Corporate Criminal ESG

J.S. Nelson[*]

ABSTRACT: As social norms around climate change shift rapidly, and the U.S. Supreme Court requires federal regulation to retreat, regulations at the state and local levels fracture into increasingly aggressive, and often diametrically opposed, enforcement. Meanwhile, business representations regarding environmental, social, and corporate governance ("ESG") initiatives are being policed by traditional charges of fraud that are civil, and, increasingly, criminal. These tensions create massive uncertainties for business. On a global issue like climate change, U.S. businesses, and the people who run them, need political and regulatory stability.

Most scholarship has focused on whether the proposed U.S. disclosure standards will survive Supreme Court review. This Article describes why they will not work, and why additional ESG liability is coming if we do not adopt protective international standards.

The Article makes three important contributions. First, it demonstrates how out-of-step with the rest of the world U.S. federal courts are, and how the country's failure to adopt ESG standards in line with international developments hurts U.S. businesses. Second, it highlights for the first time the growing potential within the United States, due to its lack of such standards, for corporate criminal ESG liability based on fraud. Third, it flags potential similar individual civil and criminal liability for businesses' agents and directors.

The Article concludes with the important, timely, and novel argument that U.S. businesses, their directors, and agents, especially counsel, should see it

[*] Visiting Professor, University of Pittsburgh School of Law; Visiting Researcher, Harvard Law School, 2022–23; Visiting Associate Professor, Harvard Business School, 2021–22. This project won the 2022 Ralph Bunche Outstanding International Paper Award from the Academy of Legal Studies in Business. It was solicited for early presentation by Columbia Law School's Blue Sky blog, NYU Law School's Compliance and Enforcement blog, and Duke Law School's FinReg blog. The author is grateful for comments from Professors Miriam Baer, Virginia Harper Ho, Elizabeth Pollman, Madison Condon, Jennifer Arlen, Sarah Haan, Will Thomas, Debora Spar, Samuel Buell, Danny Sokol, John Hasnas, Bill English, Verity Winship, and the participants in the 2022 Academy of Legal Studies in Business conference, 2022 Society for Business Ethics conference, ComplianceNet 2022, the Georgetown Institute for the Study of Markets and Ethics Workshop, the 2022 Berkeley Center for Law and Business Workshop, and the Ninth Annual Corporate & Securities Litigation Workshop. The author would like to thank the Leadership and Corporate Accountability team at Harvard Business School for prompting this exploration. Jee Young Kim provided excellent research assistance. The talented editors of the *Iowa Law Review* contributed helpful comments. Any online sources not provided a permalink in the footnotes are on file with the *Iowa Law Review*. The viewpoints expressed in this Article, and any errors, are my own.

as in their best interests for the United States to adopt protective international ESG standards.

INTRODUCTION

As the European Union implements its Corporate Sustainability Reporting Directive ("CSRD"), there is a hue and cry from Wall Street that U.S. businesses might be extraterritorially subject to the CSRD's provisions.[1] What is ironic about Wall Street's protest is that U.S. businesses should understand it to be in their long-term best interest to be covered by international standards and guidance on environmental, social, and corporate governance ("ESG") initiatives to protect themselves from volatile potential civil, and now-looming criminal, liability for fraud and other misconduct in the United States.

The U.S. Supreme Court, which is often thought of as probusiness,[2] is actually hurting the stability of the U.S. business climate by hampering the federal government's ability to standardize the country's regulations in line with international developments.

What has not been discussed or considered elsewhere, as of when this Article was written, is that U.S. businesses should ultimately *want* the CSRD's disclosures to apply to their operations as a safe harbor. If the United States adopted the CSRD, or its own version of uniform standards around climate change, U.S. businesses would have better-defined lines around climate disclosures that might protect them from domestic litigation, including potential corporate criminal liability for ESG initiatives. This Article focuses on climate-change response as an especially fast-moving set of developments within ESG initiatives.[3]

The developed world outside the United States is solidifying around climate-change reporting and responsibility standards for businesses. In the summer of 2022, the United Nations General Assembly declared by 161 votes in favor, eight abstentions, and no votes against, that access to a clean, healthy and sustainable environment is a universal human right.[4] The UN Secretary-General urged member states, in the wake of the overwhelming vote for the declaration, to "accelerate the implementation of their environmental and human rights obligations and commitments."[5]

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1. *See, e.g.*, Laura Noonan, *Global Scope of EU's Greenwashing Crackdown Spooks Wall Street*, FIN. TIMES (Aug. 21, 2022), https://www.ft.com/content/084b3974-763f-4a96-866e-3acf29a9fd8c.

2. *See, e.g.*, Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 127 (2021) ("[T]he current Court is arguably the most pro-business and anti-union in history."); Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 223 (2021) ("[W]hether one takes a quantitative or qualitative approach to the question, . . . corporations and business litigants have often succeeded in their claims before the Court and in shaping the direction of the law."). *See generally* Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. HEADNOTES 49 (2022). The Roberts Court may be the most probusiness Court in a century. The win rate for business in the Roberts Court, 63.4 percent, is 15 percentage points higher than the next highest rate of business wins over the past century (the Rehnquist Court, at 48.4 percent). *Id.* at 54 fig.1.

3. *See* Stephen Kim Park, *Legal Strategy Disrupted: Managing Climate Change and Regulatory Transformation*, 58 AM. BUS. L.J. 711, 712–13 (2021).

4. *See UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right*, UN NEWS (July 28, 2022), https://news.un.org/en/story/2022/07/1123482 [https://perma.cc/3VWW-K4QY].

5. *Id.* (paraphrasing the Secretary-General).

That same summer, the final version of the CSRD was approved by joint agreement of the European Commission, the European Council, and the European Parliament.[6] The CSRD will set uniform accounting standards for measuring and disclosing businesses' impact on climate change.[7] It builds on substantive definitions such as that "sustainable investment" must "contribute[] to an environmental objective" as measured by "key resource efficiency indicators," including the "use of energy, renewable energy, raw materials, water and land, . . . the production of waste," etc.[8] Nonfinancial information will have to be verified by an external auditor,[9] and reported in a digital form that can be easily compared with the reports of other entities.[10] The European Parliament describes the CSRD's aim as "to end greenwashing[11] and lay the groundwork for sustainability reporting standards at global level."[12] Its standards should protect companies within the EU that abide by them.[13]

The CSRD will become law in 2024.[14] Despite their protests, most U.S. companies will be only tangentially subject to the law, as the CSRD eventually covers large companies with operations in Europe that meet at least two of the

6. *See* Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, As Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15.

7. *See generally* Julian Toth, *Another Milestone: Agreement on the Corporate Sustainability Reporting Directive (CSRD)*, MEDIUM (Jan. 24, 2023) (originally published on the ISFC blog, June 27, 2022), https://isfc-prague.medium.com/another-milestone-agreement-on-the-corporate-sustainability-reporting-directive-csrd-df88a65efb14 [https://perma.cc/RFL4-QASJ].

8. *See, e.g.*, Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1, 8. Additional text *infra* note 40.

9. *See Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, As Regards Corporate Sustainability Reporting*, *passim*, COM (2021) 189 final (Apr. 21, 2021) (amending previous standards to require third-party assurance audits of nonfinancial information).

10. *See id.* at 35–36 (requiring that management reports be in European Single Electronic Format ("ESEF"/"XHTML"), and present sustainability information in a digital classification with "tag[s]," eventually supporting a searchable open European database).

11. "Greenwashing is the process of conveying a false impression or misleading information about how a company's products are environmentally sound." Adam Hayes, *What Is Greenwashing? How It Works, Examples, and Statistics*, INVESTOPEDIA (Mar. 31, 2023), https://www.investopedia.com/terms/g/greenwashing.asp [https://perma.cc/4FKT-CJD9].

12. Press Release, Eur. Parliament, New Social and Environmental Reporting Rules for Large Companies (June 21, 2022, 10:22 PM), https://www.europarl.europa.eu/news/en/press-room/20220620IPR33413/new-social-and-environmental-reporting-rules-for-large-companies [https://perma.cc/84WV-YJAF].

13. *Cf.* European Commission Press Release, Questions and Answers: Corporate Sustainability Reporting Directive Proposal (Apr. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806 [https://perma.cc/ZN9D-BWGR] (stating that "[t]he Commission's proposal is an opportunity for an orderly, cost-efficient solution to the problems posed by this increase in demand [for reliable ESG information], based on building consensus around the essential information that companies should disclose" and promising a better future for companies that conform).

14. *See id.*

following criteria: that they employ over 250 people; that they turn over assets of more than €40 million; or that they possess total assets of at least €20 million.[15]

More significant long-term liability for U.S. companies stems from their home in the United States. The U.S. Securities and Exchange Commission ("SEC") already sees warning signs for U.S. business fraud liability in their ESG, and specifically climate-change-related, disclosures.[16] In 2021, the SEC created a new Climate and Environmental, Social, and Governance Task Force ("Task Force") within the Division of Enforcement.[17] In explaining the focus of the Task Force, Acting Deputy Director Kelly Gibson highlighted greenwashing as a particular priority.[18] She wanted to target behavior "exaggerating" a "commitment to, or achievement of climate . . . related goals."[19]

More and more money is pouring into the ESG investing sector, which equates to opportunities for fraud. Worldwide in 2020, the amount of money being allocated through ESG integration[20] was $25.2 trillion,[21] or about thirty percent of the global economy.[22]

In 2022, the U.S. Inflation Reduction Act[23] provided an additional $369 billion for climate and clean-energy provisions.[24] The Act has been described as "all carrots, no sticks," meaning that it tries to influence changes in the private sector by subsidizing behaviors that may reduce climate change—but not actually to make formal regulations of behavior more coherent.[25] We have

15. *See* Kolja Stehl, Leonard Ng & Matt Feehily, *EU Corporate Sustainability Reporting Directive—What Do Companies Need to Know*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 23, 2022), https://corpgov.law.harvard.edu/2022/08/23/eu-corporate-sustainability-reporting-directive-what-do-companies-need-to-know [https://perma.cc/NZX2-BV7B].

16. *See* Press Release, Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42 [https://perma.cc/7QJS-7GN8].

17. *Id.*

18. *See* People Places Planet Podcast, *The Enforcement Angle: SEC's Kelly Gibson*, ENV'T L. INST., at 08:23 (Nov. 3, 2021), https://share.transistor.fm/s/305db9c7 [https://perma.cc/92NF-W7WY].

19. *Id.*

20. ESG integration is "[t]he systematic and explicit inclusion by investment managers of environmental, social and governance factors into financial analysis." *Global Sustainable Investment Review 2020*, GLOB. SUSTAINABLE INV. ALL. 7 (2021), http://www.gsi-alliance.org/wp-content/uploads/2021/08/GSIR-20201.pdf [https://perma.cc/ZW24-932M].

21. *See id.* at 10.

22. *See, e.g.*, Aaron O'Neill, *Global Gross Domestic Product (GDP) at Current Prices from 1985 to 2028*, STATISTA (May 10, 2023), https://www.statista.com/statistics/268750/global-gross-domestic-product-gdp [https://perma.cc/6SQW-DBPB] (estimating 2020 global GDP at approximately $84.89 trillion).

23. *See* The Inflation Reduction Act of 2022, Pub. L. No. 117–169, 136 Stat. 1818.

24. *See* Emma Newburger, *Schumer-Manchin Reconciliation Bill Has $369 Billion to Fight Climate Change—Here Are the Details*, CNBC (Aug. 22, 2022, 2:21 PM), https://www.cnbc.com/2022/07/27/inflation-reduction-act-climate-change-provisions.html [https://perma.cc/UBZ5-LQH7].

25. Robinson Meyer, *The EPA Just Quietly Got Stronger*, ATLANTIC (Aug. 24, 2022), https://www.theatlantic.com/science/archive/2022/08/inflation-reduction-act-epa-carrots-sticks/671218 (documenting how U.S. legislation has become "[a]ll carrots, no sticks" for businesses (emphasis omitted)); *see also, e.g.*, Robert Reich, *America Used to Regulate Business. Now Government Subsidises It*, GUARDIAN (Aug. 21, 2022, 6:19 AM), https://www.theguardian.com/commentisfree/2022/a

seen disastrous failures of this approach already when it comes to fraud, both civil and criminal. For example, similar U.S. pandemic spending in 2020 and 2021 led to an estimated $45.6 billion in new unemployment fraud alone, as well as the initiation of over one-thousand new criminal cases for misuse of the money.[26]

Meanwhile, on climate-change issues, the SEC has increased its enforcement efforts through an "all agency" approach, infusing ESG enforcement into many of the agency's actions.[27] Even before formation of the Task Force, in February, March, and April 2021, the SEC's Divisions of Examinations and Corporation Finance made announcements that they would focus on climate-change related risks, as the agency was concerned about "deficiencies and internal control weaknesses from examinations of investment advisers and funds regarding ESG investing."[28]

On the civil front, in May 2022, the SEC charged BNY Mellon Investment Adviser, Inc. for "misstatements and omissions about Environmental, Social, and Governance (ESG) considerations in making investment decisions for certain mutual funds that it managed."[29] The company has agreed to pay $1.5 million to settle the charges.[30] In June 2022, the SEC was investigating Goldman Sachs for potentially misrepresenting ESG claims about its funds.[31]

On the criminal front, it commanded market attention in December 2021 when the Department of Justice ("DOJ") informed Deutsche Bank AG that the bank may have violated a criminal settlement for failing to inform prosecutors of its failures to live up to ESG disclosures.[32] In March 2022, Deutsche Bank admitted that it had violated its criminal settlement, and the company agreed to extend the term of its outside compliance monitor on this basis.[33] Responding to U.S. developments, German authorities raided DWS

ug/21/america-used-to-regulate-business-now-government-subsidises-it [https://perma.cc/GD4H-6G3Q].

26. *See* Tony Romm, *U.S. Watchdog Estimates $45.6 Billion in Pandemic Unemployment Fraud*, WASH. POST (Sept. 23, 2022, 9:31 AM), https://www.washingtonpost.com/business/2022/09/22/unemployment-fraud-coroanvirus-pandemic.

27. *SEC Response to Climate and ESG Risks and Opportunities*, SEC. & EXCH. COMM'N, https://web.archive.org/web/20210322143729/https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities [https://perma.cc/XFF3-9AH6].

28. *The Division of Examinations' Review of ESG Investing*, SEC. & EXCH. COMM'N 2 (Apr. 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf [https://perma.cc/8DS8-NPE9].

29. Press Release, Sec. & Exch. Comm'n, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://www.sec.gov/news/press-release/2022-86 [https://perma.cc/GS8B-Y3Y6].

30. *See id.*

31. Patrick Temple-West & Joshua Franklin, *SEC Investigating Goldman Sachs for ESG Claims*, FIN. TIMES (June 10, 2022), https://www.ft.com/content/5812ab1f-c2d4-4681-a6be-45fobefd92df.

32. Patricia Kowsmann & Dave Michaels, *Justice Department Told Deutsche Bank Lender May Have Violated Criminal Settlement*, WALL ST. J. (Dec. 8, 2021, 3:19 PM), https://www.wsj.com/articles/justice-department-told-deutsche-bank-lender-may-have-violated-criminal-settlement-11638993595.

33. Patricia Kowsmann & Dave Michaels, *Deutsche Bank Violates DOJ Settlement, Agrees to Extend Outside Monitor*, WALL ST. J. (Mar. 11, 2022, 11:42 AM), https://www.wsj.com/articles/deutsche-bank-violates-doj-settlement-agrees-to-extend-outside-monitor-11647016959.

and Deutsche Bank offices for evidence to support greenwashing allegations.[34] The next day, the head of DWS resigned.[35]

The SEC has tried to introduce standards around ESG, and especially climate-change disclosures. In 2022, the SEC released three model ESG rules for comment.[36] The first rule would have companies disclose their climate-change risks, their greenhouse gas emissions, and potentially those of their suppliers and customers.[37] The second rule proposed a tiered system of increasing quantitative and qualitative disclosures depending on how focused a fund's investment is in ESG.[38] The agency's third rule sought to rationalize ESG fund names by disclosing how a company defines the terms in its fund's name and how it selects investments to be consistent with the name.[39]

Unfortunately, the SEC's ESG approach, very much in line with an overall contrast between the U.S. and European approaches toward business regulation, attempts merely to have companies better articulate disclosure for their funds, not actually to define what qualifies as ESG investing and what should not.[40] U.S. reliance on enforcing ESG standards through policing what companies *say* instead of what they *do* may not only discourage U.S. business investment in prosocial climate-change initiatives, but lead to prosecutions for fraud as

34. Owen Walker & Joe Miller, *German Police Raid DWS and Deutsche Bank Over Greenwashing Allegations*, FIN. TIMES (May 31, 2022), https://www.ft.com/content/ff27167d-5339-47b8-a261-6f25e1534942.

35. Julie Steinberg & Ed Frankl, *CEO of Deutsche Bank's DWS Resigns After Police Raid on Offices*, WALL ST. J. (June 1, 2022, 4:58 AM), https://www.wsj.com/articles/dws-group-ceo-resigns-after-german-police-raid-on-offices-11654073889.

36. *See infra* notes 37–39.

37. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, & 249).

38. *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, & 279) (delineating proposed expectations for low-level "integration funds," mid-level "ESG-focused funds," and high-level "impact funds").

39. *See* Investment Company Names, 87 Fed. Reg. 36594 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, & 274).

40. *Compare, e.g.*, Regulation (EU) 2019/2088, *supra* note 8, at 8 (defining a "sustainable investment" to mean "an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance"), *with* Gary Gensler, Chair, U.S. Sec. and Exch. Comm'n, Address at Harvard's Reimagining the Role of Business in the Public Square: Multistakeholder Engagement on ESG Commitments, Metrics, and Accountability (Sept. 15, 2022), *republished as Plenary, The Role of Regulation: A Fireside Chat with the Chair of the SEC*, YOUTUBE, at 3:07:39 (Oct. 4, 2022), https://youtu.be/aWQf_7W6oFs?si=EqovdX6R6hSvc3ru [https://perma.cc/SWE6-KEU2] (repeatedly describing the SEC as "not a merit regulator").

the U.S.'s major mechanism for disciplining behavior in the markets.[41] Without better substantive standards, U.S. businesses face destructive uncertainty.[42]

The largest impediment for U.S. businesses, however, to be guided by what stability the country has in standards appears to be the U.S. federal courts. Climate change is a global issue that transcends borders and demands broad coordinated action, rather than fragmented, disjointed, and even contradictory regulation at the level of U.S. states and municipalities.[43] But U.S. federal courts continue to curtail federal agencies' ability to act without additional help from an often-paralyzed Congress. On the last day of June 2022, the U.S. Supreme Court decided *West Virginia v. Environmental Protection Agency*,[44] which vitiated the Environmental Protection Agency's ("EPA") national ability to regulate climate change as pollution.[45] *West Virginia* fully embraced the "major questions" doctrine, which the Court's conservative supermajority describes as requiring a higher standard of "clear congressional authorization"[46] for federal agencies to regulate questions of economic "magnitude and consequence," such as pollution and climate change.[47]

Within days of the *West Virginia* ruling, Republican state Attorneys General had threatened legal action against the SEC for its proposed climate change rules, and twenty-four state officials submitted comments to the SEC alleging that the agency lacked power to enact regulation on climate change under the major questions doctrine.[48]

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41. *Cf.* Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2083–85, 2116–17 (2022) (describing potential First Amendment problems with regulating environmental speech, but concluding that regulation should pass them).

