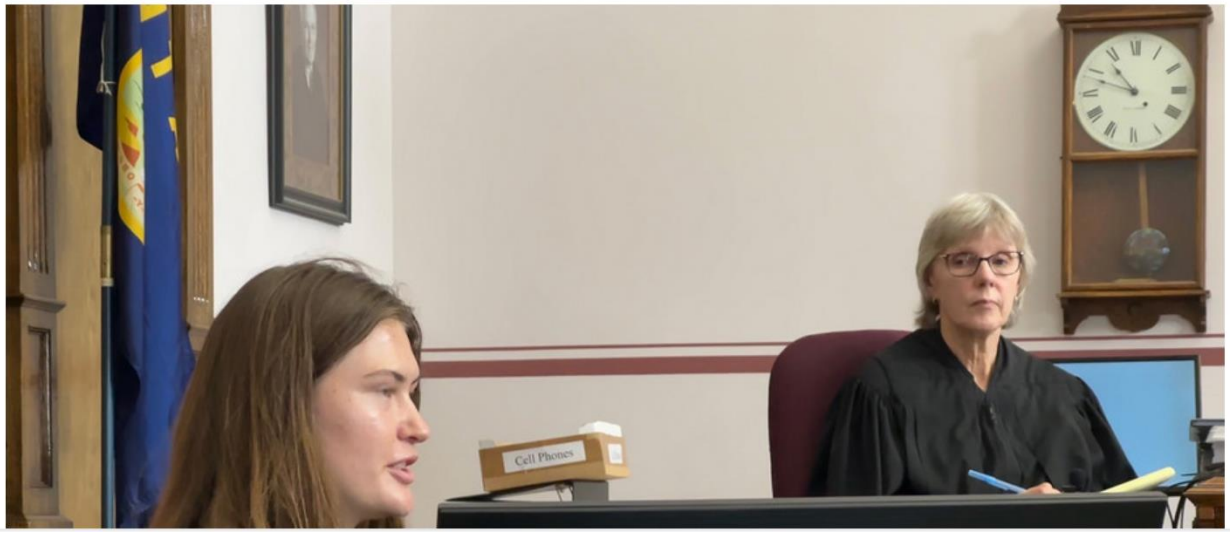
- Challenges:
  - Constitutionality of fossil fuel-based provisions of Montana's State Energy Policy Act;
  - Montana Environmental Policy Act (MEPA) limitation on considering impacts of GHG emissions or climate change in environmental reviews; and
  - Aggregate acts state has taken to implement and perpetuate a fossil fuel-based energy system pursuant to these two provisions.
- Seeking:
  - Declaratory, injunctive relief and attorneys' fees.
- "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."

Appeal of *Held v. Montana*

Montana appeals climate loss to state Supreme Court

The state accused a Montana judge of "disturbing failure" in her historic ruling siding with young climate activists.

