STATE OF RHODE ISLAND **SUPERIOR COURT**
PROVIDENCE, SC.

STATE OF RHODE ISLAND, Plaintiff,	:	
v.	:	P.C. No. 2018-4716
CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; HESS CORP.; LUKOIL PAN AMERICAS, LLC; GETTY PETROLEUM MARKETING, INC.; AND DOES 1 through 100, inclusive	:	
Defendants.		

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

Defendants file this Memorandum of Law pursuant to Rhode Island Rule of Civil Procedure, Rule 12(b)(6), in Support of their Motion to Dismiss for Failure to State a Claim upon

Which Relief Can Be Granted. This Court should dismiss all claims against Defendants with prejudice.[1]

[1] All Defendants contend they are not subject to personal jurisdiction in Rhode Island. Motions to dismiss for lack of personal jurisdiction have been filed contemporaneously with this motion to dismiss for failure to state a claim for relief. This motion is made without prejudice to the contemporaneously raised jurisdictional objections.

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I. INTRODUCTION

In this action, the State of Rhode Island ("Plaintiff" or "the State") seeks to hold a small number of selected, investor-owned energy companies liable for the effects in Rhode Island of climate change resulting from the worldwide accumulation of greenhouse gas emissions in the atmosphere for more than a century.

Defendants lawfully produced and sold fossil fuels.[2] Those fossil fuels have enabled the industrialization of the world, driven the global economy, raised and sustained standards of living, and remain vital to national security. They keep the lights on, power transportation, heat and cool countless buildings, and support innumerable products that surround us in our everyday lives. The Rhode Island General Assembly has recognized that the sale and distribution of gasoline and diesel "vitally affect[] the public health, welfare, and safety," R.I. Gen. Laws § 5-55-2, and has enacted legislation to ensure an adequate supply of fossil fuels in Rhode Island. R.I. Gen. Laws § 42-81-2. Yet despite the importance of fossil fuels to global health and welfare, and despite significant consumption and combustion of fossil fuels worldwide, including by the State of Rhode Island, Plaintiff asks this court to label fossil fuel production a nuisance and regulate global production under Rhode Island law.

If successful, Plaintiff's claims would fundamentally alter U.S. energy and environmental policy, foreign affairs, and national security. The federal government has been engaged in efforts to address climate change on both national and international levels for decades, and energy independence has been a tenet of national security policy for even longer. Courts have repeatedly rejected similar attempts to create a "climate change" tort, including two federal district courts that

[2] This joint motion addresses the range of allegations made against the signatory defendants. Individual Defendants may have defenses in addition to those argued here; joinder in this motion does not waive any such defense.

recently dismissed virtually identical suits brought by New York City, San Francisco, and Oakland. Plaintiff's suit is similarly defective and should be dismissed on multiple grounds under both Rhode Island and federal law.

Plaintiff's Complaint flies in the face of binding state law precedent. In *State v. Lead Industries Association* ("*Lead Industries*"), the Rhode Island Supreme Court rejected the State's effort to shift the cost of addressing a societal ill—childhood lead paint poisoning—to an industry that historically produced and sold a lawful product: lead pigment. 951 A.2d 428 (R.I. 2008). Following two of the longest trials in state history, the supreme court ruled that the trial court should have granted defendants' motion to dismiss filed ten years prior. *Id.* at 458. The supreme court rejected the State's attempt to create new nuisance law despite the serious harms of childhood lead poisoning. *Id.* at 452–58. The State's claims here are even more untethered to traditional tort law than were the lead pigment claims. In *Lead Industries*, the State sought damages from a product banned decades earlier due to public health concerns, *id.* at 438, but here the State seeks damages for products that it continues to welcome into the State, to tax, and to consume in significant quantities. The State's public nuisance claim fails for several reasons.