42. *Cf., e.g.*, *Economic Cost of Climate Change Could Be Six Times Higher than Previously Thought*, UCL NEWS (Sept. 6, 2021), https://www.ucl.ac.uk/news/2021/sep/economic-cost-climate-change-could-be-six-times-higher-previously-thought [https://perma.cc/PUT8-KXC2] (citing global numbers that, "by 2100, global GDP could be 37% lower than it would be without the impacts of warming, when taking the effects of climate change on economic growth into account").

43. U.S. states and local governments are taking individually divergent approaches to climate change across the country, leading to further instability for businesses. *See, e.g.*, Maxine Joselow, *Supreme Court's EPA Ruling Upends Biden's Environmental Agenda*, WASH. POST (June 30, 2022, 2:02 PM), https://www.washingtonpost.com/climate-environment/2022/06/30/epa-supreme-court-west-virginia (noting that "[a]bout 4 in 10 Americans live in a state, city or territory that has committed to reaching 100 percent clean electricity by 2050 at the latest," and that "24 [state] governors have pledged to cut greenhouse gas emissions in half by 2030 and to reach net-zero emissions by 2050" (citing the League of Conservation Voters and the U.S. Climate Alliance)).

44. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

45. *See id.* (announcing the decision of the Court).

46. *Id.* at 2614 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

47. *Id.* at 2616.

48. *See, e.g.*, Jeremy Beaman, *GOP Warns SEC to Drop Climate Rule After Supreme Court Ruling on EPA*, WASH. EXAM'R (July 14, 2022, 10:34 AM), https://www.washingtonexaminer.com/policy/energy-environment/republican-states-promise-legal-action-on-sec-rule [https://perma.cc/2ZXS-3BF9]. *See generally* David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html (detailing state efforts to curb climate change action pre-*West Virginia*).

In 2023, the U.S. Supreme Court decided another case that further illuminates the reach of its supermajority's limitations on agencies and sets guidance for the SEC.[49] In *Sackett v. EPA*,[50] all nine Justices reversed and remanded the case,[51] but Justice Alito's controlling opinion reversed a previous decision's[52] protections for agency actions with a "significant nexus" between the "navigable waters" that the EPA could regulate, and its exercise of authority.[53] The Justices further reined in and restricted the power of the federal agency. Justice Thomas, joined by Justice Gorsuch, wrote that the decision should "curb[] a serious expansion of federal authority that has simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling 'a local zoning board,'"[54] despite the agency's significant expertise and the water quality hazards at issue. By implication for the exercise of other federal agency power, the SEC's proposed rules on climate change, and additional parts of the Biden administration's climate change policies, appear to be on precarious legal ground.[55]

The academic debate around these issues has largely focused on whether the SEC has the power or will to enact its modest definitional rules[56]—although comments by thirty law professors on this question were submitted before *West Virginia* was decided,[57] and federal agencies' power was narrowed again with *Sackett*. Additional scholarship has debated whether ESG funds and initiatives are functional investments,[58] and whether stakeholder governance

49. *See* Sackett v. EPA, 598 U.S. 651, 682–84 (2023). There have been additional cases limiting federal agency powers in other areas, but this Article focuses on environmental examples.

50. *Id.*

51. *Id.* at 656, 684.

52. *See* Rapanos v. United States, 547 U.S. 715, 779–80 (Kennedy, J., concurring in judgment) (establishing the "significant nexus" test which was overturned in *Sackett*).

53. *See Sackett*, 598 U.S. at 678–79.

54. *Id.* at 709 (Thomas, J., concurring) (quoting *Rapanos*, 547 U.S. at 738).

55. *Accord* Joselow, *supra* note 43; Anna Todd, Sackett v. EPA *and the Definition of Waters of the United States*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (June 24, 2022), https://eelp.law.harvard.edu/2022/06/sackett-v-epa-and-the-definition-of-waters-of-the-united-states [https://perma.cc/P6YR-EH6V]. In August 2022, the Inflation Reduction Act defined greenhouse gases as pollution to aid the EPA in regulating them, but it is unclear whether that change could strengthen the SEC's legal footing to address climate change under the major questions doctrine. *See generally, e.g.*, Inflation Reduction Act of 2022, Pub. L. No. 117–169, sec. 60101, § 132(d)(5), 136 Stat. 1818, 2064.

56. *See, e.g.*, Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1458–60 (2021).

57. *See* Letter from Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., Univ. of Pa. Carey Sch. of L., et al., to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n (June 6, 2022), https://papers.ssrn.com/abstract=4129614 [https://perma.cc/6QWD-BHNJ].

58. *See, e.g.*, Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 418–42 (2021) (demonstrating that ESG-labeled funds empirically behave differently than other funds). *But see* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1926 (2020) (noting that "not all ESG funds are distinguishable from non-ESG funds"); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401

and market pressures will eventually produce changes by themselves.[59] This Author and Article argue that, when at issue is potential criminal fraud, effective market mechanisms are being frustrated, and the fractionalization of legal rules means that U.S. businesses will suffer.

This Article creates a new understanding of the U.S. Supreme Court's probusiness paradox that Professor Elizabeth Pollman describes in the *Harvard Law Review*.[60] She explains her effect to be that,

> [A]s the [Chief Justice] Roberts Court has expanded corporate rights and narrowed pathways to liability, many shareholders and stakeholders have become vocal participants, putting pressure on corporations to rein in the use of their rights, to mitigate risks generated by their externalities, and to take account of environmental, social, and governance (ESG) concerns.[61]

This Article argues, however, that another strain of empirical "probusiness" findings should receive more attention when thinking about the future of ESG liability. The headline in Professors Lee Epstein and Mitu Gulati's 2022 study of cases before the U.S. Supreme Court over the last century has been that U.S. businesses win overwhelmingly in cases against other parties,[62] but they also document how increasingly seldom the federal government intervenes against U.S. businesses.[63]

U.S. businesses may think that the retreat of the federal government is a "win" for them, but it portends the long-term dissolution of a stable legal—as well as natural—environment upon which they depend. The Court's hostility to federal standards may significantly impede U.S. business progress and investment on the international stage.[64] These ironies are a new paradox of U.S. business liability in the shadow of coming ad-hoc corporate criminal ESG.

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passim (2020) (arguing, based on interviews, that companies have no choice but to act on ESG initiatives); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 453 (2020) (determining that "risk-return ESG investing is permissible by a trustee on the same terms as any other active investing strategy").

59. *See, e.g.*, Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1475, 1521–24 (2021) (presenting data that corporate leaders are not generally negotiating for other interests, including the environment); Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 97–100 (2021) (expressing hope for renewed prosocial results from business stakeholder engagement during COVID-19); *cf.* Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 229–30 (arguing that corporate law and courts function best when insulated from partisanship).

60. *See* Pollman, *supra* note 2, at 223.

61. *Id.* at 225.

62. *See* Epstein & Gulati, *supra* note 2, at 52–60 (documenting U.S. businesses' win-loss record).

63. *See id.* at 66–67 (using filings by the Office of the Solicitor General as a proxy for political conditions).

64. This Author argues in the ESG context, more as Professor Noah Feldman has in the abortion context, that, by striking down federal standards, companies will be subject to increasing political battles and potential damage. *Cf.* Noah Feldman, *Opinion: The Supreme Court Has a Nasty Surprise in Store for Business*, BLOOMBERG (June 9, 2022, 9:00 AM), https://www.bloomberg.com/opinion/articles/2022-06-09/supreme-court-abortion-reversal-would-give-companies-a-nasty-surprise.

This Article contributes to the debate by demonstrating how out-of-step U.S. federal courts are with international approaches to climate change, and it is the first to argue that the courts' approach is a particular hazard for U.S. businesses because it leaves our businesses without good guidance—or safe harbors—for increasingly volatile climate-change initiative liability. The Article also points to potential individual liability for corporate directors and officers. Its argument about liabilities should make U.S. businesses, their directors, and agents, including corporate counsel, rethink their reactions to business issues in the U.S. Supreme Court and to bring the United States more in line with international developments.

Public frustration with corporate behavior, especially on climate change, continues to build. Given the thin line between civil and criminal fraud in the United States, its corporations will soon face prosecutions for criminal fraud.

Criminal liability for ESG, however, should not be the primary enforcement tool for how U.S. businesses understand their responsibility toward climate change. This Article describes how criminal corporate liability creates additional perversities and misincentives for organizations.[65]

Protective substantive standards are important also because U.S. businesses may be surprised how much liability they may incur in *any* direction for whatever they say and do on climate change.[66] In addition to the pressures for pro-ESG initiatives, there is a rising threat of penalties from state and local-level activism *against* climate change.[67] As of mid-2022, sixteen U.S. states had restricted public funds from being given to companies that valued ESG impact in their investments.[68]

In addition, although this Article focuses on liability from fraud for reasons that it elaborates,[69] substantive government standardization would offer protection from antitrust allegations. The Attorney General of Arizona, among others, has argued that ESG investing, when conducted through private market coordination, is a violation of antitrust.[70] But antitrust would

65. *See* discussion *infra* Part V.

66. *See, e.g.*, discussion *infra* Parts I, II, and V. In addition, a discussion of failure to adapt is beyond the scope of this Article. *See generally* Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 70–71.

67. *See, e.g.*, Patrick Temple-West & Brooke Masters, *Texas Accuses BlackRock of Energy Company Boycott in ESG Clampdown*, FIN. TIMES (Aug. 24, 2022), https://www.ft.com/content/1fc2cc54-d364-48ad-aace-30625e5c61f6 (describing legal penalties against at least ten companies in Texas and Florida); *see also* Brooke Masters & Patrick Temple-West, *BlackRock Labels Texas 'Anti-Competitive' over ESG Blacklisting*, FIN. TIMES (Aug. 25, 2022), https://www.ft.com/content/9bbb25of-2995-4035-914c-b42b1f3397ee (quoting BlackRock as suggesting that the penalties were politically motivated).

68. *See* Catrina Crittenden, *ESG Backlash*, AM. U. BUS. L. REV. BUZZ BLOG, https://aublr.org/2022/10/esg-backlash [https://perma.cc/F6V4-75JS]; Lance Dial, Elizabeth Goldberg & Rachel Mann, *The Challenge of Investing in the Face of State Anti-ESG Legislation*, REUTERS (Aug. 24, 2022, 9:02 AM), https://www.reuters.com/legal/legalindustry/challenge-investing-face-state-anti-esg-legislation-2022-08-24.

69. *See infra* Part V.

70. *See* Mark Brnovich, *Opinion: ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022, 4:40 PM), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energ

not apply if the government defines and requires the changes.[71] Regardless of whether antitrust allegations gain more purchase, the answer for U.S. businesses, and the people who guide them, would remain the same: to embrace federal adoption of international substantive ESG standards.

The bottom line is that U.S. businesses need stability and guidelines to address the challenges that climate change will bring.[72] Businesses recognize that, where international standards lead in international markets, they must follow.[73] U.S. businesses should welcome putting U.S. ESG standards in line with international obligations to protect them from political pressures and volatile potential liabilities.

This Article makes its argument in five parts and a conclusion. Part I describes the current state of the ESG space, including rapidly changing norms around climate change, and reasons why we are likely to see the expansion of corporate criminal liability for ESG. Part II illustrates how patterns in ESG enforcement outside of the United States have already moved from actions against governments to putting pressure on private corporations, especially for not meeting their climate obligations or for overpromising their corporate actions through "greenwashing." Parts III and IV highlight developments in the United States that may not follow international patterns, but that flash other warning signs for corporate and individual liability. Part V explains why fraud prosecutions for ESG are most likely to cross the line from civil to criminal liability in the United States, and why imposing corporate criminal liability without adopting substantive ESG standards creates further problems. The Article concludes with the argument that increasing pressure on U.S. businesses should make them want to adopt the uniform ESG standards that could protect them across jurisdictions, as well as to help mitigate climate change.

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y-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807; *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 6–7 (2020) (noting anticompetitive effects of common ownership in the context of climate change).

71. *Cf.* Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1673–74 (2022) (describing antitrust impediments to competitors collaborating to mitigate systematic risk, and helpful government reactions). Although there are exemptions in the antitrust laws, for example, for standard-setting private organizations, litigation around these issues could also prove costly for companies that want to avoid controversy. *See generally, e.g.*, *Dealings with Competitors*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors [https://perma.cc/PCJ4-VQGJ] (noting exceptions for private collaborative groups, such as standard-setting organizations, but warning that they may still trigger antitrust concerns when collaborating could give "competitors the ability to wield market power together"). *Cf.* Brnovich, *supra* note 70 (alleging ESG-collaboration wielding of market power together).

72. *Cf., e.g.*, *Why Automakers Are Driving for Uniform Fuel Efficiency Standards*, KNOWLEDGE AT WHARTON (June 14, 2019), https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/end-california-emissions-standards [https://perma.cc/5CHB-PHQQ] (featuring Eric Orts and John Paul MacDuffie) (arguing, in the context of automobile emissions, that "[h]aving more than one . . . standard in the U.S. puts automakers in a bad position in terms of planning investments and adopting new technologies").

73. *See id.*

I. CURRENT STATE OF THE ESG SPACE

There is complete scientific establishment consensus that climate change is real,[74] and almost all reputable scientists agree that the climate change we are witnessing is human-driven.[75] The United Nations' Intergovernmental Panel on Climate Change has concluded that human-driven climate change may already be on course to cause catastrophes so significant that humanity may not be able to adapt to them.[76]

A. RAPIDLY CHANGING NORMS PUSH THE LAW

Given the scientific consensus, social norms around climate change and other important ESG subjects appear to be changing faster, and to be under more pressure, than many of our other social behaviors. Although it is true that millennials between the ages of roughly thirty-three to forty may be driving much of the most urgent response to climate change, with seventy-six percent of them saying that climate change represents a serious risk to society,[77] concerns about the impact of climate change are broadening and deepening across U.S. society. In 2019, seventy-two percent of investors expressed at least a modest interest in sustainable investing to help prevent climate change, with not much of a significant distinction among generations.[78]

Changing norms around ESG make it an area around which we should most expect to find rapid movement in the law.[79]

When we criminalize corporate behaviors, there will always be goals and priorities that the government balances in choosing its prosecutions. For the government, the harm of white collar crime is that it "undermines the rule of law, defrauds victims, and disrupts the marketplace."[80]

Academics and others studying patterns in white collar crime have noted that behavior that may have previously triggered civil liability has been

74. *See, e.g.*, James Powell, *Scientists Reach 100% Consensus on Anthropogenic Global Warming*, 37 BULL. SCI., TECH. & SOC'Y, 183, 183–84 (2017); *Scientific Consensus: Earth's Climate is Warming*, NASA, https://climate.nasa.gov/scientific-consensus [https://perma.cc/5TT8-SAJN] (listing major scientific organizations and their public statements on climate change).

75. *See* Mark Lynas, Benjamin Z. Houlton & Simon Perry, *Greater Than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, 16 ENV'T RSCH. LETTERS, no. 114005, 2021, at 1, 4.

76. *See* WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 143–57 (2022).

77. *See* Alicia Adamczyk, *Millennials Spurred Growth in Sustainable Investing for Years. Now, All Generations are Interested in ESG Options*, CNBC: MAKE IT (May 21, 2021, 9:00 AM), https://www.cnbc.com/2021/05/21/millennials-spurred-growth-in-esg-investing-now-all-ages-are-on-board.html [https://perma.cc/HAP8-4YUD] (citing March 2021 CNBC/Harris Poll).

78. *See id.* (citing Morningstar numbers).

79. *See generally, e.g.*, David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1821–22 (2001) (describing how changing norms accelerate changes in corporate governance requirements).

80. Thomas L. Kirsch II & David E. Hollar, *Prosecution of Individuals in Corporate Criminal Investigations*, DEP'T JUST. J. FED. L. & PRAC., Oct. 2018, at 3, 4 (quoting Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at the BL & Leadership F. (May 23, 2018)).

increasingly criminalized.[81] Shaming and norms—including the changing of norms in society over time—are closely intertwined.[82] Many academics, including Professor Samuel Buell, have written about the social value of labeling certain corporate behaviors as criminal, in that it ascribes an important blameworthiness available in that label, which is not present the same way in the civil law.[83] Since 2021, more scholars have been calling for the reintroduction and broadening of explicit corporate shaming.[84]

B. ADDITIONAL REASONS FOR EXPANDED CORPORATE CRIMINAL ESG LIABILITY

In addition to changing norms, there are three other major reasons why ESG may draw prosecutors into expanding criminal corporate liability in the United States.

First, the current language and standards around ESG in the United States remain imprecise, and that makes it easy to mislead investors and the market.[85] One of the core competitive advantages of the United States on the international stage is the perceived stability, transparency, and accountability of its markets.[86] Part of the U.S. government's mission is to protect the country's financial position and power by upholding those values.[87]

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81. *See, e.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477–78 (1996); *see also* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 833–67 (1994).

82. *See* Skeel, *supra* note 79, at 1820–23.

83. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 491, 501 (2006).

84. *See, e.g.*, W. Robert Thomas & Mihailis E. Diamantis, *Branding Corporate Criminals*, 92 FORDHAM L. REV. (forthcoming) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4384262 [https://perma.cc/UY68-N7EV]; W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 424–28 (2021); *see also* Miranda Forsyth & Valerie Braithwaite, *From Reintegrative Shaming to Restorative Institutional Hybridity*, 3 INT'L J. RESTORATIVE JUST. 10, 10 (2020) (discussing the sociological value of reintegrative shaming in "reshaping institutions to facilitate more effective conflict resolution").

85. *See, e.g.*, George Serafeim, *ESG: Hyperboles and Reality* 2–3 (Harv. Bus. Sch. Rsch. Paper Series, Working Paper No. 22-031, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966695 [https://perma.cc/WQ9B-DJLG] ("ESG has rapidly become a household name leading to both confusion about what it means and creating unrealistic expectations about its effects."); Elizabeth Pollman, *The Making and Meaning of ESG* 6 (Eur. Corp. Governance Inst. Working Paper Series in L., Working Paper No. 659/2022, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 [https://perma.cc/RZS4-NSH9] ("[T]he combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for its success as a global phenomenon, but also its challenges such as the . . . understood purposes of the term.").

86. *See, e.g.*, John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 641–53 (1999) (noting the role of legal protections, including transparency and redress, for the minority holders of shares in dominant financial markets).

87. *See Role of the Treasury*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/about/general-information/role-of-the-treasury [https://perma.cc/66AW-BBYZ] (describing how the

Meanwhile, accountants and other financial professionals find ESG a wildly frustrating term because it is both ill-defined and overly inclusive.[88] Even amongst people who assume that they are committed to the same things, there may, for example, be direct conflicts in the outcome of "ESG" initiatives in the short-term interests of labor and the environment.[89] But, insofar as ESG has become an umbrella term, it tends to be associated with environmental concerns as one of many forms of social justice initiatives.[90]

Second, despite how imprecise ESG is as a term, companies are making concrete promises around it. Companies and others have made promises in the environmental context, for example, that have been at times precise and potentially verifiable. In the 2021 Deutsche Bank example, it was a significant signal to the business community for the DOJ to inform Deutsche Bank AG that the company may have violated a criminal settlement when it failed to inform prosecutors of its failures to live up to ESG disclosures.[91]

Moreover, the type of behavior that Deutsche Bank engaged in may be much more widespread than commonly understood.[92] As the *Wall Street Journal* describes the problems with ESG disclosures at Deutsche Bank, "Deutsche Bank AG's . . . asset management arm, DWS Group, . . . tells investors that environmental, social and governance concerns are at the heart of everything it does and that its ESG standards are above the industry average."[93] In its 2020 annual report, DWS Group promises that more than half of its assets under management—some $540 billion—are evaluated on ESG criteria.[94] But its own 2021 internal assessment admits that "only a small fraction of the investment platform" applies ESG criteria,[95] and that the company has "no quantifiable or verifiable ESG-integration for key asset classes."[96]

"Treasury's mission highlights its role as the steward of U.S. economic and financial systems, and as an influential participant in the world economy").

