Testimony in Support of LD 1870
Professor Anthony Moffa, Portland

Senator Tepler, Representative Doudera, and members of the Committee on Environment and Natural Resources, my name is Anthony Moffa. I am a professor at the University of Maine School of Law, where I teach environmental law and torts. I offer this testimony in my personal capacity and none of the views I express reflect the official position of the University of Maine.

Professor Rachel Rothschild of the University of Michigan, who you will hear from later today, and I are the foremost legal academics researching and writing about the concept of "climate superfunds" (i.e., statutory climate liability). My work on the subject has been published in the *Harvard Environmental Law Review* and provided the topic for the 2025 Lloyd K. Garrison Lecture on Environmental Law, which I was invited to deliver at the Elisabeth Haub School of Law at Pace University. The following testimony is adapted from that work. LD 1870 provides the opportunity to put my research into practice for the benefit of all Mainers.

The Polluter Pays Principle has been a central tenet of environmental policy for decades. It provided economic justification for compelling cleanups through federal Superfund law (the Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA).[1] The principle now provides the economic and legal justification for "climate superfund" legislation, including LD 1870. This bill will ensure Maine taxpayers do not have to keep paying the costs of climate change. Last year, Vermont and New York became the first states to enact laws imposing liability for climate change harms on fossil fuel producers, invoking the Polluter Pays Principle and Superfund as they did so. Maine would do well to follow suit by passing LD 1870.

I. History of Fossil Fuel Industry Complicity and the Polluter Pays Principle

Our story begins in Chicago in the year 1965. It was in that fair, windy city that a leader offered a dire warning to his constituents about climate change, declaring "[T]here is still time to save the world's peoples from the catastrophic consequence of pollution, but time is running out."[2] Those words came not from the lips of President Lyndon Johson nor Chicago Mayor Richard Daley nor civil rights leader Martin Luther King, Jr. Instead, it was Frank Ikard, President of the American Petroleum Institute, speaking to captains of that industry.

In the decades that followed, fossil fuel companies ignored that call to action. And that's describing their inaction (and actions) generously. The New York legislature was not nearly as kind, describing the actions of the "biggest fossil fuel companies" as "unconscionable" and

[1] 42 U.S.C. §§ 9601–9675.
[2] American Petroleum Institute, Proceedings 1965, Remarks of President Frank Ikard,"Meeting the Challenges of 1966"; *see* Benjamin Franta, Early oil industry knowledge of CO_2 and global warming. 8 *Nature Climate Change* 1024, 1024 (2018).

analogizing their tactics of "denial, deflection, and delay" to those infamously employed by the tobacco industry.[3] The legislature specifically found that "In spite of the information provided by their own scientists that the continued burning of fossil fuels would have catastrophic results, these companies hid the truth from the public and actively spread false information that the science of climate change was uncertain when in fact it was beyond controversy."[4]

Shortly thereafter, in 1972, the Organization for Economic Cooperation and Development (OECD) introduced the Polluter Pays Principle for the first time. In simple terms the Polluter Pays Principle imposes liability on a person who pollutes the environment to compensate for the damage caused to human health and return the environment to its original state. At its initial inception, it simply called for the internalization of the costs of pollution control. Over time, OECD has clarified that the covered costs can include "preventive measures, restoration, or a combination of both." The OECD has recognized pollution fees as an acceptable economic means of implementing the Polluter Pays Principle.

The Principle is based on the fundamental economic concept of externalities. Externalities are practical effects (i.e., costs or benefits) felt by people not directly involved in a transaction (i.e., neither the seller nor the buyer). A functioning, efficient market (i.e., one where prices dictate supply and demand) depends on accurate pricing that reflects the true cost of products. When products impose costs on society that are not felt by the producer/supplier or by the buyer/user, they impose negative externalities. Pollution is the classic example of a negative externality; all of society deals with the negative impacts, and, without government intervention, the producer need not compensate society for the harm they impose. As a result, an inefficient amount of the product is sold and used (i.e., more than would be if prices reflected true cost). Another easy-to-understand example is cigarettes. Second-hand smoke causes harm to people who neither produced nor purchased cigarettes; those people will have to pay medical expenses and perhaps suffer significant health impacts. The externalities of cigarette smoking are not accounted for in the cost of a pack without government intervention (i.e., the costs to society of producing cigarettes are not internalized). Climate superfund legislation attempts to internalize the externalities generated by decades of fossil fuel production and sale.

