
Law and the Environment 2018
Towards Environmental Responsibility, Accountability and Liability
Thursday, 26th April 2018
University College Cork
UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh
School of Law
Scoil an Dlí

CLIMATE LITIGATION HEATS UP:
A REVIEW OF LANDMARK RULINGS FROM AROUND THE WORLD

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SANDY

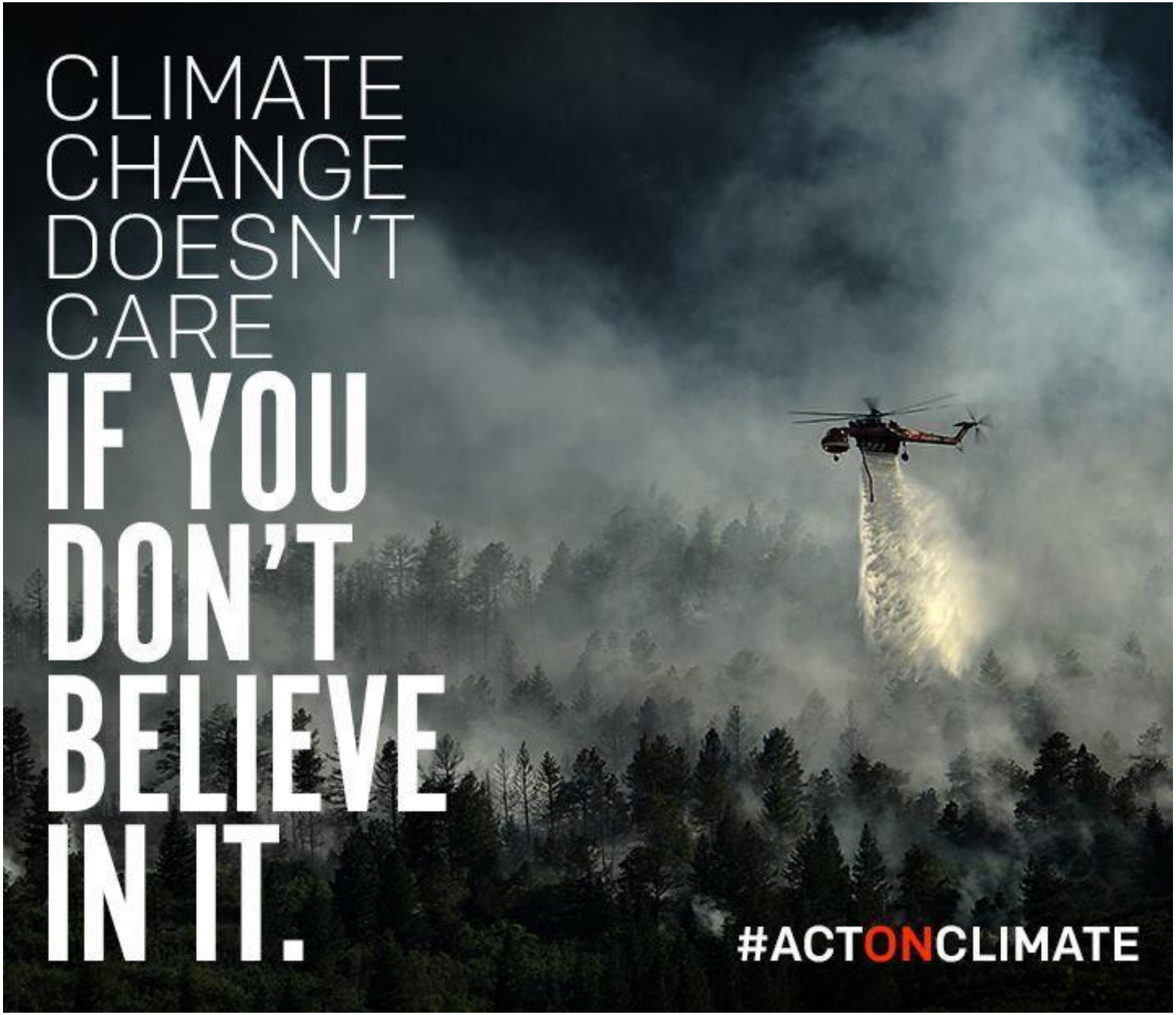
