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

EXTRACT OF RECORD – VOLUME 2 (part 1)

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IN THE CIRCUIT COURT
FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,* vs. BP P.L.C., *et al.*, *Defendants.*	Case No. 24-C-18-004219 (HEARING REQUESTED)

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND REQUEST FOR HEARING[1]

Defendants, BP p.l.c. (#1), BP America Inc. (#2), BP Products North America Inc. (#3), Chevron Corporation (#7), Chevron U.S.A. Inc. (#8), CITGO Petroleum Corporation (#13), CNX Resources Corp. (#24), CONSOL Energy Inc. (#25), CONSOL Marine Terminals LLC (#26), ConocoPhillips (#14), ConocoPhillips Company (#15), Louisiana Land & Exploration Co. LLC (#16), Crown Central, LLC (#5), Crown Central New Holdings LLC (#6), Exxon Mobil Corporation (#9), ExxonMobil Oil Corporation (#10), Hess Corporation (#23), Marathon Petroleum Corporation (#21), Speedway LLC (#22), Marathon Oil Corporation (#20), Marathon Oil Company (#19), Phillips 66 (#17), Phillips 66 Company (#18), Shell plc (#11), and Shell USA, Inc. (#12), by their undersigned attorneys and pursuant to Maryland Rules 2-311 and 2-322(b)(2), move to dismiss the Complaint filed by Plaintiff, the Mayor and City Council of Baltimore, for failure to state a claim upon which relief can be granted. For the reasons set forth in the

[1] Several Defendants are contemporaneously filing motions to dismiss on the grounds that they are not subject to personal jurisdiction in Maryland. Defendants submit this motion subject to, and without waiver of, any jurisdictional objections.

accompanying Memorandum of Law, this Court should grant this Motion and dismiss all claims against Defendants with prejudice.

REQUEST FOR HEARING

Pursuant to Maryland Rule 2-311(f), Defendants respectfully request a hearing on all issues raised in this Motion and the accompanying Memorandum of Law.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2023, a copy of the foregoing was served on all counsel of record via email (by agreement of the parties).

Alison Schurick (e-signature with authority)
Alison Schurick

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,* vs. BP P.L.C., *et al.*, *Defendants.*	Case No. 24-C-18-004219

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED[1]

Defendants, by their undersigned attorneys and pursuant to Maryland Rule 2-322(b)(2), file this Memorandum of Law in Support of their Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted. For the reasons set forth below, this Court should dismiss all claims against Defendants with prejudice.

[1] Several Defendants are contemporaneously filing motions to dismiss on the grounds that they are not subject to personal jurisdiction in Maryland. Defendants submit this motion subject to, and without waiver of, any jurisdictional objections.

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I. INTRODUCTION

Plaintiff Mayor and City Council of Baltimore seeks to impose liability on more than two dozen energy companies under *state* law for the alleged effects of *global* climate change. While the state-law labels Plaintiff attaches to its claims may be familiar, the substance and reach of the claims are extraordinary. Plaintiff asks this Court to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people beyond the State's jurisdiction rely to heat their homes, power their hospitals and schools, produce and transport their food, and manufacture countless items essential to the safety, wellbeing, and advancement of modern society. Plaintiff's sweeping claims stretch state tort law well beyond its permissible scope. Allowing such claims to proceed would not only usurp the power of the legislative and executive branches (both federal and state) to set climate policy, but would also do so retrospectively and far beyond the geographic boundaries of Maryland. It is therefore unsurprising that "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). The Court should likewise dismiss this Complaint.

First, although Plaintiff purports to plead state-law claims, state law cannot constitutionally apply here and thus is preempted. As the U.S. Supreme Court has long made clear, the federal Constitution's structure generally precludes States from using their own laws to resolve disputes caused by out-of-state and worldwide conduct. Thus, in "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Consistent with this principle, the U.S.

Supreme Court has consistently recognized that one State cannot apply its own law to claims that "deal with air and water in their ambient or interstate aspects"; in that context, "borrowing the law of a particular State would be inappropriate." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421–22 (2011) ("*AEP*"); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") ("basic interests of federalism . . . demand[]" this result). Such matters "involving 'uniquely federal interests'" are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted).

Every federal court to consider this question has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. Most recently, the Second Circuit affirmed dismissal of a case raising substantially similar claims. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Describing "the question before us" as "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under [state] law," the court held: "Our answer is simple: no." *Id.* at 91. This is because "disputes involving interstate air . . . pollution," such as climate change litigation, "implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *Id.* at 91–92. When a plaintiff seeks "to hold [energy companies] liable, under [state] law, for the *effects of emissions made around the globe*," "[s]uch a sprawling case is simply beyond the limits of state law." *Id.* at 92 (emphasis added).

The same is true here: The federal constitutional system does not permit a State—let alone a municipality—to apply its laws to claims seeking redress for injuries allegedly caused by interstate or worldwide emissions. But Plaintiff here seeks to impose liability based on the theory

that Defendants allowed—through alleged deception and failure to warn—emissions to enter the worldwide atmosphere at a level that Plaintiff believes to be too high and thus unlawful. The Constitution bars the application of state law here to avoid subjecting the same interstate and worldwide emissions to adjudication under conflicting state laws, and thus preempts the state-law causes of action Plaintiff asserts.

Second, Plaintiff's claims are preempted by the Clean Air Act. In an analogous matter, the U.S. Supreme Court held more than thirty years ago that the Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). The preemptive scope of the Clean Air Act is materially identical to that of the Clean Water Act. The "Clean Air Act entrusts such complex balancing" of total permissible nationwide greenhouse gas emissions "to EPA." *AEP*, 564 U.S. at 427. The Clean Air Act thus precludes Plaintiff's attempt to use Maryland law to obtain damages for injuries allegedly caused by innumerable worldwide sources of greenhouse gas emissions.

Third, Plaintiff's claims raise vital questions of public policy that are nonjusticiable under the political question doctrine. Indeed, the sweeping policy justifications that Plaintiff asserts in support of its claims underscore that those claims are not suitable for judicial resolution. Plaintiff's claims lack the judicially discoverable and manageable standards required to ensure that the Court does not overstep its constitutional bounds and touch upon issues—including how to balance environmental considerations with interests of economic growth, energy independence, and national security—committed to the political branches. *See* Md. Code Ann., Envir. § 2-1201(9)–(11) (finding that important aspects of emissions should be "regulated on a national and international level" in part due to economic concerns).

Fourth, Plaintiff's Complaint improperly invites this Court to "expand traditional tort concepts beyond manageable bounds" to accommodate novel and unsupported theories of liability that would impose on Defendants a "duty to the world" that Maryland courts have rejected. *Gourdine v. Crews*, 405 Md. 722, 750 (2008). Plaintiff also fails to allege essential elements of its state-law claims.

Plaintiff's nuisance claims fail because Maryland appellate courts have never recognized such a claim based on the production, promotion, and sale of a lawful product, as opposed to the use of land. This Court should follow courts across the country in refusing to expand nuisance law into "a monster that would devour in one gulp the entire law of tort." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). Additionally, Plaintiff has not alleged (and cannot allege) facts showing that Defendants exercised sufficient control over the "instrumentality" of the alleged nuisance—the worldwide global greenhouse gas emissions that allegedly have contributed to climate change.

Plaintiff's failure to warn claims fail because Plaintiff's novel theory seeks to impose an unprecedented duty of care in direct contravention of controlling precedent that reserves such expansions of law for the legislature. In any event, there is no duty to warn where, as here, the alleged impact of fossil fuel use on the global climate has been "open and obvious" for decades.

Plaintiff's design defect claims fail because Plaintiff does not even attempt to allege that its injuries resulted from any flaw in how Defendants *designed* their fossil fuel products. To the contrary, it affirmatively concedes that emissions result from the normal and intended use of fossil fuels, and it cannot dispute that emissions are an inherent characteristic of combusting fossil fuels.

Plaintiff's trespass claim fails because, among other reasons, it has failed to adequately plead that Defendants intruded or caused an intrusion on Plaintiff's land—and the vast majority of damages Plaintiff seeks for the alleged intrusion are speculative.

Finally, Plaintiff's claim under the Maryland Consumer Protection Act ("MCPA") fails because Plaintiff does not allege that it relied on any of the purported misrepresentations, and because the alleged misrepresentations are not about Defendants' products, were not made in the course of a sale, and fall outside the applicable three-year statute of limitations.

* * *

As a federal district court judge remarked in dismissing similar claims, "the development of our modern world has literally been fueled by oil and coal," and "[a]ll of us have benefitted" from their development—including Plaintiff. *City of Oakland*, 325 F. Supp. 3d at 1023; *see also City of New York*, 993 F.3d at 86 ("[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming."). Fossil fuel production has supported the safety, security, and wellbeing of our Nation—to say nothing of the billions of consumers worldwide. Plaintiff asks this Court to ignore the vital role fossil fuels play in the world economy and, instead, to impose liability and damages on a select group of energy companies under *Maryland* law because of the *global* production, promotion, distribution, and end-use emissions of those lawful products. This, it cannot do. The Court should dismiss the Complaint with prejudice.

II. BACKGROUND

This lawsuit is part of a long series of ill-conceived climate change-related actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*,

696 F.3d 849 (9th Cir. 2012). *Every federal court to consider these actions on motions to dismiss has dismissed* them as nonjusticiable or non-viable.

The first such lawsuit unsuccessfully asserted state and federal nuisance claims against automobile companies for alleged contributions to climate change. *See California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing for failing to state a claim and because claims were nonjusticiable). The next round of litigation asserted claims against direct emitters, such as power companies, but that effort, too, failed. *See AEP*, 564 U.S. at 429 (holding that claims seeking abatement of alleged public nuisance of climate change fail because the federal common law that necessarily governs was displaced by the Clean Air Act); *Kivalina*, 663 F. Supp. 2d at 863 (dismissing as nonjusticiable and for lack of standing federal common-law nuisance claims against energy and utility companies); *Kivalina*, 696 F.3d at 854 (affirming dismissal and noting that plaintiffs alleged defendants "misle[d] the public about the science of global warming").

Undeterred, Plaintiff reaches even further back in the supply chain by suing companies that provide the raw material used by direct emitters—that is, the fuel that billions of people depend on every day. Over the past six years, States and municipalities across the country, largely represented by the same private counsel, have brought more than two dozen similar cases against energy companies seeking damages for the alleged impacts of climate change. Only a few of these cases have proceeded to the merits, but, in those that have, *federal courts uniformly have dismissed them for failure to state a claim. See City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81; *City of Oakland*, 325 F. Supp. 3d at 1017, *vacated on other grounds*, 960 F.3d 570. *But see City & Cty. of Honolulu v. Sunoco LP*, No. 1CCV-20-000380, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022), *appeal pending*, SCAP-22-0000429 (Haw.). As here,

plaintiffs in those cases alleged that the defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," but "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *City of New York*, 993 F.3d at 86–87; *see also, e.g.*, Compl. ¶¶ 1, 6, 102, 145. And, like Plaintiff here, those plaintiffs suggested that the defendants are "primarily responsible for global warming and should bear the brunt of these costs," even though "every single person who uses gas and electricity . . . contributes to global warming." *City of New York*, 993 F.3d at 86; *see also, e.g.*, Compl. ¶¶ 7, 91–102.

The Complaint here asserts eight causes of action: (1)–(2) public and private nuisance, Compl. ¶¶ 218–36; (3)–(4) strict liability and negligent failure to warn, *id.* ¶¶ 237–48, 270–81; (5)–(6) strict liability and negligent design defect, *id.* ¶¶ 249–69; (7) trespass, *id.* ¶¶ 282–90; and (8) violations of the MCPA, *id.* ¶¶ 291–98. Plaintiff seeks compensatory damages, equitable relief, including "abatement," penalties under the MCPA, punitive damages, disgorgement, and costs. *See id.*, Prayer for Relief.

Plaintiff has characterized this case as being about Defendants' alleged "promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign" and purported "concealment and misrepresentation of the products' known dangers." Br. in Opp., *BP P.L.C. v. Mayor & City Council of Baltimore*, No. 22-361, 2022 WL 17852486, at 15 (U.S. Dec. 19, 2022). But fundamentally, Plaintiff alleges that its *injuries* are "caused by anthropogenic greenhouse gas *emissions*." Compl. ¶¶ 36–39 (emphasis added). Emissions are, in Plaintiff's words, "[*t*]*he mechanism*" of its alleged injuries. *Id.* ¶ 39 (emphasis added). According to Plaintiff, "greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming," *id.* ¶ 3, and its purported injuries are "*all due* to anthropogenic global

warming," *id.* ¶ 8 (emphasis added).

Emissions, which Plaintiff alleges are the mechanism of its injuries, are the result of billions of daily choices—over more than a century and around the world, by governments, companies, and individuals—about what types of fuels to use and how to use them. Plaintiff candidly admits that *worldwide* conduct, not conduct that occurred in Maryland alone, caused its alleged injuries. Compl. ¶¶ 43–45, 178–80. As Plaintiff acknowledges, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *Id.* ¶ 246. Plaintiff's claims, therefore, seek to impose liability and damages for alleged conduct outside Maryland and, indeed, around the world.

III. ARGUMENT

The Court should dismiss Plaintiff's Complaint because the well-pleaded "allegations and permissible inferences, [even] if true . . . do not state a cause of action for which relief may be granted." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (citations omitted). "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Id.* (citations omitted). Nor may the Court consider "[m]ere conclusory charges that are not factual allegations." *MCB Woodberry Developer, LLC v. Council of Owners of Millrace Condominium, Inc.*, 253 Md. App. 279, 296 (2021) (citations omitted).

A. Plaintiff's Claims Are Preempted Because State Law Cannot Constitutionally Be Applied.

Because Plaintiff seeks damages for alleged harms caused by *interstate and international* emissions and *global* warming, its claims cannot be governed by state law. Under our federal

constitutional system, States cannot use their laws to resolve claims seeking redress for injuries allegedly caused by out-of-state and worldwide emissions. As the United States explained as *amicus* in this case, claims based on climate change-related injuries are "inherently federal in nature," and greenhouse gas "emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming." Oral Arg. Tr., *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 2021 WL 197342 (2021).

Federal law necessarily governs and preempts state-law claims seeking damages for interstate emissions. The U.S. Supreme Court has long held that—under the U.S. Constitution's federal structure—"a few areas, involving uniquely federal interests, are so committed by the Constitution . . . to federal control that state law is pre-empted." *Boyle*, 487 U.S. at 504 (citation omitted). These exclusively federal areas include "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," and other areas "in which a federal rule of decision is necessary to protect uniquely federal interests"; in such cases, "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 640–41. "[T]he Constitution implicitly forbids that exercise of power because the interstate nature of the controversy makes it inappropriate for state law to control." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498 (2019).

Applying this principle, the U.S. Supreme Court has long explained that a State cannot apply its law to claims dealing with "air and water in their ambient or interstate aspects," and in this area "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 421–22. The "basic interests of federalism . . . demand[]" that "the varying common law of the individual States" cannot govern such disputes. *Milwaukee I*, 406 U.S. at 105 n.6, 108 n.9; *see also Ouellette*, 479 U.S. at 488 ("interstate . . . pollution is a matter of federal, not state, law");

City of Milwaukee v. Illinois, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("state law cannot be used" to resolve such disputes).

Accordingly, "the basic scheme of the Constitution" requires that federal law govern disputes involving "air and water in their ambient or interstate aspects" because they are not "matters of substantive law appropriately cognizable by the states." *AEP*, 564 U.S. at 421. And Supreme Court precedent makes clear that "state law cannot be used" to resolve claims seeking redress for injuries allegedly caused by out-of-state pollution. *Milwaukee II*, 451 U.S. at 313 n.7.

For this reason, *every federal court* to consider this question has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. For example, the Second Circuit, in considering largely identical claims, squarely held that "a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law." *City of New York*, 993 F.3d at 91. The Second Circuit's decision is directly on point and demonstrates why Plaintiff's claims must be dismissed. There, the plaintiff alleged that certain energy companies (including some Defendants here) were liable under state law for injuries caused by global climate change because of their "production, promotion, and sale of fossil fuels." *Id.* at 88. But the court held that such "sprawling" claims, which sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law." *Id.* at 92.

In reaching this conclusion, the Second Circuit emphasized that under our constitutional structure, federal law must govern because the dispute "implicate[d] two federal interests that are incompatible with the application of state law," namely, the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy and the "basic interests of federalism." *City of New York*, 993 F.3d at 91–92. As the court explained, applying state law

would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93. In reaching this conclusion, the Second Circuit emphasized that, "[f]or over a century, a mostly unbroken string of [U.S. Supreme Court] cases has applied federal law to disputes involving interstate air or water pollution." *Id.* at 91. And, consistent with this controlling precedent, the Second Circuit likewise recognized that federal law "preempts state law." *Id.* at 95. Other federal courts to consider the question have reached the same conclusion. *See City of New York*, 325 F. Supp. 3d at 471–72 (claims of this sort "are ultimately based on the 'transboundary' emission of greenhouse gases," so "our federal system does not permit the controversy to be resolved under state law"); *City of Oakland*, 325 F. Supp. 3d at 1022 (reaching the same conclusion). *But see City & Cty. of Honolulu*, No. 1CCV-20-000380, Dkt. 618.

In *AEP*, eight States and various other plaintiffs sued five utility companies, alleging that "the defendants' carbon-dioxide emissions" had substantially contributed to global warming, thereby "creat[ing] a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. But Justice Ginsburg, writing for the majority, explained that such claims are fit for "federal law governance" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 421–22. The issues involve "questions of national or international policy," requiring "informed assessment of competing interests," and Congress and the "expert agency here, EPA," are "better equipped to do the job than individual district judges issuing *ad hoc*, case-by-case injunctions." *Id.* at 427–28; *see also id.* at 428 (noting that "judges lack the scientific,

economic, and technological resources" that EPA possesses). Individual federal and state courts may not lawfully adjudicate such policy questions.

This unbroken line of federal precedent should be followed here. As Maryland courts have recognized, "whenever federal common law governs a particular issue, it must be applied, irrespective of whether the case is in a State or federal court." *Burgoyne v. Brooks*, 76 Md. App. 222, 225 (1988). The alternative—a patchwork of fifty different state-law answers to this necessarily global issue—would be unworkable, and state law is thus preempted under our federal constitutional system. *See North Carolina ex. rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010) ("If courts across the nation were to use the vagaries" of state "public nuisance doctrine to overturn the carefully enacted rules governing air-borne emissions, it would be increasingly difficult for anyone to determine what standards govern.").

Congress, of course, may displace federal common-law remedies—as it did for claims based on domestic emissions through the Clean Air Act—but such displacement does not allow state law to govern matters that it was never competent to address in the first place. As the Seventh Circuit explained, a State "cannot apply its own state law to out-of-state discharges" even after statutory displacement of federal common law. *Illinois v. City of Milwaukee*, 731 F.2d 403, 409–11 (7th Cir. 1984). The Second Circuit, too, has recognized that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"; it concluded, such an argument is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98–99.

Federalism and comity concerns embodied in the Constitution also preclude the application of state law to claims like those asserted here. Climate change is by its very nature global, caused

by the cumulative effect of actions far beyond the reach of any one State's borders. Applying state law to claims seeking redress for injuries allegedly caused by global climate change resulting from emissions around the world would necessarily require applying that law beyond the State's jurisdictional bounds. Thus, allowing state law to govern such areas would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Federal law necessarily governs and preempts state-law claims seeking damages for international emissions. State law also cannot apply here because Plaintiff's claims are premised on international emissions. Only federal law can govern claims based on foreign emissions, and "foreign policy concerns foreclose" any state-law remedy. *City of New York*, 993 F.3d at 101. A State may not dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Yet, that is exactly what Plaintiff's state law claims would do. If Plaintiff succeeds, Defendants may be subject to ongoing future liability for producing and selling fossil fuel products abroad unless they do so in the manner that Maryland law is deemed to require (regardless of whether Maryland law conflicts with the laws of Delaware, New Jersey, Hawaii, or any of the other 50 States, to say nothing of foreign jurisdictions). That is the paradigmatic example of a State improperly using "damages" to "regulat[e]" an industry's extraterritorial operations, *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012), by forcing Defendants to "change [their] methods of doing business . . . to avoid the threat of ongoing liability," *Ouellette*, 479 U.S. at 495. "Any actions" Defendants "take to mitigate their liability" in Maryland "must undoubtedly take effect across every state (and country)." *City of New York*, 993 F.3d at 92.

Plaintiff does not seek to hold Defendants liable only for the "effects of emissions released" in Maryland, or even in the United States. *City of New York*, 993 F.3d at 92. Rather, Plaintiff "intends to hold [Defendants] liable . . . for the effects of emissions made *around the globe* over the past *several hundred years*." *Id.* (emphases added); *see, e.g.*, Compl. ¶ 1 ("Defendants have promoted and profited from" an "enormous, foreseeable, and avoidable increase in *global* greenhouse gas pollution" (emphasis added)). "In other words, [Plaintiff] requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *City of New York*, 993 F.3d at 92. And "[s]ince '[g]reenhouse gases once emitted become well mixed in the atmosphere,' . . . 'emissions in [Maryland] may contribute no more to flooding in [Maryland] than emissions in China.'" *Id.* at 92. Plaintiff thus would be imposing liability and standards of care, based on Maryland tort law, on activities in other countries, and thus regulating conduct globally.

Because the Clean Air Act "does not regulate foreign emissions," federal common law is "still require[d]" to apply to extraterritorial aspects of claims challenging undifferentiated global emissions. *City of New York*, 993 F.3d at 95 n.7; *see also id.* at 101. Federal common law thus continues to apply in this area, even after the enactment of the Clean Air Act, thereby preempting Plaintiff's state law claims. *See Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used.").

This conclusion flows from the constitutional principle that States lack the power to regulate international activities or foreign policy and affairs, and that such matters "must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425. State "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389

U.S. 429, 440 (1968), which calls for a unified federal law rather than a set of "divergent and perhaps parochial state interpretations," *Sabbatino*, 376 U.S. at 425.

Regardless of Plaintiff's framing of its claims, this suit plainly seeks damages for alleged harms resulting from interstate and international emissions. There is no doubt that Plaintiff's claims are predicated on interstate—and international—emissions. Plaintiff seeks damages for claimed injuries in Maryland allegedly caused *not* by actions in Maryland alone, but by the cumulative impact of actions taken in every State in the Nation and every country in the world. The Complaint repeatedly concedes this point, alleging that Defendants caused an increase in "*global* greenhouse gas pollution," Compl. ¶ 1, that "greenhouse gas pollution . . . is far and away the dominant cause of *global* warming," *id.* ¶ 3, and that Plaintiff has "to mitigate[] and adapt to the effects of *global* warming," *id.* ¶ 8 (emphases added). Plaintiff candidly acknowledges that "[*t*]*he mechanism*" of "global warming"—and thus of its alleged injuries—is "emissions." *Id.* ¶ 39 (emphasis added). In short, Plaintiff identifies no harms "other than those caused by emissions." *City of New York*, 993 F.3d at 97 n.8.

Plaintiff thus seeks to recover damages for harms caused by "*global* CO_2 emissions associated" with Defendants' products. Compl. ¶ 182 (emphasis added). The crux of Plaintiff's claims is that Defendants are responsible for having supposedly caused—through alleged deception and failure to warn—some level of worldwide emissions that Plaintiff deems unlawful. Plaintiff expressly alleges that Defendants "should have taken reasonable steps *to limit the potential greenhouse gas emissions* arising out of their fossil fuel products," *id.* ¶ 142; faults Defendants for not "working to reduce the use and consumption of fossil fuel products [and] *lower the rate of greenhouse gas emissions*," *id.* ¶ 6; and insists that "[e]arlier steps *to reduce emissions*

would have led to smaller—and less disruptive—measures needed to mitigate the impacts of fossil fuel production," *id.* ¶ 180 (emphases added).

Accordingly, irrespective of Plaintiff's allegations of deception and failure to warn, Plaintiff's theory of liability is that Defendants caused an increase in *worldwide* greenhouse-gas emissions, which combined with other factors to produce global warming and thus Plaintiff's alleged injuries. But Plaintiff cannot use Maryland tort law to regulate out-of-state activities that it believes resulted in an excessive level of global emissions. Plaintiff's theory would allow municipalities across the State to use Maryland law to impose a duty of care and standards on activities across the country and around the world, even if such activities are completely lawful in the jurisdictions where they took place.

Take, for example, Plaintiff's failure to warn claims. Plaintiff asserts that failures to warn across the globe have resulted in increased consumption of fossil fuels, leading to increased emissions that have, in turn, resulted in Plaintiff's injuries. *See* Compl. ¶ 142 (alleging that Defendants should have warned "consumers, the public, and regulators"—generally—about the risks of climate change); *id.* ¶ 193 (alleging that Defendants' "concealment of known hazards associated with use of [their] products" resulted in "the increase in global mean temperature"). This means Plaintiff is seeking damages under Maryland law for increased emissions resulting from alleged failures to warn in, say, Texas, Florida, and Zimbabwe, even if there was no duty to warn in those jurisdictions. This, Plaintiff cannot do. The global causal mechanism on which Plaintiff's claims depend triggers the exclusive and preemptive effect of federal law.

Plaintiff cannot evade the preemption of state law by arguing that its claims are based solely on misrepresentations. The question whether Plaintiff's claims are based on misrepresentations as opposed to production does not change the preemption analysis, because Plaintiff admits that its

alleged *injuries* all stem from interstate and international emissions. Plaintiff alleges that "[a]nthropogenic (human-caused) greenhouse gas pollution, primarily in the form of CO_2, is far and away the dominant cause of global warming," Compl. ¶ 3, that its injuries are "*all* due to anthropogenic global warming," *id.* ¶ 8 (emphasis added), and that "[*t*]*he mechanism*" of global warming is emissions, *id.* ¶ 39 (emphasis added).

Just as in *City of New York*, "[i]t is precisely because fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [Plaintiff] is seeking damages." 993 F.3d at 91 (emphasis omitted). Indeed, the same misrepresentation theory was alleged in *City of New York*, which focused not just on the "production and sale of fossil fuels," but also their "promotion." *See* 993 F.3d at 88, 91, 97 n.8. The City alleged there, as Plaintiff does here, that "Defendants have known for decades that their fossil fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists" yet "extensively promoted fossil fuels for pervasive use, while *denying* or *downplaying* these threats." *City of New York*, 325 F. Supp. 3d at 468–69 (emphases added). The City argued there that the defendants were liable for "nuisance and trespass" damages because "for decades, Defendants promoted their fossil fuel products by *concealing* and *downplaying* the harms of climate change [and] *profited* from the misconceptions they *promoted*." Br. for Appellant at 27, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018) (emphases added). Plaintiff pursues the exact same theory of liability here. *See, e.g.*, Compl. ¶ 1 (alleging Defendants "*conceal*[*ed*] and *den*[*ied*]" risks of climate change and "*promoted* and *profited* from a massive increase in the extraction and consumption of oil, coal, and natural gas" (emphases added)).

The Second Circuit rejected the City of New York's similar attempt to cast its claims as "focus[ed] on" an "earlier moment in the global warming lifecycle" (*i.e.*, sales activity rather than

emissions), holding that this was "merely artful pleading and d[id] not change the substance of its claims." *City of New York*, 993 F.3d at 97. The crucial consideration was that emissions were the "singular source of the City's harm." *Id.* at 91. Accordingly, the Second Circuit refused to allow the City to deny the obvious: Its "case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally," as confirmed by the fact that "the City does not seek any damages for the [defendants'] production or sale of fossil fuels that do not in turn depend on harms stemming from emissions." *Id.* at 97.

The Third Circuit, too, rejected a similar attempt to shift the focus from emissions to alleged misrepresentations: Although "Delaware and Hoboken tr[ied] to cast their suits as just about misrepresentations . . . their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022). The same is true here: Plaintiff's claims attempt to collect damages for injuries allegedly stemming from worldwide emissions. And because Plaintiff's claimed *injuries* allegedly result from emissions—specifically, from a level of emissions that Plaintiff alleges is too high—the constitutional prohibition against using state law to impose liability for harms arising from interstate emissions applies fully here.

Cases rejecting Defendants' removal arguments arise in a different procedural posture and did not address the preemption question presented here. Some recent federal appellate decisions have addressed the issue whether claims alleging climate change-related harms "arise under" federal common law for purposes of conferring federal jurisdiction. But as the Fourth Circuit explained in this case, those cases resolved a different question in a "different procedural posture"—namely, the propriety of removal. *Mayor & City Council of Baltimore v. BP P.L.C.*, 31

F.4th 178, 203 (4th Cir. 2022). Indeed, the Second Circuit made clear that the defendants "sought to remove th[e] cases to federal court, arguing that they anticipated raising federal preemption defenses." *City of New York*, 993 F.3d at 94. In that posture, those courts could *not* consider the "preemption defense on its own terms," but had to apply "the heightened standard unique to the removability inquiry." *Id.* The Second Circuit recently reiterated that conclusion in *Connecticut ex rel. Tong v. Exxon Mobil Corp.*, __ F.4th __, 2023 WL 6279941 (2d Cir. Sept. 27, 2023), where it articulated a "distinction between complete (jurisdictional) preemption and ordinary (defensive) preemption" and explained that the removal cases addressed only the former. *Id.* at *9 n.4. The court explained that in *City of New York* it held that "claims 'to recover damages for the harms caused by global greenhouse gas emissions' were 'governed by federal common law'" and, therefore, the plaintiff's state law claims were preempted "on a theory of *ordinary* preemption." *Id.* Accordingly, its holding affirming dismissal on the merits in *City of New York* would "'not conflict with these out-of-circuit [removal] cases even if they were correct.'" *Id.*

The Fourth Circuit's and other courts' decisions regarding the removal issue left open the separate question presented here and decided in *City of New York*: whether federal law precludes Plaintiff's claims *on the merits*. *See City of New York*, 993 F.3d at 93–94 (explaining that in Rule 12(b)(6) context the court is "free to consider the [energy companies'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry"). Indeed, Plaintiff told the U.S. Supreme Court that the Fourth Circuit's decision in this case "would not preclude a district court in the Fourth Circuit from holding that a claim identical to New York City's, filed in federal court, would be preempted by federal law." Br. in Opp., *BP P.L.C.*, No. 22-361, 2022 WL 17852486, at 12–13.

"Ordinary preemption," which Defendants raise here, "is a federal defense to a plaintiff's claims." *Mayor & City Council of Baltimore*, 31 F.4th at 198–99. Such "important questions of ordinary preemption" are "*for the state courts to decide upon remand.*" *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (emphasis added).[2] Now that the parties are back in state court, this Court must decide whether Defendants' preemption defenses bar Plaintiff's claims *on the merits*. *See, e.g.*, *Hill v. Knapp*, 396 Md. 700, 722 (2007) (tort claim preempted by federal Longshore and Harbor Workers' Compensation Act). The answer to that question is "yes," as every federal court to address the preemption defense on the merits has held.

B. Plaintiff's State-Law Claims Are Preempted By The Clean Air Act.

Even if the Constitution did not preclude the application of state law to Plaintiff's claims, those claims would still fail because the Clean Air Act preempts state-law causes of action that would have the effect of regulating out-of-state greenhouse gas emissions.

Through the Clean Air Act, Congress evaluated and balanced the societal harms and benefits associated with the extraction, production, processing, transportation, sale, and use of fossil fuels. And it has comprehensively regulated fossil fuels and greenhouse gas emissions through an "informed assessment of competing interests," including the "environmental benefit potentially achievable" and "our Nation's energy needs and the possibility of economic disruption." *AEP*, 564 U.S. at 427. Under the Clean Air Act, EPA has the authority to determine and has determined the permissible levels of greenhouse gas emissions for many applications of most Defendants' combustible products (*e.g.*, as used in motor vehicles, heavy duty trucks, marine engines).

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[2] *See also Minnesota ex rel. Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 710 (8th Cir. 2023) (noting that "the Second Circuit recently held that federal common law still provides a defense—ordinary preemption—to state-law public nuisance").

For example, Title II of the Clean Air Act governs greenhouse gas emissions standards for vehicles, aircraft, locomotives, motorcycles, and nonroad engines and equipment. 42 U.S.C. §§ 7521(a)(1)–(2), (3)(E), 7547(a)(1), (5), 7571(a)(2)(A). Based on this authority, EPA has set vehicle-specific greenhouse gas emission standards that appropriately balance environmental and other national needs. 40 C.F.R. §§ 86.1818-12, 86.1819-14. Indeed, just in recent months, EPA has proposed new pollution standards for cars and trucks aimed at accelerating the transition to clean vehicles. EPA Press Office, *Biden-Harris Administration Proposes Strongest-Ever Pollution Standards to Accelerate Transition to a Clean-Transportation Future* (Apr. 12, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-proposes-strongest-ever-pollution-standards-cars-and. Although States may apply more stringent standards for vehicles sold *in-state* under carefully prescribed circumstances, *see* 42 U.S.C. § 7507, they cannot regulate emissions from vehicles sold in *other* States.

The Clean Air Act also governs "whether and how to regulate carbon-dioxide emissions from powerplants" and other stationary sources. *AEP*, 564 U.S. at 426; *see also* 42 U.S.C. §§ 7411(b)(1)(A)–(B), (d). EPA has issued comprehensive regulations to control greenhouse gas emissions up and down the fossil fuel supply chain, which include: limiting emissions of methane (the second-most prevalent greenhouse gas) and emissions from crude oil and natural gas production, including the facilities operated by some of the Defendants, *see* 40 C.F.R. § 60, subpart OOOOa; regulating carbon dioxide emissions from fossil fuel-fired power plants; and requiring many major industrial sources—including many Defendants' oil refineries and gas-processing facilities, as well as manufacturers that use Defendants' products—to employ the control technologies constituting the best system of emission reduction to limit greenhouse gas emissions. 42 U.S.C. § 7475.

The Clean Air Act's Renewable Fuel Standard Program regulates the consumption and use of many of the same fossil fuel products at issue in the Complaint; specifically, the Program requires many Defendants and other fuel companies to reduce the quantity of petroleum-based transportation fuel, heating oil, or jet fuel sold by blending in renewable fuels, resulting in lower greenhouse gas emissions on a lifecycle basis. *See* 42 U.S.C. § 7545(*o*).

More than thirty years ago, the U.S. Supreme Court concluded that the Clean Water "Act pre-empts state law to the extent that state law is applied to an out-of-state point source." *Ouellette*, 479 U.S. at 500. That Act establishes a "comprehensive" regulatory regime and charges EPA with primary authority to balance the "costs and benefits" of regulation. *Id.* at 492, 494–95. Although it preserves a State's ability (subject to EPA review) to regulate pollution from *within* that State, *id.* at 489–90, it does not permit States to regulate *out-of-state* pollution, *id.* at 490–91. And although it includes a savings clause, "it is clear that the only state suits that remain available are those specifically preserved by the Act," and "[a]n interpretation of the saving[s] clause that preserved actions brought under an affected State's law would disrupt th[e] balance of interests" struck by the Act. *Id.* at 492, 495. The Act accordingly left no room for state tort suits seeking damages for harms caused by out-of-state emissions, which would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494; *see also id.* at 500 ("The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution.").

The Clean Air Act shares all the features of the Clean Water Act that led the Supreme Court to find preemption of state regulation of interstate pollution. Both laws authorize "pervasive regulation" and direct EPA to engage in a "complex" balancing of economic costs and environmental benefits, *Ouellette*, 479 U.S. at 492, 494–95; both laws provide States with a

circumscribed role that is "subordinate" to EPA's role, *id.* at 491; both laws have analogous savings clauses that preserve state regulation only over *in-state* pollution sources, *see* 33 U.S.C. §§ 1365(e), 1370; and both laws confirm that "control of interstate . . . pollution is primarily a matter of federal law," *Ouellette*, 479 U.S. at 492. Indeed, because no state can control its neighbor's emissions, the Clean Air Act's "Good Neighbor Provision" specifically requires each State to ensure that emissions from sources within its boundaries do not "contribute significantly" to air quality nonattainment in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i)(I). And EPA must promulgate federal regulations to address such situations in the event a State's sources do so contribute. *Id.* § 7410(c)(1). Accordingly, the Clean Air Act, like the Clean Water Act, "precludes a court from applying the law of an affected State against an out-of-state source." *Ouellette*, 479 U.S. at 494.

