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COMMENTS

CLIMATE CHANGE DISINFORMATION LIABILITY UNDER THE FEDERAL TRADE COMMISSION ACT

by Aspen Ono

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Human behaviors and actions are causing dramatic climate change and widespread biodiversity loss, jeopardizing existing ecosystem dynamics and threatening the well-being of current and future generations.[1] A global sustainability transition comprising transformative economic, social, political, and technological changes is necessary to combat current negative trends in climate, biodiversity, and ecosystem health.[2] Such a transition requires widespread individual and collective buy-in and action for transformative structural change.

But conflicting information on climate change has contributed to the American public's and policymakers' delayed and erratic development of necessary large-scale emissions mitigation and adaptation programs.[3] The spread of disinformation campaigns is only exacerbated by the rise of digital communication and social media, which enable the rapid dispersal of false information.[4] Some of the loudest voices transmitting climate change disinformation have been and continue to be large oil corporations and conglomerates, who financially benefit from climate inaction and the continued dependence on fossil fuel products.

Oil companies and their agents have been actively involved in creating and propagating climate change disinformation for the past half-century. In response to this deception, more than two dozen American states and cities have sued these companies under traditional tort-based causes of action like public nuisance, fraud, negligence, and failure to warn.[5] They allege that the companies fueled uncertainty about climate science and undercut public support for necessary climate action. Plaintiffs in these suits often struggle to establish a legal causal chain linking fossil fuel companies' deceptive communications to incurred climate-related injuries. Thus, traditional tort-based suits may fail to provide sufficient legal pressure to dissuade oil companies from spreading misinformation that questions legitimate climate science and undercuts the need for fossil fuel regulation.

Section 5 of the Federal Trade Commission Act (FTCA), and similar business and consumer fraud statutes, might provide an alternative approach to penalizing commercial climate change deception and holding corporations accountable for their dissemination of climate disinformation. Among other things, the FTCA empowers the Federal Trade Commission (FTC) to prevent and seek redress for deceptive acts or practices in or affecting commerce.[6] The Act has been used to penalize oil companies, heat alarm manufacturers, and tobacco wholesalers for advertisements, telemarketing calls, direct solicitations, and other communications that were likely to mislead consumers acting reasonably under the present circumstances.[7]

This Comment argues that the FTC could use its authority under §5 of the FTCA as a federal tool to prohibit, discipline, and seek redress for corporate climate disinformation campaigns, as a means to hold those actors responsible for obstructing advancement of the necessary large-scale behavior change needed to mitigate the climate crisis.

1. Sandra Díaz et al., *Pervasive Human-Driven Decline of Life on Earth Points to the Need for Transformative Change*, 366 Science eaax3100 (2019); Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (Sandra Díaz et al. eds., 2019).
2. Díaz et al., *supra* note 1; IPBES, *supra* note 1.
3. National Academies of Sciences, Engineering, and Medicine, Climate Intervention: Reflecting Sunlight to Cool Earth (2016).
4. Danielle Caled & Mario J. Silva, *Digital Media and Misinformation: An Outlook on Multidisciplinary Strategies Against Manipulation*, 5 J. Computational Soc. Sci. 123 (2022). *See also* News Release, Friends of the Earth, Report Reveals YouTube Sows Division, Violates Google's Climate Disinformation Ad Policy (May 2, 2023), https://foe.org/news/youtube-denial-dollars/ (noting that despite major media company Google's pledge to stop disseminating climate disinformation, a 2023 report from the Climate Action Against Disinformation coalition determined that Google has systematically failed to enforce its policy).
5. It should be acknowledged that many of these states, cities, and localities have also advanced consumer protection claims in these lawsuits.
6. FTCA, 15 U.S.C. §§41-58 (1914).
7. Federal Trade Comm'n v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993); Standard Oil Co. of Cal. v. Federal Trade Comm'n, 577 F.2d 653 (9th Cir. 1978); Federal Trade Comm'n v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).

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I. The Fossil Fuel Industry's Deceptive Public Communications

In the 1980s, ExxonMobil developed a public reputation as a leader in climate research.[8] Around the same time, public discourse on climate change was beginning to grow. Notably, in the summer of 1988, National Aeronautics and Space Administration (NASA) climate scientist James Hansen warned the U.S. Congress of the relationship between greenhouse gas (GHG) emissions and the threat of global warming to the planet.[9]

Four years later, governments around the world formally acknowledged the threat of climate change through the United Nations Framework Convention on Climate Change, which was signed by 154 nations including the United States, with the purpose of combating the "dangerous human interference with the climate system."[10] Fossil fuel companies began to view the growing public awareness of the connection between oil, GHG emissions, global warming, and adverse climate change as a threat to their economic viability. By the end of the decade, ExxonMobil and other oil corporations changed their tune and began to attack rather than lead the field in climate science research.

At a 1989 board of directors meeting, ExxonMobil's manager of science and strategy development, Duane LeVine, acknowledged that fossil fuel-generated GHG emissions would lead to global warming that would cause significant adverse harms such as sea-level rise.[11] In spite of this knowledge, LeVine stressed that if this information was disclosed to public policymakers, the company would likely face irreversible and draconian regulation that threatened its profits.[12] Similarly, in its internal 1989 company newsletter, ExxonMobil's in-house climate expert, Brian Flannery, highlighted that regulatory efforts to mitigate climate change would "alter profoundly the strategic direction of the energy industry."[13]

ExxonMobil thus began spending millions of dollars on misinformation campaigns featuring prominent advertisements in major U.S. news sources questioning the scientific certainty of climate science.[14] LeVine, in tandem with ExxonMobil's public affairs manager, established that the company's new position was to "[e]mphasize the uncertainty in scientific conclusions regarding the potential enhanced greenhouse effect," and to stress that it was thus too early to take regulatory actions to address climate change.[15] ExxonMobil's purposeful deception continued over the coming decades. As recently as 2019, internal documents were recovered demonstrating that ExxonMobil pressured the Oil and Gas Climate Initiative to eliminate language advocating for the advancement of climate change mitigation goals under the 2015 Paris Agreement from the industry group's annual policy statement.[16] Notably, one study of 187 of ExxonMobil's communications from 1977 to 2014 found that while 80% of its internal papers recognized the reality of anthropogenic climate change, 81% of its publicly accessible documents disparaged the same scientific conclusions.[17]

ExxonMobil was not alone in its deception. In 2015, journalists at the Columbia University School of Journalism and the *Los Angeles Times* concurrently published independent investigations revealing major fossil fuel companies' knowing and purposeful concealment and disparagement of climate science as a means to preserve the value of the oil industry.[18] Fossil fuel executives continue to belittle climate change risks and only to make weak commitments to a clean energy transition. Thus, in September 2021, the U.S. House of Representatives Committee on Oversight and Reform (House Committee) launched a federal investigation into the fossil fuel industry's dissemination of climate disinformation.[19]

Rep. Ro Khanna (D-Cal.), who spearheaded the House Committee's investigation, stated that "[i]t's well established that these companies actively misled the American public for decades about the risks of climate change," and "[t]he problem is that they continue to mislead."[20] Through the investigation, the House Committee subpoenaed multiple fossil fuel companies and organizations, including Shell, ExxonMobil, BP, Chevron, and the American Petroleum Institute. These organizations have yet to substantially fulfill the House Committee's document requests.[21] Instead, they have responded by highlighting their acknowledgment of their emissions contributions and their public support and promotion of clean energy development.[22] However, internal documents gathered by the House Committee

8. Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic,* L.A. Times (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/.
9. Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate,* N.Y. Times, June 24, 1988, at A1 (stating that "Dr. James E. Hansen of the National Aeronautics and Space Administration told a Congressional committee that it was 99 percent certain that the warming trend was not a natural variation but was caused by a buildup of carbon dioxide and other artificial gases in the atmosphere.").
10. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Jerving et al., *supra* note 8.
16. Hiroko Tabuchi, *Oil Executives Privately Contradicted Public Statements on Climate, Files Show*, N.Y. Times (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/climate/oil-industry-documents-disinformation.html.
17. Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977-2014)*, 12 Env't Rsch. Letters 084019 (2017).
18. Jerving et al., *supra* note 8; Supran & Oreskes, *supra* note 17. *See also* James Hogan & Richard Littlemore, Climate Cover-Up: The Crusade to Deny Global Warming (1st ed. 2009); Naomi Oreskes & Erik M. Conway, Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming (2010).
19. Press Release, House Committee on Oversight and Accountability, Oversight Committee Launches Investigation of Fossil Fuel Industry Disinformation on Climate Crisis (Sept. 16, 2021), https://oversightdemocrats.house.gov/news/press-releases/oversight-committee-launches-investigation-of-fossil-fuel-industry.
20. *Id.*
21. *Id.*
22. Hiroko Tabuchi & Lisa Friedman, *Oil Executives Grilled Over Industry's Role in Climate Disinformation*, N.Y. Times (Nov. 9, 2021), https://www.nytimes.com/2021/10/28/climate/oil-executives-house-disinformation-testimony.html.

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demonstrate that the fossil fuel companies' in-house discussions contradict their public marketing campaigns and sustainability statements.[23]

Internal documents retrieved by the House Committee included:

1. 2019 notes from a BP chairman's report discussing shareholder resolutions related to climate change initiatives, stating, "We continue to balk at taking accountability for the emissions of our products";

2. Chevron Chief Executive Officer Mike Wirth's strategy slide presented to the company's board of directors, stating that "Chevron's strategy" is to take advantage of the oil industry consolidation by "continu[ing] to invest" in fossil fuels;

3. The American Petroleum Institute's 2021 Climate Action Framework, which had the core purpose of "the continued promotion of natural gas in a carbon constrained economy"; and

4. A Shell executive's private admission that the company used divestment as a mechanism to transfer carbon dioxide responsibility and liability onto third parties.[24]

From those documents, the House Committee concluded:

> [T]he fossil fuel industry "greenwashed" its public image with promises and actions that oil and gas executives knew would not meaningfully reduce emissions, even as the industry moved aggressively to lock in continued fossil fuel production for decades to come—actions that could doom global efforts to prevent catastrophic climate change.[25]

Republicans took control of the House following the 2022 mid-term elections.[26] As such, political experts estimate, and appear to be correct, that under GOP control there is unlikely to be legislative action responding to the House Committee's notable findings.[27] Nevertheless, the valuable evidence uncovered by the House Committee still has evidentiary value that could be used to hold fossil fuel companies legally accountable for their engagement in climate misinformation. Plaintiffs have recognized this value and have thus filed multiple climate disinformation litigation suits in courts across the country.

Since 2017, climate accountability lawsuits have been filed against fossil fuel companies by more than 20 municipalities, seven states, the District of Columbia, and one trade association.[28] For example, in October 2022, New Jersey brought a torts suit against oil companies and think-tanks, including ExxonMobil, Chevron, BP, and the American Petroleum Institute.[29] The state argued that the corporate defendants continuously concealed known hazards associated with their products, engaged in public deception campaigns designed to conceal the relationship between fossil fuel products and climate change, and thus substantially contributed to injuries incurred by New Jerseyans.[30]

It is notable that much of the climate disinformation litigation is being pursued at the state and local levels. In April 2023, the U.S. Supreme Court denied certiorari to oil company appeals from five cases brought by municipalities and cities in California, Colorado, Hawaii, Maryland, and Rhode Island, despite appellant claims that the transboundary nature of GHG emissions necessitated the application of federal law and the exercise of federal jurisdiction.[31] The Court declined to entertain the argument that these lawsuits must be carried out in federal rather than state courts.

Many climate activists and plaintiffs alike celebrated this outcome, proclaiming that they had a better chance of prevailing in climate deception litigation and that such victories would directly remedy local injuries and damages.[32] While this has given states and municipalities access to courts to pursue legal claims for the local damages they

23. Press Release, House Committee on Oversight and Accountability, *supra* note 19.
24. Memorandum from Chairwoman Carolyn B. Maloney & Chairman Ro Khanna, House Committee on Oversight and Reform, to Members of the Committee on Oversight and Reform, Re: Investigation of Fossil Fuel Industry Disinformation 2-3 (Dec. 9, 2022), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-12-09.CORSupplementalMemo-FossilFuelIndustryDisinformation.pdf.
25. *Id.*
26. *Balance of Power: Republican Majority in the House*, Bloomberg Gov't (Dec. 7, 2022), https://about.bgov.com/brief/balance-of-power-republican-majority-in-the-house/.
27. Ben Lefebvre & Zack Colman, *House Oversight Committee Accuses Oil Companies of "Lying" About Climate Actions*, Politico (Dec. 9, 2022, 11:25 AM), https://www.politico.com/news/2022/12/09/oversight-memo-oil-companies-climate-impact-00073248.
28. Center for Climate Integrity, *Climate Accountability Lawsuits*, https://climateintegrity.org/cases (last visited Oct. 23, 2023).
29. Complaint at 12, Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Law Div. Oct. 18, 2022).
30. *Id.*
31. Suncor Energy, Inc. v. Board of Cnty. Comm'rs of Boulder Cnty., 143 S. Ct. 1795 (2023), *cert. denied*; BP P.L.C. v. Mayor & City Council of Balt., 143 S. Ct. 1795 (2023), *cert. denied*; Chevron Corp. v. San Mateo County, Cal., 143 S. Ct. 1797 (2023), *cert. denied*; Sunoco LP v. Honolulu, Haw., 143 S. Ct. 1795 (2023), *cert. denied*; Shell Oil Prods. Co. v. Rhode Island, 143 S. Ct. 1796 (2023), *cert. denied*.
32. *See, e.g.*, Lawrence Hurley, *Supreme Court Deals Blow to Oil Companies by Turning Away Climate Cases*, NBC News (Apr. 24, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-oil-companies-appeals-climate-change-disputes-rcna49823# (Richard Wiles, president of the Center for Climate Integrity, stating that "Big Oil companies have been desperate to avoid trials in state courts, where they will be forced to defend their climate lies in front of juries, and today the Supreme Court declined to bail them out."). *See also* Press Release, Office of Rhode Island Attorney General Peter F. Neronha, U.S. Supreme Court Clears the Way for Rhode Island's Climate Lawsuit to Proceed in State Court (Apr. 24, 2023), https://riag.ri.gov/press-releases/us-supreme-court-clears-way-rhode-islands-climate-lawsuit-proceed-state-court (Rhode Island Attorney General Peter F. Neronha stating,

> Today's decision marks an important milestone in the proceedings as the Court has again rejected an attempt by major fossil fuel company defendants to move the case to federal court and instead kept the case in state court, where it rightly belongs. After decades of climate change deception by the fossil fuel defendants, and now nearly half a decade of delay tactics in our lawsuit to hold them accountable for it, our residents, workers, businesses, and taxpayers are ready for their day in court. Now that the Supreme Court has affirmed the decisions of dozens of federal judges across the country, it is time to prepare for trial.

