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Caesaria Kim

Golden Gate University School of Law, ckim129@my.ggu.edu

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IS AN INJUNCTION THE RIGHT VEHICLE TO COMBAT CLIMATE CHANGE?: GREENWASHING AND THE IMPORTANCE OF INCREASING CONSUMER CHOICE IN FOSSIL FUEL ALTERNATIVES

CAESARIA KIM¹

I. INTRODUCTION

Human activities that release greenhouse gasses (“GHG”), especially the burning of fossil fuels, contribute substantially to global warming and climate change.² With a warming climate comes numerous adverse impacts, including extreme weather events, rising sea levels, drought, and increased exposure to infections.³ The consequences of climate change have affected and will continue to affect communities on every continent, with some vulnerable populations, such as children in poor countries and the elderly, at greater risk of harm.⁴ A recent World Health Organization (“WHO”) assessment concluded that climate change is expected to cause an increase of approximately 250,000 deaths per year between 2030 and 2050.⁵ GHG emissions continued to increase from 1970 to 2010, with carbon dioxide emissions from fossil fuel com-

¹ Caesaria Kim is a second-year Juris Doctor Candidate at Golden Gate University School of Law. The author would like to acknowledge the ELJ editors and Professor Fiona McKenna of GGU for their thoughtful feedback in developing this project.

² *Climate Change and Health*, WORLD HEALTH ORGANIZATION (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

bustion and industrial processes contributing around seventy-eight percent of the total GHG emission increase.⁶

In the face of the climate crisis, people are increasingly interested in more sustainable and eco-conscious alternatives to fossil fuels. As a result, companies associated with fossil fuel industries are under pressure to conform to this trend among consumers by marketing themselves as leaders in developing sustainable alternatives.⁷ However, instead of changing their practices in an effort to mitigate climate change, some companies only promote the appearance of change by engaging in “greenwashing.”⁸ Greenwashing is defined as the “practice of misleading people to believe that a company is engaging in virtuous practices so as to cover up poor practices” or relying on appearances instead of reality; i.e., relying on good marketing instead of actual change.⁹

One company accused of greenwashing their image is Exxon Mobil, Inc. (“Exxon”), the oil and gas producer.¹⁰ Their recent marketing strategy and advertisements feature new research purporting to make a difference by developing biofuels from algae as an alternative to fossil fuels.¹¹ These claims are now being called into question in multiple lawsuits alleging that Exxon is deliberately misleading the public to greenwash their image.¹²

On the surface, biofuels research sounds like a promising step towards sustainability, as the fuels would be created from algae rather than fossil fuels.¹³ Biofuels from algae are considered to be a prime candidate for alternative fuels, because atmospheric GHG is decreased during the process, as the cultivation of algae uses up a large amount of carbon dioxide.¹⁴ Exxon prominently displays their biofuels research in their

⁶ INTERNATIONAL GOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *Summary for Policy Makers*, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE 8 (O. Edenhofer et al. eds., 2014), https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policy-makers.pdf.

⁷ Emily Plec & Mary Pettenger, *Greenwashing Consumption: The Didactic Framing of ExxonMobil's Energy Solutions*, 6 ENV'T COMM'N 459, 459-60, 465 (2012).

⁸ Francesco Bassetti, *Is Greenwashing a Sign of Real Change?*, FORESIGHT: THE CMCC OBSERVATORY ON CLIMATE POLICIES AND FUTURES (Feb. 26, 2020), <https://www.climateforesight.eu/global-policy/greenwashing-a-signal-of-change-to-come/>.

⁹ *Id.*

¹⁰ Emily Holden, *How the Oil Industry has Spent Billions to Control the Climate Change Conversation*, NAT'L OBSERVER (Jan. 9, 2020), <https://www.nationalobserver.com/2020/01/09/news/how-oil-industry-has-spent-billions-control-climate-change-conversation>.

¹¹ *Id.*

¹² Geoffrey Supran & Naomi Oreskes, *Big Oil Is the New Big Tobacco. Congress Must Use Its Power to Investigate*, GUARDIAN (Jan. 20, 2020), <https://www.theguardian.com/commentisfree/2020/jan/20/big-oil-congress-climate-change>.

¹³ Plec & Pettenger, *supra* note 7, at 467-68.

¹⁴ Anoop Singh et al., *Mechanism and Challenges in Commercialisation of Algal Biofuels*, 102 BIORESOURCE TECH. 26, 26 (2011).

marketing materials, including the front page of their corporate website.¹⁵

However, the algae research program at Exxon actually accounts for only a very small portion of the corporation's available budget.¹⁶ In 2016, Exxon spent less than one percent of its annual revenue on alternative energy research.¹⁷ By failing to mention that the company's contribution to alternative energy is relatively miniscule in comparison to its fossil fuel products, Exxon's biofuels advertisements mislead consumers into believing that they are making responsible choices for the environment when buying Exxon's products.¹⁸ But this discrepancy only scrapes the surface of the extent of Exxon's deceptive marketing tactics in relation to global climate change.

Recently uncovered internal documents revealed that Exxon's scientists had knowledge that their products had the potential to change the climate since the 1950s.¹⁹ By the late 1970s and early 1980s, Exxon was "explicitly aware that burning fossil fuels" could lead to "catastrophic global warming."²⁰ Exxon not only failed to disclose this information to the public but continued to promote their products.²¹ As awareness of climate change became more mainstream in the late 1980s and early 1990s, Exxon went further and began to publish advertisements that denied the existence of anthropogenic climate change and global warming.²² For example, in 2000, Exxon published an advertorial in the *New York Times*, calling climate change an "*Unsettled Science*."²³ In the advertorial, Exxon falsely stated that scientists have not been able to confirm that human activity is causing global warming — despite the fact that scientists had formed a consensus that human activity was causing global warming in the 1990s.²⁴

In response to these disclosures, three public plaintiffs — Connecticut, District of Columbia, and Massachusetts — are now bringing legal

¹⁵ EXXON MOBIL, *ExxonMobil and Porsche Are Testing Advanced Biofuels and Renewable, Lower-Carbon eFuels*, <https://corporate.exxonmobil.com> (last visited April 2, 2021).

