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IN THE SUPREME COURT OF MARYLAND

No. 11
September Term, 2025

MAYOR & CITY COUNCIL OF BALTIMORE,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

Appeal from the Circuit Court for Baltimore City
Honorable Videtta Brown, Judge

CITY OF ANNAPOLIS,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

ANNE ARUNDEL COUNTY,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

Appeals from the Circuit Court for Anne Arundel County
Honorable Steven Platt, Senior Judge

APPELLANTS' OPENING BRIEF

Sara Gross (CPF No. 412140305)
Chief, Affirmative Litigation Division
BALTIMORE CITY LAW DEPT.
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
Tel: (410) 396-3947
sara.gross@baltimorecity.gov

Andrew D. Levy (CPF No. 8205010187)
Anthony J. May (CPF No. 1512160094)
BROWN GOLDSTEIN LEVY LLP
120 E. Baltimore Street, Suite 2500
Baltimore, Maryland 21202
Tel: (410) 962-1030
Fax: (410) 385-0869
adl@browngold.com
amay@browngold.com

Attorneys for Appellant
Mayor and City Council of Baltimore

Gregory J. Swain (CPF No. 9106200276)
County Attorney
Hamilton F. Tyler (CPF No. 9012190326)
Deputy County Attorney
ANNE ARUNDEL COUNTY OFFICE OF LAW
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
Tel: (410) 222-7888
Fax: (410) 222-7835
lwswai00@aacounty.org
htyler@aacounty.org

Attorneys for Appellant
Anne Arundel County

D. Michael Lyles (CPF No. 9606050272)
City Attorney
CITY OF ANNAPOLIS OFFICE OF LAW
160 Duke of Gloucester St.
Annapolis, Maryland 21401
Tel: (410) 263-7954
dmlyles@annapolis.gov

Attorneys for Appellant
City of Annapolis

(additional counsel on signature pages)

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STATEMENT OF THE CASE

Appellants Mayor and City Council of Baltimore, City of Annapolis, and Anne Arundel County allege that Defendants—among them the world's largest oil-and-gas companies—orchestrated a pervasive, decades-long "sophisticated disinformation campaign" to mislead consumers and the public about climate change and the central role they knew their fossil-fuel products play in causing it. *Mayor & City Council of Baltimore v. BP P.L.C.* (*Baltimore IV*), 31 F.4th 178, 233 (4th Cir. 2022), *cert. denied*, 143 S.Ct. 1795 (2023); *Anne Arundel Cnty. v. BP P.L.C.* 94 F.4th 343, 346–47 (4th Cir. 2024). Beginning at least as early as the 1960s, Defendants intensively researched global warming and its causes, accurately foresaw the catastrophic effects of their products' intended uses, and invested to protect their own assets and infrastructure against those dangers. E.41, E.43–44, E.110–29, ¶¶1, 5–7, 141–76.[1] Publicly, however, Defendants "took affirmative steps to misrepresent the nature of those risks," including by "casting doubt on the integrity of scientific evidence" and "advancing their own pseudo-scientific theories" they knew to be false, directly and through paid surrogates. *Baltimore IV*, 31 F.4th at 234 n.23; *see* E.110–26, E.147–48, E.155–56, ¶¶141–70, 221, 241–42.

[1] Factual allegations in Appellants' Statement of the Case and Statement of Facts are drawn from Baltimore's Complaint. *See* E.36–172. Materially similar facts are alleged in Annapolis' and Anne Arundel County's First Amended Complaints. *See* E.1010–1187 (Annapolis); E.1188–1373 (Anne Arundel County).

Defendants' strategy worked, muddling public and consumer understanding of their products' climate risks. E.123–26, ¶¶163–70. Their deception "drove consumption, and thus greenhouse gas pollution, and thus climate change," significantly exacerbating the harms Defendants knew would occur. *Baltimore IV*, 31 F.4th at 233–34; *Anne Arundel*, 94 F.4th at 347; *see* E.87–90, E.126, E.129–33, ¶¶91–102, 170, 177–82. As a result, Appellants and their residents have suffered and will suffer severe harms from sea-level rise, flooding, extreme precipitation and storms, and extreme heat. E.44–46, E.77–78, E.80–87, E.138–46, ¶¶8–10, 14–17, 59–62, 67–90, 195–217.

To mitigate those harms, Appellants brought these suits on July 20, 2018 (Baltimore), February 22, 2021 (Annapolis), and April 26, 2021 (Anne Arundel), alleging claims for public and private nuisance, trespass, and strict liability and negligent failure to warn. E.36–172, E.663–83, E.834–1009.[2] Defendants removed each case to federal court. The district court remanded Baltimore's case for lack of

[2] Baltimore's Complaint also asserts causes of action for negligent and strict liability design defect, and under the Maryland Consumer Protection Act. *See* E.157–63, E.168–70, ¶¶249–69, 291–98. Baltimore does not appeal the dismissal of those three claims. Annapolis and Anne Arundel have each also asserted causes of action under the Consumer Protection Act and for civil conspiracy. E.1173–84, ¶¶291–321; E.1359–70, ¶¶294–324. The circuit court dismissed Annapolis' and Anne Arundel's complaints in full on preemption grounds without ruling on whether their individual claims were adequately pleaded. E.1386. Whether Annapolis and Anne Arundel have stated claims under the Consumer Protection Act and for civil conspiracy are not at issue in this appeal.

subject-matter jurisdiction, holding in relevant part that Baltimore's claims do not arise under federal common law and do not present questions of federal pollution regulation or foreign policy. *Mayor & City Council of Baltimore v. BP P.L.C.* (*Baltimore I*), 388 F.Supp.3d 538, 554–61, 574 (D. Md. 2019) (Hollander, J.). The Fourth Circuit affirmed, *see* 952 F.3d 452, and the U.S. Supreme Court vacated on procedural grounds, *see generally BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230 (2021). On remand, the Fourth Circuit again affirmed, agreeing that Baltimore's claims "do not involve the regulation of emissions" and do not "disturb foreign relations." *See Baltimore IV*, 31 F.4th at 214, 216 (quotations omitted). The district court granted motions to remand *Annapolis* and *Anne Arundel* in light of *Baltimore IV*, and the Fourth Circuit again affirmed. *City of Annapolis v. BP P.L.C.*, 2022 WL 4548226 (D. Md. Sept. 29, 2022), *aff'd*, *Anne Arundel*, 94 F.4th 343.

After those appeals resolved, the Circuit Court for Baltimore City (Hon. Videtta Brown, J.) heard Defendants' joint motion to dismiss for failure to state a claim, which the court granted July 10, 2024. In reaching its conclusions, the court fundamentally misconstrued Baltimore's case, adopting a "characterization of Baltimore's complaint differ[ent] from *Baltimore IV*'s" and contrary to Baltimore's "characterization of its own complaint." E.10. It recharacterized Baltimore's claims as "entirely about addressing the injuries of global climate change," and did "not accept[]" Baltimore's description of "the goal of its complaint." E.11. The court held

that Baltimore's claims, as recharacterized, were "beyond the limits of Maryland state law," E.14, because adjudicating them "would operate as a *de facto* regulation on greenhouse gas emissions," E.19 (quoting *City of New York v. Chevron Corp.*, 993 F.3d 81, 96 (2d Cir. 2021)). The court thus found the claims preempted by a combination of "the [U.S.] Constitution's federal structure," the federal Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, and a defunct body of federal common law the CAA displaced. E.10–19.

The court also ruled that Baltimore had not stated claims under Maryland law. E.20–34. It held that Baltimore's nuisance claims were not viable because nuisance liability "must relate to a defendant's use of land" and cannot arise from the "deceptive marketing" of dangerous products. E.22–23. The court dismissed the failure-to-warn claims because they would purportedly impose a duty on Defendants to warn "every single human being on the planet" who has used fossil fuels. E.26. Lastly, the court dismissed the trespass claim because Defendants lacked "control of the foreign matter" invading Baltimore's property, and Defendants' deceptive conduct was "far to[o] attenuated" from Baltimore's injuries to support liability. E.32–33. Baltimore timely noticed this appeal on August 9, 2024.

Annapolis and *Anne Arundel* were both specially assigned to the Honorable Steven Platt in the Circuit Court for Anne Arundel County, and motions to dismiss those complaints were briefed and argued jointly. The court dismissed one defendant

on state-law grounds with leave to amend, and deferred ruling on all other motions to dismiss for failure to state a claim. E.1389–90. It reasoned that resolving those motions would "necessitate a thorough practical review and critical examination of the nature of the relief requested and any federal and/or state statutory, regulatory or juridical impediments to the granting and implementation of such relief," which should occur after discovery. E.1398–99.

After Annapolis and Anne Arundel County filed amended complaints, however, the court reversed course and granted the Defendants' renewed joint motion to dismiss on January 23, 2025. E.1374–86. The court "acknowledge[d] being persuaded on this second go-round" that "the U.S. Constitution's federal structure does not allow the application of State Court claims like those presented in the instant cases." E.1384. Adopting the same misconstruction of the complaints the circuit court relied on in Baltimore's case, the court held that "the City of Annapolis and the County of Anne Arundel can participate in the efforts to limit emissions collaboratively, but not in the form of litigation." E.1385. It thus held that Annapolis' and Anne Arundel County's complaints were "federally preempted," and that "the preemption is operable possibly by federal common law but surely by the Federal Clean Air Act." E.1385. Annapolis and Anne Arundel County timely appealed on January 31, 2025.