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have borne due to climate change, identifying and charging oil giants for their deceptive acts at a federal scale is still beneficial in mounting a multidirectional offensive against widespread national deceptive climate change messaging.

There is variation in the legal theories applied across these climate disinformation suits, but the factual allegations presented in the plaintiffs' complaints share many similarities. Common arguments are that (1) defendant fossil fuel corporations knew of the link between their products and adverse climate change; (2) they actively obscured and/or failed to disclose such knowledge; (3) defendants' internal communications demonstrated their awareness of potential harms and their intent to profit from the unrestricted use of petroleum products; (4) their actions exacerbated the costs of climate mitigation and adaptation; and (5) defendants continue to engage in deceptive and misleading greenwashing campaigns that undermine climate action.[33] Plaintiffs generally conclude by alleging that defendants' actions have led to their suffering of climate-related damages.

One example of these cases is the 2023 action brought by the state of California in the state superior court for the County of San Francisco, suing 14 oil giants on public nuisance grounds as well as trade and consumer deception-based causes of action.[34] Therein, plaintiff claims that oil and gas executives knew that "reliance on fossil fuels would cause these catastrophic [climate change] results, but they suppressed that information from the public and policymakers by actively pushing out disinformation on the topic. Their deception caused a delayed societal response to global warming," resulting "in tremendous costs to people, property, and natural resources."[35] In light of this concealment and the alleged consequential delay in climate action, California brought seven charges against the defendants: public nuisance; equitable relief from pollution and natural resource damages; untrue or misleading advertising; misleading environmental marketing; unlawful, unfair, or fraudulent business practices; strict products liability—failure to warn; and negligent products liability—failure to warn.[36]

Similar to cases brought in other jurisdictions, California's complaint laid out almost 90 pages of evidence demonstrating that defendants either directly, or through their funding and participation in industry and think-tank research groups, purposefully undermined public awareness, understanding, and knowledge of the relationship between continued fossil fuel use, anthropogenic climate change, and consequent significant environmental disasters.[37] The supporting facts were comprehensive and damning. But plaintiff's discussion of the causal chain between defendants' deceptive practices, consumers' and policymakers' subsequent behaviors, and climate change-related injuries was far less extensive. While the establishment of such a causal chain is notably less essential for California's business and consumer protection causes of action, it may present a challenge for advancing its more traditional public nuisance claim.

Amidst this cross-country climate change liability litigation, defendant corporations and their executives continue to rebut charges that they bore any legal fault for climate change damages. Critically, at a 2021 congressional hearing, oil industry executives denied misinformation accusations against them, and instead stressed their support and involvement in the country's clean energy transition, as well as their public acknowledgment of their GHG emissions contributions.[38] Nevertheless, the chief executives of Exxon, Chevron, BP, and Shell refused to pledge *not* to lobby against GHG emissions mitigation or to prevent their powerful trade organizations from impeding the expanded access to electric vehicles.[39] Despite investigative journalists', scientists', and politicians' exposure of major fossil fuel companies' deceit, they have yet to face significant legal ramifications for their actions, and continue to engage in greenwashing and climate disinformation campaigns to this day.[40]

II. Shortcomings of a Tort-Based Fraud Approach to Climate Deception

Characteristics of climate science information, dissemination, and impact make traditional tort claims like fraud weak mechanisms for challenging and penalizing climate misrepresentation. Satisfying the evidentiary requirements to demonstrate that the defendants' deception caused climate change injuries is a key obstacle to the success of many of plaintiffs' climate disinformation lawsuits. Although jurisdictions and specific claims differ in their causation requirements, plaintiffs must often demonstrate that the defendants' actions were a "substantial factor" in causing

33. *See, e.g.*, First Amended Complaint ¶ 11, City of San Francisco v. BP, No. 3:17-cv06012-WHA (N.D. Cal. Apr. 3, 2018); First Amended Complaint ¶ 11, City of Oakland v. BP, No. 3:17-cv-06011-WHA (N.D. Cal. Apr. 3, 2018); Complaint §VII, County of San Mateo v. Chevron Corp., No. 3:17-cv-04929 (N.D. Cal. July 17, 2017); Complaint §VII, City & Cnty. of Honolulu v. Sunoco LP, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020); Complaint, Pacific Coast Fed'n of Fishermen's Ass'ns v. Chevron, No. CGC-18-571285 (Cal. Super. Ct. Nov. 14, 2018); Complaint, Mayor & City Council of Balt. v. BP, No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018); Complaint, City of Hoboken v. Exxon Mobil Corp., No. HUD-L-003179-20 (N.J. Super. Ct. Sept. 2, 2020); Complaint, City of Charleston v. Brabham Oil Co., No. 2020-CP-1003975 (S.C. Ct. Com. Pl. Sept. 9, 2020).

34. Complaint, People of the State of Cal. ex rel. Bonta v. Exxon Mobil Corp. (Cal. Super. Ct. Sept. 15, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/FINAL-9-15-COMPLAINT.pdf.

35. *Id.* ¶ 1.

36. *Id.* ¶¶ 241-302.

37. *See, e.g.*, *id.* ¶ 49 (citing an internal 1979 Exxon memorandum stating that "[t]he present trend of fossil fuel consumption will cause dramatic environmental effects before the year 2050. . . . The potential problem is great and urgent"). *See also id.* ¶ 66 (quoting a 1988 Shell report saying, "Man-made carbon dioxide, released into and accumulated in the atmosphere, is believed to warm the earth through the so-called greenhouse effect" that could "create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather.").

38. Tabuchi & Friedman, *supra* note 22.

39. *Id.*

40. *See, e.g.*, David Gelles, *How Republicans Are "Weaponizing" Public Office Against Climate Action*, N.Y. Times (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html (noting that the fossil fuel-linked Heartland Institute's annual International Conference on Climate Change that continues to engage in climate denial narratives was still held in February 2023).

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the suffered harm.[41] This part examines the causation challenges of a fraud suit to illustrate the issues plaintiffs confront across torts claims.

Generally, fraud requires an actor to (1) misrepresent or omit a material fact, (2) with some level of culpability greater than negligence, (3) with intent to induce, (4) another's justifiable reliance, and (5) such reliance causes a loss or injury.[42] As a threshold matter, plaintiffs must demonstrate that the alleged misleading speech was a fraudulent statement or omission of a material fact. Defendants may claim that the cause, effects, damages, and future ramifications of phenomena like climate change might be challenged as lacking sufficient certainty to qualify as fact.[43] Defendants could thus further argue that their statements were not de facto false declarations, but merely communications—or at most exaggerations—of the degree of indeterminacy in existing climate research.