¹⁶ Holden, *supra* note 10.

¹⁷ Complaint at 48, *District of Columbia, v. Exxon Mobil Corp.* (D.C. Super. Ct. June 25, 2020) (No. 2020 CA 002892 B) [hereinafter D.C. Complaint].

¹⁸ Complaint at 34, *Connecticut v. Exxon Mobil Corp.* (Conn. Super. Ct. Sept. 14, 2020) (No. HHDCV206132568S), 2020 WL 5522920 [hereinafter Connecticut Complaint].

¹⁹ Supran & Oreskes, *supra* note 12.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ JOHN COOK ET AL., *AMERICA MISLED: HOW THE FOSSIL FUEL INDUSTRY DELIBERATELY MISLED AMERICANS ABOUT CLIMATE CHANGE* 8, GEO. MASON UNIV. CTR. FOR CLIMATE CHANGE COMM'N (2019), https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America_Misled.pdf.

²⁴ *Id.* at 5.

90 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

actions against Exxon to stop these deceptive practices by suing under their respective consumer protection laws.²⁵ All three complaints (“the Complaints”) outline prayers for relief seeking monetary damages for the alleged injuries Exxon inflicted on consumers.²⁶ The alleged injuries listed in the Complaints include misleading consumers by telling them climate change and global warming are not real risks, and subsequently, asserting that Exxon is not a contributor to these ‘fictional’ dangers.²⁷ All three complaints also seek to enjoin Exxon from continuing its greenwashing practices, which is the focus of this comment.²⁸

Notably, all three complaints argue for the necessity of an injunction to stop Exxon’s greenwashing by drawing comparisons between the oil industry’s deceptive practices and those made infamous by the tobacco industry. Like the tobacco industry, they argue, the oil industry knew of the harmful effects of their activities but failed to publicly reveal this information and denied the effects externally.²⁹ The Complaints further allege that Exxon’s greenwashing has influenced consumers’ actions in a manner similar to the way tobacco companies used deceptive advertising to encourage consumers to buy their products by denying and downplaying the negative effects of these products.³⁰ By asking for injunctive relief and an education program to inform the public of the negative effects of petroleum products, the Complaints seek to restrict the deceptive advertising of oil products in a manner similar to the way tobacco advertising was restricted in order to change consumer behavior.³¹

This comment will explore the implications of these cases with respect to a key difference between Big Oil and Big Tobacco, which is that, unlike tobacco, many aspects of our society still depend on oil and gas. Responsible advertising, like that which helped curtail the use and sales of cigarettes, may not be as effective when it comes to oil. Many

²⁵ Connecticut v. Exxon Mobil Corp., No. HHD-CV-206132568S (Conn. Super. Ct. Sept. 14, 2020); District of Columbia, v. Exxon Mobil Corp., No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); Commonwealth v. Exxon Mobil Corp., No. 1984-CV-03333 (Mass. Super. Ct. Oct. 24, 2019).

²⁶ Connecticut Complaint, *supra* note 18, at 44; D.C. Complaint, *supra* note 17, at 77; Complaint at 204-05, Commonwealth v. Exxon Mobil Corp., No. 1984-CV-03333 (Mass. Super. Ct. Oct. 24, 2019) [hereinafter Massachusetts Complaint].

²⁷ Connecticut Complaint, *supra* note 18, at 2; D.C. Complaint, *supra* note 17, at 32-34; Massachusetts Complaint, *supra* note 26, at 28-29.

²⁸ Connecticut Complaint, *supra* note 18, at 44; D.C. Complaint, *supra* note 17, at 77; Massachusetts Complaint, *supra* note 26, at 205.

²⁹ Justine Calma, *To Take Down Big Oil, Opponents are Following the Big Tobacco Playbook*, VERGE (Oct. 23, 2019, 9:50 am EDT), <https://www.theverge.com/2019/10/23/20927522/exxonmobil-trial-big-oil-big-tobacco-investors-environmental-regulations>.

³⁰ Connecticut Complaint, *supra* note 18, at 7; D.C. Complaint, *supra* note 17, at 4; Complaint at 12-13, Massachusetts Complaint, *supra* note 26, at 5.

³¹ See e.g., Connecticut Complaint, *supra* note 18, at 45.

people still have little personal choice as to whether to participate in the oil economy because they rely on oil for fueling cars and homes and many other uses. Therefore, in order to be effective in the fight against climate change, an injunction prohibiting Exxon's greenwashing should be paired with government efforts to develop alternatives to petroleum products that will give consumers a real choice. Alternatives can include increasing access to greener transportation such as electric vehicles, as well as public transit and active travel.

This comment begins with an overview of the deceptive advertising practices that were used by the tobacco industry and those used more recently by the oil and gas industry, focusing on Exxon in particular. It then takes a closer look at the relief sought in these cases and considers how the differences between these industries might limit the effectiveness of restricting greenwashing. Finally, the comment recommends additional government actions to enhance the impact of the current lawsuits in addressing climate change.

II. BACKGROUND

In order to understand the limitations of the proposed analogy between the deceptive advertising by big tobacco and the alleged greenwashing by Exxon, an overview of their respective practices is necessary.

A. THE DECEPTIONS OF THE TOBACCO INDUSTRY

In the early 1950s, almost half of all Americans were regularly consuming tobacco products.³² The allure of the cigarette was influenced by the prevalence of smoking in popular films, as well as promotions of smoking on billboards, in magazines, and on the radio, often by athletes and celebrities.³³ However, this changed in 1952 after *Reader's Digest* reported that research showed a statistical link between smoking and lung cancer.³⁴ These research results changed the public perception of cigarettes, and over the next two years, cigarette consumption rates decreased for the first time.³⁵ Around the same time, "the tobacco industry's own research began to find carcinogens in smoke and began to

³² Martin Olszynski et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 *GEO. ENV'T L. REV.* 1, 9-10 (2017) (discussing how tobacco norms evolved over time).