88. *See, e.g.*, Mark S. Bergman et al., *ESG Ratings and Data: How to Make Sense of Disagreement*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Jan. 29, 2021), https://www.paulweiss.com/media/3980810/esg_ratings_and_data_how_to_make_sense_of_disagreement.pdf [https://perma.cc/Z3B4-ZF8X]; Jonathan Neilan, Peter Reilly & Glenn Fitzpatrick, *Time to Rethink the S in ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 28, 2020), https://corpgov.law.harvard.edu/2020/06/28/time-to-rethink-the-s-in-esg [https://perma.cc/2R5K-XUJL].

89. *See* Schanzenbach & Sitkoff, *supra* note 58, at 430–33 (listing many such ESG contradictions in terms of fiduciary duties as well).

90. *See, e.g.*, Jose Almanzar & Paula Schauwecker, *How ESG Efforts Can Promote Environmental Justice*, AM. BAR ASS'N (Apr. 18, 2022), https://www.americanbar.org/groups/environment_energy_resources/publications/natural_resources_environment/2021-22/spring/how-esg-efforts-can-promote-environmental-justice.

91. *See* Kowsmann & Michaels, *supra* note 32.

92. *See* discussion *infra* Part IV.

93. Patricia Kowsmann & Ken Brown, *Fired Executive Says Deutsche Bank's DWS Overstated Sustainable-Investing Efforts*, WALL ST. J. (Aug. 1, 2021, 5:33 AM), https://www.wsj.com/articles/fired-executive-says-deutsche-banks-dws-overstated-sustainable-investing-efforts-11627810380.

94. *Id.*

95. *Id.* (quoting the company's internal assessment).

96. *Id.* (summarizing the assessment's findings).

Although the potential criminal penalties that Deutsche Bank may face would result most immediately from failure to communicate with prosecutors about its ESG failures, this outcome would still be a step to making failed ESG commitments ground for criminal liability.

As this Article discusses,[97] because the United States has moved increasingly over time away from direct regulation of businesses to incentivizing them with programs that help buy their compliance,[98] one of the last ways that the United States has of disciplining businesses that abuse the public trust is through fraud prosecutions.[99] And, in fraud prosecutions, parties are most likely to see criminal culpability triggered in how they represent a topic. The United States enforces white collar crime largely on the basis of disclosure.[100] As previously highlighted and described further at Parts IV and V, fraud, and particularly fraud on investors in the securities context, is already a place in which the line between civil and criminal culpability is very thin.

Third, an important reason why the line between civil and criminal culpability for fraud is likely to blur regarding ESG is that there is so much economic pressure on companies to assert their role in this area to investors. There is money to be made from saying what investors want to hear, even if it is not true. Movement in ESG investing is already estimated, according to Morningstar data, to be worth $3 billion a day.[101]

II. PATTERNS OF ESG ENFORCEMENT OUTSIDE OF THE UNITED STATES

Internationally, efforts to impose liability on companies for ESG initiatives appear to follow two main routes. More substantive regulation may be emerging primarily in Europe based on corporate duties to address climate change, in addition to disclosure-based regulation such as in the United States.

In addressing climate change as a global problem, European approaches to hold corporations substantively responsible for ESG initiatives appear to be a more intuitive approach for a problem that may require coordinated corporate and governmental responses. Courts there seem to be focusing more on outcomes, rather than on merely what corporations say that they will do.

In these areas, emerging civil liability for climate change seems based on an argument that corporations have duties to humanity that require them to change their behavior insofar as it contributes to the excessive warming of the

97. *See infra* Part V.

98. *See, e.g.*, Reich, *supra* note 25; Meyer, *supra* note 25.

99. *See, e.g.*, J.S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1494–1504, 1518 (2019) [hereinafter *Disclosure-Driven Crime*] (describing the dangers of overly relying on corporate disclosure rules without substantive regulation of businesses); J. S. Nelson, 'Don't Ask, Don't Tell' Corporate Crime 65 (Aug. 3, 2017) (unpublished manuscript) [hereinafter 'Don't Ask, Don't Tell' Corporate Crime], https://papers.ssrn.com/abstract=2979728 [https://perma.cc/X458-Z49B] (illustrating the role of overly relying on disclosure-based regulation in the Volkswagen emissions scandal).

100. *See Disclosure-Driven Crime, supra* note 99, at 1504; 'Don't Ask, Don't Tell' Corporate Crime, *supra* note 99, at 9; J. S. Nelson, *The Corruption Norm*, 26 J. MGMT. INQUIRY 280, 280 (2017).

101. *See* Kowsmann & Brown, *supra* note 93 (citing Morningstar data).

planet. We will have to see if these civil liabilities, backed with urgent and sweeping language, are later enforced with criminal cases.[102]

A. *ARGUING AGAINST GOVERNMENTS FIRST*

The nascent movement for ESG liability in Europe and elsewhere seems to be first successful against governments before being used against corporations. The most significant corporate precedents, as of this Article's writing and discussion *infra*, have been under Dutch law.[103] Plaintiffs also appear to have won final judgments in suits against governments on duty of care and/or related protection of fundamental rights grounds in Pakistan, Colombia, Nepal, Germany, and Belgium.[104] They have won more limited cases to have existing promises enforced against governments in New Zealand,[105] Ireland,[106] and France.[107] Plaintiffs had been less successful to date in suits against the European Union,[108] India,[109] Switzerland,[110] the United Kingdom,[111] and the United States.[112]

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102. Criminal liability for corporations is often not available or less common in some of these European and other systems than in the United States. But pressure may emerge to change that if violations are particularly egregious and if governments start turning to criminal law should civil enforcements fail. There is certainly pressure building on these issues and the law continues to evolve.

103. *See* Dutch discussion *infra* Section II.B.

104. *See* descriptions of cases and citations *infra* Section II.A.1 and notes 122–34.

105. *Sarah Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 (N.Z.).

106. *See* Friends of the Irish Env't CLG v. The Gov't of Ir., Ir. and the Att'y Gen. [2020] IESC 49 [2020] 3 IR 1, 56–57 (Ir.).

107. Tribunal Administratif [TA] [administrative tribunal] Paris, 1e ch., Feb. 3, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1 (Fr.) (official document in French) (unofficial translation in English provided by plaintiffs); *see also* Conseil d'État [CE] [highest administrative court] 6e and 5e ch. combined, July 1, 2021, N° 427301.

108. As of March 2021, this case appears to have been dismissed on procedural ground by the European Court of Justice. Court of Justice of the European Union Press Release No 51/21, The Court of Justice Confirms That the Action Brought by Families from the European Union, Kenya and Fiji Against the EU 'Climate Package' of 2018 is Inadmissible (Mar. 25, 2021); Case C-565/19 P, Armando Carvalho and Others v. Parliament and Council, ECLI:EU:C:2021:252, ¶¶ 101–07 (Mar. 25, 2021).

109. *See* Ridhima Pandey v. Union of India & Ors., Unreported Judgments, No. 187 of 2017, decided on Jan. 15, 2019 (NGT) 2 (India) (finding "no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances").

110. In May 2020, Switzerland's Federal Supreme Court had decided against the plaintiffs. As of March 2021, the case was on appeal before the European Court of Human Rights. *See* Bundesgericht [BGer] [Federal Supreme Court] May 5, 2020, 1C_37/2019 (Switz.); Communication of Case to Swiss Federal Government, Application no. 53600/20, Verein KlimaSeniorinnen Schweiz and others v. Switzerland, European Ct. of Hum. Rts., Mar. 25, 2021.

111. In January 2019, the United Kingdom's Court of Appeal declined to overturn a High Court ruling against the plaintiffs. In its rejection of the appeal, the Court of Appeals noted that five of the six plaintiffs' grounds had "no real prospect of success." These included its allegations that the U.K. government was not understanding or not fulfilling its obligations, as well as that there was a public sector equality duty that had been violated. *See* Plan B Earth v. Sec'y of State for Bus., Energy and Indus. Strategy [2018] EWHC (Admin) 1892.

112. *See infra* Part III (discussing U.S. cases).

As of 2022, additional suits were pending against governments in Australia, Canada, the Czech Republic, Italy, Mexico, Peru, Poland, South Korea (Republic of Korea), and Spain.[113] Academics' Oslo Principles[114] were urging courts to mandate climate action on the part of governments, despite the limitations of their existing agreements. These and other efforts have been "part of a larger trend of citizens seeking action from the courts on climate issues."[115]

The cases in the category of finding established separate rights would seem to pose the most potential for future civil and criminal liability for corporations in those countries. These cases broadly recognized some form of the duty of care, right to a healthy environment, or human rights in Pakistan,[116] Columbia,[117] Nepal,[118] Germany,[119] and Belgium.[120] If such a right is being established, and may be protected independently, it is more likely that courts may protect such rights against encroachment by corporations as well. Although it is true that some rights may remain enforceable against a government when they are not enforceable against private actors, these first jurisdictions seem to be the most dynamic places to watch for pending corporate liability such as eventually emerged in the Netherlands.[121]

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113. For additional updates, see, for example, *Global Climate Litigation*, URGENDA, https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation [https://perma.cc/B7ZP-GLBY] (linking to cases and sources).

114. *See* EXPERT GRP. ON GLOB. CLIMATE OBLIGATIONS, OSLO PRINCIPLES ON GLOBAL CLIMATE OBLIGATIONS (2015), https://climateprinciplesforenterprises.files.wordpress.com/2017/12/osloprincipleswebpdf.pdf [https://perma.cc/LDX8-V4KN]; *see also*, *Oslo Principles on Global Climate Change Obligations*, GLOB. JUST. PROGRAM, https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations [https://perma.cc/TNG5-YRAB] (explaining the origin of the principles and containing updates about their progress).

115. John Schwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html.

116. *See* Asghar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Ct.) ¶ 6 (Pak.).

117. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. Abril 5, 2018, M.P: Louis Armando Tolosa Villabona, Expediente STC4360-2018, Radicación n.° 11001-22-03-000-2018-00319-01 (pp. 1–2) (Colom.) (original in Spanish).

118. *See* Advocate Padam Bahadur Shrestha v. Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others, Supreme Court of Nepal, 074-WO-0283, 10th Day of Month of Poush of the Year 2075 BS (Dec. 25, 2018).

119. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 & 1 BvR 288/20 (collectively "Climate Change"), Mar. 24, 2021 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html [https://perma.cc/FPT9-2A64] (English translation provided by court).

120. *See* Civ. [Tribunal of First Instance] Brussels (4th ch.), June 17, 2021, 2015/4585/A, p. 79 (Conclusion) (official document in French; unofficial computer translation into English provided by the Climate Litigation Network).

121. *See* Section II.B.

1. Broad Rights Against Governments

Important examples of duties of care, right to a healthy environment, or human rights, have recently emerged from courts in Pakistan, Columbia, Nepal, Germany, and Belgium. In practical terms, amongst this group, the German and Belgian courts may have the most power over large-scale corporate interests.

In 2015, Pakistan's Green Bench of the Lahore High Court issued a "clarion call" to protect what it described as "fundamental rights" being impacted by climate change.[122] As the Green Bench explained, "[c]limate [c]hange is a defining challenge of our time and has led to dramatic alterations in our planet's climate system."[123] The citizens of Pakistan's "fundamental rights" were being violated, including their "[r]ight to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice[, which] provide the necessary judicial toolkit to address and monitor the Government's response to climate change."[124]

In April 2018, Colombia's Supreme Court ruled against the country's federal government regarding the deforestation of the Amazon, and the protection of 'supra-legal' ("*supralegales*") rights such to a normal environment, life and health ("'*ambiente* sano,' vida y salud").[125]

In December 2018, the Nepalese Supreme Court held that the government of Nepal had a parental duty toward its citizens to limit climate change.[126] As the Court wrote, "climate change mitigation and adaptation by protecting the environment is the responsibility of the state according to the principle of *parens patriae*."[127]

In March 2021, Germany's highest court on constitutional questions unanimously found that the country's climate protection law violated the fundamental rights of young people and future generations by insufficiently protecting the environment.[128] The law had set a mere fifty-five percent

122. Asghar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Ct.) ¶ 6 (Pak.) ("On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.").

123. *Id.*

124. *Id.* ¶ 7.

125. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Lab. Abril 5, 2018, M.P: Louis Armando Tolosa Villabona, Expediente STC4360-2018, Radicación n.° 11001-22-03-000-2018-00319-01 (pp. 1–2) (Colom.) (original in Spanish).

126. Advocate Padam Bahadur Shrestha v. Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others, Supreme Court of Nepal, 074-WO-0283, 10th Day of Month of Poush of the Year 2075 BS (Dec. 25, 2018).

127. *Id.* ¶ 5, at p. 13.

128. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 & 1 BvR 288/20 (collectively "Climate Change"), Mar. 24, 2021 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html [https://perma.cc/FPT9-2A64] (English translation provided by court).

reduction in greenhouse emissions by 2030.[129] Instead, according to the Federal Constitutional Court, "Art. 20a GG places the legislat[ure] under a permanent obligation to adapt environmental law to the latest scientific developments and findings."[130] It was, for the Court, "imperative under constitutional law that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future . . . . These developments must begin soon in order to avoid future freedom being curtailed suddenly, radically and with no alternatives."[131] The day after the Court's decision was promulgated, the German government announced that it would comply with the decision.[132]

In June 2021, a Court of First Instance in Brussels found the Belgian federal government and three of its regional governments jointly and individually responsible for protecting their citizens from climate change. In finding "a breach of the duty of care," the court held that "the Belgian public authorities were fully aware of the certain risk of dangerous climate change for the country's population," which "makes it possible to establish that neither the federal State nor any of the three Regions acted with prudence and diligence within the meaning of Article 1382 of the Civil Code."[133] Additionally, the court held that "in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR [European Convention on Human Rights], by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy."[134] As of when this Article was written, the Belgian case was on appeal.

2. More Narrowly Holding Governments to Promises

Courts are holding governments to their own promises in New Zealand, Ireland, and France. The technique of enforcing a promise against an entity that makes it could, of course, be used against corporations for their promises too.

In 2017, New Zealand's Supreme Court intimated that the country's government had not properly respected its obligations under its 2002 Climate Change Response Act in revised targets, before a newly elected government promised to revise the targets and mooted that claim.[135] The N.Z. Court wrote,

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129. *See id.*

130. *Id.* ¶ 211.

131. *Id.* ¶ 253.

132. *Germany Pledges to Adjust Climate Law After Court Verdict*, ASSOCIATED PRESS (Apr. 30, 2021, 8:17 AM), https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8 [https://perma.cc/R69G-P3TV].

133. Civ. [Tribunal of First Instance] Brussels (4th ch.), June 17, 2021, 2015/4585/A, p. 79 (Conclusion) (official document in French; unofficial computer translation into English provided by the Climate Litigation Network).

134. *Id.* at 83 (Decision).

135. *See Sarah Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 at [¶¶ 95–98] (N.Z.); *see also id.* ¶ 88 ("As a matter of statutory interpretation, s 224(2) can and therefore must be interpreted consistently with New Zealand's international obligations under these instruments. I consider s 224(2) is also to be interpreted consistently with matters that New

in ominous language for the government—and any other potential violator—that the country's climate obligations

> [C]ollectively . . . underline the pressing need for global action, that global action requires all Parties individually to take appropriate steps to meet the necessary collective action, and that Parties should do so in light of relevant scientific information and update their individual measures in light of such information.[136]

In 2020, Ireland's Supreme Court ruled that the country's government was legally required to do more to alleviate climate change under its own legislative commitments.[137] As the Court wrote, the country's National Climate Change Plan fell "well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act."[138] The Court was careful, however, to limit its ruling to the government's existing legal obligations, and not find a "so-called unenumerated right to an environment consistent with human dignity."[139] As the Court explained, although "[c]limate change is undoubtedly one of the greatest challenges facing all states[,]. . . the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require."[140]

In February 2021, France's Administrative Court of Paris held the French government more broadly responsible for its announced obligations under its international commitments on climate change.[141] The court ruled that the

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Zealand has recognised and accepted in these instruments, as these aid in interpreting our obligations."). The Court found the New Zealand government's previous target acceptable. *See id.* ¶ 97 ("New Zealand's 2050 target was consistent with the AR4."). But the Court questioned the government's process for a revised target. *See id.* ("[T]he Minister did not in fact consider whether to adjust the 2050 target and there may be other matters in the AR5 that would cause the Minister to consider a more ambitious 2050 target."). Ultimately, however, the Court dismissed ruling on the AR5 revised target as moot, as the newly elected government announced that it would revisit the issue. *See id.* ¶¶ 97, 98 ("However I need not consider . . . whether it would have been appropriate to direct the Minister to review the 2050 target in light of the AR5 . . . further in light of the recently elected Government's announced intentions to change this target.").

136. *Id.* ¶ 91.

137. *See* Friends of the Irish Env't CLG v. The Gov't of Ir., Ir. and the Att'y Gen. [2020] IESC 49 [2020] 3 IR 1, 56–57 (Ir.).

138. *Id.* at 57. The "2015 Act" is Ireland's "Climate Action and Low Carbon Development Act" of 2015. *Id.* at 11.

139. *Id.* at 14.

140. *Id.* at 7.

141. Tribunal Administratif [TA] [administrative tribunal] Paris, 1e ch., Feb. 3, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1, ¶ 41 (Fr.) (official document in French) (unofficial translation in English provided by plaintiffs); *id.* ¶ 30 (unofficial English translation) ("[T]he State must be regarded as having disregarded the first carbon budget and thus failed to carry out the actions that it had itself recognized as likely to reduce greenhouse gas emissions."); *id.* ¶ 41 (unofficial English translation) ("[I]n view of the State's wrongful failure to implement public policies enabling it to achieve the greenhouse gas emission reduction targets it has set itself, the applicant associations may claim compensation from the State for those wrongful failings."). The final administrative decision was rendered on October 24, 2021. Tribunal

federal government's failure to reduce its greenhouse gas emissions as promised[142] had resulted in the established "ecological damage [*le préjudice écologique*] asserted by the applicant associations."[143] It ordered "the State, in order to halt for the future the worsening of the ecological damage noted, to take all measures to achieve the objectives that France has set itself with regard to the reduction of greenhouse gas emissions."[144]

In language that continued to get stronger, in July 2021, the highest administrative court of France (the Conseil d'État) ruled in favor of the Municipality of Grande-Synthe and its mayor to increase the French federal government's response to climate change targets for 2030, given the government's own promises on the subject.[145] The Conseil determined that, "since the additional measures necessary to bend the curve of greenhouse gas emissions produced on the national territory have not been taken, the refusal of the appellant by the regulatory authority is incompatible with the trajectory for reducing those emissions."[146] It held that, "[c]onsequently, and without there being any need to examine the other pleas in law, the Commune de Grande-Synthe is entitled to seek its annulment" of the government's plans.[147] The Conseil then gave the French government a startingly brief window to comply with its order and climate standards: "The Prime Minister is enjoined to take all necessary measures to bend the curve of greenhouse gas emissions produced on the national territory in order to ensure its compatibility with the greenhouse gas emission reduction objectives . . . before 31 March 2022."[148] The former mayor of Grande-Synthe has appealed to be further included in the case.[149]

Administratif [TA] [administrative tribunal] Paris, 1e ch., Oct. 14, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1 (Fr.).