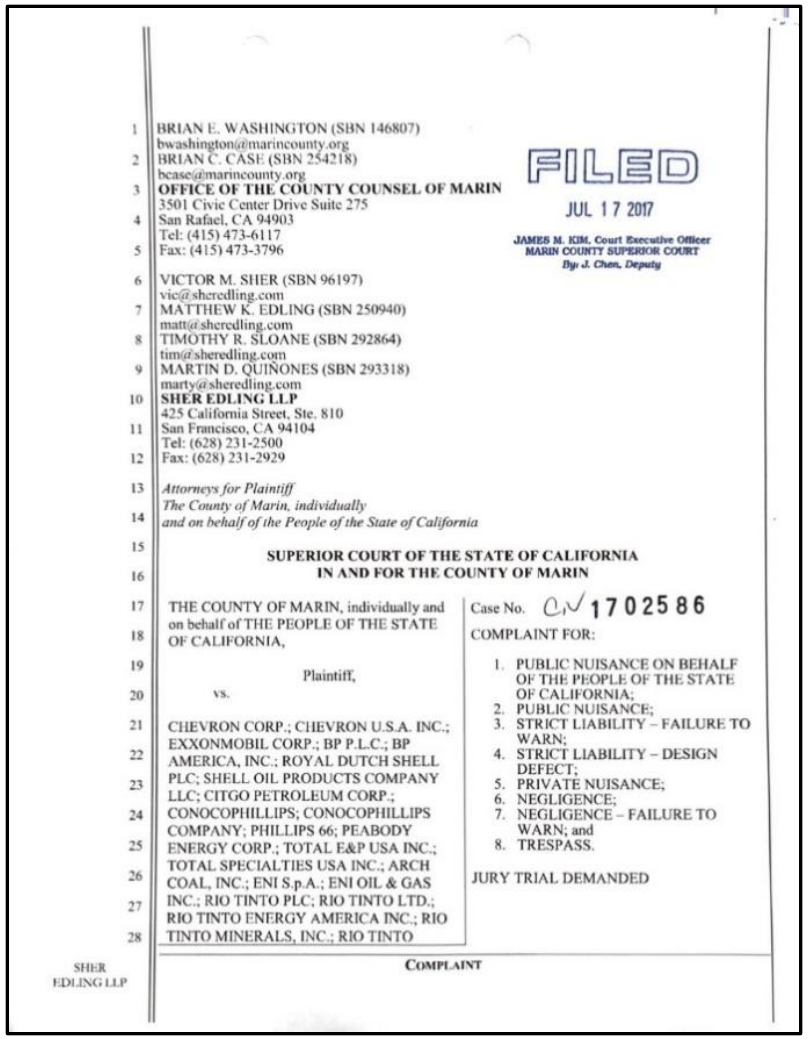
BY: **LESLEY CLARK** | 02/15/2024 06:48 AM EST



STATEMENT OF ISSUES

1. Did the District Court fail to adequately consider threshold jurisdictional safeguards so that it could reach and decide nonjusticiable claims?
2. Did the District Court Apply Montana's Constitutional Environmental Provisions Contrary to This Court's Precedent and the Intentions of the Framers?
3. Was the District Court's denial of Defendants' request for an independent medical evaluation of Plaintiffs reversible error, in light of the pervasive role Plaintiffs' mental health played in the District Court's ruling on injury, standing, and justiciability?

Municipal, State Suits Against Fossil Fuel Producers



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and on behalf of the People of the State of California

FILED
JUL 17 2017
JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN

THE COUNTY OF MARIN, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXONMOBIL CORP.; BP P.L.C.; BP AMERICA, INC.; ROYAL DUTCH SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PEABODY ENERGY CORP.; TOTAL E&P USA INC.; TOTAL SPECIALTIES USA INC.; ARCH COAL, INC.; ENI S.p.A.; ENI OIL & GAS INC.; RIO TINTO PLC; RIO TINTO LTD.; RIO TINTO ENERGY AMERICA INC.; RIO TINTO MINERALS, INC.; RIO TINTO

Case No. CV 17 02586

COMPLAINT FOR:

1. PUBLIC NUISANCE ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA;
2. PUBLIC NUISANCE;
3. STRICT LIABILITY – FAILURE TO WARN;
4. STRICT LIABILITY – DESIGN DEFECT;
5. PRIVATE NUISANCE;
6. NEGLIGENCE;
7. NEGLIGENCE – FAILURE TO WARN; and
8. TRESPASS.

JURY TRIAL DEMANDED

COMPLAINT

SHER EDLING LLP

- Municipal public nuisance actions
- Conduct was wrongful, malicious and fraudulent
  - Strict liability: failure to warn and design defect
  - Private nuisance; negligence: breach of duty of care and failure to warn
  - Trespass

Courts have uniformly held that common law claims against fossil fuel actors are properly litigated in state court