First, in *Lead Industries*, the Rhode Island Supreme Court held that the State could not prosecute a public nuisance claim based on the promotion and sale of lawful products. *Id.* at 453–55. Here, the State cannot sustain its public nuisance claim against these Defendants because the State expressly predicates that claim on the worldwide production and sale of lawful products. Plaintiff's attempt to avoid this fatal defect by claiming that alleged misrepresentations and omissions, rather than production and sale, are the "instrumentality" of the nuisance ignores that similar allegations were made against the lead pigment industry and rejected by the Rhode Island Supreme Court in *Lead Industries*. *Id.*

Second, in *Lead Industries*, the supreme court held that a defendant cannot be liable under public nuisance law unless it *controls* the instrumentality causing the alleged nuisance at the time the damage occurs. *Id.* at 449–50. The State cannot meet that requirement here: it concedes that, over decades, countless third parties around the world have purchased and combusted fossil fuels, creating the greenhouse gas emissions that it contends caused its harms. The overwhelming majority of these emissions occurred outside of Rhode Island through the activities of billions of actors—companies, governments, and individuals—residing in every country in the world. And they necessarily occurred after the fossil fuels were (1) extracted in one part of the world; (2) refined in another part of the world; (3) shipped, often across oceans; (4) traded and distributed on world markets; and, finally, (5) purchased and combusted by consumers. The damage alleged by the State occurred long after Defendants relinquished control of these fossil fuels; and Defendants never controlled the "instrumentality" combusting the fossil fuels. In other words, Defendants had no control over the choices of utilities or consumers regarding what fossil fuels to burn, how efficiently to burn them, or whether to use control devices to limit emissions. The State's claims thus fail under *Lead Industries*' control test.

Third, Defendants' extraction, production, and sale of fossil fuels and their precursors do not constitute "unreasonable conduct" necessary to support a public nuisance claim under *Lead Industries* because that conduct is legal, and indeed encouraged, under both Rhode Island and federal law, and by countries around the world. In fact, Rhode Island statutory law expressly "finds and declares that the distribution and retail sale of motor fuels at reasonable prices and in adequate supply throughout the state vitally affects the public health, welfare, and safety." R.I. Gen. Laws § 5-55-2. The production and sale of fossil fuels cannot constitute unreasonable conduct under public nuisance law when that lawful, heavily regulated and taxed activity, for

which there is no reasonable or practicable alternative, serves vital interests, not just of Rhode Island, but also of the United States and countries around the world.

Plaintiff's secondary tort claims fare no better than its public nuisance claim.[3]

First, Plaintiff's products liability claims fail because Plaintiff identifies no defect in Defendants' products. The emission of greenhouse gases is inherent to the combustion of fossil fuels. Plaintiff also does not, and cannot, allege that the fossil fuels alleged to be collectively produced by these Defendants (which Plaintiff alleges comprise 14.81% of overall production, Compl. ¶ 97) are different in any material respect from the 85% produced by others. All fossil fuels produce greenhouse gases when combusted. And Plaintiff does not, and cannot, allege that it or its citizens would have halted consumption of fossil fuels if they had more warnings about climate change. Even today, decades after the State alleges that governments, scientists, and media loudly broadcast the relationship between fossil fuel emissions and climate change, the State, and indeed the world, continue to consume fossil fuels at historic levels.

Second, Plaintiff's claims for trespass, impairment of public trust resources, and violation of the State Environmental Rights Act ("SERA") are meritless. Defendants cannot be liable for trespass because their products are not alleged to have "invaded" Plaintiff's land, and Defendants do not control the seas or floodwaters that have allegedly interfered with the State's possessory interests. Compl. ¶ 289. Plaintiff's public trust resources claim fails because such claims are not applicable to private parties, and the constitutional provisions Plaintiff cites in support of this claim do not create a cause of action. Plaintiff's SERA claim fails because the plain language of the statute does not authorize the State to bring suit.

[3] This case, as in *Lead Industries*, inevitably centers on the public nuisance claim. In *Lead Industries*, only the public nuisance claim survived to trial. 951 A.2d at 434.

Finally, Plaintiff has not alleged facts sufficient to establish two requirements fundamental to any tort—that Defendants are the cause in fact and proximate cause of Plaintiff's purported injuries. *Lead Indus.*, 951 A.2d at 451. Plaintiff does not allege facts sufficient to establish that its purported injuries would not have occurred but for Defendants' activities. *Almonte v. Kurl*, 46 A.3d 1, 18 (R.I. 2012). And Plaintiff's alleged injuries are far too derivative and remote from Defendants' lawful and "vital" conduct to satisfy bedrock principles of legal causation.