The parties jointly moved the Appellate Court to consolidate the three appeals, which it granted on March 7, 2025. E.1410–11. Defendants submitted an unopposed petition for a writ of certiorari in this Court on April 11, 2025, and Appellants jointly answered and cross-petitioned on April 20, 2025. The Court issued a writ of certiorari on April 24, 2025, limited to the questions below.

QUESTIONS PRESENTED

1. Do the Federal Constitution and federal law preempt and preclude state law claims seeking redress for injuries allegedly caused by the effects of out-of-state and international greenhouse gas emissions on the global climate?

2. Does Maryland law preclude nuisance claims based on injuries allegedly caused by the worldwide production, promotion, and sale of a lawful consumer product?

3. Does Maryland law preclude failure-to-warn claims premised on a duty to warn every person in the world whose use of a product may have contributed to a global phenomenon with effects that allegedly harmed the plaintiff?

4. Does Maryland law preclude trespass claims based on harms allegedly caused by global climate changes arising from the use of a product by billions of third parties around the world outside of the producer's control?

5. Whether Respondents' complaints state claims for public and private nuisance.

6. Whether Respondents' complaints state claims for strict liability and negligent failure to warn.

7. Whether Respondents' complaints state claims for trespass.

STATEMENT OF FACTS

For more than fifty years, Defendants have known their fossil-fuel products create greenhouse gas emissions that change Earth's climate. E.41, E.43, ¶¶1, 5; *see* E.90–110, ¶¶103–40. By the 1970s, their internal scientists warned that "five to ten years" remained before "hard decisions regarding changes in energy strategies might become critical." E.95–96, ¶112. Instead of sharing their knowledge of those existential threats with the public, however, Defendants misrepresented and concealed their products' risks. E.41, E.43–44, E.110–26, ¶¶1, 6–7, 141–70. Over many decades, Defendants promoted unfettered use of their fossil-fuel products without warning of their risks, while spreading disinformation and casting doubt on the growing scientific consensus about climate change, E.110–26, ¶¶141–70, including through trade associations and industry groups, E.64–65, E.115–125, ¶¶30–31, 150–68. Defendants ramped up their efforts in the late 1980s, spending millions of dollars to fund organizations that misrepresented the scientific consensus on global warming, and placing misleading advertisements to do the same. E.113–24, ¶¶145–65.

Appellants and their residents have suffered—and will continue to suffer—severe climate-related harms including sea-level rise, extreme precipitation and storms, flooding, extreme heat, and rising air temperatures, all of which were caused and exacerbated by Defendants' deception. Appellants face threats ranging from more frequent and intense heatwaves and storms, to more frequent sunny-day flooding, to increased coastal water acidification. E.137–46, ¶¶191–217. These climate impacts, among myriad others, jeopardize city and county property, critical infrastructure including roads and wastewater facilities, cultural and natural resources, and city and county residents' health and safety, while simultaneously burdening Appellants with mounting costs and decreased tax revenues. E.137–46, ¶¶191–217. Through these cases, Appellants seek compensatory damages and equitable relief, including to abate the ongoing local nuisance conditions, to remedy those local harms caused and worsened by Defendants' deception.

SUMMARY OF ARGUMENT

1. The only two state appellate courts that have considered similar claims both concluded they are not preempted by any source of federal law, and this Court should join them. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023) (affirming denial of motion to dismiss), *cert. denied*, 145 S.Ct. 1111 (Jan. 13, 2025); *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.* (*Boulder II*), __ P.3d __, 2025 WL 1363355 (Colo. May 12, 2025) (affirming denial of motion to

dismiss). The circuit courts below erred in finding Appellants' claims preempted for multiple reasons, and each stems from their misapprehension of Appellants' complaints. Both courts adopted Defendants' mischaracterization of Appellants' claims as impermissible "efforts to limit [greenhouse gas] emissions" nationally and globally, E.1385, and disregarded Appellants' allegations concerning Defendants' "deceptive misinformation campaign [as] simply a way to get in the back door what they cannot get in the front door," E.11. "Numerous courts have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public," however, and this Court should as well. *See Honolulu*, 537 P.3d at 1201 (cleaned up).

As the Fourth Circuit correctly concluded, "[n]one of [Appellants'] claims concern emission standards, federal regulations about those standards, or pollution permits" or "involve the regulation of emissions," and "production and use of Defendants' fossil-fuel products" are "not the source of tort liability." *Baltimore IV*, 31 F.4th at 216, 217, 233; *Anne Arundel*, 94 F.4th at 350. Rather, "each of the local governments' claims are factually premised on the companies' superior knowledge of the negative, climate-change impacts attributable to their fossil-fuel products," and their long-running concealment and misrepresentation of that knowledge. *Anne*

Arundel, 94 F.4th at 350 (cleaned up); *see also, e.g.*, *Baltimore IV*, 31 F.4th at 195, 221–22, 233–34.

Properly understood, Appellants' claims are not preempted. The federal common law of interstate pollution cannot preempt Appellants' claims because that common law has been displaced by the CAA and has therefore "cease[d] to exist." *Baltimore IV*, 31 F.4th at 205. It would not preempt the Appellants' claims even if it still existed, moreover, because it encompassed only a narrow category of nuisance claims "to enjoin further pollution" from a discrete out-of-state pollution source. *Honolulu*, 537 P.3d at 1200; *Boulder II*, 2025 WL 1363355, at *8 ¶50. Because the CAA displaced any relevant federal common law, "[t]he correct preemption analysis requires an examination *only* of the CAA's preemptive effect." *Honolulu*, 537 P.3d at 1200.

The holding in both decisions below that "the Constitution's federal structure" federalizes all questions of law "involving air and water in their ambient state," *see* E.11, E.12, E.1384, is not correct. The authorities from which that proposition supposedly derives all address the application of federal common law, and do not analyze or depend on the Constitution at all. And whether understood in constitutional or federal common law terms, there is no uniquely federal interest here that would justify preempting state law. Remedying deceptive and misleading commercial conduct as alleged here is within the core of state police powers, and

"[i]t is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

Finally, the CAA does not preempt the Appellants' claims. Appellants' claims do not pose an obstacle to accomplishing the CAA's purposes and objectives because the statute "does not concern itself in any way with" the tortious conduct alleged here: "the use of deception to promote the consumption of fossil fuel products." *Honolulu*, 537 P.3d at 1205 (quotations omitted); *see Boulder II*, 2025 WL 1363355, at *7, ¶43. Defendants can likewise comply with all their legal obligations and "avoid federal and state liability by adhering to the CAA and separately issuing warnings and refraining from deceptive conduct as required by [Maryland] law." *See Honolulu*, 537 P.3d at 1207; *Boulder II*, 2025 WL 1363355, at *7, ¶42.

2. The Circuit Court for Baltimore City also erred in holding that Baltimore failed to state claims under Maryland law. E.20–34. Baltimore's Complaint states claims for public and private nuisance because Defendants' deceptive and misleading conduct substantially contributed to creating and maintaining unreasonable climate-related interferences with public rights and city property. Maryland law extends nuisance liability to those caused by tortious promotion or sale of dangerous products, and the court's holding that "public nuisance theory has

only been applied to cases involving a defendant's use of land" is not accurate. E.23. The complaint similarly states a claim for trespass because by affirmatively marketing their products for uses they knew would cause seawater and other foreign materials to invade coastal cities like Baltimore, Defendants knowingly caused those materials to invade Baltimore's real property interests. Finally, Defendants owed a duty to issue adequate warnings to protect Baltimore from foreseeable climate injuries caused by Defendants' fossil-fuel products, just like any other manufacturer, and Baltimore has stated negligent and strict liability failure to warn claims for violations of that duty. That duty would not require Defendants to warn "every single human being on the planet whose use of fossil fuels may have contributed to global climate change" or an indeterminate class, E.26, but required them at minimum to warn their own customers.

STANDARD OF REVIEW

An order granting a motion to dismiss is "review[ed] *de novo*, with no deference given to the trial court." *Chavis v. Blibaum & Assocs., P.A.*, 476 Md. 534, 551 (2021). The court "must assume the truth of all relevant and material facts that are well pleaded and all inferences" reasonably drawn from them. *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021) (quotations omitted). "The critical inquiry" is whether the complaint "alleges specific facts that, if true, would justify recovery under any established theory"; "an appellate court 'cannot sustain its dismissal if the

facts therein set forth present, on their face, a legally sufficient cause of action.'" *Tavakoli-Nouri v. State*, 139 Md. App. 716, 730 (2001) (citation omitted).

ARGUMENT

I. Appellants' Claims Are Not Preempted.

The circuit courts' holdings that Appellants' claims are federally preempted misconstrue both Appellants' complaints and controlling law, and must be reversed. The U.S. Supreme Court has carefully articulated the tests for preemption, and "at least one feature unites them: Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion). Instead, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Id.* (cleaned up); *see also, e.g.*, *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal pre-emption *in vacuo,* without a constitutional text or a federal statute to assert it.").

The decisions below do not apply any recognized preemption test or identify any provision of the Constitution or the Clean Air Act that might preempt Appellants' claims. Each instead holds incorrectly that "[f]ederal law governs disputes involving air and water in their ambient state," because "the Constitution's federal structure does not allow the application of state law to claims like"

Appellants'. E.11, E.1384 (same). From that incorrect premise, both decisions held that Appellants' claims were preempted by a combination of the CAA, the Constitution, and federal common law. E.11–19; E.1384–86.