For example, in the 1980s and 1990s, Mobil and ExxonMobil published weekly climate editorials that appeared as op-eds in the *New York Times* and other news sources with catchy titles such as "Apocalypse no" and "Lies they tell our children."[44] These advertising opinion pieces made declarations like "Let's not rush to a decision at Kyoto (re the United Nations Kyoto Protocol) . . . We still don't know what role man-made greenhouse gases might play in warming the planet."[45] This claim was not, in fact, wholly false. Although at the time scientists were confident that anthropogenic GHG emissions contributed to global warming, the *exact* role that human actions played in driving climate change was still being determined.[46]

Despite the challenge that ever-present scientific uncertainty poses to substantiating a material fact, the discovery of documents demonstrating the stark inconsistencies between a defendant's internal and external statements on climate change could likely substantiate their statements as deception. Additionally, the culpability and intention requirements of a fraud claim are supported by the substantial evidence demonstrating that defendants intentionally publicly contradicted and disparaged climate science, while internally admitting the contributions that their products had on advancing climate change and the threats that climate change posed to the world.

Even if plaintiffs establish the falsity of alleged climate misinformation, substantiating the causation requirement is a significant obstacle to the success of a fraud or other tort cause of action. To demonstrate causation, plaintiffs must establish a sound causal chain linking a defendant's misinformation to the suffered climate change-caused harm. First, plaintiffs must prove that a defendant's misrepresentations actually misled the public and/or politicians. Second, reliance on a defendant's misrepresentation must be shown to have prevented politicians or the public from taking necessary climate change mitigation actions. Moreover, they must demonstrate that, had politicians and the public not been misled by the defendant, they would have taken or demanded the untaken climate mitigation actions.

Finally, to complete the causal chain, the plaintiffs would need to demonstrate that the hypothetical climate actions that they would have taken, if not for a defendant's misrepresentations, would have mitigated global GHG emissions to a degree that would significantly reduce or eliminate the climate-related damages they suffered.[47] In short, it will be difficult to prove that (1) the defendant's misinformation was a substantial factor that led to a failure of the United States to mitigate climate change; (2) the failure to reduce those emissions significantly exacerbated climate change; and (3) the worsened climate change generated the damages suffered by the plaintiff.

The hurdle of substantiating causation was demonstrated in *Native Village of Kivalina v. ExxonMobil Corp.*, a public nuisance case in which an Indigenous Alaskan village brought nuisance and civil conspiracy claims under federal law against 24 defendants, including international fossil fuel companies.[48] In its complaint, the village claimed that the defendants

> participate[d] in an agreement with each other to mislead the public with respect to the science of global warming and to delay public awareness of the issue—so that they could continue contributing to, maintaining and/or creating the nuisance without demands from the public that they change their behavior as a condition of further buying their products.[49]

The defendants' response argued that the plaintiff's accusations relied on an "attenuated and remote" causal chain that failed to support a sound cause of action.[50] The district court and the affirming appellate court agreed, concluding that the plaintiff lacked Article III standing's traceability requirement. They found that "Kivalina could not demonstrate either a 'substantial likelihood' that defendants' conduct caused the plaintiff's injury nor that the 'seed' of its injury could be traced to any of the Energy Producers."[51]

41. S*ee, e.g.*, Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1092-93 (N.D. Cal. 2019).
42. Restatement (Second) of Torts §525 (Am. L. Inst. 1977).
43. *Compare* Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law,* 54 Vand. L. Rev. 1011 (2001) (noting the challenge of establishing tort causation in matters lacking scientific certainty).
44. Geoffrey Supran & Naomi Oreskes, *The Forgotten Oil Ads That Told Us Climate Change Was Nothing,* Guardian (Nov. 18, 2021, 5:00 PM), https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing.
45. *Id.*
46. U.S. Environmental Protection Agency, The Potential Effects of Global Climate Change on the United States: Report to Congress (Joel B. Smith & Dennis Tirpak eds., 1989).
47. *See* Jessica Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages,* 52 ELR 10995 (Dec. 2022) (highlighting that public and government climate mitigation conduct is a superseding cause between corporate disinformation and climate change injuries that greatly complicates establishing the necessary causal chain to impose tort-based climate deception liability on fossil fuel companies).
48. 663 F. Supp. 2d 863, 868, 39 ELR 20236 (N.D. Cal. 2009).
49. Complaint, *Kivalina,* 663 F. Supp. at 269.
50. Motion of Certain Utility Defendants to Dismiss Plaintiff's Civil Conspiracy Claim, Complaint, *Kivalina,* 663 F. Supp. 2d 863.
51. *Kivalina*, 663 F. Supp. 2d at 878-81.

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The federal district court in *Kivalina* emphasized that the harm of climate change could not be traced to defendants' actual emissions-creating activities, given the rapid combination of GHGs in the atmosphere.[52] Notably, the court did not reach the plaintiff's disinformation claims. However, since the plaintiff in *Kivalina* struggled to substantiate standing causation claims linking actual GHG emissions to its climate-related injuries, demonstrating that those same defendants' disingenuous climate communications caused those same injuries will be even more difficult. Thus, challenging major fossil fuel companies' deceptive speech to impose climate change liability through torts-based civil actions is likely to be ineffective, and in some jurisdictions it may even prove impossible.

The potential success of torts, nuisance, and fraud-based causes of action challenging corporate climate deception is highly dependent upon the exact jurisdictional statutory basis, common-law precedent, and legal standards for such a claim. For example, public nuisance under California Civil Code §§3479, 3480, and 3494 is one of the causes of action in the 2023 California case *California v. Exxon*.[53] Plaintiffs argued, among other things, that defendants' deception "[prevented] customers, the media, policymakers, and the public from having access to full and accurate information material to their energy purchasing decisions, thereby causing the emission of vast quantities of greenhouse gases into the atmosphere"[54]; "delayed regulatory action on GHG emissions"[55]; and "significantly delayed the transition to alternative energy sources that could have prevented some of the worst impacts of climate change in California."[56]

To substantiate its causation claims, California argues, among other things, that "[f]orthrightly communicating with consumers, the public, regulators . . . and the State . . . would have enabled those groups to make informed decisions . . ."; informed consumers "might have decreased the consumer's use of fossil fuel products and/or demanded lower-carbon transportation options from policymakers."[57] Plaintiffs further note studies suggesting that consumers informed on climate change indicated a willingness to change their consumption habits to reduce climate change.[58] Plaintiffs thus maintain that consumers educated on the climate changes impacts of their purchases would make changes that may contribute to solving environmental problems.[59] Upon these findings, California contends that the defendants' deceit could be causally linked to delayed climate action and consequent incurred climate change damages.

While such arguments would fall short of the causation requirements of other jurisdictions' public nuisance and tort-based statutes, California's public nuisance standard is markedly broad,[60] and liability turns on "the critical question . . . whether the defendant *created or assisted in the creation of the nuisance*."[61] The California courts' application of the public nuisance doctrine to a climate change deception claim remains untested, given that previous similar cases were dismissed on other grounds.[62] Thus, the pending California case might be the most promising example of how traditional torts-based suits may still be successful in penalizing climate disinformation, particularly in jurisdictions with liberal public nuisance statutes. Nevertheless, considering alternative causes of action to regulate climate disinformation that are less vulnerable to stringent causal requirements is still valuable. Thus, consumer protection laws like the FTCA, and including those state statutes invoked by California under its state Business and Professions Code, provide promising alternative mechanisms for penalizing climate deception.