Federal law also bars Plaintiff's claims. In *American Electric Power Co. v. Connecticut* ("*AEP*"), the U.S. Supreme Court held that the Clean Air Act ("CAA") made the Environmental Protection Agency ("EPA") the "primary regulator of greenhouse gas emissions," thus precluding federal judges from "setting emissions standards by judicial decree under federal tort law." 564 U.S. 410, 427–28 (2011). As the Court explained, the "appropriate amount" of greenhouse gas production is a "question of . . . international policy," where "informed assessment of competing interests is required" including "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption . . . ." *Id.* 427. The limited exception to this rule allowing states to regulate sources of pollution within their borders does not allow for Plaintiff's claims, which reach well beyond Rhode Island.

While the claims in *AEP* were held to be governed by federal common law—which Defendants also allege must apply here—even if Plaintiff were correct that its transboundary pollution claims could be pleaded under state law, Plaintiff's state law claims would still conflict with, and be preempted by, the CAA. Allowing the State to pursue these claims would topple the regulatory scheme for transboundary pollution established by Congress under the CAA. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495–96 (1987). Indeed, in dismissing virtually identical claims brought by San Francisco and Oakland, a federal court, noting the demand for billions of

dollars in damages, held that if Defendants' extraction, production and sale of oil and gas constitute a nuisance, "judgments in favor of the plaintiffs who have brought similar nuisance claims based on identical conduct (let alone those plaintiffs who have yet to file suit) would make the continuation of defendants' fossil fuel production 'not feasible.'" *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1027 (N.D. Cal. 2018). Tasked with effectively deciding whether Defendants should continue to operate, courts would be assessing the social utility of Defendants' conduct. Plaintiff's claim that it is not seeking to regulate the fossil fuel industry through this tort suit thus rings hollow.

Plaintiff's claims attempt to reach not just interstate, but global activities, and to impose retroactive liability on Defendants' legal, worldwide commercial activities. Thus, the foreign affairs doctrine also bars Plaintiff's claims, because adjudicating them would interfere—now and in the future—with the U.S. Government's ability to conduct foreign policy on energy and the environment, including through ongoing global discussions regarding climate change. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–20 (2003). Similarly, the Commerce and Due Process Clauses of the United States Constitution bar Plaintiff's claims because the relief Rhode Island seeks would control extraterritorial conduct and impose enormous retroactive penalties on Defendants' lawful conduct. U.S. Const. art. I, § 8, cl. 3.; U.S. Const. amend. V.; *See Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989); *E. Enters. v. Apfel*, 524 U.S. 498 (1998). Additionally, Plaintiff's claims warrant dismissal because they seek to punish Defendants for protected speech.

Given the Complaint's insurmountable deficiencies, this Court should dismiss Plaintiff's claims with prejudice.

II. BACKGROUND

The Complaint names 21 energy companies and asserts eight state law causes of action as follows:

- public nuisance, Compl. ¶¶ 225–37;
- strict liability for failure to warn and negligent failure to warn, *id*. ¶¶ 238–50, 273–84;
- strict liability for design defect and negligent design defect, *id*. ¶¶ 251–72;
- trespass, *id*. ¶¶ 285–93;
- impairment of public trust resources, *id*. ¶¶ 294–305; and
- a claim under the State Environmental Rights Act, *id*. ¶¶ 306–15.

The premise underlying Plaintiff's claims is that Defendants' production and sale of coal, oil, and natural gas (which the Complaint refers to as "fossil fuel products," *id.* ¶ 3), and Defendants' allegedly deceptive public relations and lobbying activity renders them liable for Plaintiff's alleged climate change-related harms. Plaintiff seeks compensatory damages, abatement of the alleged nuisance, disgorgement of profits, punitive damages, and attorneys' fees and costs. *Id.* at 140 (Prayer for Relief).[4]

While Plaintiff purports to sue based on "Defendants' production, promotion, and marketing of fossil fuel products," *id*. ¶ 10, these activities did not cause Plaintiff's alleged injuries. Instead, the alleged injuries depend entirely on fossil fuel *emissions*, which in turn are the result of billions of choices made daily, and over more than a century, by governments, companies, and individuals about what types of fuel to use, how efficiently to use them, and whether to employ measures to offset those emissions.[5] The Complaint itself acknowledges that emissions are the mechanism of the alleged nuisance: "atmospheric CO_2 and other greenhouse gases [are] the main

[4] Defendants removed this action to the United States District Court for the District of Rhode Island. The district court remanded the case. *See Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019). Defendants appeal of the remand order is now pending review in the U.S. Court of Appeals for the First Circuit. *Rhode Island v. Chevron*, No. 19-1818 (1st Cir.).