The decisions of the Hawai'i and Colorado Supreme Courts in the *Honolulu* and *Boulder II* cases apply the correct analysis and illustrate the errors in the reasoning below. As in those cases, Appellants' claims cannot regulate pollution or emissions because the acts that trigger liability are Defendants' failure to warn and deceptive promotion, and Appellants do not ask the court to enjoin or reduce fossil-fuel production or emissions. *See Honolulu*, 537 P.3d at 1201; *Boulder II*, 2025 WL 1363355, at *3, ¶10. Thus, "neither federal common law nor the [CAA]," nor the Constitution, preempts Appellants' claims. *Honolulu*, 537 P.3d at 1207; *see Boulder II*, 2025 WL 1363355, at *2, ¶2.

A. Appellants' Claims Cannot Regulate Greenhouse Gas Emissions.

The circuit courts' preemption holdings all flow from and depend on the courts' "bottom line" conclusion that adjudicating Appellants' claims "would operate as a *de facto* regulation on greenhouse gas emissions." E.19 (quotations omitted); *see* E.1385–86. As the Fourth Circuit and federal district court held concerning Baltimore's case, however, that conclusion "rest[s] on a fundamental confusion," *Baltimore IV*, 31 F.4th at 217, and "mischaracterization of [Appellants'] claims," *Baltimore I*, 388 F.Supp.3d at 560. By construing the complaints in

Defendants' favor, the courts below misapplied the standards applicable to motions to dismiss under Rule 2-322.

Appellants' complaints target Defendants alleged "misinformation campaign that contributed to [Appellants'] injuries" from the impacts of climate change. *See Baltimore IV*, 31 F.4th at 217. Each alleges that Defendants breached Maryland tort duties by, *inter alia*, "[a]ffirmatively and knowingly promoting the sale and use of fossil fuel products which Defendants knew to be hazardous and knew would cause or exacerbate global warming," E.147 ¶221(b), E.1161 ¶246(b), E.1347 ¶249(b), and "failing to adequately warn … of the climate effects that inevitably flow from the intended use of their fossil fuel products," E.155 ¶241, E.1169, E.1171 ¶¶265, 276, E.1355, E.1357 ¶¶268, 279. As in *Honolulu* and *Boulder II*, "the acts that trigger liability" are Defendants' "use of deception to promote the consumption of fossil fuel products." *Honolulu*, 537 P.3d at 1205 (quotations omitted); *Boulder II*, 2025 WL 1363355, at *10 ¶58. Numerous courts have construed similar complaints the same way in the jurisdictional context: claims like Appellants' do not regulate air pollution.[3]

[3] *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1111, 1113 (9th Cir. 2022) ("Plaintiffs' claims are not about Defendants' oil and gas operations. . . . This case is about whether oil and gas companies misled the public about dangers from fossil fuels."); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.* (*Boulder I*), 25 F.4th 1238, 1264 (10th Cir. 2022) ("The Municipalities' claims do not concern CAA emissions standards or limitations, government orders

Appellants do *not* allege Defendants violated any legal duty by manufacturing or burning fossil fuels, by lawfully selling those products, or by releasing pollution. Appellants do not, moreover, "seek to enjoin any oil and gas operations or sales in [Maryland] or elsewhere," and do not "seek to enforce emissions controls of any kind." *Boulder II*, 2025 WL 1363355, at *3 ¶10; *compare Baltimore IV*, 39 F.4th at 217 ("[W]e take Baltimore at its word when it claims that it does not seek . . . to restrain Defendants from engaging in their business operations." (quotations omitted)); *see also Minnesota v. Am. Petroleum Inst.*, 2025 WL 562630, at *13 (Minn. Dist. Ct. Feb. 14, 2025) (nonprecedential) (denying motion to dismiss similar claims) ("Within the claims in the Complaint, there is no attempt to regulate transboundary pollution."). Defendants will not have to reduce production or change pollution control practices to avoid future liability. "[S]o long as Defendants start warning of their products' climate impacts and stop spreading climate disinformation, they can sell as much fossil fuel as they wish without fear of incurring further liability." *Honolulu*, 537 P.3d at 1186 (quotations omitted).

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regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters."); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 55 n.8 (1st Cir. 2022) (similar claims did "*not* [seek] to regulate greenhouse-gas emissions"); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) (similar claims did not "seek[] a referendum" on fossil-fuel or pollution regulation), *aff'd*, 63 F.4th 703 (8th Cir. 2023); *Massachusetts v. Exxon Mobil Corp.*, 462 F.Supp.3d 31, 44 (D. Mass. 2020) (rejecting "ExxonMobil's caricature of the complaint").

The circuit courts' contrary readings of Appellants' complaints were not only incorrect, but ultimately impermissible. Under Rule 2-322, "[d]ismissal is only proper if the facts and allegations viewed in the light most favorable to the plaintiff fail to afford the plaintiff relief if proven." *Bd. of Educ. of Montgomery Cnty. v. Browning*, 333 Md. 281, 286 (1994). "A freely acknowledged slant in support of sustaining the viability of the complaint is, moreover, mandated at this stage of the proceedings on this particular issue (the pre-trial dismissal of a complaint)." *Simms v. Constantine*, 113 Md. App. 291, 297 (1997). The courts below reversed those presumptions by "not accept[ing]" Appellants' "characterization of [their] own complaints." E.10. This Court has more than once reversed dismissal where, as here, a lower court rejects one plausible reading of a complaint that would state viable claims in favor of a reading that would not. *See Figueiredo-Torres v. Nickel*, 321 Md. 642, 649, 652 (1991) (reversing Appellate Court's holding that professional negligence claims against psychologist were "merely a 'refitting of the abolished actions [for 'alienation of affections' and 'criminal conversion'] into other forms'"); *Tavakoli-Nouri*, 139 Md. App. at 732–33 (reversing dismissal where complaint alleged "various theories collectively" and "failed to set forth each of [the plaintiff's] separate claims," but facts alleged would support a civil rights claim); *see also Minnesota*, 2025 WL 562630, at *14 (the decision in Baltimore's case was "wrongly

decided, because [it] did not draw inferences in favor of the plaintiff, including those that relate to its theory of liability").

The decision in *City of New York*, 993 F.3d 81, does not support a different result. The Second Circuit there held that New York City's claims against fossil-fuel companies "would regulate cross-border emissions," and affirmed their dismissal. 993 F.3d at 93. But New York City's claims and theories of liability differed fundamentally from Appellants'—New York City sought to hold defendants liable for impacts caused by their "admittedly legal commercial conduct" producing and selling fossil fuels. *Id.* at 86. The City expressly averred that its "particular theory of the claims asserted . . . d[id] not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation . . . for the severe harms resulting from their lawful and profitable commercial activities." Brief for Appellant at 19, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018). In the Second Circuit's view, those claims would "effectively impose strict liability" for all greenhouse gas emissions such that the defendants could not "avoid [future] liability" unless they "cease[d] global production [of fossil fuels] altogether." *City of New York*, 993 F.3d at 93.

Appellants' claims here differ from the *de facto* strict liability claims in *City of New York*, and cannot control either production of fossil fuels or greenhouse gas

emissions. "Defendants' liability is causally tethered to their failure to warn and deceptive promotion, and nothing in this lawsuit incentivizes—much less compels—Defendants to curb their fossil fuel production or greenhouse gas emissions." *Honolulu*, 537 P.3d at 1201 (quotations omitted); *Boulder II*, 2025 WL 1363355, at *10 ¶¶57–59.

Each of the circuit courts' preemption holdings flows from inaccurate, impermissible readings of the complaints, and each must be reversed.

B. Displaced Federal Common Law Addressing Interstate Pollution Cannot Preempt or Replace Appellants' Claims.

In addition to misconstruing Appellants' complaints, the courts below misapplied multiple lines of controlling precedent. First, no body of federal common law "governs" or preempts Appellants' claims. *See* E.13; E.1385. The federal common law of interstate pollution cannot preempt Appellants' claims because it has been displaced by the CAA. Even if it still existed, moreover, it would not preempt the claims here because Appellants allege liability based on deceptive marketing, which has never been a subject of federal common law and involves no uniquely federal interests. To the contrary, advertising, consumer protection, and public safety are within core state police powers.

Federal common law is rare. Judge-made federal law "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States," and

thus "[t]he cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 589 U.S. 132, 133, 136 (2020). "In the absence of congressional authorization," federal common law is only permissible where it is "'necessary to protect uniquely federal interests.'" *Id.* at 136 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). There must also be "a 'significant conflict between some federal policy or interest and the use of state law,'" which the Supreme Court's "cases uniformly require . . . as a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). "Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict." *Id.* at 87–88.

Federal common law is also fragile—the federal judiciary's "'commitment to the separation of powers is too fundamental' to continue to rely on federal common law . . . when Congress has addressed the problem." *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 315 (1981) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)). Thus, "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished" and "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981). "Legislative

displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law," and "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue." *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 423–24 (2011) (cleaned up). In turn, "[w]hen Congress legislates to displace federal common law, the statute governs the extent to which state law is preempted," not "the preemptive effect of (any residual) federal common law." *D.C. v. Exxon Mobil Corp.*, 89 F.4th 144, 152–53 (D.C. Cir. 2023); *see Honolulu*, 537 P.3d at 1198–1200; *Boulder II*, 2025 WL 1363355, at *5–6 ¶¶27–32.

1. Displaced Federal Common Law Is Wholly Abrogated and Cannot Preempt or Supplant State Law.

All parties agree, and both courts below held, that the CAA's enactment displaced any federal common law that may once have existed concerning interstate air pollution. *See AEP*, 564 U.S. at 424; E.8, E.14; E.1384–85. That federal common law thus "*no longer exists* due to Congress's displacement." *Honolulu*, 537 P.3d at 1195 (quotations omitted); *Boulder II*, 2025 WL 1363355, at *6 ¶¶31–32; *Baltimore IV*, 31 F.4th at 205; *Boulder I*, 25 F.4th at 1260. Therefore, "[t]he correct preemption analysis requires an examination *only* of the CAA's preemptive effect," and "displaced federal common law plays no part." *Honolulu*, 537 P.3d at 1199–1200; *Boulder II*, 2025 WL 1363355, at *6 ¶32; *see D.C.*, 89 F.4th at 153.