Because the structure of the Clean Air Act so closely parallels that of the Clean Water Act, courts have consistently construed *Ouellette* to mean that the Clean Air Act preempts state laws to the extent they purport to regulate air pollution originating out of state. *See, e.g.*, *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("[C]laims based on the common law of a non-source state . . . are preempted by the Clean Air Act."); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301, 306 (same). Because Plaintiff's claims seek remedies for harms allegedly caused by cumulative worldwide greenhouse gas emissions over more than a century, imposition of those remedies would necessarily regulate interstate emissions, thereby upsetting the careful balance Congress struck through the comprehensive Clean Air Act regime overseen by EPA.

Indeed, Plaintiff *expressly* asks this Court to assess the "harms and benefits of Defendants' conduct" by "weighing the social benefit of extracting and burning a unit of fossil fuels against the

costs that a unit of fuel imposes on society." Compl. ¶ 177. Such regulation via tort law "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 564 U.S. at 429. "Congress designated an expert agency . . . , EPA, as best suited to serve as primary regulator of greenhouse gas emissions," and "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 428.

While *AEP* did not address the narrow question whether state-law claims may be brought under "the law of each State *where the defendants operate powerplants*," 564 U.S. at 429 (emphasis added), its articulation of that potential exception proves the rule—one State cannot apply its law to claims based on emissions from *another* State. Here, Plaintiff intentionally and explicitly targets global emissions: the emissions allegedly causing Plaintiff's claimed injuries come from every State in this Nation and every country in the world. *See, e.g.*, Compl. ¶¶ 107, 246, 260, 271, 283, 292. But Plaintiff is suing under *one* State's law—which federal law prohibits. *See Ouellette*, 479 U.S. at 495; *City of New York*, 993 F.3d at 92 ("Any actions [defendants would] take to mitigate their liability . . . must undoubtedly take effect across every state (and country).").

That Plaintiff seeks *damages* rather than injunctive relief makes no difference. As the U.S. Supreme Court has explained, state damages suits equally constitute state regulation: "[A] liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."). Indeed, *Ouellette* itself held that state-law claims for damages caused by interstate pollution were preempted. 479 U.S. at 484, 493–94. Because Plaintiff seeks damages based on harms caused by diffuse and commingled emissions, any liability award would result in one State regulating interstate emissions, so

Plaintiff's claims are preempted. *See Bell*, 734 F.3d at 192, 196–97 (holding that "*Ouellette* controls" claims for "damages under three state common law tort theories: (1) nuisance; (2) negligence and recklessness; and (3) trespass").

Plaintiff cannot evade the dispositive force of *Ouellette* by casting its claims as based solely on Defendants' alleged deception, rather than on greenhouse gas emissions. Plaintiff's theory of harm and damages is premised on the notion that Defendants' conduct has resulted in an excessive level of emissions in the atmosphere. *See, e.g.*, Compl. ¶ 6 ("Defendants . . . engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes" and thus "contributed substantially to the buildup of CO_2 in the environment that drives global warming and its physical, environmental, and socioeconomic consequences"), ¶ 107 ("[Defendants] could and should have taken reasonable steps to limit the potential greenhouse gas emissions arising out of their fossil fuel products."). It is thus beyond dispute that "the *singular source* of [Plaintiff's] harm" is the nationwide greenhouse gas emissions regulated by the Clean Air Act—and the worldwide emissions that state law cannot regulate. *City of New York*, 993 F.3d at 91 (emphasis added). Thus, Plaintiff's theory of harm and requested relief are central to the preemption inquiry under the Clean Air Act.

As *Ouellette* recognized, if a downwind court rules that upwind defendants are liable based on the effects of pollution downwind, the defendant "would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability"—regardless of whether "the source had complied fully with its [source] state and federal . . . obligations." 479 U.S. at 495. The stated goal of the Clean Air Act is "to prevent and control air pollution," *see* 42 U.S.C. § 7401(a)(4), and the statute achieves that goal by regulating pollution-generating emissions and carefully delegating authority for setting emissions standards, *see* 40 C.F.R. § 50 *et seq.* Allowing

the tort law of a downwind state to impose liability for emissions from out-of-state sources is entirely incompatible with the Clean Air Act's "delegation of authority and its comprehensive regulation" of emissions. *Ouellette*, 479 U.S. at 500.

Plaintiff's claims impermissibly seek to regulate out-of-state emissions through the imposition of damages awards. As the Second Circuit put it, permitting claims seeking "damages caused by global greenhouse gas emissions" to proceed would replace the "carefully crafted frameworks" Congress established in the Clean Air Act "with a patchwork of claims under state nuisance law." *City of New York*, 993 F.3d at 85–86. Congress and EPA have concluded that selling and using fossil fuel products should be regulated by balancing the risks to the climate with the benefits to the public and the United States. But Plaintiff's lawsuit would wield Maryland law to impose damages liability on Defendants for out-of-state emissions that were and are lawful under the Clean Air Act and the regulatory regimes of the source States. "The inevitable result of [sustaining these claims] would be that [Maryland] and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495.

C. Plaintiff's Claims Raise Nonjusticiable Political Questions.

Plaintiff's claims also fail because they would require the Court to usurp the political branches' power to set energy and climate policy, in violation of the political question doctrine. The Maryland Supreme Court has adopted the U.S. Supreme Court's articulation of the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962). *See Est. of Burris v. State*, 360 Md. 721, 745 (2000). For "a claim [to be] justiciable," a court must determine: (1) "whether the claim presented and the relief sought are of the type which admit of judicial resolution," and (2) "whether there is," among other things, "'a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 745 (quoting *Baker*, 369 U.S. at 217).

Under that standard, energy and climate policy plainly present political questions that cannot be resolved by the courts. As the U.S. Supreme Court has recognized, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" raises "questions of national or international policy" that require an "informed assessment of competing interests." *AEP*, 564 U.S. at 427. And, as the Maryland General Assembly has proclaimed, important aspects of emissions are best "regulated on a national and international level." Md. Code Ann., Envir. § 2-1201(9)–(11).

The Weight of Authority Confirms That Climate-Related Claims Are Non-Justiciable. *Kivalina* is directly on point. There, as here, the plaintiffs alleged that the defendant energy companies were "substantial contributors to global warming" and had, among other things, "conspir[ed] to mislead the public about the science of global warming." *Kivalina*, 696 F.3d at 854. Also, as here, "Plaintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere." 663 F. Supp. 2d at 875 (emphasis omitted). And "Plaintiffs acknowledge[d] that the global warming process involves 'common pollutants that are mixed together in the atmosphere that cannot be similarly geographically circumscribed.'" *Id.* (alteration omitted).

The court held that the claims in *Kivalina* presented nonjusticiable political questions because they would require the trier of fact to "balance the utility and benefit of the alleged nuisance against the harm caused." *Kivalina*, 663 F. Supp. 2d at 874. "Stated another way," the court explained, "resolution of [the] nuisance claim is not based on whether the plaintiff finds the invasion unreasonable, but rather 'whether reasonable persons generally, *looking at the whole situation* impartially and objectively, would consider it unreasonable.'" *Id.* The plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would

guide the factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id.* at 875. The same is true here.

That court reached a similar result in *General Motors*, 2007 WL 2726871. There, California sued General Motors and other automakers for creating or contributing to climate change. *Id.* at *1–2. The court found it lacked "guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *Id.* at *15. The court rejected the notion that global climate change cases are just like any other trans-boundary pollution case, explaining that the State sought to impose damages on an "unprecedented scale" that left the court no way to distinguish one emitter from another. *Id.*

Similarly, the plaintiffs in *Comer v. Murphy Oil USA, Inc.* brought nuisance and trespass claims against a group of energy companies alleging that their products "led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged their property." 839 F. Supp. 2d 849, 852 (S.D. Miss. 2012). The court rejected these claims as requiring "the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.'" *Id.* at 864. "Simply looking to the standards established by the Mississippi courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury." *Id.*

More recently, the Alaska Supreme Court rejected similar climate change claims under the political question doctrine. *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022). The court explained that "[t]he political question doctrine maintains the separation of powers by 'exclud[ing] from

judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to' the political branches of government." *Id.* at 795. Notably, the court found that plaintiffs' claims require balancing the social utility of defendants' conduct with the harm it inflicts, *id.* at 796, a process that, "by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants," *Kivalina*, 663 F. Supp. 2d at 876.[3]

Plaintiff's claims present even greater hurdles to judicial resolution than those in the cases discussed above. Again, Plaintiff does not seek to hold Defendants liable for their *own* emissions, but rather for production of fossil fuel products that countless *third parties* combusted and for alleged misrepresentations that supposedly caused those third parties to consume more of those products than they otherwise would have. *See* Compl. ¶¶ 36–39. Under tort law, Plaintiff would need to prove that Defendants' actions were "unreasonable." But the concept of "reasonableness" provides no guidance for resolving the far-reaching economic, environmental, foreign affairs, and national-security issues raised by Plaintiff's claims—together "with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427; *see Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) ("'Fairness' does not seem to us a judicially manageable standard."); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (reversing judgment holding opioid manufacturers liable under public nuisance theory and "defer[ring] the policy-making to the legislative and executive branches"). In short, Plaintiff's "global warming nuisance tort claim seek[ing] to impose damages on a much larger and unprecedented scale by grounding the claim in

[3] *See also Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014) ("The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature, just as in *AEP* the inquiry was better reserved for the EPA.").

pollution originating both within, and well beyond, the borders of the State" presents nonjusticiable political questions and should be dismissed. *Gen. Motors*, 2007 WL 2726871, at *15.

Maryland's Political Branches Actively Address Climate-Related Issues. The political questions implicated by Plaintiff's claims are not theoretical. The Maryland executive and legislative branches have known about climate change for decades—including about the alleged climate risks that Plaintiff accuses Defendants of concealing—and, with that knowledge, have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve the State. For example, in 2009, Maryland enacted legislation to reduce greenhouse emissions and combat climate change. *See* The Greenhouse Gas Emissions Reduction Act of 2009, Md. Code Ann., Envir. § 2-1206(5). In 2015, the Maryland General Assembly codified the Maryland Climate Commission—previously established by executive order—into law and charged it with "advis[ing] the Governor and General Assembly on ways to mitigate the causes of, prepare for, and adapt to the consequences of climate change." Maryland Commission on Climate Change Act of 2015, Md. Code Ann., Envir. § 2-1302(a). And the State continues to address the issue legislatively, recently enacting the Climate Solutions Now Act, which sets significant emissions-reductions targets within Maryland. *See* 2022 Md. Laws Ch. 38. Indeed, nearly every year, Maryland revises its renewable portfolio standards to incentivize electricity generation from renewable sources instead of fossil fuels. Md. Code Ann., Public Utilities § 7-701 *et seq.*

At the same time, Maryland and the City of Baltimore have promoted, and continue to promote, the production and sale of petroleum products. The General Assembly has declared that "*the production and development of oil and gas resources is important to the economic well-being of the State and the nation.*" Md. Code Ann., Envir. § 14-101 (emphasis added). Maryland thus maintains an "Oil and Gas Fund" to "administer and implement programs to oversee the drilling,

development, production, and storage of oil and gas wells" throughout the State. *Id.* §§ 14-122, 14-123. And the Climate Solutions Now Act continues to insist that plans adopted to reduce emissions shall "[e]nsure that the plans *do not decrease* the likelihood of reliable and affordable electrical service and statewide fuel supplies," *id.* § 2-1206(5) (emphasis added), while recognizing that important aspects of emissions are "most effectively regulated on a national and international level"—the opposite of a municipal tort suit, *id.* § 2-1201(9)–(11). During the COVID-19 pandemic, both the Governor of Maryland and the Mayor of Baltimore issued orders exempting businesses in "critical infrastructure sectors"—including companies engaged in the production and sale of oil and gas products —from mandatory closure orders.[4]

These issues are political questions that have been considered by the executive and legislative branches for decades, resolution of which belongs in their hands, not in the judiciary's.

An Abatement Would Infringe on the Authority of the Other Branches. Finally, the relief Plaintiff seeks—an "order that provides for abatement of the public nuisance," Compl. ¶ 228—presumably would require this Court to estimate potential future damages resulting from global climate change over the next century and to oversee and administer a fund to pay for and address those future injuries. The Ninth Circuit rejected a similar request in *Juliana v. United States*, 947 F.3d 1159, 1169–75 (9th Cir. 2020), because it is beyond the power of the court "to order, design, supervise, or implement" such a remedial plan, which "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171.

The same is true here. Administering "abatement" of the kind sought by Plaintiff would "entail a broad range of policymaking," such as determining what infrastructure projects—from

[4] *See, e.g.*, Md. Executive Order 20-03-23-01 (Mar. 23, 2020); Balt. Mayoral Executive Order Continuation of Governor's Stay at Home Order (May 29, 2020).

sea walls, to transit, to levees—are supposedly necessary to prevent climate change-related harms and how to prioritize such projects. *Juliana*, 947 F.3d at 1172. And "given the complexity and long-lasting nature of global climate change, the court would be required to supervise the [fund] for many decades," if not forever. *Id.*

D. Maryland Law Requires Dismissal Of Plaintiff's Claims.

Plaintiff's claims should also be dismissed because they are premised on a sweeping and expansive duty to third parties that Maryland courts have consistently rejected, and because Plaintiff fails to plead necessary elements of each of its state-law causes of action.[5]

1. Plaintiff Fails Adequately To Allege A Claim For Public Or Private Nuisance.

Under Maryland law, "[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land," and a "public nuisance is an unreasonable interference with a right common to the general public." *Tadjer v. Montgomery Cty.*, 300 Md. 539, 551–52 (1984) (quoting Restatement (Second) of Torts §§ 821B, 821D).

Plaintiff fails to state a claim for private or public nuisance. The Complaint alleges that emissions resulting from Defendants' production, sale, marketing, and promotion of lawful fossil fuel products constitute a nuisance. But multiple state and federal courts have rejected similarly breathtaking attempts to expand the scope of state nuisance law. This Court should do the same. Neither the General Assembly nor the Maryland Supreme Court—the only bodies with authority to recognize new causes of action under Maryland common law—has recognized a nuisance claim based on the production, promotion, and sale of a lawful consumer product.[6] Nor does Plaintiff

[5] Defendants assume for purposes of this Motion that Plaintiff purports to bring its claims under Maryland law and reserve all rights to brief choice-of-law issues as necessary.

[6] *See Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 692–95 (2013) (recognizing the Maryland Supreme Court's authority to change the common law, or for the legislature to abrogate it).

allege facts that, if taken as true, show Defendants exercised sufficient control over the instrumentality (*i.e.*, the concentration of greenhouse gases in the Earth's atmosphere) that allegedly caused the nuisance for which Plaintiff claims injuries.

Maryland does not recognize a nuisance claim based on production, promotion, and sale of a consumer product. Like courts in other States, Maryland appellate courts have recognized nuisances only based on the defendant's *use of land*. *See, e.g.*, *Tadjer*, 300 Md. at 550 (alleging nuisance based on "landfill operation"); *Whitaker v. Prince George's Cty.*, 307 Md. 368, 379 (1986) (holding that "the operation of a bawdyhouse constitutes a public nuisance"); *Bishop Processing Co. v. Davis*, 213 Md. 465, 468 (1957) (seeking to enjoin operation of a processing plant); *Gorman v. Sabo*, 210 Md. 155, 161 (1956) (intentionally disturbing neighbor with loud radio); *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 393 (1946) (obstructing highway with lamp pole); *Burley v. City of Annapolis*, 182 Md. 307, 312 (1943) (listing "slaughterhouses" and "livery stables" as examples of potential nuisances).

Courts have long recognized that, to avoid turning nuisance law into "a monster that would devour in one gulp the entire law of tort," *Tioga Pub. Sch. Dist.*, 984 F.2d at 921, the boundaries between products liability and nuisance must be respected. Accordingly, multiple courts in other jurisdictions have explained that nuisance cases appropriately concern the use or condition of the defendant's *property*, not products. They have therefore dismissed attempts to expand common-law public nuisance claims to cover the production, sale, or promotion of consumer products such as lead paint, asbestos, prescription opioids, firearms, and tobacco.

As the Oklahoma Supreme Court recently explained in overturning a public nuisance judgment arising from a manufacturer's allegedly deceptive sale and promotion of opioids, public nuisance "has historically been linked to the use of land by the one creating the nuisance." *Hunter*,

499 P.3d at 724. Similarly, the New Jersey Supreme Court rejected attempts to expand nuisance law to cover the sale and promotion of lead paint because "essential to the concept of a public nuisance tort ... is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007). The Rhode Island Supreme Court concurred, explaining that "[p]ublic nuisance focuses on the abatement of annoying or bothersome activities," whereas claims based on a defendant's sale or distribution of an allegedly harmful product sound in products liability, which is "designed specifically to hold manufacturers liable for harmful products." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008). Thus, "[t]he law of public nuisance never before has been applied to products, however harmful." *Id.* And in affirming dismissal of nuisance claims related to the production and sale of asbestos products, the Eighth Circuit explained that "cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of the property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." *Tioga Pub. Sch. Dist.*, 984 F.2d at 920.

In short, "[t]he core historical policies underlying [public nuisance] are inconsistent with its use to impose liability for the manufacture or distribution of lawful products." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 834 (2003). "Courts should not replace the substantial bodies of mature doctrinal and policy analysis available to guide them in products liability actions with a vaguely defined tort that is being used in ways utterly foreign to its historical context." *Id.* at 837; *see also* Schwartz & Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552 (2006). Such a result would run counter to Maryland courts' reluctance to "expand traditional tort concepts beyond manageable bounds." *Gourdine*, 405 Md. at 750.

The New Jersey Supreme Court's reasoning as to lead paint is instructive. The court there declined to allow a nuisance claim based on the sale and promotion of lead pigment, notwithstanding the harmful effects of lead poisoning. As the court explained, doing so would "stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *In re Lead Paint*, 924 A.2d at 494. Similarly, the Oklahoma Supreme Court's decision overturning an award of damages based on the production, distribution, and deceptive marketing of opioids is on point. *Hunter*, 499 P.3d at 721. "[T]he central focus" of those complaints was that the defendants "failed to warn of the dangers" of their products when they "promot[ed] and market[ed]" them. *Id.* at 725. The court held that "[p]ublic nuisance is fundamentally ill-suited to resolve claims against product manufacturers," *id.* at 726, and that "[e]xtending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to 'convert almost every products liability action into a [public] nuisance claim.'" *Id.* at 729–30. Indeed, applying nuisance law "to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers," which is why the court had "never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Id.* at 725. In reaching its conclusion, the court recognized the "clear national trend to limit public nuisance to land or property use." *Id.* at 730.

Here, Plaintiff does not (and cannot) allege that Defendants' use of land or property in Maryland caused or contributed to global warming. To the contrary, Plaintiff has insisted that its nuisance claims are based on a theory that Defendants engaged in deception and misrepresentation unconnected to any real property in Maryland. *See, e.g.*, Compl. ¶ 221. But Maryland appellate courts have never recognized such a non-property basis for a nuisance action, and the "clear

national trend" is to resist extending nuisance to cover the production and promotion of consumer products. This Court should decline Plaintiff's invitation to upend centuries of established nuisance law by "creat[ing] a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of . . . nuisance." *In re Lead Paint Litig.*, 924 A.2d at 494.

While the U.S. District Court for the District of Maryland recently allowed two nuisance claims to proceed where the alleged conduct related to a defendant's products, rather than land use, *see State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 469 (D. Md. 2019); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *10 (D. Md. Mar. 31, 2020), this Court is not bound by a federal district court's expansion of Maryland law, *see Sessoms v. State*, 357 Md. 274, 287 (2000). Neither of those cases is precedential authority for extending Maryland nuisance law to engulf the distinct law of products liability. And both cases focused on the question whether Maryland law requires the defendant to have "exclusive control" of the nuisance-causing instrumentality. *Exxon*, 406 F. Supp. 3d at 468; *accord Monsanto*, 2020 WL 1529014, at *9. On that distinct point, the *Exxon* court allowed the claim to proceed because it could not find "case law foreclos[ing] this theory of public nuisance liability under Maryland law"—not because it identified any case law *supporting* a product-based nuisance claim. 406 F. Supp. 3d at 469.

Moreover, both cases relied on *Adams v. NVR Homes, Inc.* for the proposition that "[i]t has been held that where the finished product of a third party constitutes a public nuisance, the third party may be held liable for creation of the public nuisance, even though it no longer has control of the product creating the public nuisance." 193 F.R.D. 243, 256 (D. Md. 2000) (relying on *E. Coast Freight Lines*, 187 Md. at 397). But both *Adams* and *East Coast Freight Lines* involved the use of land: "contamination emanating from property formerly owned by the defendant" in the

former, 193 F.R.D. at 256, and a light pole that allegedly obstructed a public highway in the latter, 187 Md. at 393. Thus, *Exxon* and *Monsanto* erred in relying on property-based nuisance cases to expand nuisance law to allow claims untethered to the use of land.

In all events, neither *Monsanto* nor *Exxon* presented a nuisance theory that is remotely analogous to the theory in this case. In each case, the defendant purportedly "manufactured and distributed the toxic chemicals at issue," *Monsanto*, 2020 WL 1529014, at *10, and those chemicals leaked directly into the plaintiff's waters, *see id.* at *3; *Exxon*, 406 F. Supp. 3d at 461 (State "alleges that its waters were contaminated when MTBE gasoline was released into the environment from hundreds of release sites in the State, primarily from storage and delivery systems."). Here, by contrast, Plaintiff's nuisance theory is not predicated on the allegation that Defendants' fossil fuel products were released onto Plaintiff's land or into its waters. To the contrary, Plaintiff alleges that the "emissions" from billions of "humans combusting fossil fuels"—over more than a century and mostly not produced by Defendants—"comingle[d] in the atmosphere" from sources around the world, causing global warming, which in turn alters the environment in a manner that impacts its land through "rising sea levels" and flooding. Compl. ¶¶ 39–41, 224, 235. That attenuated theory of nuisance liability is readily distinguishable from the theories in *Monsanto* and *Exxon*—and finds no support in Maryland law.

In addition, Plaintiff purports to base liability on Defendants' alleged misrepresentations and deception. *See, e.g.*, Compl. ¶ 1. But there is no support in Maryland law for the proposition that this type of conduct is cognizable as a nuisance either. Maryland law requires a plaintiff to plead that the defendant has caused "an unreasonable interference with a right common to the general public." *Tadjer*, 300 Md. at 552 (quoting Restatement (Second) of Torts § 821B). What this Complaint essentially pleads for the nuisance is a right not to be deceived—which is an

"individual right," not a public right that could trigger a nuisance claim. Restatement (Second) of Torts § 821B. cmt. g. Thus, Plaintiff's allegations regarding purportedly deceptive marketing have no basis in nuisance law.[7]

Plaintiff's nuisance claims also fail because Defendants did not control the instrumentality alleged to cause the nuisance. Under Maryland law, as in many other States, "an action for either public or private nuisance requires the plaintiff to plead and prove that the defendant has control over the alleged nuisance." *Cofield v. Lead Indus. Ass'n*, 2000 WL 34292681, at *7 (D. Md. Aug. 17, 2000) (relying on *E. Coast Freight Lines*, 187 Md. at 401–02; *Callahan v. Clemens*, 184 Md. 520, 524 (1945)); *see also, e.g., In re Paraquat Prods. Liab. Litig.*, 2022 WL 451898, at *11 (S.D. Ill. Feb. 14, 2022) (dismissing nuisance claims under laws of all 11 States involved in multidistrict litigation because laws required control of instrumentality causing alleged nuisance). Plaintiff asserts that alleged impacts of global climate change constitute a nuisance caused by the combustion of fossil fuel products that release emissions into the atmosphere. Compl. ¶¶ 3, 45, 224, 233. But Plaintiff does not, and cannot, allege that Defendants control the time, place, or rate of combustion of coal, oil, and natural gas used by third parties worldwide. Under nuisance law, it "would run contrary to notions of fair play" to hold sellers liable when "they lack direct control over how end-purchasers use" the product. *City of Phila. v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002). For these reasons, "courts have refrained from applying public nuisance doctrine in cases

[7] The D.C. Circuit rejected an attempt to premise a public nuisance claim on misleading statements as "radical," noting that it could "brook much mischief, including a multitude of inconsistent state prohibitions and requirements." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973).

where the instrument of the nuisance is a lawfully sold product which has left the manufacturer's control." *Id.*[8]

Plaintiff's suit hinges on the premise that its purported harms flow not from any single source of emissions, but from the overall cumulative concentration of greenhouse gases in the Earth's atmosphere caused by, *inter alia*, the "combustion of fossil fuel products." Compl. ¶ 48. In other words, the "instrumentality" allegedly causing Plaintiff's claimed harms is the worldwide combustion of fossil fuels that releases greenhouse gas emissions. But combustion, and the resulting emissions, are not alleged to have occurred while Defendants controlled or possessed these fossil fuel products. By definition, those emissions occurred *after* Defendants relinquished control over these products to third parties. Even more problematic, the overwhelming majority of the emissions that Plaintiff alleges has caused global climate change resulted from the use of fossil fuels by consumers *outside of Maryland* and from fossil fuels that *Defendants did not produce or supply*. Defendants here supply a relatively small fraction of all the fossil-fuel products combusted by consumers and governments across the world, and there can be no serious dispute that Defendants lack control over fossil fuels they did not produce, let alone how consumers used the fuels they did produce.

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[8] *See also, e.g.*, *Hunter*, 499 P.3d at 727–28 ("Another factor in rejecting the imposition of liability for public nuisance . . . is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred."); *Lead Indus. Ass'n*, 951 A.2d at 449 ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."); *In re Lead Paint Litig.*, 924 A.2d at 499 ("[A] public nuisance, by definition, is related to conduct, *performed in a location within the actor's control*, which has an adverse effect on a common right." (emphasis added)); *Beretta U.S.A. Corp.*, 277 F.3d at 422 ("[A]s defendants lack the requisite control over the interference with a public right, we will affirm the district court's dismissal of plaintiffs' public nuisance claim" alleging harm from gun violence); *Tioga Public School Dist.*, 984 F.2d at 920 (explaining in asbestos case that "liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance").

The federal court in *Monsanto* and *Exxon* declined to follow *Cofield*, reasoning that "Maryland courts have never adopted the 'exclusive control' rule for public nuisance liability" and thus that "no case law *forecloses*" the plaintiffs' "theor[ies] of public nuisance liability under Maryland law." *Exxon*, 406 F. Supp. 3d at 468–69 (emphasis added). But the Maryland Supreme Court rejected a nuisance claim on precisely that basis in *Callahan*: There, a landowner brought a nuisance claim alleging that a negligently constructed wall on an adjoining property caused water to discharge onto her land, and she sued (among others) the adjoining landowners. 184 Md. at 522, 525. That claim failed because there was no allegation that the landowners "attempted to or could exercise any control over the manner in which the work [*i.e.*, constructing the wall] was performed, and there was no relation of principal and agent." *Id.* at 525. Similarly, in *Maenner v. Carroll*, the Maryland Supreme Court explained that when "a person is sought to be made responsible for a nuisance, not simply on the ground of his being the owner of the ground on which the nuisance exists, but because he has ordered or directed the doing of an act in a public highway which has created a nuisance, *it is necessary that the act be alleged either as having been done or caused to be done by the defendant himself, or by others under his direction and authority.*" 46 Md. 193, 215 (1877) (emphasis added).

Moreover, none of the cases cited in *Exxon* addressed a situation at all analogous to this case. In *Adams*, the court explained that "there has been no clear expression in the Maryland law concerning the viability of a claim of public nuisance arising as a result of contamination emanating from property formerly owned by the defendant," and it refused to "render a definitive ruling on the issue" at an early stage of the case. 193 F.R.D. at 256. In *East Coast Freight Lines*, the court explained that, in theory, "a contractor, even after he has completed his work, may be held liable in damages if such work is inherently dangerous and constitutes a public nuisance,"

such as (in that case) if the contractor placed a light pole "improperly." 187 Md. at 397–98. And in *Gorman v. Sabo*, the court reasoned that "[o]ne 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." 210 Md. at 161. The defendant there did so by refusing to turn down an obnoxious radio "in the home he owned and lived in"; he "turned it up" himself on one occasion; and he "stood silent when his wife said that 'they' were purposely annoying" their neighbors. *Id.*

Even if those cases could be read to stand for the limited proposition that a defendant need not have "exclusive" control over the instrumentality causing the nuisance, they do not come close to establishing that a nuisance claim may proceed where, as here, Defendants have *no* control over such instrumentality. This Court should reject Plaintiff's proposed unprecedented expansion of Maryland nuisance law.

* * *

Maryland courts have rebuffed efforts to expand the law of nuisance. *See Little v. Union Trust Co.*, 45 Md. App. 178, 185 (1980) (efforts to expand nuisance law to cover negligence claims "have been repulsed by the Court of Appeals") (citing *State v. Feldstein*, 207 Md. 20 (1955)). This Court, too, should decline to upend hundreds of years of established nuisance law to "create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of . . . nuisance." *In re Lead Paint Litig.*, 924 A.2d at 494.

2. Plaintiff's Failure-To-Warn Claims Should Be Dismissed Because Defendants Had No Duty To Warn Of Widely Publicized Risks Relating To Climate Change.

Plaintiff does not even attempt to allege that a warning by Defendants to Plaintiff could have prevented its injuries. Rather, Plaintiff alleges that Defendants "breached their duty of care by failing to adequately warn *any consumers or any other party* of the climate effects that inevitably flow from the intended use of their fossil fuel products." Compl. ¶ 241 (emphasis

added). "Duty . . . is an essential element of both negligence and strict liability causes of action for failure to warn." *Gourdine*, 405 Md. at 743. Here, Plaintiff seeks to use Maryland products liability law to impose a duty on Defendants to warn the world. Maryland courts have declined to impose such duties, however, which could result in unlimited liability. *See id.* at 744–54 (rejecting duty to an indeterminate class of people). Moreover, Plaintiff's Complaint acknowledges that the potential link between fossil fuel use and global climate change has been well understood for at least half a century, *see, e.g.*, Compl. ¶¶ 2, 103, 104, 143, precluding any duty to warn of such a "clear and obvious" danger and "generally known" risk. *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 330–31 (1995).

First, Plaintiff's sweeping duty-to-warn-the-world theory flies in the face of established law. "Duty," as the Maryland Supreme Court has explained, "requires a close or direct effect of the tortfeasor's conduct *on the injured party*." *Gourdine*, 405 Md. at 746 (emphasis added). For that reason, Maryland courts have "resisted the establishment of duties of care to indeterminate classes of people," because doing so would foster "boundless" liability and "make tort law unmanageable." *Id.* at 749 (quoting *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 420–21 (2005)). In *Gourdine*, for example, the Supreme Court held that a drug company owed no duty to warn a motorist killed by a woman taking the company's medication, because "duty should be defined . . . [with] regard to the size of the group to which the duty would be owed." *Id.* at 750–52. Imposing a duty to warn in such circumstances would create "a duty to the world, an indeterminate class of people," a result the Maryland Supreme Court has consistently rejected. *Id.* (collecting cases).

But that is exactly what Plaintiff proposes here. Plaintiff's theory is that Defendants "should have warned the public"—writ large—about the risks of climate change and that

Defendants' alleged failure to warn "consumers, the public, and regulators" caused a marginal increase in cumulative greenhouse gas emissions by unidentified third parties throughout the world, which ultimately injured Plaintiff and others. Compl. ¶ 142. Under that theory, no single actor's use of fossil fuels created risk to that user—because the harm flows not from any individual's use of the product, but rather from the overall concentration of greenhouse gases in the atmosphere, from cumulative *global* emissions over many decades. *See id.* ¶ 235. As in *Gourdine*, this Court should reject Plaintiff's attempt to impose such a boundless duty.

Second, under Maryland law there is no duty to warn of "clear and obvious" dangers and "generally known" risks. *Mazda Motor*, 105 Md. App. at 330–31; *see also Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 435 (D. Md. 2005), *aff'd*, 162 F. App'x 231 (4th Cir. 2006). A manufacturer has a duty to warn only when "the item produced has an inherent and *hidden* danger that the producer knows or should know could be a substantial factor in causing injury." *Virgil v. Kash N' Karry Serv. Corp.*, 61 Md. App. 23, 33 (1984) (emphasis added) (citation omitted). But Plaintiff repeatedly alleges that the link between fossil fuel use and global climate change has been *well understood and widely known for at least half a century*. For example, Plaintiff alleges that:

- "Decades of scientific research show that pollution from the production and use of Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO_2 concentrations that have occurred since the mid-20th century. This dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate." Compl. ¶ 2.
- "By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community" with the publication of a report by "President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel." *Id.* ¶ 103.

- "In 1988, National Aeronautics and Space Administration (NASA) scientists confirmed that human activities were actually contributing to global warming" with "significant news coverage." *Id.* ¶ 143(a).

- "In 1990, the [Intergovernmental Panel on Climate Change] published its First Assessment Report on anthropogenic climate change, in which it concluded that . . . 'there is a natural greenhouse effect which already keeps the Earth warmer than it would otherwise be.'" *Id.* ¶ 143(d) (footnote omitted).

- "The United Nations began preparing for the 1992 Earth Summit . . . [which] resulted in the United Nations Framework Convention on Climate Change (UNFCCC), an international environmental treaty providing protocols for future negotiations aimed at 'stabiliz[ing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'" *Id.* ¶ 143(e).

See also, e.g., *id.* ¶ 136 (describing 1991 Shell film discussing "serious warning" about climate change "endorsed by a uniquely broad consensus of scientists in their report to the UN at the end of 1990"), ¶ 181 (discussing 1997 public speech of BP's chief executive acknowledging the "effective consensus" that "there is a discernible human influence on the climate").

Because Plaintiff's own allegations make clear that the alleged potential effects of fossil fuel use on the climate have been "open and obvious" for decades, Defendants had no duty to warn about these alleged dangers, "whether or not [the danger was] actually known" to Plaintiff. *Mazda Motor*, 105 Md. App. at 327 (quoting 1 Am. L. Prod. Liab. 3d § 1:70 (1987)). The standard is not "whether the plaintiff actually recognized the risk, but whether a reasonable person in the plaintiff's position would have done so." *Id.* at 328 (citation omitted); *see also Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000) (cigarette manufacturers did not have a duty to warn "because the dangers of smoking cigarettes were commonly known").

3. Plaintiff's Design Defect Claims Should Be Dismissed Because Plaintiff Fails To Allege Any "Design" Defect.

For a seller to be strictly liable for a design defect, "the product must be both in a 'defective condition' *and* 'unreasonably dangerous' at the time that it is placed on the market by the seller."

Phipps v. Gen. Motors Corp., 278 Md. 337, 344 (1976) (emphasis added); *accord Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 591 (1985) (plaintiff must show "the product is in a defective condition . . . and unreasonably dangerous").[9] Plaintiff has not and cannot adequately allege either.

To begin, it is black-letter law in Maryland that a product "which functions as intended and as expected is not 'defective,'" even if use of the product creates negative externalities. *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 138 (1985), *abrogated on other grounds by* Md. Code Ann., Pub. Safety § 5-402(b). Thus, in *Halliday v. Sturm, Ruger & Co.*, the Maryland Supreme Court held that a firearm was not defective because "it worked exactly as it was designed and intended to work." 368 Md. 186, 208 (2002). And in *Ziegler v. Kawasaki Heavy Industries, Ltd.*, the Appellate Court of Maryland held that a motorcycle was not defective, despite lacking a safety feature, because it "operated exactly as intended." 74 Md. App. 613, 623 (1988).