[5] Plaintiff acknowledges the creation of greenhouse gas emissions by other human conduct—including "land use practices, such as forestry and agriculture" (Compl. ¶ 44), but does not quantify them.

driver of the gravely dangerous changes occurring to the global climate." Compl. ¶ 2.[6] Plaintiff uses variations of the word "emission" or "emit" more than 135 times in its Complaint. As one court explained in dismissing similar claims: "The harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels." *City of Oakland*, 325 F. Supp. 3d at 1024 (emphasis in original); *see also City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018) ("[T]he amended complaint makes clear that the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels.").

Plaintiff concedes that emitted greenhouse gas molecules "quickly diffuse and comingle [sic] in the atmosphere" and cannot be "trace[d] . . . to their source," Compl. ¶ 248, but Plaintiff seeks to hold Defendants liable for all of these harms because, collectively, their fossil fuel products allegedly account for "14.81%" of CO_2 emissions between 1965 and 2015.[7] *Id.* ¶ 7. According to Plaintiff's theories, Defendants should be held liable for harm caused to it by climate change, even though Plaintiff acknowledges Defendants' products are not the source of the other 85% of greenhouse gases, and are created by the conduct of literally billions of third parties. *Id.* at 140 (Prayer for Relief).

Plaintiff acknowledges that the scientific community and government recognized the climate change phenomenon more than a half-century ago:

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[6] *See also* Compl. ¶ 3 ("[G]reenhouse gas pollution, primarily in the form of CO_2 is far and away the dominant cause of global warming, and results in severe impacts."); *id.* ¶ 40 ("The mechanism by which human activity causes global warming and climate change is well established: ocean and atmospheric warming is overwhelmingly caused by anthropogenic greenhouse gas emissions."); *id*. ¶ 41 ("When emitted, greenhouse gases trap heat within the Earth's atmosphere that would otherwise radiate into space."); *id.* ¶ 43 ("Human activity, particularly greenhouse gas emissions, is the primary cause of global warming and its associated effects on Earth's climate."); *id*. ¶¶ 49–55 (stating that greenhouse gases are the primary cause of sea level rise).

[7] The Complaint pleads these percentage figures but Defendants dispute them and believe that they are the product of a fundamentally flawed analysis.

> By 1965, concern about the risks of anthropogenic greenhouse gas emissions reached the highest level of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee Panel on Environmental Pollution reported that by the year 2000, anthropogenic CO_2 emissions would "modify the heat balance of the atmosphere to such an extent that marked changes in climate . . . could occur."

Id. ¶ 106 (alteration in original). The Complaint further notes that "President Johnson announced in a special message to Congress that '[t]his generation has altered the composition of the atmosphere on a global scale through . . . a steady increase in carbon dioxide from the burning of fossil fuels.'" *Id.* (alteration in original).

Despite this public knowledge at least as early as 1965 and the persistent focus on climate change since then by the media, governments, and international community, Plaintiff asserts that Defendants somehow "concealed the dangers" of climate change, "sought to undermine the public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes." *Id.* ¶ 6. Even with this widespread knowledge of climate change risks, the Complaint acknowledges that use of fossil fuels and the resulting greenhouse emissions, have "exploded" over the past several decades—long after the scientific community and governments sounded alarms. *Id.* ¶ 4. Plaintiff's Complaint makes clear that governments have promoted and authorized fossil fuel production, and society has continued to use these fuels, with eyes wide open, accepting the benefits and risks that accompany such use.