III. A Legal Alternative: The FTCA of 1914

Unlike traditional tort suits, violations of consumer protection laws have less robust causation requirements that might make them more effective at imposing climate disinformation liability on fossil fuel companies.[63] Consumer protection statutes generally do not require plaintiffs to establish reliance on the defendant's misrepresentations; they need only show that the defendant made material misrepresentations that had the capability of deceiving reasonable consumers.[64] Moreover, some consumer protection laws like the FTCA do not even mandate that the plaintiffs suffered actual harms as a result of the defendant's misrepresentation; the potential deceit itself is the delinquent action.[65] Thus, on a federal level, utilizing consumer protection statutes, specifically the FTCA, removes the significant causation obstacle to legally challenging oil companies' climate change misinformation campaigns.

The FTC is the primary agency responsible for administering the United States' consumer protection statutes.

52. *Id.* at 880.
53. Complaint ¶¶ 241-256, People of the State of Cal. ex rel. Bonta v. Exxon Mobil Corp. (Cal. Super. Ct. Sept. 15, 2023).
54. *Id.* ¶ 263(e).
55. *Id.* ¶ 158.
56. *Id.* ¶ 110.
57. *Id.* ¶¶ 125(c), 155.
58. *Id.* ¶ 155.
59. *Id.*
60. Cal. Civ. Code §3479 (2020), defining "nuisance" as
    > [a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . .

    A "public nuisance" is one that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Id.* §3480.
61. County of Santa Clara v. Atlantic Richfield Co., 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006) (quoting City of Modesto Redev. Agency v. Superior Ct., 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004)).
62. *See, e.g.*, City of Oakland v. BP PLC, 325 F. Supp. 3d 1017, 1021, 48 ELR 20105 (N.D. Cal. 2018), *vacated*, 960 F.3d 570, 50 ELR 20124 (9th Cir. 2020), *modified*, 969 F.3d 895 (9th Cir. 2020).
63. *See* National Consumer Law Center, Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws (2018).
64. *Id.*
65. FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, at 3-4 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

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Pursuant to §5 of the FTCA, the Commission possesses the authority to regulate "unfair methods of competition in or affecting commerce, and unfair *or deceptive acts* or practices in or affecting commerce."[66] The FTC is further empowered to prescribe rules defining specific unfair or deceptive acts; gather information and conduct investigations related to commercial actors' trade practices; and seek monetary redress and/or alternative relief conduct to remedy actions that were injurious to consumers.[67]

Section 5 of the FTCA grants the Commission broad investigative authority.[68] It is empowered to inspect any entity or business whose activities impact commerce,[69] and to "prosecute any inquiry necessary to its duties in any part of the United States."[70] The FTC may commence an investigation voluntarily or at the behest of government agencies, officials, or the general public.[71] Following its investigation, if the FTC has "reason to believe" that an entity is engaging in practices in violation of the FTCA, the Commission may issue a letter warning the entity that it is likely in violation of the Act and that it should change its behavior to comply with the law immediately or risk legal penalties.[72] Alternatively, rather than issuing a warning letter, the FTC may immediately bring an enforcement action via administrative or judicial proceedings.[73]

Section 5 of the FTCA gives the FTC broad authority to identify and define deceptive acts, practices, and other unfair methods of competition.[74] The Commission defines "deceptive acts or practices" as those communicating material facts that a reasonable consumer would view as likely to mislead.[75] Deceptive practices are those in which (1) a representation, omission, or practice that misleads or is likely to mislead a consumer is made; (2) a consumer in the present circumstances could reasonably interpret the representation, omission, or practice; and (3) the representation, omission, or practice that misleads the consumer is material.[76] A representation is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."[77]

Intent to deceive is not required to substantiate a deceptive acts claim under §5 of the FTCA, instead "it is enough that the representations or practices were likely to mislead consumers acting reasonably."[78] Proof that consumers were deceived is also not necessary.[79] Additionally, courts have held that communication containing both true and misleading disclosures can qualify as a §5 violation if it creates a net misrepresentative impression.[80]

Initially, the FTC frequently used §13 of the FTCA to seek equitable remedies for §5 violations for injured consumers.[81] In 1973, Congress added §13(b) to the FTCA through the passage of the Trans-Alaska Pipeline Authorization Act.[82] This section provides that when the Commission believes that an actor is in violation of the FTCA, it may bring a suit in federal district court to enjoin that actor's suspect activities.[83] Subsequently, federal court action under §13(b) of the FTCA became the FTC's preferred enforcement mechanism. For years, the Commission used §13(b) to obtain consumer redress through court-granted monetary awards recovering "billions of dollars from corporate and individual defendants."[84]

However, the FTC's enforcement capabilities under §§5 and 13 of the FTCA were then constrained in 2021 in the Supreme Court decision *AMG Capital Management LLC v. Federal Trade Commission*.[85] There, the Court concluded that the Commission lacked the authority to pursue equitable monetary relief.[86] The Supreme Court ruled that the FTC could only ask a court for a "temporary restraining order or preliminary injunction" or, in certain cases, "a permanent injunction."[87] The removal of the Commission's ability to grant equitable monetary relief under §13(b) weakened the Commission's power to discourage deceptive communications violating §5 of the FTCA, and thus undermined the FTC's ability to seek redress for harmed consumers.[88]

The FTC can still pursue restitution for consumers under §19 of the FTCA. Pursuant to §19, the Commission can file an initial cease-and-desist order with an administrative adjudicatory body when it identifies an unfair or deceptive delinquent act or practice.[89] Through those proceedings, an administrative law judge (ALJ) can order the defendant party to terminate any deceptive acts or practic-

66. 15 U.S.C. §45(1) (emphasis added).
67. *Id.* §45.
68. *See* 1 Stephanie W. Kanwit, Federal Trade Commission §13:1 (2021-2022 ed.) (stating that the Commission's investigatory power is "probably the broadest investigatory powers of any federal regulatory agency").
69. 15 U.S.C. §46(a).
70. *Id.* §43.
71. 1 Kanwit, *supra* note 68, §13:2.
72. FTC, *About FTC Warning Letters*, https://perma.cc/VT2B-YV6A (last visited Apr. 4, 2023).
73. FTC, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority,* https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/J6BS-9VZA] (last visited Oct. 23, 2023).
74. 52 Stat. III (1938), *amended by* 72 Stat. 1750 (1958), 15 U.S.C. §45 (1958).
75. National Consumer Law Center, *supra* note 63.
76. *See* Federal Trade Comm'n v. Cyberspace.com LLC, 453 F.3d 1196, 1199 (9th Cir. 2006). *See also* Trans World Accts., Inc. v. Federal Trade Comm'n, 594 F.2d 212, 214 (9th Cir. 1979) (stating that "[p]roof of actual deception is unnecessary to establish a violation of Section 5").
77. *Cyberspace.com LLC,* 453 F.3d at 1201.
78. Federal Trade Comm'n v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006).
79. *See, e.g.*, Federal Trade Comm'n v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005) (noting that "neither proof of consumer reliance nor consumer injury is necessary to establish a §5 violation").
80. *Cyberspace.com LLC*, 453 F.3d at 1200-01.
81. 1 Kanwit, *supra* note 68, §10:1. *See also* FTC, Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
82. *See* FTCA, 15 U.S.C. §53(b).
83. *Id.*
84. FTC, *supra* note 73.
85. 141 S. Ct. 1341 (2021).
86. *Id.* at 1352 (in which the Supreme Court determined that the issued equitable monetary relief was impermissible under §13(b)).
87. *Id.* at 1346; M. Sean Royall et al., *A Watershed Moment? What Comes Next for the FTC in the Wake of AMG*, 35 Antitrust 103, 103 (2021).
88. *See* Amy Widman, *Inclusive Agency Design*, 74 Admin. L. Rev. 23, 41 (2022) ("The recent decision in *AMG* . . . weakened regulatory oversight of fraudulent actors in the consumer marketplace. . . . The combined effect of a weakened regulatory landscape and a formalist Supreme Court ruling makes it harder for the FTC to get money back in people's pockets after they suffer fraud.").
89. 15 U.S.C. §45(b).