³³ Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *STAN. L. REV.* 853, 855 (1992) (discussing the popularity of cigarette smoking and the lack of tobacco related product injury lawsuits in the 1950s).

³⁴ Olszynski et al., *supra* note 32, at 10.

³⁵ *Id.*

confirm the relationship between smoking and cancer.”³⁶ However, the tobacco industry did not publish these results or disclose the mounting evidence indicating that cigarettes caused lung cancer.³⁷ Instead, the tobacco industry began “creating doubt and controversy surrounding the health risks,”³⁸ and responded “to the growing public concern by putting filters on cigarettes and promising research into the health effects of smoking.”³⁹

As a result of the industry’s tactics, individual plaintiffs in the first wave of litigation against the tobacco industry, starting with *Lowe v. R.J. Reynolds Tobacco Co.* in 1954,⁴⁰ had difficulty proving that “tobacco-related harms were reasonably foreseeable” at the time.⁴¹ The tobacco industry argued that the foreseeability of adverse health impacts could not be established unless the connection between “smoking and disease became irrefutable.”⁴² In time, the evidence became increasingly undeniable with the publication of the U.S. Surgeon General’s report on “Smoking and Health” in 1964, which concluded by stating that “[c]igarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors.”⁴³ Thus, public perception of smoking had begun to change.

Throughout the 1960s, the tobacco industry tried to mitigate the blow to their industry by using advertisements to deny that their products caused cancer.⁴⁴ During this time, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965, which required cigarette manufacturers to place health warnings on cigarette packets, and warnings in their broadcast advertising.⁴⁵ However, tobacco companies were not deterred from their efforts to popularize smoking. In 1989, at a hearing of the U.S. Subcommittee of the Committee on Energy and Commerce of the House of Representatives, it was disclosed that cigarette companies had also worked to “spread their message” by paying to have cigarettes

³⁶ Clive Bates & Andy Rowell, *Tobacco Explained*, ACTION ON SMOKING AND HEALTH (ASH) 1 (2004), <https://www.who.int/tobacco/media/en/TobaccoExplained.pdf> (last visited Dec. 16, 2020).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ § 18:2. Historical Overview of Tobacco Litigation—The First Phase of Tobacco Litigation, 2 TOXIC TORTS LITIGATION GUIDE § 18:2 (2020) (noting *Lowe* was voluntarily discontinued by the plaintiff).

⁴¹ Olszynski et al., *supra* note 32, at 10-11.

⁴² *Id.*

⁴³ Bates & Rowell, *supra* note 36, at 6.

⁴⁴ *Id.* at 40.

⁴⁵ § 18:3. Historical Overview of Tobacco Litigation—The Second Phase of Tobacco Litigation, TOXIC TORTS LITIGATION GUIDE § 18:3 (2020).

appear in mediums such as movies, which did not appear to be advertisements at first glance.⁴⁶ For example, Philip Morris, a tobacco company, paid “\$42,000 in 1979 to have Marlboro cigarettes appear in the movie ‘*Superman II*’ and paid \$350,000 [in 1988] to have the Lark cigarette appear in the new James Bond movie ‘*License to Kill*.’”⁴⁷

In addition, tobacco companies began to (and continue to) market “light” and “low tar” cigarettes, accompanied by advertisements promoting these as healthier alternatives to traditional cigarettes.⁴⁸ But tobacco companies knew that there was virtually no change in the products, and light cigarettes could deliver more tar and nicotine than advertised.⁴⁹ In this way, tobacco companies continued to deceive consumers as to the harmful nature of their products, by convincing consumers that light and low tar cigarettes are safe alternatives to smoking regular cigarettes.⁵⁰

The Master Settlement Agreement (“MSA”) of 1999 came from the culmination of states suing the tobacco industry for recovery of Medicaid costs due to smoking-related illnesses.⁵¹ The MSA limited advertising, including a ban on the use of characters and limitations on tobacco industry sponsorship of sports events.⁵² Notably, the MSA required payments of: (1) 206 billion dollars to the states spread out over a twenty-five year period; (2) a 1.5 billion dollar payment to support state antismoking measures over a ten year time period; and (3) a 250 million dollar payment to fund research into reducing youth smoking.⁵³ In the wake of the MSA, some states implemented tobacco control programs with the MSA funds in order to reduce tobacco consumption.⁵⁴ These tobacco control programs generally included: public education campaigns, school based tobacco prevention programs, and enforcement of “existing policies aimed at curbing exposure to smoke in public places and youth access to tobacco.”⁵⁵

In sum, the tobacco companies were well aware of the harmful effects of their products, but they continued to promote their products anyway without disclosing their research to their consumers. When the link

⁴⁶ Bates & Rowell, *supra* note 36, at 47.

⁴⁷ *Id.*

⁴⁸ WORLD HEALTH ORGANIZATION, TOBACCO: DEADLY IN ANY FORM OR DISGUISE 29 (2006), https://www.who.int/tobacco/communications/events/wntd/2006/Report_v8_4May06.pdf.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and its Impact on Tobacco Use 10 Years Later*, 137 CHEST 692, 692-93 (2010).

⁵² *Id.* at 698 (e.g., use of characters such as Joe Camel).

⁵³ *Id.*

⁵⁴ Matthew C. Farrelly, et al., *The Impact of Tobacco Control Program Expenditures on Aggregate Cigarette Sales: 1981-2000*, 22 J. HEALTH ECON. 843, 845 (2003).

⁵⁵ *Id.*

94 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

between smoking and lung cancer became publicly widespread, tobacco companies switched tactics and published advertisements that denied the fact that tobacco caused cancer. Eventually legislation was passed that required cigarettes to be labeled with health warnings and banned cigarette advertisements on television. However, the tobacco companies continued to subtly advertise by sponsoring their way into feature films. Undeterred, tobacco companies are still deceiving consumers by continuing to market light and low tar cigarettes.