HARVEY

IRMA

MARIA

CALIFORNIA

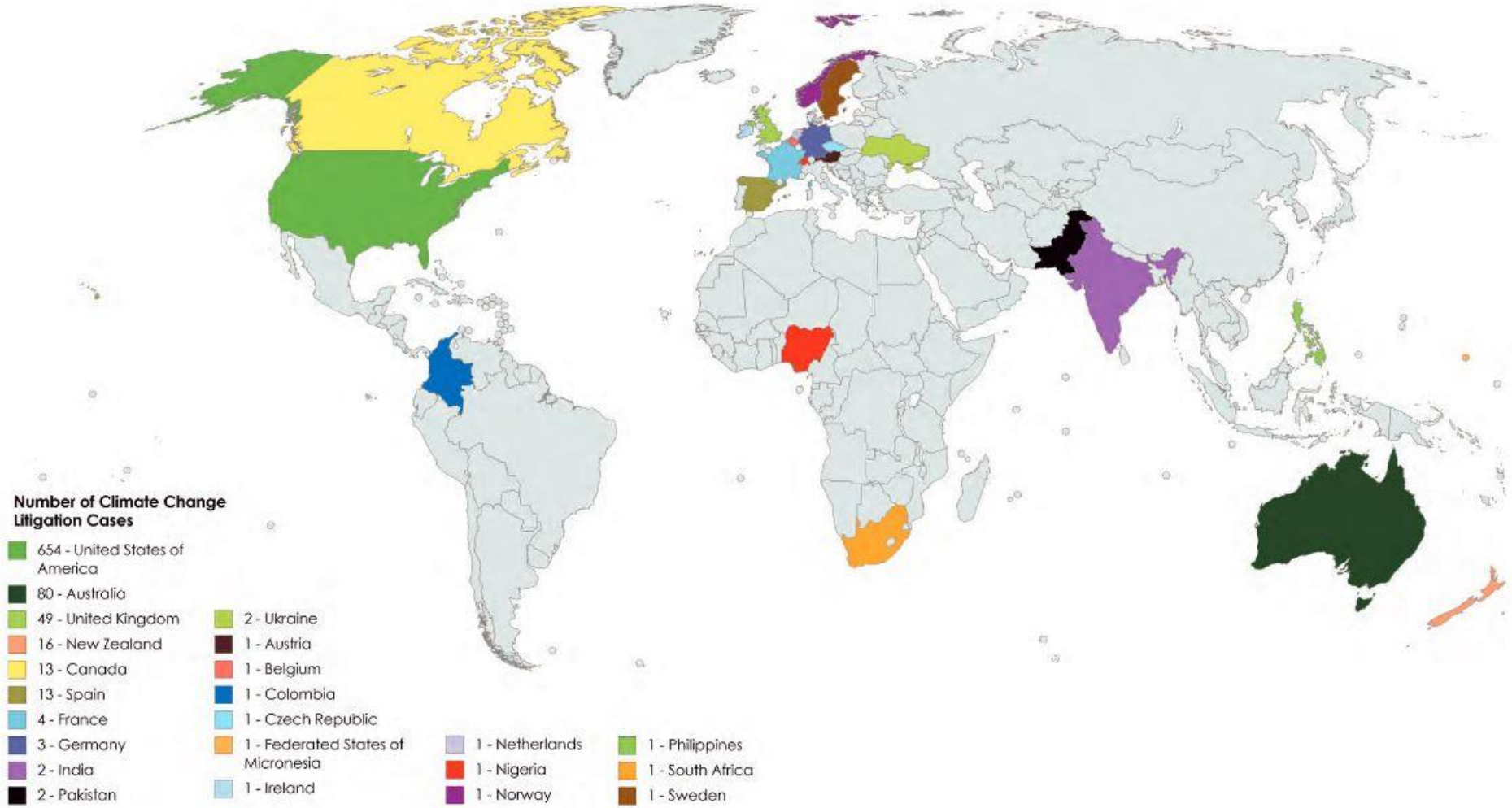
BARK BEETLE 8 BILLION TREES

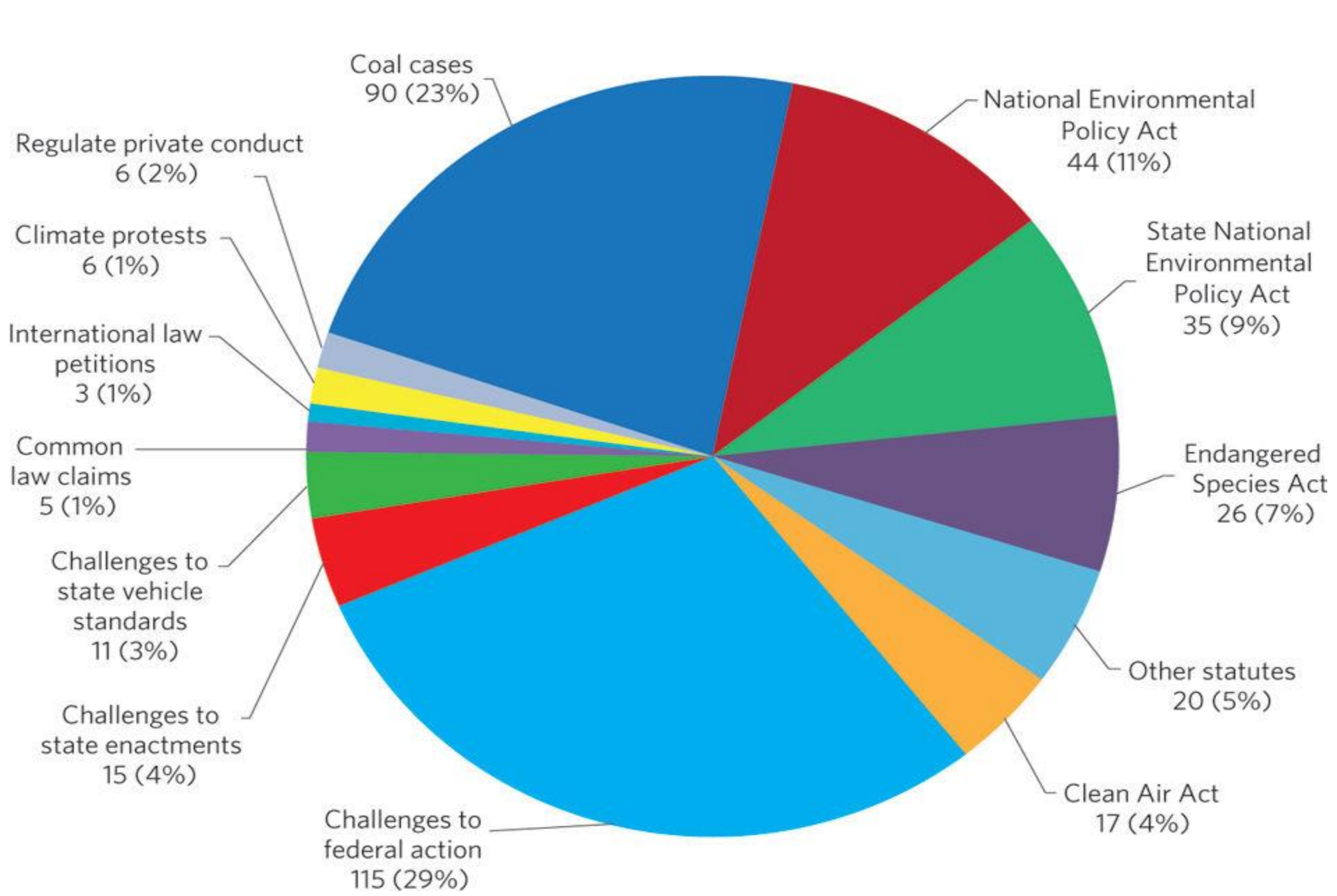

CLIMATE
CHANGE
DOESN'T
CARE
IF YOU
DON'T
BELIEVE
IN IT.
#ACTONCLIMATE

Global Climate Damages: $600 Billion & rising.

Chances of climate lawsuits also rising.

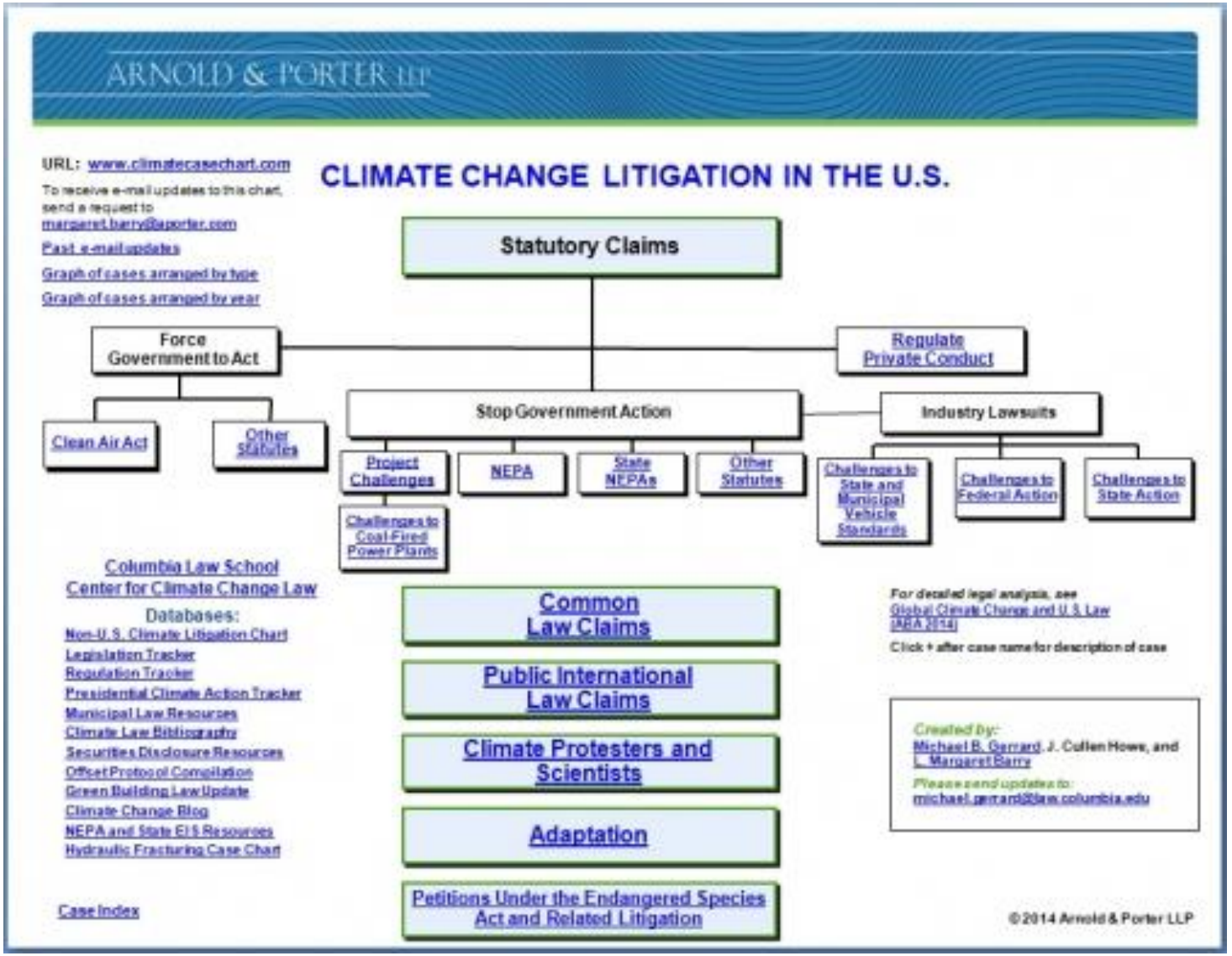
Climate Change Litigation: The Five Trends		
	1	Holding governments to their legislative and policy commitments
	2	Linking the impacts of resource extraction to climate change and resilience
	3	Establishing that particular emissions are the proximate cause of particular adverse climate change impacts
	4	Establishing liability for failures (or efforts) to adapt to climate change
	5	Applying the public trust doctrine to climate change.


