

The logo for Environmental and Natural Resources Law Center (ENR), consisting of the letters 'ENR' in a bold, bright green, sans-serif font.

**Environmental and  
Natural Resources  
Law Center**

# CLIMATE LITIGATION in Oregon

*Sarah J. Adams-Schoen*

October 18, 2023

Suits against fossil fuel companies and **major emitters**

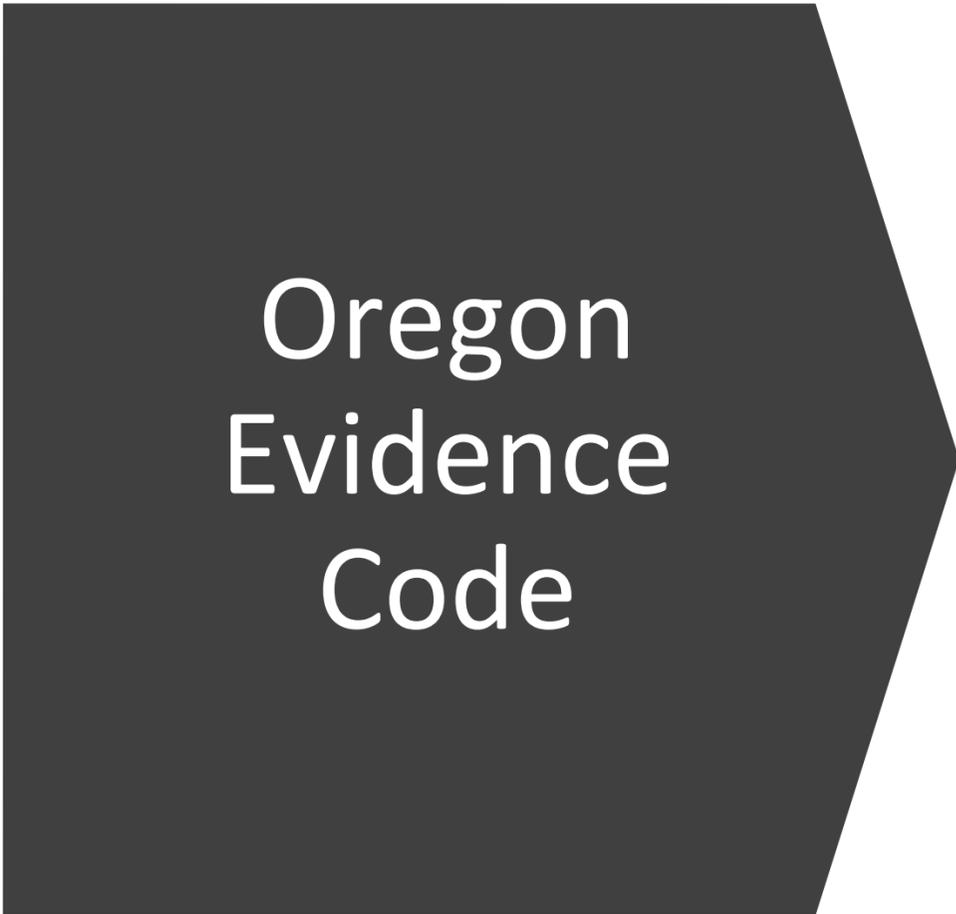
Suits against the state

Climate “across the curriculum”

**\*But first**

# OEC 401, 702 & 403





Oregon  
Evidence  
Code

Rule 403. Relevance

Rule 702. Testimony by experts

Rule 403. Exclusion of relevant evidence  
(prejudice, confusion, undue delay)

*State v. Brown* (Or 1984)

*State v. O'Key* (Or 1995)

*Jennings v. Baxter Healthcare Corporation*  
(Or 2009)

“The function of the court is to ensure that the persuasive appeal [of scientific evidence] is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert. . . . [S]cientific assertions . . . should be supported by the appropriate scientific validation. This approach ‘ensure[s] that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science.’”

*Jennings v. Baxter Healthcare Corporation* (Or 2009)  
(quoting *State v. O’Key* (Or 1995)).



Gas refinery, Baytown, TX. Source: Chelsea Harvey, Lesley Clark, Benjamin Storrow, E&E News, January 13, 2023 (photo credit: Benjamin Lowy/Getty Images)

## Suits against energy companies & major emitters

# Torts

Nuisance, trespass, negligence, failure to warn, design defect

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Ds caused climate disruption that harmed Ps

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Caused wildfire

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Caused wildfire to be larger, harder to control

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Misrepresentation

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False and misleading statements

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Claims

Suits against energy companies  
& major emitters

Federal  
preemption /  
Removal to  
federal court

Claims require resolution of substantial question of fed'l law

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Fed'l law is necessary element of claim

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Def acted under fed'l officer's directions

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Claims preempted by foreign affairs doctrine

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Claims displaced by CAA, OCSLA, fed'l common law

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Defense assertions

Suits against energy companies  
& major emitters

Federal  
preemp  
Remova  
federal

(ORDER LIST: 598 U.S.)

MONDAY, APRIL 24, 2023

**CERTIORARI DENIED**

21-1550 SUNCOR ENERGY, INC., ET AL. V. BD. COMM'RS BOULDER CTY., ET AL.

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition. Justice Kavanaugh would grant the petition for a writ of certiorari.