Two seminal U.S. Supreme Court decisions make this point crystal clear. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court considered a Clean Water Act ("CWA") preemption challenge to Vermont common-law nuisance claims seeking to enjoin water pollution flowing from a New York paper mill into Lake Champlain, which borders both states. The Court observed that "[u]ntil fairly recently, federal common law governed the use and misuse of interstate water," *id.* at 487, but amendments to the CWA "pre-empt[ed] all *federal* common law" and replaced it with "a federal permit program designed to regulate the discharge of polluting effluents," *id.* at 489. So the Court "turn[ed] to the question presented: whether the [CWA] pre-empts Vermont common law to the extent that law may impose liability on a New York point source." *Id.* at 491. It applied a typical statutory conflict preemption analysis, asking whether Vermont law "actually conflict[ed] with [the] federal statute" or posed an obstacle to "the full purposes and objectives of Congress." *Id.* at 491–92 (cleaned up). "The Court repeatedly emphasized Congress's directives in the statute, rather than the preemptive effect of (any residual) federal common law," and "held the particular state-law claim at issue was preempted" while "other state-law claims were not." *D.C.*, 89 F.4th at 153 (citing *Ouellette*, 479 U.S. at 491–500).

Applying the same analysis twenty years later, the Court in *AEP* held that the CAA "displace[d] any federal common-law right to seek abatement of carbon-

dioxide emissions" from the electric utility defendants there, since "the Act 'speaks directly' to emissions of carbon dioxide from the defendants' [power]plants." 564 U.S. at 424. Because "the [CAA] displaces federal common law," the Court reiterated that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA]" and remanded for consideration of that issue. *Id.* at 429. As in *Ouellette*, the Court "did not analyze the federal common law's preemptive effect." *Honolulu*, 537 P.3d at 1199. "[I]f federal common law retained preemptive effect after displacement, the Court would have instructed the trial court on remand to examine whether displaced federal common law preempted the state law claims," which it did not. *Id.* Courts have thus "overwhelmingly rejected [Defendants'] argument that even after the [CAA] the federal common law of interstate pollution overrides all state-law claims," because that result "cannot be squared with [*AEP*] or *Ouellette*." *D.C.*, 89 F.4th at 153 & n.5 (collecting cases).

The analysis is no different with respect to pollution originating internationally, despite the lower courts' contrary holding. *See* E.14 (citing *City of New York*, 993 F.3d at 95 n.7, 100–01); E.1377, E.1383–84. The test for displacement of federal common law is "simply whether the statute speaks directly to the question at issue," *AEP*, 564 U.S. at 424 (cleaned up), and the CAA *does* "speak directly" to international air pollution, in a section titled "International Air Pollution." *See* 42 U.S.C. § 7415. That provision provides a reciprocal framework

for addressing "air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country" with foreign governments that "ha[ve] given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country." *See* 42 U.S.C. § 7415(a), (c). The CAA itself thus precludes the recognition of any federal common law rules of decision pertaining to foreign emissions because it "addresses the [same] problem" that the common law might at one time have "governed," *Milwaukee II*, 451 U.S. at 315 n.8, namely "the prevention or control of air pollution occurring in" other countries, § 7415(c). No federal common law of air pollution—interstate or international—survives the CAA.

2. Federal Common Law Would Not Encompass Claims Like Appellants' Even if It Still Existed.

Even if some vestigial federal common law had survived the CAA, Appellants' claims would not fit within it. That body of law imposed certain duties not to release pollution across state borders, and recognized a small class of nuisance claims seeking to reduce or enjoin further pollution entering interstate waterways or drifting across state lines.[4]

[4] *See, e.g.*, *Milwaukee II*, 451 U.S. at 311–12 (sewage flowing into Lake Michigan); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (sewage discharged into New York Harbor); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (garbage dumped off New Jersey coast); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (sulfuric acid gas drifting into Georgia); *Missouri v. Illinois*, 180 U.S. 208, 242–43 (1901) (sewage draining into Mississippi River).

The Supreme Court analogized claims by a State to enjoin "pollution of interstate or navigable waters" to cases involving "[r]ights in interstate streams" or "apportionment of interstate waters," which the Court had long recognized as presenting "question[s] of 'federal common law.'" *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 104, 105 (1972) (quoting *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)). Such claims fall within the "narrow areas" in which federal courts were empowered to craft common law rules of decision because they "implicat[e] the conflicting rights of States" in a manner that "makes it inappropriate for state law to control." *Texas Indus.*, 451 U.S. at 641 & n.13 (citing *Milwaukee I* and *Hinderlider*). "The claims permitted by federal common law in this area were brought against polluting entities and sought to enjoin further pollution," and "the source of the injury . . . [wa]s pollution traveling from one state to another." *Honolulu*, 537 P.3d at 1200, 1201; *see also Boulder II*, 2025 WL 1363355, at *8 ¶50 ("[S]uch actions involved claims against the pollution emitters themselves. . . .").

Neither the duties imposed by the former federal common law nor their conceptual underpinning are implicated here. Appellants do not allege Defendants violated a duty not to pollute, do not seek to enjoin or limit pollution from any source, and do not seek to change anyone's methods of controlling pollution. As in *Honolulu* and *Boulder*, Appellants allege Defendants violated state-law tort duties

by deceptively marketing their products, about which the former federal common law said nothing. *See Boulder II*, 2025 WL 1363355, at *8 ¶50 ("[A]lthough defendants assert that the federal common law would have governed Boulder's claims, that does not appear to be accurate."). Because the breach of duty alleged here is "tortious marketing conduct, not pollution traveling from one state to another," *Honolulu*, 537 P.3d at 1201, the federal common law of interstate pollution would never have applied.

There is no other "uniquely federal interest" that could support the continued or renewed application of federal common law here, either. *Rodriguez*, 589 U.S. at 136. The Supreme Court has long stated that "there is no question that [a state's] interest in ensuring the accuracy of commercial information in the marketplace is substantial." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); *see also, e.g.*, *Ohralik v. Ohio State Bar Ass'n* 436 U.S. 447, 462 (1978) (in-person solicitation); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (advertising); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (unfair business practices); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (consumer protection). That Defendants' alleged misrepresentations concern their products' effects on the climate does not change the analysis, and Defendants do not attempt to explain why it would. There are "no 'uniquely federal interests' in regulating marketing conduct, an area traditionally governed by state law." *Honolulu*, 537 P.3d at 1202 (citation

omitted); *see also Boulder II*, 2025 WL 1363355, at *8 ¶44 (holding that Boulder's claims do not "involve uniquely federal areas of regulation" because "nuisance abatement" and the other claims at issue "have been deemed traditional state law matters implicating important state interests.").

C. No Constitutional Provision Bars Appellants' Claims.

The circuit courts' conclusion that the federal Constitution's "structure" does not permit claims like Appellants' to proceed under state law was clear error. *See* E.15; E.1384. Nothing in the Constitution places all matters "involving . . . ambient" air or water outside the reach of the states, E.12, and no Supreme Court precedent stands for that sweeping, atextual rule.

"Constitutional analysis must begin with 'the language of the instrument,' . . . which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (quoting *Gibbons v. Ogden*, 9 U.S (Wheat.) 1, 71 (1824)). Notwithstanding that clear instruction, the courts below did not cite, let alone analyze, any constitutional text or any specific constitutional provision. Tellingly, neither did Defendants. Their briefing below in *Baltimore* cited only the Supremacy Clause (once, on reply), without discussion. E.365; *see Boulder II*, 2025 WL 1363355, at *9 ¶¶51–52; *Minnesota*, 2025 WL 562630, at *13 ("Defendants do not cite a specific provision of the Constitution as authority to support federal preemption. Because the federal

common law was displaced, and no other provision of the Constitution applies, the Court concludes that Defendants' 'structure of the Constitution' argument is not persuasive."). "Ordinarily, if an argument is not raised at trial or in proceedings below, it is not preserved for appellate review," and Defendants' constitutional arguments fail for that reason alone. *State v. Jones*, 138 Md. App. 178, 229 (2001) (collecting cases); Md. R. 8-131(a).

Instead of the Constitution's actual text, the supposed rule federalizing all "disputes involving air and water in their ambient state," E.12, purportedly derives from Supreme Court precedent. But both Defendants and the courts below "cite[d] no applicable authority supporting the proposition that once federal common law exists, the structure of the Constitution precludes the application of state law even when that common law no longer exists," and "[t]he cases on which [they] rely for this theory do not support it." *Boulder*, 2025 WL 1363355, at *9 ¶51. Most of the cases Defendants cited below analyze unrelated federal common law rules and contain no discussion of the Constitution.[5] Defendants also relied heavily on *AEP*

[5] *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–07 (1988) (discussing federal common law defense "immunizing Government contractors from liability for design defects"); *Texas Indus.*, 451 U.S. at 647 ("[W]e are unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged by petitioner . . . ."); *AEP*, 564 U.S. at 423; *Milwaukee II*, 451 U.S. at 317–26 (discussing displacement of federal common law by 1972 CWA amendments); *Milwaukee I*, 406 U.S. at 104 (holding that "application of federal common law . . . is not inconsistent with" pre-amendment Water Pollution Control Act).

and *Ouellette*, and the circuit courts appear to have adopted dicta from those cases noting that "[e]nvironmental protection is undoubtedly an area within national legislative power," *see AEP*, 564 U.S. at 421, and that "control of interstate pollution is primarily a matter of federal law," *Ouellette*, 479 U.S. at 492. *See* E.12–13. But neither *AEP* nor *Ouellette* analyzed or cited the Constitution either, and instead interpreted the preemptive reach of the CAA and CWA, respectively. *See* § 21I.B.1, *supra*. Ultimately, the cases relied on by the circuit courts that *do* analyze the Constitution have nothing to do with interstate pollution, and the cases involving interstate pollution say nothing about the Constitution.