Number of Climate Change Litigation Cases
654 - United States of America
80 - Australia
49 - United Kingdom
16 - New Zealand
13 - Canada
13 - Spain
4 - France
3 - Germany
2 - India
2 - Pakistan
2 - Ukraine
1 - Austria
1 - Belgium
1 - Colombia
1 - Czech Republic
1 - Federated States of Micronesia
1 - Ireland
1 - Netherlands
1 - Nigeria
1 - Norway
1 - Philippines
1 - South Africa
1 - Sweden



nature climate change

May 2011



http://blogs.law.columbia.edu/climatechange/2015/01/21/2955/

Urgenda Foundation v. Kingdom of the Netherlands (District Court of the Hague, 2015)

A group of 900 Dutch citizens sued the Dutch government, alleging that the government's recent revision of GHG emissions reduction goals amounted to a violation of its constitutionally imposed duty of care. The court in the Hague ordered the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020, finding the government's existing pledge to reduce emissions 17% insufficient to meet the state's fair contribution toward the goal, codified in the Paris Agreement, of keeping global temperature increases within 2°C of pre-industrial conditions.

This decision was pathbreaking in separation of powers jurisprudence because it grounded its instruction to the government to tighten emissions limits on a rights-based analysis rather than through reference to statutory requirements.

Ashgar Leghari v. Federation of Pakistan (Lahore High Court Green Bench 2015)

On September 4, 2015 the appellate court determined that "the delay and lethargy of the State in implementing the 2012 National Climate Policy and Framework "offend the fundamental rights of the citizens."

The court 1) directed several government ministries to each nominate "a climate change focal person" to help ensure the implementation of the Framework, and to present a list of action points by December 31, 2015; and 2) created a Climate Change Commission with representatives of key ministries, NGOs, and technical experts. The court stated that it would retain jurisdiction until its instructions were executed.

Pandey v. India

Ridhima Pandey, a nine-year-old from the Uttarakhand region, is the named plaintiff in a climate change case filed in March 2017 with the National Green Tribunal of India. Plaintiff's petition argues that the Public Trust Doctrine, India's commitments under the Paris Agreement, and India's existing environmental laws and climate-related policies oblige greater action to mitigate climate change. It also argues that the term "environment," as used in the Environment (Protection) Act 1986, necessarily encompasses the climate. The case was brought pursuant to section 2(m) of the National Green Tribunal Act 2010, which authorizes claims that raise "a substantial question relating to the environment."

Friends of the Irish Environment CLG v. Fingal County Council

A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution.

High Court Justice Max Barrett

Colombia lost 178,597 acres of forests in 2016, an increase of 44% from the year before.

Andrea Lozano Barragan v President of Colombia

acción de tutela

Writ for the protection of constitutional rights

The fundamental rights of life, health, liberty, and human dignity are determined by the environment and ecosystems. Without a clean environment, the plaintiffs and human beings, in general, can't survive, much less protect those rights for the children or future generations.

[Court orders government agencies to prepare a plan within four months of judgment to curb deforestation.]

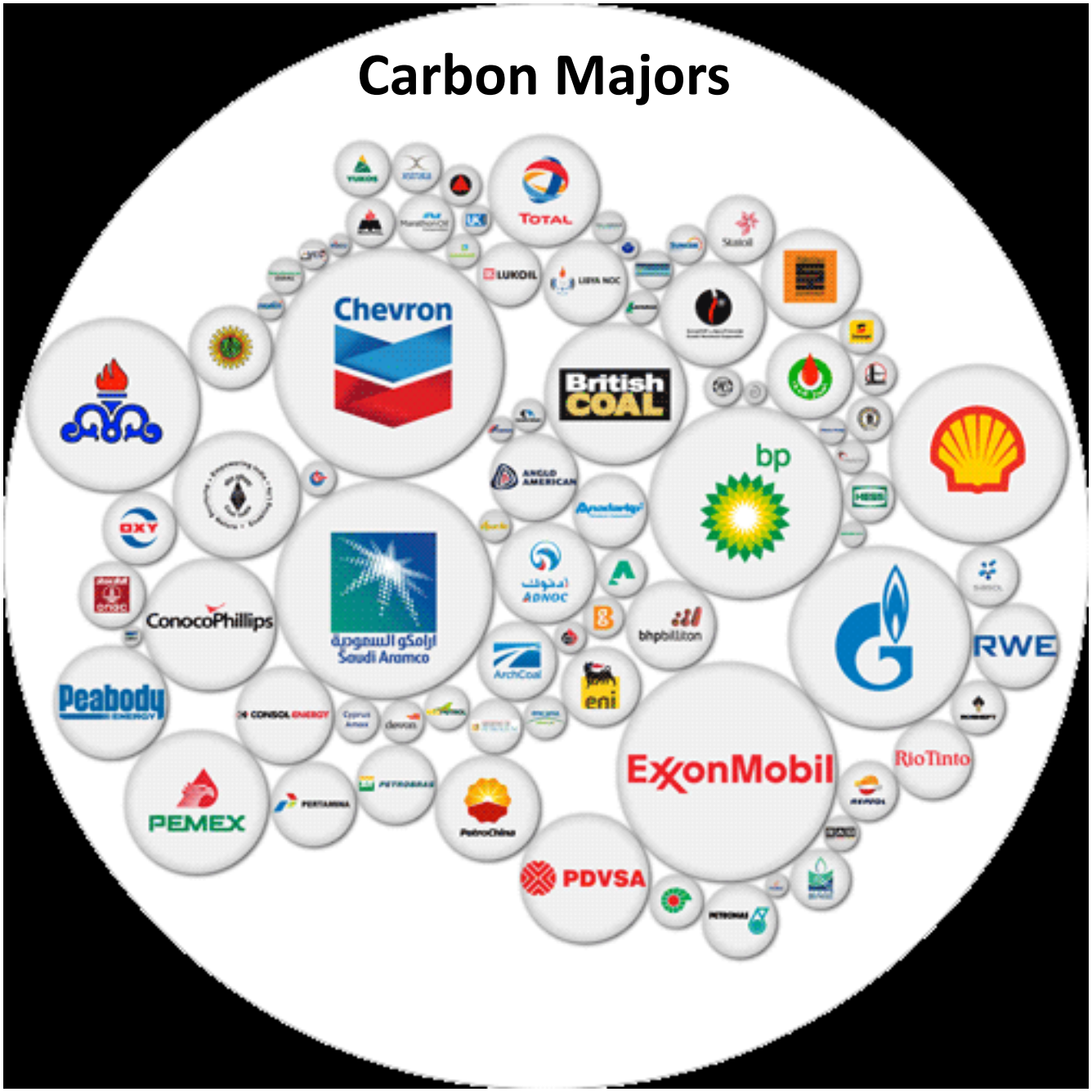
Juliana v. United States, 217 F.Supp.3d 1224 (D. OR 2016)