As the decade of environmental lawmaking that began with our Senator Ed Muskie's work to clean up the nation's air and water came to a close, a series of bills that would morph into what we now know as "Superfund" or "CERCLA" were first introduced in the Senate and then the House of Representatives.[5] It embodied the Polluter Pays Principle and attempted to internalize years of negative externalities from the unregulated disposal and handling of hazardous materials. The federal law enacted in 1980 had its defining features cemented by court decisions in the decade that followed. The liability CERCLA imposes is <u>strict</u>. In the context of cleanup actions, what that means is if you ever owned or operated the contaminated property, or sent

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[3] Climate Change Superfund Act, 2024 N.Y. Laws 679.
[4] *Id.*
[5] Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"),* 8 COLUM. J. ENV'T. L. 1, 2 n.6, 6 (1982) (citing S. 1480, 96th Cong., 1st Sess. (1979), 126 CONG. REC. S30,987 (daily ed. Nov. 24, 1980)).

things there to be disposed of, you have to clean it up. It is retroactive meaning it reaches back to the turn of the twentieth century when it looks for parties responsible for contamination. And it is joint and several at every superfund site. Any one of the owners, operators, or arrangers could be on the hook for the entire cost of a cleanup.

The United Nations Framework Convention on Climate Change is undoubtedly the most well-known product of the 1992 Earth Summit. But another is more important to our story. The Rio Declaration on Environment and Development (the so-called "Rio Declaration"), was a short document produced at the 1992 United Nations Conference on Environment and Development (UNCED),[6] informally known as the Earth Summit.[7] The Rio Declaration consisted of 27 principles intended to guide countries in future sustainable development.[8] It was signed by over 175 countries.[9] Principle 16 of the Rio Declaration provides that "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[10]

Around the same time, Stanford played host to John Browne, Group Executive for BP America, who perhaps unknowingly, made the first pitch for a climate superfund law: "We [the fossil fuel industry] have a responsibility to act, and I hope that through our actions we can contribute to the much wider process which is desirable and necessary. BP accepts that responsibility." These remarks represent an astonishing admission of culpability and seeming willingness to contribute to the remediation of the attendant harm. LD 1870, like its Vermont and New York predecessors, takes BP at its word and asks industry to take some financial responsibility for the externalities their products created through climate change.

II. Present Urgency to Act and CERCLA Analogy Analysis

I am sorry to report that the climate crisis has gone largely unmitigated since that 1992 summit. Considerable damage has been done. Communities in Maine are racking up bills that would make even the wealthiest among us blush - tens, if not hundreds, of millions of dollars. Someone must pay the tab. The default answer is us - the taxpayers of Maine. Climate torts litigation has spread across the nation. More than thirty states and municipalities, including Maine, have sued the largest fossil fuel producers.[11] These lawsuits rely on time-tested common law causes of action like nuisance, fraud, and products liability. They are also rooted in the Polluter Pays

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[6] *See Rio Declaration on Environment and Development, Jun. 13, 1992 31 ILM 874 (1992).*
[7] *See* UN, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, https://www.un.org/en/conferences/environment/rio1992.
[8] *See Rio Declaration on Environment and Development, Jun. 13, 1992 31 ILM 874 (1992).*
[9] Id.
[10] Id.
[11] *See* Sabin Center for Climate Change Law, Climate Case Chart: Common Law Claims, *https://climatecasechart.com/case-category/common-law-claims/.*

Principle. Unfortunately, the only bills being paid as we sit here today aren't for infrastructure improvements or resiliency programs, they are bills counted in sixths of an hour and payable to the biggest law firms in the country. And those firms have so far frustrated the efforts of state and municipal attorneys.