22-361 BP P.L.C., ET AL. V. MAYOR AND CITY COUNCIL BALTIMORE

22-495 CHEVRON CORP., ET AL. V. SAN MATEO COUNTY, CA, ET AL.

22-523 SUNOCO LP, ET AL. V. HONOLULU, HI, ET AL.

22-524 SHELL OIL PRODUCTS CO., ET AL. V. RHODE ISLAND

The petitions for writs of certiorari are denied. Justice Alito took no part in the consideration or decision of these petitions.

of fed'l law

Defense

W

es

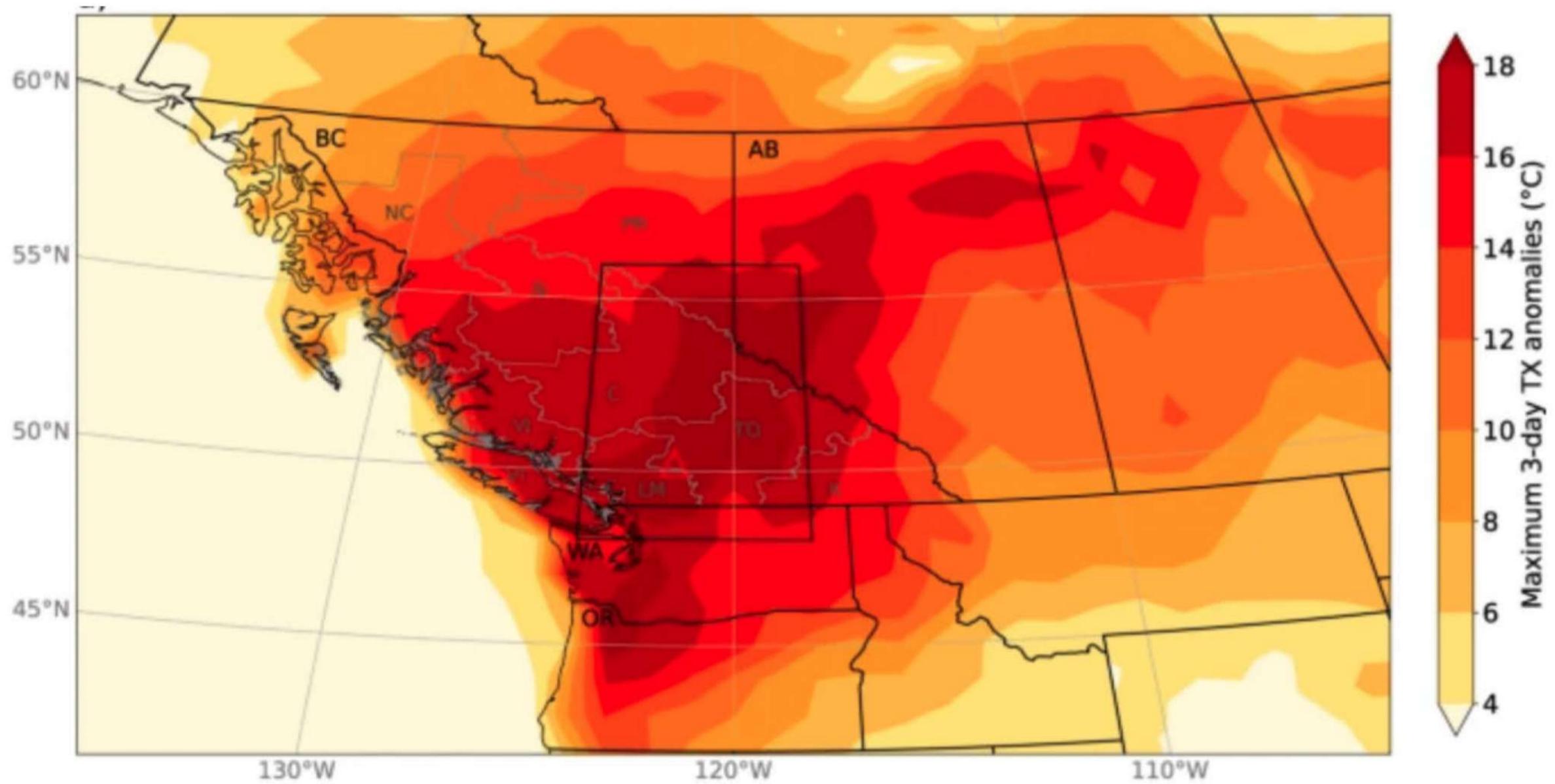


Phoenix, Oregon

Sept. 10, 2020

IMAGE SOURCE: David Ryder/Getty Images

# Wildfire in the Mountain West

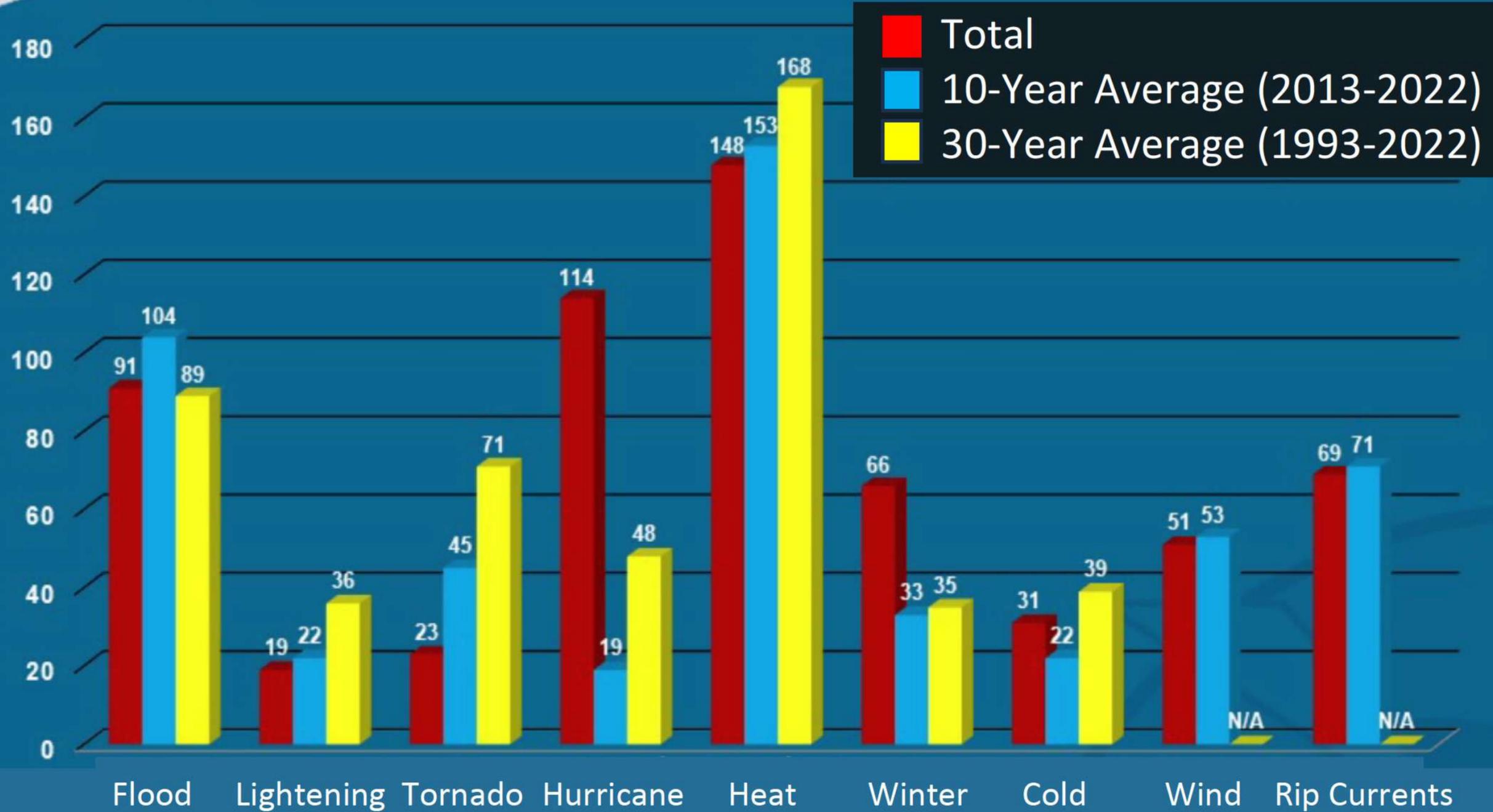


SOURCE: White, R.H., *et al.* The unprecedented Pacific Northwest heatwave of June 2021. *Nat Commun* 14, 727 (2023).

## Heatwaves



# Weather Fatalities 2022





The Explosion of the Steamboat Mose

[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

# Suits against the State

**MITIGATION** – Most often, “climate change mitigation scenarios involve **reductions in the concentrations of greenhouse gases**, either by reducing their sources or by increasing their sinks.” (IPCC AR4)

**ADAPTATION** – “Adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which **moderates harm** or exploits beneficial opportunities.” (IPCC AR4)

# Failure to adapt?



Ashley Schafer, *Troubled Waters: Edenville Dam just one part in a system*, Midland Daily News, May 30, 2020;  
photo by Adam Ferman, Midland Daily News

# Failure to adapt?



Photo: Georgia Forestry Commission

# Right to a life-sustaining climate system

Express constitutional right to healthy environment (not in Oregon)

Implied constitutional right

Public trust doctrine

- *Held v. Montana* (Aug. 2023)
- *Utah Physicians for a Healthy Env't v. Utah Dep't of Nat. Res.* (complaint filed Sept. 2023)
- *Navahine F. v. Hawai'i Department of Transportation* (proceeding to trial 2023-24)
- *Nat'l. Audubon Soc'y. v. Superior Court*, 33 Cal 3d 419, 452 (1983)
- *But see Chernaik v. Brown*, 367 Or 143, 148 (2020)

CONCLUSIONS.