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es.[90] If that party then violates the cease-and-desist order, the FTC may pursue court action under §19 "to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violations or the unfair or deceptive act or practice."[91]

Relief under §19 includes, but is not limited to, "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice."[92] For example, §19(b) contemplates public warning and notification through corrective advertising to be one form of redress.[93] Since the Commission may no longer seek consumer monetary relief under §13 of the FTCA, §19 is likely the more fruitful avenue for pursuing remedies for climate deception in the coming years.[94] But §19 monetary relief might be limited in kind and/or degree. When Congress passed the section in 1975, it barred relief that was intended as "the imposition of any *exemplary* or *punitive* damages," consequently restraining the amount of restitution damages that a court can award for a §19 violation.[95]

In response to public pressures to address rising greenwashing campaigns, the FTC created the nonbinding Green Guides in 1992 to advise businesses on how to make and present environmental claims without violating §5 of the Act.[96] The guides focus on "greenwashing," the use of misleading or deceptive environmental claims to market commercial products as a means to attract the business of socially conscious consumers, without absorbing the costs of making real sustainable change.[97] The guides empower the FTC to "take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides."[98]

Generally, the guides instruct entities to:

1. Use "clear, prominent, and understandable" disclosures, by using "plain language and sufficiently large type," and "avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosures."
2. Specify whether a claim "refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service."
3. Avoid "overstat[ing], directly or by implication, an environmental attribute or benefit."
4. Use clear "[c]omparative environmental marketing claims . . . [with] substantiation for the comparison."[99]

Since their creation, the guides have been critiqued for their voluntary nature and their vague unscientific standards.[100]

In July 2021, the Commission initiated a review and update of the Green Guides and called for public comment until April 24, 2023.[101] At this time, the final updates to the guides have not been publicly released. Academics argue that if refined the guides could provide meaningful instruction to actors, including fashion industry marketers and commercial labelers, on how to accurately communicate sustainability claims to consumers.[102] Beyond providing companies with useful information, the guides clarify standards that could be used to support FTCA §5 claims against fossil fuel companies whose climate communications qualify as deceptive greenwashing.

IV. Analogizing and Applying FTCA §5 Case Law

Under its §5 authority, the FTC has challenged a wide range of practices, including suspect advertising, data security, and lending conduct. The Commission has repeatedly penalized corporate actors for engaging in advertising campaigns designed to mislead or confuse consumers. The multistage litigation challenging misleading communications made by a defendant heat detector manufacturer in *Federal Trade Commission v. Figgie International* illustrates how a §5 deception claim can be used to impose disinformation liability on a corporation.

In the 1970s, two new studies demonstrated that Figgie heat detectors provided inadequate protection against household fires relative to safer smoke alarms.[103] In response to these findings, in 1978 the National Fire Protection Association (NFPA) changed its standards, demanding that every floor level of a home contain a smoke detector, only mentioning heat detectors as an optional supplementary safety device in a footnote.[104] Despite being made aware of the study's findings and the NFPA's standard changes, Figgie represented to consumers that its heat detector products provided sufficient warning of home fires.[105]

90. *Id.*; *see also* 1 Kanwit, *supra* note 68, §8:1.
91. 15 U.S.C. §57b(a)-(b).
92. *Id.* §57b(b).
93. Federal Trade Comm'n v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993).
94. Daniel Kaufman, *Taking Another Look at Courts Interpreting Section 19 of the FTC Act*, BakerHostetler: AD-ttorneys L. Blog (July 5, 2022), https://perma.cc/M8YE-UNEA.
95. *Id.* (emphasis added).
96. Guides for the Use of Environmental Marketing Claims, 16 C.F.R. §260.1(a) (2012).
97. Sophie Slater, *The "Greenwashing" Hiding the Truth of Your Favourite Fashion Brands,* VICE (May 1, 2019, 5:04 AM), https://www.vice.com/en/article/kzmw5a/the-greenwashing-hiding-the-truth-of-your-favourite-fashion-brands [https://perma.cc/KG34-HM8J].
98. 16 C.F.R. §260.1(a) (2012).
99. *Id.* §260.3(a)-(d).
100. Lauren C. Avallone, *Green Marketing: The Urgent Need for Federal Regulation,* 14 Pa. State Env't L. Rev. 685, 686 (2006); Jessica E. Fliegelman, *The Next Generation of Greenwash: Diminish Consumer Confusion Through a National Eco-Labeling Program,* 37 Fordham Urb. L.J. 1001, 1020 (2010).
101. *See* FTC Regulatory Review Schedule, 86 Fed. Reg. 35239, 35239 (proposed July 2, 2021) (to be codified at 16 C.F.R. pt. 260); Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77766 (proposed Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260). *See also* Lesley Fair, *FTC Greenlights Green Guides Comment Extension*, FTC: Bus. Blog (Jan. 31, 2023), https://www.ftc.gov/business-guidance/blog/2023/01/ftc-greenlights-green-guides-comment-extension.
102. Kasey A. West, *Goodbye to Greenwashing in the Fashion Industry: Greater Enforcement and Guidelines*, 101 N.C. L. Rev. 841, 842 (2023).
103. Federal Trade Comm'n v. Figgie Int'l, Inc., 994 F.2d 595, 599 (9th Cir. 1993) (noting that studies found that heat detectors had slower reaction times, provided limited warning, and provided minimal protection against non-heat-related fire threats like smoke inhalation).
104. *Id.* at 599.
105. *Id.* at 604.

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Figgie's public communications portrayed its heat detectors as independently effective life-saving fire protection devices.[106] For example, one of Figgie's promotions stated that "HEAT DETECTORS HAVE PROBABLY SAVED MORE LIVES AND PROPERTY THAN ANY OTHER FIRE DETECTION DEVICE."[107] In response, the FTC issued a cease-and-desist order to Figgie, requiring it to modify its advertisements to include disclaimers that heat detectors were generally less effective than smoke detectors at providing notice of residential fires.[108]

Figgie failed to comply with the FTC's order, and justified its actions by noting there was still some debate over the scientific standards used to evaluate the efficacy of heat detectors.[109] Thus, the Commission filed an administrative complaint and the hearing ALJ upheld the FTC's order, noting that the "record leaves no doubt that there is a substantial agreement now among fire scientists . . . and they appear to have a rational scientific basis."[110] Ultimately, the U.S. Court of Appeals for the Fourth Circuit affirmed the ALJ's decision upholding the cease-and-desist order, concluding that Figgie's representations were misleading in the absence of a disclaimer about the limits of heat detectors.[111]