Confronted with this landscape and the ticking time bomb that is the climate crisis, it only makes sense to turn to legislation. Taking inspiration from the Congress that passed CERCLA in the 1980s and the Polluter Pays Principle, the legislatures of Vermont and New York crafted and passed legislation that imposes strict, retroactive liability on the largest fossil fuel producers for the costs of climate change. LD 1870 is Maine's effort to join them, and I applaud it.

LD 1870 tracks the Vermont statute closely. It is useful to examine its text, looking for those defining features of CERCLA. It is important to analyze why and how they work (or don't) in the context of climate liability.

A. Strict Liability

The type of strict liability that courts have applied in CERCLA cases would work well for climate adaptation costs. Similarly, an industry has imposed the most significant environmental externality of their operations on society. The largest fossil fuel companies have controlled the production and widespread distribution of the primary pollutant contributing to climate change.[12] Their control over fossil fuel mirrors the potentially responsible parties' control over hazardous substances. In both instances, imposing liability without fault forces the industry as a whole to internalize the externality (i.e. to make the polluter pay).[13]

Going back to first principles of tort and polluter pays - there is a strong theoretical case for the common law strict liability in the case of fossil fuels.[14] After all, the production and distribution (i.e. sale) of fossil fuels presents a fairly straightforward products liability situation. Indeed, the currently pending state tort cases all include claims of product defects. A statutory strict liability scheme would simply confirm that the law of products applies even when the harm caused by the defect is collectively felt. The harms in this instance being the well-documented costs of adaptation measures.[15] These costs, and even some of the specific infrastructure involved, are very similar to the costs of remediation of contaminated sites under CERCLA.

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[12] *See* Anthony Moffa, From Comprehensive Liability to Climate Liability: The Case for a Climate Adaptation Resilience and Liability Act (CARLA), 47 Harv. Env. L. Rev. 473, 513 (2023).
[13] *Id.*
[14] *See id.* at part II.B.
[15] *See id.*

LD 1870 laws explicitly impose strict liability on "responsible parties." It reads, "[a] responsible party is strictly liable for a share of the costs of climate change adaptation projects and all qualifying expenditures from the fund."

As with CERCLA, when fault drops out of CARLA's liability equation, something else needs to define who is "responsible." In the case of CERCLA, the statute based responsibility on control over hazardous substances and/or property that ultimately led to contamination.[16] In this way the statute reached back to the root of pollution problem, rather than targeted individual bad actors. A parallel scheme for climate adaptation liability would emphasize the introduction and control of the underlying substance (i.e. fossil fuels) that generates greenhouse gas pollution. That is precisely how proposed statute would operate. LD 1870 does not discriminate as to the type of fossil fuels or the location of the companies' headquarters. The bill does, however, focus on the biggest producers.

Like Vermont[17] and New York,[18] the Maine climate superfund law would use the threshold of one billion metric tons of greenhouse emissions. Because these statutes, like CERCLA and in keeping with the spirit of the Polluter Pays Principle, charge externalities to the initial polluters – the companies that produced the fossil fuels. In theory, this is a bold and important step. In practice, it creates a quagmire. How should Maine convert the extracted fossil fuels into historical greenhouse gas emissions? Fortunately, the United States Environmental Protection Agency (EPA) has calculated (and published) emissions factors for various fossil fuels,[19] as well as a Greenhouse Gas Equivalencies Calculator.[20] LD 1870 smartly relies on this work, but does not limit the department to it, for the purposes of calculating entities' shares of greenhouse gas emissions.[21]

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[16] *See* 42 U.S.C. § 9607(a).

[17] 24A V.S.A. § 596(22) ("Responsible party" means any entity or a successor in interest to an entity that during any part of the covered period was engaged in the trade or business of extracting fossil fuel or refining crude oil and is determined by the Agency attributable to for more than one billion metric tons of covered greenhouse gas emissions during the covered period.)

[18] N.Y. Env. Cons. Law § 76-0101(20) ("Responsible party" means any entity (or a successor in interest to such entity described herein), which, during any part of the covered period, was engaged in the trade or business of extracting fossil fuel or refining crude oil and is determined by the department to be responisible for more than one billion tons of covered greenhouse gas emissions.").