The circuit courts were also incorrect in determining that Appellants' claims cannot be pleaded under state law because their "injuries all stem from interstate and international emissions." E.11; E.1384. There is nothing unusual or constitutionally improper about applying state law simply because the complaints allege in-state effects of Defendants' conduct both within and outside Maryland. To the contrary, a dispute "cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985); *see also, e.g.*, *Young v. Masci*, 289 U.S. 253, 258–59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it.");

National Pork Producers Council v. Ross, 598 U.S. 356, 390 (2023) ("virtually all state laws create ripple effects beyond their borders"). *Ouellette* illustrates that principle: the court held that "the particular state-law claim at issue was preempted under the [CWA], [but also] held that other state-law claims were not." *D.C.*, 89 F.4th at 153 (citing *Ouellette*, 479 U.S. at 497). Appellants allege here that Defendants made misrepresentations and engaged in other unlawful conduct in Maryland that they also engaged in elsewhere, and seek relief for injuries they and their residents have suffered in Maryland as a result. "That these climate change risks are widely-shared does not minimize [Maryland's] interest in reducing them." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080–81 (9th Cir. 2013) (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 522 (2007)) (cleaned up); *O'Keeffe*, 903 F.3d at 913.

D. The Clean Air Act Does Not Preempt Appellants' Claims.

The only question remaining is whether the CAA preempts Appellants' claims. "[T]here are at least three instances in which state laws are preempted: express, field, and conflict preemption." *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 483 (2017). Defendants have never argued that the CAA expressly preempts any claims at issue here, or that the statute occupies the field in which they arise.[6]

[6] Both arguments would fail, regardless. Express preemption does not apply because "the CAA contains no express language preempting state common law tort claims."

The question is thus whether there is an irreconcilable conflict between those claims and operation of the CAA. There is no such conflict because Appellants' claims and the CAA speak to different subject areas entirely.

Conflict preemption "includes cases where compliance with both federal and state regulations is a physical impossibility," and those "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chateau Foghorn*, 455 Md. at 484 (cleaned up). "'[T]he purpose of Congress is the ultimate touchstone,'" and courts must "apply a presumption that Congress did not intend to preempt state law." *Id.* at 485, 519 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "Congress' intent 'primarily is discerned' by examining the language of the federal statute(s) that allegedly preempt the state law as well as the 'statutory framework' . . . ." *Id.* at 485 (quoting *Medtronic*, 518 U.S. at 486). Conversely, "preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011)

Honolulu, 537 P.3d at 1203 (quotations omitted). Courts have universally rejected arguments that field preemption applies because the CAA's savings clauses make clear that Congress did not intend to bar all state regulation of air pollution. *See id.* at 1204; *Ouellette*, 479 U.S. at 492 (materially identical savings clause in CWA "negates the inference that Congress 'left no room' for state[-law] causes of action"). To the contrary, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also id.* § 7416, 7604(e) (savings clauses); *see also Boulder II*, 2025 WL 1363355, at *7 ¶41.

(cleaned up), and there is no preemption "where the conflict with federal law is merely potential or speculative," *Bd. of Trs. of Emps.' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore*, 317 Md. 72, 120 (1989).

There is no actual conflict between the Appellants' claims and the CAA because the CAA says nothing about the tortious deceptive conduct alleged in the complaints. The CAA's stated purpose is "pollution prevention," *see* 42 U.S.C. § 7401(a)(3) & (c), which it achieves by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and power plants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014). As the Fourth Circuit observed, "[n]one of [Appellants'] claims concern emission standards, federal regulations about those standards, or pollution permits"—they instead target the "extravagant misinformation campaign that contributed to [Appellants'] injuries." *Baltimore IV*, 31 F.4th at 217; *Anne Arundel*, 94 F.4th at 350. In turn, "[t]he CAA expresses no policy preference and does not even mention marketing regulations," let alone the kind of misleading and deceptive conduct Appellants allege. *Honolulu*, 537 P.3d at 1205; *see also Boulder II*, 2025 WL 1363355, at *7–8 ¶¶39–48.

The Hawai‘i Supreme Court's holding in *Honolulu* and the Colorado Supreme Court's opinion in *Boulder II* are directly on point. In rejecting CAA preemption, both courts explained that the plaintiffs' claims posed no obstacle to achieving the

statute's objectives because "while the CAA regulates pollution," it "expresses no policy preference and does not even mention marketing regulations." *Honolulu*, 537 P.3d at 1205; *see Boulder II*, 2025 WL 1363355, at *7 ¶43 ("Defendants have not identified any way in which state tort liability would frustrate the CAA's purposes, and we perceive none."); *cf. In re MTBE Prods. Liab. Litig.* (*MTBE II*), 725 F.3d 65, 103–04 (2d Cir. 2013) (rejecting CAA preemption of state-law claims for pollution from federally-approved gasoline additive in part because defendant "engaged in additional tortious conduct"). Impossibility preemption did not apply either, because the plaintiffs' claims and requested remedies "do not subject Defendants to *any* additional emissions regulation," and "[t]he CAA does not bar Defendants from warning consumers about the dangers of using their fossil fuel products." *Honolulu*, 537 P.3d at 1207 (emphasis added). Nothing would prevent the defendants from "adhering to the CAA and separately issuing warnings and refraining from deceptive conduct." *Id.*

The Supreme Court's decision in *Ouellette* does not call for a different result, because the Court held there that applying affected-state nuisance law to sources in another state would have imposed pollution-control requirements inconsistent with the CWA's complex permitting system. *See* 479 U.S. at 491–97. The Court noted that "[o]ne of the primary features" of the CWA was establishing "a federal permit program designed to regulate the discharge of polluting effluents" that expressly laid

out roles for the EPA and "source" states in designing, issuing, and enforcing permits, and a lesser advisory role for "affected" states impacted by an out-of-state permittee's effluent. *Id.* at 489–91. The program "sets forth the procedures for obtaining a permit in great detail," *id.* at 492, and the permits themselves "contain detailed effluent limitations, and a compliance schedule," *id.* at 489. The Court reasoned that claims brought under an affected state's laws against an out-of-state permittee "could effectively override both the permit requirements and the policy choices made by the source State" in crafting and issuing the permit, and "compel the [permittee] to adopt different control standards and a different compliance schedule from those approved by the EPA." *Id.* at 495. A permittee could thus face liability "even though the source had complied fully with its state and federal permit obligations." *Id.*

There are no similar considerations here and liability here would not conflict with any aspect of the CAA. There is no permitting system or other federal program at issue, and "[D]efendants have not cited, . . . any facts to indicate that it is impossible to comply with both the CAA and state tort law, that state tort law penalizes what the CAA requires, or that state tort law directly conflicts with the CAA." *Boulder II*, 2025 WL 1363355, at *7 ¶42. The courts below did not cite any provision or program of the CAA that would conflict with Appellants' claims either, and there is none. This Court should join the Hawai‘i and Colorado high courts in

holding that "the rationale motivating the *Ouellette* court in preempting affected-state common law claims does not apply to [Appellants'] state tort claims." *Honolulu*, 537 P.3d at 1206.

II. Appellants Plead Actionable Claims Under Maryland Law.

Appellants' complaints state claims for nuisance, trespass, strict liability failure to warn, and negligent failure to warn based on the widespread harms caused by Defendants' deception. Each claim asserts a "well recognized" tort cause of action "tethered to existing well-known elements," which the alleged facts more than satisfy. *See Honolulu*, 537 P.3d at 1195.

The Circuit Court for Baltimore City held that Baltimore had failed to state any claims under Maryland law, while the Circuit Court for Anne Arundel County did not reach the issues with respect to Annapolis and Anne Arundel County. The three Appellants' claims are materially similar, however, and this Court can and should hold that all three complaints state claims for those causes of action.

A. Appellants' Complaints State Claims for Public and Private Nuisance.

Courts have long affirmed the viability of nuisance claims against manufacturers for nuisances created by their tortious promotion and sale of products they knew to be dangerous, as Appellants allege here. Maryland law is not to the contrary, and the allegations in Appellants' complaints satisfy Maryland's time-honored tests for public and private nuisance.

Maryland follows the Restatement (Second) of Torts ("Restatement") in considering claims for public and private nuisance. *See Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984); *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94, 114 (2008). Under the Restatement, nuisance liability runs to anyone who participates in creating or maintaining a nuisance. Restatement § 834 ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on."); *Gorman v. Sabo*, 210 Md. 155, 161 (1956) ("One who does not create a nuisance may be liable for some active participation in the continuance of it or by the doing of some positive act evidencing its adoption."); *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 646 (1938) ("No matter how many other separate and independent offenders there may be the defendant must answer for its individual contribution."). A private nuisance is anything that interferes with the "private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (quoting Restatement § 821D). A public nuisance is anything that unreasonably interferes with "a right common to the general public," including public health, safety, peace, or comfort. *Tadjer*, 300 Md. at 552 (quoting Restatement § 821B).