Following the cease-and-desist order, the FTC brought a consumer redress suit under §19 of the FTCA in federal district court. The court granted the Commission summary judgment, holding that the defendant should pay the $7.59 million necessary to refund the full purchase price of the heat detectors to consumers who bought the devices during the time that the defendant was engaging in deceptive advertising.[112] Moreover, if customers had damages claims beyond those of being deceived into buying the less effective product, Figgie was to give additional funds to a maximum of $49.95 million to compensate for any further injuries.[113]

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the California district court's determination that the manufacturer was liable for deceptive acts under §5 of the FTCA.[114] However, it concluded that the lower court's damages award was outside of its authority under the Act.[115] The appellate court characterized the district court's imposition of fees beyond reimbursement as impermissibly punitive, and thus adjusted the remedy award to exclude the potential $49.95 million in additional compensation fees.[116]

Oil corporations and their agents, like the Figgie heat detector marketing team, actively concealed, misled, and/or omitted sound climate science from their communications in a way that obfuscated the risks associated with their products' production and use. Nevertheless, even though awarded damages under §9 in *Figgie* were limited to the reimbursement of deceived customers, a similar finding in a climate deception case could generate net reimbursement damages of billions of dollars given the almost half-century of recorded deception and the size of the oil market. Like *Figgie*, fossil fuel companies engaged in public advertising campaigns that publicly denied the risks of their products, while internally acknowledging the truth of contradictory scientific consensus.[117]

Using the FTCA to inquire into more contemporary cases might be complicated by the increased sophistication of the messaging in oil companies' modern disinformation campaigns. Such campaigns leave behind basic statements attacking the existence of anthropogenic climate change, and adopt more complex greenwashing messages that continue to support the sale of fossil fuel products under the guise of backing the clean energy transition. However, examination of an example of a modern greenwashing advertisement demonstrates how the FTCA might still be an effective regulatory tool.

For example a recent *New York Times* promotional piece, entitled "How scientists are tapping algae and plant waste to fuel a sustainable energy future," reported on ExxonMobil's green biofuel research.[118] Notably, the article was sponsored content paid for by the oil giant. In a Massachusetts lawsuit against the company, the state used the *New York Times* piece to demonstrate how the oil company was actively misleading consumers to believe that it was focusing on developing sustainable energy alternatives.[119] In reality, scientists have determined that the described algae-based biofuel technologies are not and may never be viable.[120] The advertisement portrays ExxonMobil as an environmentally conscious and progressive corporation, while in reality the company continues to traffic in environmentally damaging fuel sources. These acts clearly violate the FTC's Green Guides, and thus §5 of the FTCA is well-suited to attack this type of deception.

Pursuant to §5 of the FTCA, a party may also be held liable when a communication's chief visual message is deceptive, even if it is accompanied by a less misleading verbal or written message.[121] For instance, in *Standard Oil Co. v. Federal Trade Commission*, a court upheld the Commission's cease-and-desist order, finding that an oil company and its associate advertising agency's gasoline additive

106. *Id.* at 599-600.
107. *Id.*
108. *Id.* at 600.
109. *Id.* at 599-600.
110. *Id.* at 604.
111. Figgie Int'l Inc. v. Federal Trade Comm'n, 817 F.2d 102 (4th Cir. 1987).
112. *Figgie Int'l, Inc.*, 994 F.2d at 604.
113. *Id.*
114. *Figgie Int'l, Inc.*, 994 F.2d 595.
115. *Id.* at 605.
116. *Id.* at 607-08.
117. *See, e.g.*, Oliver Milman, *Revealed: Exxon Made "Breathtakingly" Accurate Climate Predictions in 1970s and 80s*, Guardian (Jan. 12, 2023, 2:00 PM), https://www.theguardian.com/business/2023/jan/12/exxon-climate-change-global-warming-research.
118. ExxonMobil, *The Future of Energy? It May Come From Where You Least Expect,* N.Y. Times (2023), https://www.nytimes.com/paidpost/exxonmobil/the-future-of-energy-it-may-come-from-where-you-least-expect.html.
119. Rich Barlow, *That "News Story" on Climate Change You're Reading Might Be a Greenwashing Ad Instead,* BU Today (Feb. 6, 2023), https://www.bu.edu/articles/2023/climate-change-news-might-be-greenwashing-ad-instead/.
120. *Id.*
121. Standard Oil Co. of Cal. v. Federal Trade Comm'n, 577 F.2d 653, 659 (9th Cir. 1978) (it should be noted that case was later reversed by the Supreme Court on other grounds in *Federal Trade Commission v. Standard Oil Co.,* 449 U.S. 232, 233 (1980)). *See also* Sterling Drug, Inc. v. Federal Trade Comm'n, 741 F.2d 1146, 1152, 1154 (9th Cir. 1984) ("A determination of false advertising can be based upon deceptive visual representations.").

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television commercials violated §5 of the Act.[122] One of the challenged commercials showed the inflation of clear balloons that had been attached to two cars' tailpipes.[123] One car was said to contain gas with the additive, while the other car was filled with additive-free gasoline.[124] In the advertisement, the car without the additive was shown to fill the balloon with black "dirty exhaust emissions," while the car containing the additive-enriched gas expelled transparent, "good, clean" vapor, free of "dirty smoke."[125]

The FTC argued that, among other things, the

> commercials falsely represented (1) that use of [the additive] would result in a complete reduction of air pollutants; (2) that all cars would show the same degree of improvement as was illustrated by the reduction of pollution in the exceptionally dirty engine; [and] (3) that the use of [the additive] would affect all types of exhaust emissions.[126]

Fossil fuel companies' communications have also used deceptive visual images to confuse consumers' understandings of the climate change damages and impacts. Graphs relying on strategically selected data are a common misleading visual mechanism used by oil companies. For example, one opinion piece published by Exxon in the *New York Times* entitled "Unsettled Science" presented a graph of the temperature of the Sargasso Sea, showing that between 1000 B.C. and 2000 A.D. the temperature in that sea varied and demonstrated a general downwards trend, thus undermining scientific claims of global warming.[127] Given that the piece's general argument was questioning the occurrence of global warming, the graph likely misled some readers who missed the small print, which indicated that the graph showed the temperature of a particular body of water and not that of the globe.[128] Although this advertisement, like the one in *Standard Oil*, possessed clarifying written or oral information, it strategically presented images and visual aids in a way that could easily confuse a reasonable consumer in a manner that violates §5 of the FTCA.

Courts have also found sufficient evidence to support §5 deception claims in cases where the identity of the communicator is obfuscated. For example, in *Floersheim v. Federal Trade Commission*, the Ninth Circuit affirmed an FTC cease-and-desist order finding that the prominent appearance and repetition of "Washington, D.C.," on a defendant's debt collection forms produced by a private collections company could deceive prudent persons into believing that the company was associated with the government.[129] The court stressed that "[n]one of the Payment Demand forms, except the one containing the questionnaire, has a disclaimer of government connection."[130] The disclaimer clause was also in fine print, making it less visible to the common consumer.[131] Moreover, the FTC noted that "the use of 'elaborate type styles on several forms to simulate legal documents'" further contributed to the ruse.[132] The Ninth Circuit agreed, concluding that the Commission "justifiably believe[d that] Floersheim's present and prior activities require[d] its present [cease-and-desist] order."[133]

Similar to the defendant in *Floersheim*, fossil fuel companies' climate change campaigns have obfuscated the source of their communications in a way that legitimizes and/or obscures the biased perspective of their claims. For example, deceptively named interest groups and think-tanks are often the disseminators of climate misinformation communications. In fact, many of those actors are either fully funded by fossil fuel companies or are merely front groups for energy corporations.