Our Childre Trust

The right to a climate system capable of sustaining human life is a fundamental right protected by substantive due process.

Federal courts too often have been cautious and overly deferential in the arena of environmental law and the world has suffered because of it. Exercising my reasoned judgment, I have no doubt that the right to a 'climate system capable of sustaining human life' is fundamental to a free and ordered society.

Carbon Majors



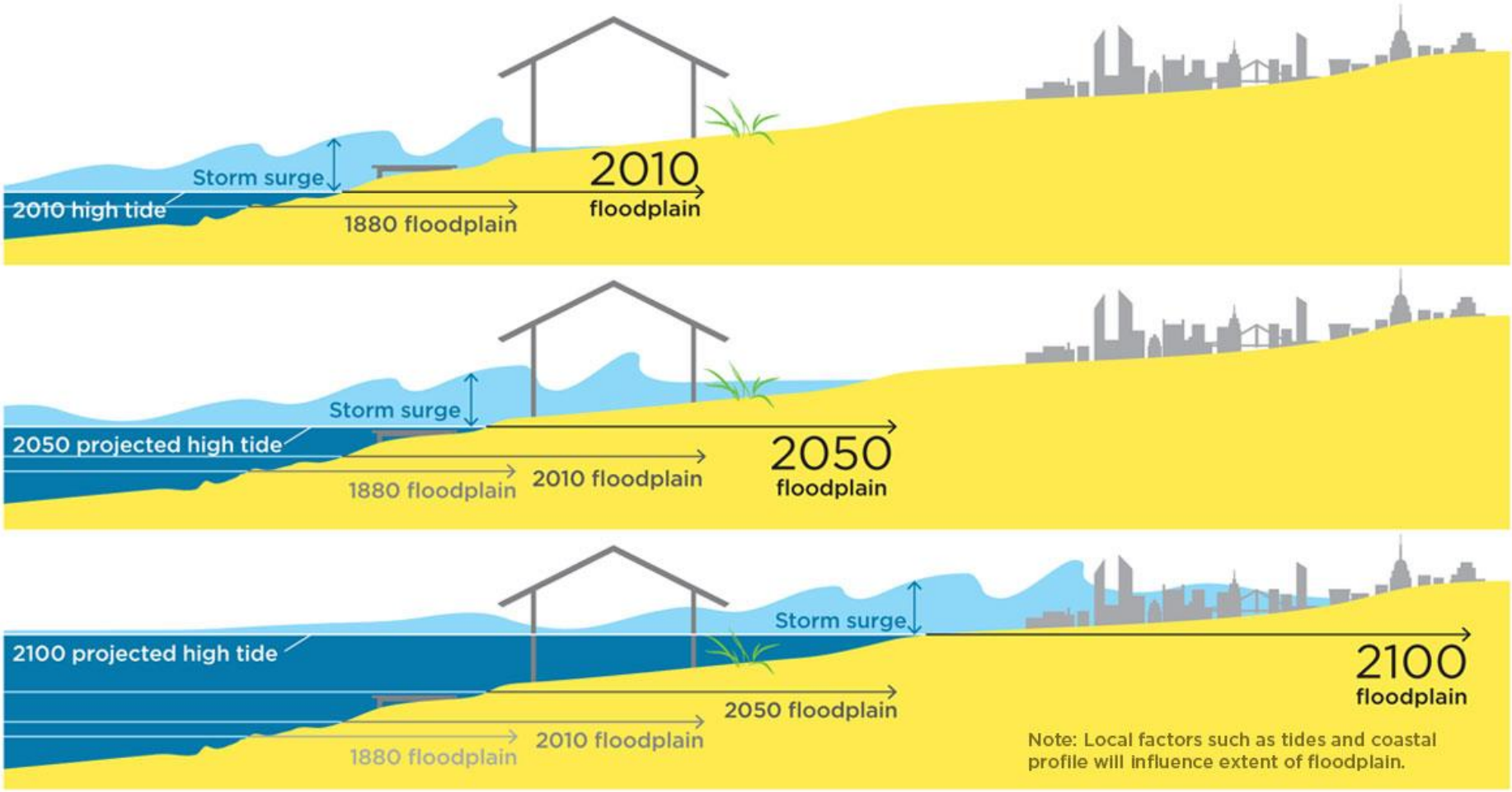
National Climate Assessment 2017

The oceans are absorbing over 90% of the increased atmospheric heat associated with emissions from human activity. Like mercury in a thermometer, water expands as it warms up (this is referred to as "thermal expansion") causing sea levels to rise. Melting of glaciers and ice sheets is also contributing to sea level rise at increasing rates

These models suggest a range of additional sea level rise from about 2 feet to as much as 6 feet by 2100, depending on emissions scenario.

https://seeing.climatecentral.org/#12/37.7749/-122.4194?show=lockinAnimated&level=8&unit=feet&pois=hide

FIGURE 3. Storm Surge and High Tides Magnify the Risks of Local Sea Level Rise



Sea level sets a baseline for storm surge—the potentially destructive rise in sea height that occurs during a coastal storm. As local sea level rises, so does that baseline, allowing coastal storm surges to penetrate farther inland. With higher global sea levels in 2050 and 2100, areas much farther inland would be at risk of being flooded. The extent of local flooding also depends on factors like tides, natural and artificial barriers, and the contours of coastal land.