B. HISTORY REPEATS ITSELF WITH THE OIL INDUSTRY

Archival documents show that Exxon knew their products had the potential to change the climate as early as the 1950s.⁵⁶ In 1954, geochemist Harrison Brown proposed research to the American Petroleum Institute (“API”), the petroleum industry’s main trade association.⁵⁷ Brown’s research proposal informed the API that fossil fuels had caused atmospheric carbon dioxide levels to rise about five percent over the last hundred years.⁵⁸ “By the late 1970s and early 1980s, Exxon scientists were explicitly aware that burning fossil fuels could lead to what they called ‘catastrophic’ global warming.”⁵⁹ However, like the tobacco companies, Exxon decided to conceal this information and continued to promote their products instead of informing their customers.⁶⁰

Exxon actively fought against the concern for climate change, echoing the actions of the tobacco industry. For example, Exxon became a member of the Global Climate Coalition (“GCC”) along with several other fossil fuel companies in 1989.⁶¹ The GCC is an organization that was founded to “coordinate business participation in the scientific and policy debate on the global climate change issue.”⁶² The Coalition opposed governmental action that was designed to address the emerging scientific studies on global warming.⁶³ In 1997, in light of the Kyoto Protocol, other leading oil companies such as BP and Shell changed their stance on climate change and abandoned the GCC.⁶⁴ Exxon decided to

⁵⁶ Benjamin Franta, *Early Oil industry Knowledge of CO₂ and Global Warming*, 8 NATURE CLIMATE CHANGE 1024, 1024 (2018).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Supran & Oreskes, *supra* note 12.

⁶⁰ *Id.*

⁶¹ UNION OF CONCERNED SCIENTISTS, *SMOKE, MIRRORS, & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO’S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE* 9 (2007), https://www.ucsusa.org/sites/default/files/2019-09/exxon_report.pdf.

⁶² Connecticut Complaint, *supra* note 18, at 22.

⁶³ UNION OF CONCERNED SCIENTISTS, *supra* note 61, at 9.

⁶⁴ *Id.*

double down instead, and helped to create a task force called the Global Climate Science Team (“GCST”) to create a disinformation campaign similar to that of Big Tobacco.⁶⁵ An internal memo of GCC revealed that the goal of the team was to ensure that average citizens recognized the uncertainties in climate science.⁶⁶

As the science of climate change became less deniable, Exxon switched tactics to greenwashing.⁶⁷ Enter Exxon’s new marketing strategy: to emphasize their research into algae-based biofuels in their advertising and thereby promote an image of corporate commitment to developing low-carbon, more environmentally friendly fuels.⁶⁸ Exxon has “flooded the United States television market with advertisements” about their efforts to research and promote alternative sources of energy.⁶⁹ Exxon has also continued with their tried and true greenwashing tactics by continuing to pay for advertorials. For example, in 2018,⁷⁰ Exxon published an article entitled “*The Future of Energy? It May Come from Where You Least Expect*”⁷¹ that lays out Exxon’s research into algae biofuels with clear graphs and bright colors.⁷² Additionally, the article mentions how alternative fuel sources like biofuels seemed “poised to enter the market” in the 2000s.⁷³ Of course, there is no mention of how Exxon contributed to fossil fuel production or GHG emissions during this time. Exxon also shares specific numbers for how many barrels of biofuel it hopes to produce (10,000 barrels per day by 2025), but makes no mention of how many barrels of oil it plans to produce from fossil fuels at that time. Instead, the article emphasizes how Exxon wants to create the “next generation of biofuels” and “make the future of energy literally green.”⁷⁴

Like the tobacco industry, Exxon knew that their products were harming consumers, and further, the global environment. Exxon decided to stay silent and continue to promote their products, while denying climate change. Once confronted with undeniable evidence, Exxon

⁶⁵ *Id.* at 10.

⁶⁶ *Id.*

⁶⁷ D.C. Complaint, *supra* note 17, at 59-60.

⁶⁸ Plec & Pettenger, et al., *supra* note 7, at 460.

⁶⁹ *Id.*

⁷⁰ Tristan Bove, *The Fossil Fuel Industry’s Influence on Environmental Journalism*, EARTH.ORG (Dec. 15, 2020), <https://earth.org/fossil-fuel-industrys-influence-on-environmental-journalism/>.

⁷¹ Paid Post by ExxonMobil, *The Future of Energy? It May Come From Where You Least Expect*, N.Y. TIMES, <https://www.nytimes.com/paidpost/exxonmobil/the-future-of-energy-it-may-come-from-where-you-least-expect.html> (last visited Apr. 10, 2021).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

switched tactics from denial to greenwashing to continue to sell their products while creating a false, greener image.

III. THE COMPLAINTS

The Commonwealth of Massachusetts brought the first of the three complaints against Exxon's greenwashing. The attorney general brought the suit, acting as the Commonwealth, against Exxon, which is registered to do business in Massachusetts as a foreign corporation.⁷⁵ The suit alleges that Exxon deceived, and continues to deceive, Massachusetts investors by (1) misrepresenting and failing to disclose material facts about climate change;⁷⁶ and (2) making materially false and misleading statements to Massachusetts investors about its use of a proxy cost of carbon.⁷⁷ Additionally, Massachusetts alleges that Exxon deceived and continues to deceive consumers by (3) misrepresenting the environmental benefit of its "green" products and failing to disclose the risks of climate change caused by Exxon products;⁷⁸ and (4) promoting false and misleading greenwashing campaigns.⁷⁹ Amongst other remedies, Massachusetts is requesting that the court: (a) determine that Exxon has violated and is continuing to violate the Massachusetts Consumer Protection Act ("CPA"); (b) grant comprehensive injunctive relief; and (c) award Massachusetts penalties against Exxon in the amount of \$5,000 for each violation of the Massachusetts CPA.⁸⁰

The District of Columbia took their claim a step further than Massachusetts and brought suit against three other petroleum companies in addition to Exxon, including Shell, BP, and Chevron.⁸¹ The District of Columbia is represented by the Attorney General for the District of Columbia.⁸² The suit alleges that Exxon has violated section 28-3904 of the D.C. Consumer Protection Procedures Act ("CPPA"), which prohibits unfair and deceptive practices when offering, selling, and supplying consumer goods and services.⁸³ D.C. alleges that Exxon violated section 28-3904 by: (1) using a long-term advertising and communications campaign relying on climate change denialism to influence consumer demand for their fossil fuel products; (2) making misleading or incomplete

⁷⁵ Massachusetts Complaint, *supra* note 26, at 15.