For instance, a 1991 advertisement published by "Informed Citizens for the Environment" proclaimed that "Doomsday is canceled!" and queried, "Who told you Earth was warming . . . Chicken Little?"[134] The announcement went on to state that there was no proof supporting existing inaccurate climate models, declaring that the physics was "open to debate."[135] To an unwitting consumer, the group, Informed Citizens for the Environment, facially appears to be a nongovernmental organization giving unbiased science-backed information.[136] But in reality, the organization was a front for fossil fuel-emitting utilities and coal plants.[137]

Similarly, between 2020 and 2023, a gas industry-backed group calling itself Natural Allies for a Clean Energy Future spent $10 million on pro-natural gas advertisements on news websites, including Politico.[138] Scientific experts argued that the ads misled consumers about natural gas' viability as a climate solution.[139] Section 5 of the FTCA could thus be used, as it was in *Floersheim*, to force fossil fuel corporations to disclose their source identities in their statements as a means to empower the public to judge the subjectivity and reliability of those companies' climate change communications.

In summary, consumer protection statutes like the FTCA lower the evidentiary bar necessary to challenge climate change disinformation campaigns in court. The FTC is charged with protecting the public from deceptive trade practices. It thus already possesses the authority and capability to play a significant role in preventing misinformation campaigns that undermine

122. 577 F.2d at 653.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 656.
127. Supran & Oreskes, *supra* note 44.
128. *Id.*
129. 411 F.2d 874 (9th Cir. 1969) (for example, the form said, "'This Demand is made to give you a last opportunity to pay before action is taken on said claim.' . . . At the bottom of the form, in larger letters, is 'NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND.'").
130. *Id.* at 876.
131. *Id.* at 874.
132. *Id.* at 877.
133. *Id.* at 878.
134. Supran & Oreskes, *supra* note 44.
135. *Id.*
136. *Id.*
137. *Id.*
138. Arielle Samuelson & Emily Atkin, *These Natural Gas Ads Are Full of Hot Air,* Heated (Feb. 16, 2023), https://heated.world/p/these-natural-gas-ads-are-full-of.
139. *Id.*

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climate mitigation actions by confusing the public about the risks of trusting fossil fuel companies and using their products. The FTCA could be used to require oil companies to be transparent about their culpability and responses to the modern climate crisis, which threatens the homes, livelihoods, and environments of people around the world.

V. Limitations of the FTCA as a Climate Disinformation Solution

Enforcement and deterrence of climate disinformation campaigns under §5 of the FTCA may be precluded by real-world administrative capabilities and the public's response to actors' past and ongoing violations. For one, the Commission's capabilities are constrained by its lack of fundamental resources.[140] Over the past five years, the number of consumer fraud reports received by the Commission ballooned from 1.3 to 2.8 million, and the Commission has publicly noted that it possesses insufficient resources to perform its enforcement duties.[141] As such, the FTC's ability to address climate disinformation may be impacted by its institutional limitations.

Another obstacle encumbering the FTC's regulation of deceptive acts and practices under §5 of the FTCA is the narrow spectrum of available remedies that the Commission has the authority to issue. As previously discussed, following the Supreme Court's ruling in *AMG Capital Management LLC*, the FTC may only seek consumer monetary redress under §19 of the Act, and it may only do so following a defendant party's violation of a cease-and-desist order. Thus, circumstances in which delinquent actors would be held monetarily liable for their deceptive practices are limited. Nevertheless, the Commission has other enforcement tools at its disposal, including the issuance of public warning, admission letters, and the initiation of administrative or judicial proceedings.

Even if courts decline to award consumers monetary damages under the FTCA, the Act may still be used as a regulatory shaming mechanism that forces deceptive actors to publicly account for their misdeeds. Law Professor Sharon Yadin defines "regulatory shaming" as "the publication of negative information by administrative agencies concerning private regulated bodies, mostly corporations, in order to further public-interest goals."[142] For example, the Occupational Safety and Health Administration releases and publicizes workplace safety violations, naming and publicly reprimanding companies who violated set regulatory standards.[143] Similarly, the FTC could use its authority to discipline companies for deceptive communications through public legal declarations and/or requirements that delinquent parties engage in public informational and remedial actions through which customers could penalize companies for their deceit via their purchasing decisions.

Using the FTCA as a shaming mechanism to force fossil fuel corporations and think-tanks to admit to their past lies and dissuade them from engaging in further deceptive practices admittedly does not force those entities to reduce their GHG-emitting activities. However, it does create a more transparent marketplace in which entities financially benefiting from their climate change contributions must simultaneously grapple with public liability and the potential loss of market share arising from those contributions. Deception-related shaming can generate real-world monetary consequences, as some corporations that have deceived their consumers through greenwashing have already experienced dramatic depreciations in market share price.[144] Popular opinion indicates that American consumers are concerned about the ramifications of climate change, support a rapid transition away from fossil fuel energy, and feel that the energy industry's sustainability efforts are insufficient.[145] As such, there is reason to believe that reputational shaming communicated through FTCA §5 violations could dissuade fossil fuel corporate engagement in climate change disinformation, even with the Act's limited substantive remedies provisions.

VI. Conclusion

For the past half-century, the fossil fuel industry has been a merchant of doubt, gaslighting policymakers and the public into questioning good climate science to maximize its own profits. Holding major oil companies accountable for their deception is and must continue to be part of growing climate liability litigation. However, in many jurisdictions, plaintiffs will struggle to establish a causal nexus between corporate deception and climate-related injuries. Thus, using §§5 and 19 of the FTCA, as well as comparable state consumer fraud statutes, provides a viable alternative that holds oil companies legally accountable for their deceptive practices without needing to overcome the considerable obstacle of substantiating the causal daisy chain triggered by oil giants' climate change disinformation campaigns.

140. *See* FTC, Fiscal Year 2023 Congressional Budget Justification 9 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P859900FY23CBJ.pdf [https://perma.cc/Q7BD-NUH9]; Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 115 Colum. L. Rev. 2311, 2324 (2015).

141. FTC, *supra* note 140, at 9.

142. Sharon Yadin, *Regulatory Shaming*, 49 Env't L. 407 (2019).

143. Sharon Yadin, *Saving Lives Through Shaming,* 9 Harv. Bus. L. Rev. Online 1 (2019).

144. *See, e.g.*, Jan Schwartz, *VW Investors Sue for Billions of Dollars Over Diesel Scandal*, Reuters (Sept. 10, 2018), https://www.reuters.com/article/uk-volkswagen-emissions-trial-idUKKCN1LQ0WD# (noting the dramatic decrease in the share price of Volkswagen stock following the company's public admission that it installed "cheating devices" in some of its vehicles to cheat emissions tests).

145. *See* Alec Tyson et al., *What the Data Says About Americans' Views of Climate Change*, Pew Rsch. Ctr. (Aug. 9, 2023), https://www.pewresearch.org/short-reads/2023/04/18/for-earth-day-key-facts-about-americans-views-of-climate-change-and-renewable-energy/ (stating that 2023 poll indicated that seven in 10 Americans favored the country making efforts to become carbon-neutral by 2050 and more than one-half the U.S. population thought that the energy industry was not doing enough to address climate change).