Acts of God, human influence and litigation

Sophie Marjanac, Lindene Patton & James Thornton

Nature Geoscience 10, 616–619 (2017)

Developments in attribution science are improving our ability to detect human influence on extreme weather events. By implication, the legal duties of government, business and others to manage foreseeable harms are broadening, and may lead to more climate change litigation.

Isla Vista, California

County of San Mateo et al v. Chevron Corp.

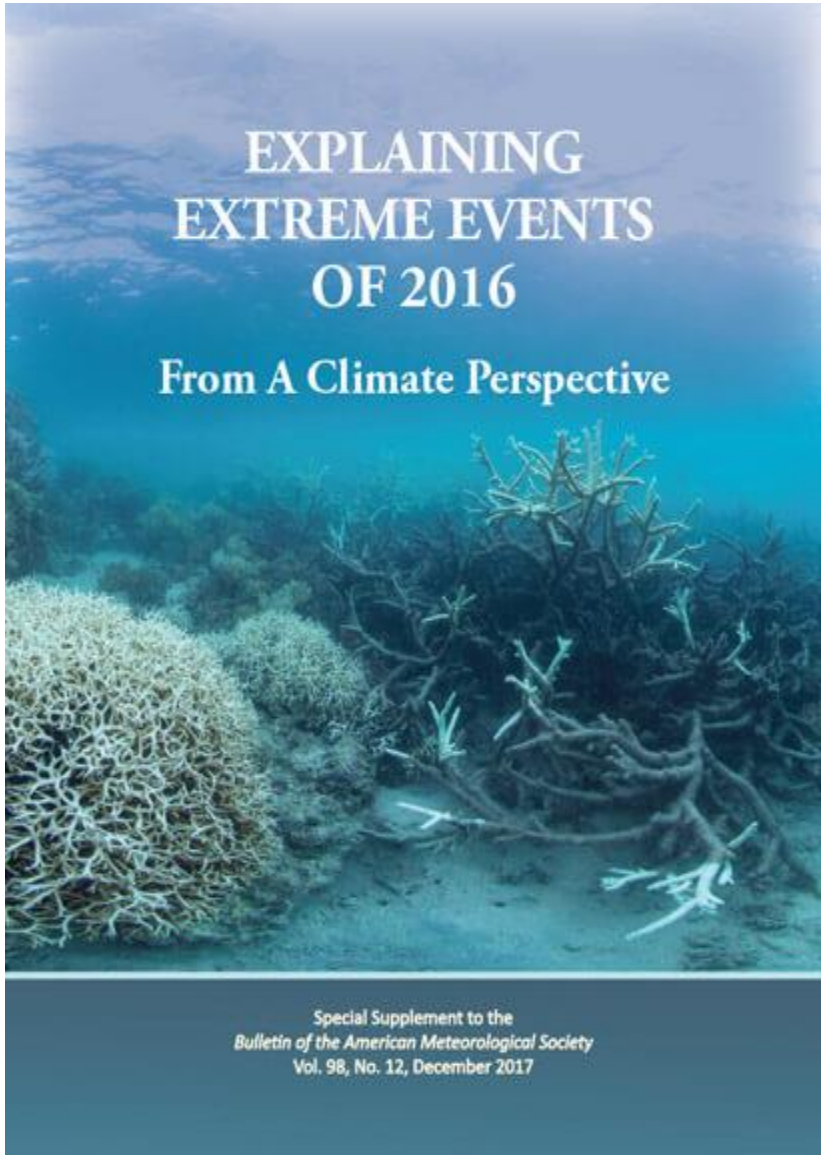
Each of the complaints presents the same simple, compelling storyline: These fossil fuel companies knew. They knew that climate change was happening, that fossil fuel production and use was causing it, and that continued fossil fuel production and use would only make it worse. They knew this, but they hid it. And then they lied about it, and paid other people to lie about it for them. All the while they profited from it, and plotted to profit more. Ultimately, their actions caused sea levels to rise, and thereby caused harm, are continuing to cause harm, and are contributing to future harm to the plaintiff governments and their residents. Accordingly, the complaints claim that the defendant companies should be held liable and forced to pay, both for the costs the local governments are incurring to adapt to sea level rise and for the companies' own willful, deceptive, and malicious behavior.