142. *See, e.g.*, Tribunal Administratif [TA] [administrative tribunal] Paris, 1e ch., Feb. 3, 2021, N°1904967, 1904968, 1904972 & 1904976/4-1, ¶ 30 (Fr.) (unofficial English translation) ("[T]he State must be regarded as having disregarded the first carbon budget and thus failed to carry out the actions that it had itself recognized as likely to reduce greenhouse gas emissions.").

143. *Id.* ¶ 16. Specifically in France:

> [T]he increase in average temperature . . . is notably causing . . . the aggravation of coastal erosion, which affects a quarter of the French coastline, . . . poses serious threats to the biodiversity of glaciers and the coastline, leads to an increase in extreme climatic phenomena such as heat waves, droughts, forest fires, extreme rainfall, floods, and hurricanes . . . [—]risks to which 62% of the French population is heavily exposed[—] . . . and contributes to the increase in ozone pollution and the spread of insects that are vectors of infectious agents such as dengue fever or chikungunya.

Id.

144. *Id.* at Decisions, Art. 4. Later stages of the process would establish amounts and methods of compensation.

145. *See* Conseil d'État [CE] [highest administrative court] 6e and 5e ch. combined, July 1, 2021, N° 427301 (Fr.).

146. *Id.* ¶ 6 (Word translation of official document in French).

147. *Id.*

148. *Id.* at Decisions, Art. 2.

149. *See* Carême v. France, App. No. 7189/21, (June 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13678%22]} [https://perma.cc/NK72-7RPW]; European Court of Human Rights Press Release, Grand Chamber to Examine Complaint that France's Action to

As of March 2023, the Grande-Synthe case, and two others—from Switzerland[150] and directly to the Court[151]—were being heard by the European Court of Human Rights.[152] When issued, the decision of the European Court of Human Rights will be binding precedent on all member states in the Council of Europe.[153]

B. ARGUMENTS AGAINST GOVERNMENTS MOVING INTO LIABILITY FOR CORPORATIONS

The most significant corporate precedents to date have been in the Netherlands under Dutch law. Those developments deserve some discussion as a potential map for how international ESG liability for governments starts to translate into substantive and predictable enforcement for corporations in the private sector.

In 2019, the Netherland's Supreme Court ordered the Dutch government to drastically reduce its greenhouse gas emissions.[154] According to the Court, it could so rule because "the risk of dangerous climate change . . . can also seriously affect residents of the Netherlands in their right to life and well-being."[155] These protections, according to the Court, were "pursuant to art. 2 and 8 ECHR [The European Convention on Human Rights (or, more formally, The Convention for the Protection of Human Rights and Fundamental Freedoms)]," such that it "can and may rule that the State is obliged to achieve this reduction."[156]

Prevent Climate Change has been Insufficient, (Jun. 7, 2022), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7353639-10043718&filename=Relinquishment%20in%20favor%20of%20the%20Grand%20Chamber%20in%20the%20case%20Car%C3%AAme%20v.%20France.pdf [https://perma.cc/8UKW-D96E].

150. The case from Switzerland is Application no. 53600/20, Verein KlimaSeniorinnen Schweiz and others v. Switzerland, Eur. Comm'n on Hum. Rts., *supra* note 110 (previously less-successful case brought by senior women against the government of Switzerland).

151. The case filed directly with the Court is Duarte Agostinho and Others v. Portugal and 32 Others, App. No. 39371/20, (Nov. 30, 2020), https://hudoc.echr.coe.int/#{%22fulltext%22:[%22Duarte%20Agostinho%20and%20Others%22],%22itemid%22:[%22002-13055%22]} [https://perma.cc/Z5B2-U3MN]. It was filed in the fall of 2020 by six Portuguese children and young adults against thirty-three European countries. *Id.* Plaintiffs argue that the countries' failures to adequately address climate change violate their rights as guaranteed under the European Convention on Human Rights. *Id.*; *see also Claudia Duarte Agostinho and Others v. Portugal and 32 Other States Application no. 29371/20*, EXTRATERRITORIAL OBLIGATIONS CONSORTIUM, ET AL. 1–2 (May 6, 2021), https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR0140922021ENGLISH.pdf [https://perma.cc/22ZU-829P] (providing background and jurisdictional context).

152. *See First Climate Case Heard at The European Court of Human Rights*, GREENPEACE INT'L (Mar. 29, 2023), https://www.greenpeace.org/international/press-release/58956/first-climate-case-heard-at-the-european-court-of-human-rights [https://perma.cc/7YKX-2N5U].

153. *See generally European Court of Human Rights: The ECHR in 50 Questions*, EUR. CT. OF HUM. RTS. & THE COUNCIL OF EUR. 9–10 (2021), https://www.echr.coe.int/documents/d/echr/50Questions_ENG [https://perma.cc/J7EC-LWG7].

154. *See* HR 20 December 2019, ECLI:NL:HR:2019:2006 m.nt. (Urgenda Foundation/The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)) (Neth.) (author using Google Translate to quote official document).

155. *Id.* at Conclusion.

156. *Id.*

The Court acknowledged that legislating is typically a political process, but it had to intervene to review the government's action to protect citizens' established right. Generally, "[i]n the Dutch constitutional system, the decision-making process about the reduction of greenhouse gas emissions falls to the government and parliament[,] . . . [and] [t]hey have a great deal of freedom to make the necessary political considerations."[157] However, the Court wrote that "[i]t is up to the judge to assess whether the government and parliament have kept their decision-making within the bounds of the law to which they are bound."[158] Accordingly, the Netherlands had "to reduce greenhouse gas emissions by at least 25 [percent] by the end of 2020 compared to 1990."[159]

The Dutch Supreme Court's strong statements seem to have encouraged the country's lower courts to find climate change liability against a corporation.

In May 2021, a panel of three judges for the district court in The Hague ruled under Dutch law that the Royal Dutch Shell ("RDS") oil company must reduce its group's carbon dioxide emissions—including the emissions of its suppliers and customers—by forty-five percent from its 2019 levels by 2030.[160] The court based its decision in

> the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code on the basis of the relevant facts and circumstances . . . and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.[161]

The "standard of care ensues that[,] when determining the Shell group's corporate policy, RDS must observe the due care exercised in society."[162] The court explained that this standard of care compelled RDS to have a "reduction obligation" that "relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions."[163] The entire Shell group was bound by RDS's obligations because RDS determined its policies.[164] The group's "significant best-efforts obligation with respect to the business relations of the Shell group" included its "end-users" as well.[165]

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157. *Id.* at "Judge and political domain."

158. *Id.*

159. *Id.* at Conclusion (upholding the order of the lower court, as well as the judgment of the court of appeal).

160. *See* Rb. Hague 26 mei 2021, RvdW 2021, C/09/571932 / HA ZA 19-397 m.nt (Vereniging Milieudefensie/Royal Dutch Shell PLC) (Neth.) (English translation published by the court).

161. *Id.* § 4.1.3.

162. *Id.* § 4.4.1.

163. *Id.* § 4.1.4.

164. *See id.* § 4.4.4 ("RDS determines the general policy of the Shell group. The companies in the Shell group are responsible for the implementation and execution of the policy, and [they] must comply with applicable legislation and their contractual obligations. The implementation responsibility of the Shell companies does not alter the fact that RDS determines the general policy of the Shell group.").

165. *Id.* § 4.1.4.

The environmental group suing Shell had included more limited arguments that Shell should at least be bound to fulfill its own promises, and it had documented how Shell's lofty language did not describe the company's actual conduct.[166] RDS itself had objected that "the solution should not be provided by a court, but by the legislat[ure] and politics."[167] The *Shell* court swept away both arguments, explaining that it had to rule on the case because determining a party's "alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court."[168] Although, "[i]t is up to RDS to design the reduction obligation," the company's current plan was in danger of being inadequate "taking account of its current obligations and other relevant circumstances."[169]

In addition, RDS had objected that it should not be bound to the unwritten duty of care to protect human rights the same way that a government would. The court directly addressed RDS's argument and dismissed it. As the court explained, first, in "its interpretation of the unwritten standard of care," that the court was following "the UN Guiding Principles [on Business and Human Rights] (UNGP)."[170] According to the court, "[t]he UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights."[171]

The court next explained that "no inevitable tension needs to exist" between "the different responsibilities for states and businesses."[172] As the court describes,

> [t]he responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility.[173]

Finally, the Dutch court included ringing language that could be picked up and echoed elsewhere on the broad obligation of the rights at issue. As the court explained,

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166. *See generally id.* §§ 2.6.1–2.6.2 (citing correspondence between the parties).

167. *Id.* § 4.1.2.

168. *Id.* § 4.1.3.

169. *Id.* § 4.1.4; *see also id.* §§ 4.5.5–4.5.8 (finding that Shell's current CO_2 emissions were not unlawful, but holding that "[t]he order is for RDS to meet its reduction obligation and [ensure that the group] is sufficiently in line with [its] obligation").

170. *Id.* § 4.4.11.

171. *Id.*

172. *Id.* § 4.4.13.

173. *Id.* (internal citations omitted).

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate. . . . [T]his responsibility of businesses exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. It is not an optional responsibility for companies. It applies everywhere, regardless of the local legal context, and is not passive.[174]

The *Shell* court's ruling is remarkable for U.S. lawyers for several reasons beyond its language about business ethics and human rights.

First, it binds the entire "Shell group," regardless of where those companies are in the world.[175] As the court had noted, although the "RDS has been the top holding company of the Shell group," the Shell group "is further composed of intermediate parents, Operating Companies and Service Companies."[176] This makes "RDS . . . the direct or indirect shareholder of over 1,100 separate companies established all over the world."[177]

Second, it holds RDS responsible for the emissions of its suppliers and customers, who are even farther outside of the company's legal shell, and possibly its influence.[178] The Dutch court explained that its holding bridged all Scope 1, 2, and 3 emissions.[179] As the decision details, the scopes included are the same ones that dominate international standards:

> -Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organization;
>
> -Scope 2: indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam, or heating for its operations;
>
> -Scope 3: all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas.[180]

174. *Id.* § 4.4.15 (internal citations omitted).

175. *See id.* §§ 4.4.4, 4.4.23, 4.4.55.

176. *See id.* § 2.2.2.

177. *Id.*

178. *Id.* § 2.5.4; *see also id.* § 4.4.24 (holding that Shell had a "significant best-efforts obligation" regarding the end-users of its products).

179. *See id.* §§ 4.4.23, 4.4.25.

180. *Id.* § 2.5.4.

Third, the company is not limited by what it had described about its own efforts. It is, instead, bound by a "significant best-efforts obligation" to produce *results* in line with what might be necessary to protect human rights and the planet.[181]

Shell has already announced that it will appeal the ruling.[182] It has promised to accelerate its own energy transition plans in response to the decision, but the company wants to "stick to its own climate timetable."[183] The company's appeal may take two or three years, and news media warn (without irony) that, especially "[i]n the current climate, there's no guarantee that Shell will successfully overturn the verdict."[184]

The more muscular Dutch legal approach against a company directly may echo first in the other countries that have found the existence of a fundamental right regarding climate change. In Germany, for example, in September 2021, a group of German activists initiated lawsuits against BMW and Daimler to cut emissions, and, in November 2021, Greenpeace sued Volkswagen to end the production of combustion-engine cars and cut total emissions by 2030.[185]

The lawyer who primarily litigated the case against Shell predicts a coming "avalanche of cases against the fossil fuel industry and related industries like the car industry."[186] He argues that "[o]ne of the big reasons for the judiciary to exist is to bring balance in society and to protect us from human rights violations from our governments and other large entities that dictate our world and our wellbeing."[187] He believes that "[i]t is just a matter of time [before] the same kind of approaches will also be successful in other countries."[188] Interestingly, he anticipates first, copycat legal action against other oil companies, then companies in other sectors of the economy, and eventually against "individual directors."[189]

Importantly, the Dutch fundamental rights approach may dovetail with a local disclosure-based enforcement strategy as well. For example, in August 2021, the Netherlands' Advertising Code Committee found that Royal Dutch Shell's advertising campaign promising that consumers could offset their

181. S*ee id.* §§ 4.4.23, 4.4.39 (holding that Shell had a "significant best-efforts obligation" regarding even the end-users of its products).

182. *See* Laura Hurst & Diederik Baazil, *Shell to Appeal Landmark Dutch Court Ruling on Climate Goals*, BLOOMBERG (July 20, 2021, 9:15 AM), https://www.bloomberg.com/news/articles/2021-07-20/shell-to-appeal-landmark-climate-case-in-the-netherlands?embedded-checkout=true#xj4y7vzkg.

183. *Id.*

184. *Id.*

185. *See* Tom Wilson, *Lawyer Who Defeated Shell Predicts 'Avalanche' of Climate Cases*, FIN. TIMES (Dec. 16, 2021), https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef.

186. *Id.* (quoting attorney Roger Cox).

187. *Id.* (same).

188. *Id.* (alteration in original) (same).

189. *See id.*

carbon emissions by paying more for gasoline from Shell was misleading.[190] By November 2021, Royal Dutch Shell Plc had announced that it would drop "Royal Dutch" from its name, and that it would move the company's headquarters out of the Netherlands.[191]

But the Dutch courts are not the only sources of concern for the company. In December 2021, a South African court ordered Shell to temporarily halt its nearby offshore seismic survey for oil and gas.[192] In a blend of the substantive concerns that have fueled objections in Europe, and the more procedural approach in the United States, the South African court enjoined Shell's activity because the company allegedly had not fully disclosed the hazards the activity posed to wildlife, and therefore permission for the work had been "awarded on the basis of a substantially flawed consultation process."[193]

C. INTERNATIONAL LEGAL BACKLASH AGAINST "GREENWASHING"

Continuing with the theme of potential liability for company promises internationally, so-called "greenwashing" cases for untruthful or misleading disclosures are being pursued against fossil-fuel companies as well in other countries.

In December 2019, ClientEarth filed with the United Kingdom's National Contact Point for the OECD Guidelines for Multinational Enterprises to allege that "BP's global corporate advertising misled the public in the way that it presented BP's low-carbon energy activities including their scale relative to the company's fossil fuel extraction business."[194] In that case, the agency did not follow through because BP's campaign had already ended.[195]

In February 2020, the UK's Advertising Standards Authority ("ASA"), a self-regulating industry group, concluded that budget-airline Ryanair's assertions that it was "Europe's…Lowest Emissions Airline" and that its

190. *See* Laura Hurst & Diederik Baazil, *Dutch Ad Watchdog Tells Shell to Pull 'Carbon Neutral' Campaign*, BLOOMBERG (Aug. 27, 2021, 10:36 AM), https://www.bloomberg.com/news/articles/2021-08-27/dutch-ad-watchdog-tells-shell-to-pull-carbon-neutral-campaign.

191. *See* Laura Hurst & Diederik Baazil, *Shell Ditches 'Dutch' from Name and Makes Britain Its HQ*, BLOOMBERG (Nov. 15, 2021, 6:16 AM), https://www.bloomberg.com/news/articles/2021-11-15/shell-to-drop-the-dutch-from-name-end-dual-share-structure#xj4y7vzkg.

192. *See* Paul Burkhardt, *Shell Ordered to Temporarily Halt Seismic Survey in South Africa*, BLOOMBERG (Dec. 28, 2021, 5:33 AM), https://www.bloomberg.com/news/articles/2021-12-28/shell-ordered-to-temporarily-halt-seismic-survey-in-south-africa#xj4y7vzkg.

193. *South Africa Court Blocks Shell's Oil Exploration*, BBC (Dec. 28, 2021), https://www.bbc.com/news/world-africa-59809821 [https://perma.cc/TE62-6MP4] (quoting High Court Judge Gerald Bloem's ruling).

194. *Initial Assessment: ClientEarth Complaint to the UK NCP About BP*, GOV.UK (June 16, 2020), https://www.gov.uk/government/publications/client-earth-complaint-to-the-uk-ncp-about-bp/initial-assessment-clientearth-complaint-to-the-uk-ncp-about-bp [https://perma.cc/6P6R-BSDG].

195. *See id.*

operations had "low CO_2 emissions" were misleading, and the claims had to be removed.[196]

In August 2021, the Australasian Centre for Corporate Responsibility filed in Australian federal court against the country's oil-and-gas producer Santos Ltd. The Centre alleged that the company had engaged in misleading or deceptive conduct by claiming to have a "clear and credible" path to net-zero carbon emissions in its operations.[197]

In December 2021, a case was filed in South Korea against the country's largest private gas provider, SK E&S Co., for allegedly false advertising regarding the green credentials of a foreign project.[198] The action is "the first claim in South Korea against a company [regarding] its emissions."[199]

III. DEVELOPMENTS IN THE UNITED STATES

As U.S. courts do not seem particularly receptive to the fundamental rights arguments that have prevailed in Europe and elsewhere, potential U.S. corporate liability for ESG issues is more likely to develop through public nuisance or fraud cases.

Between the two options, this Article argues that the major movement in corporate liability will come through charges of fraud. Private climate change securities litigation cases to-date have mainly been tag-on suits to these other claims.[200] Such suits thus act to magnify U.S. corporate liability for successful charges of fraud.[201]

196. *ASA Ruling on Ryanair Ltd t/a Ryanair Ltd*, ADVERT. STANDARDS AUTH. (Feb. 5, 2020), https://www.asa.org.uk/rulings/ryanair-ltd-cas-571089-p1w6b2.html [https://perma.cc/658Z-FLNU].

197. James Thornhill, *Gas Producer's Net Zero Pledge Challenged in Court by Activist*, BLOOMBERG (Aug. 26, 2021, 2:11 AM), https://www.bloomberg.com/news/articles/2021-08-26/gas-producer-s-net-zero-pledge-challenged-in-court-by-activist#xj4y7vzkg; *Australasian Centre for Corporate Responsibility v Santos Limited* (2021) NSD858/2021, filed in the Federal Court of Australia on Aug. 25, 2021, https://www.comcourts.gov.au/file/FEDERAL/P/NSD858/2021/order_list [https://perma.cc/4JX4-XZVQ].

198. *See* Heesu Lee, *Gas Giant in Korea Accused by Activists of Greenwashing*, BLOOMBERG (Dec. 22, 2021, 7:18 PM), https://news.bloomberglaw.com/antitrust/gas-giant-in-korea-accused-by-activists-of-greenwash-advertising (noting that case will be pending before the Korea Fair Trade Commission and the Korean Ministry of Environment).

199. *Id.*

200. *See, e.g.*, Emily Strauss, *Climate Change and Shareholder Lawsuits*, 20 N.Y.U. J.L. & BUS. 95, 98–100, 150–53 (2023) (finding, in its data set of climate-related shareholder lawsuits, that "most existing climate-related shareholder litigation consists of follow-on lawsuits" in the wake government or other market-disclosure action for misleading behavior). In addition, the current Article answers Strauss's paper's question "Where Are the 'Riverkeepers?,'" *id.* at 145–50, by showing why most other nonprofit direct enforcement actions, such as in *Juliana v. United States*, *infra* Section III.A, have been unsuccessful.