Appellants' allegations amply state claims for public and private nuisance. Defendants' deceptive promotion inflated fossil-fuel consumption, increased greenhouse gas emissions, accelerated global warming, and thereby created

hazardous conditions in each Appellant's jurisdiction—including sea-level rise, flooding, storm surges, and heat waves—that Defendants actually and accurately foresaw. E.44–46, E.77–87, E.138, ¶¶8–10, 14–17, 59–90, 193–94 (Baltimore); E.1018–20, E.1022–23, E.1062–63, E.1152–53, ¶¶10–12, 19–21, 57–62, 237 (Annapolis); E.1196–99, E.1201–02, E.1242–43, E.1334–35 ¶¶10–12, 21–23, 58–63, 237 (Anne Arundel County). Those conditions have interfered with public rights by endangering human life (*e.g.*, by increasing risks of heat stroke), impairing public infrastructure and jeopardizing waterways (*e.g.*, by inundating sewer systems), and threatening public safety; and have interfered with the use and enjoyment of land, infrastructure, facilities, and public spaces owned by Appellants. E.138–46, ¶¶193–217 (Baltimore); E.1153–60, ¶¶238–242 (Annapolis); E.1335–46, ¶¶238–245 (Anne Arundel). Defendants have created and contributed to quintessential public and private nuisances through their decades-long deception.

1. Nuisance Liability Under Maryland Law Can Arise from Knowing Misleading Promotion of Products for Dangerous Uses, and Is Not Limited to Nuisances Created by a Defendant's Use of Land.

The Baltimore City Circuit court dismissed Baltimore's public and private nuisance claims principally based on the incorrect premises that "nuisance claims in Maryland must relate to a defendant's use of land," and that manufacturers cannot create actionable nuisances by deceptively promoting dangerous products. E.23.

Maryland law does not impose such restrictions, however, and the reasoning underlying the decision below does not support imposing them.

Maryland courts have long endorsed a broad view of the conduct that may gives rise to a nuisance,[7] in line with the Restatement. *See* Restatement § 821B cmt. b (nuisance liability reaches a "diversified group" of misconduct, including "shooting of fireworks" and "indecent exhibitions"). That broad view is in accord with the principle that nuisances are defined by "reference to the interests invaded," and "not to any particular kind of act" causing the invasion. E.347, Prosser, *Handbook of Law of Torts* 573 (4th ed. 1971); *see also Tadjer*, 300 Md. at 551 (citing Prosser on nuisance).[8] For the same reason, nuisance liability attaches to "every

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[7] *See, e.g.*, *Tadjer*, 300 Md. at 551–52 ("practice of medicine by one not qualified," "public profanity," "eavesdropping on a jury" (quotations omitted)); *400 E. Baltimore St., Inc. v. State*, 49 Md. App. 147, 154 (1981) ("publication and exhibition of lewd and obscene words and writings"); *Maxa v. Commissioners of Harford Cnty.*, 158 Md. 229, 148 A. 214, 215 (1930) ("continuously and habitually occup[ying]" a public landing "by storing and placing therein boats, vessels, timber, and lumber . . . preventing the public use of the portion so covered"); *Cochrane v. City of Frostburgh*, 81 Md. 54, 31 A. 703, 704 (1895) (permitting "large numbers of horses, cows, hogs, and horned cattle . . . to run at large upon the streets"); *Raynor v. Dept. of Health*, 110 Md. App. 165, 193 (1996) (keeping of biting ferret); *Collins v. Tri-State Zoological Park of W. Md., Inc.*, 514 F.Supp.3d 773, 780–81 (D. Md. 2021) ("mistreatment of animals").

[8] *See also, e.g.*, *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 594 (Tex. 2016) ("[T]he term 'nuisance' does not refer to the 'wrongful act' or to the 'resulting damages,' but only to the legal injury . . . that may result from the wrongful act . . . ."); *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 316 P.3d 707, 715 (Kan. 2013) ("[W]hether an activity constitutes a nuisance is generally determined by reference to the interest invaded and the harm inflicted, not the nature

person who does or directs the doing of an act that will of necessity constitute or create a nuisance." *Maenner v. Carroll*, 46 Md. 193, 215 (1877); *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 394 (1946) (same); *State v. Exxon Mobil Corp.* (*Exxon*), 406 F.Supp.3d 420, 468 (D. Md. 2019) (Hollander, J.) (same). Liability in turn can arise from "all acts that are a cause of [the] harm." Restatement § 834 & cmt. b; *Exxon*, 406 F.Supp.3d at 468.

Based on these principles and contrary to the circuit court's holding below, Maryland does not limit nuisance liability to "cases involving a defendant's use of land" or immunize manufacturers of products that create a nuisance. E.23.[9] Various courts have unsurprisingly found product-based nuisance claims viable under Maryland law. *See Exxon*, 406 F.Supp.3d at 467–69 ("manufacture, marketing, and supply" of a gasoline additive with "extensive knowledge of [its] environmental hazards"); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *9–10 (D. Md. Mar. 31, 2020) (nonprecedential) ("manufactur[ing],

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or quality of the defendant's acts."); *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 669 (Wis. 2005) ("[A] cause of action in nuisance is predicated upon a particular type of injurious consequence, not the wrongful behavior causing the harm."); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 273–74 (Utah 1982) (same).

[9] Some courts have commented that public nuisance "has historically been linked to the use of land." *E.g.*, *Hunter v. Johnson & Johnson*, 499 P.3d 719, 724 (Okla. 2021). Regardless whether that contention is accurate, however—and there are reasons to doubt that it is, *see, e.g.*, nn.7, 8, *supra*—Maryland courts have not so limited nuisance liability.

distribut[ing], market[ing], and promot[ing] PCBs," while withholding "extensive knowledge about [their] harmful effects"); *In re Kia Hyundai Vehicle Theft Litig.*, 2023 WL 8126870, at *1, *7–8 (C.D. Cal. Nov. 17, 2023) ("knowingly s[elling]" vehicles with "design flaws that allow thieves to [quickly] steal [them]," resulting in rampant theft and crime that unreasonably interfered with public's right "to safely use their streets, sidewalks, and businesses"). Manufacturers do not enjoy special immunity from nuisance liability; producing, promoting, and selling harmful products can create conditions that unduly interfere with public rights or private property just as effectively as a misuse of real property.

Maryland is not alone in recognizing nuisance claims based on analogous facts. Courts nationwide have overwhelmingly concluded that manufacturers can create actionable nuisances through deceptive promotion of dangerous products, including lead paint, firearms, asbestos, cigarettes, and chemicals. That view accords with the prevailing judicial consensus today, which has overwhelmingly declined to limit nuisance liability to the use of land. *See also, e.g.*, *MTBE II*, 725 F.3d at 121–23 (gasoline additives); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141–1144 (Ohio 2002) (firearms); *People v. ConAgra Grocery Prods. Co.* (*ConAgra*), 227 Cal.Rptr.3d 499, 534–43 (Ct. App. 2017) (lead paint); *Northridge Co. v. W.R. Grace & Co.*, 556 N.W.2d 345, 351–52 (Wis. Ct. App. 1996) (asbestos); *Evans v. Lorillard Tobacco Co.*, 2007 WL 796175, at *1, *18–19 (Mass. Super. Ct. Feb. 7,

2007) (nonprecedential) (cigarettes); *In re JUUL Labs, Inc.*, 497 F.Supp.3d 552, 645–51 (N.D. Cal. 2020) (e-cigarettes).[10] Fossil-fuel products are no different. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, 2024 WL 3204275, at *36 (Colo. Dist. Ct. June 21, 2024) (nonprecedential) (*Boulder I*) (applying Restatement and holding that Colorado law does not "categorically foreclose[] nuisance liability for promoting or selling lawful [fossil-fuel] products"). The limitations on nuisance adopted by the court below are not supported by Maryland precedent or the development of common law more broadly.

2. The Policy Reasons Asserted Below Not to Recognize a Nuisance Are Not Persuasive.

None of the policy arguments relied on below to limit nuisance liability to conditions arising from a defendant's use of land have merit. First, there is nothing novel about nuisance claims arising from conditions created by a defendant's products. *Cf.* E.23. To the contrary, "historical examples abound of products that were held to create a public nuisance." *Delaware v. Monsanto Co.*, 299 A.3d 372, 383, 383 n.70 (Del. 2023); *see also id.* at 387 (reversing dismissal of public nuisance

[10] There are a few exceptions. *E.g.*, *Hunter*, 499 P.3d at 724–31; *Rhode Island v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 457–58 (R.I. 2008). Those types of cases are distinguishable because they either turned on state-specific nuisance statutes; involved nuisances arising from unforeseeable or criminal misuse of products by third parties; did not adequately allege the violation of a public right; or did not involve allegations that a manufacturer promoted dangerous products while affirmatively misrepresenting their risks.

claim alleging "Monsanto substantially participated in the creation of a public nuisance by manufacturing and selling PCBs that it sold to industry and consumers and knew PCBs would eventually end up causing long lasting contamination to state lands and waters"). At common law, a defendant could create an actionable nuisance by selling harmful products such as "meat, food, or drink" "injurious to health," "obscene pictures, prints, books[,] or devices," or "horse[s] affected with glanders"; and through publication of "false reports" that "create false terror or anxiety." *See* E.339–43, H.G. Wood, *The Law of Nuisances*, 72–73, 75, 143, 147 (1875) (collecting cases); *see also Becker v. State*, 363 Md. 77, 89 (2001) (Wood's treatise incorporates "fundamental principle[s] of nuisance. . . reflected in Maryland law."); *E. Coast Freight Lines*, 187 Md. at 398 (citing Wood for a different "general rule" of nuisance). "As early as the 1660s," in fact, treatises defined "common nuisances" to include "sell[ing] products unfit for human consumption." Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 738 (2023).