[19] *See* EPA, GHG Emission Factors Hub, https://www.epa.gov/climateleadership/ghg-emission-factors-hub.

[20] *See* EPA, Greenhouse Gas Equivalencies Calculator, https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator

[21] "The department shall use the best available information, including but not limited to the United States Environmental Protection Agency's emissions factors for greenhouse gas inventories as applied to the fossil fuel volume data, for the purpose of determining the amount of covered greenhouse gas emissions attributable to any entity from the fossil fuels attributable to the entity."

B. Retroactive Liability

A retroactive law "looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect."[22] Arguably, retroactivity is the most important feature of CERCLA liability. After all, the statute aimed to clean up sites that had been contaminated over the course of industrialization dating back to the turn of the twentieth century. Many, if not most, of such sites had changed hands (and uses) a few times by the 1980s. Thus, the ability to recover cleanup costs would have been severely compromised if it imposed liability only on the current/1980s owners. Instead, CERCLA liability attaches to any party that fit into one of the four statutory categories[23] of responsible party *at any point in time*. Retroactive liability is a rare and powerful tool that departs from the common law norm. Negligence ordinarily judges the reasonableness of an action at the time it was taken, not before or after. Consequently, retroactive liability thus derives from the statute itself – CERCLA and now climate superfund laws, including LD 1870.

Much like contaminated sites in 1980, the atmosphere is already polluted by greenhouse gases. While some might be done to mitigate its degree, climate change is a reality thanks to historical emissions. Those emissions can largely be traced to the fossil fuel industry, and further isolated within that industry to a subset of the worst contributors. Certainly, a CERCLA style retroactivity makes a great deal of sense, especially as newer and possibly disrupting geopolitical events and new industry may cause previous emitters to leave the market. All of these factors make retroactivity a necessary feature of any effective climate adaptation liability scheme. LD 1870 recognizes this and incorporates retroactivity – though to a limited degree.

In the case of greenhouse gas pollution, the relevant timescale is not as straightforward as industrial contamination - most greenhouse gases persist in the atmosphere for decades, even centuries. There was no fossil fuel revolution to mirror the industrial revolution in the early twentieth century. Companies have been extracting, and humans have been burning, fuels and carbon polluting for far longer. Thus, the question in crafting climate liability is how far back to look. And that question is both one of policy and one of science.

Science only minimally constrains the reach of fossil fuel climate liability. Thanks to Richard Heede's seminal accountability work, one could track contributions to climate change from fossil fuel producers all the way back to the 1850s.[24] Subsequently, more recent studies have focused on the contributions during the narrower window of time between the 1980s and today.[25]

Both Vermont and New York use the phrase "covered period" to describe the years upon which they will base liability, and LD 1870 does the same. Taking a cue from these more recent studies, Vermont, and now (if enacted) Maine, impose liability on fossil fuel producers for their activities

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[22] Black's Law Dictionary 353 (8th ed. 1999).
[23] *See* 42 U.S.C. § 9607.
[24] Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions from Fossil Fuel and Cement Producers, 1854–2010,* 122 CLIMATIC CHANGE 229 (2014).
[25] *See* CARLA, Part II.B.

during the period from 1995 to 2024.[26] This is a sensible period of time based on when the most significant emissions occurred.

In one sense, starting the covered period in 1995 is actually generous. A completely defensible cutoff could have been the time that the fossil fuel industry possessed information indicating that climate change would result from their continued operation. Investigative journalism has uncovered reports to the American Petroleum Institute dating back to the 1960s that warn of the dangers of carbon dioxide pollution and resultant global warming.[27] Retroactivity to that date consequently comes with some supporting moral justification.

C. Joint and Several Liability

And here enters a big, and important, difference between climate superfund and traditional superfund law. In climate superfunds joint and several liability gives way to proportional liability. And the proportional liability scheme selected by LD 1870 (as well as Vermont and New York) looks a heck of a lot like a time-tested, though rarely-invoked torts concept called "market share liability." Which is just what it sounds like - proportional liability based on the defendant's share of the market for the offending product.