⁷⁶ *Id.* at 195.

⁷⁷ *Id.* at 197.

⁷⁸ *Id.* at 200.

⁷⁹ *Id.* at 202.

⁸⁰ *Id.* at 204-205.

⁸¹ D.C. Complaint, *supra* note 17, at 1.

⁸² *Id.* at 4.

⁸³ *Id.* at 68.

claims about their commitment to environmental sustainability; and (3) aggressively marketing its fossil fuel products with misleading representations about the products' environmental benefits.⁸⁴ D.C. is requesting that the court: (a) permanently enjoin the defendants from violating the CPPA; (b) order the defendants to pay restitution or damages; and (c) award civil penalties in an amount to be proven at trial.⁸⁵

Lastly, Connecticut brought action against Exxon pursuant to section 42-110 of Connecticut General Statutes, which prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁸⁶ The attorney general brought the suit at the request of the commissioner of the Department of Consumer Protection.⁸⁷ Connecticut alleges that Exxon violated section 42-110b by: (1) misleading consumers about the existence of climate change, and whether human activity contributed to it when Exxon knew otherwise;⁸⁸ and (2) engaging in deceptive greenwashing campaigns to depict Exxon as environmentally conscious to sell petroleum products to Connecticut consumers.⁸⁹

Out of the three Complaints, Connecticut has the most robust and diversified prayer for relief. Similar to Massachusetts and D.C., Connecticut is requesting that the court: (1) find that Exxon engaged in unfair and deceptive acts and practices; (2) enforce an injunction against Exxon from engaging in any acts that violate Connecticut's Unfair Trade Practices Act; (3) grant equitable relief “for past, present and future deceptive acts and practices that will require future climate change mitigation, adaptation, and resiliency;” and (4) order Exxon to pay civil penalties and (5) to pay restitution to the State for all expenditures attributable to Exxon that the State has and will have to make to counter the effects of climate change.⁹⁰ Additionally, Connecticut goes further by asking the court to direct Exxon to: (6) yield revenue, profit, and gain achieved through unfair acts or practices; (7) disclose all research and studies relating to climate change in its possession; and (8) fund a “corrective education campaign to remedy the harm inflicted by decades of disinformation” that would be either controlled by the state of Connecticut, or another independent third party.⁹¹

The Complaints argue that Exxon is currently greenwashing by overemphasizing its commitment to biofuels, and harming consumers

⁸⁴ *Id.* at 68-69.

⁸⁵ *Id.* at 77.

⁸⁶ CT Gen. Stat. § 42-110b (2012).

⁸⁷ Connecticut Complaint, *supra* note 18, at 8.

⁸⁸ *Id.* at 36-38.

⁸⁹ *Id.* at 40-41.

⁹⁰ *Id.* at 44.

⁹¹ *Id.* at 44-45.

98 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

with this deception.⁹² According to its own promotional materials, Exxon's goal is to provide 10,000 barrels of algae biofuel per day by 2025.⁹³ But Connecticut argued that if Exxon was able to achieve this goal, the algae biofuels would only occupy approximately 0.2 percent of its current refinery capacity,⁹⁴ meaning that 99.8 percent of Exxon's refinery capacity would still consist of fossil fuels. Therefore, almost 100 percent of Exxon's refineries would still consist of fossil fuels, while they prominently promote their biofuels to paint themselves as a greener company. D.C. landed on similar numbers, alleging that, in 2016, "Exxon earned \$198 billion in revenue but invested less than 1% of that in alternative energy research, including algae."⁹⁵

IV. ANALYSIS

The oil industry's history of sitting on known risks, and using deceptive advertising is substantially similar to the tobacco industry's history, and the states draw on these similarities in their complaints. However, there are also major differences between the two industries. Whereas cigarette smoking is largely a matter of personal choice, widespread reliance on oil and gas for fuel and other products makes consumers more restricted in their choices about whether to engage in the oil economy.

A. THE TOBACCO INDUSTRY'S DECEPTIONS ARE NOT A GOOD PREDICTOR FOR BIG OIL'S GREENWASHING PRACTICE

The restrictions implemented on tobacco advertising have been largely successful.⁹⁶ The tobacco control programs resulting from the MSA have reduced smoking rates over an extended period of time.⁹⁷ Additionally, the health warnings on cigarette packaging have been shown to decrease cigarette consumption.⁹⁸

The prevalent misconceptions about light and low-tar cigarettes led Congress to enact the Family Smoking Prevention and Tobacco Control Act of 2009, which prohibited tobacco companies from producing and

⁹² Connecticut Complaint, *supra* note 18, at 33-34; D.C. Complaint, *supra* note 17, at 47-49; Massachusetts Complaint, *supra* note 26, at 173-79.

⁹³ Connecticut Complaint, *supra* note 18, at 33.

⁹⁴ *Id.* at 33.

⁹⁵ D.C. Complaint, *supra* note 17, at 48.

⁹⁶ Ali Palali & Jan C. van Ours, *The Impact of Tobacco Control Policies on Smoking Initiation in Eleven European Countries*, 20 EUR. J. HEALTH ECON. 1287, 1289 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6856042/>.

⁹⁷ Jones & Silvestri, *supra* note 51, at 697.