- **Widespread :** since 2016, local and state governments have brought common law claims against fossil fuel actors in state courts in California, Colorado, Delaware, Hawaii, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, South Carolina, and Washington
  - Sher Edling LLP has brought many of these suits—the firm reports representing twenty governments in these matters
- **Claims:** these suits seeks to hold fossil fuel actors liable for contributing to climate change, under theories such as public nuisance, negligence, trespass, and failure to warn
  - Plaintiffs seek injunctive relief (e.g., abatement of the "public nuisance"), compensatory damages, and punitive damages
- **Removal:** the defendants have removed these cases to federal court, both as a delay tactic and because they view federal forums as more friendly for numerous reasons, including jury-selection practices and a potential appetite among federal judges to reject state common law claims as preempted by federal laws, such as the Clean Air Act
- **Remand:** the plaintiffs have moved for federal courts to remand these cases to state forums, arguing that there is no jurisdictional basis upon which federal courts can hear these cases at this juncture
- **Results:** the plaintiffs have been largely successful—the Courts of Appeals for the First, Third, Fourth, Eighth, Ninth, and Tenth Circuit have all granted remands, and the Supreme Court has largely allowed these decisions to stand
  - Of note, Justice Kavanaugh recently dissented from the denial of certiorari in one case (*American Petroleum Institute v. Minnesota*)

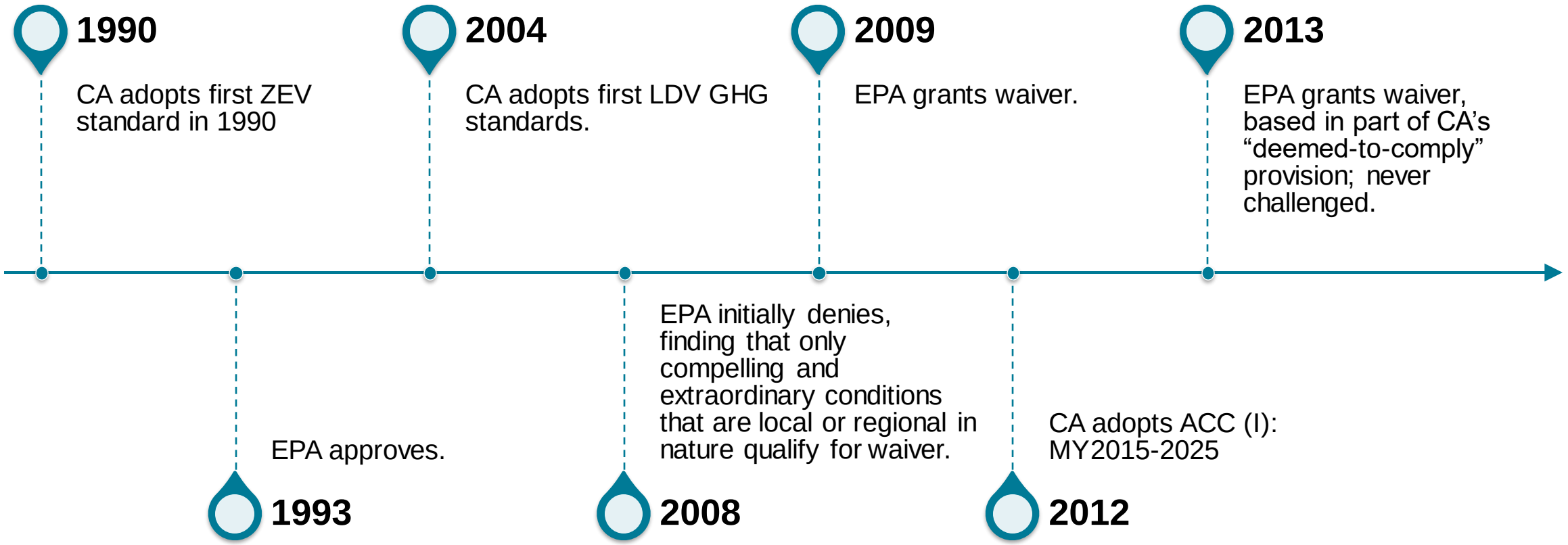
- Eight cases brought by California municipalities, and one brought by the state itself, are now proceeding in state court and are currently subject to a coordination motion, through which a judge will determine whether the cases should proceed together or separately
  - These cases—brought on behalf of the people of the most populous state and proceeding in a liberal state court system—could dominate headlines in the years to come, especially if they ultimately proceed together
- While most of these cases are only now proceeding to the merits, *City of New York v. BP p.l.c.*—which was filed in federal court rather than state court—saw the S.D.N.Y. and the Second Circuit conclude that the Clean Air Act preempted the city's common law claims