201. *See id.* at 150–53; *see also* William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2149 (2004) (describing one of the functions of private suits as "increasing the intensity of the penalty wrongdoers must pay").

A. U.S. COURTS' RELUCTANCE TO ACKNOWLEDGE NEW RIGHTS

U.S. federal courts are unlikely to follow the international pattern of finding ESG climate requirements to be enforced as fundamental rights.[202] Indeed, U.S. courts seem reluctant to find the development of such new rights in general. For example, in the 2015 climate change case of first impression, *Juliana v. United States*,[203] U.S. Court of Appeals for the Ninth Circuit Judge Andrew Hurwitz objected to lead counsel that he was uncomfortable with the plaintiffs' arguments because "[y]ou're arguing for us to break new ground."[204]

Juliana had been filed on behalf of a group of young people who sued the U.S. federal government, President Obama, and executive agencies, alleging that the "defendants' actions violate [the plaintiffs'] substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations."[205] In 2020, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded *Juliana* on standing ground for failing to "establish[] that the specific relief [plaintiffs] seek is within the power of an Article III court."[206] Fundamentally, the appellate court objected that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan."[207] In 2021, the Ninth Circuit rejected rehearing of the case en banc.[208]

The *Juliana* case was brought under the public trust doctrine against the federal government to compel protective action. This set of arguments was similar internationally to the Nepalese Supreme Court case on *parens patriae* or the Belgian and Dutch cases on a breach of a government's duty of care.[209]

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202. As of 2023, an environmental case against the State of Montana has gone to trial, but that litigation is in state court, and it is premised on protections under the Montana State Constitution, which are unusual and specific. *See* Findings of Fact, Conclusions of L., and Ord. at 1–9, Held v. Montana, No. cvd-2020-307 (D. Mont. Aug. 14, 2023); MONT. CONST. art. II, § 3 ("All persons . . . have certain inalienable rights. They include the right to a clean and healthful environment . . . ."); *id.* art. IX, § 1, cl. 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); *id.* § 1, cl. 3 ("The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."). *Juliana v. United States*, described *infra* text accompanying notes 203–11, is more typical of cases against the federal government in U.S. federal courts.

203. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

204. Darlene Ricker, *Lawyers Are Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change*, AM. BAR ASS'N J. (Nov. 1, 2019, 12:00 AM), https://www.abajournal.com/magazine/article/lawyers-are-unleashing-a-flurry-of-lawsuits-to-step-up-the-fight-against-climate-change (quoting Judge Hurwitz on oral argument in 2019).

205. *Juliana*, 217 F. Supp. 3d at 1233.

206. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020), *reh'g denied en banc*, 986 F.3d 1295 (9th Cir. 2021).

207. *Id.*

208. Juliana v. United States, 986 F.3d 1295, 1296 (9th Cir. 2021) (rejecting rehearing en banc).

209. *See* discussion *supra* Part II.

But public trust arguments unavailing in a case against the government in the United States would be even more legally tenuous against a private company.

More common in the United States has been public nuisance tort suit against companies such as those that marketed tobacco and opioids.[210] The *Juliana* case had tried to make a similar case against the federal government in saying that it had ignored the danger of climate change impacts for years, failing either under a duty of care to the public or in the enforcement of international obligations.[211] A fundamental problem, however, in compelling federal government action according to any international obligations is that the United States has been cagey about putting its environmental commitments into legally enforceable form.

In addition, standing for civil plaintiffs to bring these cases has been a major problem in U.S. courts. According to a district court regarding a case modeled on *Juliana*, but filed in the Eastern District of Pennsylvania, despite plaintiffs' providing in "[a]pproximately half [of their] Amended Complaint . . . a recitation of domestic and international treaty provisions, studies, declarations, and administrative actions effected over the last fifty years addressing air pollution and climate change,"[212] plaintiffs lacked an enforceable claim under U.S. law for standing in federal court. Indeed, the court in *Clean Air Council v. United States* seemed incredulous that the plaintiffs would want it to intervene to challenge government action on climate change.[213] The court cited solely the U.S. Supreme Court for its authority; international commitments and violations of human rights from climate change seemed far from its consideration. As it wrote, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute."[214]

The *Clean Air Council* court was additionally harsh in its outright dismissal that fundamental climate change interest might be protected by U.S. law. In regard to the U.S. Constitution, although plaintiffs "argue that that their fundamental right to a life-sustaining climate system stems is such a liberty interest," the court wrote that "I do not agree."[215] Point-blank, "[t]he Third Circuit has held that 'there is no constitutional right to a pollution-free environment.'"[216]

The court was reluctant to intervene in what it considered to be a "political" matter involving other branches of government. As it explains,

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210. *See* discussion *infra* Section III.B.

211. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

212. Clean Air Council v. United States, 362 F. Supp. 3d 237, 243–44 (E.D. Pa. 2019).

213. *See id.* at 242.

214. *Id.* at 244 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

215. *Id.* at 250.

216. *Id.* (quoting Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1238 (3d Cir. 1980), *vacated on other grounds sub nom.*, Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).

"[b]ecause I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants' Motion [to dismiss the suit]."[217] Moreover, "I decline to arrogate to the Courts the authority to direct national environmental policy."[218]

Finally, the district court was dismissive of any alleged tie between government inaction and the plaintiffs' damages from climate change. As it wrote, "[p]lainly, the challenged actions have nothing to do with Plaintiffs' allergies and asthma."[219] And, later, about the plaintiffs' causal argument: "This is absurd."[220] The largest disconnect for the court was that the government was not primarily *emitting* greenhouse gases, according to the plaintiffs' arguments, private actors were.[221] For the court, this was simply a step too far: "Plaintiffs simply ignore that Defendant agencies and officers do not produce greenhouse gases, but act to regulate those third parties that do: innumerable businesses and private industries."[222] Generally, in U.S. federal law, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[223]

B. THE PUBLIC NUISANCE TORT SUIT APPROACH

Although there may come a future wave of public nuisance tort suits against private industries,[224] many of the same standing issues as in *Juliana* and *Clean Air Council* will apply if plaintiffs cannot persuade U.S. courts to accept the basis of their claims and to recognize that their damages are addressable. An American Bar Association publication has noted that, as of 2019, there were "a dozen major public nuisance climate change lawsuits pending in the United States."[225] At the time, "[m]ore than 1,300 climate cases have been brought in 29 nations around the world—more than 1,000 of them in the U.S."[226]

Among the most prominent of the public nuisance cases is the one filed in 2018 by the Mayor and City of Baltimore in Maryland state court against twenty-six multinational oil and gas companies alleging that they are partly

217. *Id.* at 242.

218. *Id.* at 254.

219. *Id.* at 248.

220. *Id.*

221. *See id.* at 249.

222. *Id.* (emphasis omitted).

223. *Id.* at 251 (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989)). Plaintiffs' arguments also failed to establish a "state-created" danger. *Id.* at 251–52 (noting that state-created danger and prison-created danger are two exceptions to this general rule).

224. *But see* Strauss, *supra* note 200, at 150–61 (quantifying that these have not materialized in large numbers). In addition, this Section provides an explanation for why such suits may not materialize at the rate that might be otherwise expected.

225. Ricker, *supra* note 204.

226. *Id.*

responsible for climate change and should have to compensate the City in tort for the City's costs in responding to it.[227] What is interesting about the tort claim as expressed by the City is how much it actually sounds like a claim regarding misinformation or fraud.[228] In 2021, the U.S. Supreme Court overruled the Fourth Circuit's decision on removal to federal court, but it did not address the underlying allegations against the oil and gas companies.[229]

Another practical problem with public nuisance suits in torts is that they must show, as in the tobacco, opioid, and other litigation, that the companies involved fully understood how dangerous their actions were at the time, and they proceeded anyway. This knowledge may have been fully present in the fossil-fuel industry, for example, but it is harder to argue that most other sectors of the economy fully understood the dangers from climate change internally much before there was a public scientific consensus about it—and there still is, arguably, not a political public consensus on the issue in the United States with the repeated failure of most proposed climate change legislation at the federal level.[230]

However, U.S. law has been retreating from substantive regulation of many industries, and now primarily, in white collar crime, it polices what parties *say* instead of what they *do*. We turn next to show how, in this context, U.S. ESG cases may first cross the line into potential corporate criminal liability in the area of fraud.

IV. CROSSING THE U.S. LINE INTO CRIMINAL PROSECUTION FOR FRAUD

When there is pressure to please the market and investors to make money, and companies are not honest about their products and processes to chase profits, fraud is likely to result. Particularly interesting are recent developments in U.S. charges of criminal fraud for representations to investors.

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227. *See* Plaintiff's Complaint at 107–11, Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-02357), 2018 WL 4236520.

228. *See, e.g.*, Mayor & City Council of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020), *vacated and remanded on question of removal by* 141 S. Ct. 1532 (2021) ("Baltimore alleges that, despite knowing about the direct link between fossil fuel use and global warming for nearly fifty years, Defendants have engaged in a 'coordinated, multi-front effort' to conceal that knowledge; have tried to discredit the growing body of publicly available scientific evidence by championing sophisticated disinformation campaigns; and have actively attempted to undermine public support for regulation of their business practices, all while promoting the unrestrained and expanded use of their fossil fuel products.").

229. *See* BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532, 1536, 1547 (2021).

230. *See, e.g.*, Josh Lederman, *What the Collapse of Build Back Better Would Mean for Climate Change*, NBC NEWS (Dec. 19, 2021, 4:59 PM), https://www.nbcnews.com/politics/congress/what-collapse-build-back-better-would-mean-climate-change-n1286288 [https://perma.cc/5L3T-WRR6] (reviewing the political disagreement over the Build Back Better legislation and how its failure could make "it nearly impossible for the U.S. to meet its emissions-cutting pledges"); Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021, 10:35 AM), https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why [https://perma.cc/YYS4-JFZH] (discussing "the oil industry's . . . disinformation . . . delay[ed] climate action" and how it is similar to "the tobacco industry . . . misleading the public about the harmful effects of smoking" twenty-five years ago).

In 2021-2022, prosecutors tried high-profile criminal fraud cases against Elizabeth Holmes and Ramesh "Sunny" Balwani, Theranos's chief executive and its chief operating officer. The pair were charged with nine counts of fraud, and two counts of conspiracy to commit fraud—one against Theranos's investors and one against Theranos's doctors and patients.[231] The indictment cited company statements about its product and processes that the DOJ established were untrue.[232] The harm to investors was that "after receiving false and misleading statements, misrepresentations, and omissions from [the defendants] . . . . [i]nvestors . . . initiated electronic wire transfers for the purpose of investing money in Theranos."[233]

Previous civil securities fraud charges had been brought against Holmes and the company on the same basis, but they had been settled with the SEC.[234]

It is interesting that the government felt so strongly that it pursued a criminal case with the same arguments, even after achieving the civil settlement.[235] That decision is a forceful signal of how norms may be shifting around such behavior in misrepresenting information to investors.

In 2022, the jury controversially found Holmes guilty on four of the counts regarding investors, but not on any of the counts regarding patients.[236] It may be that, under arguments regarding fraud, it is simply easier to show that Holmes had communicated directly with investors as opposed to patients.

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231. *See* Indictment at 7–10, United States v. Holmes, No. 5:18-cr-00258, 2023 WL 3489320 (N.D. Cal. 2023), 2018 WL 3216817.

232. *See id.* at 3.

233. *Id.* at 6.

234. *See* Complaint at 21–22, SEC v. Holmes, No. 18-cv-01602 (N.D. Cal. Mar. 14, 2018). The Holmes and Theranos complaint alleges "[v]iolations of Section 10(b) of the Exchange Act and Rule 10b-5," as well as "[v]iolations of Sections 17(a)(1), (2), and (3) of the Securities Act." *Id.* Ramesh "Sunny" Balwani did not settle with the SEC in his case. Press Release, Sec. & Exch. Comm'n, Theranos, CEO Holmes, and Former President Balwani Charged with Massive Fraud: Holmes Stripped of Control of Company for Defrauding Investors (Mar. 14, 2018), https://www.sec.gov/news/press-release/2018-41 [https://perma.cc/YTC8-RE52] ("The SEC will litigate its claims against Balwani in federal district court in the Northern District of California.").

235. Generally, we have thought of civil law as supplementing penalties provided by the criminal law, even as the criminal law expands. *See, e.g.*, Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions Symposium*, 101 YALE L.J. 1895, 1895 (1992) ("[C]ivil damage actions are being brought to supplement criminal cases—sometimes for treble damages or for punitive damages."). The blurring of the civil and criminal line continues, but it is interesting to see the government move in 'reverse' order of settling the civil action before pursuing a criminal one. Typically, it would be easiest to pursue the civil action *after* the criminal one, as the criminal one has the higher burden of proof and would make the civil action easier to follow as the second case. Trying the criminal case before a civil settlement would also give the government effectively a 'second bite at the apple' if it had any doubts about its ability to win the criminal case. Pursuing the criminal case after settling the civil case then appears to be more about sending a signal to the market and desire to label the underlying behavior as being criminal.

236. *See* Erin Griffith & Erin Woo, *Elizabeth Holmes Found Guilty of Four Charges of Fraud*, N.Y. TIMES (July 8, 2022), https://www.nytimes.com/live/2022/01/03/technology/elizabeth-holmes-trial-verdict. In July 2022, Ramesh "Sunny" Balwani was found "guilty of two counts of conspiracy and ten counts of wire fraud." *See* Press Release, U.S. Att'y Off. of N. Dist. of Cal., Theranos Chief Operating Officer Ramesh "Sunny" Balwani Found Guilty of Conspiracy, Wire Fraud (July 8, 2022), https://www.justice.gov/usao-ndca/pr/theranos-chief-operating-officer-ramesh-sunny-balwani-found-guilty-conspiracy-wire [https://perma.cc/66VS-6BGS].

Even though we may think that patients would have the more compelling emotional stories, cases protecting investors against fraud in the criminal context appear easier for the government to win. Accordingly, in thinking about potential ESG criminal corporate liability for fraud, we should be thinking about the government bringing cases regarding investors first.

A. POTENTIAL MISREPRESENTATIONS TO ESG INVESTORS

We do seem to see potentially serious misrepresentations to investors regarding ESG. As has been the pattern for other frauds that have been pursued criminally, there is a lot of money to be made, and potential lies about what people are doing to make that money.

1. Ratings Such as MSCI Across the Market

The facts supporting a prosecution for the use of misleading metrics,[237] such as the MSCI ratings used across the market, seem striking. In 2021, for example, news broke that one of the largest investment firms in the country, BlackRock, was driving investment into so-called "ESG" funds by

> inserting its primary ESG fund into popular and influential model portfolios offered to investment advisers, who use them with clients across North America. The huge flows from such models mean many investors got into an ESG vehicle without necessarily choosing one as a specific investment strategy, or even knowing that their money has gone into one.[238]

Most importantly, for investors who think that their money is being channeled into an ESG fund, "the ratings BlackRock cites to justify the fund's sustainable label have almost nothing to do with the environmental and social impact companies in the fund have on the world."[239] In fact, the ratings BlackRock is using were "primarily . . . designed to measure the opposite: the potential harm government regulations and other factors might cause to the companies' bottom line, especially when it relates to addressing climate change."[240]

The ratings firm MSCI, Inc., whose material dominates the world of sustainable investing, makes some forty cents out of every dollar spent in the market on ESG ratings,[241] and counts BlackRock as its largest customer. It has

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237. *See also* Virginia Harper Ho, *Sustainable Investment & Asset Management: From Resistance to Retooling*, *in* INVESTMENT MANAGEMENT, STEWARDSHIP AND SUSTAINABILITY: TRANSFORMATIONS AND CHALLENGES IN LAW AND REGULATION 137, 162–63 (Iris H-Y Chiu & Hans-Christoph Hirt eds., 2022) (noting how many ESG ratings and information disclosures are less than transparent and helpful to investors).

238. Cam Simpson & Saijel Kishan, *How BlackRock Made ESG the Hottest Ticket on Wall Street*, BLOOMBERG (Dec. 31, 2021), https://www.bloomberg.com/news/articles/2021-12-31/how-blackrock-s-invisible-hand-helped-make-esg-a-hot-ticket#xj4y7vzkg.

239. *Id.*

240. *Id.*

241. Cam Simpson, Akshat Rathi & Saijel Kishan, *The ESG Mirage: MSCI, the Largest ESG Rating Company, Doesn't Even Try to Measure the Impact of a Corporation on the World. It's All About Whether the*

used its ratings to open "the door to [ESG-advertised funds] owning companies that have been among those considered the worst offenders by some investors focused on environmental and social responsibility."[242] Such companies that the funds have invested in include "fossil-fuel giants Chevron and ExxonMobil, along with Facebook (now called Meta Platforms), Amazon, McDonald's, and JP Morgan Chase, which is the biggest financier of fossil-fuel projects since the 2015 Paris [Climate] Accords."[243]

MSCI's rating system for ESG investments, according to MSCI—but not to BlackRock and the other companies that use it—is *not* supposed to "measure a company's impact on the Earth and society. In fact, [it] gauge[s] the opposite: the potential impact of the world on the company and its shareholders."[244] The rating company "doesn't dispute this characterization," and it "defends its methodology as the most financially relevant for the companies it rates."[245] Financial relevance here seems to mean overall profit, not the financial relevance of the ESG goals for which the ratings are being sold.

The misrepresentation of BlackRock's ESG-advertised fund based on MSCI's ratings as investing in companies that combat climate change is so significant that, in fact, BlackRock's "ESGU fund holds a heavier weighting in 12 fossil-fuel stocks than the S&P 500 does."[246]

BlackRock's ESGU fund (whose formal name is iShares ESG Aware MSCI USA), advertises that it provides exposure to "U.S. stocks with favorable environmental, social, and governance (ESG) practices."[247] As reporters have noted, BlackRock "doesn't tell anyone what 'favorable practices' actually means."[248] On climate change, BlackRock's posted 2022 guidance does define "net zero" as "an economy that emits no more greenhouse gas than it removes from the atmosphere."[249]

A motivation for companies pushing ESG-advertised funds is that they typically generate higher fees for investment companies than non-ESG funds.[250] However, while customers may be paying these higher fees because

World Might Mess with the Bottom Line., BLOOMBERG (Dec. 10, 2021), https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line (referencing investment bank UBS Group AG's analysis).

242. Simpson & Kishan, *supra* note 238.

243. *Id.*

244. Simpson et al., *supra* note 241.

245. *Id.* Mr. Henry Fernandez, chairman and chief executive of MSCI, fully admits that neither customers nor many portfolio managers using the company's ratings may understand how MSCI is defining "ESG" investments: "No, they for sure don't understand that . . . . I would even say many portfolio managers don't totally grasp that. Remember, they get paid. . . . They're not as concerned about the risk to the world." *Id.* (quoting Mr. Fernandez).

246. Simpson & Kishan, *supra* note 238 (citing Bloomberg Intelligence, the research arm of Bloomberg).

247. Simpson et al., *supra* note 241.

248. *Id.*

249. Gargi Pal Chaudhuri, *iShares 2022 Outlook and ETF Investment Guide*, BLACKROCK (Dec. 13, 2021), https://www.ishares.com/us/insights/ishares-2022-outlook-and-etf-investment-guide.