⁹⁸ Palali & van Ours, *supra* note 96, at 1289.

distributing any products labeled or advertised as “light” or “low” unless the companies can meet rigorous criteria established by the Food and Drug Administration (“FDA”).⁹⁹ If the company can meet the criteria, a Modified Risk Tobacco Product order is issued from the FDA, which allows companies to use the “light” and “low” terms in their labeling or advertising; but if companies use those terms without the FDA order, the claims can be considered health fraud.¹⁰⁰ Exxon’s greenwashing of their fossil fuel products has been compared to the tobacco industry’s adoption of light and low-tar cigarettes, and if adopted, an injunction against Exxon’s greenwashing of their biofuels could most likely look similar to the criteria that is required of tobacco companies.

But does the tobacco industry provide a good model for determining what measures to take in the oil industry? Despite the similarities in the actions of the tobacco and oil industries, consumer reliance on the oil industry for basic needs is a major difference between oil and tobacco. Petroleum products are part of American consumers’ everyday lives, including transportation fuels, and feedstocks for making the chemicals, plastics, and synthetic materials that are in almost everything.¹⁰¹ In 2019, 7.5 billion barrels of petroleum were consumed in the United States.¹⁰² Out of the 7.5 billion barrels, forty-five percent was used for motor gasoline,¹⁰³ meaning almost half of petroleum consumption was due to gasoline powered transportation.

Although buying a cigarette has little societal benefit outside of economic benefit, oil and gas have become an integral part of our society from transportation to heating homes. There is no question that both industries cause harm, but widespread reliance on the products of the oil industry makes it different than the tobacco industry. The current reliance on oil limits consumer choice in deciding whether or not to use it. An injunction against Exxon’s greenwashing thus would not necessarily provide consumers with a better option. In order to achieve results like those in the tobacco industry, an injunction would have to be paired with something else, such as government intervention and policies. If Massachusetts, D.C., and Connecticut, or other states, succeed in restricting deceptive advertising, they may also need to enact additional government

⁹⁹ U.S. FOOD & DRUG ADMIN., *Light, Low, Mild or Similar Descriptors*, (Jan. 19, 2018), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/light-low-mild-or-similar-descriptors>.

¹⁰⁰ *Id.*

¹⁰¹ *What Are Petroleum Products, and What Is Petroleum Used For?* U.S. ENERGY INFO. ADMIN. (Sept. 2020), <https://www.eia.gov/tools/faqs/faq.php?id=41&t=6> (last visited Apr. 10, 2021).

¹⁰² *Id.*

¹⁰³ *Id.*

100 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

programs and policies to provide consumers with options for decreasing dependency on petroleum products.

B. AN INJUNCTION AGAINST EXXON'S ALLEGED GREENWASHING OF BIOFUELS BY ITSELF IS NOT AN EFFECTIVE WAY TO MITIGATE CLIMATE CHANGE

An injunction against Exxon's greenwashing practices may not be an effective way to improve informed consumer decisions about their fossil fuel consumption if no alternatives to petroleum products are available to consumers. Therefore, governments should also implement policies to increase the availability of alternative energy products. This section explores how states can produce viable alternatives to petroleum products by increasing access to electric vehicles and related infrastructure.

1. *An Injunction by Itself Would Not Significantly Change Consumer Behavior*

Connecticut argues in its complaint that Exxon's advertisements about biofuels misled reasonable consumers into believing that Exxon's products are "environmentally sound," which deprived Connecticut consumers of accurate information about their purchasing decisions.¹⁰⁴ Similarly, D.C. claims that if consumers understood the "full degree" of the harm that Exxon's products contribute to climate change, they would have chosen not to purchase from Exxon, or at least would have purchased less.¹⁰⁵ In other words, both complaints argue that consumers would have behaved differently had they known the truth.

But would a change in advertising practices influence consumers in a significant way? Because buying gas is a routine part of millions of Americans' lives, it seems doubtful that fewer consumers would buy Exxon products if they hadn't seen advertisements about biofuels. According to a report by CNBC, as of July 2020, approximately 280 million cars, trucks, and SUVs were registered with U.S. motor vehicle departments.¹⁰⁶ However, just 1.4 million plug-in electric vehicles ("PEVs") have been sold in the United States,¹⁰⁷ which suggests that there are still

¹⁰⁴ Connecticut Complaint, *supra* note 18, at 34.

¹⁰⁵ D.C. Complaint, *supra* note 17, at 61.

¹⁰⁶ Phil LeBeau, *25% of Cars in the U.S. are at Least Sixteen Years Old as Vehicle Age Hits Record High*, CNBC, (July 28, 2020, 7:00 AM), <https://www.cnbc.com/2020/07/28/25percent-of-cars-in-us-are-at-least-sixteen-years-old---record-high.html>.

¹⁰⁷ *How Many Electric Cars are on the Road in the United States?* USA FACTS (Oct. 22, 2020, 10:17 AM), <https://usafacts.org/articles/how-many-electric-cars-in-united-states/>.

over 278 million cars in the United States that rely at least partly on gas or diesel. Therefore, a significant majority of consumers who drive cars, regardless of whether they see an advertisement from Exxon or not, still have to buy gas for their vehicles (whether from Exxon or another company).

Climate change is a serious issue that needs to be addressed immediately. Unfortunately, filing for an injunction to stop current greenwashing practices for a product that is a necessity in consumers' lives does not seem like an effective way to combat climate change unless there are accessible alternatives to fossil fuels. Consumers cannot make environmentally friendly choices without an oil substitute in place when they rely on petroleum daily, which is why the government should step in by creating more incentives and infrastructure to promote electric vehicles.

2. *Government Policies Need to Provide Consumer Choice*

While choice of fuels seems very limited, consumers arguably do have choice in deciding whether to buy electric cars over fossil-fuel powered cars. In addition, there are already some incentive programs in place to promote buying an electric car. For example, at the federal level, a program administered by the U.S. Department of Energy provides that “[a]ll-electric and plug-in hybrid cars purchased new in or after 2010 may be eligible for a federal income tax credit of \$7,500.”¹⁰⁸ States can also develop incentive programs.