Constitutional Limitations on State and Local Climate Action

COVINGTON

BEIJING BOSTON BRUSSELS DUBAI FRANKFURT
JOHANNESBURG LONDON LOS ANGELES NEW YORK
PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

California ZEV/GHG Regulation



SAFE Vehicles Rule Part One

- SAFE Rule Part One (2019)
  - NHTSA reinterprets the act it applies, EPCA, to preempt state GHG and ZEV standards.
    - Sharp reversal of decades of past EPA precedent, as well as directly on point federal case law, to the contrary..
  - EPA revokes California's "waiver" to directly regulate vehicle GHG emissions under the Clean Air Act
    - Because conflicts with NHTSA's new preemption rule.
    - Because ambiguity in whether CA needs "such State standards to meet compelling and extraordinary condition" should require assessment of standards for which waiver sought, not overall CA program.
  - Other states also barred from adopting/maintaining CA standards.

Ohio v. EPA, D.C. Cir. No. 22-1081

- EPA reconsiders California waiver, 87 Fed. Reg. 14332 (Mar. 14, 2022)
  - Inappropriate to reconsider settled adjudication
  - Flawed interpretation; half-century of considering California waiver requests in the aggregate (whole program)
  - Misapplication of facts; failed to prove that CA does not need its GHG and ZEV standards to meet compelling and extraordinary circumstances
  - Erroneous consideration of EPCA preemption

Ohio v. EPA, D.C. Cir. No. 22-1081

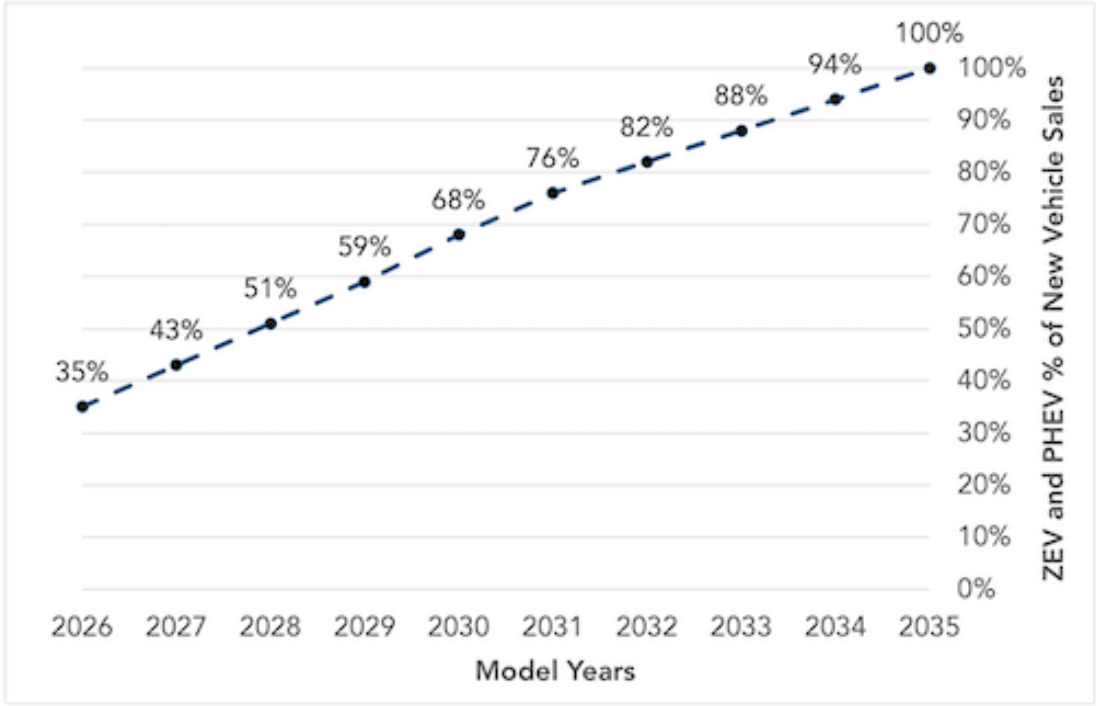
- Equal Sovereignty
  - Alleged new constitutional limit on Commerce Clause power not supporting by Constitution or precedent
  - Congress, in CAA, exercising quintessential federal power to regulate interstate commerce, even more forceful where pollution crosses state borders. *See EPA v. EME Homer City Generation, L.P.*, 572 US. 489, 496 (2014).
  - *Shelby County* about disfavored treatment, rather than enhancement of state authority.
    - Section 177 increases regulatory options for all states.