Moreover, "a product cannot be defective because of a characteristic that is *inherent* in the product itself." *Cofield*, 2000 WL 34292681, at *2 (dismissing design defect claim as to lead pigment). That is exactly why the Appellate Court of Maryland in *Dudley v. Baltimore Gas & Elec. Co.* rejected a claim that natural gas was defective on the theory "that the gas was flammable and highly explosive." 98 Md. App. 182, 202–03 (1993). The court reasoned that "[f]lammability and explosiveness are intrinsic to the nature of natural gas." *Id.* at 202. Thus, "[t]o claim that the gas supplied by [the defendant] was defective and unreasonably dangerous because it is flammable

[9] With respect to a negligent design defect claim, the elements "are essentially the same, except that in a negligence action the plaintiff must show a breach of a duty of care by the defendant, while in a strict liability context the plaintiff must show that the product was unreasonably dangerous." *Cofield*, 2000 WL 34292681, at *2. Here, because Plaintiff cannot show that Defendants' products were in a defective condition at the time they were placed on the market, or that Defendants breached a cognizable duty, the negligent design defect claim also fails.

and highly explosive is equivalent to asserting that a kitchen knife is defective and unreasonably dangerous because it is sharp and can cut things." *Id.* at 203.[10]

Far from alleging that Defendants' products did not function as intended and expected, the Complaint insists that *all* of Plaintiff's alleged injuries resulted from "the normal and intended use" of Defendants' "fossil fuel products." Compl. ¶ 18. Plaintiff does not allege that any user of Defendants' products would have expected them to function any differently than alleged. Nor could it: Gasoline, jet fuel, natural gas, coal, and other fossil fuels are meant to be combusted, and carbon emissions are an inherent byproduct of the combustion of fossil fuel products by end users. Plaintiff itself asserts that the "climate effects" that caused its alleged injuries "*inevitably flow from the intended use* of [Defendants'] fossil fuel products." *Id.* ¶ 241. But, as the Maryland Supreme Court explained in *Kelley*, the fact that a product's "normal function" may be dangerous "is not sufficient for [a] manufacturer to incur liability"—there must *also* "be a problem" in the product's "manufacture or *design*." 304 Md. at 136 (emphasis altered). Because Plaintiff does not and cannot identify any problem with how Defendants *designed* their fossil fuel products, its *design* defect claims should be dismissed.

Even if Plaintiff could allege a "defective condition," it does not and cannot allege facts showing that Defendants' fossil fuel products are "unreasonably dangerous." *Phipps*, 278 Md. at 344. To evaluate design defect claims where a product has functioned as intended, Maryland courts employ the "consumer expectation" test, *Simpson v. Standard Container Co.*, 72 Md. App.

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[10] *See also, e.g.*, *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 270 (D. Mass. 2015) (holding no design defect where Plaintiff was unable to identify a defective aspect of the design of polychlorinated biphenyls ("PCBs") beyond the "mere presence of PCBs," as "PCBs cannot be PCBs without the presence of PCBs themselves, along with their inherent characteristics"); *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 678 (Wis. 2009) (rejecting design defect claim involving lead pigment "where the presence of lead is the alleged defect in design, and its very presence is a characteristic of the product itself. Without lead, there can be no white lead carbonate pigment").

199, 203 (1987), which considers whether a product "is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics," *Halliday*, 368 Md. at 194 (adopting Restatement (Second) of Torts § 402A); *see also Kelley*, 304 Md. at 136 (finding a handgun not unreasonably dangerous, though "capable of being used . . . to inflict harm," because an ordinary consumer would "expect a handgun to be dangerous").

As an initial matter, Plaintiff does not attempt to allege that Defendants' products themselves, or even emissions from Defendants' products, are dangerous to the user. Rather, Plaintiff's theory is that the collective emissions from billions of users of fossil fuels produced and sold by Defendants and many others over decades, combined with emissions from countless other sources, have contributed to climate change. *See* Compl. ¶ 253. That unprecedented theory of "dangerousness" finds no support in Maryland design-defect law.

But even if Plaintiff had adequately alleged that fossil fuel products are dangerous, they are not unreasonably so as a matter of law. Plaintiff alleges widespread, longstanding knowledge of the exact characteristics of the fossil fuels that Plaintiff claims are hazardous. For example, Plaintiff alleges that the relationship between greenhouse gas emissions and climate change has been publicly known since at least the 1960s, and that knowledge only grew in magnitude, specificity, and urgency in the years that followed. Compl. ¶¶ 103–05. Indeed, Plaintiff alleges that in 1965, President Lyndon B. Johnson and his science advisory committee publicly acknowledged and forewarned of anthropogenic climate change. *Id.* ¶ 103. Those allegations belie Plaintiff's claim that fossil fuel products "have not performed as safely as an ordinary consumer would expect them to" with respect to emissions of greenhouse gases. *Id.* ¶ 253. Despite the known risks associated with fossil fuels, billions of ordinary consumers (including Plaintiff)

have continued to use them as intended for their myriad benefits, thus demonstrating that fossil fuels are not defective or unreasonably dangerous. In fact, in 2021, three years *after* Plaintiff filed its Complaint, the Biden Administration announced that it was "engaging with relevant OPEC+ members" to encourage "*production increases*" of crude oil in hopes of lowering "high[] gasoline costs," because "reliable and stable energy supplies" were (and still are) essential to the "ongoing global recovery" from the pandemic.[11] And as recently as March of this year, the Biden Administration praised the recent increase in U.S. oil and gas exports, acknowledging that "oil and gas is going to remain a part of our energy mix for years to come. Even the boldest projections for clean energy deployment suggest that in the middle of the century we are going to be using abated fossil fuels."[12]

4. Plaintiff's Trespass Claim Fails Because Plaintiff Has Not Adequately Pleaded Any Of Its Elements.

Plaintiff's trespass claim fares no better, for multiple reasons. ***First***, to prevail on a trespass claim under Maryland law, a plaintiff must establish "an interference with a possessory interest in his property." *United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 234 (2016). But here, Plaintiff fails to allege, as it must, that Defendants interfered with property over which it has "exclusive possession." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013), *reconsideration granted in part on other grounds*, 433 Md. 502 (2013). Plaintiff vaguely alleges that floodwaters have "enter[ed] its real property," *id.* ¶ 286, but Defendants and

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[11] The White House, *Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets* (Aug. 11, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/11/statement-by-national-security-advisor-jake-sullivan-on-the-need-for-reliable-and-stable-global-energy-markets.

[12] Brian Dabbs, *Biden Admin Paradox: Boost Oil – and Cut CO2?*, EnergyWire (March 9, 2023), https://subscriber.politicopro.com/article/eenews/2023/03/09/biden-admin-paradox-boost-oil-but-cut-co2-00086186.

the Court are left to speculate about which property Plaintiff refers to and whether Plaintiff had exclusive possession of any such property.

Second, Plaintiff does not allege that Defendants, *or even their products*, intruded upon any property owned by Plaintiff. Rather, Plaintiff alleges that Defendants "caused flood waters, extreme precipitation, saltwater, and other materials, to enter [its] real property." Compl. ¶ 284. But no precedent supports the novel assertion that a party can be held liable in trespass because use of its product by third parties around the world over nearly a century results in weather changes that affect another's property. In fact, the Restatement suggests the opposite, providing that an actor causes an object to trespass upon another's property when, "without himself entering the land, [he] may invade another's interest in its exclusive possession *by throwing, propelling, or placing a thing* either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 cmt. i (emphasis added).

Consistent with the Restatement, Maryland courts have long held that where, as here, property is allegedly "invaded by an inanimate or intangible object[,] it is obvious that the defendant must have *some connection with or some control* over that object in order for an action in trespass to be successful against him." *Rockland Bleach & Dye Works Co. v. H. J. Williams Corp.*, 242 Md. 375, 387 (1966) (emphasis added). Just as obvious, Plaintiff does not and cannot allege that Defendants exercised control over the oceans, clouds, or precipitation. Rather, Plaintiff's theory is that Defendants should be held liable for trespass because they introduced "fossil fuel products into the stream of commerce," which allegedly contributed to global warming and its resultant weather changes. Compl. ¶ 287. The link between this activity and the harms of which Plaintiff complains is far too attenuated to constitute the control necessary to establish liability for trespass. *See JBG/Twinbrook Metro Ltd. P'ship v. Wheeler*, 346 Md. 601, 625–26

(1997) (finding that a gas company contracting with station owner to sell company's gas was not liable in trespass for subsurface percolation of gas onto an adjacent property because company had "insufficient control, as a matter of law" over the gasoline).

Third, Plaintiff's trespass claim is not ripe to the extent it is based on anticipated *future* invasions of property, and virtually all of Plaintiff's alleged injuries are entirely speculative and will be felt (if at all) only decades hence. For example, Plaintiff alleges that, "*within 80 years*, floods breaking today's records would be expected once a year in Baltimore" and that there "is also a higher than 4 in 5 chance of flooding above nine feet in Baltimore *by 2100* under [a] high sea level rise scenario." *See, e.g.*, Compl. ¶ 198 (emphases added). But Plaintiff cannot state a trespass claim based on such speculative forecasts because "trespass requires that the defendant . . . *entered* or *caused* something harmful or noxious to enter onto the plaintiff's land." *Albright*, 433 Md. at 408 (emphases added). Future invasions that have not yet occurred—and may never occur—are not actionable. *See id.* ("General contamination of an aquifer that may or may not reach a given [plaintiff's] property at an undetermined point in the future is not sufficient to prove invasion of property.").

As one court observed, "modern courts do not favor trespass claims for environmental pollution." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013). Indeed, "use of trespass liability for [environmental pollution] has 'been held to be an inappropriate theory of liability' and an 'endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.'" *Woodcliff, Inc. v. Jersey Constr., Inc.*, 900 F. Supp. 2d 398, 402 (D.N.J. 2012). The Court should therefore dismiss Plaintiff's claim for trespass.

5. Plaintiff Fails Adequately To Allege An MCPA Claim.

To state an MCPA claim, a plaintiff must show: (1) an unfair or deceptive practice or misrepresentation, (2) upon which it relied, (3) that caused it actual injury. *See Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 140–43 (2007). Plaintiff's MCPA claim fails for multiple reasons.

a. Plaintiff Does Not Allege That It Relied On Any Statements.

Plaintiff invokes the MCPA's "private right of action" provision, Md. Code Ann., Com. Law § 13-408(a). Compl. ¶ 293. But Plaintiff cannot state a claim to remedy any harm it purportedly incurred as a consumer because Plaintiff does not allege that it relied on any supposed misrepresentation by Defendants, as it must do "to prevail on a damages action under the MCPA." *Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 532 (D. Md. 2011); *see also Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014) (dismissing MCPA claim because plaintiff "did not rely on Defendants' representations"); *Farwell v. Story*, 2010 WL 4963008, at *8–9 (D. Md. Dec. 1, 2010) (same). Plaintiff alleges only that Defendants "intended that recipients of their marketing messages would rely" on those messages and that as a result, Defendants "obtained income, profits, and other benefits [they] would not otherwise have obtained," Compl. ¶¶ 296–97, not that *Plaintiff* purchased additional fossil fuel products *in reliance on Defendants' supposed misrepresentations*. Plaintiff's MCPA claim should be dismissed on this ground alone.[13]

[13] Plaintiff does not allege that third-party consumers in fact relied on Defendants' alleged misrepresentations. But if it had, Plaintiff could not state a claim based on reliance by third-party consumers because Plaintiff lacks standing to pursue MCPA claims on behalf of such consumers. The Consumer Protection Division of the Office of the Attorney General can enforce the MCPA on behalf of third-party consumers under certain circumstances, *see* Md. Code Ann., Com. Law § 13-204, but Plaintiff does not—and as a local government cannot—invoke any such regulatory authority here. *See id.* § 13-408(a) ("In addition to any action by the Division or Attorney General authorized by this title . . . , any person may bring an action to recover for injury or loss sustained *by him* as the result of a practice prohibited by this title." (emphasis added)); *see also Lloyd*, 397 Md. at 143 (explaining that plaintiff bringing MCPA claim must have suffered actual injury or loss "as a result of his or her reliance on the seller's misrepresentation").

b. Plaintiff's MCPA Claim Is Otherwise Meritless Because It Is Not Premised on Any Allegedly Deceptive Statements About Defendants' Products.

Plaintiff's MCPA claim should also be dismissed because the Complaint does not identify any alleged misrepresentations relating to Defendants' particular *products*, as opposed to *climate change*, a climatological phenomenon. The MCPA requires that the misrepresentations be "in" the "sale" or "offer for sale" of "consumer goods . . . or consumer services." Md. Code Ann., Com. Law § 13-303(1)–(2). As a result, a claim under the MCPA cannot be based on alleged misrepresentations that "were not made in the course of a sale." *Rutherford v. BMW of N. Am., LLC*, 579 F. Supp. 3d 737, 751 (D. Md. 2022); *see also Morris v. Osmose Wood Preserving*, 340 Md. 519, 542 (1995) (MCPA requires deception in the course of "selling, offering or advertising the [product] that the plaintiffs bought").

Here, the focus of Plaintiff's Complaint is not deception related to the sale of Defendants' products. Plaintiff's allegations with respect to the supposed "campaign" relate only to the *risks of climate change* writ large—not to Defendants' specific products. According to Plaintiff, "Defendants embarked on a concerted public relations campaign to cast doubt *on the science* connecting climate change to fossil fuel products and greenhouse emissions," including through "advertisements challenging the validity of climate science . . . intended to obscure the scientific consensus on anthropogenic climate change and induce political inertia to address it," and their supposed campaign sought "to convince the public that the scientific basis for climate change was in doubt." Compl. ¶¶ 147 (emphasis added), 152. Those alleged statements have nothing to do

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Thus, Plaintiff's MCPA claim should be dismissed to the extent it seeks damages for statements to third parties.

with any particular fossil fuel product, much less the sale of any such product. This, too, is fatal to the MCPA claim.

c. Plaintiff's MCPA Claim Is Time-Barred.

MCPA claims are "subject to the [default] three-year statute of limitations" codified in Section 5-101 of the Maryland Code, Courts and Judicial Proceedings Article. *Cain v. Midland Funding, LLC*, 475 Md. 4, 39 (2021). Plaintiff's MCPA claim focuses on a supposed "decades-long campaign" to "conceal[], discredit[], and/or misrepresent[] information" about climate change. Comp ¶¶ 145–46. But Plaintiff does not identify any allegedly misleading statements by Defendants as part of that "campaign" during the limitations period. Rather, Plaintiff alleges that this campaign started in approximately 1988, Compl. ¶ 141, and that the last alleged statement made as a part of this purported campaign occurred in 1998—*nearly two decades before the relevant limitations period began in 2015. See id.* ¶ 158. Thus, Plaintiff's claim is time-barred.

Notably, Plaintiff does not attempt to allege that it could not have discovered the facts giving rise to its claim before July 20, 2015. *See Cain*, 475 Md. at 35 (under Maryland's discovery rule, "a claim accrues"—and the statute of limitations begins to run—"when the plaintiff 'knew or reasonably should have known of the wrong'"). For good reason: Any suggestion that a reasonable plaintiff could not have known about Defendants' purported "campaign" and its alleged effects before July 2015 is inconceivable and controverted by Plaintiff's own allegations.

After all, the Complaint itself alleges that as early as *1965*, "statements from the Johnson Administration . . . put Defendants on notice of the potentially substantial dangers to people, communities, and the planet associated with unabated use of their fossil fuel products." Compl. ¶ 104. And the Complaint alleges that the link between the combustion of fossil fuels and global climate change has been well understood, and widely known, since that time. *See, e.g., id.* ¶¶ 2, 103, 128, 143. Similarly, Plaintiff alleges that Defendants began their supposed "campaign" *30*

years before Plaintiff filed this action and that this alleged "campaign" was purportedly carried out in full view of the public. *See, e.g.*, *id.* ¶ 147. If, as Plaintiff alleges, fossil fuels' impact on climate change was *publicly* known and Defendants engaged in a *public* "campaign of denial," then Plaintiff clearly would have been on inquiry notice of its MCPA claim as soon as Defendants made their alleged statements purportedly denying any such impact.

Moreover, the same accusations that Plaintiff makes here regarding a purported "campaign of denial" by energy companies have been widely publicized by other parties for decades before Plaintiff filed its Complaint. As early as 1997, *The Washington Post* ran a story on the front page of its opinions section charging that, "[e]ven as global warming intensifies, the evidence is being denied with a ferocious disinformation campaign. Largely funded by oil and coal interests, it is being carried out on many fronts." Ross Gelbspan, *Hot Air, Cold Truth*, Wash. Post (May 25, 1997), https://tinyurl.com/mwwxdbuv. A year later, the Sunday edition of *The New York Times* reported on its front page that oil-and-gas "[i]ndustry opponents of a treaty to fight global warming have drafted an ambitious proposal to spend millions of dollars to convince the public that the environmental accord is based on shaky science." John H. Cushman Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. Times (Apr. 26, 1998), https://tinyurl.com/fakcbkph.[14] And given that Plaintiff alleges that the *Washington Post* and the *New York Times* are publications "with substantial circulation to Maryland," Compl. ¶ 129, Plaintiff cannot seriously contend that these articles did not provide it with at least reasonable notice of its potential MCPA claim.

And if all that were not enough, States and municipalities filed suits alleging a link between fossil fuels and climate change more than a *decade* before this suit, including in cases that reached

[14] Defendants deny the accuracy of these materials and do not offer them for the truth of their contents, but only to show that they put Plaintiff on notice of its potential MCPA claims. Accordingly, the Court may take judicial notice of the fact that these articles were published. *See* Md. R. 5-201(b)(2).

the U.S. Supreme Court. *See, e.g.*, *AEP*, 564 U.S. 410; *Kivalina*, 663 F. Supp. 2d 863. In fact, Plaintiff *itself* was one of the petitioners in *Massachusetts v. EPA*, where Plaintiff called "global warming 'the most pressing environmental challenge of our time,'" and the Supreme Court found "that burning fossil fuels could lead to global warming." 549 U.S. 497, 505 (2007). Plaintiff filed its petition in that action *twenty years* ago. Petition, *Mayor of Balt. City v. EPA*, No. 03-1364 (D.C. Cir. Oct. 23, 2003).

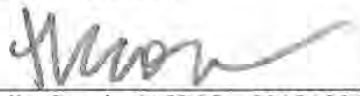
Accordingly, Plaintiff cannot possibly deny that it was aware of the asserted link between fossil fuel emissions and climate change long before July 2015. Indeed, in "response to the growing concern over climate change, the Maryland General Assembly enacted legislation" *in 2004* "intended to reduce Maryland greenhouse gas emissions." *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610, 621 (2019); *see also Accokeek v. Public Serv. Comm.*, 451 Md. 1, 13 (2016) (explaining that "the public had raised concerns about greenhouse gas emissions . . . and its overall contribution to climate change"). Any assertion that Plaintiff was not on reasonable notice of the facts giving rise to its claim by July 2015 would be absurd.

IV. CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Dated: October 16, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2023, a copy of the foregoing was served on all counsel of record via email (by agreement of the parties).

Alison Schurick

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, vs. BP P.L.C., *et al.*, *Defendants*.	Case No. 24-C-18-004219

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted, Plaintiff's opposition thereto, and Defendants' reply, it is this _____ day of _____, 20____, hereby

ORDERED that Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim Upon Which Relief Can Be Granted is **GRANTED**; it is further

ORDERED that all claims against Defendants are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that the Clerk of the Court shall deliver copies of this Order to all parties of record.

_____
Judge Videtta A. Brown
Circuit Court for Baltimore City

MAYOR AND CITY COUNCIL OF BALTIMORE	*	IN THE
	*	CIRCUIT COURT
Plaintiff,		
v.	*	FOR BALTIMORE CITY
BP P.L.C., *et al.*	*	Case No. 24-C-18-004219
Defendants.	*	Specially Assigned to the Hon. Videtta A. Brown
	*	

* * * * * * * * * * * * *

PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

This case is about Defendants' failure to warn and deceptive promotion of products in Maryland that they knew would cause harm in Maryland. Defendants—among them the world's largest oil-and-gas companies—have waged a sophisticated, long-running disinformation campaign to discredit the science of global warming and mislead the public about their fossil fuel products' environmental impacts. Defendants' tortious conduct worsened climate change and its local impacts to Plaintiff the Mayor and City Council of Baltimore (the "City") and its residents. The City accordingly "seeks to hold Defendants liable on well-established state tort law theories" for the local injuries they have caused. *See* Br. of Amicus Curiae Attorney General of Maryland in Opp. to Defendants' Mot. to Dismiss for Failure to State a Claim at 2, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Apr. 23, 2020).

Defendants' arguments for dismissal all attack an imagined caricature of the Complaint ("Compl."). Their arguments that the City's claims are preempted by federal common law or the federal Clean Air Act ("CAA") and present nonjusticiable federal questions all hinge on the faulty assumption that this case asks the Court to "usurp the power of the legislative and executive branches (both federal and state) to set climate policy." *See* Mem. of Law in Support of Defs' Mot. to Dismiss for Failure to State a Claim ("Mot.") at 1. The Fourth Circuit rejected that characterization of the Complaint in affirming the remand order that returned this case to state court: "None of Baltimore's claims concern emission standards, federal regulations about those standards, or pollution permits. Their Complaint is about Defendants' fossil-fuel products and extravagant misinformation campaign that contributed to its injuries." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022) ("*Baltimore IV*"), *cert. denied*, 143 S. Ct. 1795 (2023)). "Numerous [other] courts have [likewise] 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 about those dangers." *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1201 (Haw. 2023) (affirming denial of motions to dismiss for failure to state a claim and lack of personal jurisdiction).[1] This Court should do so as well. When the City prevails, Defendants will not need to reduce fossil fuel production to avoid future liability, and this case does not and could not regulate interstate or international pollution.

Each of Defendants' arguments based on federal law fails. Federal common law does not preempt the City's claims because those claims do not come within any such body of law, and there has never been a federal common law concerning consumer deception. Whatever previously operative body of federal common law concerning interstate air pollution might once have applied no longer exists. It has been displaced by the CAA, and "after displacement, federal common law does not preempt state law." *Id.* at 1181. The CAA also does not preempt the City's claims because the case does not seek to regulate any pollution source, but rather remedy injuries from misleading and deceptive marketing behavior. Even assuming this case might indirectly affect greenhouse gas emissions, the CAA still would not preempt the City's claims because that statute does not occupy the field of air pollution regulation, and adjudicating the case would not pose an obstacle to

[1] *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1113 (9th Cir. 2022) ("This case is about whether oil and gas companies misled the public about dangers from fossil fuels. It is not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the [outer continental shelf]."), *cert. denied*, 143 S. Ct. 1795 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1264 (10th Cir. 2022) ("The Municipalities' claims do not concern CAA emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters."), *cert. denied*, 143 S. Ct. 1795 (2023); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("[T]he State's action here is far more modest than the caricature Defendants present. States have both the clear authority and primary competence to adjudicate alleged violations of state common law and consumer protection statutes, and a complex injury does not a federal action make."), *aff'd sub nom. Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023), *cert. petition filed*, No. 23-168 (U.S. Aug 22, 2023); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud.").

accomplishing the statute's purposes or lead to irreconcilable state and federal requirements. This case also does not present any nonjusticiable political questions because the rights and remedies the City seeks to vindicate are well known to Maryland law. The City's claims would not interfere with the regulatory authority of the elected branches because, again, the City does not seek to regulate emissions, enjoin or reduce pollution, or set climate and energy policy.

There is also no basis to dismiss the City's claims under Maryland law. The City sufficiently alleges all elements of its claims for public and private nuisance, trespass, failure to warn and design defect sounding in negligence and strict liability, and violations of the Maryland Consumer Protection Act ("MCPA"). The City properly asserts nuisance claims because, by wrongfully promoting their fossil fuel products while concealing and downplaying those products' risks, Defendants actively participated in creating unreasonable climate-related interferences with public health, safety, and welfare in Baltimore, and with the normal use and enjoyment of City property. Such conduct fits within Maryland's expansive definition of nuisance. The Complaint also properly alleges Defendants interfered with the City's interest in exclusive possession of its property by knowingly causing water and other foreign materials to invade that property through sea level rise, flooding, extreme precipitation, and other climate-related impacts exacerbated by their tortious conduct—invasions the City alleges are already occurring and will only worsen. Defendants owed a duty to issue adequate warnings to protect the City and others foreseeably harmed by their fossil fuel products of the hazards attending those products' intended uses, which Defendants researched and understood in depth. The dangers of Defendants' products were not obvious to ordinary consumers, due in large part to Defendants' deliberate efforts. Defendants breached their duty by failing to warn and instead deploying a lengthy campaign of deception and denial, causing the City's injuries. Defendants' deceptive tactics deprived consumers of the ability

to understand that the normal use of fossil fuel products causes grave climate dangers, such that those products were far more dangerous than a reasonable consumer would expect. Finally, the City properly asserts an MCPA claim because Defendants' misleading and deceptive statements and omissions deceived consumers about the risks of Defendants' fossil fuel products, increasing and prolonging demand for fossil fuels and exacerbating the City's climate-related injuries.

The Court should reject Defendants' attempts to impose nonexistent limitations on Maryland law and their requests to prematurely adjudicate factual questions, and deny the Motion.

II. STATEMENT OF FACTS

For more than half a century, Defendants have known that their fossil fuel products create greenhouse gas emissions that change Earth's climate. Compl. ¶¶ 1, 5. Beginning in the 1950s, Defendants researched the link between fossil fuel consumption and global warming, amassing a comprehensive understanding of their products' climate impacts. *Id.* ¶¶ 103–40. They understood that only a narrow window of time existed to prevent "catastrophic" climate change. *E.g.*, *id.* ¶¶ 112, 118, 120, 124, 127, 129. Defendants capitalized on their superior knowledge by investing to protect their own assets and exploit new opportunities in a warming world. *Id.* ¶¶ 5, 171–76.

Instead of sharing their knowledge with consumers and the public (or indeed anyone outside their companies), Defendants deployed a sophisticated campaign of deception to misrepresent and conceal their products' risks. *Id.* ¶¶ 1, 6–7, 141–70. Over many decades, Defendants affirmatively promoted their fossil fuel products without warning of their risks, while spreading disinformation and casting doubt on the growing scientific consensus about climate change. *Id.* ¶¶ 141–70. Defendants relied in large part on trade associations and industry groups like the American Petroleum Institute ("API"), the Global Climate Coalition, and the Information Council for the Environment to disseminate climate change denial and disinformation on their

behalf. *See id.* ¶¶ 30–31, 150–68.

When public awareness of climate change began catching up to Defendants' own knowledge, many Defendants launched marketing campaigns repositioning themselves as moving away from fossil fuel production and toward renewable energy. *E.g.*, *id.* ¶¶ 184–88. But Defendants' "forays into the alternative energy sector were largely pretenses," *id.* ¶ 184, and Defendants often contradicted their asserted commitments to renewable energy development by continuing and intensifying their focus on fossil fuel production, *id.* ¶¶ 184–88. Defendants' strategy has worked as intended, inflating and prolonging demand for (and profits from) fossil fuels, while substantially increasing greenhouse gas emissions and their concomitant climate impacts. *Id.* ¶¶ 91–102, 169–70, 177–82.

As a result, the City and its residents have suffered, and will continue to suffer, severe climatic harms. *Id.* ¶¶ 8–10, 14–17, 59–60, 62, 67–68, 195–217. Baltimore, which encompasses over 60 miles of waterfront land, is particularly susceptible to flooding and inundation exacerbated by sea level rise, extreme precipitation, and coastal storms. *Id.* ¶¶ 8, 14–17, 59, 72–82, 85–86, 196–204. The City is also especially vulnerable to rising temperatures and extreme heat events, which add to the heat load of its urban infrastructure and worsen the "urban heat island" effect. *Id.* ¶ 67–68. These climate impacts, among myriad others, jeopardize City property, critical infrastructure including roads and wastewater facilities, cultural and natural resources, and City residents' health and safety. *Id.* ¶¶ 8, 15–17, 196–217. The City faces mounting costs to protect its resources and residents from these worsening climate impacts, as well as decreased tax revenue due to impacts on private property and the City's shipping and tourism industries. *Id.* ¶¶ 15–17, 197–204, 207, 210–15. The City filed this lawsuit to ensure that Defendants—rather than the City or its taxpayers—bear the costs of the local injuries their tortious conduct is causing. *Id.* ¶ 12.

Defendants removed the case from this Court to federal court, and City successfully moved to remand. *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, *Baltimore IV*, 31 F.4th 178, *cert. denied*, 143 S. Ct. 1795 (2023).

III. LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim, the court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can reasonably be drawn from those pleadings." *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021) (cleaned up); *see also Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 169 (2021). The court must view the well-pleaded facts and allegations "in a light most favorable to the non-moving party." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (cleaned up). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 614 (2011) (cleaned up).

Maryland's pleading requirements serve multiple purposes, including "provid[ing] notice to the parties as to the nature of the claim or defense"; among those purposes, "notice is paramount." *Scott v. Jenkins*, 345 Md. 21, 27–28 (1997); *Tshiani v. Tshiani*, 436 Md. 255, 270 (2013) ("The primary purpose behind our pleading standards is notice."). Thus, "[i]n determining whether a plaintiff has alleged claims upon which relief can be granted, there is a big difference between that which is necessary to prove the elements, and that which is necessary to merely allege them." *Wheeling*, 473 Md. at 374 (citing *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007)).

IV. ARGUMENT

A. The City's Claims Are Not Preempted by Federal Common Law.

Defendants' argument that federal common law preempts the City's claims because "'the

basic scheme of the Constitution'" prohibits applying state law in any case "seeking redress for injuries allegedly caused by out-of-state pollution," Mot. at 10, fails for at least four reasons.

First, the federal common law of interstate pollution nuisance Defendants invoke could not preempt the City's claims here, because the City's claims look nothing like any federal common law causes of action ever recognized. The City's Complaint does not seek to cap, enjoin, or regulate any pollution source, as the Fourth Circuit recognized in affirming remand to this Court:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil-fuel production in the Complaint, which spans 132 pages. But, by and large, these references only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil-fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate-change-related injuries, it is not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Baltimore IV, 31 F.4th at 233–34. Because "the source of [the City's] alleged injury is Defendants' allegedly tortious marketing conduct, not pollution traveling from one state to another," the City's claims "would not be preempted by" the federal common law of interstate pollution nuisance. *Honolulu*, 537 P.3d at 1201. Defendants' heavy reliance on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is therefore misplaced. Even assuming that case was correctly decided, the court there found the plaintiff's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," and that the defendants could only avoid future liability if they "cease[d] global production altogether," which is not true here. *Id.* at 93.

Second, even if City's claims would have once come within the federal common law on which Defendants rely, that body of law has been "displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions," namely the CAA, and has no effect. *Am. Elec. Power*

Co. v. Connecticut, 564 U.S. 410, 423 (2011) ("*AEP*"). "When federal common law is displaced, it 'no longer exists,'" and cannot preempt state law. *Honolulu*, 537 P.3d at 1199, n.11 (quoting *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1260 (10th Cir. 2022)); *see also AEP*, 565 U.S. at 423; *Baltimore IV*, 31 F.4th at 205.

Third, there has never been a federal common law of "foreign emissions," Mot. at 13, and to the extent Defendants rely on the foreign affairs doctrine, they have not made a serious showing that it applies. Defendants vaguely urge that "States lack the power to regulate international activities or foreign policy and affairs," and that the City's claims invade federal foreign relations prerogatives. Mot. at 14. But they "never detail[] what those foreign relations are and how they conflict with [the City's] state-law claims." *Honolulu*, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203). "A state or local law is not invalid if it has only 'some incidental or indirect effect in foreign countries,'" and that is the most Defendants assert here. *Bd. of Tr. of Emps.' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City*, 317 Md. 72, 127 (1989) ("*Baltimore Emps. Ret. Sys.*") (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

Fourth, there is no basis to craft *new* federal common law, even assuming this Court has authority to do so. Federal "common lawmaking" is only ever appropriate where it is "necessary to protect uniquely federal interests," *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)), and there are "no 'uniquely federal interests' in regulating marketing conduct, an area traditionally governed by state law," *Honolulu*, 537 P.3d at 1202. To the extent the Second Circuit Court of Appeals purported to recognize a new federal common law of international pollution nuisance in *City of New York*, that decision "is not persuasive in that respect" because the court "'essentially evade[d] the careful analysis that the Supreme Court requires during a significant-conflict analysis.'"

Honolulu, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203).

1. Even If It Were Still Operative, the Federal Common Law of Interstate Pollution Nuisance Would Not Apply Here.

The common law on which Defendants rely never recognized claims like the City's, and there has never been a federal common law pertaining to consumer deception. The U.S. Supreme Court only ever recognized a "federal common law of interstate nuisance" in cases where a state plaintiff sued to enjoin or restrict pollution being discharged from a specific point source located in another state. *See AEP*, 564 U.S. at 418, 421.[2] The City's claims look nothing like that—the City challenges the Defendants' alleged deceptive promotion and failure to warn, which federal common law has never recognized as a basis for liability under any cause of action. *See Baltimore IV*, 31 F.4th at 208. Even if this Court were to find that some vestigial federal common law of air pollution nuisance survived the CAA, it would not preempt the City's claims.

Defendants badly contort the Complaint to fit the City's claims within federal common law. They argue that the City "asks this Court to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people" depend, and "set climate policy," Mot. at 1; "regulate international activities or foreign policy and affairs," *id.* at 14; and "regulate interstate emissions," *id.* at 23. In the jurisdictional context, the Fourth Circuit correctly rejected Defendants' mischaracterizations of the City's Complaint and held that "Defendants have failed to show that federal common law truly controls this dispute involving their fossil-fuel products and misinformation campaign." *Baltimore IV*, 31 F.4th at 208. The City does not seek a reduction or cessation of emissions from any source, and does not seek injunctive

[2] *E.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236, 238 (1907) (sulfuric acid gas from copper smelter); *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 into New York Harbor); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") (sewage discharged into Lake Michigan).

relief that would limit Defendants' ability to extract, refine, and sell fossil fuels or anyone's ability to burn them. *See* Compl. ¶ 12.

"Numerous [other] 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 about those dangers," *Honolulu*, 537 P.3d at 1201 (collecting cases), and the Hawai'i Supreme Court's discussion in *Honolulu* is squarely on point. The defendants argued there that the plaintiffs were "seeking to regulate interstate and international greenhouse gas emissions," but the court "agree[d] with [the] Plaintiffs" that their "suit d[id] not seek to regulate emissions and does not seek damages for interstate emissions." *Id.* at 1181. To the contrary, the plaintiffs brought "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products." *Id.* at 1187. The court quoted the Fourth Circuit's description of this very case, holding that the plaintiffs "clearly s[ought] to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Id.* at 1181 (quoting *Baltimore IV*, 31 F.4th at 233). Because "[t]he source of Plaintiffs' injury [wa]s not pollution, nor emissions," but rather the "Defendants' alleged failure to warn and deceptive promotion," the court held that "even if federal common law had not been displaced, Plaintiffs' claims would not be preempted by it." *Id.* at 1201. The *Honolulu* opinion confirms that the Fourth Circuit's understanding of the City's Complaint in its jurisdictional analysis applies with equal force here, on the merits.

Even if Defendants' caricature of the Complaint were accurate, federal common law nuisance claims were only ever available to *states*. The U.S. Supreme Court never "decided whether private citizens . . . or political subdivisions . . . may invoke the federal common law of nuisance to abate out-of-state pollution." *AEP*, 564 U.S. at 422. The Court in *AEP* declined to

resolve the "academic question whether, in the absence of the Clean Air Act," those types of plaintiffs "could state a federal common-law claim," because "[a]ny such claim would be displaced." *Id.* at 423. There has simply never been a federal common law cause of action the City could have asserted.

The Second Circuit's reasoning in City of New York does not counsel a different result, because the complaint in that case was materially different from the City's. The plaintiff there "acknowledge[d]" that the conduct on which it premised liability was "lawful commercial activity," and the Second Circuit held that the City's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," requiring the defendants to "cease global production altogether" to avoid ongoing liability. 993 F.3d at 87, 93 (cleaned up). Defendants say the City "pursues the exact same theory of liability" here, Mot. at 17, but that is simply incorrect. In the appellate brief Defendants cite, the *City of New York* plaintiff explained 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," and instead relied on "a narrower theory that would require Defendants to pay for the severe harms resulting from their lawful and profitable commercial activities." Br. for Appellant at 19, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018); *see also id.* ("Nuisance and trespass offer a means to reallocate the costs imposed by lawful economic activity."). The "source of tort liability" here is not Defendants' production and sale of fossil fuels, but rather their "concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use." *Baltimore IV*, 31 F.4th at 233–34.