Below is an equation that expresses in basic terms how LD 1870 purports to apportion liability.

$$\frac{Demand\ to\ Responsible\ Party}{Cost\ to\ ME\ of\ GHG\ emissions} = \frac{Responsible\ Party's\ share\ of\ GHG\ emissions}{Total\ GHG\ emissions}$$

A lot of these variables could prove difficult to assign values to, but without three of them defined Maine cannot solve for the all-important cost demand variable.

The cost side of the equation is a little more complicated than the emissions side. How do we know how much money Maine needs? In other words, how much will climate cost the state?

The New York statute includes a provision fixing the cost denominator at seventy-five billion dollars. The Vermont statute tasks the state treasurer with making "an assessment of the cost to the State of Vermont and its residents of the emission of covered greenhouse gases."[28] Maine,

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[26] 24A V.S.A. § 596(8) ("Covered period" means the period that began on January 1, 1995 and ended on December 31, 2024.")

[27] *See* ELMER ROBINSON AND R.C. ROBBINS, FINAL REPORT TO THE AMERICAN PETROLEUM INSTITUTE (API) (1968).

[28] 24A V.S.A. § 599c. The section provides that this assessment of costs "shall include: (1) a summary of the various cost-driving effects of covered greenhouse gas emissions on the State of Vermont, including effects on public health, natural resources, biodiversity, agriculture, economic development, flood preparedness and safety, housing, and any other effect that the State Treasurer, in consultation with the Climate Action Office, determines is relevant; (2) a categorized calculation of the costs that have been incurred and are projected to be incurred in the future within the State of Vermont of each of the effects identified under subdivision (1) of this section; and (3) a categorized calculation of the costs that have been incurred and are projected to be incurred in the future within the

faced with a choice between these options, went the more sensible, less potentially arbitrary route of Vermont. LD 1870 tasks the Treasurer of the State of Maine with conducting "an assessment of the costs to the State of the emission of greenhouse gases for the period that began on January 1, 1995 and ended on December 31, 2024." Consistent with the Polluter Pays Principle, that assessment begins with identifying the effects (i.e. externalities) of climate change on the state and then proceeds by attaching cost figures to those effects – both already incurred and projected.[29]

Looking to the emissions side, science, and the above-referenced conversion figures for extracted fossil fuels, can help set the ratio on the right side of the equation; especially if, as LD 1870 does, the denominator is set to global emissions. Why? Because the limits of science and the reality. There is no atmospheric bubble around Maine.

Given this significant difference and the lack of individual contaminated sites, some, like Prof. Robin Craig have suggested that these "climate superfund" laws function much more like the CERCLA's now extinct superfund tax. That provision collected excise taxes on crude oil and petroleum products, among others, to help keep the federal coffers full to pay for so-called orphaned cleanup sites. The tax was formal recognition that the petroleum industry's products contributed to a common problem - widespread land and water contamination - that cost money to deal with. In other words, the tax facilitated polluter payments on a grand scale, not tied to any one cleanup. The same could very much be said of the cost demands made to fossil fuel companies by Vermont, New York, and, potentially, Maine. The whole country is one, big orphan climate superfund site.

D. Process

CERCLA litigation can famously be initiated by EPA or by potentially responsible parties suing one another. Recognizing the futility of asking the fossil fuel industry to sue each other, LD 1870 forgoes CERCLA's private cause of action. Instead, it relies on administrative initiation by the Department of Environmental Protection. Importantly, it makes the initial notice of liability (i.e. cost recovery demand), and the reconsideration of that notice, administrative proceedings. It is only on appeal of a final notice that a responsible party can get into a courtroom.

State of Vermont to abate the effects of covered greenhouse gas emissions from between January 1, 1995 and December 31, 2024 on the State of Vermont and its residents."

[29] "The assessment must include: 1. A summary of the various cost-driving effects of greenhouse gas emissions on the State, including effects on public health, natural resources, biodiversity, agriculture, economic development, flood preparedness and safety, and any other effect that the Treasurer of State determines is relevant; 2. A categorized calculation of the costs that have been incurred and are projected to be incurred by the State of each of the effects identified under subsection 1; and 3. A categorized calculation of the costs that have been incurred and are projected to be incurred by the State to abate the effects of greenhouse gas emissions from between January 1, 1995 and December 31, 2024 on the State and residents of the State."