Ohio v. EPA, D.C. Cir. No. 22-1081

- April 9, 2024: D.C. Circuit denies petitions for review:
  - Both the fuel petitioners and the states lack standing to bring most of their claims because they fail to show a substantial probability that a decision in their favor (vacating the waiver) would redress their alleged injuries.
  - As to the state's alleged constitutional injury – premised on the equal sovereignty doctrine – the Court dismisses that on the merits.
  - Court positions its decision as following two other circuits that considered similar efforts to extend the equal sovereignty doctrine, limiting it where Congress was acting pursuant to its Commerce Clause powers, rather than the Fifteenth Amendment and where the intrusion is not into a traditional area of state and local policymaking (as laws pertaining to elections are).

Advanced Clean Cars II

- Amends the ZEV regulations to require an increasing number of zero-emission vehicles, and relies on currently available advanced vehicle technologies, including battery-electric, hydrogen fuel cell electric and plug-in hybrid electric-vehicles, to meet air quality and climate change emissions standards, per 2020 Executive Order N-79-20 that requires all new passenger vehicles sold in California to be zero emissions by 2035.



Rocky Mountain Farms Union

- Dormant Commerce Clause
  - "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." Art. 1 § 8, cl. 3.
  - Balancing Framers' distrust of economic balkanization, with their federalism favoring local autonomy.
  - Targets economic protectionism:
    - If statute discriminates against out-of-state interests on its face, in its purpose or in its practical effect, it is unconstitutional unless it serves legitimate local purpose that could not be served by nondiscriminatory means.
    - Absent discrimination, law upheld unless burden on commerce is clearly excessive in relation to putative local benefits. "*Pike* balancing"

Rocky Mountain Farmers Union

District Court found LCFS facially discriminated against out-of-state corn ethanol by differentiating between ethanol pathways based on origin and based on factors in CA-GREET inextricably intertwined with origin.

Excluded consideration of Brazilian sugarcane ethanol

Considered pathways equivalent if they used same feedstock and production process

9th Circuit found that fuels' disparate treatment not based on origin, but carbon intensity.

Only considered origin to extent it affects actual GHG emissions; non-discriminatory reason for higher carbon intensity

National Pork Producers

State law violates dormant CC when it flouts basic "antidiscrimination principle" among states.