2. The Body of Federal Common Law on Which Defendants Rely Has Been Displaced by the Clean Air Act and No Longer Exists.

Defendants' contention that federal common law preempts the City's claims because "'the basic scheme of the Constitution' requires that federal law govern disputes involving 'air and water in their ambient or interstate aspects'" would remain wrong on its own terms even if that body of law applied here. Mot. at 14 (quoting *AEP*, 564 U.S. at 421). Congress "displaced federal common law governing interstate pollution damages suits" through the CAA, and "after displacement, federal common law does not preempt state law." *Honolulu*, 537 P.3d at 1181.

Federal common law "plays a necessarily modest role" under the Constitution, which "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717. Courts thus "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*") (cleaned up), and ultimately the fate and scope of "federal common law is 'subject to the paramount authority of Congress,'" *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). Congress can eliminate judge-made federal law even without intending to: "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law . . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34. "When a federal statute displaces federal common law, the federal common law ceases to exist." *Baltimore IV*, 31 F.4th at 205 (cleaned up); *Honolulu*, 537 P.3d at 1195 (same).

Defendants agree that Congress "displace[d] federal common-law remedies" for "claims based on domestic emissions" when it passed the CAA, and that the Supreme Court so held in *AEP*. Mot. at 12. The plaintiffs in *AEP* brought federal and state common law nuisance claims against electric power companies, seeking injunctive relief that would have required each defendant to reduce its greenhouse gas emissions. 564 U.S. at 418–19. The Court "h[e]ld that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions," because "the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. "In light of our holding that the Clean Air Act displaces federal common law," the Court continued, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.* at 429. Because the parties had not "briefed preemption or otherwise addressed the availability of a claim under state nuisance law," however, the Court "le[ft] the matter open for consideration on remand." *Id.*

State and federal courts have echoed *AEP*'s conclusion and declined to recognize the federal common law's continued vitality. *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (affirming dismissal of federal common law claims because "federal common law addressing domestic greenhouse gas emissions has been displaced"); *Baltimore IV*, 31 F.4th at 205; *Honolulu*, 537 P.3d at 1195. The "underlying legal basis" for the former federal common law Defendants invoke "is now pre-empted by statute" and has no effect. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981).

3. Displaced Federal Common Law Cannot Preempt State Law.

Despite conceding that the federal common law of interstate pollution nuisance has been displaced, Defendants insist that "such displacement does not allow state law to govern matters that it was never competent to address in the first place," and that the non-existent federal common

law still preempts state law. Mot. at 12. That assertion is directly contrary to the U.S. Supreme Court's analysis of federal environmental statutes and their relation to federal common law.

The Supreme Court of Hawai'i rejected Defendants' exact line of reasoning in *Honolulu* and affirmed denial of motions to dismiss a closely analogous complaint. As the City does here, the plaintiffs in *Honolulu* brought state common law claims alleging that fossil fuel companies "knowingly concealed and misrepresented the climate impacts of their fossil fuel products," which ultimately caused "property and infrastructure damage in Honolulu." 537 P.3d at 1181. And like Defendants here, the defendants in *Honolulu* "acknowledge[d] that the federal common law that once governed interstate pollution damages and abatement suits was displaced by the CAA," but argued that "federal common law still lives but only with enough power to preempt state common law claims 'involving interstate air pollution.'" *Id.* at 1198 (cleaned up). The court declined to adopt the defendants' argument that "federal common law is both dead and alive," because it "engages in backwards reasoning" and "cannot be reconciled with *AEP*." *Id.* at 1198–99.

The Hawai'i Supreme Court traced the U.S. Supreme Court's reasoning in *AEP*, and observed that the Court "did not analyze the federal common law's preemptive effect because it was displaced by the CAA." *Id.* Instead, *AEP* "made clear that whether the state law nuisance claims were preempted depended *only* on an analysis of the CAA because 'when Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears.'" *Id.* (quoting *AEP*, 564 U.S. at 423); *see also Milwaukee II*, 451 U.S. at 314. "And if federal common law retained preemptive effect after displacement," the Court in *AEP* "would have instructed the trial court on remand to examine whether displaced federal common law preempted the state law claims," which it did not. *Honolulu*, 537 P.3d at 1199. The Hawai'i court thus held that "displaced federal common

law plays no part in this court's preemption analysis," which "requires an examination *only* of the CAA's preemptive effect." *Id.* at 1199, 1200.

The reasoning in *Honolulu* comports with the U.S. Supreme Court's consistent treatment of displaced federal common law, pre-dating *AEP*. The Court followed the same approach in its series of cases analyzing the relationship between state law, displaced federal common law, and the federal Clean Water Act ("CWA"). The Court had recognized a federal common law of interstate water pollution nuisance in *Milwaukee I*, but shortly thereafter "Congress enacted the Federal Water Pollution Control Act Amendments of 1972," which created an elaborate permitting framework to control water pollution. *Milwaukee II*, 451 U.S. at 307, 310–11. In *Milwaukee II*, the Court held that "establishment of such a self-consciously comprehensive program by Congress" left "no room for courts to attempt to improve on that program with federal common law." *Id.* at 319. The Court added that "the comprehensive nature of [Congress's] action suggest[ed] that [the CWA] was *the exclusive source* of federal law." *Id.* at 319 n.14 (emphasis modified).

The Court confronted the separate question of whether *state* law could still apply to claims involving interstate water pollution in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and held that it could, to the extent not preempted by the CWA. The Court performed a traditional statutory preemption analysis and held that "[t]he [CWA] pre-empts state law to the extent that the state law is applied to an out-of-state point source," but does not preempt claims under the law of the state where the pollution source sits. *Id.* at 500. The Court reasoned that "[a]n action brought against [a pollution source in New York with a CWA permit] under New York nuisance law would not frustrate the goals of the CWA," in part because "[a]lthough New York nuisance law may impose separate standards and thus create some tension with the permit system, [the] source only [would be] required to look to a single additional authority, whose rules should be relatively

predictable." *Id.* at 498–99. The Court did *not* hold that the displaced federal common law or the CWA prohibited all application of state law to such a dispute, and did *not* analyze the federal common law's preemptive effect. As the Court reiterated later in *AEP*, where a statute "displaces federal common law, the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act." 564 U.S. at 429.[3]

The Second Circuit in *City of New York* opined that because air pollution "is an interstate matter raising significant federalism concerns," state law did not "snap back into action" after the CAA displaced federal common law, and that "[s]uch an outcome is too strange to seriously contemplate." 993 F.3d at 92, 98–99; *see also* Mot. at 12. But that is exactly what *Milwaukee II*, *Ouelette*, and the U.S. Supreme Court's other precedents instruct: "Whether interstate in nature or not, if a dispute implicates [c]ommerce among the several States[,] Congress is authorized to enact the substantive federal law governing the dispute." *Milwaukee II*, at 451 U.S. at 315 n.8 (cleaned up). And while "interstate disputes frequently call for the application of a federal rule when Congress has *not* spoken," it is clear that "[w]hen Congress *has* spoken its decision controls, even in the context of interstate disputes." *Id.* (emphasis added). Once a statute like the CAA displaces federal common law, that statute may preempt state law, but the displaced common law cannot.[4]

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[3] Defendants' repeated contention that there is a "constitutional prohibition against using state law to impose liability for harms arising from interstate emissions," Mot. at 17, is irreconcilable with *Oullette* and *AEP*, and with federalism principles more broadly. "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." *Young v. Masci*, 289 U.S. 253, 258–59 (1933); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (state law may apply to out-of-state conduct if the application is "supported by the State's interest in protecting its own consumers and its own economy").

[4] Defendants cite *Burgoyne v. Brooks*, 76 Md. App. 222, 225 (1988), for its statement that "[w]henever federal common law governs a particular issue, it must be applied." Mot. at 12. That is true so far as it goes, but the case is not instructive. The court in *Burgoyne* followed precedent holding that "States must follow federal law with respect to slander or libel committed by a federal employee," 76 Md. App. at 225, relying in part on the Supreme Court's statement six months earlier in *Westfall v. Erwin* that "the scope of absolute official immunity afforded federal employees is a matter of federal law, to be formulated by the courts in the absence of legislative action by Congress," 484 U.S. 292, 295 (1988), (citation omitted). This case has nothing to do with official immunity. More importantly,

4. Defendants' References to Foreign Affairs Do Not Present a Preemption Defense.

To the extent Defendants rely on federal foreign policy concerns as a basis for applying or crafting federal common law in this case, they cannot satisfy their burden. There has never been a federal common law of "foreign emissions," and the separate foreign affairs doctrine has no application here.

Under the foreign affairs doctrine, state laws that "take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility" are *per se* preempted. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003). But state law only invades federal foreign policy prerogatives if it "produce[s] something more than [an] incidental effect in conflict with express foreign policy of the National Government." *Id.* at 420; *see also Baltimore Emps. Ret. Sys.*, 317 Md. at 80, 147 (city ordinance prohibiting employee pension fund from investing in "banks or financial institutions that make loans to South Africa or Namibia" did not "interfere[e] with the Nation's ability to achieve its foreign policy objectives" concerning apartheid, including those expressed through the federal Anti-Apartheid Act). Defendants make no meaningful argument that the doctrine applies.[5]

Congress passed the so-called Westfall Act only a few months later, which "establishe[d] the absolute immunity for Government employees that the Court declined to recognize under the common law" in *Westfall. See United States v. Smith*, 499 U.S. 160, 163 (1991); 28 U.S.C § 2679. That is, the common law discussed in *Westfall* and *Burgoyne* has since been *displaced by statute*. The City is aware of no authority suggesting that *Westfall*'s common law rule retains any force, to preempt state law or otherwise.

[5] Defendants' passing citations to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012), *see* Mot. at 13, are not instructive. In *Sabbatino*, "an instrumentality of the Cuban Government" sued an American commodities broker for conversion to recover proceeds from certain sales of sugar, based on the Cuban government's authority to "nationalize by forced expropriation property or enterprises in which American nationals had an interest." 376 U.S. at 401, 404–06. The Court held that while "it cannot of course be thought that every case or controversy which touches foreign relations lies beyond judicial cognizance," federal separation of powers principles cautioned against courts "passing on the validity of foreign acts of state." *Id.* at 423. As such, the Court held that "the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case." *Id.* at 439. This case is not remotely similar, and Defendants do not raise the act of state doctrine as a defense. *Kurns*, meanwhile, did not involve foreign affairs at all, but rather whether a railroad employee's state law products liability claims for asbestos exposure were preempted by the Locomotive Inspection Act, which "occup[ies] the entire field of regulating locomotive equipment." 565 U.S. at 628, 631. As discussed below, the CAA does not preempt the field of dealing with air pollution, and Defendants do not argue any other statute does.

The Second Circuit in *City of New York* arguably recognized a new federal common law of "foreign emissions," but to the extent it did so the case was wrongly decided. The court held that because the claims there "implicat[ed] the conflicting rights of states and our relations with foreign nations, this case poses the quintessential example of when federal common law is most needed." 993 F.3d at 92 (cleaned up). Because "the Clean Air Act does not regulate foreign emissions," the court held that the plaintiff's claims "still require[d] [it] to apply federal common law." *Id.* at 95 n.7. That analysis is incorrect for multiple reasons, and is inapplicable here.

First, no court had ever previously recognized a federal common law of "foreign emissions," and the Second Circuit "essentially evade[d] the careful analysis that the Supreme Court requires" before a court may craft new federal common law. *Honolulu*, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203). *Second*, even if there were a pre-existing federal common law of nuisance related to foreign pollution, the CAA displaced that too, just it displaced federal common law nuisance claims concerning interstate air pollution. A proper displacement analysis would not ask whether the CAA "regulate[s] foreign emissions," as the Second Circuit discussed, 993 F.3d at 95 n.7, but only whether "the Act 'speaks directly' to" those emissions, *AEP*, 564 U.S. at 424. It does: if the EPA Administrator "has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country," the Administrator must notify the Governor of the source state and that state must take certain actions. 42 U.S.C. § 7415(a), (b). Importantly, those requirements "apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country." *Id.* § 7415(c). Because Congress has spoken to the issue, any federal common law of "foreign emissions" that might once have existed does not

any longer, and "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34.

Third, as discussed above, even if the Second Circuit correctly held that *City of New York* involved regulating emissions (including international emissions) because the plaintiff's complaint assumed defendants engaged only in "lawful commercial activity," this case is entirely different. 993 F.3d at 87 (cleaned up). Because the plaintiff in *City of New York* expressly argued that the defendants had not violated any statutory or common law duty, the Second Circuit held that its complaint would "effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at 93. On those allegations, the court held that if the defendants "want[ed] to avoid all liability, then their only solution would be to cease global production altogether." *Id.* The complaint thus "would regulate cross-border emissions in an indirect and roundabout manner, [but] would regulate them nonetheless." *Id.* In this case, defendants can avoid unlimited future liability by stopping their tortious failure to warn abetted by a sophisticated disinformation campaign. Plaintiffs' success at trial here will not regulate emissions at all, directly or indirectly, and Defendants' "lawful commercial activity" will not be impeded.

5. There Is No Basis to Recognize New Federal Common Law Because the City's Claims Do Not Conflict with Any Uniquely Federal Interest.

Finally, to the extent Defendants ask the Court to stretch the now-displaced federal common law to embrace the City's claims, they have not come close to carrying their "heavy burden" to do so. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1997). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez*, 140 S. Ct. at 716. Only a "few," "restricted" areas exist where judge-made federal law is appropriate absent express congressional authorization, because "a

federal rule of decision is necessary to protect uniquely federal interests." *Tex. Indus., Inc.*, 451 U.S. at 640 (cleaned up). And "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. First, state law must be in "significant conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994). The conflict must implicate a "genuinely identifiable (as opposed to judicially constructed) federal policy," *id.* at 89, and must be "specifically shown" by the proponent of the federal rule, *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Miree v. DeKalb Cnty., Ga.*, 433 U.S. 25, 31–32 (1977) (same).

As an initial matter, the City is aware of no authority suggesting that this Court (or any state court) could create new federal common law, which would necessarily constitute federal "lawmaking," *see Rodriguez*, 140 S. Ct. at 717, and Defendants offer none. Even assuming the Court has that power, none of the necessary conditions are satisfied here. The City's case pursues the core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct traditionally regulated by the States. *See, e.g.*, *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). It pursues tort remedies rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it seeks to redress injuries that "states have a legitimate interest in combating," namely "the adverse effects of climate change." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). There are simply "no 'uniquely federal interests' in regulating marketing conduct" that would justify new federal common law. *Honolulu*, 537 P.3d at 1202.

There is likewise no significant conflict between the City's claims and any federal interest. Defendants say state law conflicts with an "overriding need for a uniform rule of decision on matters influencing national energy and environmental policy," and with vague "basic interests of federalism." Mot. at 2, 9, 10 (cleaned up). But the U.S. Supreme Court has held that federal common law cannot rest on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," and requires instead a "specific, concrete federal policy or interest" with which state law conflicts. *O'Melveny*, 512 U.S. at 88. Defendants do not identify any uniquely federal interest or any significant conflict, and thus cannot satisfy "the most basic" preconditions for crafting federal common law. *Rodriguez*, 140 S. Ct. at 717.

B. The Clean Air Act Does Not Preempt the City's Claims.

Because any existing federal common law of interstate air pollution nuisance has been displaced by the CAA, this Court "must only consider whether the CAA preempts state law." *Honolulu*, 537 P.3d at 1181. Defendants' Motion is ambiguous as to whether Defendants raise a conflict preemption or field preemption challenge to the Complaint, but both fail. There is no field preemption because the CAA's savings clauses make clear Congress did not intend to bar all state regulation of air pollution. 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). The City's case is also not preempted under any conflict preemption analysis, because no aspect of its claims would make Defendants' compliance with the CAA impossible, or stand in the way of the CAA's purposes and objectives.

Under the field preemption doctrine, "[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Congressional intent

to occupy a field "may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (cleaned up). "The presence of a savings provision," however, "is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field there would be nothing to 'save.'" *Farina v. Nokia Inc.*, 625 F.3d 97, 121 (3d Cir. 2010) (cleaned up).

Conflict preemption occurs where state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009), or where "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43. As those descriptions suggest, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up). Preemption cannot rest on "brooding federal interest[s]," "judicial policy preference[s]," or "abstract and unenacted legislative desires." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901, 1907 (2019) (lead opinion). Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (cleaned up).

The Hawai'i Supreme Court considered at length a CAA preemption challenge to substantially similar claims in *Honolulu*, and rejected preemption under any theory. The CAA "does not occupy the field of emissions regulation such that state law is preempted," and "even if it did, the City's claims do not seek to regulate emissions, and so a claim of field preemption in the field of emissions regulation is inapposite." *Honolulu*, 537 P.3d at 1204. One of the CAA's savings clauses "expressly protects a state's right to adopt or enforce any standard or limitation

respecting emissions unless the state policy in question would be less stringent than the CAA," *id.*, and the U.S. Supreme Court held in *Ouellette* that a nearly identical savings clause in the CWA "negates the inference that Congress 'left no room' for state causes of action." 479 U.S. at 492.

The Hawai'i court also held there was no obstacle preemption because the plaintiffs' claims "ar[o]se from Defendants' alleged failure to warn and deceptive marketing conduct, not emissions-producing activities regulated by the CAA." *Honolulu*, 537 P.3d at 1205. The claims could "potentially regulate marketing conduct while the CAA regulates pollution," so there was no "'actual conflict' between Hawai'i tort law and the CAA." *Id.* at 1205 (citation omitted). There was finally no impossibility preemption, because the defendants could "avoid federal and state liability by adhering to the CAA and separately issuing warnings and refraining from deceptive conduct as required by Hawai'i law; it is not a 'physical impossibility' to do both concurrently." *Id.* at 1207.[6] The analysis from *Honolulu* applies with equal force here. The City's claims are not preempted by the Clean Air Act.

C. The City's Claims Do Not Present Nonjusticiable Political Questions.

The City's claims also do not present any nonjusticiable political question, and instead turn on traditional tort law questions clearly within judicial competence. Maryland courts apply the U.S. Supreme Court's test from *Baker v. Carr*, 369 U.S. 186 (1962), to determine whether a case presents a political question. *See Est. of Burris v. State*, 360 Md. 721, 745 (2000). The *Baker v. Carr* test considers, among other issues, whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable

[6] *Accord, e.g., Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 672–73 (9th Cir. 2003) (state ban on gasoline additive "enacted for the purpose of protecting groundwater" did not interfere with CAA's "central goal of . . . reduc[ing] air pollution" or "inhibit federal efforts to fight air pollution"); *In re MTBE*, 725 F.3d at 95–96, 104 (state common law claims for injuries caused by same gasoline additive not preempted because defendants "could have complied with [the CAA]" without violating state tort duties).

and manageable standards for resolving" the case, "the impossibility of deciding [the dispute] without an initial policy determination of a kind clearly for nonjudicial discretion," or "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Id.* at 745 (quoting *Baker*, 369 U.S. at 217). "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217.

The Second Circuit's opinion in *AEP*, holding that the plaintiffs' claims there did not present a political question, is instructive. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). The court there discussed the political question doctrine in exhaustive detail, and reasoned that the plaintiffs' complaint would not intrude on any issue committed to another branch of government because the plaintiffs did not "ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches," and a district court would have no power to "set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit." *Id.* at 325. Similarly, the court found discoverable standards existed to govern the case, because "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." *Id.* at 326. And finally, the court held "where a case 'appears to be an ordinary tort suit, there is no impossibility of deciding [the case] without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 331 (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007)). Likewise here, the City has brought "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products," and is seeking traditional relief courts are competent to provide. *See Honolulu*, 537 P.3d at 1187.

The cases Defendants cite in support of their political question argument are all distinguishable and inapposite. In *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), the plaintiffs brought claims against the federal and state government, respectively, expressly demanding that the government broadly reduce greenhouse gas emissions. The Ninth Circuit held that the *Juliana* plaintiffs lacked standing because "[t]he crux of the plaintiffs' requested remedy is an injunction requiring the [federal] government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions," all of which was beyond the judiciary's power to grant. 947 F.3d at 1170–73. The court did not rely on the political question doctrine, and instead held that the plaintiffs lacked standing because Article III courts could not "provide the plaintiffs the redress they seek." *Id.* at 1164; *see also id.* at 1174 n.9 ("[W]e do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns.").

In *Sagoonick*, the Alaska Supreme Court held the political question doctrine barred the plaintiffs' suit because "the remedy plaintiffs [sought] in th[at] case would require courts to make decisions that article VIII [of the Alaska constitution] has committed to the legislature," including ordering state agencies to measure, account for, and reduce greenhouse gas emissions statewide. 503 P.3d at 798. The Alaska constitution expressly states that "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State . . . , for the maximum benefit of its people," Alaska Const. art. 8, § 2. The court found that language, and the article's provisions taken as a whole, "reflect[] careful consideration of each government branch's role in managing Alaska's resources and textually establishes the legislature's importance in this policy-making area." *Id.* at 785. "[S]eparation of powers considerations therefore [we]re

clearly implicated," and the plaintiffs' claims were nonjusticiable. *Id.* at 798. The City requests no analogous relief, and Maryland's constitution does not commit any issue presented here to the political branches.

The other cases Defendants cite are equally distinguishable because they all alleged injuries directly from emissions themselves, and sought relief also directly related to emissions. *See* Mot. at 25–27; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). In each case, the plaintiff sought to hold the defendants strictly liable for climate-related injuries caused by the defendants' lawful production, promotion, and sale of fossil fuels or fuel-consuming equipment.[7] The courts in each case found they would have to determine how the costs of responding to global warming writ large should be distributed, and make first-order policy determinations concerning the appropriate or acceptable levels of greenhouse gas emissions nationwide. None of those concerns are implicated here. For the reasons laid out by the Second Circuit in *AEP*, moreover, those cases were likely wrongly decided. *See* 582 F.3d at 323–334. The Fifth Circuit in fact *reversed* the *Comer* decision's political question holding after considering the *Baker v. Carr* factors, because "[i]n th[at] case the only 'issues' [we]re those inherent in the adjudication of plaintiffs' Mississippi common law tort claims for damages," which were "well within the authority of the federal judiciary" to adjudicate. *Comer v. Murphy Oil USA*, 585 F.3d 855, 875 (5th Cir. 2009), *vacated on reh'g en banc on other grounds*,

[7] *See Kivalina*, 663 F. Supp. 2d at 868 (seeking to hold fossil-fuel companies liable for their "contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming"); *Gen. Motors*, 2007 WL 2726871, at *14 ("seeking to impose damages for the Defendant automakers' lawful worldwide sale of automobiles"); *Comer*, 839 F.Supp.2d at 852 ("The plaintiffs also contend that the defendants should be held strictly liable for the injuries that result from their emissions.").

607 F.3d 1049 (5th Cir. 2010).[8] And while the Ninth Circuit affirmed *Kivalina*, it did so because the federal common law claims the plaintiff asserted were displaced; it did not discuss the political question doctrine or affirm on that basis. *See* 696 F.3d at 858; *supra* Part IV.A.2.

Defendants' assertion that "[t]he Maryland executive and legislative branches . . . have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve the State," Mot. at 28, proves nothing. Again, the City does not ask this Court to "weigh[] the costs and benefits of fossil fuel use" or "enact policies." *Id.* Moreover, the fact that a subject "ha[s] been considered by the executive and legislative branches," Mot. at 29, does not mean courts lose all ability to adjudicate claims that touching on that subject. Every state in the union extensively regulates the operation of motor vehicles, for example, *see, e.g.*, Md. Code Ann. Transp. § 11-101 *et seq.*, but car accidents remain the classic, archetypal common law tort action. It cannot be the case here that the City's claims are nonjusticiable because "Maryland enacted legislation to reduce greenhouse emissions and combat climate change." Mot. at 28. That result would be nonsensical.

D. The City Pleads Actionable Claims Under Maryland Law.

1. The City Sufficiently Pleads Its Nuisance Claims.

a. The Complaint States a Claim for Public Nuisance.

Following the Restatement (Second) of Torts ("Rest."), Maryland recognizes that "[a] public nuisance is an unreasonable interference with a right common to the general public." *See Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984) (quoting Rest. § 821B)); *Gallagher v. H.V.*

[8] The panel decision from *Comer* was later vacated for unusual reasons unrelated to its holdings. The Fifth Circuit granted a petition for rehearing *en banc*. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010) (Mem.). After voting to hear the appeal *en banc*, however, one of the judges recused, such that "th[e] en banc court lost its quorum." *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010). The court held that it lacked authority to reinstate the panel opinion and dismissed the appeal, such that "there [wa]s no opinion or judgment in th[e] case upon which any mandate may issue." *Id.* at 1055. Neither the opinion of the court nor the two dissents discussed the merits of the earlier opinion. While the panel opinion is no longer controlling precedent in the Fifth Circuit, its reasoning is sound and provides persuasive authority here.

Pierhomes, LLC, 182 Md. App. 94, 114 (2008). Traditional public rights include "the public health, the public safety, the public peace, the public comfort [and] the public convenience." *Tadjer*, 300 Md. at 552 (quoting Rest. § 821B). The Complaint here amply alleges all the elements of a public nuisance cause of action.

The City alleges that Defendants created, assisted in creating, or were a substantial factor in contributing to a nuisance by, among other conduct, "[c]ontrolling every step of the fossil fuel product supply chain" including "marketing of those fossil fuel products," "promoting the sale and use of fossil fuel products which Defendants knew to be hazardous and knew would cause or exacerbate global warming and related consequences," "concealing the hazards that Defendants knew would result from the normal use of their fossil fuel products," and "[d]isseminating and funding the dissemination of information intended to mislead customers" about those hazards. Compl. ¶¶ 221(a)–(d). That conduct "maximize[d] continued dependence on their products," *id.* ¶ 145, and delayed efforts to address climate change, substantially increasing "the magnitude and costs to remediate" its effects, *id.* ¶ 179; *see also id.* ¶¶ 10, 191–95. The increased emissions attributable to Defendants' tortious conduct have engendered significant climate impacts in Baltimore including sea level rise, flooding and inundation, extreme precipitation and storms, drought, extreme heat, and rising air temperatures—each of which interferes with fundamental public rights including public health, safety, comfort, and convenience.[9] *Id.* ¶¶ 8–10, 14–17, 59–60, 62, 67–90, 102, 195–217, 219–26. The interferences with public rights flowing from Defendants' conduct are unreasonable because they are significant—resulting in impacts as severe

[9] Defendants' argument that the Complaint pleads only interference with a private "right not to be deceived," Mot. at 37–38, misses the mark. Unlike in the sole case Defendants cite, the City does not allege that Defendants' campaign of deception and disinformation or failures to warn are in and of themselves a public nuisance. *Cf. Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988, 1002 (D.C. Cir. 1973) (rejecting claim that false or deceptive "advertisements [of a drug] constitute a public nuisance"). Instead, Defendants' misleading and deceptive conduct has *caused* unreasonable interferences with public rights that are quintessential public nuisances requiring abatement. *See* Compl. ¶¶ 191–217.

as inundation of low-lying areas, destruction of critical electric and wastewater infrastructure, and loss of life, *e.g.*, *id.* ¶¶ 15, 77, 81, 87, 199–209, just as Defendants predicted they would, *e.g.*, *id.* ¶¶ 103–40, 181—and will have permanent or long-lasting effects on the City and its residents, *id.* ¶¶ 220, 224. *See Tadjer*, 300 Md. at 552.[10]

As discussed in greater detail below, those allegations state a claim for public nuisance under Maryland law, which is in accord with the numerous state courts that have found nuisance liability sufficiently alleged in similar circumstances. *See infra* Part IV.D.1.c.

b. The Complaint States a Claim for Private Nuisance.

The City also alleges an actionable private nuisance, defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (quoting Rest. § 821D). A private nuisance injury is actionable when it is "of such a character as to diminish materially the value of the property" for its intended purpose, "and seriously interfere[s] with the ordinary comfort and enjoyment of" the property. *Slaird v. Klewers*, 260 Md. 2, 9 (1970). The seriousness of the interference is measured by whether it "would be offensive or inconvenient to the normal person." *Wash. Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 125 (1993).

Defendants' tortious conduct is causing flooding, inundation, and other damage to City property, including roads, emergency response facilities, dock and harbor facilities, and the City's stormwater drainage system and wastewater facilities; that conduct also increases the cost of protecting the City's critical infrastructure and natural resources. *Id.* ¶¶ 77–83, 197–215. These injuries substantially interfere with the normal use and enjoyment of City property. *Id.* ¶¶ 230–33.

[10] Defendants' conduct is also a nuisance *per se* because it violates the MCPA. *See* Compl. ¶ 225; *infra* Part IV.D.4.

c. The City's Nuisance Claims Apply Well-Recognized Maryland Law.

Defendants do not challenge the Complaint's satisfaction of any element of a public or private nuisance claim. Instead, they assert that nuisance claims can only arise from a defendant's use of land, that the City cannot assert nuisance claims based on harms caused by products, and that Defendants cannot be liable because they did not control their fossil fuel products at the time of combustion. Mot. at 30–39. Maryland law imposes none of those constraints on nuisance liability.

d. Maryland Nuisance Liability Extends to the Wrongful Promotion of Dangerous Products, Consistent with the Nationwide Trend.

Maryland does not limit nuisance claims to the use of land or categorically exclude liability for nuisances created by wrongful promotion of hazardous products. Maryland courts have long recognized that nuisance liability extends to all those who actively participate in the creation of a nuisance. *See 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."); *Maenner v. Carroll*, 46 Md. 193, 215 (1877) ("[I]t is certainly true, that every person who does or directs the doing of an act that will of necessity constitute or create a nuisance, is personally responsible for all the consequences resulting therefrom."). Historically and today, parties whose products substantially contribute to a nuisance may be liable even if the nuisance would not have occurred without another's participation. *See Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256–57 (D. Md. 2000) (citing *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Balt.*, 187 Md. 385, 397 (1946)). This accords with the Restatement: a defendant "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." Rest. § 834.

Applying the Restatement definitions, federal district courts sitting in Maryland have recognized that nuisance liability under Maryland law can extend to a defendant who misleadingly markets products for uses the defendant knows will likely cause environmental or health hazards and those nuisance conditions arise. *See State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467–69 (D. Md. 2019) (denying motion to dismiss public nuisance claim against manufacturers over groundwater contamination from gasoline additive); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *9–10 (D. Md. 2020) (same as to nuisance claim against manufacturer for PCB contamination of stormwater infrastructure). In *State v. Exxon*, Judge Hollander concluded that "no case law forecloses [a] theory of public nuisance liability" based on deceptive promotion of a dangerous product, and held the State adequately pleaded a nuisance claim "premised on [the defendants'] manufacture, marketing, and supply of MTBE gasoline" with "extensive knowledge of the environmental hazards associated with MTBE." 406 F. Supp. 3d at 467–69. Judge Bennett came to a similar conclusion in *Baltimore v. Monsanto*, finding that the City sufficiently alleged the defendants substantially participated in creating a public nuisance by marketing and promoting PCBs while withholding their "extensive knowledge about PCB's harmful effects" from consumers and the public. 2020 WL 1529014, at *9–10. Defendants here likewise had extensive knowledge of the climatic harms that would arise from their products' intended use, but concealed that knowledge while misleadingly promoting their products. *See* Compl. ¶¶ 103–70.

Resisting this conclusion, Defendants cite cases involving nuisances caused by land use, and argue that nuisance liability can arise *only* from a defendant's use of land. *See* Mot. at 4, 33–37 Defendants' cases do not stand for that proposition, and Maryland nuisance law is not so limited. *See, e.g.*, *Maenner*, 46 Md. at 215. At common law, a defendant historically could create

an actionable nuisance by selling harmful products such as "meat, food, or drink" that was "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" or "posting placards in the vicinity of [a] plaintiff's business, calculated to bring the plaintiff into contempt and to prevent people from trading with him." *See* H. G. Wood, *The Law of Nuisances* 72–73, 75, 143, 147 (1875) [Ex. 1] (collecting cases).[11] Professor Prosser[12] likewise explained that "nuisance is a field of tort liability rather than a type of tortious conduct," and thus the scope of nuisance liability is defined by "reference to the interests invaded . . . not to any particular kind of act or omission which has led to the invasion." Prosser, *Handbook of Law of Torts* 573 (4th ed. 1971) [Ex. 2].[13]

Courts across the country have recognized nuisance claims against manufacturers and sellers of products who wrongfully promoted their products for a use the defendant knew to be dangerous, while concealing or misrepresenting those dangers.[14] Most recently, the Delaware

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[11] Maryland courts have looked to Wood's treatises as persuasive guidance on tort law. *See, e.g.*, *Greene Tree Home Owners Ass'n, Inc. v. Greene Tree Assocs.*, 358 Md. 453, 458, 466, 472, 475–76 (2000); *Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 303 (1991); *Garner v. Garner*, 31 Md. App. 641, 650 (1976).

[12] Maryland courts frequently cite Professor Prosser for nuisance principles. *See, e.g.*, *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 403 (2011); *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 649–50 (2020); *Gambril v. Bd. of Educ. of Dorchester Cnty.*, 481 Md. 274, 317 (2022); *Tadjer*, 300 Md. at 551–52.

[13] The two law review articles Defendants cite, Mot. at 32, are contrary to this weight of authority and to the litany of cases nationwide that have since embraced public nuisance claims based on wrongful promotion of products. *See* Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743, 764–74 (2003) (acknowledging numerous cases upholding public nuisance claims against product manufacturers); Schwartz & Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543, 556, 560 (2006) (recognizing some courts have allowed such claims to proceed). In any event, the City does not seek to hold Defendants liable for mere "manufacture or distribution of lawful products," Gifford, 71 U. Cin. L. Rev. at 834, but for their tortious promotion of their products and their failures to warn of those products' hazards.

[14] *See, e.g.*, *In re MTBE*, 725 F.3d 65, 121–23 (2d Cir. 2013) (upholding jury verdict for public nuisance against MTBE manufacturer who knew its gasoline would be stored in tanks that leaked); *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 628–30 (S.D.N.Y. 2001) (plaintiffs stated viable nuisance claims under California, Florida, Illinois, and New York law by alleging defendants manufactured and distributed MTBE gasoline with knowledge of its dangers while failing to warn downstream handlers of those dangers, misrepresenting the chemical properties of MTBE, and

Supreme Court reversed dismissal of public nuisance claims brought by the state against the primary manufacturer of PCBs, who "took affirmative steps to conceal the toxic nature of PCBs" despite knowing "PCBs would eventually end up causing long lasting contamination to state lands and waters." *Delaware v. Monsanto Co.*, 299 A.3d 372, 376, 386–87 (Del. 2023). That court discussed and agreed with the District of Maryland's decision in *Baltimore v. Monsanto*, and confirmed the longstanding "common-sense notion that public nuisance liability extends . . . to those who substantially participate in creating [a] public nuisance." *Id.* at 381.