250. *See* Simpson & Kishan, *supra* note 238 (citing Tariq Fancy, BlackRock's former chief investment officer for sustainable investing).

they believe that they are helping the planet through their investment choices, their money is, in fact, instead often funding "emissions [to] continue to climb and social ills [to] grow."[251]

The reality of what is happening with money invested in so-called ESG funds may be a far cry from the language used to promote them. In 2018, Mr. Larry Fink, BlackRock's CEO, had announced in his letter to investors that BlackRock was taking a higher moral ground.[252] As the *New York Times* summarized, he "inform[ed] business leaders that their companies need to do more than make profits—they need to contribute to society as well if they want to receive the support of BlackRock."[253] The advertising has worked: In 2021, BlackRock was approaching $10 trillion assets under management, with a large part of its growth from ESG funds.[254] As one source explained, "[t]o put that number in perspective," as of 2020, "consider that only two countries—the U.S. and China—boast [a] higher GDP than $10 trillion."[255]

As BlackRock's former chief investment officer for sustainable investing describes, inside the company, the materials he received to promote ESG funds were simple, "even if that meant glossing over how it directly contributed to fighting climate change, which was always hard to explain and at best a bit uncertain."[256] As he explains a basic truth: "there's always money to be made from telling people what they want to hear."[257] In 2021, ESG-advertised funds were "the fastest-growing segment of the global financial-services industry, thanks to marketing built on dire warnings about the climate crisis, wide-scale social unrest, and the pandemic."[258]

The hypocrisy of that misrepresentation to investors has turned BlackRock's former chief investment officer for sustainable investing into a fierce critic of current ESG investing.[259] He explains that his "thinking [has] evolved from evangelizing 'sustainable investing' for the world's largest investment firm to decrying it as a dangerous placebo that harms the public interest."[260]

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251. *See id.* (same).

252. *See* Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html.

253. *Id.*

254. *See* Palash Ghosh, *No End in Sight to BlackRock's Growth as It Approaches $10 Trillion*, PENSIONS & INVS. (Nov. 19, 2021, 6:00 AM), https://www.pionline.com/money-management/blackrock-surging-toward-10-trillion-assets.

255. *Id.* (citing World Bank data).

256. Tariq Fancy, *The Secret Diary of a 'Sustainable Investor'—Part 1*, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139 [https://perma.cc/JJ2H-4EWZ].

257. Tariq Fancy, *The Secret Diary of a 'Sustainable Investor'—Part 2*, MEDIUM (Aug. 20, 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-2-831a25cb642d [https://perma.cc/QXH5-66AR].

258. Simpson et al., *supra* note 241.

259. *See, e.g.*, Fancy, *supra* note 257.

260. *See, e.g.*, *id.*

The MSCI and BlackRock ESG story may be one of the many examples that draw regulators to consider pursuing fraud charges, and potentially charges for criminal fraud, for the differences between what the companies represent that they are doing with investors' money, and what they have actually been doing with those funds.

2. Consumer Products

Additional issues around advertising of consumer products have already drawn potential civil liability for misrepresenting information to consumers, but they could draw more serious sanctions if direct investor cases prove successful.

One example of misrepresentation to consumers regarding ESG is fast-fashion brand H&M's promotion of its "Conscious" clothing line that was criticized in 2019 by the Norwegian Consumer Authority for giving the "misleading" impression that it had environmental benefits.[261] H&M had promised customers that "every piece in the collection is made from a sustainably sourced material, such as 100 per cent organic cotton, Tencel or recycled polyester," and that its premium Conscious Exclusive collection "explore[s] the healing power of nature, while also embracing innovation with sustainable materials and processes for a more sustainable fashion future."[262] According to the Norwegian Consumer Authority, H&M's marketing was "misleading" because it "contain[ed] false information and is therefore untruthful." It found H&M to be in violation of Norwegian marketing laws, and it was in consultation with the company about the information that H&M needed to provide to be in compliance.[263]

Another example from the United States is the June 2021 Earth Island Institute's case against Coca-Cola for "false and deceptive marketing representing itself as a sustainable and environmentally friendly company."[264] By 2020, Coca-Cola had been ranked the worst plastic polluter on the planet three years in a row, and, in that year, it had eclipsed the plastic pollution of the next two companies, combined.[265] In August 2021, Earth Island Institute filed a similar lawsuit against BlueTriton Brands, formerly Nestlé Waters North America.[266]

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261. *See* Natashah Hitti, *H&M Called Out for "Greenwashing" in Its Conscious Fashion Collection*, DEZEEN (Aug. 2, 2019), https://www.dezeen.com/2019/08/02/hm-norway-greenwashing-conscious-fashion-collection-news [https://perma.cc/W48S-JXQW].

262. *Id.*

263. *See id.*

264. Complaint at 1, Earth Island Inst. v. Coca-Cola Co., No. 2021 CA-001846-B, 2022 WL 18492133 (D.C. Super. Ct. 2022) (No. 22-cv-0895), 2021 WL 9949916.

265. *See* Tanuvi Joe, *Earth Island Sues Coca-Cola Over Greenwashing Claims & False Advertisement*, GREEN QUEEN (June 11, 2021), https://www.greenqueen.com.hk/earth-island-sues-coca-cola-over-greenwashing-claims-false-advertising [https://perma.cc/S5QG-4ESH] (citing data from the Break Free From Plastic Global Cleanup and Brand Audit report).

266. *See* Complaint at 1, Earth Island Inst. v. BlueTriton Brands, No. 2021 CA-003027-B, 2022 WL 2132634 (D.C. Super. Ct. June 7, 2022) (No. 2021 CA-003027-B), 2021 WL 88825066; *see also* Deena Robinson, *10 Companies Called Out for Greenwashing*, EARTH.ORG (July

B. WARNINGS ABOUT INDIVIDUAL LIABILITY

Corporate liability is often easier to prove than individual liability,[267] so it is significant that the people being asked to make ESG statements or set policy on behalf of companies are particularly concerned. The U.S. Department of Justice has a general policy that it will attempt to pursue individual cases of wrongdoing in addition to attempting to impose corporate liability.[268] The individual verdicts against Theranos's Holmes and Balwani are also evidence of this trend.[269]

1. Compliance Officers

Given the increasing volatility around ESG, some compliance officers and in-house counsel are concerned about their personal involvement.

U.S. businesses have been asking their compliance officers to be the face and enforcement personnel for ESG initiatives.[270] As one sustainability director who used to work in the oil-and-gas industry explains, "[a] compliance officer is viewed as a leader in ethics, in good corporate practices . . . . Right there, they have a role in disclosing internally to employees and to the market about why they are a responsible corporation."[271]

In a 2021 Stanford-Law-School-based survey of corporate general counsel and senior legal officers, over three-quarters (seventy-eight percent) of respondents report that they have been under increasing pressure in the last three years to grow ESG efforts.[272] Up to half of respondents, however, fear

17, 2022), https://earth.org/greenwashing-companies-corporations [https://perma.cc/55K8-73HE] (highlighting instances of greenwashing by Nestlé).

267. *See generally, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195 (1991) ("Essentially, corporate criminal liability (at least as recognized in the United States) is a species of vicarious criminal liability; that is, the principal is held liable for the acts of its agent—even when the principal makes a substantial good faith attempt to monitor the agent and prevent the illegality.").

268. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-28.210 (2023) ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or outside the corporation . . . . Provable individual criminal charges should be pursued, particularly if they implicate high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.").

269. *See supra* notes 231–36 and accompanying text.

270. *See, e.g.*, Dylan Tokar, *Compliance Officers Play Growing Role in Corporate Sustainability Efforts*, WALL ST. J. (May 4, 2021, 10:00 AM), https://www.wsj.com/articles/compliance-officers-play-growing-role-in-corporate-sustainability-efforts-11620136800.

271. *Id.* (quoting Taylor Pullins, former sustainability director for Noble Energy Inc.).

272. *See* Michael J. Callahan, David F. Larcker & Brian Tayan, *The General Counsel View of ESG Risk*, STAN. GRADUATE SCH. BUS.: STAN. CLOSER LOOK SERIES 1, 2 (Sept. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923913 [https://perma.cc/HDX9-BD5S]. It is interesting to see a breakdown in the survey about where this pressure is coming from. It seems to be often a combination of employees, institutional investors, customers, and third-party advocacy groups, as well as ESG ratings firms. *See id.* (providing breakdown numbers).

that increasing ESG efforts may lead the company to incur legal or regulatory harms.[273] That result could put their jobs at risk.

In 2022, a Harvard Law School and EY joint survey of over one thousand general counsel finds similar concerns about the changing nature of their jobs, with respondents placing fears of pressure from investors and regulators at the top of their lists.[274] They are most worried about the amorphous nature of regulation around ESG. Ninety percent of law departments are concerned about "creating policies where there are no specific regulations connected to environmental issues."[275]

Compliance officers' concerns center on enforcement of the securities laws—which would include their statements about ESG initiatives.[276] In 2021, the New York City Bar Association asked the SEC to adopt a framework to quell members' fears "in deciding whether to charge chief compliance officers for conduct relating to their job-related duties under federal securities laws."[277]

2. Corporate Directors

Not only compliance officers, but corporate directors have reason to be worried. In 2021, Professor Cynthia Williams and lawyers for the Commonwealth Climate and Law Initiative showed that failure to adequately address climate change risks could be the foundation for individual suits against directors for violations of their fiduciary duties.[278] They argue that, under Delaware law, directors should be concerned about a potential breach of the duty of loyalty if the corporation that they serve "were to suffer harm due to climate-related risks and the director or officer had failed to adequately consider relevant issues . . . or acted impermissibly in respect to a conflict of interest."[279] In addition, directors could be "exposed to liability for a breach of their duty of care if they made a decision regarding climate change risks or opportunities in a grossly negligent, or uninformed, manner."[280]

The emergence of these potential liabilities for directors is yet another reason why companies should understand it to be good corporate governance to be proactive in addressing the risks of climate change.[281]

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273. *See id.* at 2.

274. *See* EY & CTR. ON THE LEGAL PROF., HARVARD L. SCH., 2022 GENERAL COUNSEL SUSTAINABILITY STUDY 5–6 (2022), https://www.ey.com/en_gl/law/how-the-law-department-is-key-in-unlocking-your-sustainability-strategy [https://perma.cc/6Z8T-EC2D] (download study at link).

275. *Id.* at 9.

276. *See* Mengqi Sun, *Proposed Framework Aims to Guide Regulators in Decisions to Charge Chief Compliance Officers*, WALL ST. J. (June 4, 2021, 7:42 PM), https://www.wsj.com/articles/proposed-framework-aims-to-guide-regulators-in-decisions-to-charge-chief-compliance-officers-11622850144.

277. *Id.*

278. *See* SARAH BARKER, CYNTHIA WILLIAMS & ALEX COOPER, COMMONWEALTH CLIMATE & L. INITIATIVE, FIDUCIARY DUTIES AND CLIMATE CHANGE IN THE UNITED STATES 4 (2021).

279. *Id.*

280. *Id.*

281. *See id.* at 10–11, 45–47.

In addition, other countries such as Singapore appear to be leading the way in enforcing potential individual liability for climate change against directors, including personal criminal liability. According to a 2021 Singapore legal opinion, "various statutes that impact on climate change specifically provide that directors are criminally liable if their respective companies are guilty of breaching the provisions of those laws."[282] It advises that "[m]any provisions in these legislative instruments criminalise . . . activities which may adversely affect the environment and directly or indirectly contribute to climate change."[283] Such violations are "punishable with substantial fines and/or imprisonment."[284]

To show how far Singapore has developed toward personal criminal liability for climate change, the net for sweeping in responsible officers is very broad. Personal criminal liability may rest on any "officer of the corporation or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation."[285] It may be triggered when such a person "knew or ought reasonably to have known that the offense by the corporation . . . would be or is being committed, and failed to take all reasonable steps to prevent or stop the commission of that offence."[286] The person would then be "guilty of the same offence as the corporation."[287]

Singapore's "increasingly strict stance on potential criminal liability" allows the imposition of liability from "even [an] *omission* by directors in a situation where they only *ought reasonably to have known* that an offence was being committed."[288] Along these lines, directors can be personally criminally liable "if they fail to ensure that their companies have in place principles and systems for compliance" with climate change laws.[289]

V. WHY FRAUD PROSECUTIONS MAY MOVE FASTEST IN THE UNITED STATES AND HOW OUR APPROACH CAUSES PROBLEMS

Insofar as the United States advances business liability for climate change and misrepresentations around the subject, it is most likely to be through prosecutions for fraud. This Part discusses why focusing on criminal corporate ESG liability without standards creates further problems. The Part develops the nature of federal prosecutions for fraud, the doctrinally slippery slope in

282. JEFFREY W T CHAN, SC, JOSEPH CHUN, ERNEST LIM, PETER DORAISAMY & QUEK WEN JIANG, GERARD, LEGAL OPINION ON DIRECTORS' RESPONSIBILITIES AND CLIMATE CHANGE UNDER SINGAPORE LAW 5 (2021), https://www.pdlegal.com.sg/wp-content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-Under-Singapore-Law-1.pdf [https://perma.cc/BSB6-LJXB].

283. *Id.* at 14.

284. *Id.*

285. *Id.* at 20–21.

286. *Id.* at 21 (quoting Carbon Pricing Act, 2018, § 68(2)(b)(iii) (Act no. 23/2018) (Sing.) (emphasis omitted)).

287. *Id.*

288. *Id.*

289. *Id.*

fraud between civil and criminal enforcement, recent political and economic pressures around fraud as it relates to climate change, problems with corporate responses, and finally, signs of movement on fraud prosecutions against U.S. corporations.

A. THE NATURE OF FRAUD PROSECUTIONS

Although there are good arguments that the United States does not have a credible system of white collar criminal enforcement,[290] what enforcement the country has tends to be built around what entities *say* instead of what they *do*.

The practical issue is that we tend not to pass new statutes that contain substantive regulation of business behavior—for example, outlawing the actual use of production techniques that damage the environment.[291] That approach would take consensus on banning a practice, which industry and labor may fight, and the hiring of inspectors and other personnel who would have to enforce it.[292]

Instead, what we tend to do, as with the 2022 Inflation Reduction Act,[293] is either use "carrots" to change the relative price of practices by flooding the market with subsidies[294]—or we insist that companies disclose their practices on an issue, with the assumption that the market will discipline companies and punish them through their reputations.[295] But flooding the market with subsidies without many controls, as the United States did with pandemic spending, leads to large amounts of fraud.[296] In addition, the consensus of

290. *See, e.g.*, Mihailis Diamantis, *Corporate Criminal Law Is Different*, HARV. L. REC.: OPS. (Feb. 28, 2022), https://hlrecord.org/corporate-criminal-law-is-different [https://perma.cc/6KKE-7Q5M] (arguing that "[t]he biggest corporate criminals routinely side-step all criminal procedure and any possibility of conviction by cutting deals with prosecutors, trading paltry fines and empty promises of reform for government press releases praising their cooperation"); Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991 *passim* (2022) (similar); John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009, 1026 (2022) (arguing that corporate criminal liability creates an expensive and wasteful compliance industry, and there should be an end to "the compliance game").

291. For example, see *supra* notes 25–28 and accompanying text for discussion of the United States's "all carrots, no sticks" approach toward business regulation.

292. *See generally supra* notes 24–25 and accompanying text.

293. *See* discussion *supra* notes 23–26.

294. *See* discussion *supra* notes 23–26.

295. *See, e.g.*, Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 396 (2004) (describing how "the traditional law and economics model of corporate disclosure" posits that "firms have strong incentives to disclose information in order to distinguish themselves from poorly performing rivals," and that "[f]ear of negative sanctions" should "prevent[] firms from misrepresenting their corporate performance").

296. *See, e.g.*, David A. Fahrenthold, *Prosecutors Struggle to Catch Up to a Tidal Wave of Pandemic Fraud*, N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/16/business/economy/covid-pandemic-fraud.html ("[The pandemic] dollars came with few strings and minimal oversight. The result: one of the largest frauds in American history, with billions of dollars stolen by thousands of people.").

empirical work on market disclosures to enforce ethical behavior shows that they do not work to protect others from corporate misbehavior.[297]

In the United States, merely enforcing disclosures on climate change becomes a political dodge for Congress not to have to set actual goals for business emissions reductions.[298] This omission allows politicians to sidestep arguments that businesses make about the validity of the science—and politicians can then also fail to acknowledge that businesses deny climate change to extract profits by taking advantage of political paralysis.[299] Additionally, limiting arguments to disclosure enables businesses to refrain from doing a key part of company management in the rest of the world: determining what efforts the business can implement for itself to meet global goals.[300]

So, for both performative purposes and short-term profit, U.S. businesses have an incentive to lie.[301] It is often cheaper to tell the government and other oversight organizations that companies have made changes, than for them to make such changes. A classic example is the 2015 to 2017 Volkswagen emissions cheating scandal. Even when the company was held liable for lying about its compliance with emissions standards, it never developed so-called "clean diesel" technology, and it escaped liability for the estimated twelve thousand additional deaths that its violation of diesel emissions standards, combined with others in the industry, may have caused each year.[302]

Furthermore, businesses recognize that there has been a hollowing out of U.S. regulatory resources, and a decision since at least the 1990s that the

297. It is an important, though separate, discussion that the market does not discipline companies as we imagine that it should. *See, e.g.*, *Disclosure-Driven Crime*, *supra* note 99, at 1518–24 (describing and citing research from finance and other disciplines).

298. For example, see *supra* Section I.A, Section V.A, notes 25–28, 98–100, 295 and accompanying text for discussion of the United States's "all carrots, no sticks" approach toward business regulation.

299. *See, e.g.*, Robinson Meyer, *It Wasn't Just Oil Companies Spreading Climate Denial*, ATLANTIC (Sept. 7, 2022), https://www.theatlantic.com/science/archive/2022/09/electric-utilities-downplayed-climate-change/671361. For further discussion of ExxonMobil's efforts, see *infra* Section V.D.

300. *See* Jennifer Howard-Grenville, Simon J. Buckle, Brian J. Hoskins & Gerard George, *Climate Change and Management*, 57 ACAD. MGMT. J. 615, 615 (2014) (describing in the premier journal of the Academy of Management the broad significance of climate change on the world of management and managers); *cf.* Lisa Friedman, *Executives Call for Deep Emission Cuts to Combat Climate Change*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/climate/business-executives-climate-change.html (noting that more than three hundred corporate leaders asked the Biden administration to nearly double the emission reduction targets set by the Obama administration); Andrew Winston, *What 1,000 CEOs Really Think About Climate Change and Inequality*, HARV. BUS. REV. (Sept. 24, 2019), https://hbr.org/2019/09/what-1000-ceos-really-think-about-climate-change-and-inequality (describing, as part of the study of CEOs, that "94 [percent] feel a personal responsibility for laying out their company's core purpose and role in society").

301. *See generally, e.g.*, John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963 (2022) (describing the current structure of corporate criminal liability and the existing incentives against self-reporting misconduct).

302. *See Disclosure-Driven Crime*, *supra* note 99, at 1495; Sarah Knapton, *Volkswagen Scandal: Nearly 12,000 Deaths Could Be Avoided If Industry Met Emissions Targets*, TELEGRAPH (Sept. 22, 2015, 10:00 PM), https://www.telegraph.co.uk/news/health/news/11883416/vw-scandal-emission-target-death-rate.html.