Economic protectionism

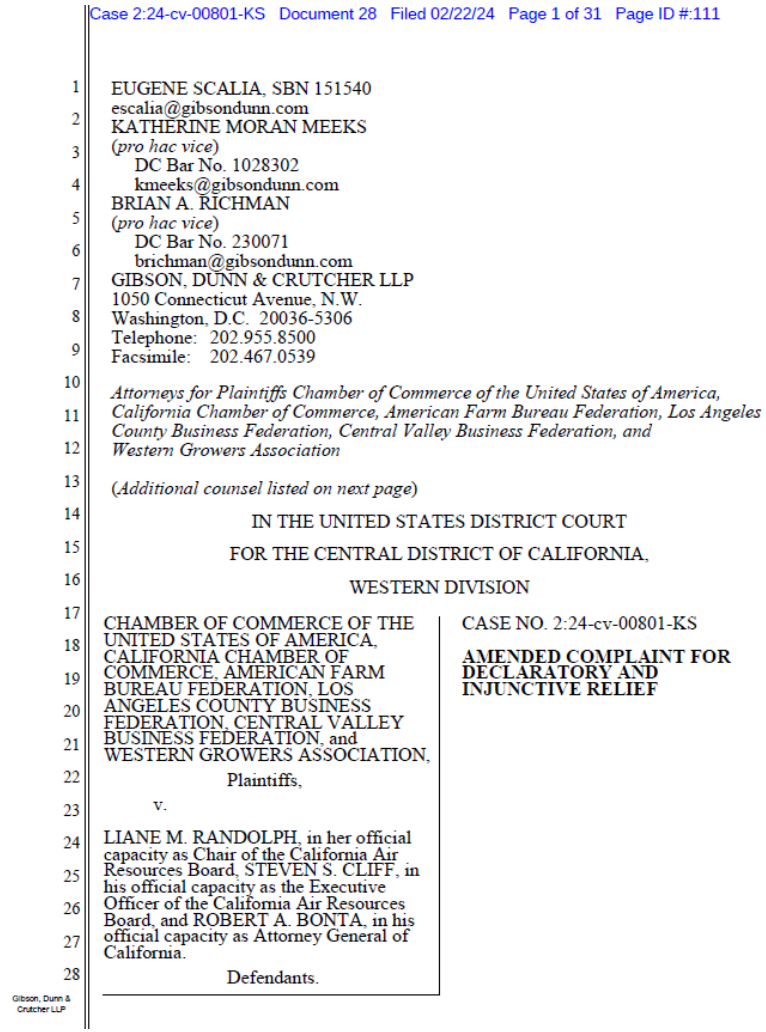
State law does not violate dormant CC *just* because it has "extraterritorial effects," i.e., "practical effect of controlling commerce outside the State."

An almost *per se* rule would invalidate nearly all state laws.

Law that imposes substantial burdens on interstate commerce can be invalidated if the burdens are clearly excessive in relation to putative local benefits.

"When there's smoke, there's fire:" pretextual discrimination

Chamber of Commerce Lawsuit Against SB 253/SB 261



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(*Additional counsel listed on next page*)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA,

WESTERN DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AMERICAN FARM BUREAU FEDERATION, LOS ANGELES COUNTY BUSINESS FEDERATION, CENTRAL VALLEY BUSINESS FEDERATION, and WESTERN GROWERS ASSOCIATION,

Plaintiffs,

v.

LIANE M. RANDOLPH, in her official capacity as Chair of the California Air Resources Board, STEVEN S. CLIFF, in his official capacity as the Executive Officer of the California Air Resources Board, and ROBERT A. BONTA, in his official capacity as Attorney General of California.

Defendants.

CASE NO. 2:24-cv-00801-KS

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Gibson, Dunn & Crutcher LLP

Four Claims for Relief:

- First Amendment
- Supremacy Clause
- Extraterritorial Regulation
- Attorneys' Fees

Justiciability Concerns?

Chamber of Commerce Claims Against SB 253/261

First Amendment

- The core claim is that SB 253 and SB 261 "compel speech" in violation of the First Amendment.
- First Amendment review is relaxed as long as compelled speech is "factual" and "noncontroversial," so the plaintiffs argue that (1) statements about emissions and climate-related risk are "speculative," "controversial," and "politically-charged," and (2) they fail the applicable heightened review.
- This argument is colorable, and at least some judges in the Ninth Circuit might agree.

Supremacy Clause

- The second claim is that California law is preempted by federal law.
- But plaintiffs cannot point to any relevant federal law or regulation on climate disclosure, instead referring vaguely to the Clean Air Act and "principles of federalism inherent" in the Constitution.
- This claim is very weak and unlikely to succeed.

Extraterritorial Regulation

- The third claim is that the laws force out-of-state companies to conform their conduct to California's preferences, thus unconstitutionally burdening interstate commerce.
- However, last term, the Supreme Court upheld a California law that forbade pork sold in the state to be derived from breeding pigs confined in a crowded manner (even though it pushed out-of-state producers to conform their conduct to California's preferences).
- This claim is weaker than that in *National Pork Producers* and is unlikely to succeed.