1. To the extent that incorporate Conclusions of Law or the incorporated herein as Conclusions of

2. This Court has jurisdiction in this case.

3. The Conclusions presented at trial by both parties. More address the constitutionality of Mont. enacted by SB 557 and addressed by *See, e.g., Docs. 390, 402.*

I. PLAINTIFFS HAVE PROVEN

A. Plaintiffs Have Proven

4. As described in the experienced past and ongoing injuries consider GHGs and climate change, ir mental health, homes and property, re tribal and cultural traditions, economic

5. Plaintiffs' mental inaction or counterproductive action o establish a cognizable injury. *Steel Co*

107 (1998). However, Plaintiffs' n effects of climate change on Mont and anxiety, are cognizable injurie

6. Every additic Plaintiffs' injuries and risks lockin

7. Plaintiffs' inj irreversible without science-basec

8. Plaintiffs ha disproportionately harmed by fos

9. Plaintiffs ha are concrete, particularized, and c

10. Plaintiffs su the State's statutorily mandated c

in the MEPA Limitation, and du equitable remedies with Mont. C

B. Plaintiffs Have P

11. The PSC is Code Ann. § 75-1-201(3).<sup>2</sup>

12. There is a Limitation and the State's allow which contribute to and exacerb

13. There is a disregard of GHG emissions an

Limitation, GHG emissions ov impacts, and Plaintiffs' proven

<sup>2</sup> Hereinafter, when the Court refers to

the permitted activities and the resulting environmental harms is reasonably close. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, 2017 MT 222, ¶ 25, 401 P.3d 712. The State authorizes fossil fuel activities without analyzing GHGs or climate impacts, which result in GHG emissions in Montana and abroad that have caused and continue to exacerbate anthropogenic climate change.

14. The Defendants have the authority under the statutes by which they operate to protect Montana's environment and natural resources, protect the health and safety of Montana's youth, and alleviate and avoid climate impacts by limiting fossil fuel activities that occur in Montana when the MEPA analysis shows that those activities are resulting in degradation or other harms which violate the Montana Constitution.

15. Montana's contributions to GHG emissions can be measured incrementally and cumulatively both in terms of immediate local effects and by mixing in the atmosphere and contributing to global climate change and an already destabilized climate system.

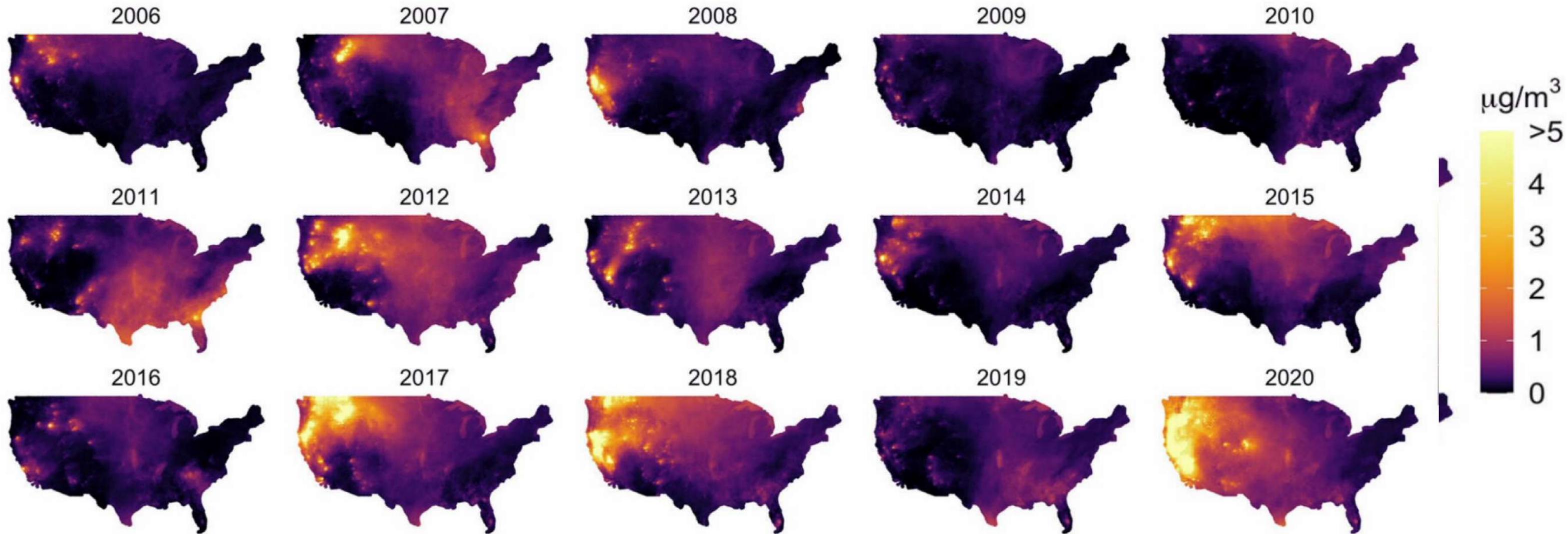
16. Montana's GHG contributions are not *de minimis* but are nationally and globally significant. Montana's GHG emissions cause and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries.