The handful of exceptions Defendants cite are inapplicable because they did not involve allegations that a manufacturer wrongfully promoted products while concealing or downplaying the products' risks, allegations central to the City's claims here. *Compare Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[N]uisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building."),

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concealing its risks); *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 650–51 (Pa. Commw. Ct. 2021) (denying motion to dismiss public nuisance claim against PCB manufacturers "where Plaintiffs allege that the marketed uses of the PCB products themselves created the nuisance" and that defendants knew the products' use "as intended" would result in contamination); *Oregon v. Monsanto Co.*, 2019 WL 11815008, at *7 (Or. Cir. Ct. Jan. 9, 2019) (PCBs); *City of Spokane v. Monsanto Co.*, 2016 WL 6275164, at *7–9 (E.D. Wash. Oct. 26, 2016) (PCBs); *Port of Portland v. Monsanto Co.*, 2017 WL 4236561, at *9 (D. Or. Sept. 22, 2017) (PCBs); *People v. ConAgra Grocery Prods. Co.* ("*ConAgra*"), 17 Cal. App. 5th 51, 91–101 (2017) (lead paint); *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 304–13 (2006) (lead paint); *Johnson v. 3M*, 563 F. Supp. 3d 1253, 1342–43 (N.D. Ga. 2021) (PFAS); *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) (cigarettes); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 645–51 (N.D. Cal. 2020) (e-cigarettes); *City of Bos. v. Smith & Wesson Corp.*, 2000 WL 1473568, at *13–14 (Mass. Super. Ct. July 13, 2000) (guns); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141–1144 (2002) (guns); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1209–15 (9th Cir. 2003) (guns); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187, 194–96, (N.Y. Sup. Ct. 1994) (pesticides); *Alaska v. Purdue Pharma L.P.*, 2018 WL 4468439, at *4 (Alaska Super. Ct. July 12, 2018) (opioids); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064, at *3–4 (Ark. Cir. Ct. Apr. 5, 2019) (opioids); *Kentucky v. Endo Health Sols. Inc.*, 2018 WL 3635765, at *6 (Ky. Cir. Ct. July 10, 2018) (opioids); *Massachusetts v. Purdue Pharma, L.P.*, 2019 WL 5495866, at *4–5 (Mass. Super. Ct. Sept. 17, 2019) (opioids); *In re Opioid Litig.*, 2018 WL 3115102, at *21–22 (N.Y. Sup. Ct. June 18, 2018) (opioids); *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *7–11 (R.I. Super. Ct. Aug. 16, 2019) (opioids); *Tennessee v. Purdue Pharma L.P.*, 2019 WL 2331282, at *5–6 (Tenn. Cir. Ct. Feb. 22, 2019) (opioids); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129, at *13–14 (N.H. Super. Ct. Sept. 18, 2018) (opioids).

with Honolulu, 537 P.3d at 1187 (explaining that Honolulu's complaint does not challenge defendants' production and sale of fossil fuels, but rather "Defendants' *failures to disclose and deceptive promotion* increased fossil fuel consumption, which—in turn—exacerbated the local impacts of climate change in Hawai'i." (citation omitted) (emphasis added)).

Most of Defendants' cases involved the unforeseeable or even criminal *misuse* of a manufacturer's products by third parties. For example, the court in *Oklahoma v. Johnson & Johnson* declined to recognize "a public right to be free from the threat that others may *misuse* or *abuse* prescription opioids." 499 P.3d 719, 727 (Okla. 2021) (emphasis added).[15] The claim in New Jersey's *In re Lead Paint Litigation* sought to hold lead paint manufacturers liable for "merely offering an everyday household product for sale," and the conduct actually giving rise to the lead poisoning hazard was the property owners' "poor maintenance" of lead paint on their premises. 924 A.2d 484, 501–02 (N.J. 2007).[16] In *Rhode Island v. Lead Industries Association, Inc.*, similarly, the court noted that the state legislature had "placed the burden on landlords and property owners to make their properties lead-safe," such that any hazards from the lead paint were attributable to those property owners, not the manufacturers. 951 A.2d 428, 435–36 (R.I. 2008).[17]

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[15] *Philadelphia v. Beretta U.S.A. Corp.*, Mot. at 36, 37, similarly alleged a public nuisance arising from the "*misuse*" of the defendants' handguns "by criminals and others unlawfully in possession of firearms." 126 F. Supp. 2d 882, 910, 911 (E.D. Pa. 2000) (emphasis added), *aff'd*, 277 F.3d 415, 419, 422 (3d Cir. 2002) ("The defendants are not in control of the guns at the time they are *misused*" by "criminals and children." (citation omitted and emphasis added)).

[16] Notably, the court acknowledged that nuisance liability might apply to product-based harms in other contexts. 924 A.2d at 505 ("[T]here may be room, in other circumstances, for an expanded definition of the tort of public nuisance.").

[17] The complaint there also failed to allege the defendants' interference with a public right, which the court defined as "those indivisible resources shared by the public at large, such as air, water, or public rights of way." 951 A.2d at 453. The City's Complaint, meanwhile, alleges Defendants interfered with quintessential public rights, including by contaminating drinking water, warming the air, and inundating roads and other rights of way. *See* Compl. ¶¶ 236–40. Since *Lead Industries Ass'n*, moreover, several lower courts in Rhode Island have allowed public nuisance claims to proceed where, as here, a defendant manufacturer inflated the market for a dangerous product by "misrepresent[ing]" the product's risks, supplying "excessive amounts" of the product, and "falsely promot[ing] and distribut[ing] [the product] generally." *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *10 (R.I. Super. Ct. Aug. 16, 2019). *See also Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 134 (D. R.I. 2018) (nuisance claim alleging MTBE manufacturers knew about hazards "but instead of alerting the public . . . waged an obfuscation campaign, downplaying the risks it knew about" was viable under Rhode Island law notwithstanding *Lead Industries Ass'n*).

Not so here. The Complaint alleges that the incremental greenhouse gas emissions resulting from Defendants' wrongful promotion of their fossil fuel products arise from the only intended uses of those products, which Defendants knew would create nuisance conditions. *See* Compl. ¶¶ 5, 8, 264(d), 265–66, 277–78. Those allegations state a claim for nuisance under Maryland law.

e. The Complaint Satisfies Any "Control" Requirement.

Defendants invent another limitation on Maryland nuisance law, contending they cannot be liable because they "did not control the instrumentality alleged to cause the nuisance." Mot. at 36–39. Maryland nuisance law imposes no such control requirement. Multiple Maryland federal district courts have concluded that "control is not a required element to plead public nuisance under Maryland law." *Baltimore v. Monsanto*, 2020 WL 1529014, at *9; *see also State v. Exxon*, 406 F. Supp. 3d at 467–68. Instead, Maryland courts have long imposed liability on all who actively participate in creating a nuisance. *See Gorman*, 210 Md. at 161; *Maenner*, 46 Md. at 215.

Defendants chiefly cite *Cofield v. Lead Industries Association, Inc.*, 2000 WL 34292681 (D. Md. Aug. 17, 2000), for the proposition that Maryland law requires a plaintiff to prove the defendant's control over the instrumentality of the nuisance. *See* Mot. at 36. But as Judge Hollander explained in *State v. Exxon*, the *Cofield* court inaccurately imported a control element not found in Maryland law:

> Maryland courts have never adopted the 'exclusive control' rule for public nuisance liability outlined by the court in *Cofield*. To the contrary, Maryland courts have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality.

406 F. Supp. 3d at 468 (collecting cases); *see also Adams*, 193 F.R.D. at 256–57 (nuisance liability may be premised on conditions created by product manufactured by defendant, even when a defendant "no longer has control of the product creating the public nuisance").

The other cases Defendants cite are plainly distinguishable. In *Callahan v. Clemens*, a

plaintiff landowner alleged that a retaining wall on an adjoining tract had begun to crumble, encroaching and spreading dirt onto the plaintiff's property. 184 Md. 520, 523 (1945). Clemens, the relevant defendant, "had, at most, only a nominal fee in" a portion of an alley above the retaining wall, "by a quirk of [his late brother's] conveyancing" the adjoining property to a since-defunct development company. *Id.* at 523, 527. Critically, the plaintiff's "complaint [wa]s not that the wall [wa]s a nuisance per se, but that it was negligently *constructed*," and "neither of the Clemens brothers attempted to or could exercise any control over the manner in which the work was performed" by the development company and its contractors. *Id.* at 525 (emphasis added). The court held Clemens was not liable because giving "[p]ermission to erect the wall would not itself constitute a tortious act." *Id.* at 527. Liability against Clemens also could not be "predicated upon failure of an owner to abate a nuisance," because his alleged title in the alley was "highly technical" and insufficient to impose "an obligation to maintain the alley, and the wall supporting it." *Id.* at 526–527. The facts here have nothing in common with *Callahan*. The City does not allege Defendants passively gave consumers "[p]ermission to" use their fossil fuel products, and Defendants' relationship to the nuisance is not a "highly technical" one premised "upon ownership of a naked legal title." *See id.* at 525–27. Rather, Defendants contributed to the nuisance conditions through affirmative, knowing misrepresentations about their products' effects. *See* Compl. ¶¶ 221, 226, 231, 235.

East Coast Freight does not help Defendants, either. *See* Mot. at 36. The court there held that a gas company was not liable when a driver struck a lamp pole the company had installed on a grass median "in the middle of the highway," because the pole was not "such a dangerous instrumentality as to make the contractor who placed it there liable." 187 Md. at 388–89, 401. The court did not dismiss claims against the gas company because it lacked control over the pole, but

because "the dangerous condition, if there was such a condition, was not due to the pole." *Id.* at 401. Instead, the City of Baltimore's decision to establish the median and place the pole on it "without proper warning of its beginning to approaching travelers" created any nuisance. *Id.*

Defendants' control argument, moreover, "rests upon a false premise that the instrumentality of the nuisance is the [emissions resulting from the fossil-fuel] product itself." *JUUL Labs*, 497 F. Supp. 3d at 649 (cleaned up); *see Baltimore v. Monsanto*, 2020 WL 1529014, at *10 (city sufficiently alleged defendants "created or substantially participated in" creating nuisance, "even though Defendants may not have maintained control over the contaminants once disseminated"). Here, the nuisance-causing instrumentality is "Defendants' conduct in carrying out their business activities," *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019), namely "their ongoing conduct of marketing, distributing, and selling [fossil fuels]" while misrepresenting their hazards, *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1143 (Ohio 2002). Nuisance law does not require Defendants to control "the actual use" of their fossil-fuel products. *Id. See also, e.g.*, *Delaware v. Monsanto*, 299 A.3d at 376 ("[W]hether there is control of the product once sold . . . [is] not [an] element[] of an environmental-based public nuisance . . . .").

Even if Maryland law did impose a control requirement, the Complaint would satisfy it. Defendants exercised control over the instrumentality of the nuisance by "[c]ontrolling every step of the fossil fuel product supply chain," "affirmatively and knowingly promoting the sale and use of fossil fuel products" they knew to be hazardous, and "knowingly concealing" those hazards. Compl. ¶ 221(a), 221(b); *see Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d at 142–43 (finding MTBE manufacturers exercised sufficient control by controlling "every step of the supply chain" and contamination through "releases, leaks, overfills, and spills" was foreseeable).

The decision in *Philadelphia v. Beretta U.S.A. Corp.*, *see* Mot. at 36, is inapposite. The court there held that Pennsylvania's Uniform Firearms Act prohibits "municipalities such as Philadelphia from suing gun manufacturers for the production and distribution of firearms" and "clearly refers to nuisance actions because it mentions 'abatement,'" such that the City of Philadelphia's nuisance claims against gun manufacturers were a "transparent attempt at an end run around the legislature's statutory prerogatives." 126 F. Supp. 2d at 890, 911. The other private plaintiffs lacked Article III standing because their theory of liability asserted that straw buyers purchased the defendants' guns for use in crimes, "[n]one of [which] are natural consequences of the gun manufacturers' distribution scheme." *Id.* at 897. And in *In re Paraquat Products Liability Litigation*, Mot. at 36, the court held that because that MDL proceeding "involve[d] injuries to individuals allegedly caused by direct exposure to" a pesticide and the plaintiffs "s[ought] damages for their alleged injuries rather than abatement of any true public nuisance," the plaintiffs "ha[d] not alleged any interference with a public right." 2022 WL 451898, at *10 (S.D. Ill. Feb. 14, 2022). In turn, the court considered "application" of the pesticide to be the instrumentality of harm, and the defendants "exerted no control over [the pesticide] at the time of its application" when injuries allegedly occurred. *Id.* at *11; *compare In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (rejecting argument that "addiction and death is the nuisance and the physical opioid drugs causing the addition and death are the instrumentality," and holding distributors controlled instrumentality of opioid epidemic nuisance "by virtue of their control over their own opioid marketing, distribution, or dispensing practices"). Unlike in *In re Paraquat*, the City does not allege that each use of Defendants' products caused a discrete injury, or that releasing greenhouse

gas itself constitutes a nuisance.[18]

At minimum, Defendants' alleged control over the fossil fuel supply chain and their own marketing raises questions of fact "inappropriate for resolution on a motion to dismiss." *JUUL Labs*, 497 F. Supp. 3d at 649 (cleaned up); *see Connecticut v. Tippetts-Abbett-McCarthy-Stratton*, 527 A.2d 688, 693 (Conn. 1987) (control "for nuisance liability normally is a jury question").

f. The Court Is Well Equipped to Resolve the City's Nuisance Claims.

Finally, Defendants' concern that this Court may not recognize new causes of action is misguided because the City does not plead a new cause of action. *See* Mot. at 30. It seeks to apply age-old public and private nuisance claims to contemporary facts.[19] The Hawai'i Supreme Court considered closely similar nuisance claims in *Honolulu*, and held that the plaintiffs' allegations presented "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products." *See Honolulu*, 537 P.3d at 1187. In affirming denial of the defendants' motions to dismiss, the court quoted the trial court's statement that "the causes of action may seem new, but in fact are common," and "[c]ommon law historically tries to adapt to such new circumstances." *See id.* at 1185. This state's high court takes the same approach: "One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court." *Boblitz v. Boblitz*, 296 Md. 242, 259 (1983)).[20] This Court is equipped to apply existing law to the facts alleged.

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[18] *See Honolulu*, 537 P.3d at 1206 ("[T]he . . . tortious conduct is Defendants' alleged deceptive marketing and failure to warn about the dangers of using their products.").

[19] In the case Defendants cite, Mot. at 30 n.5, the petitioners expressly "urge[d] th[e] Court to *abolish the contributory negligence standard* and *replace it* with a form of comparative negligence." *Coleman v. Soccer Ass'n of Colum.*, 432 Md. 679, 691 (2013) (emphasis added).

[20] Defendants' two cited cases declining to recognize public nuisance claims by tenants against landlords for "improper maintenance of individual rental units," *Little v. Union Tr. Co. of Md.*, 45 Md. App. 178, 185 (1980), or for "negligent[]

2. The City Sufficiently States a Claim for Trespass.

A trespass occurs "[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. Exclusive possession entails "the possessory right to exclude [another] from entering the property without permission." *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 388–89 (2021).

The City properly states a claim for trespass by alleging that it "owns, leases, occupies, and/or controls real property throughout the City," Compl. ¶ 283, and that Defendants "have intentionally, recklessly, or negligently caused flood waters, extreme precipitation, saltwater, and other materials[] to enter" that real property, *id.* ¶ 284; *see also id.* ¶¶ 286–87, without the City's consent, *id.* ¶ 285. Defendants did so by concealing and misrepresenting the climate impacts of their products, *e.g.*, *id.* ¶¶ 141–70, which inflated and extended demand for fossil fuels and significantly increased greenhouse gas emissions, resulting in substantial interferences with the City's property and infrastructure, *e.g.*, *id.* ¶¶ 77–83, 197–215, 282–89. Defendants knew their conduct would cause water and other matter to enter City lands. *Id.* ¶¶ 103–40, 289.

Defendants' counterarguments are unavailing. *First*, Defendants take issue with allegations that they have caused water and other materials to invade the City's real property, contending that they are "left to speculate about which property Plaintiff refers to" and whether the City has exclusive possession of such property. Mot. at 48–49. At the pleading stage, however, a plaintiff need not specify each precise parcel that has been invaded. In fact, courts have rejected attempts to dismiss trespass claims on this basis. *See, e.g.*, *State v. Exxon*, 406 F. Supp. 3d at 471 (to state a claim for trespass in Maryland, a plaintiff need not "identify the precise locations of all the State

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install[ation]" of a hot water heater resulting in carbon monoxide poisoning, *State v. Feldstein*, 207 Md. 20, 24–26, 35 (1955), are inapposite. Here, the City alleges Defendants caused the nuisances—which interfere broadly with public health, safety, and convenience in Annapolis—by knowingly and *intentionally* deploying campaigns of deception to conceal their knowledge of the hazards of fossil fuel products. *See* Compl. ¶¶ 64–141, 161–221, 243–61.

properties that were contaminated"); *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 438 (S.D.N.Y. 2005) (plaintiffs "need not make such a showing at the pleading stage"). Defendants provide no contrary authority. Their cited cases stand for the unrelated propositions that 1) interference with an exclusive possessory right occurs when a defendant causes something "to enter onto the plaintiff's land" causing a "physical intrusion," *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013), and 2) if a person consents to entry onto its land for a certain purpose, "it d[oes] not give up its right to exclude from its property others entering for [other] purpose[s]," *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 235 (2016). Here, the Complaint provides sufficient specificity to state a claim for trespass based on allegations that flooding, sea level rise, and other climate-related invasions threaten "the City's stormwater drainage system, especially in the vicinity of Jones Falls, Gwynns Falls, and Herring Run," Compl. ¶ 79, among other City-owned, -leased, or -controlled property and infrastructure, *see id.* ¶¶ 197, 199, 201–08, 213–15, 283–85.[21]

Second, Defendants insist that neither they nor their products intruded on City property, and "no precedent supports" the City's trespass theory. Mot. at 49. Under Maryland law, however, a party is liable for trespass when it interferes with another's possessory interest in its property "by entering *or causing something to enter* the land." *Albright*, 433 Md. at 408 (emphasis added); *see In re MTBE Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 315 (S.D.N.Y. 2006) ("Maryland allows claims for trespass where a defendant caused an invading substance to enter plaintiff's property

[21] To the extent Defendants suggest the City lacks exclusive possession over the invaded properties, that is incorrect. The Complaint alleges that the City "owns, leases, occupies, and/or controls real property throughout the City," and "did not give permission for Fossil Fuel Defendants, or any of them, to cause floodwaters, extreme precipitation, saltwater, and other materials to enter its property . . . ." Compl. ¶¶ 283, 285. It alleges that Defendants' conduct has caused injuries including, as one example among many, flooding in the City's Inner Harbor *Id.* ¶¶ 197, 199–201. The City has exclusive control over public docks along the Inner Harbor, and exercises that control through, among other means, the City Code. *See, e.g.*, Balt. City Code art. 10 § 6-3(a)(1) ("No vessel shall enter any public dock without permission from the Harbor Master . . . .")

without actually entering himself."). Maryland recognizes trespass claims when property "is invaded by an inanimate or intangible object," and the defendant has "some connection with or some control over [the] object." *Rockland Bleach & Dye Works Co. v. H.J. Williams Corp.* ("*Rockland*"), 242 Md. 375, 387 (1966). This comports with the Restatement, which provides that "one is subject to liability to another for trespass . . . if he intentionally" "causes a thing" to enter another's land. Rest. § 158. The foreign matter need not be placed there directly; it suffices if "an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.* cmt i. Numerous courts applying the Restatement—as Maryland does[22]—recognize that trespass may lie even if there are intervening steps between the defendant's conduct and the invasion.[23] Defendants substantially contributed to invasions of City property by misleadingly and deceptively marketing their fossil fuel products, knowing that emissions from those products would cause the very climate-related invasions alleged here. *See* Compl. ¶¶ 103–140, 191–217, 221–23, 231, 234.

The cases Defendants cite do not suggest otherwise. In *Rockland*, the defendant caused a trespass by placing fill material that was carried onto the plaintiff's land by "foreseeable seasonal rains." 242 Md. at 387. The City's Complaint likewise alleges that Defendants designed, manufactured, marketed, and sold fossil fuel products whose intended use would foreseeably cause trespasses on City property. *See* Compl. ¶¶ 103–140, 284, 286–89. The decision in *JBG/Twinbrook Metro Ltd. P'ship v. Wheeler* involved whether Exxon assumed liability to maintain underground

[22] *See, e.g., Bramble v. Thompson*, 264 Md. 518, 522 (1972); *Kirby v. Hylton*, 51 Md. App. 365, 371 (1982).

[23] *See, e.g., Delaware v. Monsanto*, 299 A.3d at 389 (holding that Delaware stated a claim for trespass against a defendant that "substantially contributed to the entry [of PCBs] onto the State's land by supplying PCBs to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands," even though defendant did not "dump[] the PCBs directly onto the State's land"); *City of Bristol v. Tilcon Materials, Inc.*, 931 A.2d 237, 259 (Conn. 2007) (upholding trespass liability where defendant "had reason to know that leachate from the landfill might invade the groundwater and migrate downhill to off-site locations," including plaintiffs' property).

storage tanks ("USTs") it paid to install at a gas station as part of a larger renovation, in consideration for exclusive rights to supply gasoline at the station. 346 Md. 601, 606, 622, 625–26 (1997). The court held Exxon lacked sufficient control over the tanks because under the plain terms of the contract, once the renovations were complete the station owner "became the owner of the USTs with the obligation to maintain them," such that Exxon was not liable for contents that leaked from the tanks and invaded the plaintiff's neighboring property. *Id.* The case does not hold, as Defendants suggest, that Exxon lacked sufficient control "over the *gasoline*" it supplied to the station, and does not say Exxon's conduct was "too attenuated" for common law duties to attach. Mot. at 44 (emphasis added). The court considered only Exxon's *contractual* duties with respect to the *tanks* after paying for their installation.

Third, Defendants contend the City's trespass claim is unripe to the extent based on future invasions, and that "virtually all of Plaintiff's alleged injuries are entirely speculative." Mot. at 50. Not so. The Complaint alleges numerous invasions of City property that have already occurred, *e.g.*, Compl. ¶¶ 195–96, 201–210, 286, 288–90, and costs the City has already incurred to address those invasions, *id.* ¶ 86, 195, 201, 205, 210, 212, 214. Those allegations distinguish *Albright*, where the court reversed a damages award because the "general contamination of an aquifer that may or may not reach a given [plaintiff's] property," was insufficient to show an invasion of the plaintiffs' property where the plaintiffs had not yet detected any contamination. 433 Md. at 408. Nor does Maryland law bar recovery of future damages. *See Gillespie-Linton v. Miles*, 58 Md. App. 484, 499–500 (1984) (explaining that an award of future damages is proper if based on sufficient evidence (citing *Hutzell v. Boyer*, 252 Md. 227 (1969)); *DiLeo v. Nugent*, 88 Md. App. 59, 77 (1991) (expert testimony "was sufficient for the jury to award future damages with reasonable probability"). As alleged, "[e]ven if all carbon emissions were to cease, Baltimore

would still experience greater future committed sea level rise due to the 'locked in' greenhouse gases already emitted." Compl. ¶ 196. The City will prove its injuries at trial, and the reasonably probable damages that flow from them.[24]

3. The City Adequately Alleges Strict Liability and Negligent Failure to Warn.

The Maryland Supreme Court has adopted the requirements of § 402A of the Restatement for product liability claims sounding in strict liability. *See Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 432 (1992). Under that test, a plaintiff must prove that:

> (1) [] the product was in a defective condition at the time that it left the possession or control of the seller, (2) [] it was unreasonably dangerous to the user or consumer, (3) [] the defect was a cause of the injuries, and (4) [] the product was expected to and did reach the consumer without substantial change in its condition.

Id. (cleaned up). "In a strict liability failure to warn case, the alleged defect is the failure of the seller to give an adequate warning," *id.* at 438 n.8, which "will, without more, cause the product to be unreasonably dangerous as marketed," *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 325 (1995) ("*Mazda*") (quoting 3 Am. Law of Prods. Liab. 3d § 32:2 (1993)).[25]

To recover under a negligence theory, the plaintiff must show that:

> (1) [] the defendant was under a duty to protect the plaintiff from injury, (2) [] the defendant breached that duty, (3) [] the plaintiff suffered actual injury or loss, and (4) [] the loss or injury proximately resulted from the defendant's breach of the duty.

Gourdine v. Crews, 405 Md. 722, 738 (2008) (cleaned up). In practice, for failure-to-warn claims,

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[24] Defendants separately argue trespass claims for environmental pollution are disfavored. Mot. at 44–45. But their two cases from a single federal district court do not accurately reflect the nationwide trend of courts recognizing viable trespass claims for environmental harms. *See, e.g.*, *State v. Exxon*, 406 F. Supp. 3d at 469–71 (trespass via MTBE groundwater contamination); *In re MTBE*, 725 F.3d at 119–20 (same); *Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d at 143–44 (same); *Bristol*, 284 Conn. 55 (trespass via groundwater contamination by toxic chemicals); *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 683 (1985) (en banc) (trespass via smokestack pollution).

[25] *See also Zenobia*, 325 Md. at 433 ("a product containing an adequate warning" is not defective or unreasonably dangerous (citing Rest. § 402A, cmt. j)); *Werner v. Upjohn Co.*, 628 F.2d 848, 858 (4th Cir. 1980) ("[U]nder a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous.").

"negligence concepts and those of strict liability have 'morphed together,'" and a plaintiff must prove under either theory that the manufacturer or seller owed a duty because it knew or should have known of the product's dangerous propensity. *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 24 (2015) (quoting *Gourdine*, 405 Md. at 743); *see also* Rest. § 402A, cmt. j.

The City sufficiently pleads its failure-to-warn claims. The Complaint alleges Defendants knew or should have known that their fossil fuel products would cause devastating climate injuries when used as intended. Compl. ¶¶ 239–40, 272–73; *see also id.* ¶¶ 103–40. Defendants accordingly had a duty to issue adequate warnings to protect the City and others foreseeably harmed by their products' intended use. *Id.* ¶¶ 238, 271. They breached their duty by failing to issue adequate warnings, as reasonable manufacturers and sellers would have done, *id.* ¶¶ 241–43, 274–76, and instead undertaking a decades-long campaign to conceal and misrepresent those hazards, *id.* ¶¶ 141–70. Defendants' failure to warn of the dire climatic risks resulting from using their fossil fuel products, along with their affirmative efforts to deceive about those risks, "prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate changes," *id.* ¶¶ 242, 275, such that those products were significantly more dangerous than reasonable consumers' expectations, *see id.* ¶¶ 239–42, 272–75. Defendants' failure to warn was a direct, proximate, and substantial-factor cause of the City's climate-related injuries, resulting in extensive damage and expenses. *Id.* ¶¶ 244, 277.

a. Defendants Had a Duty to Adequately Warn Consumers and Bystanders.

Contrary to their arguments, Defendants owed the City and other consumers a duty to warn of their products' known climatic hazards. Compl. ¶¶ 103–40, 238, 271; Mot. at 41–44. The Supreme Court has emphasized that ultimately "the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts

of the defendant." *Gourdine*, 405 Md. at 745. Duty can be analyzed using several "classic factors":

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Kennedy Krieger Inst., Inc. v. Partlow, 460 Md. 607, 633–34 (2018) (cleaned up). "Foreseeability is perhaps [the] most important" one. *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016) (cleaned up).

Each of those factors supports a finding that Defendants owed a duty to warn. Most importantly, it was not only foreseeable but *foreseen* by Defendants more than half a century ago that their fossil fuel products' intended use would result in the very climate-related harms the City and others now face. *See* Compl. ¶¶ 103–40, 239, 272. The Complaint details the myriad injuries the City has suffered, and will continue to suffer, *e.g.*, *id.* ¶¶ 191–217, as a direct result of Defendants' failure to provide *any* warnings of the harms from using their products as promoted, *id.* ¶¶ 241, 274. Defendants have earned moral blame because they had actual knowledge that their products were dangerous, and deployed a decades-long campaign of deception and disinformation to obscure those dangers and maximize their profits. *Id.* ¶¶ 1, 5, 30, 141–70, 247, 280. Defendants took concrete steps to protect their *own* infrastructure from rising seas and worsening storms, *id.* ¶¶ 171–76, but withheld their superior knowledge from the City, the public, consumers, and others. Imposing liability under these circumstances will further the policy of preventing future harm by incentivizing defendants to act truthfully and warn of known product dangers. The economic burden Defendants will incur is the inevitable consequence of remediating the injuries they have caused the City and is appropriate given Defendants' deliberate disregard for the consequences of their conduct, *id.* ¶¶ 247, 280, especially since that conduct delayed mitigation and dramatically increased the costs the City will bear, *id.* ¶¶ 179–80. Finally, insurance availability to offset the

City's injuries is at best unclear. *See, e.g.*, *id.* ¶¶ 191–217.

Recognizing Defendants' duty to warn would not create an unlimited "duty to warn the world," as Defendants contend. *See* Mot. at 40. The federal court in *State v. Exxon* squarely rejected that argument in a comparable case, explaining:

> Of course, there is no duty to warn the world. However, the duty to warn extends not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use.

406 F. Supp. 3d at 463 (cleaned up).[26] *See also Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (defendants had "duty to warn the general public, whom they allegedly knew and expected would be endangered"). Maryland courts agree that foreseeable "bystanders . . . are protected under the doctrine of strict liability in tort." *See Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 323 (1988), *rev'd on other grounds*, 317 Md. 185 (1989)); *ACandS, Inc. v. Godwin*, 340 Md. 334, 349–55 (1995) (upholding damages award where defendants' product was a substantial cause of bystanders' injuries); *Ga.-Pac. Corp. v. Pransky*, 369 Md. 360, 363–68 (2002) (same). Defendants knew the City and others would be endangered by their products' intended uses, and owed a duty to issue adequate warnings to protect the City and other foreseeable victims of those dangers.

b. The Dangers of Defendants' Products Were Not Open and Obvious.

Defendants' assertion that the dangers of climate change were open and obvious, *see* Mot. at 41–42, ignores the whole substance of the Complaint and seeks to prematurely adjudicate factual questions. The City alleges Defendants spent decades working to conceal the exact dangers they now insist were obvious (despite their efforts). *See* Compl. ¶¶ 103–40. "It necessarily is a question

[26] *Accord, e.g.*, *Pennsylvania v. Monsanto*, 269 A.3d at 665–66; *In re MTBE*, 725 F.3d at 123 ("[A] manufacturer 'has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known,'" which "extends 'to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn.'" (citations omitted)); *In re MTBE*, 175 F. Supp. 2d at 625–26.

of fact" whether Defendants can establish that the climate-related harms of using their fossil fuel products were open and obvious, because "[w]hether a particular danger is obvious or patent can depend on a number of things," including potential "distractions." *See Figgie Int'l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 96 Md. App. 228, 240 (1993) (quotation omitted). Where, as here, that question is disputed, it is "for the jury to decide." *Id.*; *see also Mazda*, 105 Md. App. at 329 (obviousness of danger is typically "a jury issue because reasonable minds could differ on it").

Here, the Complaint alleges that Defendants "widely disseminated marketing materials, refuted the scientific knowledge generally accepted [about climate change], advanced pseudo-scientific theories of their own, and developed public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate change." Compl. ¶ 275; *see also id.* ¶¶ 141–70 (detailing how Defendants "affirmatively acted to obscure th[e] harms" of their products). Over many decades, Defendants employed and financed industry associations and front groups to "misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products," *id.* ¶ 31, deploy "national climate change science denial campaign[s]," *id.* ¶ 150, and covertly "bankroll scientists" holding "fringe opinions" to "[c]reat[e] a false sense of disagreement in the scientific community" regarding the reality and causes of climate change, *id.* ¶¶ 162–63; *see also id.* ¶¶ 158–68. A jury could conclude that the dangers of Defendants' fossil fuel products were not open and obvious *because of* Defendants' intentional and misleading conduct, which distracted consumers from the harms. Maryland courts have found far less egregious distractions sufficient to preclude a finding that a danger was obvious. *See, e.g.*, *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 395 (1997) (in slip and fall case, "the jury would be entitled to consider whether appellant's attention was reasonably focused on selecting produce that was on display" at grocery and did not notice slipping hazard on floor).

The allegations Defendants cite do not show any dangers were open and obvious. *See* Mot. at 43–44. The fact that an expert science advisory panel to President Johnson, scientists including those at NASA, and United Nations bodies recognized the risks of greenhouse gas pollution, *see* Compl. ¶¶ 103, 143, does not show that the risks of using Defendants' fossil fuel products were objectively obvious to "the average consumer," *Mazda*, 105 Md. App. at 327 (quotation omitted), in Maryland or otherwise. The entire thrust of the City's allegations is that *despite* increasing scientific understanding of climate change, Defendants dedicated substantial resources to obscuring their products' dangers, attacking climate science and scientists, and convincing the public their products' dangers were unproven. Compl. ¶¶ 141–76. Nor do the allegations regarding a film Shell released in 1991 about climate change, or a 1997 speech by BP's former CEO at Stanford University mentioning climate impacts, *see id.* ¶¶ 136, 181, show that the dangers of Defendants' products were obvious. The Complaint does not allege those media accurately portrayed the risks of using fossil fuel products, or that they were shared with the users or foreseeable bystanders. It is for a jury to decide whether the dangers were obvious.

Defendants' cited cases only reinforce the point—they were all decided by juries, or on directed verdicts or summary judgment based on a developed record. In *Mazda*, the court reversed a jury verdict on failure-to-warn claim because it was "absurd to suggest that persons of ordinary intelligence would not appreciate" that in a head-on collision with a tree, a seatbelt might not entirely prevent all injury. *See* 105 Md. App. at 321, 330. In *Virgil v. Kash N' Karry Service Corp.*, obviousness was not in issue at all; rather, the court directed a defense verdict on a failure-to-warn claim "because there was no evidence that either of the [defendants] knew or should have known that the thermos bottle presented a danger." 61 Md. App. 23, 33 (1984). Defendants' reliance on two tobacco cases is similarly misplaced, as both were decided at summary judgment based on

uncontradicted and "overwhelming" evidence that ordinary consumers understood the dangers of cigarettes during the years the plaintiffs smoked. *See Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 437 (D. Md. 2005), *aff'd*, 162 F. App'x 231 (4th Cir. 2006); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000). Here, by contrast, the City alleges that Defendants misrepresented and concealed their products' dangers to ensure reasonable consumers would *not* have contemplated those dangers.[27] The trier of fact should consider obviousness based on a developed record.[28]

4. The City Adequately Pleads Negligent and Strict Liability Design Defect Claims.

Maryland courts generally apply the consumer expectation test derived from Restatement § 402A to determine whether a product is defectively designed. *See Halliday v. Sturm, Ruger & Co.*, 368 Md. 186, 193–95 (2002).[29] Under that test:

> a "defective condition" is defined as a "condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." . . . And, a product is "unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary

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[27] *See Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1023 (Mass. 2013) (obviousness was jury question because "cigarette manufacturers[] engaged in a calculated effort . . . to raise doubts [about] the causative link between cigarettes and cancer"); *Standish-Parkin v. Lorillard Tobacco Co.*, 786 N.Y.S.2d 13, 14 (N.Y. App. Div. 2004) (triable issues of fact existed as to public knowledge of the risks of cigarettes prior to 1969, and "whether [plaintiff] had relied upon defendants' various allegedly fraudulent misrepresentations and concealments of the truth"); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389–90 (N.Y. App. Div. 2003) (reversing dismissal of failure to warn claim because "plaintiff . . . raised issues of fact as to whether consumers were fully aware of the health hazards posed by smoking cigarettes," "particularly considering that the respondents disseminated information, at the relevant time, disputing the validity of the scientific evidence linking cigarette smoking to cancer and other diseases").

[28] Defendants state in passing that the City does not allege a warning would have prevented its injuries, Mot. at 39, but Maryland recognizes a presumption that "plaintiffs would have heeded a legally adequate warning had one been given." *State v. Exxon*, 406 F. Supp. 3d at 464 (quoting *U.S. Gypsum Co. v. Mayor & City Council of Baltimore*, 336 Md. 145, 161–63 (1994)). Ultimately, whether Defendants' failure to provide any warning caused the City's injuries is an issue "for the trier of fact to consider," not for resolution on the pleadings. *U.S. Gypsum*, 336 Md. at 162.

[29] Maryland courts use the risk-utility test as well, but "only when the product 'malfunctions in some way.'" *State v. Exxon*, 406 F. Supp. 3d. at 460 (quoting *Halliday*, 792 A.2d at 1153). As Defendants acknowledge, the consumer expectation test applies here, Mot. at 46–47, as it did in *State v. Exxon* and *Baltimore v. Monsanto. See State v. Exxon*, 406 F. Supp. 3d at 461 (applying consumer expectation test rather than risk-utility test where state alleged that product was "defective and unreasonably dangerous when used in its ordinary and intended way"); *Baltimore v. Monsanto*, 2020 WL 1529014, at *10 (same).

knowledge common to the community as to its characteristics."

State v. Exxon, 406 F. Supp. 3d at 460 (quoting *Halliday*, 368 Md. at 193).