U.S. government effectively permits companies to regulate themselves.[303] U.S. regulators largely police compliance by disciplining companies for not doing what they say that they will do. That approach polices what such entities *say*, rather than spending resources to find out what they actually *do*.

Another serious problem with this approach is that it overly relies on the media and whistleblowers to reveal corporate misconduct. Data show that local media across the United States are disappearing, with thousands of local media companies being bought up.[304] Often, among the first services not to be funded after acquisition of a local media company is investigative reporting, which is vital to holding entities accountable for their actions in a community.[305]

Meanwhile, the SEC and other agencies encourage whistleblowing by employees and parties with knowledge of misconduct, but whistleblowers' careers are often destroyed—a particularly dangerous outcome when they may be among the most ethical people in the company or industry.[306] Whistleblowers face financial hardships with little reasonable possibility of winning an award in a timely way or at all.[307]

Terror of whistleblowing also prompts companies to treat employees as potential enemies, and poisons relationships in the workplace. Consider, for example, in 2021, after whistleblower Frances Haugen disclosed tens of thousands of documents showing that Facebook knew that its products caused harm and that the company had misrepresented itself to the public, one of the first things that Facebook (now Meta) did was to cut off other employees'

303. *See, e.g.*, *Compliance: Arguments for Various Models*, COMPLIANCENET (June 29, 2021), https://www.compliancenet.org/2021 [https://perma.cc/3REF-H32Q], published later at YOUTUBE (July 2, 2021), https://www.youtube.com/watch?v=ReKGNoJc24Y&t=1s [https://perma.cc/3UN4-WWKJ]. As a former Managing Director of Goldman Sachs, Robert Mass, explained "I remember talking to a regulator, and saying, 'This looks to me like you're taking an obligation that was traditionally the government's obligation and basically saying you now have to do it.' And she said, 'Absolutely. We've written the rules precisely to put it on you.'" *Id.* at 23:19.

304. *See* PENELOPE MUSE ABERNATHY, UNIV. OF N.C. AT CHAPEL HILL, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 7–39 (2020).

305. *See, e.g.*, Brier Dudley, *Study: Private Equity Firms Buying Newspapers Cut Local News*, UNION-BULL. (Feb. 18, 2022), https://www.union-bulletin.com/seattle_times/study-private-equity-firms-buying-newspapers-cut-local-news/article_7f5d0c70-50be-523d-8c54-f193d54b3ef7.html [https://perma.cc/5R6J-GQB5]; Michael Ewens, Arpit Gupta & Sabrina T. Howell, *Local Journalism Under Private Equity Ownership* 1–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29743, 2022); *see also* Elahe Izadi, *The Troubling New Void in Local Journalism—and the Nonprofits Trying to Fill It*, WASH. POST (Dec. 6, 2021, 6:59 AM), https://www.washingtonpost.com/media/2021/12/06/media-states-newsroom-government (opening with an overlooked story from legal filings about callous abuse of workers during the coronavirus pandemic).

306. *See, e.g.*, Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 668–69 (2018) (describing multiple impacts of discrimination on whistleblowers' careers).

307. *See, e.g.*, Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2217 (2017) (documenting that "the percentage of tips that result in a financial recovery warranting a whistleblower reward . . . registers just below 0.2 [percent]").

access to similar information inside the company.[308] In 2022, Meta disbanded the unit entirely.[309]

Although imposing corporate criminal fraud liability for what businesses say they will do should theoretically make U.S. companies less willing to announce initiatives to address climate change, there is so much money to be made in the market for ESG investments that companies seem to be making these statements on climate change anyway.[310]

On the international stage, U.S. businesses may make less progress by holding themselves to weaker standards on reducing pollution. There is market pressure, however, to outdo others by boasting big.[311] What we can see are the outcomes: although the United States appears closer to its promised emission reductions through other economic factors, which tend to be global, such as the COVID-19 pandemic and the relative price of energy markets, as of 2022, its efforts will fall short of the Paris Agreement to stay under a one-and-a-half-degree-warming cap.[312]

Corporate prosecutions have become "unbound," as Professor Miriam Baer notes, in that prosecutors, faced with corporate misrepresentations and little substantive law, try to use what law exists to go after misstatements and other poor behavior.[313] Professor John Coffee, Jr. is also correct that U.S. prosecutors have similarly distorted the boundaries of tort and criminal law to prosecute behavior as criminal that may previously have been civilly fraudulent.[314] And Professors Mihailis Diamantis and W. Robert Thomas are correct when they say in 2022 that the mess of this system means that the United States does not have a principled corporate criminal law.[315]

Despite the fact that criminal penalties continue to increase, shifting criminal law to rely on statements in the ESG context is weakening the

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308. *See* Deepa Seetharaman, *Facebook Limits Employee Access to Some Internal Discussion Groups*, WALL ST. J. (Oct. 13, 2021, 8:36 PM), https://www.wsj.com/articles/facebook-limits-employee-access-to-some-internal-discussion-groups-11634171786. Facebook's justification was that "[l]eaks decrease the effectiveness, efficiency, and morale of the teams working every day to address the challenges that come with operating a platform for billions of people." *Id.* (quoting Facebook statement).

309. *See* Jeff Horwitz, *Facebook Parent Meta Platforms Cuts Responsible Innovation Team*, WALL ST. J. (Sept. 8, 2022, 1:33 PM), https://www.wsj.com/articles/facebook-parent-meta-platforms-cuts-responsible-innovation-team-11662658423.

310. For discussion of the money to be made from ESG-labeled investments, see *supra* Section I.A., notes 92–100 and accompanying text.

311. See, for example, discussion of BlackRock's market strategy, *supra* Section IV.A and notes 245–53.

312. *See, e.g.*, *USA*, CLIMATE ACTION TRACKER, https://climateactiontracker.org/countries/usa [https://perma.cc/86D8-LHQC]; *cf.* Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 290–95 (2019) (articulating frustration with the ultimate limits of private ordering without substantive regulation).

313. Miriam H. Baer, *Corporate Criminal Law Unbounded*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 475, 484–85 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

314. *See* Coffee, *supra* note 267, at 202–10.

315. Diamantis & Thomas, *supra* note 290, at 993.

coherent impact of the law. The traditionally stronger substantive prohibitions of criminal law have become obfuscated by smokescreens of disclosure and ad-hoc application.

Disclosure in civil law is the abdication of values by the state and the delegation of those values to the marketplace. Disclosure used to be one of the features that distinguished civil regimes from criminal ones. As Professor Kevin Davis writes in the context of debates around the passage of the Foreign Corrupt Practices Act, civil "[d]isclosure regimes deter by enabling embarrassment, by triggering naming and shaming. They work by exposing wrongdoers to condemnation by customers, suppliers, peers, and the public at large."[316] Importantly, what delegation to disclosure in enforcement means is no "explicit denunciation by the state" of what companies are substantively doing.[317]

Academics criticize the collapse of distinctions in the law for criminalizing what would otherwise have been civil actions.[318] But this is a weakening and destabilization of the criminal law, even with its larger penalties—not a sign of its strength. In continuing to emphasize the disclosure approach of civil law, criminal law is increasingly diminished in its substantive prohibitions.[319] Especially as relates to ESG, criminal law is being limited in its reach to cover what used to be primarily civil. This is a sad reverse implication of Professor Coffee's observation regarding "the disappearance of any clearly definable line between civil and criminal law."[320]

B. DOCTRINALLY SLIPPERY FRAUD PROSECUTIONS

As many other parts of white collar law fail to retain their bite, fraud—based largely on statements—remains a malleable concept in white collar

316. Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 500 (2012).

317. *Id.*

318. *See, e.g.*, Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. 1483, 1516 (2022) (disapproving that "[e]ven a non-authoritarian observer might be tempted to say that criminal defendants—not because of but regardless of their race or class—are by and large guilty of a crime and thus are rule breakers against whom obedience can justifiably be enforced"); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 720 (2013) (raising concerns when "the penal code regulates too much conduct that is beyond the common law definitions of crimes or that is not inherently blameworthy"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (protesting that "criminal law [has] come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over"); *cf.* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1196 (2015) (theorizing that "[o]vercriminalization increases criminal behavior by lessening the legitimacy of the criminal law, which fuels offender rationalizations").

319. *Cf., e.g.*, Stuntz, *supra* note 318, at 509 (noting in 2001 that "[t]he end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments. We have not reached that point yet; substantive criminal law has not wholly ceased to operate. But we are closer than we used to be—the movement is very much in that direction.").

320. Coffee, *supra* note 267, at 193.

crime, and an easier basis for prosecutions than many other grounds.[321] As Professor Buell describes, "[i]f malfeasance in the business world has a single concept at its core, it is fraud."[322] Fraud, he concludes after a survey of its origins and applications, "is deception, with the getting of something from another as the object of the deception."[323] In the "intentional and wrongful deception worked upon the fraud victim—either a lie or the concealment of important information that the seller was obligated to disclose"—the lie or omission is key.[324]

The DOJ's own journal provides a nice summary of the dilemmas that prosecutors often find themselves in when prosecuting white collar cases. It is not an accident that its general discussion of white collar crime continually refers to standards and strategy for fraud—in some places, four times within a few sentences.[325]

Professor Ellen Podgor's research on criminal fraud reveals how imprecise the charge is. As she writes, although "[t]he focus of many white collar criminal offenses is fraud[,] . . . fraud is not a crime with prescribed elements."[326] Fraud is instead a "'concept' at the core of a variety of criminal statutes."[327] Application of fraud charges has been growing as "generic statutes such as mail fraud and conspiracy to defraud [are] being applied to an ever-increasing spectrum of fraudulent conduct."[328]

There are distinctions to be made between prosecution of the corporation versus individuals within the corporation. As Professor Buell notes, it "is the nature of the corporation . . . to divide and diminish responsibility."[329] That division and diminishment of responsibility includes not only the protection of investors behind limited liability for loss of their assets in the corporation, but also the division and diminishment of responsibility for misconduct by agents of the corporation on the corporation's behalf.[330] Abuse of the corporate form has evolved for large-scale entities.[331] Rather than a single person hiding

321. *Cf.* Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887, 895–900 (2022) (noting the weakening of white collar crime across the board).

322. SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 32 (2016).

323. *Id.* at 44.

324. *Id.* at 60.

325. Kirsch & Hollar, *supra* note 80, at 7–9.

326. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 730 (1999) (footnote omitted).

327. *Id.* (citing ANTHONY ARLIDGE, JACQUES PARRY & IAN GATT, ARLIDGE & PARRY ON FRAUD 33 (2d ed. 1996)).

328. *Id.* at 730–31.

329. BUELL, *supra* note 322, at 24.

330. *See* J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 892–93, 898–99 (2017); *accord* Peter J. Henning, *Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503, 517–21 (2017).

331. Nelson, *supra* note 330, at 884; *accord id.* at 901–08 (providing examples); *id.* at 909–21 (describing resulting problems with application of conspiracy law).

abuse through his control of the entire corporate form, the corporation hides its abuse by delegating to its agents pieces of abusive behavior.[332]

In regard to the corporation itself, Professor Jennifer Arlen thus notes that "a rule of 'pure strict vicarious criminal liability' best approximates the existing law governing corporate criminal liability, especially for those crimes which are of particular concern, such as securities fraud, government procurement fraud, and antitrust violations."[333]

Turning to how these cases are charged, the essential difference between U.S. federal civil and criminal law is not necessarily the acts to be proven, but the degree of motivation ("intent") necessary for the acts.

Federal securities fraud provides a good example of how thin this distinction is between civil and criminal charges. Although securities are regulated through a series of federal statutes, securities fraud is primarily regulated through the Securities Act of 1933[334] ("1933 Act") and the Securities Exchange Act of 1934[335] ("1934 Act").[336]

For certain types of civil federal-securities fraud,[337] the moving party must merely prove scienter. Scienter for fraud, according to the U.S. Supreme Court, is "a mental state embracing intent to deceive, manipulate, or defraud."[338] In many circuits, this scienter may be satisfied by severe recklessness or extreme departures from ordinary care.[339] In other civil fraud cases, scienter need not even be proven.[340]

The definition of fraud is broad for both civil and criminal federal cases. For example, pattern criminal jury instructions define "fraud," "fraudulent," or "defrauding" as "to trick, deceive, injure, or damage in some way."[341] A statement or representation is "fraud" when "the person making it knew the

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332. *Id.* at 884, 901–02. There is also an interesting note in the DOJ's Journal that "*Pinkerton* instructions are particularly useful in corporate conspiracy cases, because they allow decision-makers to be held responsible for the reasonably foreseeable actions of their subordinates." Kirsch & Hollar, *supra* note 80, at 11 (citing United States v. Sullivan, 522 F.3d 967, 977 (9th Cir. 2008) for "upholding advertising agency CEO's fraudulent concealment conviction based on Pinkerton theory").

333. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 840 (1994).

334. 15 U.S.C. §§ 77a–bbbb (2022).

335. 15 U.S.C. §§ 78a–qq.

336. *See generally* Katherine Drummonds, Ron Havas, Jennifer Maul, Damon Porter & Bonnie Trunley, *Securities Fraud*, 53 AM. CRIM. L. REV. 1733, 1734–35 (2016).

337. These cases would be under § 10(b), Rule 10b-5, and § 17(a)(1). 2 JOEL M. ANDROPHY, WHITE COLLAR CRIME § 12:22 (3d ed. 2021).

338. Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976)).

339. *See, e.g.*, Nathenson v. Zonagen Inc., 267 F.3d 400, 407–08 (5th Cir. 2001) (citing cases that are still good law from the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

340. These cases would be under §§ 17(a)(2) & (3). *See* ANDROPHY, *supra* note 337, § 12:22.

341. 2B KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 62:15 (6th ed. 2022).

statement to be untrue or knew the representations to be false at the time that the statement or representation was made."[342]

In practice, criminal fraud mens rea is not significantly elevated over the civil standard of scienter. To commit a criminal violation of the 1933 Act, the defendant must have acted "willfully."[343] The 1934 Act proscribes behavior that is performed "willfully and knowingly."[344] Federal courts, in their jury instructions for violations of both the 1933 and 1934 Acts, have interpreted these requirements to mean that the "person making the statement or making the representation" must have been "acting with the intent to trick, deceive, injure, or damage or is making the statement or representation with reckless indifference to its truth, accuracy, or falsity."[345]

As in some civil cases, some criminal federal-securities-fraud courts permit recklessness to satisfy intent.[346] The Seventh Circuit has found criminal intent satisfied by circumstantial evidence of a defendant's knowledge of the scheme when taking over a company.[347]

Moreover, in federal-securities-fraud cases, a defendant need not be successful in defrauding his or her victims for conviction: if the defendant acted with fraudulent intent beyond a reasonable doubt, "it is unimportant whether the defendant was successful and accomplished the plan or was unsuccessful and did not accomplish it."[348] Under the U.S. Supreme Court's "fraud-on-the-market" theory, the government also need not prove direct reliance on a defendant's statement for fraud to have occurred if the fraud could have affected a security's market price.[349] It is, however, a complete defense to criminal fraud for the defendant to have "[a]n honest belief or 'good faith' belief . . . that the statements or representations made were true" at the time that they were made.[350]

When criminal intent is not as hard a thing to prove, such as with fraud, the remaining difference between civil and criminal cases is in the level of proof required, from civil "preponderance of the evidence" to criminal "beyond a reasonable doubt."[351] Factual cases often easily satisfy the criminal

342. *Id.*

343. *See* 15 U.S.C. § 77x; 5 ALAN R. BROMBERG, LEWIS D. LOWENFELS & MICHAEL J. SULLIVAN, BROMBERG & LOWENFELS ON SECURITIES FRAUD § 7:48.10 (2d ed. 2023).

344. 15 U.S.C. § 78ff(a). There is also a "no-knowledge" standard in the 1934 Act, which is an additional discussion beyond the scope of this Article. *See id.;* 21 MARVIN G. PICKHOLZ, PETER J. HENNING & JASON R. PICKHOLZ, SECURITIES CRIMES § 7:3 (2d ed. 2022).

345. O'MALLEY ET AL., *supra* note 341, § 62:15.

346. *See, e.g.*, United States v. Boyer, 694 F.2d 58, 59 (3d Cir. 1982) (holding, in criminal federal securities fraud case, that reckless indifference for the true facts is the equivalent of intentional misrepresentation).

347. *See* United States v. Wilson, 879 F.3d 795, 804–05 (7th Cir. 2018).

348. BROMBERG ET AL., *supra* note 343, § 62:15.

349. *See* Basic Inc. v. Levinson, 485 U.S. 224, 241–50 (1988).

350. BROMBERG ET AL., *supra* note 343, § 62:15.

351. *See generally* 21B CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. EVIDENCE § 5122 (2d ed. 2023).

standard of proof because many corporate fraud prosecutions rely, for example, on extensive written documentation.

Ultimately then, the practical issue determining whether the U.S. government pursues a civil or criminal prosecution tends to be how strongly the government feels that it should signal its condemnation of the behavior and what remedies it seeks.[352] The U.S. Supreme Court has explicitly approved of the government's ability to choose whether it wants to pursue a civil or criminal case based on the same underlying course of conduct.[353]

Finally, there are a growing number of cases being brought by federal prosecutors under 18 U.S.C. § 1348, which is modeled on the bank fraud statute[354] but penalizes securities and commodities fraud.[355] The importance of § 1348 being modeled on the bank fraud statute, and not on mail, wire, or traditional securities fraud, is that appellate courts are holding that it reaches securities and commodities schemes in which there is no evidence of direct misrepresentations or material omissions with a duty to disclose.[356] This provides prosecutors even more flexibility to charge fraud criminally as a basic concept in relations with investors.

C. POLITICAL AND ECONOMIC PRESSURES AROUND FRAUD

By 2018, however, government prosecutions against white collar crimes had fallen to their lowest level in twenty years.[357] During the first year of the Trump administration, DOJ's fines against corporations fell off ninety percent.[358] In addition, Professor Brandon Garrett notes that "most of the cases with large penalties in the first twenty months of the Trump Administration were legacy cases that had been initiated and investigated under the Obama Administration."[359]

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352. The DOJ's own Journal makes this point about how the same actions can form the basis of various prosecutions, including civil and overlapping criminal ones. Benjamin Greenberg & Susan Torres, *Parallel Proceedings in Health Care Fraud*, 66 DEP'T JUST. J. FED. L. & PRAC. 15, 16 (2018).

353. *See, e.g.*, United States v. Kordel, 397 U.S. 1, 11 (1970). There may still be a double jeopardy issue in the government's pursing the same behavior twice, but that is not the same as the government's freedom to choose how it will pursue behavior that could be either civil or criminal.

354. *See* 18 U.S.C. § 1344.

355. *See, e.g.*, Sandra Moser & Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, 66 DEP'T JUST. J. FED. L. & PRAC. 111, 111–12 (2018).

356. *See id.* at 113–19 (describing federal court decisions around the country). As the statute's legislative history records, it was passed to "provide needed enforcement flexibility in the context of publicly traded companies to protect shareholders and prospective shareholders against all the types [of] schemes and frauds which inventive criminals may devise in the future." 148 CONG. REC. S7421 (daily ed. July 26, 2002).

357. *White Collar Prosecutions Fall to Lowest in 20 Years*, TRAC REPS., https://trac.syr.edu/tracreports/crim/514 [https://perma.cc/9V6C-MK8C].