California Penal Code 370 Public Nuisance Defined

"Anything 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 by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance."

People v. ConAgra Grocery Products Company, et al. (Nov. 14, 2017), affirmed in large part a trial court order requiring Defendants Sherwin-Williams Company, NL Industries Inc., and ConAgra Grocery Products Co. to pay $1.15 billion into a fund to abate the hazards of lead paint in 10 cities and counties in California.

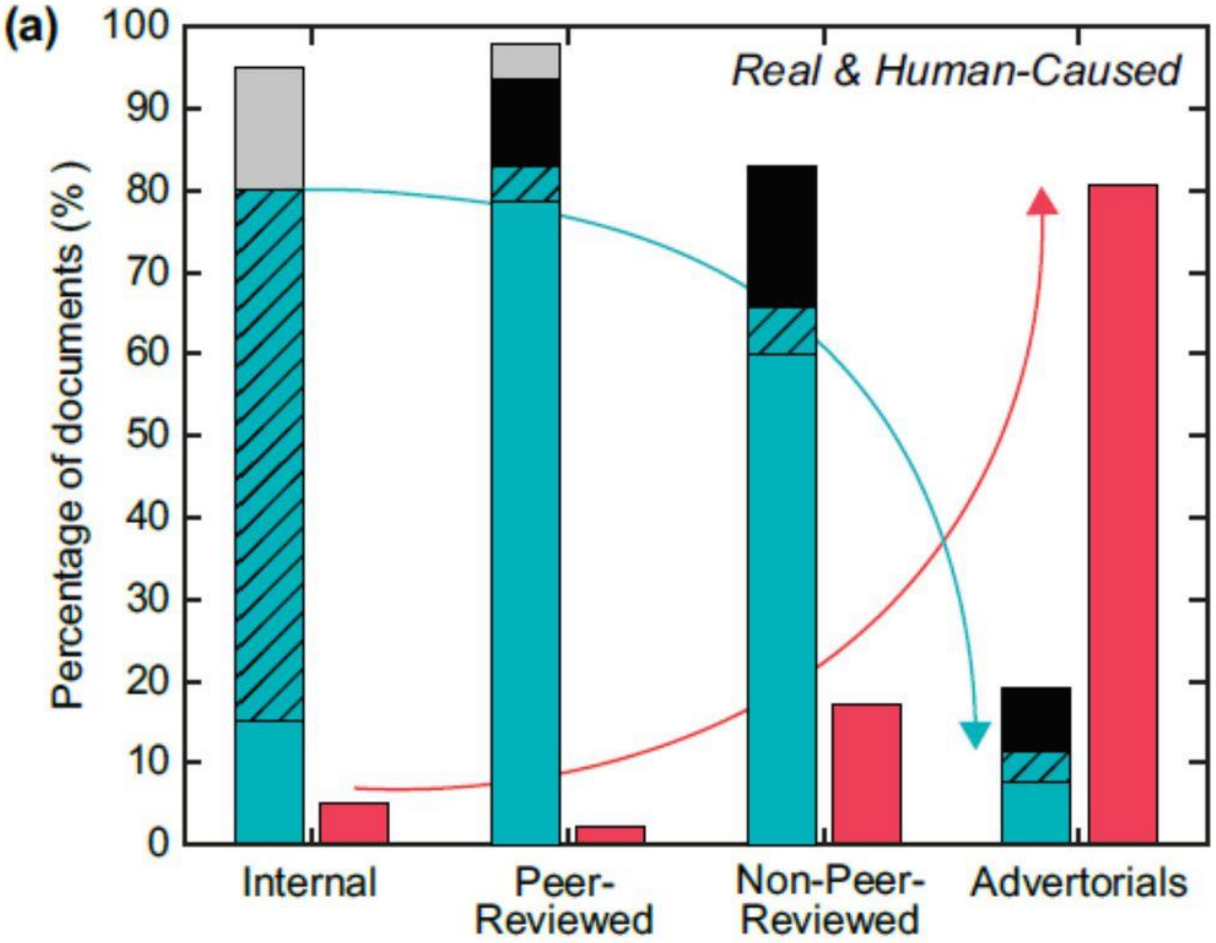
The appeals court held that "the evidence, while circumstantial, was sufficient to support reasonable inferences that Defendants must have known in the early 20th century that interior residential lead paint posed a serious risk of harm…." The court found that the Defendants' affirmative promotion of lead paint for interior residential use played at least a "minor" role in causing the harm and that was sufficient to hold them liable under California nuisance law.



This sixth edition of explaining extreme events of the previous year (2016) from a climate perspective is the first of these reports to find that some extreme events were not possible in a preindustrial climate. The events were the 2016 record global heat, the heat across Asia, as well as a marine heat wave off the coast of Alaska. While these results are novel, they were not unexpected. Climate attribution scientists have been predicting that eventually the influence of human-caused climate change would become sufficiently strong as to push events beyond the bounds of natural variability alone. It was also predicted that we would first observe this phenomenon for heat events where the climate change influence is most pronounced. Additional retrospective analysis will reveal if, in fact, these are the first events of their kind or were simply some of the first to be discovered.