The City adequately alleges design defect claims. In addition to failing to warn of their products' dire climatic risks, Defendants "took affirmative steps to misrepresent the nature of those risks, such as by disseminating information aimed at casting doubt on the integrity of scientific evidence that was generally accepted at the time and by advancing their own pseudo-scientific theories." *Baltimore IV*, 31 F.4th at 234 n.23; *see* Compl. ¶¶ 250–55, 264, 275. In doing so, Defendants breached the duty of care owed to consumers and reasonably foreseeable victims. *See id.* ¶¶ 262–64. Defendants' affirmative conduct "prevented reasonable consumers from forming an expectation that fossil fuel products would cause grave climate changes," *e.g.*, Compl. ¶ 254, such that those products were unreasonably dangerous and defective, *id.* ¶¶ 250, 253, 255. In other words, Defendants' products were more dangerous than an ordinary consumer would have expected precisely *because of* "Defendants' promotional efforts" and affirmative campaign to conceal and deceive consumers about their products' risks, and were thus defective. *See Baltimore IV*, 31 F.4th at 234 n.23. Those defects were a direct, proximate, and substantial-factor cause of the City's climate-related injuries, resulting in extensive damage and costs. *Id.* ¶¶ 257, 265–66.[30]

Defendants' counter-arguments are unpersuasive. *First*, Defendants insist that their fossil fuel products were not defective because the products, and their inherent characteristics, functioned as intended. Mot. at 45–46. Defendants cite several cases for the proposition that "a product which functions as intended and as expected is not defective." Mot. at 45 (quotations

[30] As described above, because Defendants knew of the grave climatic risks posed by their fossil fuel products, *id.* ¶ 262, they owed a duty "to all persons whom [their] fossil fuel products might foreseeably harm, including [the City]," *id.* ¶ 250; *see also id.* ¶ 263. Defendants breached that duty by embarking on a campaign to promote unrestricted use of their fossil fuel products, while misrepresenting the harms that they know would arise from those products' intended use, *id.* ¶¶ 141–70, 264, causing the City's injuries, ¶¶ 257, 265–67. Thus, Defendants' affirmative deceptive promotion of their fossil fuel products both breached their duty and rendered their products defective.

omitted) (citing *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701 (Md. 1988); *Halliday*, 792 A.2d at 1158). As the Fourth Circuit explained in this case, however, the City's "design-defect claim hinges on its ability to demonstrate that Defendants' promotional efforts deprived reasonable consumers of the ability to form expectations that they would have otherwise formed." *See Baltimore IV*, 31 F.4th at 234 n.23. The City is not alleging that Defendants' products are defective because, for example, they contain carbon or because they produce greenhouse gases upon combustion. They are defective because they do not perform as safely as a reasonable consumer would expect, as a consequence of Defendants' deliberate efforts to prevent consumers from appreciating that the products' normal use would cause sea levels to rise, air temperatures to increase, and extreme weather events to multiply, jeopardizing human life, natural resources, and public and private property. *See* Compl. ¶ 253. That sets the City's claim apart from that in *Dudley v. Baltimore Gas & Elec. Co.*, where the alleged defect was that natural gas is "flammable and highly explosive," 98 Md. App. 182, 202–03 (1993), and there was no evidence that the defendant gas company concealed those facts. None of Defendants' other cases undercut the City's theory, either.[31]

[31] In *Cofield v. Lead Indus. Ass'n, Inc.*, the federal district court required the plaintiff "to plead and prove the presence of a safer, commercially reasonable, alternative" to the defendant's allegedly defective product. 2000 WL 34292681, at *2. But a plaintiff pleading "strict liability due to a design defect [is] under no obligation to provide a 'safer alternative' to establish their claim" under the consumer expectation test. *Green v. Wing Enters., Inc.*, 2016 WL 739060, at *2 (D. Md. Feb. 25, 2016) (citing cases). In *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 266–69 (D. Mass. 2015), the court decided on summary judgment that "an inherent danger in the product at issue is not conclusive of a design defect" where the plaintiffs failed to offer any other evidence of a defect. In *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, the claimed defect was based solely on the presence of lead in white lead carbonate pigment, but the court cited with approval another case that successfully alleged defective design based on a single product ingredient. 768 N.W.2d 674, 684–85 (Wis. 2009). *But see Hall v. Bos. Sci. Corp.*, 2015 WL 874760, at *5 (S.D.W. Va. Feb. 27, 2015) (Wisconsin law did not bar claim because "the plaintiff in this case does not argue that the mere presence of an ingredient creates a defect in the product's design," but instead "primarily focuses on the amount of the ingredient used in the design"); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 732 (Wis. 2001) (plaintiff adequately alleged design defect regarding inherent characteristic where defect related to quantity of product). These cases stand for the proposition that "an inherent danger in the product at issue is not *conclusive* of a design defect"—not that any claim of a defect that relates to a product's inherent characteristics must fail, as Defendants claim. *Town of Lexington*, 133 F. Supp. at 269 (emphasis added).

Second, Defendants contend that the City has failed to allege that their products are unreasonably dangerous, as required by the consumer expectation test. Mot. at 46–47. As described above, however, the City alleges that Defendants' fossil fuel products did not perform as safely as a reasonable consumer would expect because Defendants affirmatively prevented reasonable consumers from understanding their products' true dangers. *See* Compl. ¶¶ 239, 246. Particularly in light of Defendants' aggressive campaigns to spread disinformation and deceive consumers about the risks of their fossil fuel products, *see id.* ¶¶ 141–70, reasonable consumers could not and did not expect the climatic harms Defendants knew their products would cause, *see, e.g.*, *id.* ¶¶ 191–215.[32] As alleged, Defendants' disinformation campaign worked exactly as intended and thereby made their products unreasonably dangerous under the consumer expectation test.

Finally, Defendants purport that their products were not unreasonably dangerous—as a matter of law—because their hazards were "publicly known." Mot. at 47–48. Defendants repeat their reliance on select allegations that an expert science advisory panel to President Johnson and other scientists recognized the risks of greenhouse gas pollution. *See* Compl. ¶¶ 103–05. But as described above, *see supra* Part IV.3.b, those allegations do not show that reasonable consumers in Maryland would appreciate the dangers of Defendants' products.[33] That is particularly so because Defendants spent millions of dollars seeking to discredit the emerging scientific consensus

[32] Defendants also protest that the Complaint does not allege that Defendants' fossil fuel products "are dangerous to the user." Mot. at 47. But as Judge Hollander explained in *State v. Exxon*, "Maryland courts have never limited recovery in strict liability for design defect to ultimate users of the product," and bystanders who are foreseeably harmed by the use of defective products may properly assert design defect claims. 406 F. Supp. 3d at 461–62 ("I reject defendants' argument that the State's design defect claim fails because its alleged injury was not the result of its use of MTBE gasoline as a consumer product" but rather foreseeably resulted from the widespread use of MTBE gasoline by others); *accord Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (declining to dismiss design defect claim based on allegations that it was foreseeable to defendant that its PCB products, "when used as intended, would become a global contaminant and cause toxic contamination of waterways and wildlife, such as the City's stormwater system").

[33] Nor do Defendants' citations to irrelevant extra-Complaint sources regarding the Biden Administration's actions in relation to fossil fuels. *See* Mot. at 48.

on global warming, deny the link between their fossil fuel products and climate change, and "persistently create doubt in the minds of . . . consumers" about the risks of their products. *See, e.g.*, Compl. ¶¶ 1, 147, 158. It is for a jury to decide if, and when, reasonable Maryland consumers appreciated the true dangers of Defendants' fossil fuel products.

5. The City Pleads Actionable Violations of the MCPA.

The MCPA prohibits "any unfair, abusive, or deceptive trade practice" in the sale or "offer for sale" of consumer goods. Md. Code Ann., Com. Law § 13-303(1)–(2).[34] To state a claim under § 13-301 of the MCPA, one must allege: (1) an unfair or deceptive trade practice; (2) reliance upon the practice; and (3) an identifiable injury. *Lloyd*, 397 Md. at 142–43. Unfair and deceptive trade practices include "[f]alse, falsely disparaging, or misleading oral or written statement[s], . . . which ha[ve] the capacity, tendency or effect of deceiving or misleading consumers," Md. Code Ann., Com. Law § 13-301(1); "[f]ailure to state a material fact if the failure deceives or tends to deceive," *id.* § 13-301(3); and "[d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that the consumer rely on the same in connection with . . . the promotion or sale of any consumer goods," *id.* § 13-301(9). A fact is material "if a significant number of unsophisticated consumers would find that information important in determining a course of action," *Green v. H & R Block, Inc.*, 355 Md. 488, 524 (1999), which "is ordinarily a question of fact for the trier of fact," *Bank of Am. v. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 532 (D. Md. 2011); *see Green*, 355 Md. at 524.

The Complaint satisfies each element of an MCPA claim. *First*, it identifies numerous unfair and deceptive trade practices Defendants have committed over the course of many decades:

- Defendants' false and misleading statements about climate change, their fossil fuel

[34] "[A]ny person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by [the MCPA]." *Id.* § 13-408(a).

products' leading role in causing it, and their own commitments to invest in energy sources other than fossil fuels, *see* Compl. ¶¶ 141–70, 184–87, 295–96, have "the capacity, tendency, or effect of deceiving or misleading consumers," Md. Code Ann., Com. Law § 13-301(1), into believing that Defendants and their fossil fuel products do not contribute to climate change as much as they do, *see* Compl. ¶¶ 295–96.

- Defendants' ongoing failure to disclose, as far back as the 1980s, the material fact that profligate use of their fossil fuel products would lead to catastrophic consequences for the planet, *see* Compl. ¶¶ 141–70, 295–96, has deceived consumers including the City, *see id.* ¶ 170; *see* Md. Code Ann., Com. Law § 13-301(3) (proscribing the "[f]ailure to state a material fact if the failure deceives or tends to deceive"); *Proctor v. Am. Offshore Powerboats, LLC*, 2005 WL 8174466, at *2 (D. Md. Feb. 8, 2005) (denying motion to dismiss MCPA claim because allegations that plaintiffs were deceived by defendant's "failure to disclose the powerboat's defects and associated risks" sufficed to state a claim under § 13-301(3)).[35]

- Defendants' rampant use of deception, misrepresentations, and knowing concealment and omissions about the dire climatic risks of their fossil fuel products in connection with the promotion and sale of those products, *see* Compl. ¶¶ 141–70, 184–87, 295–96, qualify as unfair or deceptive trade practices under § 13-301(9). *See Lloyd*, 397 Md. at 150–54 (plaintiffs stated a claim under § 13-301(9) based on allegations that defendant automakers knew the risk of injury from weak seatbacks but "engaged in a 30-year cover up of the product malfunction" and "concealed" that defect); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 545–46, 548 (D. Md. 2011) (plaintiffs stated claim under MCPA by alleging that defendant "concealed, suppressed, and omitted material facts regarding the inherent defect within the torque converter system," "knew the vehicles were defective[,] and intended for the Plaintiffs to rely on its concealment of those material facts, thereby misleading its customers"). Defendants intended for consumers to rely on their misrepresentations and omissions to continue purchasing fossil fuel products. *See* Compl. ¶ 296–297.

Second, "[a]s a result of Defendants' tortious, false and misleading conduct, reasonable consumers of Defendants' fossil fuel products . . . have been deliberately and unnecessarily deceived about: the role of fossil fuel products in causing global warming . . . [and] that the continued increase in fossil fuel product consumption that creates severe environmental threats

[35] Although the Complaint expressly refers to only §§ 13-301(1) and 13-301(9), *see* Compl. ¶ 292, the Complaint also states a violation of § 13-301(3). Specifically, the Complaint alleges that the climatic risks of fossil fuel products are material to Maryland consumers, *see id.* ¶¶ 295–96, and that Defendants failed to warn of their products' climatic risks while marketing and selling those products, *see id.* ¶¶ 141–70, 241, 274, which has deceived consumers, *id.* ¶ 170. These allegations state a § 13-301(3) claim against Defendants. *See Tavakoli-Nouri v. State*, 139 Md. App. 716, 730 (2001) ("The critical inquiry is not whether the complaint specifically identifies a recognized theory of recovery, but whether it alleges specific facts that, if true, would justify recovery under any established theory."). If the Court disagrees, the City respectfully requests leave to amend to expressly assert violations of § 13-301(3).

and significant economic costs for coastal communities, including Baltimore." *Id.* ¶ 170. Defendants' tactics expanded the use of fossil fuels and delayed action on climate change, which "drastically increased the cost of mitigating further harm," *id.* ¶¶ 179–80, while enabling them to obtain profits they would not have been able to earn absent their unfair and deceptive trade practices, *see id.* ¶ 297. *Third*, "[b]y reason of [Defendants' deceptive and misleading] conduct," which resulted in increased greenhouse gas emissions and exacerbated local climate impacts, "the City of Baltimore incurred harm and was damaged in ways it would not otherwise have been," *id.* ¶ 298, imposing significant costs to mitigate local climate impacts, *see id.* ¶¶ 191–217.[36]

a. The City's MCPA Claim Is Timely.

The City's MCPA claim is timely because Defendants' fraudulent concealment of their conduct tolled the statute of limitations until the City reasonably could have discovered the facts essential to its MCPA claim—a jury question.

Under Maryland's discovery rule, "a claim accrues when the plaintiff knew or reasonably should have known of the wrong," *i.e.*, "the operative facts giving rise to the cause of action." *Cain v. Midland Funding, LLC*, 475 Md. 4, 35, 37 (2021) (cleaned up). However, under the fraudulent concealment doctrine, if an adverse party's fraud keeps the plaintiff from gaining knowledge of the claim, "the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." *Doe v. Archdiocese of*

[36] The cases Defendants cite in which courts found the reliance element lacking, *see* Mot. at 45, are all distinguishable. *Mitchell Living Trust* involved a partial grant of *summary judgment* based on *uncontroverted facts* showing that the party asserting the MCPA claim "could not have relied on [the opposing party's] alleged misrepresentation." 822 F. Supp. 2d at 534. In *Farwell v. Story*, the private plaintiff argued that "she need not prove reliance to establish a violation of the Act," and did not even attempt to allege as much. 2010 WL 4963008, at *8–9 (D. Md. Dec. 1, 2010). And in *Bey v. Shapiro Brown & Alt, LLP*, the plaintiff failed to oppose the defendant's argument that the complaint "failed to allege reliance," and, moreover, the allegations affirmatively "show[ed] that he opposed [requests made by the defendants] and therefore *did not rely* on Defendants' representations." 997 F. Supp. 2d 310, 319 (D. Md. 2014) (emphasis added). Here, by contrast, the City adequately alleges reliance, as described above. *See Lloyd*, 397 Md. at 149 (finding plaintiffs stated MCPA claim by "alleg[ing] that, as a result of the [defendants'] misrepresentation or omission, they suffered a loss" based on the cost of repairing their automobile defect).

Wash., 114 Md. App. 169, 186–87 (1997) (quoting Md. Code Ann., Cts. & Jud. Proc. § 5-203); *see also Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 617–18 (2013). Determining when the plaintiff should have discovered the cause of action "is inevitably a fact-intensive inquiry" and "ordinarily . . . to be determined by the factfinder, typically a jury." *Mathews*, 435 Md. at 618, 620–21 (reversing grant of summary judgment because whether defendant's fraudulent concealment tolled the statute of limitations was a jury question); *Geisz v. Greater Baltimore Med. Ctr.*, 313 Md. 301, 304 (1988) (similar because it was a jury question of fact when plaintiff should have discovered the claim); *Poffenberger v. Risser*, 290 Md. 631, 638 (1981) (same due to factual dispute as to when plaintiff "possessed knowledge from which actual notice may be inferred").

Here, Defendants "deliberately obscured" the existence and operation of their deception campaigns by using trade associations, front groups, and think tanks to deploy climate denial and disinformation on their behalf, Compl. ¶¶ 166–67; *see also id.* ¶¶ 31, 150–68. For example, "[a] key strategy in Defendants' efforts to discredit [the] scientific consensus on climate change . . . was to bankroll scientists" advancing "fringe opinions" to "[c]reat[e] a false sense of disagreement in the scientific community" regarding the reality and causes of climate change. *Id.* ¶¶ 162–63. Defendants' role in funding these scientists—either directly or "through Defendant-funded organizations like API"—was often undisclosed, *id.* ¶ 162. Defendants also funded front groups like the Global Climate Science Team, which did not in fact include any scientists, and "developed a strategy to spend millions of dollars manufacturing climate change uncertainty" on Defendants' behalf. *Id.* ¶ 165. These covert tactics ensured that outside observers like the City would view the disinformation and deception as coming from unconnected neutral sources, rather than Defendants. Defendants' affirmative acts to promote disinformation, conceal their knowledge about their products' harms, and cast doubt on the scientific consensus—while covering their tracks through

use of third parties—"kept the [City] in ignorance of" its MCPA claim. *See Doe*, 114 Md. App. at 187. A jury should resolve the factual question of when the City could reasonably have traced the threads of climate disinformation to Defendants. *See Mathews*, 435 Md. at 618, 620–21.

Defendants again point to allegations that scientists—including Exxon's own scientists, certain politicians, and United Nations bodies—have acknowledged a link between fossil fuels and climate change for decades. *See* Mot. at 53–54. Setting aside whether the City should have possessed comparable knowledge to a presidential advisory panel, industry scientists, or international organizations focused on climate change, Defendants conflate knowledge of climate change and its impacts with knowledge of the facts underpinning the deceptive nature of their own statements and omissions—including *Defendants'* own early knowledge about the severe risks posed by their products, and the companies' efforts to undermine the public's understanding of those risks. Defendants did not violate the MCPA by producing fossil fuels; they did so by concealing and misrepresenting the dangers of their products and by attacking the very knowledge and reporting they now seek to hide behind.[37] The City's evolving understanding of climate change and its impacts did not cause the limitations period to begin running, nor did the General Assembly's enactment of legislation intended to reduce greenhouse gas emissions. *See* Mot. at 55.

Next, Defendants assert that their deception campaigns were "widely publicized" through two news articles from the late 1990s, such that the City was on notice of their deception. *See id.* at 54. But even assuming those articles described the facts essential to the City's MCPA claim, "[t]he fact that news about some event was available at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news." *Johnson v. Multnomah Cnty.*

[37] *See Honolulu*, 537 P.3d at 1181 (confirming that, as here, Honolulu's similar "complaint 'clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign,'" not merely defendants' production and sale of fossil fuels (quoting *Baltimore IV*, 31 F.4th at 233)).

Dep't of Cmty. Just., 178 P.3d 210, 216 (Or. 2008) (en banc). Defendants cite the filing of unrelated lawsuits raising distinct theories in *AEP* and *Kivalina*, as well as the City's filing of a petition in *Massachusetts v. EPA*, 549 U.S. 497 (2007), to support their argument that other lawsuits "alleg[ed] a link between fossil fuels and climate change more than a decade before this suit." Mot. at 54–55. But neither the existence of these separate lawsuits (none of which raised consumer-protection claims, and which did not result in any factual findings or assignments of liability), nor the City's statement acknowledging that global warming is "the most pressing environmental challenge of our time," *Id.* at 55 (citation omitted), demonstrate *as a matter of law* that the City should have been aware of the facts underpinning the its own MCPA claim against Defendants here. Defendants' arguments only highlight the factual issues in determining when the City should have discovered the facts underpinning its MCPA claim, which a jury should resolve.

b. Defendants' Misrepresentations About Climate Change Are Actionable.

The MCPA "defines sales to include not only sales, but also offers and attempts to sell." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 538 (1995). Defendants' fossil fuel products qualify as "consumer goods" under the MCPA, and the Complaint plausibly alleges that Defendants' unfair and deceptive trade practices—including their misleading statements and omissions about the reality and severity of the climatic risks resulting from continued profligate use of their products—were made in the sale, offer for sale, or in attempt to sell their fossil fuel products and were intended to induce consumers (including the City) to purchase those products. *See* Md. Code Ann., Com. Law § 13-303(1)–(2); Compl. ¶¶ 141–70, 291–98. Defendants' cases merely stand for the propositions that the MCPA does not apply to post-sale representations, *Rutherford v. BMW of N. Am., LLC*, 579 F. Supp. 3d 737, 751 (D. Md. 2022), or to statements to non-consumers, *Morris*, 340 Md. at 541–42, neither of which is at issue here.

Although the question is premature at the pleading stage, Defendants have not shown (and cannot show) as a matter of law that none of their statements about climate change were made as "attempts to sell" their fossil fuel products. *See Morris*, 340 Md. at 538. Indeed, the Complaint expressly alleges that Defendants' climate change denial campaigns were "designed to influence consumers to continue using Defendants' fossil fuel products," Compl. ¶ 147, and that such tactics did deceive consumers about their products' climatic risks, *id.* ¶ 170. *Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) (quotation omitted). The Court should similarly allow the jury to make that determination here. In any event, Defendants are wrong that the allegations "relate only to the effects of climate change writ large." Mot. at 52. Among other misconduct, the Complaint challenges misrepresentations Defendants made about their fossil fuel products' contributions to climate change. *See, e.g.*, Compl. ¶¶ 153, 156.

V. CONCLUSION

The Court should deny Defendants' Motion in its entirety.[38]

Dated: December 12, 2023

Respectfully submitted,

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[38] In the alternative, to the extent the Court finds the Complaint deficient in any regard, the City respectfully requests dismissal without prejudice with leave to amend so that it may amend to cure any deficiencies. In Maryland, "it is well-established that leave to amend complaints should be granted freely to serve the ends of justice and that it is the rare situation in which a court should not grant leave to amend." *RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 673 (2010); *see also* Md. Rule 2-341 ("Amendments shall be freely allowed when justice so permits."); *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 269 (2015) ("[L]eave to amend should be generously granted." (quotation omitted)), *aff'd*, 447 Md. 31 (2016). Here, Defendants do not even attempt to justify their passing request for the Court to depart from this presumption and instead award them dismissal with prejudice. Mot. at 5, 50.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2023, a copy of the *Mayor and City Council of Baltimore's Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Failure to State a Claim* was served upon all counsel of record via email (by agreement of the parties).

/s/ Matthew K. Edling
Matthew K. Edling

EXHIBIT 1

A PRACTICAL TREATISE

ON

THE LAW OF NUISANCES

IN THEIR

VARIOUS FORMS;

INCLUDING

REMEDIES THEREFOR AT LAW AND IN EQUITY.

BY H. G. WOOD,
ATTORNEY AND COUNSELOR AT LAW.

ALBANY, N. Y.
JOHN D. PARSONS, JR., PUBLISHER.
1875.

WEED, PARSONS AND COMPANY.
PRINTERS AND STEREOTYPERS,
ALBANY, N. Y.

PREFACE.

I can assure the profession that it is with no small degree of trepidation that I submit this work to their criticism. But, whatever may be the reception with which it meets at their hands, I have the consciousness that I have labored earnestly, faithfully and honestly to make it a work worthy their patronage and favor. That it is not free from faults, I am fully aware, but it must be remembered that I was a pioneer in this "wilderness" of law, with no compass to guide me, but left to find my way through the entangled mass, as best I might. No work upon the subject has previously been written, and, while there are numerous works in which a single chapter is devoted to the subject, yet, in every instance, I have found those chapters worse than useless, as affording any light upon the subject. They are necessarily superficial views of the subject, and calculated to mislead, rather than to serve as a guide.

I have examined most of the decided cases bearing upon the various branches of the subject in the reports of the courts, both of this country and England, that were within my reach. I believe that none of any importance have escaped my attention. If so, it has been through inadvertence, and not design.

That the work may be found useful, both to the student and practicing lawyer, is my earnest wish, and, if I have failed to grasp the subject with that vigor, or to set it forth with the

clearness desirable, I have the satisfaction of knowing that I have at least cleared the way for some abler and more vigorous writer, who may hereafter take up the subject.

ALBANY, N. Y., *April* 12, 1875.

H. G. WOOD.

NOTE. — Since this work went to press, the Supreme Court of Illinois, in the case of *Stone* v. *The F. P. & N. W. R. R. Co.* (Am. Law Times, vol. 2, p. 54), have held that a railroad company which, in the operation of its road, casts smoke, dust or cinders over or upon the estate of one whose lands have not been taken for the construction of its road, is liable for all damages resulting therefrom, whether to the property itself or its comfortable enjoyment. This doctrine conflicts with *Brand* v. *Hammersmith R. R. Co.*, 4 H. L. Cas. 451, but it is sustained by substantial justice, and rests upon sound principles. See, also, *Eaton* v. *Boston, Concord & Maine R. R. Co.*, 51 N. H. 504, where, in effect, a similar doctrine is held.

H. G. W.

courts were established. The learned judges must have lost sight entirely of the principles controlling this class of wrongs. If any servant in the course of my employment, but without my knowledge, and even contrary to my orders, creates a public nuisance, as by obstructing a public highway, or polluting the waters of a stream, I am liable therefor civilly and criminally, even though in the view of the learned judge I could in no sense be said to have done the act.[1] In *Rex* v. *Medley*, 6 C. & P. 292, the directors of a gas company were held liable upon an indictment for acts done by their superintendent and engineer under a general authority to manage the works, although they were personally ignorant of the particular plan adopted, and which was a departure in fact from the one originally agreed upon, and when they supposed that the original design was being carried out. DENMAN, C. J., said: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

SEC. 31. Thus, it will be seen that it is not necessary, in order to charge a person with criminal liability for a nuisance, that he should commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely. If a landlord lets his premises to another in a populous neighborhood, to be used for a slaughter-house or other noxious trade, he is jointly liable with the tenant, both civilly and criminally, for the consequences thereof. Why then is he not equally liable as a keeper of a bawdy house, when he lets his premises for that purpose, and thereby creates a nuisance? He clearly is, both upon principle and authority.[2]

SEC. 32. It has sometimes been thought by people in some sections of the country, that nuisances of this character can be abated by the acts of persons living in their vicinity, and offended thereby as much as any other. But this is a serious mistake. No nuisance, whose effect is merely moral, can be abated except by the

[1] Commonwealth v. Gillespie, 7 S. & R. (Penn.) 469; Rex v. Dixon, 3 M. & S. 11; Rex v. Medley, 6 Car. & P. 292; Regina v. Same, 6 C. & P. 298.

[2] Pedley's Case, 1 Ad. & E. 822; 28 Eng. Com. Law, 220; Commonwealth v. Park, 1 Gray (Mass.), 553; Commonwealth v. Mayor, 6 Dana (Ky.), 293.

mon-law offense, it would seem that this would be regarded as a defense, where the parties are competent to contract marriage, for at common law such cohabitation would create the relation of husband and wife. But this could not be held where the parties, or either of them, are incompetent to marry. However, these offenses are regulated by legislation, and resort to an indictment for the common-law offense will seldom be had.

SEC. 69. So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purposes of exhibition or sale may be indicted therefor at common law, because they are clearly in derogation of public morals and common decency.[1]

ACTS AFFECTING HEALTH.

SEC. 70. It is a public nuisance, for a person afflicted with an infectious or contagious disease, to expose himself in a public place, whereby the health of others is jeopardized.[2] So, too, it is an offense of the same character for a person to expose one afflicted with such a disease in a public place.[3] So, too, a hospital for the reception and treatment of patients with contagious diseases, established in a public place, is a public nuisance, and indictable as such.[4] So a depot for the landing of emigrants in a public place, near to places of business or private residences, is a public nuisance.[5] So, too, it is a public nuisance for a person to take a horse afflicted with glanders or other infectious diseases into a public place, particularly to water it at a public watering place.[6] But a person sick in his own house, or in a room in a hotel, is not a nuisance.[7] Nor is it a nuisance for a person to use his own premises for a hospital for the treatment of horses or cattle affected with contagious diseases, or to pasture sheep upon his own premises affected with foot rot.[8] But it would be an

[1] Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S. & R. (Penn.) 91.
[2] Rex v. Vantadillo, 4 M. & S. 73.
[3] Rex v. Burnett, 4 M. & S. 472; Rex v. Sutton, 4 Burr. 2116; 1 Russ. on Crimes, 113.
[4] Rex v. Vantadillo, 4 M. & S. 73; Wolcott v. Mellick, 3 Stockt. (N. J.) 309.
[5] Brower v. New York, 3 Barb. (N. Y.) 234.
[6] Mills v. Railroad Co., 2 Rob. (N. Y.) 326; Barnum v. Van Dusen, 16 Conn. 200 (sheep afflicted with foot rot).
[7] Mills v. Railroad Co., 2 Rob. (N. Y. Sup. Ct.) 326.
[8] Fisher v. Clark, 41 Barb. (N. Y. Sup. Ct.) 329.

indictable offense for a person to take sheep affected with foot rot to a public fair or other public place where the disease would be likely to be communicated to the sheep of many persons.

SEC. 71. So it is a public nuisance for a person to sell diseased or corrupted meat, or unwholesome or adulterated foods or drinks of any kind deleterious to health.[1] In order to constitute the offense, the meat, food, or drink must be of such a noxious, unwholesome and deleterious quality as to be injurious to health if eaten.[2] But it has been held that it is not necessary to set forth in the indictment that the articles were sold to be eaten.[3] In order to make out the offense it is necessary to show that the person knew that the provisions were diseased or adulterated, although the taint or adulteration is imperceptible to the senses, and produces no perceptible injury to the health of those consuming it.[4] Knowledge of the diseased condition of meat, or of the noxious and unwholesome quality of food, may be inferred from circumstances.

Thus in *Goodrich* v. *People*, 5 E. D. Smith (N. Y.), 549, it was held that the jury might infer guilty knowledge on the part of the respondent, from the fact that he knew that the abscess or the sore in the head of the cow (for the selling of the meat of which he was indicted) had existed and been increasing several months, and that he was liable, even though the taint was imperceptible to the senses, and produced no apparently injurious consequences to those who ate it. In *Rex* v. *Dixon*, 3 Maule & Selwyn, 11, the respondent was convicted on an indictment for selling bread in which alum was mixed, and it was held that he was chargeable, even though the bread was mixed by his servants, as it would be presumed that the adulteration was made with his knowledge and by his directions.

SEC. 72. A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the

[1] State v. Smith, 3 Hawks. 376; State v. Norton, 2 Iredell (N. C.), 40; Goodrich v. People, 2 Parker's Crim Rep. (N. Y.) 622; Goodrich v. People, 5 E. P. Smith (N. Y.), 549; Rex v. Dixon, 3 M. & S. 11; Daly v. Webb, 4 Irish R. (C. L.) 309.

[2] State v. Norton, 2 Iredell (N. C.), 40; State v. Smith, 3 Hawkins (N. C.), 378.

[3] Goodrich v. People, 8 Parker's Crim. Rep. (N. Y.) 622.

[4] Goodrich v. People, 5 E. D. Smith (N. Y. C. P.), 549.

to the injury, which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases, once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate every thing near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or instantly inflammable nature." And in this case (*Weir* v. *Kirk*), the erection of a powder magazine, intended for the reception of large quantities of powder, on the line of a public highway over a half mile distant from the plaintiff's residence, was enjoined. Thus it will be seen that the fact of *negligent* keeping is not regarded as an element. The fact of its presence in a locality where it *may* result disastrously is sufficient.

SEC. 74. Any thing that creates unnecessary alarm or anxiety in the public mind, such as the publication of false reports of an intended invasion, or of the reported presence in a community of a child-stealer, which is calculated to disturb the public mind and create false terror or anxiety, is a public nuisance, and was so held in *Commonwealth* v. *Cassidy*, 6 Phila. R. (Penn.) 82. In that case a false hand-bill was circulated, cautioning the public to look out for a child-stealer, who was represented to be a black woman, and then in the city, and fully describing her. The statement was wholly false, but naturally created great alarm in the city. The person circulating the bills was indicted therefor as for a public nuisance, and the court held that the indictment would lie, "that mental anxiety, induced from any cause, is a fruitful source of bodily disease, as well as of death itself, and any false publication, calculated unnecessarily to excite it, is a public nuisance."

SEC. 75. There are, in addition to the matters previously named in this chapter, a multitude of uses of property that are indictable as public nuisances; but, as these matters will be specifically treated in other chapters of this work, it will be unnecessary to treat of them *in extenso* here. All obstructions of a highway, or

principle, a loaded gun is regarded as a nuisance, and any person who, by its use in a public place, injures another, is liable therefor. So, too, if he intrusts it to an incompetent person he is liable for all the consequences that result therefrom; or if he leaves it exposed in a careless situation where others are liable to come in contact with it, he is liable if actual injury results therefrom.[1] The rule in reference to such injuries is, that if the wrong and legal damages are known by common experience to be the natural and ordinary sequence of an act, and that damage, naturally, according to the ordinary course of events, follows the wrong, the wrong and damage are sufficiently concatenated, as cause and effect to support an action.[2] In *Vanderburgh* v. *Truax*, 4 Denio (N. Y. S. C.), 464, the defendant had a quarrel with a boy, and picking up a pick-axe pursued him through the street, and the boy, to escape from his pursuer, ran into a wine store, and upset a cask of wine. In an action against the pursuer, it was held that he, and not the boy, was liable for the damage. In *Scott* v. *Shepard*, 3 Wilson, 403, the defendant threw a lighted squib into the market house, in the market place, during a fair, and the squib falling upon a gingerbread stall, the stall-keeper, for his own protection, threw it across the market place, where it fell upon another stall, where it was thrown off and exploded near the plaintiff's eye, and blinded him. DeGray, C. J., in delivering the opinion of the court, said: "All the injury was done by the first act of the defendant; that, and all the intervening acts, are to be treated as only one act."

Sec. 143. There are a class of nuisances that arise from an interference, by force or fraud, with the free exercise of another's trade or occupation, by preventing persons by threats from trading with the plaintiff,[3] or by posting placards in the vicinity of the plaintiff's place of business, calculated to bring the plaintiff into contempt and to prevent people from trading with him,[4]

[1] Illidge v. Goodwin, 5 C. & P. 190; Lynch v. Nurdin, 1 Q. B. 29; Scott v. Shepard, 3 Wils. 403.

[2] Gerhard v. Bates, 2 Ell. & Bl. 490.

[3] Tarleton v. McGamley, Peake, 270; Bell v. Midland R. R., 30 L. R. 278; Springhead Spinning Co. v. Riley, L. R., 6 Eq. Cas. 551; Keeble v. Hickeringill, 11 East, 576 n.

[4] Gilbert v. Mickle, 4 Sand. Ch. (N. Y.) 357.

there kicked a child who was lawfully in the highway. The court held that the defendant could not be made responsible for the injury unless he was aware that the horse was likely to commit such acts. But the doctrine of this case does not commend itself to courts or the profession, as being consistent with reason or sound policy. The horse was *unlawfully* in the highway, the child was *lawfully* there, and there seems to be no good reason why the owner or keeper of the horse should not be responsible for the injuries inflicted upon the child while so unlawfully at large. Judge REDFIELD, in an article entitled "Recent developments in English Jurisprudence," 4 Am. Law Reg. (N. S.), pp. 140–1, severely criticises this case, and gives it, as his opinion, that knowledge of the propensities of the horse, under such circumstances, is not essential to fixing liability for injuries inflicted.

SEC. 148. While a man may keep horses affected by glanders or other contagious diseases upon his own premises, yet he has not a right to allow them to go at large in the street, or to drink at public watering places; and if he does do so he is answerable as for a nuisance to any person sustaining damage therefrom.[1] And for a person to sell a horse affected with glanders, knowing it be so affected, is so far a fraud and opposed to sound policy that he may be made liable, even though there be no warranty.[2] A person may keep horses afflicted with glanders upon his own premises, or sheep afflicted with the foot-rot, but he must keep them there at his peril; for, while he will not be liable for a spread of the disease therefrom among his neighbors' horses or sheep so long as he keeps them on his own land, yet if they escape upon the land of another, he will be liable for all the damage from a spread of the disease resulting from their escape.[3] But this is only the case when the duty is imposed upon him to fence the lands. When the duty to fence is upon another, or when the lands are left common, he is only bound to give those interested notice of the diseased state of his cattle and flocks, and that he intends to turn them into his pastures.[4]

[1] Mills v. N. Y. & H. R. R. Co., 3 Rob. (N. Y. Sup. Ct.) 326.
[2] Blakemore v. Bristol & Ex. R. R. Co., 8 Ell. & Ell. 1051; Anderson v. Buckton, 1 Str. 192.
[3] Fisher v. Clark, 41 Barb. (N. Y. Sup. Ct.) 329; Anderson v. Buckton, 1 Str. 192.
[4] Walker v. Herron, 22 Tex. 55.