C. Plaintiffs Have Proven Redressability at Trial.

17. The psychological satisfaction of prevailing in this lawsuit does not establish redressability. *Steel Co.* at 107.

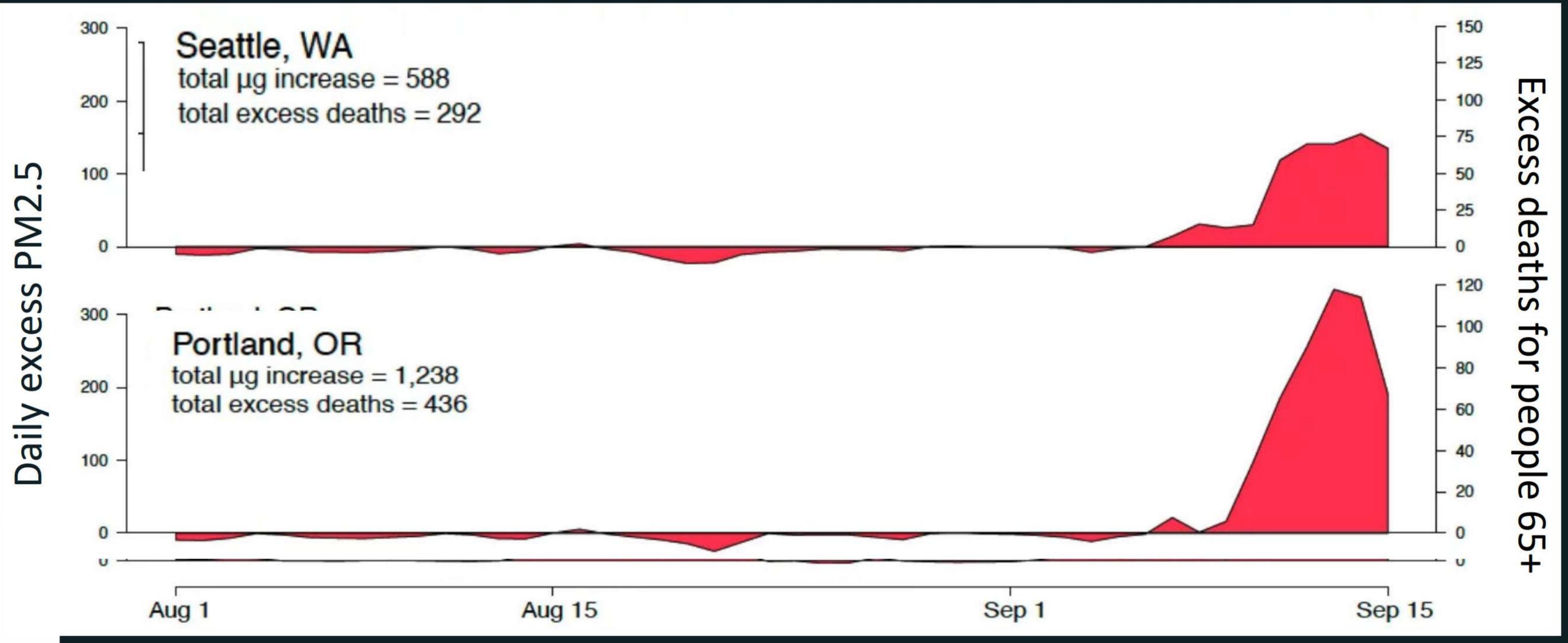
18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if

# Daily average PM2.5 from smoke by year



Childs et al., *Daily Local-Level Estimates of Ambient Wildfire Smoke PM2.5 for the Contiguous US 2022*, 56 Environ. Sci. Tech. 13607 (2022).

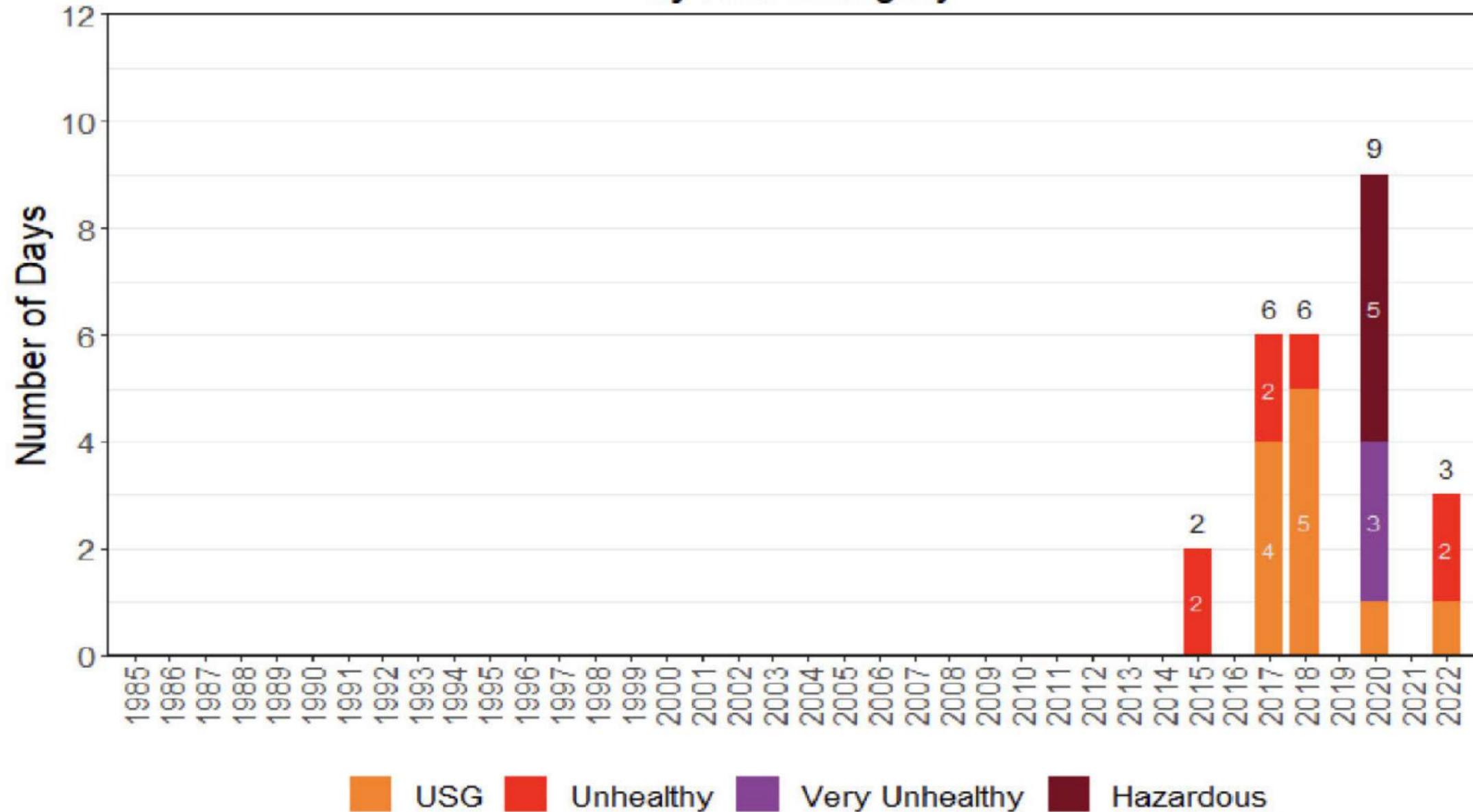
# Estimated Smoke Related Deaths from 2020 Wildfires