However, there are still many other obstacles, like the lack of charging stations in many areas, that deter consumers from purchasing electric cars that run entirely without gas. Despite the growing popularity of electric cars, critics argue that “governments, regulators, and utilities aren’t doing enough” to accommodate or encourage the acceleration of this growth.¹⁰⁹ In addition, because “40 percent of Americans don’t live in single-family homes where [they] could have a personal charger,” the feasibility of owning and using an electric car can be more difficult for some people than others.¹¹⁰ Without accessible public charging stations for individuals without their own parking spaces with charging ports, the decision to buy an electric car is not practical. Consequently, many con-

¹⁰⁸ *Federal Tax Credits for New All-Electric and Plug-in Hybrid Vehicles*, U.S. DEP’T OF ENERGY (Feb. 2021), <https://www.fueleconomy.gov/feg/taxevb.shtml>.

¹⁰⁹ Lawrence Ulrich, *Charger Desert in Big Cities Keeps Electric Cars from Mainstream*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/business/electric-cars-cities-chargers.html>.

¹¹⁰ *Id.*

102 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

sumers have limited power to exercise their preferences for electric cars and cleaner, safer fuels. In order to effectively combat climate change and give consumers meaningful choices, governments need to increase the availability of electric cars and charging stations.

In California, Governor Gavin Newsom issued an executive order in September 2020 that aims to increase the availability of electric vehicles. Executive Order N-79-20 directs the state to reduce reliance on fossil fuels by requiring the sales of “all new passenger vehicles to be zero-emission by 2035.”¹¹¹ Newsom is pushing the state to make electric cars the new normal. The order also requires state agencies and private companies to “accelerate deployment of affordable fueling and charging options.”¹¹² Increasing the number of electric cars and charging stations available, at least in California, could help eliminate two of the key barriers that prevent consumers from purchasing electric cars. Other states should adopt similar measures to push the availability of PEV cars and charging stations. Ceasing the sales of fossil fuel cars by 2035 is an ambitious goal, and while some states may not find this to be feasible, they could still adopt similar policies to accelerate the deployment of affordable fueling and charging stations.

Connecticut and Massachusetts have both started initiatives similar to California to increase the number and accessibility of electric cars.¹¹³ Connecticut has established a state goal for 500,000 vehicles to be PEVs by 2030.¹¹⁴ Additionally, Connecticut plans to implement policies to educate consumers on the costs and benefits of owning an electric vehicle (“EV”).¹¹⁵ The suggested policies also include methods of marketing, education, and outreach to engage Connecticut consumers through “experiential opportunities such as ride-and-drive events,” as well as encouraging leaders at the forefront of the EV movement to establish credibility

¹¹¹ OFFICE OF GOVERNOR GAVIN NEWSOM, *Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California’s Fight Against Climate Change* (Sept. 23, 2020), <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

¹¹² *Id.*

¹¹³ CONN. DEP’T OF ENERGY & ENV’T PROT. (DEEP), Press Release: DEEP Launches Electric Vehicle Roadmap (Apr. 22, 2020), <https://portal.ct.gov/DEEP/News-Releases/News-Releases---2020/DEEP-Launches-Electric-Vehicle-Roadmap>; MASS. COMM’N ON THE FUTURE OF TRANSP. IN THE COMMONWEALTH, *Choices for Stewardship: Recommendations to Meet the Transportation Future*, <https://www.mass.gov/lists/choices-for-stewardship-recommendations-to-meet-the-transportation-future> (last visited Apr. 9, 2021).

¹¹⁴ CONN. DEEP, ELECTRIC VEHICLE ROADMAP FOR CONNECTICUT 12 (2020), [http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/f7ed4932eec438d0852585520001c81b/\\$FILE/EV%20Roadmap%20for%20Connecticut.pdf](http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/f7ed4932eec438d0852585520001c81b/$FILE/EV%20Roadmap%20for%20Connecticut.pdf).

¹¹⁵ *Id.* at 92-93.

with consumers.¹¹⁶ Massachusetts, on the other hand, has established a commission to advise the governor's office on implementing new technology initiatives, including strategies for providing the infrastructure necessary for the increased deployment of PEVs.¹¹⁷ By creating policies that allow charging stations to become more accessible to more people, states can eliminate a key barrier to buying an electric car and thereby give consumers more choices in deciding how they engage with the fossil fuel industry.

Another potential barrier to buying an electric car is the cost. Currently, the up-front cost of buying an electric car can be higher than that of buying a fossil fuel burning vehicle.¹¹⁸ However, by 2035, "zero-emission vehicles will almost certainly be cheaper and better than the traditional fossil fuel powered cars," as the upfront cost of electric cars are projected to be similar to conventional cars in "just a matter of years."¹¹⁹ Additionally, the costs of maintaining and powering an electric car, mile by mile, are "far less" than a fossil fuel burning vehicle.¹²⁰ It is also important to consider that not everyone who is buying a car is going to buy new. In fact, on average, a quarter of cars and trucks on American roads are at least sixteen years old.¹²¹ Therefore, new policies implemented to encourage the sale of EVs may not persuade everyone to immediately purchase an EV and will not completely eliminate the use of gasoline powered vehicles. This gradual change could be both a benefit and a detriment. It would be detrimental to the environment to delay the elimination of fossil fueled powered cars, but it could be beneficial to consumers if they are able to educate themselves more on the topic of EVs in order to make informed choices when deciding whether to buy an EV.

Although this paper has focused on expanding the accessibility of EVs, governments can also introduce other policies to encourage greener transportation. For example, in their 2020 Emissions Gap Report, the United Nations Environment Programme ("UNEP") recommended increasing public transport and active travel (such as bicycling and walking) through public policies and infrastructure.¹²² Policy suggestions include subsidized public transport and incentives for cycling and bicycle

¹¹⁶ *Id.*

¹¹⁷ Alternative Fuels Data Ctr., *Support for Plug-In Electric Vehicles (PEVs) and Autonomous Vehicles (AVs)*, U.S. DEP'T OF ENERGY, <https://afdc.energy.gov/laws/11935> (last visited Apr. 9, 2021).

¹¹⁸ OFFICE OF GOVERNOR GAVIN NEWSOM, *supra* note 111.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ LeBeau, *supra* note 106.