EXHIBIT 2

LAW OF TORTS

William L. Prosser

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OF
THE LAW OF TORTS

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edy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large,[16] which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure.[17] As in the case of other crimes, the normal remedy is in the hands of the state. The two have almost nothing in common, except that each causes inconvenience to someone,[18] and it would have been fortunate if they had been called from the beginning by different names. Add to this the fact that a public nuisance may also be a private one, when it interferes with the enjoyment of land,[19] and that even apart from this there are circumstances in which a private individual may have a tort action for the public offense itself,[20] and it is not difficult to explain the existing confusion.

If "nuisance" is to have any meaning at all, it is necessary to dismiss a considerable number of cases[21] which have applied the term to matters not connected either with land or with any public right, as mere aberration, adding to the vagueness of an already uncertain word. Unless the facts can be brought within one of the two categories mentioned there is not, with any accurate use of the term, a nuisance.[22]

87. BASIS OF LIABILITY

Another fertile source of confusion is the fact that nuisance is a field of tort liability, rather than a type of tortious conduct. It has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion.[23] The attempt frequently made to distinguish between nuisance and negligence,[24] for example, is based upon an entirely mistaken emphasis upon what the defendant has done rather than the result

16. Salmond, Law of Torts, 8th Ed. 1934, 238. "Public nuisances may be considered as offenses against the public by either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." Russell, Crimes and Misdemeanors, 8th Ed. 1923, 1691.

17. A very good case on the distinction between the two is Mandell v. Pivnick, 1956, 20 Conn.Sup. 99, 125 A.2d 175, which found neither. Plaintiff was injured by a defectively installed awning on defendant's building. It was held that no private nuisance was pleaded, because there was no allegation of any interference with rights in land; and no public nuisance, because there was no allegation that the awning interfered with the public highway, or with plaintiff's rights as a member of the general public.

In accord is Radigan v. W. J. Halloran Co., 1963, 97 R.I. 122, 196 A.2d 160 (personal injury from negligent operation of a crane).

18. "Public and private nuisances are not in reality two species of the same genus at all. There is no generic concept which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbor." Salmond, Law of Torts, 8th Ed. 1934, 233.

"What generic conception, it has been asked, connects public nuisances like the woman who is a common scold, or the boy who fires a squib, with private nuisances like blocking up the ancient lights of a building or excessive playing on the piano? The only link which we can suggest is inconvenience, and loose as this term is, it is probably the best that can be offered. At any rate, be the ground of the distinction what it may, the distinction itself cannot be cast aside without departing from settled legal terminology, and ignoring not only the fact that a public nuisance may become a private one but also the very practical consequence of the distinction which is that a public nuisance is a crime while a private nuisance is a tort." Winfield, Law of Tort, 1937, 466.

19. See infra, p. 589.

20. See infra, p. 586.

21. For example, Carroll v. New York Pie Baking Co., 1926, 215 App.Div. 240, 213 N.Y.S. 553.

22. Mandell v. Pivnick, 1956, 20 Conn.Sup. 99, 125 A. 2d 175; Dahlstrom v. Roosevelt Mills, Inc., 1967, 27 Conn.Sup. 355, 238 A.2d 431.

23. Restatement of Torts, Scope and Introductory Note to chapter 40, preceding § 822; Peterson v. King County, 1954, 45 Wash.2d 860, 278 P.2d 774.

24. See Hogle v. H. H. Franklin Mfg. Co., 1910, 199 N.Y. 388, 92 N.E. 794; Bell v. Gray-Robinson Const. Co., 1954, 265 Wis. 652, 62 N.W.2d 390; Winfield, Law of Tort, 5th Ed. 1950, § 138; Lowndes, Contributory Negligence, 1934, 22 Geo.L.J. 674, 697; Note, 1915, 1 Corn.L.Q. 55.

which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance.[25] The same is true as to the attempted distinction between nuisance and strict liability for abnormal activities, which has plagued the English [26] as well as the American courts.

Again the confusion is largely historical. Early cases of private nuisance seem to have assumed that the defendant was strictly liable, and to have made no inquiry as to the nature of his conduct. As late as 1705, in a case where sewage from the defendant's privy percolated into the cellar of the plaintiff's adjoining house, Chief Justice Holt considered it sufficient that it was the defendant's wall and the defendant's filth, because "he was bound of common right to keep his wall so his filth would not damnify his neighbor." [27] Over a period of years the general modifications of the theory of tort liability to which reference has been made above [28] have included private nuisance. Today liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability. With very rare exceptions, there is no liability unless the case can be fitted into one of these familiar categories.[29]

Any of the three types of conduct may result in liability for a private nuisance.[30] By far the greater number of such nuisances are intentional. Occasionally they proceed from a malicious desire to do harm for its own sake; [31] but more often they are intentional merely in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.[32] Thus a defendant who continues to spray chemicals into the air after he is notified that they are blown onto the plaintiff's land is to be regarded as intending that result,[33] and the same is true when he knows that he is contaminating the plaintiff's water supply with his slag refuse,[34] or that blown sand from the land he is improving is ruining the paint on the plaintiff's house.[35] If there is no reasonable justifica-

25. See infra, notes 37–44.

26. See Winfield, Law of Tort, 5th Ed.1950, § 143; Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480.

27. Tenant v. Goldwin, 1705, 1 Salk. 360, 91 Eng.Rep. 314, adding, "and that it was a trespass [the action was on the case] on his neighbor, as if his beasts should escape, or one should make a great heap upon his ground, and it should tumble and fall down upon his neighbor's." See also Sutton v. Clarke, 1815, 6 Taunt. 29, 44, 128 Eng.Rep. 943; Humphries v. Cousins, 1877, 2 C.P.D. 239, 46 L.J.C.P. 488.

28. Supra, p. 17. See, 8 Holdsworth, History of English Law, 2d Ed. 1937, 446–459.

29. Wright v. Masonite Corp., M.D. N.C.1965, 237 F. Supp. 129 affirmed 368 F.2d 661, cert. denied 386 U.S. 934; Power v. Village of Hibbing, 1930, 182 Minn. 66, 233 N.W. 597; Schindler v. Standard Oil Co. of Ind., 1921, 207 Mo.App. 190, 232 S.W. 735; Rose v. Socony Vacuum Corp., 1934, 54 R.I. 411, 173 A. 627; Ettl v. Land & Loan Co., 1939, 122 N.J.L. 401, 5 A.2d 689.

30. See the excellent discussion in Taylor v. City of Cincinnati, 1944, 143 Ohio St. 426, 55 N.E.2d 724. Also Rose v. Standard Oil Co. of N. Y., 1936, 56 R.I. 272, 185 A. 251, reargument denied, 1936, 56 R.I. 472, 188 A. 71.

31. See for example the spite fence cases, infra, p. 598. Also Medford v. Levy, 1888, 31 W.Va. 649, 8 S.E. 302; Smith v. Morse, 1889, 148 Mass. 407, 19 N.E. 393; Christie v. Davey, [1893] 1 Ch. 316; Hollywood Silver Fox Farm v. Emmett, [1936] 2 K.B. 468; Collier v. Ernst, 1941, 31 Del.Co., Pa., 49. See Friedmann, Motive in the English Law of Nuisance, 1954, 40 Va.L.Rev. 583.

32. See supra, § 8.

33. Vaughn v. Missouri Power & Light Co., Mo.App. 1935, 89 S.W.2d 699; Smith v. Staso Milling Co., 2 Cir. 1927, 18 F.2d 736; Jost v. Dairyland Power Cooperative, 1969, 45 Wis.2d 164, 172 N.W.2d 647. Cf. Morgan v. High Penn Oil Co., 1953, 238 N.C. 185, 77 S.E.2d 682; E. Rauh & Sons Fertilizer Co. v. Shreffler, 6 Cir. 1943, 139 F.2d 38. See Note, 1955, 8 Vand.L.Rev. 921.

34. Burr v. Adam Eidemiller, Inc., 1956, 386 Pa. 416, 126 A.2d 403.

35. Waters v. McNearney, 1959, 8 App.Div.2d 13, 185 N.Y.S.2d 29, affirmed, 1960, 8 N.Y.2d 808, 202 N.Y.S.2d 24, 168 N.E.2d 255.

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, vs. BP P.L.C., *et al.*, *Defendants*.	Case No. 24-C-18-004219

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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RULE

TREATISES

I. INTRODUCTION

This action seeks relief for harms allegedly arising from global emissions of greenhouse gases. It is not, as Plaintiff claims, simply a product liability suit regarding "Defendants' failure to warn and deceptive promotion of products in Maryland." Opposition Brief ("Opp.") at 1. Indeed, Plaintiff acknowledges this reality in the opening paragraph of its opposition: This lawsuit's fundamental allegation is that "Defendants' tortious conduct ***worsened climate change***." *Id.* (emphasis added). Plaintiff's opposition confirms that the essential connection between Defendants' purported misconduct (alleged misrepresentations and deception) and Plaintiff's alleged injuries (*e.g.*, sea level rise and flooding) is "***increased emissions***" that "***have engendered significant climate impacts in***" Baltimore. *Id.* at 28 (emphases added). In fact, Plaintiff concedes that its Complaint alleges that it is "the ***incremental greenhouse gas emissions*** resulting from Defendants' wrongful promotion of their fossil fuel products" that caused its injuries. *Id.* at 35 (emphasis added). Put simply, Plaintiff alleges that its damages *all* result from cumulative increases in greenhouse gas emissions released every day by billions of consumers in every State in the Nation and every country in the world.

As hard as Plaintiff tries to paint this lawsuit as a run-of-the-mill tort case, Plaintiff cannot dispute—and, in fact, repeatedly concedes (as it must)—that it seeks damages for the alleged impacts of interstate and international emissions. These concessions are fatal to Plaintiff's claims because federal law precludes imposing liability on select energy companies for global emissions and global climate change. This Court should reject Plaintiff's efforts to obscure the obvious, and it should dismiss Plaintiff's claims for several reasons.

First, the structure of the federal Constitution precludes applying state law to Plaintiff's claims. Fundamental principles of federalism embodied in the U.S. Constitution make clear that

state law cannot operate in areas of "uniquely federal interests." *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981). The Supreme Court has repeatedly held that interstate air pollution is such an area. In affirming dismissal of nearly identical claims, the Second Circuit held that a "suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law," noting that "a mostly unbroken string of [Supreme Court] cases has applied federal law to disputes involving interstate air or water pollution." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (citing cases).

Plaintiff relies on cases—like the Hawai'i Supreme Court's erroneous decision in *City & County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023)—that never address these constitutional constraints and, instead, incorrectly tries to reframe the question as whether federal common law provides a cause of action that substitutes for its state-law claims. But the critical question here is whether, under our constitutional structure, state law can ever resolve claims seeking damages for interstate and international emissions. As the Second Circuit held in affirming dismissal of nearly identical claims on the merits, the "answer is simple: 'no.'" *City of New York*, 993 F.3d at 91; *accord Delaware v. BP Am., Inc.*, 2024 WL 98888, at *9 (Del. Super. Ct. Jan. 9, 2024) (holding that claims "seeking damages for injuries resulting from out-of-state or global greenhouse emissions" are "beyond the limits of [state] common law").

Second, even if Plaintiff could assert claims under state law, they would be preempted by the Clean Air Act ("CAA"). In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Supreme Court held that the Clean Water Act ("CWA") prohibits States from regulating out-of-state sources of water pollution. Federal appellate courts have consistently applied this rule to air pollution under the CAA. Plaintiff asserts that its claims fall outside the scope of the CAA because they turn on purported misrepresentation and deception. But regardless of the tort theory on which

its claims are based, Plaintiff undeniably seeks to hold Defendants liable under Maryland law for emissions generated outside Maryland. Under *Ouellette*, that type of interstate regulation is preempted by the CAA's comprehensive regime regulating those same emissions. Indeed, the Delaware Superior Court recently held that *Ouellette* is on all fours with a similar climate lawsuit brought under state law and thus ruled that claims "seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution[] are pre-empted by the CAA." *Delaware*, 2024 WL 98888, at *9.

Third, Maryland's political question doctrine bars this Court from adjudicating Plaintiff's claims because there are no judicially discoverable and manageable standards for resolving them—and certainly no way to do so without encroaching upon the prerogatives of the political branches.

Fourth, Plaintiff fails to adequately plead its putative state-law claims and instead invites this Court to "expand traditional tort concepts beyond manageable bounds" to hold Defendants liable. *Gourdine v. Crews*, 405 Md. 722, 750 (2008). Maryland takes a strikingly narrow view of the scope of duty in tort claims. The Supreme Court has expressly distinguished Maryland law from the law of States that have "embraced the belief that duty should be defined . . . without regard to the size of the group to which the duty would be owed." *Id.* at 752.

Putting aside Plaintiff's plea for a sweeping expansion of settled Maryland law, its state-law claims still fail. A nuisance claim will not lie based on lawful products, like fossil fuels, that are not inherently dangerous or where, as here, Defendants have no control over the instrumentality of the purported nuisance. Defendants had no duty to warn the world of the potential impact of fossil fuels on the global climate given the Complaint's allegations that those impacts have been open and obvious for decades. Plaintiff has not alleged—and cannot plausibly allege—that the emissions it claims injured it were released due to a *design* defect in Defendants' fossil-fuel

products. Plaintiff's trespass claim fails because it has not alleged that Defendants caused a cognizable entry onto property exclusively possessed by Plaintiff. And Plaintiff's Maryland Consumer Protection Act ("MCPA") claim targeting Defendants' alleged "campaign of deception" is time-barred and meritless—and should be dismissed in its entirety because Plaintiff does not adequately allege reliance.

The Complaint should be dismissed with prejudice.

II. ARGUMENT

A. Plaintiff's Claims Are Barred Because State Law Cannot Constitutionally Be Applied.

Plaintiff's claims seek compensation for harms allegedly caused by *interstate and international* emissions of greenhouse gases that allegedly contribute to *global* climate change. But under our constitutional system, States cannot use their own laws to resolve claims seeking redress for injuries caused by out-of-state emissions. *See* Joint Brief ("Br.") 8–15. This constitutional rule derives from the federal structure of our government. As the Supreme Court has explained, "[t]he States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because the 'interstate . . . nature of the controversy makes it inappropriate for state law to control'" and instead those disputes "turn on federal 'rules of law.'" *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019); *see also Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (explaining that when "a State enters the Union" it "surrenders certain sovereign prerogatives" to the federal government). Plaintiff does not contend otherwise; indeed, Plaintiff's opposition (like the duplicative amicus brief by the Maryland Attorney General) scarcely addresses Defendants' constitutional argument.

Instead, Plaintiff attacks a strawman, arguing that federal common law does not supply a

cause of action that would preempt state law. *See, e.g.*, Opp. 6–9. Plaintiff not only misconstrues Defendants' argument, but also misses the constitutional point: the Constitution's federal structure does not allow the application of state law to claims like Plaintiff's, *irrespective* of whether federal common or statutory law supplies a cause of action.

The Supreme Court has made clear that state law cannot govern cases "in which a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Tex. Indus.*, 451 U.S. at 640. Certain "matters [are] exclusively federal, because [they are] made so by constitutional or valid congressional command, or . . . so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

This is such a case. The Supreme Court has repeatedly recognized that disputes "deal[ing] with air and water in their ambient or interstate aspects" are "areas of national concern" because "the basic scheme of the Constitution so demands"—and explained that such areas are not "matters of substantive law appropriately cognizable by the states." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"); *see also, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6, 108 n.10 (1972) ("*Milwaukee I*") (the "basic interests of federalism . . . demand[]" that, in disputes concerning interstate and international emissions, "the rule of decision [is] federal").

Whether a *remedy* is available under federal common law or whether federal common law has been displaced by statute are separate questions and irrelevant to whether state law can govern this case. As the Second Circuit held in a closely analogous case, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98; *accord Illinois v. City of Milwaukee*, 731 F.2d 403, 410–11 (7th Cir.

1984) ("*Milwaukee III*"). And in any event, federal common law has *not* been displaced with respect to foreign emissions—emissions for which Plaintiff necessarily seeks damages given the sweeping nature of its claims—and "federal common law preempts state law." *City of New York*, 993 F.3d at 92, 95 n.7. Because Plaintiff attempts to bring its claims under Maryland law and seeks damages for undifferentiated global emissions, those claims must yield to a uniform federal rule of decision, and the Complaint must be dismissed. Plaintiff's arguments to the contrary do not change the analysis.

First, Plaintiff argues that state law must apply because its claims "look nothing like any federal common law causes of action ever recognized." Opp. 7. But it does not matter whether federal law supplies a cause of action for these claims. The dispositive *constitutional* question is instead whether "a federal rule of decision" addressing claims premised on injuries arising from interstate (and international) emissions "is '*necessary* to protect uniquely federal interests.'" *Tex. Indus.*, 451 U.S. at 640 (emphasis added). Because the answer is "yes," Maryland state law constitutionally cannot apply.

"For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 994 F.3d at 91. In *Milwaukee I*, the Supreme Court held that "basic interests of federalism" demand "applying federal law" to a dispute involving "the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n.6. The Supreme Court reaffirmed that understanding more than a decade later when it explained that "the regulation of interstate water pollution is a matter of federal, not state, law." *Ouellette*, 479 U.S. at 488. More recently, the Supreme Court underscored that federal law must govern "'[w]hen we deal with air and water in their ambient or interstate aspects'" because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421

(citation omitted). Accordingly, "borrowing the law of a particular State would be inappropriate" in a dispute involving injuries allegedly caused by the effect of global emissions on the Earth's climate. *Id.* at 422.

Plaintiff attempts to distinguish these cases because they involved *nuisance* claims, whereas this case purportedly involves consumer deception. *See* Opp. 9–11. But Plaintiff *does* bring nuisance claims, Compl. ¶¶ 218–36, which are necessarily premised on the alleged impact of interstate (and international) emissions. Indeed, in seeking to salvage its nuisance claims, Plaintiff insists "that the ***incremental greenhouse gas emissions*** resulting from Defendants' wrongful promotion of their fossil fuel products" *are* the challenged "nuisance conditions." Opp. 35 (emphasis added). In any event, Plaintiff's illusory distinction between nuisance and "consumer deception" claims makes no difference here because the basis for every one of Plaintiff's claims is that Defendants' alleged tortious campaign to conceal their products' climate-related dangers "'maximize[d] continued dependence on their products'" and that "***increased emissions*** attributable to Defendants' tortious conduct have engendered significant climate impacts in Baltimore." *Id.* at 28 (alteration in original; emphasis added). Whatever the label, Plaintiff seeks to use Maryland law to impose liability for cumulative emissions released from billions of sources everywhere in the world. This it cannot do.

City of New York is directly on point. There, the City argued that state law governed because "this case concerns only 'the production, promotion, and sale of fossil fuels, not the regulation of emissions.'" 993 F.3d at 91. The Second Circuit disagreed. In its view, the determinative consideration was that the City's claims targeted the *harms* from interstate pollution: "Stripped to its essence, then, the question before us is whether a nuisance suit seeking to recover damages *for the harms caused by global greenhouse gas emissions* may proceed under New York

law. Our answer is simple: no." *Id.* (emphasis added); *see also id.* at 85 (state governments may not "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions."); Ex. A (New York City Complaint). That the City dressed up its claims in the language of promotion and attacked an earlier link in the supposed causal chain was irrelevant: "Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages." 993 F.3d at 91 (emphasis in original). The same is true here.[1]

The Delaware Superior Court recently reached a similar conclusion in a materially identical case, holding that claims—like Plaintiff's here—ostensibly predicated on allegedly misleading marketing but "seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution" are "beyond the limits of [state] common law." *Delaware*, 2024 WL 98888, at *9. That principle bars *all* of Plaintiff's claims here, which necessarily seek damages for interstate and international emissions.

Plaintiff does not dispute that it seeks damages for harms allegedly caused by interstate emissions. *See, e.g.*, Br. 15–18; Opp. 28–29. Plaintiff seeks to impose liability for any alleged misrepresentation—regardless of whether they were made *outside of, or directed to, Maryland*—and damages for injuries caused by greenhouse gas emissions *worldwide*. *See* Opp. 28. Plaintiff thus seeks to use state law to "regulat[e]" an industry's interstate and extraterritorial operations. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). And its claims entail a "significant

[1] Contrary to Plaintiff's assertion, *City of New York* is not "materially different" from this case. Opp. 11. Both cases involve nuisance and trespass claims based on allegations of deception. While the City may have emphasized different aspects of its claims, that was irrelevant to the outcome. As explained above, the Second Circuit described the question in that case simply as "whether municipalities may utilize state tort law to hold multinational oil companies liable *for the damages caused* by global greenhouse gas emissions." 993 F.3d at 85 (emphasis added).

conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994).

For the same reason, Plaintiff's contention that its "case pursues the core state 'interest in ensuring the accuracy of commercial information in the marketplace'" and "targets misconduct traditionally regulated by the States" (Opp. 20) is a red herring. Such alleged interests were no less at play in *Milwaukee I*, *Ouellette*, and *City of New York*. Yet the plaintiffs in those cases were nonetheless barred from using their own States' laws to advance those claimed interests because doing so would have the impermissible effect of regulating out-of-state conduct and encroaching on uniquely federal interests. In such a case, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422; *see also Hindes v. FDIC*, 137 F.3d 148, 169 (3d Cir. 1998) ("[S]tate laws or requirements which are inconsistent with federal law or its objectives are subordinated to the federal law by virtue of the Supremacy Clause."). And while Plaintiff cites *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018), for the proposition that this action is designed to "redress injuries that 'states have a legitimate interest in combatting,' namely 'the adverse effects of climate change'" (Opp. 20), there was no dispute in that case that the law at issue "d[id] not legislate extraterritorially." 903 F.3d at 917. Here, Plaintiff seeks to apply Maryland law extraterritorially, which it constitutionally cannot do.

Second, Plaintiff argues that "Congress displaced federal common law governing interstate pollution damages suits through the CAA, and after displacement, federal common law does not preempt state law." Opp. 12 (quotation omitted). Again, Plaintiff confuses the issue. As explained above, the U.S. Constitution's allocation of sovereignty among the States and the federal government prevents state law from governing disputes involving interstate pollution. *See* U.S. Const. art. VI, cl. 2. This constitutional constraint on state authority arises from the "overriding

federal interest in the need for a uniform rule of decision" to avoid the inevitable conflicts that would arise if the laws of every State applied to emissions emanating from every other State. *Milwaukee I*, 406 U.S. at 105 n.6. That overriding federal interest exists regardless of whether the federal government acts through congressional statute to regulate interstate pollution or allows federal common law to apply. As the Second and Seventh Circuits correctly held—but the Hawai'i Supreme Court failed to appreciate in *Honolulu*—the statutory displacement of federal common law does not permit state law to govern an area that it could *never* constitutionally have governed in the first place: "[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98; *accord Milwaukee III*, 731 F.2d at 410–11.

Plaintiff errs in contending that "[t]he reasoning in *Honolulu*"—that displaced federal common law cannot preempt state law—"comports with the U.S. Supreme Court's consistent treatment of displaced federal common law." Opp. 15. *AEP*, for example, did not hold that whether state-law claims are "preempted depend[s] *only* on an analysis of the CAA." *Id.* at 14 (quoting *Honolulu*, 537 P.3d at 1199). To the contrary, *AEP* explained that "the availability *vel non* of a state lawsuit depends, ***inter alia***, on the preemptive effect of the" CAA. 564 U.S. at 429 (emphasis added). And the only state law at issue in *AEP* was *source* state laws, *see Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009), which would not be preempted by the Constitution's federal structure or by federal common law because there is no potential for interstate conflict or need for national uniformity.

Ouellette likewise did not find that state law could apply in an area that had always been exclusively federal after the CWA displaced the federal common law of interstate water pollution.

Quite the opposite: "In light of [the CWA's] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically *preserved* by the [federal] Act." *Ouellette*, 479 U.S. at 492 (emphasis added).[2] The Court's preemption analysis was thus aimed at determining the extent to which the CWA specifically authorized state law to govern—not whether federal law's *silence* allowed state law to govern. Plaintiff points to the Court's holding that state law can still govern in-state emissions (Opp. 15), but that holding is entirely consistent with Defendants' argument here: The overriding need for federal uniformity precludes States from applying their laws to claims based on *interstate* emissions, but there are no federalism concerns when a State applies its law to *in-state* emissions.

This is consistent with the Seventh Circuit's holding on remand from *Milwaukee I*—which *Ouellette* endorsed, *see* 479 U.S. at 490, 497—that the enactment of the CWA did not give birth to state common law claims that had never existed before the CWA's enactment: "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now." *Milwaukee III*, 731 F.2d at 410. "The claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states." *Id.* at 410–11.

Once again, *City of New York* is on-point and should be followed here. The Second Circuit began by explaining that the plaintiff's novel and "sprawling" claims were preempted not by "a traditional statutory preemption analysis" but because under our federal constitutional structure

[2] As demonstrated below, *Ouellette* makes clear that the only form of state law regulation preserved by the CWA—and hence the CAA—is that which applies to in-state sources of pollution. *See infra*, Part II.

state law never has governed, and never can govern, interstate pollution. 993 F.3d at 98. "[W]here a federal statute [like the CAA] displaces federal common law, it does so" in a field which "the states have traditionally *not* occupied"—that is, a field where federal law *must* govern by virtue of our constitutional structure. *Id.* (cleaned up). As a result, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* Indeed, the Second Circuit found that idea "too strange to seriously contemplate." *Id.* at 98–99. Citing *Ouellette*, the court reasoned that "resorting to state law on a question previously governed by federal common law is permissible only to the extent *authorized* by federal statute." *Id.* at 99 (emphasis added). And because the CAA "does not authorize the City's state-law claims, . . . such claims concerning domestic emissions are barred." *Id.* at 100. At bottom, regardless of whether Congress has displaced federal common law remedies, "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641.

Third, Plaintiff insists that its claims targeting foreign emissions survive. Opp. 17–19. But state law cannot govern claims for harms caused by foreign emissions for the same federalism and separation-of-powers reasons discussed above—namely, that allowing state law to intrude into such international affairs would "needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *City of New York*, 993 F.3d at 103. While Plaintiff insists that Maryland law should reach conduct occurring not only outside the State, but outside the *country*, it does not cite a single case to support its position—because there is none.

By not disputing that it seeks damages based on international emissions, Plaintiff refutes its own contention that the federal common law applicable to its claims has been displaced. Federal common law is "still require[d]" to govern extraterritorial aspects of claims challenging

global emissions because the CAA "does not regulate foreign emissions" and, viewed through that lens, "federal common law preempts [the] state law" claims Plaintiff attempts to plead. *City of New York*, 993 F.3d at 95 n.7, 101; *accord City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("[I]f federal common law exists, it is because state law cannot be used."). This flows from the constitutional principle that States lack the power to regulate international activities or foreign policy and affairs, and that such matters "must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

Thus, federalism and comity concerns embodied in the Constitution preclude the application of state law to claims like Plaintiff's. While "Congress has ample authority to enact [climate] policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (footnote omitted); *see Massachusetts*, 549 U.S. at 519 ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions."); *Philip Morris USA v. Williams*, 549 U.S. 346, 352–53 (2007) ("[O]ne State[]" may not "impose" its "policy choice[s] . . . upon neighboring States with different public policies."). Allowing state law to govern such areas would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). The implications are apparent here: States and municipalities across the country have filed more than two dozen lawsuits challenging the same conduct targeted by Plaintiff, each arguing that this conduct is subject to *their own* laws.

Simply put, only federal law can govern Plaintiff's interstate and international emissions claims because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. Thus, Plaintiff's putative state-law claims are preempted, and this action should be dismissed.

B. Plaintiff's State-Law Claims Are Preempted By The Clean Air Act.

Even if state law could govern interstate pollution under the U.S. Constitution, Plaintiff's claims would fail because "the CAA preempts state law to the extent a state attempts to regulate air pollution originating in other states," and that is precisely what Plaintiff's sprawling lawsuit seeks to do here. *Delaware*, 2024 WL 98888, at *10.

Contrary to Plaintiff's suggestion, Defendants do not contend that States are powerless under the CAA to regulate pollution generated *within* their borders. *See* Opp. 21. But one State may not apply its laws to pollution sources in *other* States. Such claims are preempted *even if*, as Plaintiff alleges, the impacts of those out-of-state emissions are experienced in the State. *See, e.g.*, Compl. ¶ 8. The CAA preempts such claims because they "'stand[] as an obstacle' to the full implementation" of the Act and "interfere[] with the methods by which the federal statute was designed" to regulate pollution. *Ouellette*, 479 U.S. at 494. Indeed, in a materially indistinguishable lawsuit over alleged climate deception brought by the State of Delaware, the Delaware Superior Court recently concluded that the state's claims "seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution, are pre-empted by the CAA." *Delaware*, 2024 WL 98888, at *9.

Plaintiff does not dispute that *Ouellette*, which addressed preemption under the CWA, applies with equal force to the CAA. *See* Opp. 23. Plaintiff instead notes that *Ouellette* construed the CWA's savings clauses as preserving certain state authority. *Id.* But the savings clauses preserve state authority to regulate only *in-state* pollution sources, and the Court made clear that the CWA "*precludes* . . . applying the law of an affected State against an out-of-state source." *Ouellette*, 479 U.S. at 494 (emphasis added). The savings clauses in the CAA are comparable. The Sixth Circuit recognized that damages claims "based on the common law of a non-source state . . . are preempted by the Clean Air Act." *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685,

691, 693 (6th Cir. 2015). Similarly, in *N.C. ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), the Fourth Circuit concluded that, insofar as North Carolina "wanted out-of-state entities, including TVA, to follow its state rules" respecting emissions, "it violates *Ouellette*'s directive that source state law applies" to such disputes. *Id.* at 308–09.[3]

Plaintiff's response boils down to a single contention, erroneously embraced by the Hawai'i Supreme Court, that its lawsuit deals only with "'alleged failure to warn and deceptive marketing conduct,'" not out-of-state sources of pollution. Opp. 23 (quoting *Honolulu*, 537 P.3d at 1205). But that cannot be squared with Plaintiff's own characterization of its Complaint: Plaintiff alleges that "[t]he ***increased emissions*** attributable to Defendants' tortious conduct have engendered significant climate impacts." *Id.* at 28 (emphasis added). Plaintiff "does ***not*** allege that Defendants' campaign of deception and disinformation or failures to warn are in and of themselves a public nuisance." *Id.* at n.9 (emphasis added). Plaintiff thus cannot deny that it seeks redress for harms allegedly caused by climate change—a global phenomenon caused by emissions from sources in literally every State and Nation in the world—or that it seeks to hold Defendants liable under Maryland law for those out-of-state emissions.

The "obstacle" that Plaintiff's unprecedented theory would pose "to the full implementation" of the CAA is readily apparent. *Ouellette*, 479 U.S. at 494. For example, Plaintiff attempts to hold certain Defendants responsible for the combustion of their diesel and gasoline products in vehicles. Compl. ¶¶ 20(g), 21(c), 22(g), 23(g), 24(e), 25(e), 26(i), 27(h), 28(e). But greenhouse gas emissions from motor vehicles are regulated comprehensively under the CAA. Br. 21–22. EPA sets national standards, and States may apply more stringent standards *only* for vehicles sold *in-state*, and only under carefully prescribed circumstances. *See* 42 U.S.C. § 7507

[3] Plaintiff's reliance on *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), is misplaced, particularly since the court held that those state-law claims were *preempted* by federal regulations. *See id.* at 133–34.

(providing process for opting into more stringent emissions standards adopted by California). What States may not do is regulate emissions from vehicles sold in *other* States. But that is what Plaintiff seeks to do here—impose liability under Maryland law for injuries allegedly caused by vehicle emissions originating outside the State. Moreover, Plaintiff seeks to impose Maryland's liability regime regardless of whether the out-of-state emissions have "complied fully with . . . state and federal . . . obligations" under the CAA. *Ouellette*, 479 U.S. at 495.

Plaintiff cannot cure this fatal flaw by arguing that its claims arise from Defendants' alleged statements to consumers or under laws concerning product liability, failure to warn, and/or consumer deception. The essence of Plaintiff's causation theory is that these statements induced greater consumption of Defendants' products, and that the resulting emissions *combined with similar emissions in all other States* (and Nations around the world) to exacerbate climate change, thereby allegedly causing injury to Plaintiff in Maryland. Under Plaintiff's theory, liability for emissions in States from Delaware to New York to Texas would be assigned to Defendants as a matter of Maryland law, even if such emissions were within permissible levels established by EPA and each source State.

This would hold true for every State. Fossil fuel suppliers would be subject to "an indeterminate number of potential regulations" through the application of "a variety of common-law rules established by the different States." *Ouellette*, 479 U.S. at 496, 499. This is exactly the extraterritorial application of state law that *Ouellette* held would impermissibly "interfere" with Congress's "comprehensive regulation." *Id.* at 500. Plaintiff is not permitted to "upset[] the balance of public and private interests so carefully addressed by" Congress and thereby "effectively override" policy choices made by EPA and neighboring States regulating sources within their own borders. *Id.* at 494–95; *see also Cooper*, 615 F.3d at 302 (observing that courts

"are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions").

Plaintiff protests that it is not attempting to *regulate* out-of-state conduct because it only seeks money damages for its alleged injuries. But Plaintiff alleges its injuries purportedly attributable to cumulative global greenhouse gas emissions reach into the tens if not hundreds of millions of dollars. *See, e.g.*, Compl. ¶¶ 81, 191-217. The imposition of such emissions-based liability would inevitably have drastic effects on emissions and energy policy far beyond Maryland's borders.

In short, because Congress has designated EPA "as primary regulator of greenhouse gas emissions," *AEP*, 564 U.S. at 428, the CAA prevents Plaintiff from using Maryland law to remedy injuries allegedly caused by nationwide out-of-state emissions. If permitted, Plaintiff's claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the CAA. *Arizona v. United States*, 567 U.S. 387, 399 (2012). This would violate the Supreme Court's teaching that States cannot "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495. As a result, Plaintiff's claims are preempted by the CAA.[4]

C. Plaintiff's Claims Raise Nonjusticiable Political Questions.

Plaintiff's claims also fail because they would require the Court to usurp the political branches' power to set energy and climate policy, in violation of the political question doctrine. Plaintiff does not dispute that Maryland's political question doctrine precludes judicial resolution

[4] For this reason, Plaintiff's reliance on *Wyeth v. Levine*, 555 U.S. 555 (2009), is misplaced. In *Wyeth*, the Supreme Court wrote that one of the "cornerstones" guiding preemption analysis is the presumption that a federal statute does not preempt States' historic police powers unless that is the clear and manifest purpose of Congress. *Id.* at 565. But in our federal system, the States' historic police powers do not include the regulation of *interstate* pollution, which is a field "the states have traditionally *not* occupied." *City of New York*, 993 F.3d at 98.

of cases that present any "'one of the[] formulations'" that the U.S. Supreme Court first recognized in *Baker v. Carr*, 369 U.S. 186 (1962), Opp. 24—including "'a lack of judicially discoverable and manageable standards for resolving [the dispute]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Est. of Burris v. State*, 360 Md. 721, 745 (2000). Those *Baker* "formulations" are present here.

Plaintiff concedes that many courts have dismissed suits "alleg[ing] injuries directly from emissions themselves, and s[eeking] relief also directly related to emissions" under the political question doctrine. Opp. 26. For example, the court in *Native Village of Kivalina v. ExxonMobil Corp.* dismissed claims seeking to hold energy companies liable for climate change because adjudicating those claims would require the factfinder "to weigh the benefits derived from [energy production] choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding," and the plaintiffs "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." 663 F. Supp. 2d 863, 874–75 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). As here, the *Kivalina* plaintiffs also premised liability on allegations that the defendants "misle[d] the public about the science of global warming." 696 F.3d at 854.