Second, product-based nuisance claims do not impermissibly blur "the lines between public nuisance law and product liability." E.23. Where, as here, nuisance "liability is premised on [a defendant's] promotion of [a hazardous product] for [a] use with knowledge of the hazard that such use would create," the nuisance-creating conduct "is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." *Cnty. of Santa Clara v. Atl.*

Richfield Co., 40 Cal.Rptr.3d 313, 328 (Ct. App. 2006); *see ConAgra*, 227 Cal.Rptr.3d at 594 (a "public nuisance action is not a disguised products liability action"). Here, Appellants allege Defendants took affirmative steps over decades to obfuscate their products' catastrophic dangers. *E.g.*, E.110–26, ¶¶141–70. In any event, overlapping conduct often gives rise to multiple causes of action. *See, e.g.*, *Exxon*, 406 F.Supp.3d at 458–69 (upholding public nuisance, failure-to-warn, and design-defect claims); *Baltimore v. Monsanto*, 2020 WL 1529014, at *8–11 (same).

Third, the circuit court misconstrued relevant case law. The court distinguished *Exxon* and *Baltimore v. Monsanto* on the grounds that they supposedly involved "a tight nexus between the sale of a product and the contamination of local lands and waters." E.22. As those decisions confirm, however, Maryland nuisance law does not demand "a tight nexus"; it requires only that the defendant "substantially participated in the creation of the nuisance." *Baltimore v. Monsanto*, 2020 WL 1529014, at *9 (quoting *Exxon*, 406 F.Supp.3d at 468); *see* Restatement § 834 & cmt. d (similar). The Complaint easily meets this requirement by alleging that Defendants' failure to warn and deceptive promotion "drove [fossil fuel] consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore IV*, 31 F.4th at 234.

Fourth, nuisance liability does not turn on whether fossil fuels are "lawful" or federally regulated. *Compare* E.22, *with Boulder I*, 2024 WL 3204275, at *36

(declining to create "exception" for "nuisances involving lawful products"); *see also* § II.A.1, *supra*. What matters is that Defendants' deceptive conduct created harmful conditions in Baltimore that significantly impair public rights and private property. *See Tadjer*, 300 Md. at 552; *see also Branch*, 657 P.2d at 274 ("It is of no consequence that a business which causes a nuisance is a lawful business.").

3. "Control Over the Instrumentality of the Nuisance" Is Not an Element of Nuisance Claims in Maryland.

Finally, although the circuit court declined to resolve whether a defendant must "exercise[] control over the instrumentality that caused the nuisance," E.23, the answer is clearly no. A defendant who "substantially participate[s] in the creation of the nuisance," is liable under Maryland law, even if it "no longer has control over the nuisance-causing instrumentality." *Exxon*, 406 F.Supp.3d at 468;[11] *see also* Restatement § 834 & cmt. e; E.338, Wood, *supra*, at 89 (a defendant need not "commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely"). Numerous courts have rejected analogous attempts to graft a "control" element onto nuisance claims.[12]

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[11] *See also Baltimore v. Monsanto*, 2020 WL 1529014, at *9 ("[C]ontrol is not a required element to plead public nuisance under Maryland law."); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256–57 (D. Md. 2000) (holding that nuisance liability may attach even if the "party no longer has control of the work or product creating the public nuisance").

[12] *See, e.g.*, *Boulder I*, 2024 WL 3204275, at *37; *Delaware v. Monsanto*, 299 A.3d at 383–84; *In re MTBE* (*MTBE I*), 175 F.Supp.2d 593, 628–29 (S.D.N.Y. 2001);

Regardless, Appellants *do* allege, and will prove, that Defendants exercised control over the instrumentality that caused the nuisances. That nuisance-causing instrumentality is Defendants' deceptive business practices, which caused Appellants' injuries and which Defendants controlled. *Compare* E.89–90, E.147–48, ¶¶100–02, 221, *with In re JUUL Labs*, 497 F.Supp.3d at 649 ("instrumentality of the nuisance" as defendants' tortious promotion and sale of a dangerous product, rather than the "product itself"); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019); *Cincinnati*, 768 N.E.2d at 1143; *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *10 (R.I. Super. Ct. Aug. 16, 2019) (nonprecedential). Appellants have stated claims for public and private nuisance.

B. Appellants State Claims for Trespass.

A trespass is actionable under Maryland law "[w]hen a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land." *Rosenblatt*, 335 Md. at 78; *see* Restatement § 158 (similar); *Bramble v. Thompson*, 264 Md. 518, 522 (1972) (citing Restatement for guidance on trespass). The complaints adequately allege such interference.

ConAgra, 227 Cal.Rptr.3d at 594; *Northridge*, 556 N.W.2d at 351–52. Although some courts have concluded otherwise, *e.g.*, *Hunter*, 499 P.3d at 728; *Lead Indus., Ass'n*, 951 A.2d at 449, such cases are distinguishable for the reasons described in footnote 10.

Defendants' failure to warn and deceptive promotion drove fossil-fuel consumption, which exacerbated climate impacts in Appellants' communities. E.139–46, E.166–68, ¶¶197–217, 282–89 (Baltimore); E.1153–60, E.1172–73 ¶¶239–42, 283–89 (Annapolis); E.1335–46, E.1358–59 ¶¶239–245, 286–92 (Anne Arundel County). Defendants are thus liable for trespass because they "caused flood waters, extreme precipitation, saltwater, and other materials" to invade and harm property Appellants own and have possession of. E.166, ¶284 (Baltimore); E.1172, ¶285 (Annapolis); E.1358, ¶288 (Anne Arundel County).

As with nuisance, courts in Maryland and elsewhere have affirmed the viability of trespass claims against manufacturers based on their tortious production, promotion, or sale of products. *E.g.*, *Exxon*, 406 F.Supp.3d at 471 (trespass claim stated under Maryland law based on "defendants' manufacture, distribution, or supply of MTBE gasoline that was subsequently released by another entity"); *Baltimore v. Monsanto*, 2020 WL 1529014, at *11–12 (trespass by PCB chemicals).[13] Courts have likewise correctly upheld trespass claims alleging climate impacts caused by deceptive promotion of fossil fuels. *E.g.*, *Boulder I*, 2024 WL 3204275, at *38.

[13] *See also, e.g.*, *Delaware v. Monsanto*, 299 A.3d at 389 (trespass claim against manufacturer who allegedly caused trespasses through production, promotion, and sale of PCBs); *Oregon v. Monsanto Co.*, 2019 WL 11815008, at *9 (Or. Cir. Ct. Jan. 9, 2019) (nonprecedential) (same); *MTBE II*, 725 F.3d at 120 (gasoline); *New York v. Fermenta ASC Corp.*, 238 A.D.2d 400, 404 (N.Y. App. Div. 1997) (herbicides).

"[T]he link" here between Defendants' deceptive conduct and the alleged trespasses is not "to[o] attenuated" to support liability. E.32. When a foreign object invades a plaintiff's land, a defendant need only "have some connection with or some control over that object in order for an action in trespass to be successful." *Rockland Bleach & Dye Works Co. v. H. J. Williams Corp.*, 242 Md. 375, 387 (1966); *Exxon*, 406 F.Supp.3d at 471 (same). A sufficient connection exists when a defendant knowingly "caus[es] something to enter the [plaintiff's] land," whether or not the defendant intended that result. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013) (quotations omitted); *see* Restatement § 158 cmt. i. Appellants' complaints plead that connection: Defendants' failure to warn and deceptive promotion caused climate impacts in Baltimore, the City of Annapolis, and Anne Arundel County that invaded and damaged property Appellants own and possess, just as Defendants accurately predicted would occur on the eastern seaboard. *E.g.*, E.83–86, E.90–110, E.139–46, E.166–68, ¶¶77–83, 103–40, 197–217, 283–89. Defendants' own scientists alerted them to the catastrophic effects of climate change decades ago, triggering Defendants' deceptive acts designed to protect their profits.

Nor is there any requirement that a defendant own, produce, or manufacture the physical thing that enters a plaintiff's land. *See* E.32. Rather, trespass liability can arise from entry by water, snow, mud, or other natural materials. *See, e.g.*, *Kurpiel v. Hicks*, 284 Va. 347, 350, 355–57 (2012) (floodwater); *Shaheen v. G & G*

Corp., 230 Ga. 646, 648 (1973) (rainwater and dirt); *Mapco Express, Inc. v. Faulk*, 24 P.3d 531, 538, 540, 546 (Alaska 2001) (snowfall); Restatement § 158 cmt. i & ill. 5. Appellants' trespass claims are adequately pleaded.

C. Appellants Have Stated Claims for Negligent and Strict Liability Failure-to-Warn.

The Court should also permit the Appellants' failure-to-warn claims to proceed. Under settled Maryland law, Defendants owed a duty to issue adequate warnings about their products' climate impacts and are liable for foreseeable injuries to bystanders like Appellants. Recognizing such a duty does not create an indeterminate class of potential plaintiffs or impose a duty to warn the world.

"Maryland has long recognized a duty on the part of sellers to warn of latent dangers attendant upon a proper use of the products they sell, where injury is foreseeable." *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 287 (2002) (quotations omitted). Under the Restatement's "general standard," manufacturers owe a duty "not only to those for whose use the [product] is supplied but also to third persons whom the supplier *should expect to be endangered by its use*." *Ga. Pac., LLC v. Farrar*, 432 Md. 523, 531 (2013) (quoting Restatement § 388 cmt. d). Maryland law is clear that a plaintiff may bring a products-liability claim for injuries foreseeably caused by a third party's use of a dangerous product. *See, e.g.*, *Ga.-Pac. Corp. v. Pransky*, 369 Md. 360, 363–68 (2002); *ACandS, Inc. v. Godwin*, 340 Md. 334, 348–56 (1995); *Valk Mfg. Co. v.*

Rangaswamy, 74 Md. App. 304, 323 (1988), *rev'd on other grounds*, 317 Md. 185 (1989); *Moran v. Faberge, Inc.*, 273 Md. 538, 554 (1975).