¹²² UNITED NATIONS ENV'T PROGRAMME (UNEP), *Emissions Gap Report 2020*, at 66 (2020).

104 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

purchases.¹²³ Suggested infrastructure included opening dedicated cycling lanes and expanding cycle networks, as well as implementing car-free residential zones.¹²⁴ With these types of changes to policy and infrastructure, local governments can further promote greener transportation alternatives in addition to increased EV access.

Government has an important role in ensuring that consumers have choices when engaging in commerce with the fossil fuel industry. Although an injunction would affect Exxon's actions, consumer behavior would not change significantly if there are not ready alternatives to fossil fuels. Consumers' options can be expanded by increasing the accessibility of EVs and EV charging infrastructure, as well as through outreach and education about the EV industry to inform consumers of their choices. Governments can also encourage more environmentally friendly transportation options by increasing public transport and active travel. An injunction against Exxon's greenwashing must work in tandem with government policy for the injunction to be effective in changing consumer behavior.

C. WHAT COULD AN INJUNCTION WITH GOVERNMENT POLICY LOOK LIKE?

An injunction against Exxon to prevent further greenwashing, if modeled after the tobacco industry, could utilize restrictions similar to those that were applied to restrict deceptive advertising of tobacco products and require labeling of light and low-tar cigarettes. A look at how tobacco advertising is restricted could therefore be useful for envisioning how a similar injunction might apply in the case of fossil fuels.

Under the federal Food, Drug, and Cosmetic Act, tobacco companies must meet rigorous criteria and receive an order for a Modified Risk Tobacco Product (MRTP) from the FDA before they can use the terms *light* or *low tar* in their advertising and labelling.¹²⁵ In order for an MRTP application to be successful, the applicant must "demonstrate that the product will or is expected to benefit the health of the population as a whole."¹²⁶ The FDA must also consider the following factors, among others, when reviewing an application:

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ U.S. FOOD & DRUG ADMIN., *Light, Low, Mild or Similar Descriptors*, *supra* note 99.

¹²⁶ U.S. FOOD & DRUG ADMIN., *Modified Risk Tobacco Products*, <https://www.fda.gov/tobacco-products/advertising-and-promotion/modified-risk-tobacco-products> (last visited Apr. 9, 2021).

- The relative health risks to individuals of the tobacco product that is the subject of the application;
- The increased or decreased likelihood that existing users of tobacco products who would otherwise stop using such products will switch to the tobacco product that is the subject of the application;
- The increased or decreased likelihood that persons who do not use tobacco products will start using the tobacco product that is the subject of the application.¹²⁷

In other words, the FDA must consider the product's potential health risks and how the advertising is likely to influence the behavior of existing tobacco users as well as non-users.

This regulatory structure could work for Exxon's biofuels to ensure that there is potential change before allowing Exxon to advertise about their green products. If a similar regulatory structure were applied to Exxon, the company would first have to demonstrate that their product is expected to benefit the entire population. This would require Exxon to show that its claims of benefiting the environment through the development of algae biofuel have merit before they can use those claims in their marketing. Admittedly, under the broad question of benefiting the population, Exxon's greenwashing would probably still be permitted, because the research they are conducting, though minimal, is beneficial. This is where the additional factors would come in to evaluate the health risks associated with Exxon's products, and the likelihood that existing oil consumers would switch to using Exxon biofuel. If there is an increased likelihood that oil consumers would switch to biofuel, it seems likely that Exxon biofuel would be approved. In contrast, if the product is likely to influence non-consumers to start using biofuel or Exxon products in general, including petroleum products, there could be less likelihood of approval. It would be contradictory if Exxon's application to advertise greener fuels actually led to an increase in the purchase of their petroleum products. Thus, an application and approval process modeled after the tobacco industry would only be the first step.

The next step would be to adopt additional measures to promote increased consumer choice in deciding to participate in the economy of fossil fuels. If Exxon's biofuel application is denied because they are greenwashing rather than offering healthy and viable options for consumers, consumer choice would continue to be limited with respect to buying petroleum products. Although this might prevent Exxon from deceiving consumers, unless additional steps were taken to eliminate obstacles and provide incentives for purchasing electric cars, little change

¹²⁷ 21 U.S.C. § 387k(g)(4).

106 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 13

would result from the restrictions. But if the government implements programs to make EVs and charging stations cheaper and more available, this could encourage more people to purchase them. Additionally, it would be important to educate consumers about EVs and their accompanying infrastructure, as well as other alternatives, to enable consumers to make informed decisions. Eliminating greenwashing narratives, to be successful in addressing climate change, must therefore work in conjunction with other programs to advance meaningful alternatives to fossil fuel powered cars.

V. CONCLUSION

In conclusion, an injunction against Exxon's greenwashing is not going to be effective without further government action to increase viable fossil fuel alternatives. Currently, consumers do not have a choice in participating in the fossil fuel industry. There is no denying the harm that Exxon has caused by misleading the public about climate change. Further, Exxon's greenwashing of products is continuing to deceive consumers about the harm caused by Exxon's products, and this must be stopped. But preventative measures, like regulatory restrictions that worked for the tobacco industry, may not be an exact fit when applied to the oil industry. This is because of American consumers' reliance on oil in their everyday lives.

The states filing for injunctions against Exxon's alleged greenwashing are engaged in a noble cause, but an injunction is unlikely to be very effective without further actions from the government to give consumers actual choices in whether or not they want to participate in the fossil fuel economy. Though some state governments are already providing incentives for purchasing EVs, governments must do more to make these alternatives more accessible by increasing availability of PEVs and charging structures, and educating consumers about the EV industry. Ultimately, states that pursue lawsuits similar to Connecticut, D.C., and Massachusetts, should consider implementing such measures in conjunction with an injunction, to make the alternatives to fossil fuels more accessible.

Consumers are more conscientious than ever in the fight against climate change, but they need the government to create accessible alternatives to fossil fuels in order to have a choice in green transportation.