III. The Fate of Climate Superfund in the Courts

Massachusetts, Maryland, California, New Jersey are all considering similar legislation. Unsurprisingly, the fossil fuel producers who now face liability do not want to foot the bill. Their hope lies in federal court where they, along with politically and economically aligned states, challenge the legislation on a number of grounds. That litigation, at least in some form, may very well find its way to the United States Supreme Court. But, more immediately, how will it fair in the federal trial and appeals courts? Will these "climate superfund" bills withstand Constitutional scrutiny? The answer is complicated and uncertain; though, I remain cautiously optimistic in the near term in our state.

As an initial matter it is worth briefly articulating the claims common to the legal challenges in both Vermont and New York. The fossil fuel industry and state plaintiffs allege that these laws imposing liability for climate adaptation based on historic greenhouse gas production are preempted by the Clean Air Act and nonetheless violate the Due Process and Equal Protection Clauses of the 14th Amendment; the Supremacy Clause and fundamental components of federalism; the Dormant Commerce Clause; the Eighth Amendment's prohibition on "excessive fines"; and the Takings Clause of the Fifth Amendment.

The early work of Professor Rachel Rothschild presciently anticipated the legal arguments against these laws and aptly addressed each of them.[30] Her recent work, and testimony here, has expanded on that analysis. In particular, Professor Rothchild has laid out how properly designed climate accountability legislation, like LD 1870, can avoid the most direct preemption and due process problems.

I concur with her analysis that these *liability* statutes are likely not preempted by the Clean Air Act. The controlling Supreme Court precedent here is *AEP v. Connecticut*.[31] In that case, the Supreme Court held that federal nuisance claims based on greenhouse gas emissions were *displaced* by the Clean Air Act.[32] Federal common law nuisance is a wholly different cause of action, seeking a different remedy than the state statutory liability at issue now. Importantly, Connecticut sought a court order enjoining greenhouse gas emissions (above a certain level) by defendant emitters. The Supreme Court based its conclusion in that case on the fact that, after *Massachusetts v. EPA*, the EPA was empowered to regulate greenhouse gases from mobile sources if it concluded that greenhouse gases endanger public health and welfare.[33] The EPA

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[30] I feel compelled to firmly denounce the efforts to publicly harass and/or ridicule Professor Rothschild for this work and to silence her. Those efforts impede fundamental principles of academic freedom and deserve near universal condemnation. *See* Coral Davenport, *She Inspired Laws to Hold the Fossil Fuel Industry Accountable. Now She's a Target*, NY Times, March 27, 2025.

[31] 564 U.S. 410 (2011).

[32] *See id.*

[33] *See id.* at 410 ("*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Clean Air Act.").

made such a conclusion in 2009.[34] Now, EPA can and does regulate greenhouse gas emissions. However, those regulations do not attempt to remedy harm that has been done nor provide compensation to vulnerable communities. These "climate superfund" laws serve those distinct purposes and do not conflict with pollution regulation; no court would conclude that the existence of federal pollution control regulations in any other area preempts the field of toxic torts. This reasoning is especially true in light of the Supreme Court's recent decision in *WV v. EPA* and the recent discussion at EPA regarding the so-called "endangerment finding" for greenhouse gas emissions. Both of those developments occurred after Rothchild's initial writings. Both indicate EPA lacks the authority and the will to comprehensively regulate, and compensate, in the field of climate change.

I also agree with her analysis on the essential personal jurisdiction component of any due process challenge. The proposed statutory language makes clear that to impose liability on an entity, it must have the "minimum contacts" with Maine necessary for a state to establish jurisdiction over a defendant.