Likewise, in *California v. General Motors Corp.*, the court dismissed nuisance claims that sought to hold automobile manufacturers liable for climate change because "the adjudication of Plaintiff's [nuisance] claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," and "[t]he balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court." 2007 WL 2726871, at *8

(N.D. Cal. Sept. 17, 2007). Contrary to Plaintiff's assertion (Opp. 26), those same concerns are equally present here. As explained above, Plaintiff's alleged injuries flow entirely and exclusively from emissions—which Plaintiff asserts is "*[t]he mechanism*" of global warming. Compl. ¶ 39 (emphasis added). The claims here are thus just as "directly related to emissions" as the claims in *Kivalina*, *General Motors*, and *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012). Opp. 26.

Plaintiff contends that two other cases—*Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022)—are "inapposite" because only the *relief* requested in those cases lacked any judicially manageable standards. Opp. 25–26. But as Defendants have explained, Plaintiff's requested abatement relief "presumably would require this Court to estimate potential future damages resulting from global climate change over the next century and to oversee and administer a fund to pay for and address those future injuries." Br. 31. Plaintiff does not contend otherwise. The relief requested here is thus every bit as unmanageable as the relief sought in *Juliana* and *Sagoonick*. *Id.* at 31–32. As the U.S. government recently argued, "addressing climate change requires the active involvement of the federal government," and courts should not be used to "'usurp the powers of the political branches.'" Defs.' Mot. for a Stay Pending a Pet. for a Writ of Mandamus at 8, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Jan. 18, 2024), Dkt. 571.

D. Maryland Law Requires Dismissal Of Plaintiff's Claims.

Plaintiff's claims must also be dismissed under state law. Instead of adequately pleading the essential elements of its claims under Maryland law, Plaintiff asks this Court to adopt sweeping tort theories never before recognized in Maryland.

1. Plaintiff Fails Adequately To Allege A Claim For Public Or Private Nuisance.

a. Plaintiff effectively concedes that Maryland appellate courts have *never* recognized a nuisance claim based on the production, promotion, and sale of a lawful consumer product. Br. 33–38; Opp. 31–32. Nor does Plaintiff deny that its theory would eviscerate the boundary between nuisance and products liability. Instead, it dismisses the cases enforcing that boundary on the ground that they "did not involve allegations that a manufacturer wrongfully promoted products while concealing or downplaying the products' risks, allegations central to the City's claims here." Opp. 33. That characterization is incorrect. *See, e.g., Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 917 (8th Cir. 1993) ("Tioga asserted theories of . . . fraud and misrepresentation" in action against drywall manufacturer whose products contained asbestos.); *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 440 (R.I. 2008) ("The state asserted that defendants failed to warn Rhode Islanders of the hazardous nature of lead" and "concealed these hazards from the public or misrepresented that they were safe.").

But even if it were correct, the fact that Plaintiff purports to premise its nuisance claims on allegations that Defendants misrepresented the risks of their products is a *problem* for its theory, not a solution. A claim that a defendant misrepresented its products' risks is a classic products-liability—not nuisance—claim. *See Smith v. Lead Indus. Ass'n, Inc.*, 386 Md. 12, 16 (2005) ("This is essentially a tort-based product liability case involving, among other causes of action, allegations of fraudulent and negligent misrepresentation and failure to warn of hazards associated with either the product itself [*i.e.*, lead paint] or the use of the product."); Restatement (Third) of Torts: Products Liability § 9 (recognizing a products-liability action when a seller "makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product" that causes "harm to persons or property").

Nor does it matter that some of Defendants' cases did not find nuisance liability in part because the alleged harm resulted from third-party misuses of a product, whereas the harms Plaintiff alleges "arise from the only intended uses" of Defendants' products. Opp. 34–35. A claim that a seller misrepresented harms that would occur even if the product is used and functions as intended is still a *products-liability* claim, not a nuisance claim. *Cf. Halliday v. Sturm, Ruger & Co.*, 368 Md. 186, 202 (2002) ("[A] product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.").

The Maryland cases Plaintiff cites *confirm* the rule that nuisance claims are "linked to the use of land by the one creating the nuisance," not the promotion and sale of a lawful consumer product. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724 (Okla. 2021); *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007) (same). *Gorman v. Sabo*, for example, involved the blaring of a radio from "the home [defendant] owned and lived in" into a neighbor's home. 210 Md. 155, 161 (1956). *Maenner v. Carroll* involved allegations that "owners of a certain open and unenclosed lot of ground . . . cut on such lot, in a dangerous and exposed portion thereof, a deep excavation." 46 Md. 193, 212 (1877). And *East Coast Freight Lines v. Consolidated Gas, Electric Light & Power Co. of Baltimore* involved "keeping a pole" on a "grass plot" on a highway. 187 Md. 385, 393 (1946).[5]

With no support for its position in Maryland precedents, Plaintiff falls back on decisions of federal district courts, other States, and a nearly 150-year-old treatise, none of which is precedential authority here. *See* Opp. 31–33 (citing, for example, H.G. Wood, *The Law of*

[5] In fact, private nuisance liability is limited to circumstances in which a defendant's use of land interferes with a "*neighbor[ing]* use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (emphasis added).

Nuisances (1875)). Nor are they persuasive. As Defendants have already explained (Br. 36), the two cases from the U.S. District Court for the District of Maryland on which Plaintiff heavily relies (Opp. 31) focused on whether Maryland law requires a defendant to exercise "exclusive control" over the nuisance-causing instrumentality, not the distinct question whether Maryland law recognizes nuisance claims that are unlinked to the use of land and that sound in products liability. *See State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 468 (D. Md. 2019); *Mayor & City Council of Balt. v. Monsanto Co.*, 2020 WL 1529014, at *9 (D. Md. Mar. 31, 2020). And the Maryland cases on which *Exxon* and *Monsanto* relied all involved challenged uses of land. *Exxon*, 406 F. Supp. 3d at 468; *Monsanto*, 2020 WL 1529014, at *9.

Even if *Exxon* and *Monsanto* had not erred in extending Maryland law to the sale of a consumer product, they still would not support Plaintiff's nuisance claims because both cases alleged facts that established a tight nexus between the sale of a product and the contamination of local lands and waters. They are not, as Plaintiff suggests, cases solely about "defendant[s] who misleadingly market[] products." Opp. 31. In *Exxon*, the plaintiff alleged that the defendants "manufactured and distributed MTBE gasoline in Maryland even though they knew or reasonably should have known that it would be placed into leaking gasoline storage and delivery systems there," from where it was directly "released into [the plaintiff's] waters, resulting in widespread contamination." 406 F. Supp. 3d at 455, 469. In *Monsanto*, the plaintiff alleged that Monsanto, "the sole manufacturer of PCBs," "distributed PCBs in Baltimore's waters, causing harm to the City's humans, animals, and environment." 2020 WL 1529014, at *10–11. Similarly, the plaintiff in *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372 (Del. 2023), brought a nuisance claim against "Monsanto, as the sole PCB producer," alleging that its sale of PCBs, chemicals so dangerous that "the federal government banned the[ir] manufacture and sale" in 1977, resulted in

the *direct* "release of PCBs onto Delaware's lands and into its waters." *Id.* at 380–81, 386.

These cases thus offer no support for Plaintiff's nuisance theory here, which is *not* based on the direct release of a hazardous chemical onto lands and waters just after the point of sale. As Plaintiff candidly admits, it "does not allege" that "releasing greenhouse gas itself constitutes a nuisance." Opp. 38–39. Rather, Plaintiff's theory is that Defendants' allegedly deceptive conduct "'maximize[d] continued dependence'" on fossil fuels, which purportedly increased the third-party use and combustion of Defendants' products. *Id.* at 28. According to Plaintiff, that purportedly increased use and combustion of fossil fuels, in turn, supposedly resulted in incrementally higher emissions into the atmosphere, which, though not a nuisance in themselves, when combined with all greenhouse-gas emissions released around the world, allegedly caused harm to Plaintiff decades later through an attenuated causal chain. *See id.* at 28 n.9. That is nothing like the sale of products that, when mishandled or improperly stored, directly release hazardous chemicals onto land and water.

Because Plaintiff's claims do not challenge Defendants' use of land but rather their alleged misrepresentation of the purportedly harmful nature of their products, they sound in products liability, and this Court should reject Plaintiff's "clever, but transparent attempt" to evade limits on products liability. *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000); *see also* Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g. (addressing nuisance claims against the "makers of products" and explaining that "[l]iability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue").

b. Plaintiff's nuisance claims also should be dismissed because Plaintiff does not allege that Defendants exercised control over the instrumentality that caused the purported nuisance. Br.

38–41. Plaintiff contends that a defendant may be held liable in nuisance even if it has *no* control over the nuisance-causing instrumentality. Opp. 35. That is incorrect. *See Callahan v. Clemens*, 184 Md. 520, 525 (1945) (rejecting nuisance claim challenging negligently constructed wall where defendants did not "exercise any control over the manner in which the work was performed, and there was no relation of principal and agent"); *E. Coast Freight Lines*, 187 Md. at 401 (rejecting nuisance claim against gas company that constructed light pole on highway median without warning or lighting where "[t]he absence of warning signs or lights is a matter entirely in the control of the City").

Plaintiff concedes that emissions from Defendants' products occurred long *after* Defendants relinquished control of their products to third parties. *See* Opp. 37 (citing cases involving application of nuisance law to products sold to external parties). Moreover, "the City does not allege . . . that releasing greenhouse gas itself constitutes a nuisance." *Id.* at 38–39. Rather, the Complaint emphasizes that it is "*the buildup* of CO_2 in the environment that drives global warming and its physical, environmental, and socioeconomic consequences," Compl. ¶ 6 (emphasis added), and that "*global* fossil fuel product-related CO_2" is responsible for "historical, projected, and committed sea level rise and disruptions to the hydrologic cycle," *id.* ¶ 94 (emphasis added). Plainly, Defendants lack control over the concentration of greenhouse gases in the Earth's atmosphere—where such gases allegedly take "thousands of years" to dissipate. *Id.* ¶ 178.

Because Defendants lack control over greenhouse gas emissions or the Earth's atmosphere, Plaintiff contends that the nuisance-causing instrumentality here is Defendants' "'marketing, distributing, and selling'" of fossil fuels while allegedly "misrepresenting their hazards." Opp. 37. Yet only pages earlier, Plaintiff professes that "the City does not allege that Defendants' campaign of deception and disinformation or failures to warn are in and of themselves a public nuisance,"

but rather that the allegedly misleading marketing caused an incremental increase in the combustion of fossil fuels, which in turn created a public nuisance. *Id.* at 28 n.9. And the Complaint unmistakably alleges that the nuisance-causing instrumentality is the cumulative combustion of fossil fuels as a result of billions of individual decisions by consumers and governments everywhere around the world. Compl. ¶¶ 3, 36–45. At bottom, Plaintiff "cannot escape the true nature of the nuisance claim[s] it has pleaded," which places the worldwide combustion of fossil fuels "directly at the heart of [its] nuisance claim[s], regardless of how it otherwise now tries to characterize its claim[s]." *State ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *12 (N.D. Dist. 2019) (dismissing opioid-related nuisance claim and rejecting the State's argument that the instrumentality of the nuisance was the opioid manufacturer's marketing rather than third-party opioid use). Plaintiff accordingly fails to state claims for public or private nuisance, and those claims must be dismissed.

2. Plaintiff's Failure-To-Warn Claims Should Be Dismissed Because Defendants Had No Duty To Warn Of Widely Publicized Risks Relating To Climate Change.

The Court should dismiss Plaintiff's failure-to-warn claims because Plaintiff's theory of negligence has no place in Maryland law. Maryland has embraced a narrow definition of "duty" that depends on "a relationship between the actor and the injured person." *Dehn v. Edgecombe*, 384 Md. 606, 619 (2005). There is no duty to warn the world, an indefinite class, nor is there a duty to warn where, as here, the alleged harms were generally known. *See* Br. 41–44.

First, while Plaintiff concedes that "'there is no duty to warn the world,'" it asserts that Defendants nonetheless had a duty to warn Plaintiff as a "foreseeable bystander[]." Opp. 47 (quotation marks omitted). Not so. Even a foreseeable risk of injury does not create a duty to warn an "indeterminate class of people." *Gourdine*, 405 Md. at 750. Maryland has expressly distinguished itself from States, like Hawai'i, that have "embraced the belief that duty should be

defined mainly with regard to foreseeability, without regard to the size of the group to which the duty would be owed." *Id*. at 752.[6] Yet Plaintiff alleges that Defendants had a duty to warn such a class, including "the public, consumers, and public officials." Compl. ¶¶ 238, 271. Moreover, there is no duty to warn third parties absent "***a close or direct effect*** of the tortfeasor's conduct [or products] ***on the injured party***." *Gourdine*, 405 Md. at 746 (emphases added). Here, Plaintiff's theory would extend the purported duty to everyone contributing to climate change because Plaintiff alleges that its injury results not from its own use of or direct exposure to Defendants' products, but from *worldwide* consumers' decisions to use fossil fuels over the course of decades, resulting in the global atmospheric accumulation of greenhouse gases (including much that has long been "locked in"), which then results in climatic changes, sea-level rise, and finally increased mitigation costs to Plaintiff. Compl. ¶¶ 142, 180, 191–217.

Maryland courts have never imposed a duty of care in similar circumstances. Indeed, the Supreme Court has refused to impose a duty even where there was a far narrower class of potential plaintiffs and a much closer nexus between the conduct and injury. *See, e.g.*, *Dehn*, 384 Md. at 621 (physician conducting vasectomy had no duty to patient's wife who became pregnant); *Doe v. Pharmacia & Uphohn Co.*, 388 Md. 407, 421 (2005) (employer of laboratory technician who contracted HIV at work had no duty to technician's wife, who contracted HIV); *Gourdine*, 405 Md. at 754 (drug manufacturer who did not warn about side effects owed no duty to motorist injured by drug's user); *Warr v. JMGM Grp., LLC*, 433 Md. 170, 189 (2013) (dram shop did not

[6] Plaintiff misleadingly quotes the Supreme Court's decision in *Kiriakos v. Phillips* as purported support for its contention that foreseeability is "'perhaps [the] most important'" factor in determining whether a duty of care exists. Opp. 46 (alteration in original) (quoting 448 Md. 440, 486 (2016)). But Plaintiff omits the full quote: "Although foreseeability is perhaps 'most important' among these factors, ***it alone does not justify the imposition of a duty***." 448 Md. at 486 (emphasis added). In any event, the ruling makes clear that foreseeability is not enough to create a duty to the general public and must be limited to a "specific class." *Id.* at 460.

owe "blanket duty" to its intoxicated patrons). Far from helping Plaintiff, the cases Plaintiff cites only underscore that, for failure to warn cases, bystander liability requires a ***direct*** nexus between the alleged injury and the third party's use of or exposure to a defendant's product. For example, the alleged injury in *Exxon*—groundwater contamination by the chemical MTBE—was allegedly tied *directly* to the storage, delivery, and leakage *within Maryland* of gasoline containing MTBE, for which the named defendants were themselves allegedly "responsible for all or substantially all of th[e] market." 406 F. Supp. 3d at 463. There is no such direct connection here.[7]

Second, there is no duty to warn of "clear and obvious" dangers and "generally known" risks. *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 330–31 (1995); Br. 43–44. Plaintiff contends that whether the dangers were open and obvious is a factual issue that cannot be decided until after discovery. Opp. 47–50. But courts can and do determine obviousness at the outset and based on the pleadings. For example, *Nicholson v. Yamaha Motor Co.*, 80 Md. App. 695 (1989), affirmed dismissal of a failure to warn claim at the pleading stage where "the danger not warned about was clear and obvious." *Id.* at 721. And even where courts have dismissed failure to warn claims after discovery, it is often because the assertion of non-obviousness was "absurd"—not due to a more developed record. *Mazda Motor*, 105 Md. App. at 330–31.

Here, dismissal is warranted because the Complaint itself makes clear that the alleged risks have been well known for decades. *See, e.g.*, Compl. ¶ 103 (noting concern about climate change

[7] Plaintiff's other cases fare no better. *See Monsanto*, 2020 WL 1529014, at *10 (allowing bystander design defect claim to proceed where PCB manufacturer allegedly contaminated plaintiff's groundwater *directly*); *Georgia-Pacific Corp. v. Pransky*, 369 Md. 360, 366 (2002) (allowing design defect bystander claims to proceed where alleged injury resulted from *direct* exposure to asbestos-containing product in plaintiff's home); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 318 (1988) (motorist harmed by *collision* with snowplow hitch on vehicle could recover against hitch manufacturer as bystander), *rev'd on other grounds sub nom. Montgomery Cty. v. Valk Mfg. Co.*, 317 Md. 185 (1989); *ACandS, Inc. v. Godwin*, 340 Md. 334, 404 (1995) (allowing bystander liability where plaintiffs were *directly* exposed to asbestos); *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607 (2018) (recognizing a duty of care in "limited circumstances" involving research studies that exposed non-participant children to lead-based paint).

risks that resulted in a report by Lyndon B. Johnson's Science Advisory Committee in 1965); *id.* ¶ 143 (discussing multiple government reports and actions from 1988 to 1992 confirming the role of greenhouse gas emissions in climate change); *id.* ¶¶ 136, 181 (discussing statements by Defendants in the 1990s acknowledging the consensus regarding human-influenced climate change). Plaintiff cannot seriously dispute that a reasonable consumer would have been aware of the alleged impacts of fossil fuel consumption. Thus, Defendants had no duty to warn, and Plaintiff's failure to warn claims fail on the pleadings.[8]

3. Plaintiff's Design Defect Claims Should Be Dismissed Because Plaintiff Fails To Allege Any "Design" Defect.

Plaintiff's opposition confirms that its design defect claims fail as a matter of law. A product that "functions as intended and as expected is not 'defective,'" even if the use of the product creates negative externalities. *Kelly v. R.G. Indus., Inc.*, 304 Md. 124, 138 (1985); Br. 45. And a *design* defect claim cannot be premised on "a characteristic that is *inherent* in the product itself." *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *2 (D. Md. Aug. 17, 2000) (emphasis added); Br. 45–46. Those undisputed legal principles doom Plaintiff's design defect claims: Plaintiff alleges that all of its injuries resulted from "the normal and intended use" of Defendants' "fossil fuel products," Compl. ¶ 18, and that the "climate effects" that caused its injuries "*inevitably flow from the intended use* of [Defendants'] fossil fuel products," *id.* ¶ 241 (emphasis added). Plaintiff's opposition does not confront these fatal flaws, because it cannot.

Plaintiff nonetheless insists that its claims turn on "Defendants' promotional efforts." Opp. 52 (quotation marks omitted). But that merely restates the problem with Plaintiff's claims: As the

[8] Plaintiff suggests that the potential existence of "distractions" renders this case inappropriate for judgment before discovery. Opp. 48–50. The cases it cites, however, merely recognize that the presence of distractions is relevant to determining, in the first place, whether a danger was open and obvious under an objective standard. Here, Plaintiff's allegations foreclose any question as to the openness and obviousness of the alleged dangers of fossil fuels.

Supreme Court has explained, the "relevant inquiry in a strict liability action" for design defect "focuses *not* on the conduct of the manufacturer but rather *on the product itself*." *Phipps v. Gen. Motors Corp*., 278 Md. 337, 344 (1976) (emphases added). It is therefore unsurprising that Plaintiff does not cite a single case from Maryland—or any other jurisdiction for that matter—accepting an analogous design defect theory. To the contrary, Plaintiff's primary authority is a footnote in the Fourth Circuit's decision affirming remand in this case, where the court merely recounted "how Baltimore has framed its claim." *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 234 n.23 (4th Cir. 2022); *see* Opp. 51–52. Far from endorsing Plaintiff's untenable design-defect theory, that court described Plaintiff's theory as "novel" and noted that "[t]he viability of such a theory under Maryland law is a question for the Maryland courts to decide." *Baltimore*, 31 F.4th at 234 n.23. And Plaintiff's remaining cases merely recite the consumer expectation test, *see* Opp. 50–51, without remotely suggesting that a *design* defect theory can be premised on a defendant's *statements or omissions* about its products.

Plaintiff does not meaningfully distinguish *Kelley* or other Maryland cases holding that a product cannot be defectively designed if it "operated exactly as intended." *E.g.*, *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 74 Md. App. 613, 623 (1988); *see also Halliday*, 368 Md. at 208 (holding that firearm was not defective because "it worked exactly as it was designed and intended to work"). And where Plaintiff does attempt to distinguish Defendants' cases, it offers nothing of substance. For example, there may have been "no evidence" in *Dudley v. Baltimore Gas & Electric Co.*, 98 Md. App. 182 (1993), "that the defendant gas company concealed" that natural gas is flammable and highly explosive. Opp. 52. But that hardly distinguishes the Appellate Court's holding—that a product cannot be defective because of a quality that is "intrinsic to the nature" of the product—because the plaintiff's claims did not turn on evidence of the defendant's

conduct. *Dudley*, 98 Md. App. at 202. And the court in *Cofield* may have required the plaintiff to plead a safer, commercially reasonable alternative design. Opp. 52 n.31. But that was *independent* of its holding that "[u]nder Maryland law, a product cannot be defective because of a characteristic that is inherent in the product itself." *Cofield*, 2000 WL 34292681, at *2.[9]

Furthermore, Plaintiff still does not and cannot allege facts showing that Defendants' fossil fuel products are "unreasonably dangerous" to the consumer. *Phipps*, 278 Md. at 344; *see* Br. 46–48. To the contrary, Plaintiff actually concedes it "is *not* alleging that Defendants' products are defective because . . . they produce greenhouse gases upon combustion." Opp. 52 (emphasis added). Plaintiff does not cite a *single* case supporting a theory of a product being "unreasonably dangerous" based on its collective use by billions of consumers over decades. Nor could it: The danger Plaintiff alleges is *climate change*, which allegedly causes harm not to a single consumer based on her combustion of fossil fuels but only by collective combustion across the world and for decades. *See* Restatement (Second) of Torts § 402A cmt. g ("The rule stated in this Section applies *only* where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be *unreasonably dangerous to him*." (emphases added)). And in any event, Plaintiff's allegations about the widespread, longstanding knowledge of the alleged connection between fossils fuels and climate change undermine any theory that such routinely used products are defective or unreasonably dangerous. *See* Br. 47–48.

[9] The cases Plaintiff cites only underscore the incoherence of its arguments. In *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727 (Wis. 2001) (cited at Opp. 52 n.31), for example, the plaintiff alleged that latex gloves were defective because, among other reasons, "they were powdered, which allowed the latex to be airborne"—thus arguing "that a *particular design feature*, powder, made the gloves more dangerous." *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 685 (Wis. 2009) (emphasis added); *see also id.* at 684, 687 (holding that white lead carbonate pigment, which "[b]y definition . . . contains lead," was *not* defectively designed because "the presence of an ingredient" (lead) that "is 'characteristic of the product itself' is an improper basis for a defective design claim"). Here, Plaintiff does not and cannot allege that anything about the *design* of Defendants' fossil fuels rendered them defective.

4. Plaintiff's Trespass Claim Fails Because Plaintiff Has Not Adequately Pleaded Any Of Its Elements.

Plaintiff fails to plead facts that, if true, would satisfy three essential elements of its trespass claim. ***First***, Plaintiff does not allege any trespass to land over which it has "exclusive possession." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013). Plaintiff incorrectly argues that it is not required to identify specific properties over which it has exclusive possession, pointing to two *federal* cases applying federal pleading rules. *See* Opp. 40–41. But Plaintiff does not address Maryland Rule 2-304, which provides that "[t]ime *and place* shall be averred in a pleading when material to the cause of action or ground of defense" (emphasis added). The "place" of a trespass claim is material, and the claim should be dismissed for failing to meet the applicable pleading requirement. *See Gusdorff v. Duncan*, 94 Md. 160, 166 (1901) (demurrer should have been sustained because pleading failed "to state the location of the premises upon which the trespass is alleged to have been made"). Although Plaintiff vaguely alleges that floodwaters have "enter[ed] the City's real property," Compl. ¶ 284, Defendants and the Court are left to speculate about which property Plaintiff refers to and whether Plaintiff had exclusive possession of any such property.

Second, Plaintiff "does not allege that Defendants, *or even their products,* intruded upon any property owned by Plaintiff." Br. 49. Instead, Plaintiff alleges only that Defendants "caused flood waters, extreme precipitation, saltwater, and other materials, to enter [its] real property." Compl. ¶ 284. In support of its far-fetched theory of trespass, Plaintiff cites *Albright* for the proposition that "a party is liable for trespass when it interferes with another's possessory interest in its property 'by entering or causing something to enter the land.'" Opp. 41 (emphasis omitted) (quoting *Albright*, 433 Md. at 408). But that non-controversial statement of trespass law provides no support for the novel assertion that a party can be held liable in trespass because use of its

products—along with the use of products from innumerable third parties—by billions of people around the world for many decades results in weather changes that affect another's property.

The Restatement (Second) of Torts, which Plaintiff cites as purported support for its theory that Defendants caused a trespass (Opp. 42), undermines its claim. The Restatement explains when a defendant may be liable for causing a trespass: "The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts: Liab. for Intentional Intrusions on Land § 158 cmt. i. Here, none of the Defendants entered Plaintiff's land or invaded Plaintiff's "exclusive possession" of any land by "throwing, propelling, or placing" anything (particularly fossil fuels) on, over, or beneath it. And under Plaintiff's promotion theory, the alleged wrongful conduct is Defendants' supposed campaign of misinformation—not the production of fossil fuel products. But speech plainly is not an invasion of property, and under no interpretation of trespass law can Defendants be found to have trespassed on Plaintiff's property by promoting their products.

Relying on *Rockland Bleach & Dye Works Co. v. H.J. Williams Corp.*, 242 Md. 375 (1966), Plaintiff argues that a trespass claim can succeed when property "'is invaded by an inanimate or intangible object,'" so long as the defendant has "'some connection with or some control over [the] object.'" Opp. 42 (alteration in original). But the tortious conduct Plaintiff alleges here is not the production of fossil fuels, but the supposedly nefarious marketing of them, which is not an invasion of property. And, in any event, Defendants have no control over the oceans, clouds, or precipitation that allegedly trespassed on Plaintiff's unidentified lands, let alone the "very significant amounts of control" held by the defendant in *Rockland*, 242 Md. at 387–88. Neither *Rockland* nor any other case suggests that liability can be imposed in the absence of such control.

Plaintiff nonetheless argues that Defendants "designed, manufactured, marketed, and sold fossil fuel products whose intended use" would cause "trespasses on City property." Opp. 42. But Plaintiff does not point to any Maryland authority even suggesting that the lawful production of fossil fuel products constitutes sufficient control of property-invading "flood waters" merely because a byproduct created by third-party combustion of fossil fuels may affect the weather.

Plaintiff therefore cannot reasonably allege that Defendants control, or have a legally sufficient "connection with," global weather and the oceans, which would be required even under Plaintiff's overbroad interpretation of *Rockland*. To the contrary, that case, like the other cases cited by Plaintiff, involved trespass by objects controlled by defendants that invaded property from nearby. *See Rockland*, 242 Md. at 378 (defendant general contractor caused mud and debris from excavation to pile up on adjacent property); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 315 (S.D.N.Y. 2006) (defendants' gasoline allegedly leaked from storage tanks); *Monsanto*, 299 A.3d at 389 (PCBs that Monsanto manufactured and sold to Delaware manufacturers and consumers were the instrument of intrusion); *City of Bristol v. Tilcon Minerals, Inc.*, 931 A.2d 237, 259 (Conn. 2007) (leachate from landfill contaminated groundwater and neighboring property). Even direct leakage from one landowner's property to another's may not suffice to state a trespass claim. *See JBG/Twinbrook Metro. Ltd. P'Ship v. Wheeler*, 346 Md. 601, 626 (1997) (gasoline leaked from underground storage tanks found to be insufficient to support trespass claim as a matter of law).[10] Plaintiff does not allege even these facts here.

Thus, Plaintiff's theories of tort liability are much more attenuated than any found in the *Rockland*/*Wheeler* line of cases. Plaintiff's theory of changed weather leading to rising sea levels

[10] Plaintiff's attempt to distinguish *JBG/Twinbrook*, falls flat. Opp. 42–43. That court considered defendants' contractual rights to the allegedly trespassing tanks. *JBG/Twinbrook*, 346 Md. at 623–26. But that fact does not render the case inapposite. As here, the defendant in *JBG/Twinbrook* did not exercise control over the object that allegedly trespassed on the plaintiff's property.

does not even remotely fit within any recognized theory of trespass.

Third, Plaintiff's trespass claim cannot be based on anticipated *future* invasions of property, and virtually all of Plaintiff's alleged injuries are entirely speculative and will be felt (if at all) only decades in the future. *See* Br. 50. Plaintiff contends that the Complaint "alleges numerous invasions of City property that have already occurred" and "costs the City has already incurred to address those invasions." Opp. 43. But the Complaint only vaguely and conclusorily states that Plaintiff "has experienced significant sea level rise and associated impacts over the last half century attributable to Defendants' conduct." Compl. ¶ 196. The focus of the claim is instead speculative *future* trespasses that Plaintiff merely *predicts* will result from Defendants' conduct. *Id.* ¶ 198-99 (noting that "within 80 years, floods breaking today's records would be expected once a year in Baltimore" and "sea level rise and associated flooding" are "expected by the end of this century"). Plaintiff cannot state a trespass claim based on such forecasts because trespass is a retrospective claim that "requires that the defendant . . . *entered* or *caused* something harmful or noxious to enter onto the plaintiff's land." *Albright*, 433 Md. at 408 (emphases added). Future invasions that have not occurred—and may never occur—are not actionable. *See id.* ("General contamination of an aquifer that may or may not reach a given [plaintiff's] property at an undetermined point in the future is not sufficient to prove an invasion of property.").

5. Plaintiff Fails Adequately To Allege An MCPA Claim.

Plaintiff's opposition confirms that its MCPA claim should be dismissed because Plaintiff fails to allege reliance on the alleged misrepresentations, and because its claim is both meritless and time-barred. Br. 51–55.

First, Plaintiff agrees that an element of an MCPA claim is that the consumer-plaintiff relied on the representations. Opp. 54 & 56 n.36. But Plaintiff has not alleged reliance on the alleged misstatements in connection with its own purchases. Instead, Plaintiff alleges only that

Defendants "obtained income, profits, and other benefits [they] would not otherwise have obtained" because of the alleged conduct, Compl. ¶ 297—not that ***Plaintiff*** purchased additional fossil fuel products ***in reliance on Defendants' alleged misrepresentations***.

In response, Plaintiff states that "Defendants' tactics expanded the use of fossil fuels and delayed action on climate change," citing its assertion that, "[b]y reason of that same conduct, the City of Baltimore incurred harm and was damaged in ways it would not otherwise have been." Compl. ¶ 298; Opp. 55–56. This conclusory assertion does not even mention reliance, much less factually allege that Plaintiff actually bought more fuel than it otherwise would have but for any alleged misstatements by Defendants. If Plaintiff had actually relied on any alleged misstatements or deception, it would have said so clearly and unequivocally. Its failure to do is both fatal and dispositive. *See Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014) (dismissing complaint for failure to allege reliance on representations in relation to a transaction); Opp. 56 n.36 (conceding that reliance is an "element" of an MCPA claim).[11]

Plaintiff's unsuccessful attempt to salvage its MCPA claim only highlights the fundamental mismatch between Plaintiff's case and the MCPA: Plaintiff's alleged injury is not tied to its ***own*** fuel purchases. Rather, Plaintiff alleges its injury is the mitigation costs due to "the use of fossil fuels and delayed action on climate change" globally. Opp. 55–56. But Plaintiff does not allege (nor could it plausibly allege) that its injuries resulted from the incrementally higher emissions due to Plaintiff's own increased fuel purchases. Any such incremental emissions (an infinitesimally small fraction of global emissions) would not result in an "identifiable loss"—which is required to

[11] Plaintiff has failed even to allege that it is a "consumer" within the meaning of the MCPA. A consumer is a purchaser of goods "used or bought for use primarily for personal, family, or household purposes." *Boatel Indus., Inc. v. Hester*, 77 Md. App. 284, 301 (1988) (citation omitted). Plaintiff does not allege that it purchased Defendants' products for these purposes, and cannot, under the MCPA, satisfy the elements of an MCPA claim based on alleged reliance by other consumers.

allege an MCPA claim. *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 143 (2007). Undeterred, Plaintiff repeatedly refers to the emissions associated with *other* consumers. *E.g.*, Compl. ¶ 295 (referring to unspecified, generic "reasonable consumers"); *id.* ¶ 296 (referring to unspecified, generic "recipients of [Defendants'] marketing messages"). But the MCPA only provides a claim for a "consumer" injured "as a result of ***his or her*** reliance on the seller's misrepresentation"—not the reliance of other consumers. *Lloyd*, 397 Md. at 143 (emphasis added). Because Plaintiff does not and cannot make any such allegation, its entire MCPA claim should be dismissed.

Second, Plaintiff's MCPA claim should also be dismissed because the alleged misrepresentations relate to *climate change* writ large, not Defendants' *products*. The MCPA requires the misrepresentations to be "in" the "sale" or "offer for sale" of "consumer goods" or "consumer services." Md. Code Ann. Com. Law § 13-303(1)–(2). Accordingly, Maryland courts require the representations to be made while "selling, offering, or advertising the [product] that the plaintiffs bought." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 542 (1995). But here, the alleged misrepresentations do not even identify or refer to such products.

Plaintiff offers little in response. Inverting the pleading burdens, Plaintiff asserts that Defendants have not shown "that none of their statements about climate change were made as 'attempts to sell' their fossil fuel products." Opp. 60. But the inquiry is whether Plaintiff's allegations are adequate. And here, none of the representations identified in Plaintiff's Complaint were made in the course of any Defendant selling the products to Plaintiff. *See Rutherford v. BMW of N. Am.*, 579 F. Supp. 3d 737, 751 (D. Md. 2022) (requiring representations forming the basis of MCPA claims to be "made in the course of a sale"). Because the Complaint asserts only a campaign of deception related to climate change, and *not* any Defendants' individual products, the MCPA claim should be dismissed.

Third, Plaintiff's MCPA claim is barred by the applicable "three-year statute of limitations." *Cain v. Midland Funding, LLC*, 475 Md. 4, 39 (2021). As Plaintiff concedes, its claim accrued when it "knew or reasonably should have known" by reasonable diligence the facts giving rise to its claim. *Id.* at 35.

The Complaint itself, together with matters undisputed by Plaintiff, plainly demonstrate that the MCPA claim is time-barred because Plaintiff "knew or reasonably should have known" by reasonable diligence of the facts giving rise to its MCPA claim ***far*** more than three years before it commenced this action in 2018. For example:

- The Complaint alleges that Defendants' purported "decades-long campaign" of ***public*** misrepresentations began in 1988 and that the last such alleged statement occurred in 1998—***two decades before the relevant limitations period would have had to begin in 2015***. Compl. ¶¶ 141, 145–46, 158.
- The Complaint acknowledges both that fossil fuels' impact on climate change was publicly known for ***half a century***, *id.* ¶¶ 103, 128, and that Defendants' so-called "campaign" occurred ***publicly***, *id.* ¶ 147.
- Plaintiff does not dispute that Defendants' alleged "campaign" was publicly reported in the 1990s in newspapers with substantial circulation in Maryland, that other States and municipalities—***including Baltimore—***filed suits alleging a link between fossil fuels and climate change more than a decade before the commencement of this suit, or that the Maryland General Assembly enacted legislation to address climate change in 2014. *See* Opp. 58–59; Br. 54–55 (raising this argument).

As a result, any suggestion that Plaintiff reasonably did not know or should not have known about Defendants' purported "campaign" before the limitations period is implausible and

controverted by Plaintiff's own allegations and admissions. Indeed, a Delaware state court recently dismissed as time-barred substantially similar consumer-protection claims in a climate change lawsuit, finding that the "general public had knowledge of or had access to information about the disputes, regarding the existence of climate change and effects, decades prior to the expiration of the five-year limitations period." *Delaware*, 2024 WL 98888, at *19. The same is true here where the limitations period is only three years.

III. CONCLUSION

The Court should dismiss the Complaint in its entirety with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January 2024, a copy of the foregoing was served on all counsel of record via email (by agreement of the parties).

Alison C. Schurick