B. Ekwurzel, et al., The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers.
Climatic Change (2017) 144:579–590

Recent findings that nearly two thirds of total industrial CO2 and CH4 emissions can be traced to 90 major industrial carbon producers have drawn attention to their potential climate responsibilities. Here, we use a simple climate model to quantify the contribution of historical (1880–2010) and recent (1980–2010) emissions traced to these producers to the historical rise in global atmospheric CO2, surface temperature, and sea level. Emissions traced to these 90 carbon producers contributed ~57% of the observed rise in atmospheric CO2, ~42–50% of the rise in global mean surface temperature (GMST), and ~26–32% of global sea level (GSL) rise over the historical period and ~43% (atmospheric CO2), ~29–35% (GMST), and ~11–14% (GSL) since 1980 (based on best estimate parameters and accounting for uncertainty arising from the lack of data on aerosol forcings traced to producers).


(a)
Real & Human-Caused
Percentage of documents (%)
100
90
80
70
60
50
40
30
20
10
0
Internal
Peer-Reviewed
Non-Peer-Reviewed
Advertorials

Shell

CONFIDENTIAL

SUMMARY

Man-made carbon dioxide, released into and accumulated in the atmosphere, is believed to warm the earth through the so-called greenhouse effect. The gas acts like the transparent walls of a greenhouse and traps heat in the atmosphere that would normally be radiated back into space. Mainly due to fossil fuel burning and deforestation, the atmospheric CO2 concentration has increased some 15% in the present century to a level of about 340 ppm. If this trend continues, the concentration will be doubled by the third quarter of the next century. The most sophisticated geophysical computer models predict that such a doubling could increase the global mean temperature by 1.3-3.3°C. The release of other (trace) gases, notably chlorofluorocarbons, methane, ozone and nitrous oxide, which have the same effect, may amplify the warming by predicted factors ranging from 1.5 to 3.5°C.

Mathematical models of the earth's climate indicate that if this warming occurs then it could create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather. These changes could be larger than any that have occurred over the last 12,000 years. Such relatively fast and dramatic changes would impact on the human environment, future living standards and food supplies, and could have major social, economic and political consequences

1998 Group Scenarios – summary

TINA

The 1995 scenarios introduced us to the idea of TINA: There Is No Alternative to adapting to and making use of the impersonal forces of Globalisation, Liberalisation and Technology. Three years later the power of TINA is undiminished. Different countries or companies may be at different stages of adaptation but the direction is all one way.

TINA is also operating at the people level ('TINA below' as opposed to the impersonal forces of 'TINA above'). People are increasingly impacting the world market as consumers, employees and citizens. Almost everywhere, they are better off, better educated and able to exercise more choice.

The scenarios ask the question; which of these forces of TINA matter most?

The New Game

'The New Game' is the story of the evolution of new organisational forms and structures to manage these powerful forces. We have always been scared that powerful trends would unbalance society and lead to crisis and disaster. Yet looking back we are able to see that increasingly, institutions (such as governments or companies) are showing themselves to be adaptable and that society is adept at creating new organisational forms. We only have to look at the 'dogs that didn't bark'; disasters that never occurred. As we do look back, we can scarcely believe we once thought Kyoto wouldn't succeed, EMU would be derailed, China would fall apart and so on.

'The New Game' is a very dynamic story. The game is increasingly complex with a bigger board, new pieces, new rules. At the global level we see the emergence of new institutions to set frameworks and rules; on financial institutions, the environment, antitrust and so on. Many of these institutions are amalgams of public and private sector activities.

In this framework of rules, liquid and competitive markets emerge everywhere, for example, in new forms of trading risk and trading of carbon emission permits. This leads to a drive for transparency and commoditisation.

This rules-driven and competitive world leads to continued world economic growth, averaging just under 4% p.a. over the period. Energy demand is curtailed by the effects of environmental management. Coal and oil are particularly affected although gas and later renewables grow quickly. Middle East producers see the writing on the wall and seek the best solution, increasing their share of the limited market by keeping prices around the $10/bbl mark.

This is a tough world for business. Many industries are at risk of developing unprofitable "Empty Cores". Globalisation is a necessity but there are many models to choose from. Companies seek alternatives to commoditisation by understanding what 'Strategic Control Points' are open to them and seizing them. Fast, cheap and effective learning becomes a core competence and organisational structures are devised to make it happen. This leads to constant adaptation and reinvention as the 'Profit Zone' (the areas of the value chain where customers are prepared to pay in excess of the cost of capital)

"With very long time scales involved, it would be tempting for society to wait until then to begin doing anything," said the 1988 document. "The potential implications for the world are, however, so large, that policy options need to be considered much earlier. And the energy industry needs to consider how it should play its part.“

"Following the storms, a coalition of environmental organizations brings a class-action suit against the US government and fossil-fuel companies on the grounds of neglecting what scientists (including their own) have been saying for years: that something must be done. A social reaction to the use of fossil fuels grow, and individuals become 'vigilante environmentalists' in the same way, a generation earlier, they had become fiercely anti-tobacco. Direct-action campaigns against companies escalate. Young consumers, especially, demand action."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THANKS FOR LISTENING