“These estimates suggest that for every one microgram increase in PM2.5 on a given day, mortality over the next few days rises by about one person per million individuals. When combined with the increases in PM2.5 shown [above], the implied excess death totals are staggering: Hundreds of elderly individuals likely died from smoke exposure in each major West Coast population center and thousands likely died across California alone.”

Marshall Burke et al., *Managing the growing cost of wildfire*, Policy Brief, Stanford Inst. For Econ. Policy Res., Oct. 2020.

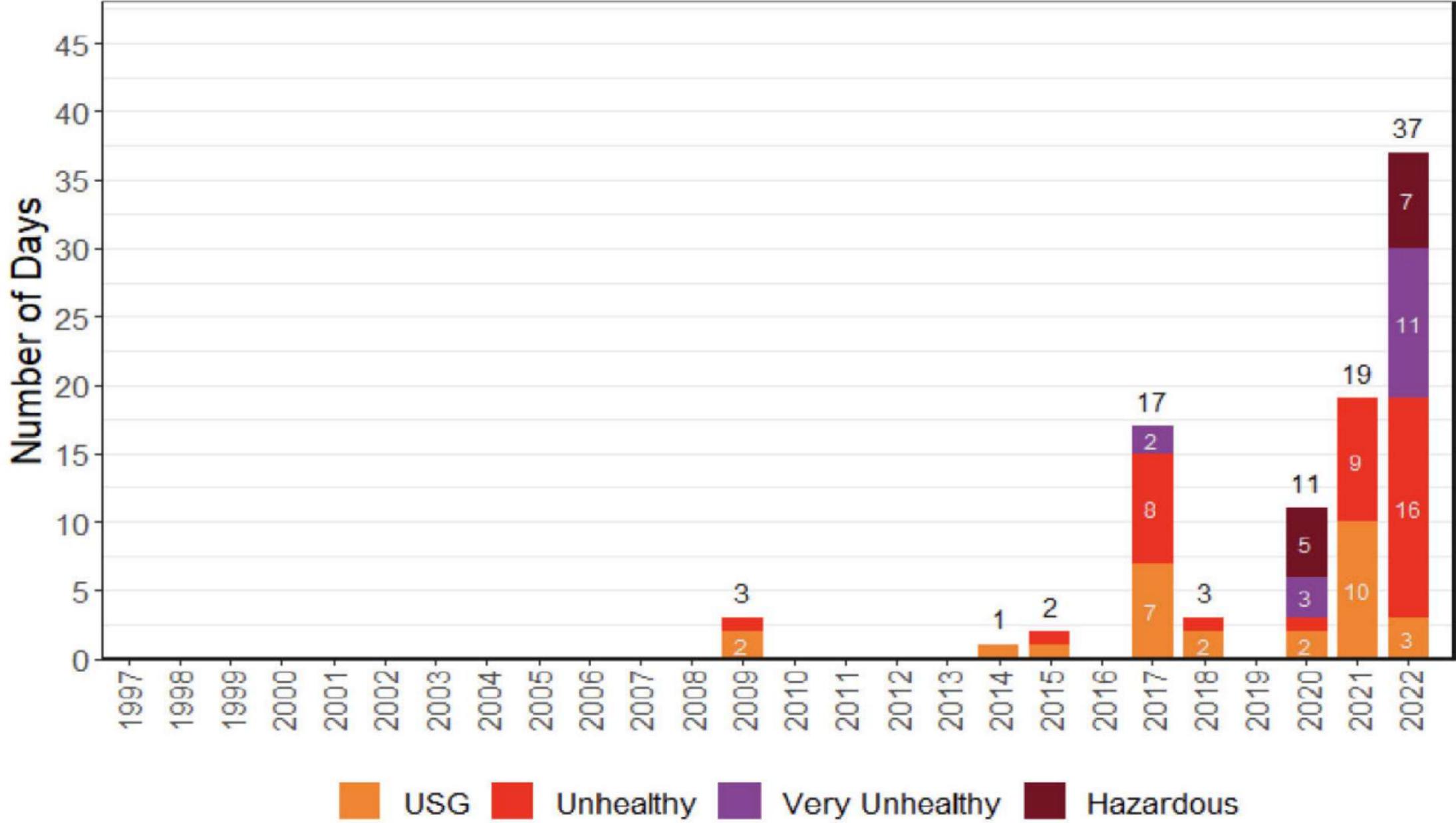
### Portland Wildfire Smoke by AQI Category