358. Jamiles Lartey, *Corporate Penalties Dropped as Much as 94% Under Trump, Study Says*, GUARDIAN (July 25, 2018, 5:28 PM), https://www.theguardian.com/us-news/2018/jul/25/trump-corporate-penalties-drop-public-citizen-study [https://perma.cc/V439-AHZ4].

359. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 115 (2020).

What should make us think that government prosecutions of white collar crime should pick up, especially in the area of fraud as a low-hanging fruit?

First, there is increasingly realization that asking corporations to police themselves is not working particularly well. According to Professor Eugene Soltes in 2019, if we measure the pervasiveness of illegal conduct from the likelihood that a large, publicly traded firm "would be criminally sanctioned by the Department of Justice (DOJ) or face a civil enforcement action for accounting matters by the Securities and Exchange Commission (SEC)," those numbers would be "0.5 per cent and 1.1 per cent, in a given year."[360] The likelihood that such a firm is civilly sued for alleged misconduct is under five percent per year.[361]

Meanwhile, benchmarking data from the internal reports of large firms indicate that they have around 124 substantive reports of legally actionable misconduct per year, or, on average, once every three days.[362] Using all available public data sources, this would indicate on the order of merely one-out-of-nearly-thirteen (12.8) incidents being reported, or ninety-two percent of incidents not being reported.[363] In 2018, using another data set of 608 firms, Professors Paul Healy and George Serafeim record that only seventeen percent of firms (104 in 608) reported internal violations to regulators at all.[364]

Perhaps as a result, white collar crime may be much more common than the property or violent crime that often commands public attention. Although it is difficult to collect accurate statistics on precisely how much white collar crime occurs each year, according to victimization studies, people and businesses are far more likely to be victims of white collar crime than of either traditional property crime or violent crime. In a 2018 publication, thirty-six percent of businesses, and twenty-five percent of households, reported that they have been victims of white collar crime.[365] Victimization rates for property crime and violent crime, by contrast, are eight percent and a little over one percent.[366] Accordingly, nearly four-and-a-half times as many businesses have been victims of white collar crime as of general property

360. Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 924 (2019).

361. *See id.*

362. *See id.*

363. *See id.* (indicating that a "back-of-the-envelope" calculation on all public sources would find report of an act of substantive misconduct "every 1,586 days per company on average," versus a more accurate rate of once every three days).

364. Paul M. Healy & George Serafeim, Agency Costs and Enforcement of Management Controls: Analyzing Punishments for Perpetrators of Economic Crimes 14, 55 tbl.6 (Mar. 20, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801622 [https://perma.cc/YQZ8-W4AU]; *see also* Paul Healy & George Serafeim, *Who Pays for White-Collar Crime?* 4 (Harvard Bus. Sch., Working Paper No. 16-148, 2016).

365. *See* Gerald Cliff & April Wall-Parker, *Statistical Analysis of White-Collar Crime*, OXFORD RSCH. ENCYC. CRIMINOLOGY AND CRIM. JUST. (Apr. 26, 2017), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-267 [https://perma.cc/R8R4-MQWH].

366. *See id.*

crime, and nearly twenty-five times as many households have been the victims of white collar crime as of violent crime.

Second, damages from fraud especially seem to be growing. Fraud may be among the fastest-growing forms of white collar crime. According to a 2020 report from accounting firm PwC, in a survey of more than five thousand respondents across ninety-nine territories, nearly half had suffered losses from fraud over the past twenty-four months, with an average of six times per company.[367] Healthcare fraud alone is estimated to cost between three and ten percent of health care expenditures, which could total more than $300 billion a year.[368] In 2023, the U.S. Federal Trade Commission revealed that 2021 consumer fraud reports to its agency totaled losses of more than $5.8 billion, increasingly more than seventy percent over 2020.[369]

Third, there is new, tough talk on white collar crime from the DOJ, and the lowest-hanging fruit may be prosecutions for fraud. In 2021, as Deputy Attorney General Lisa Monaco explained in her keynote policy address to the American Bar Association, the Biden administration is "going to find ways to surge resources to the department's prosecutors" combatting white collar crime.[370] Her specific example was a dedication of resources to combat criminal fraud with "a new squad of FBI agents . . . embedded in the Department's Criminal Fraud Section."[371] She also noted that, as part of the Biden administration's new aggressiveness on white collar crime, "[w]e also have our prosecutors preparing for more trials right now than at any time in the last decade."[372]

In addition, pursuing ESG misrepresentations comports with the advice that federal prosecutors give each other about what makes the best white collar cases. As the DOJ's internal journal advises, in thinking about pursuing cases that "will stick," "[l]ook for the Big Lie."[373] In white collar cases, "[t]he

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367. FIGHTING FRAUD: A NEVER-ENDING BATTLE: PWC'S GLOBAL ECONOMIC CRIME AND FRAUD SURVEY 3 (2020), https://www.pwc.com/hu/hu/kiadvanyok/assets/pdf/PwC_Global_Economic_Crime_and_Fraud_Survey_2020.pdf [https://perma.cc/9R3B-AK5X].

368. *The Challenge of Health Care Fraud*, NAT'L HEALTH CARE ANTI-FRAUD ASS'N, https://www.nhcaa.org/tools-insights/about-health-care-fraud/the-challenge-of-health-care-fraud [https://perma.cc/CQB9-T3JX].

369. *See New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021*, FED. TRADE COMM'N (Feb. 22, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0 [https://perma.cc/6Z8W-GG4T].

370. Lisa O. Monaco, Deputy Att'y Gen., Off. of Pub. Affs., Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [http://perma.cc/8MZW-LSF5].

371. *Id.*

372. Sadie Gurman, *Deputy Attorney General Lisa Monaco Underscores DOJ's Tougher Line on Corporate Crime*, WALL ST. J. (Feb. 25, 2022, 7:40 PM), https://www.wsj.com/livecoverage/wsj-ceo-council-tesla-intel-reddit-pfizer/card/deputy-attorney-general-lisa-monaco-underscores-doj-s-tougher-line-on-corporate-crime-SqhPcoC3ih6pvJZtJw3u (Deputy AG Monaco's remarks to *Wall St. J.* CEO Council at 1:23).

373. Kelly A. Zusman, *Making It Stick: Protecting Your White Collar Convictions on Appeal*, 66 DEP'T JUST. J. FED. L. & PRAC. 65, 65 (2018) (capitalization in original).

common tactic [is to] create a dust storm of confusion, blame underlings, express a lack of business acumen and sophistication, and the like."[374] Meanwhile, a federal prosecutor's "most effective response stays true to that simple theme: there was a big lie, and this defendant cannot explain it, hide from it, or ultimately, defend it."[375] The prosecutor should be able to prove that the defendant "wrote it, said it, posted it, or all three."[376] In legal terms, "[i]t was false, it was material, and it formed the backbone of his scheme. Everything else is just white noise."[377]

As more information emerges about climate change, denial of facts about climate change, and the lack of responsible action from corporations to address it, may start to look like a more and more attractive "big lie" for prosecutors to pursue.

D. MOVEMENT ON FRAUD PROSECUTIONS AGAINST CORPORATIONS

Finally, there are signs of movement on ESG fraud prosecutions against corporations in the United States for their statements to investors. These have been civil to date, except for the 2021 action against Deutsche Bank mentioned at the start of this Article,[378] but criminal charges may follow, such as in the example of BlackRock's advertised ESG fund.

Some of the most promising language to emerge from U.S. federal courts on corporate liability for climate change has involved ExxonMobil Corporation ("Exxon").[379] This litigation had a sputtering start, but new revelations in 2023 should boost its prospects. Exxon has known the true impact of its fossil-fuels business on global warming since the 1970s, and the company's predictions have been remarkably accurate.[380] As the lead author of a 2023 study in *Science*[381] concludes, the "accuracy and skill of [Exxon's] insights" over that time are "pretty shocking."[382] The company "didn't just vaguely know something about global warming. . . . [It] knew as much as academic researchers."[383]

Over those years, however, the company has funded public-relations campaigns against the scientific veracity of climate change, misled its investors,

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *See supra* text accompanying notes 32–35.

379. *See infra* text accompanying notes 386–400.

380. *See* G. Supran, S. Rahmstorf & N. Oreskes, *Assessing ExxonMobil's Global Warming Projections*, SCIENCE, Jan. 2023, at 1, 6 (finding ExxonMobil's predicted average projected warming of 0.20°±0.04°C per decade to be the result of "highly skillful predictions").

381. *See id.* at 153.

382. Justine Calma, *ExxonMobil Accurately Predicted Climate Change While Publicly Dismissing It*, VERGE (Jan. 12, 2023, 1:00 PM), https://www.theverge.com/23550834/exxonmobil-climate-change-predictions-shockingly-accurate [https://perma.cc/2UU8-L6JV] (quoting Geoffrey Supran, the study's lead author).

383. *Id.*

and engaged in lobbying to defeat public action on global warming.[384] Exxon has specifically and publicly rejected the science that it had correctly projected, such as whether there would be "a coming ice age," "when human-caused global warming would first be detected," and how to estimate the "'carbon budget' for holding [global] warming below 2°C."[385]

In 2018, the Attorney General of the State of New York brought a high-profile case against Exxon, alleging that the company had committed fraud against its investors by misleading them about the risks to the company posed by climate change.[386] The reason why the 2018 case failed is because, although Exxon was maintaining two sets of accounting books—one inside the company that accounted for costs from climate change, and an external one that did not—it had not made "material misrepresentations that 'would have been viewed by a reasonable investor as having significantly altered the "total mix" of information made available'" because the company was not required to share its internal calculations with outside investors.[387] As the court noted, "[i]t is undisputed that ExxonMobil does not publish the details or the economic bases upon which ExxonMobil evaluates investment opportunities due to competitive considerations."[388] The court found nothing wrong with Exxon's practice in this regard. Again, in a U.S. court, the company was being judged solely on what it did *say* to investors, rather than on the duplicity of its actions in keeping two separate sets of books.

But there may be further progress toward liability for fraud, even against the same corporate defendant. In 2019, the Massachusetts Attorney General filed a similar case against Exxon, which the company quickly sought to remove to federal court, and the Commonwealth contested.[389] In 2020, the federal court permitted the case to be remanded to state court with an interesting decision that went much farther than commenting on the case's jurisdictional issues.[390]

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384. *See, e.g.*, Hiroko Tabuchi, *In Video, Exxon Lobbyist Describes Efforts to Undercut Climate Action*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/climate/exxon-greenpeace-lobbyist-video.html (reporting on-going evidence); John Schwartz, *Exxon Misled the Public on Climate Change, Study Says*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/climate/exxon-global-warming-science-study.html (highlighting previous studies and evidence).

385. Supran et al., *supra* note 380, at 1.

386. *See* Summons and Complaint at 86–89, People v. Exxon Mobil Corp., (N.Y. Sup. Ct. Oct. 24, 2018) (No. 452044/2018). The claims of equitable fraud and common-law fraud were later dropped. *See* Decision After Trial at 3–4, People v. Exxon Mobil Corp., 2019 WL 6795771 (N.Y. Sup. Ct. Dec. 10, 2019) (No. 452044/2018).

387. Decision After Trial, *supra* note 386, at 3, *Exxon Mobil Corp.*, (No. 452044/2018) (quoting in part TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

388. *Id.* at 2.

389. *See generally* Memorandum of L. of the Commonwealth of Mass. in Support of Its Motion for Remand to the Massachusetts Superior Court for Suffolk Cnty., Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020) (No. 19-12430-WGY), 2019 WL 11274870 (describing allegations against Exxon and arguments against federal subject matter jurisdiction).

390. *See generally* Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020).

In sections headed "Greenhouse Gases and Climate Change," "ExxonMobil's Campaign of Deception," "ExxonMobil's Misrepresentations to Investors," and "ExxonMobil's Misrepresentations to Consumers," the federal *Exxon* court appeared to find well-pleaded allegations of fraud on the part of the company to multiple external audiences.[391] According to the court, "[o]ur Earth is plainly getting hotter, and scientists have reached a consensus that this is largely due to rising carbon dioxide concentrations and other greenhouse gas emissions . . . . This fact threatens our planet and all its people, including those in Massachusetts, with intolerable disaster."[392]

The court correctly suspected that Exxon had been in a privileged position to have known about the danger for a long time. As the court wrote, "[n]early forty years ago," Exxon "knew that climate change presented dramatic risks to human civilization and the environment as well as a major potential constraint on fossil fuel use."[393]

As part of the company's alleged deception, "[d]espite this knowledge, '[a]n August 1988 Exxon internal memorandum, captioned "The Greenhouse Effect," captures Exxon's intentional decision to misrepresent both its knowledge of climate change and the role of Exxon's products in causing climate change.'"[394] The court notes the coordination of the company's attempts to influence public perception—including, of course, the "'total mix' of information made available"[395]—enabled Exxon to push "a false narrative that climate science was plagued with doubts."[396] Referring to another time in which corporate misinformation brought significant liability, the court described Exxon and its allies as "in cahoots with a veteran of Philip Morris' tobacco-misinformation campaign."[397] Specifically, in regard to investors, the court notes that:

> [T]he Commonwealth alleges that "ExxonMobil has repeatedly represented to investors . . . that ExxonMobil used escalating proxy [in the sense of disguised or substitute] costs" as a way to estimate the financial dangers of climate change to the corporation, yet often "ExxonMobil was not actually using proxy costs in this manner."[398]

Instead, "[d]ocuments disclosed through other litigation revealed that ExxonMobil was internally using a lower proxy carbon cost than what it told investors, or that it failed entirely to use a proxy cost of carbon across many sectors of its business."[399] Ultimately, "[b]y not internally applying the

391. *Id.* at 36–37.

392. *Id.* at 36 (internal citations omitted).

393. *Id.*

394. *Id.* (alteration in original) (quoting Commonwealth's complaint).

395. *Cf.* Decision After Trial, *supra* note 386, at 3, *Exxon Mobil Corp.*, (No. 452044/2018) (quoting in part TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

396. Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 36 (D. Mass. 2020).

397. *Id.*

398. *Id.* at 37 (quoting Commonwealth's complaint).

399. *Id.* (same).

proxy cost as it publicly claimed to do, ExxonMobil avoided 'project[ing] billions of dollars of additional climate-related costs'" in its disclosures to investors.[400]

The *Exxon* federal court opinion in Massachusetts sounds much more like the cases making sweeping statements about business liability for climate change coming out of other countries. In addition, although the formal case of fraud against Exxon is still, as of when this Article was written, proceeding in Massachusetts,[401] Exxon is already feeling pressure from investors regarding its attempts to deny the impacts of climate change. In 2020, shareholder suits against the company alleging violations of securities laws were consolidated in Texas.[402] In May 2021, a group of activist investors, led by Engine No. 1, was able to elect to the board a slate of directors who promised reform on accounting for climate change.[403] By November 2021, Exxon's formal disclosures to investors had altered course significantly, describing a large percentage of its fossil-fuel assets as potentially "impaired," due to issues around climate change.[404]

CONCLUSION

As the science confirming climate change has become indisputable, and norms around ESG shift, U.S. businesses should seek stability in adopting protective substantive international standards. Developments have been accelerating around international corporate ESG liability standards, while U.S. businesses experience economic pain from the U.S. Supreme Court's hostility to federal regulation and the protective standardization that it could bring.[405]

Some of the most potentially egregious misrepresentations to investors are in the ESG space, and they could trigger liability first. The SEC's emphasis on disclosure, even if it survives U.S. Supreme Court review, will not fix this problem for businesses. Increasing scientific, political, and economic pressures may push prosecutors over the thin line from civil liability into potential

400. *Id.* (same).

401. *See* Nate Raymond, *Exxon Must Face Massachusetts Climate Change Lawsuit, Court Rules*, REUTERS (May 24, 2022, 4:37 PM), https://www.reuters.com/business/energy/exxon-must-face-massachusetts-climate-change-lawsuit-court-rules-2022-05-24 [https://perma.cc/GP8Z-3TSS].

402. *See In re* Exxon Mobil Corp. Derivative Litigation, No. 19-cv-16380, 2020 WL 5525537, at *1 (D.N.J. Sept. 15, 2020).

403. *See* Svea Herbst-Bayliss, *Little Engine No. 1 Beat Exxon with Just $12.5 Mln - Sources*, REUTERS (June 29, 2021, 10:45 PM), https://www.reuters.com/business/little-engine-no-1-beat-exxon-with-just-125-mln-sources-2021-06-29 [https://perma.cc/AS59-TQZP].

404. *See* Sabrina Valle, *Exxon Warns Some Assets May Be at Risk for Impairment Due to Climate Change*, REUTERS (Nov. 3, 2021, 10:26 PM), https://www.reuters.com/business/energy/exxon-warns-some-assets-may-risk-impairment-due-climate-change-filing-2021-11-03 [https://perma.cc/EQ94-KT2S].

405. *Cf.* Satya Nadella, Chairman and Chief Executive Officer, Microsoft Corp., Comments at Harvard's Reimagining the Role of Business in the Public Square: Multistakeholder Engagement on ESG Commitments, Metrics, and Accountability (Sept. 15, 2022), *republished as Reimagining the Role of Business in the Public Square: Opening Plenary*, YOUTUBE (Oct. 4, 2022), https://www.youtube.com/watch?v=aWQf_7W6oFs [https://perma.cc/P23K-3FJ6] (describing ESG regulation as not "cohesive" and looking to the U.S. federal government to lead changes).

criminal liability. A direct criminal ESG case for corporate fraud may appear in U.S. courts soon.[406]

Compliance officers and corporate directors should also be concerned about individual liability. The New York Bar Association is already asking for regulation and guidance to help protect its members.[407]

Courts around the world have led the way toward holding businesses responsible for the quality of their climate-change initiatives. This enforcement of substantive standards not only helps companies focus on what they should be doing about the climate, but it encourages them to maintain substantive targets. As organizations, corporations are excellent at meeting goals when they want to and can depend on the protection of meeting substantive standards.[408] This alignment is good for U.S. businesses, the coherence of U.S. enforcement, and the world's climate.

Ultimately, U.S. businesses and individuals will want clarity and relief from the fractionalization and increasing volatility of their U.S. liabilities. They need to plan, predict, invest, and rely on a stable business—as well as natural—environment. U.S. businesses should request standardization in the United States with international developments, and the shift toward ESG standardization could build momentum for further changes to come.

406. Arguably, the charges against Trevor Milton of Nikola Corp. may already be that case. *See* Sealed Indictment at 1, 13, 45–46, United States v. Milton, No. 21-cr-478-ER (S.D.N.Y. July 28, 2022) (entering two counts of criminal securities fraud for statements to investors from Nikola as "a first mover in the zero-emissions-trucking business," and a tag-along third count of wire fraud; amended to add another charge of wire fraud); Verdict Form, United States v. Milton, No. 21-cr-478 (ER) (S.D.N.Y. Oct. 14, 2022) (convicting defendant on one of the two counts of securities fraud and both counts of wire fraud); Notice of Appeal, United States v. Milton, No. 21-cr-478-ER (S.D.N.Y. Nov. 29, 2021).

407. *See supra* Section IV.B and notes 276–77; *cf. also* Sealed Indictment, *supra* note 406, at 1, 13, 45–46.

408. *See, e.g.*, *supra* Introduction and notes 72–73 (discussing vehicle emissions standards); *supra* Section V.A and note 300 (discussing management leadership).