In *Ford Motor Co. v. Montana*,[35] the Supreme Court held that as long as the claims in a given case "relate to" a defendant's in-state activities that state came assert jurisdiction over the party.[36] In other words, the Due Process Clause does not demand that the harm-causing action all originate in the state exercising personal jurisdiction over a responsible party. It is hard to dispute that the climate change inducing activities of the fossil fuel industry relate to the well-documented impacts in Maine.

When it comes to the other Constitutional claims, none seems particularly compelling on its own. Analyzing each one in isolation, and removing politics from the equation, the federal courts, including the Supreme Court, should reject them and refuse to overturn the properly enacted state statutes at issue, including LD 1870, should it be enacted. Lawyers for Vermont and New York will undoubtedly raise the correct legal arguments and poke holes in each of the individual Constitutional claims.

Let's begin with the federalism claims. These arguments operate on two dimensions of power – vertical (between the state and federal government) and horizontal (amongst the states). On the first, national and international pollution might be considered only subjects for the federal government. That is primarily a political argument; one that is arguably at odds with the current posture of the federal government to defer to states. Indeed, Justice Brandeis famously described

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[34] *See* 74 Federal Register 66496 (Dec. 15, 2009).
[35] 592 U.S. ___ (2021).
[36] Id.

states within a federalist system as "laboratories of democracy."[37] On the second, Supreme Court precedent from the Clean Water Act allows application of the source state's law, rather than the state where the damage occurs.[38] This latter precedent, however, has not been applied outside the context of discrete interstate pollution; the fossil fuel production activities at issue here are ubiquitous and not confined at any one state.

Aside from the less convincing and artfully-drafted-around personal jurisdiction issue, some Due Process Clause precedent suggests that "arbitrary and irrational" penalties will not withstand substantive due process scrutiny.[39] This is a very manipulable and subjective standard. It is thus hard to predict how arguments around it will resonate.

The Dormant Commerce Clause is the judicially derived negative converse of Article 1 Section 8 of the Constitution, which grants Congress the power to regulate interstate commerce.[40] Dormant Commerce Clause doctrine seeks to invalidate individual state attempts to regulate the national market. At the core of Dormant Clause concern are state laws the discriminate against out-of-state economic actors, either internationally or in practice. Recently, the Supreme Court has fractured over whether a truly neutral state law can violate the Dormant Commerce Clause because it burdens all commerce in a national marketplace. A majority of the Court declined to endorse that expansive reading of the Clause in *National Pork Producers Council v. Ross*.[41] After *Pork Producers* the door is theoretically still open for some future Supreme Court to find that even non-discriminatory laws that burden interstate commerce can be invalidated if costs outweigh benefits. However, it is extremely unlikely that the United States Court of Appeals for the First Circuit (where federal appeals from Maine's courts go) would expand the Dormant Commerce Clause doctrine absent such a change in the Supreme Court's approach.

The Eighth Amendment explicitly prohibits the imposition of "excessive fines." While this is a little used provision in terms of invalidation of state laws, the Supreme Court famously invoked it in the civil liability context in *BMW v. Gore*.[42] Again, without direct precedent on state superfund law from the Supreme Court, it is unlikely the First Circuit would rely on the Eighth Amendment line of cases in this non-punitive context.

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[37] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). 177. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government . . . .").

[38] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 499 (1987) ("application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests.").

[39] *See, e.g.,* Duke Power Co. v. Carolina Env't Study Grp., 438 U.S. 59, 83–84 (1978) ("upheld absent proof of arbitrariness or irrationality on the part of Congress.").

[40] U.S. CONST. ART. 1, § 8 ("The Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); *see also* Gibbons v. Ogden, 22 U.S. 1 (1824) (Chief Justice Marshall wrote that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie ***dormant***.") (emphasis added).

[41] 598 U.S. 356 (2023).

[42] 517 U.S. 559 (1996).

Conclusion

So where does that leave us? What should we do?

Pass LD 1870. It is the best iteration yet of the climate superfund concept. It builds on the Vermont and New York experiences. It is drafted to avoid major legal pitfalls. It has the potential to change the landscape of climate lawmaking across the country. Perhaps more importantly, it brings hope to Mainers desperate to deal with the rising costs of the rising temperatures and seas.

-Anthony Moffa