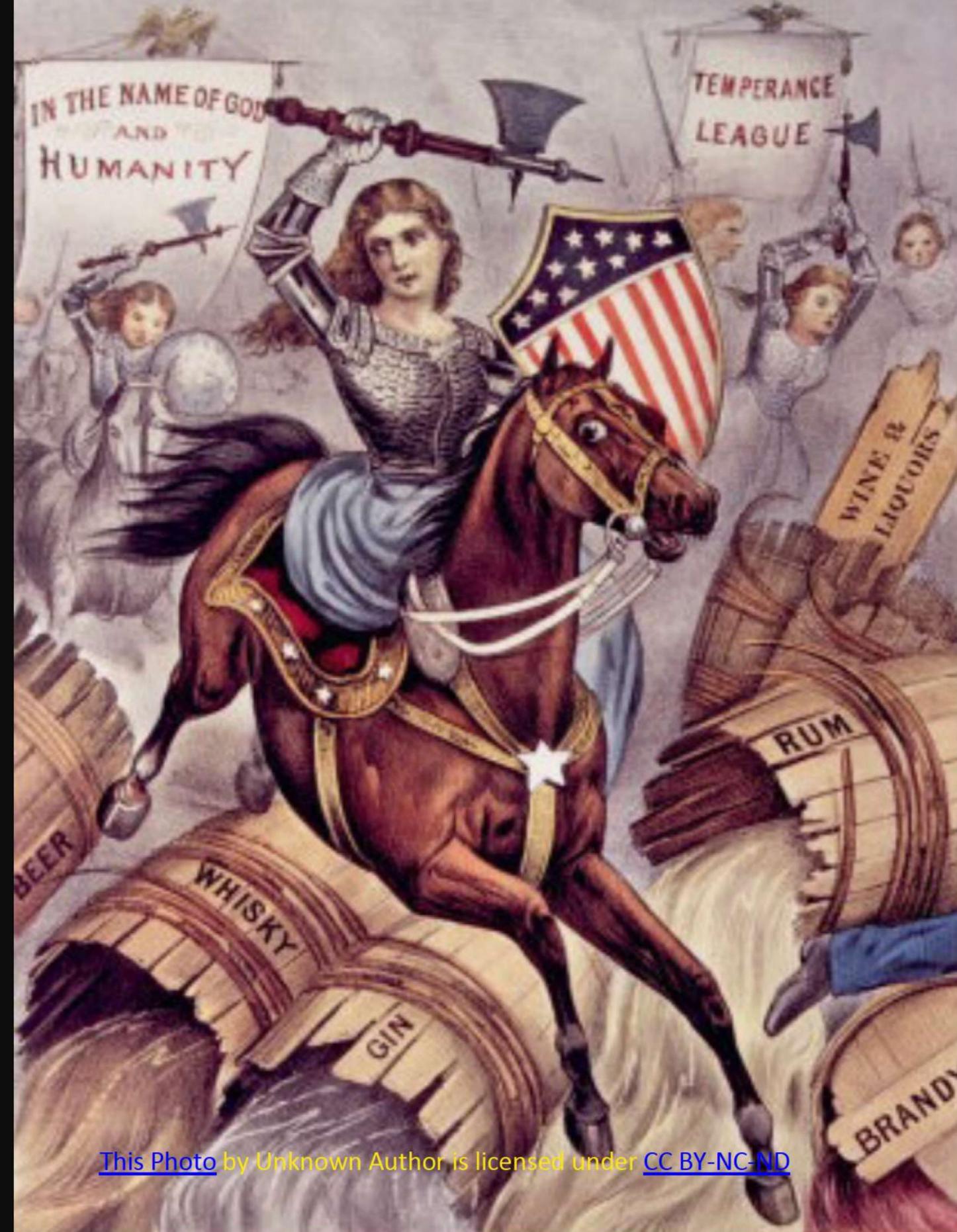
**Figure 6. Portland  $\geq$  USG AQI wildfire smoke trends.**

*Note: USG days not included: two in 1985, one in 1987, and one in 1990. These were likely from field burning.*

### Oakridge Wildfire Smoke by AQI Category



**Figure 19. Oakridge wildfire ≥ USG AQI wildfire smoke trends.**



# Takings

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Private property shall not be taken for public use...without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

Article I, Section 18, of the Oregon Constitution

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# EQUAL PROTECTION

Privileges & Immunities  
Due Process



6/15/40 AERIAL VIEW FLOOD WATERS  
Veroport area West from N. Denver Ave.