Appellants allege Defendants knew for decades that the intended use of their fossil fuels would cause devastating climate-change impacts, including in coastal communities like Appellants'. *E.g.*, E.90–110, E.155, E.164 ¶¶103–40, 239–40, 272–73. Defendants nonetheless embarked on a decades-long deception campaign that "prevent[ed] consumers from recognizing" those risks. *E.g.*, E.156, E.165 ¶¶242, 275. Taken as true, those allegations establish a duty to warn. *See, e.g.*, *Exxon*, 406 F.Supp.3d at 462 (manufacturer owed the State of Maryland a duty to warn where it knew its products would cause widespread environmental harms); *Monsanto*, 2020 WL 1529014, at *11 (similar duty owed to Baltimore). Through that conduct, Defendants breached their duty by failing to issue any warnings about their products' climate impacts, causing foreseeable injuries to bystanders like Appellants.

Contrary to the Baltimore circuit court's holding below, Defendants need not warn "everyone contributing to climate change" to satisfy their duty to Appellants. E.26. They need only issue "adequate warnings" about the climate impacts of "the products *they* sell," *Utica Mutual*, 145 Md. App. at 287–88 (emphasis added) (quotations omitted), and the "adequacy of [a] warning[]" is typically "a factual issue for submission to the jury," *Halliday v. Sturm, Ruger & Co.*, 138 Md. App. 136, 159 (2001). Defendants could have—at a minimum—reduced harms to Appellants by

issuing warnings to their own customers about their own products' climate risks. *E.g.*, *Moran*, 273 Md. at 554 (where defendant's cologne could foreseeably ignite and injure bystanders, defendant "should have warned consumers of this latent flammability danger"). They failed to take those basic steps, breaching their duty.

In any event, Appellants belong to an identifiable group whose injuries Defendants actually foresaw: communities on the U.S. East Coast. E.91–92, E.103–04, ¶¶105, 127. Some Defendants even anticipated lawsuits in response to climate impacts along "the eastern coast of the U.S." *See* E.108–09, ¶137. Therefore, Appellants' claims avoid concerns about "indeterminate class[es]." *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 671–72 (2000); *see Kennedy Krieger*, 460 Md. at 642.[14]

The "classic factors" Maryland courts use "to determine whether a duty exists" confirm the result that a duty is owed here. *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 633–34, 650–57 (2018) (listing factors) (quoting *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016)); *see also Farrar*, 432 Md. at 527 (applying factors to failure-to-warn claims). First, Appellants' climate-related harms were foreseeable to Defendants, who actually foresaw as early as the 1960s the climatic

[14] This Court need not—and should not—decide whether that duty extends to other hypothetical plaintiffs, which will turn on case-specific factors including foreseeability and certainty of injury. *See Farrar*, 432 Md. at 536 n.2; *Valentine v. On Target, Inc.*, 353 Md. 544, 556 (1999) (existence of duty turns on "specific facts alleged in this particular case").

havoc the intended use of their fossil fuels would wreak, particularly in coastal communities like Appellants'. E.90–110, E.155, E.164 ¶¶103–40, 239–40, 272–73 (Baltimore); E.1064–87, E.1168, E.1170 ¶¶63–104, 263–64, 274–75 (Annapolis); E.1244–69, E.1354, E.1356 ¶¶64–105, 266–67, 277–78 (Anne Arundel County). Foreseeability is "the principal determinant of duty" here because Defendants knowingly created risks of physical harm, not just "a risk of economic loss," *Hancock v. Mayor & City Council of Baltimore*, 480 Md. 588, 604–05 (2022) (citations omitted), which "weighs heavily in favor of imposing a duty," *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 11 (2015) (quotations omitted).

The remaining factors confirm Defendants owed Appellants a duty to warn. Appellants have already suffered numerous climate-related harms. *See May*, 446 Md. at 12 (considering "degree of certainty" plaintiff suffered injury). And Defendants have earned "moral blame" by misleading consumers about their products' risks to maximize profits. *Id.* at 16–17; *see* E.156, E.165, ¶¶242, 275 (Defendants embarked on a decades-long deception campaign that "prevent[ed] consumers from recognizing" their products' risks). This suit also advances a "policy of preventing future harm," *Kiriakos*, 448 Md. at 490, because Defendants' failure to warn continues unchecked.

The costs and benefits of providing adequate warnings also support imposing a duty here. "Where the magnitude of potential harm is great, 'even a relatively

remote possibility' of the harm occurring may be sufficient to tip the scales 'in favor of duty,'" and here the threatened harms are both certain and grave. *Brady v. Walmart Inc.*, 2024 WL 2273382, at *24 (D. Md. May 20, 2024) (citations omitted). And as this Court has "long recognized," the cost of product warnings are usually "minimal, amounting only to the expense of adding some more printing to a label." *May*, 446 Md. at 16 (quotations omitted).[15]

There is a more than sufficient "connection" between Defendants' misconduct and Appellants' injuries. *Kiriakos*, 448 Md. at 488. A "close connection . . . is not required" here because Defendants' conduct created "the risk [of] death [and] personal injury." *Id.* Instead, the immense "magnitude of th[at] risk" justifies "the imposition of a duty in favor of a large class of persons." *Id.* (quotations omitted). Appellants fall squarely within that class because the complaints plead "proximate caus[ation]" *id.*, alleging that Defendants' failure to warn and deceptive promotion "drove [fossil-fuel] consumption, and thus greenhouse gas pollution, and thus climate change," *Baltimore IV*, 31 F.4th at 233–34. Those allegations suffice at the pleading stage, especially because "proximate cause," including "the substantial factor inquiry," "is ordinarily a jury question." *Kiriakos*, 448 Md. at 470–71; *compare Lab'y Corp. of Am. v. Hood*, 395 Md. 608, 627 (2006) ("[A]lthough the

[15] Insurance availability is at best unclear, but the Court need not consider this factor at the pleading stage. *See Kiriakos*, 448 Md. at 492 (declining to address factor without "evidence in the record").

existence of duty is a question of law, the answer to that question . . . is necessarily fact-based . . . ."). Every relevant factor indicates Defendants owed Appellants a duty to warn.

CONCLUSION

This Court should reverse the circuit courts' dismissals of Appellants' claims for public and private nuisance, trespass, and strict liability and negligent failure to warn, and remand for further proceedings.

Respectfully submitted,

[SIGNATURE PAGES FOLLOW]

/s/ Sara Gross
Sara Gross (CPF No. 412140305)
Chief, Affirmative Litigation Division
BALTIMORE CITY LAW DEPT.
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
Tel: (410) 396-3947
Email: sara.gross@baltimorecity.gov

Victor M. Sher (pro hac vice)
Matthew K. Edling (pro hac vice)
Katie H. Jones (pro hac vice)
Martin D. Quiñones (pro hac vice)
Quentin C. Karpilow (pro hac vice)
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
katie@sheredling.com
marty@sheredling.com
quentin@sheredling.com

Andrew D. Levy (CPF No. 8205010187)
Anthony J. May (CPF No. 1512160094)
BROWN GOLDSTEIN LEVY LLP
120 E. Baltimore Street, Suite 2500
Baltimore, Maryland 21202
Tel: (410) 962-1030
Fax: (410) 385-0869
Email: adl@browngold.com
amay@browngold.com

Attorneys for Appellant Mayor and City Council of Baltimore

/s/ Gregory J. Swain
Gregory J. Swain (CPF No. 9106200276)
Hamilton F. Tyler (CPF No. 9012190326)
ANNE ARUNDEL COUNTY OFFICE OF LAW
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
Tel: (410) 222-7888
Fax: (410) 222-7835
Email: lwswai00@aacounty.org
htyler@aacounty.org

Victor M. Sher (pro hac vice)
Matthew K. Edling (pro hac vice)
Katie H. Jones (pro hac vice)
Martin D. Quiñones (pro hac vice)
Quentin C. Karpilow (pro hac vice)
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
katie@sheredling.com
marty@sheredling.com
quentin@sheredling.com

Attorneys for Appellant Anne Arundel County

/s/ D. Michael Lyles
D. Michael Lyles (CPF No. 9606050272)
CITY OF ANNAPOLIS OFFICE
OF LAW
160 Duke of Gloucester Street
Annapolis, MD 21401
Tel: (410) 263-7954
Fax: (410) 268-3916
Email: dmlyles@annapolis.gov

Victor M. Sher (pro hac vice)
Matthew K. Edling (pro hac vice)
Katie H. Jones (pro hac vice)
Martin D. Quiñones (pro hac vice)
Quentin C. Karpilow (pro hac vice)
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
katie@sheredling.com
marty@sheredling.com
quentin@sheredling.com

Attorneys for Appellant City of Annapolis

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I HEREBY CERTIFY that:

1. This petition contains 12,970 words, excluding the parts exempted from the word count by Rule 8-503.
2. This petition complies with the requirements stated in Rule 8-112.

/s/ Martin Quiñones
Martin Quiñones (pro hac vice)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June 2025, a copy of the foregoing document was filed and served electronically via the Court's MDEC system, on all counsel of record.

/s/ Martin Quiñones
Martin Quiñones (pro hac vice)