# ENVIRONMENTAL JUSTICE IN WEST EUGENE: FAMILIES, HEALTH & AIR POLLUTION

Grant Report for the US EPA  
Environmental Justice Small Grant Program  
2011-2012

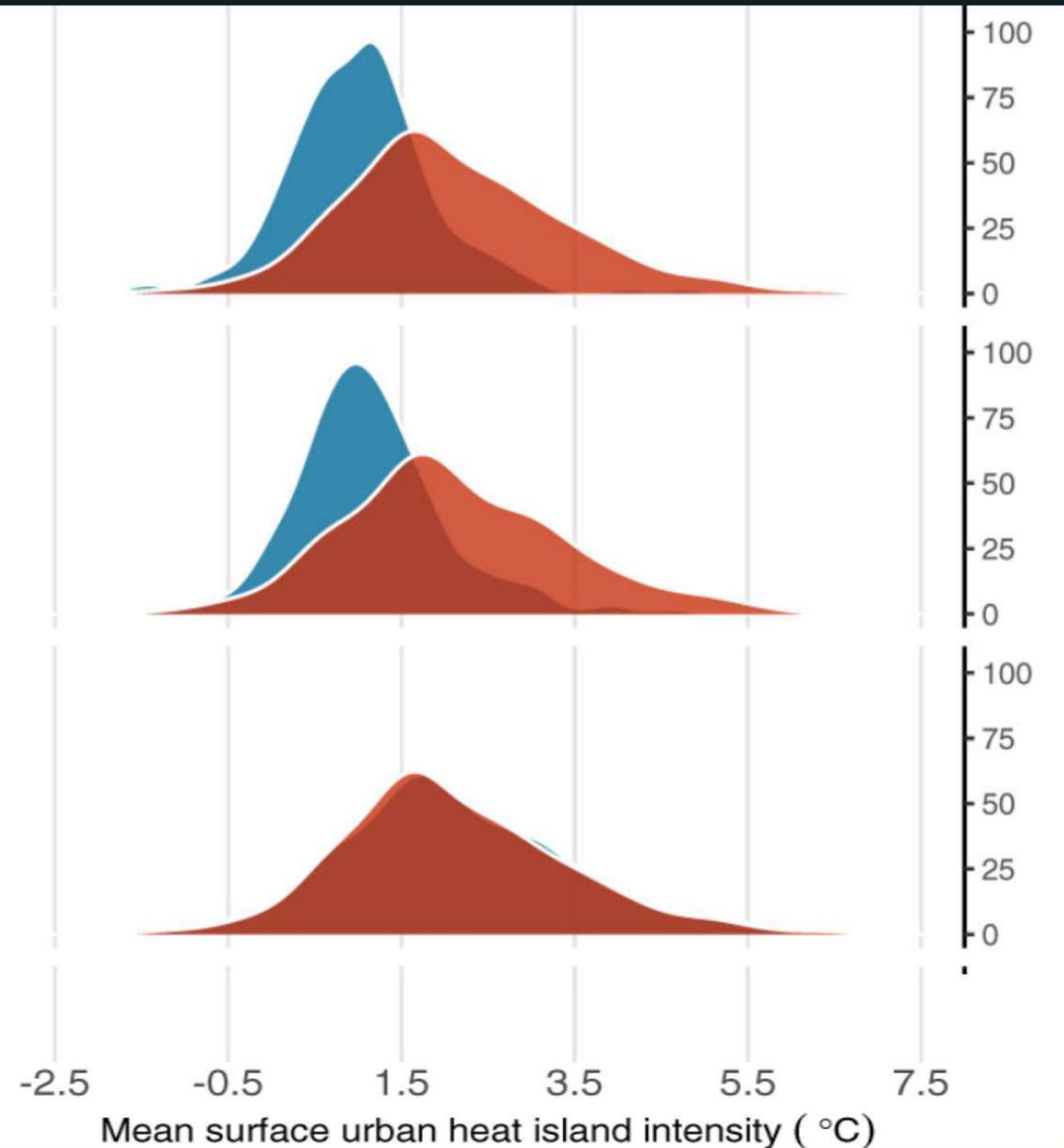
<b>Year</b>	<b>% of total emissions in zip code 97402</b>	<b>% of total emissions all other zip codes</b>
2005	99.9	0.1
2008	100	0.0
2011	99.9	0.1

**Distribution  
across cities of  
mean summer  
daytime  
surface urban  
heat island  
(SUHI) intensity**

Non-Hispanic white  
vs. all people of color

2× above poverty  
vs. below poverty

Below poverty  
vs. all people of color



Hsu, A., et al., *Disproportionate exposure to urban heat island intensity across major US cities*, 12 Nat Commun 2721 (2021).

“[T]he average person of color lives in a census tract with higher summer daytime surface urban heat island (SUHI) intensity than non-Hispanic whites in all but 6 of the 175 largest urbanized areas in the continental United States.”

“In nearly half the urbanized areas, the average person of color faces a higher summer daytime SUHI intensity than the average person living below poverty, despite the fact that, on average, only 10% of people of color live below the poverty line.”

Hsu, A., et al., *Disproportionate exposure to urban heat island intensity across major US cities*, 12 Nat Commun 2721 (2021).

# Climate “across the curriculum”

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- Constitutional law
- Contracts
- Criminal law
- Family law
- Property
- Torts

Thank you