III. ARGUMENT

On a motion to dismiss for failure to state a claim, the court "examines the allegations contained in the plaintiff's complaint, assumes them to be true, and views them in the light most favorable to the plaintiff." *McKenna v. Guglietta*, 185 A.3d 1248, 1251 (R.I. 2018) (citation omitted). "A motion to dismiss is properly granted when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be

proven in support of the plaintiff's claim." *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 175 (R.I. 2016) (quoting *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 942 (R.I. 2015)).

A. *Lead Industries* and Fundamental Tenets of Rhode Island Tort Law Require Dismissal of Plaintiff's Claims.

1. Plaintiff Fails to Plead a Viable Claim for Public Nuisance.

The Rhode Island Supreme Court's decision in *Lead Industries* forecloses the State's public nuisance claim. Under Rhode Island law, a claim for public nuisance requires a showing of "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred" and (4) causation. *Lead Indus.*, 951 A.2d at 446. In *Lead Industries*, the supreme court rejected the State's attempt to apply public nuisance theory to the distribution of a lawful product—lead pigment in paint. That rule applies with equal force to fossil fuels. And just as in *Lead Industries*, Plaintiff cannot establish that Defendants controlled the instrumentality causing the alleged nuisance at the relevant time—the point of combustion and consequent emission of greenhouse gases. Plaintiff also cannot establish that Defendants' conduct was unreasonable, because federal and state laws specifically authorize and promote the production, sale, and use of fossil fuels as vital to the State and its citizens.

a) Rhode Island Precedent Bars Plaintiff's Nuisance Claim.

In 2008, in *Lead Industries*, the Rhode Island Supreme Court squarely rejected as a matter of law the very type of nuisance claim asserted in this case. There, the State of Rhode Island brought a public nuisance claim against an assortment of lead pigment manufacturers, alleging that they had "manufactured, promoted, distributed, and sold lead pigment for use in residential paint, despite [knowing], since the early 1900s, that lead is hazardous to human health." *Id.* at 440. The

State sought to hold the manufacturers liable for "the cumulative presence of lead pigment in paints and coatings in or on buildings throughout the State of Rhode Island." *Id.* at 455.

The court held that the "law of public nuisance" was an improper vehicle for Plaintiff's claims, having "never before [] been applied to products, however harmful." *Id.* at 456 (collecting cases). The court observed that "actions for nuisance in this jurisdiction have been related to land," and that "public nuisance typically arises on a defendant's land and interferes with a public right." *Id.* at 452. To allow a nuisance claim based on the sale and promotion of lead pigment, no matter how harmful the effects of lead poisoning, the court held, 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." *Id.* at 455 (*quoting In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007)). The court also emphasized that the General Assembly had enacted legislation setting standards and creating mechanisms to address lead paint hazards. *Id.* at 457–58.

Plaintiff's nuisance claim fails for the same reasons. As in *Lead Industries*, Plaintiff alleges injury stemming from Defendants' "production, promotion, and marketing" of a lawful product. Compl. ¶ 10. Similar to the alleged harms caused by the "cumulative presence of lead pigment[s]," *Lead Indus.*, 951 A.2d at 455, the alleged harm from fossil fuels derives not from Defendants' production or marketing, but from third-party actions and processes of fossil fuel combustion that Defendants do not control.

The State's claim is even weaker here than in *Lead Industries*. In that case, Plaintiff at least attempted to allege an injury caused by the use of a product within the State (lead pigment used in paint in Rhode Island buildings). *Id*. at 440. Here, by contrast, Plaintiff alleges an injury resulting from the general use of a product worldwide (fossil fuels combusted around the globe).

The State does so without pleading how the use of any specific product in Rhode Island creates an unreasonable interference with a public right, without identifying any distinct harmful acts by Defendants, and without pinpointing any other injury unique to the State of Rhode Island. And it does so even though the State continues to recognize the necessity of fossil fuels, to consume fossil fuels, and to tax them. *See infra* III.A.3. Allowing this claim to proceed would open the floodgates of tort law, the outcome the Rhode Island Supreme Court rejected in *Lead Industries*: "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." 951 A.2d at 457 (quoting *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 95 (N.Y. App. Div. 2003)).

Plaintiff's contention that the "instrumentality of the nuisance" here is Defendants' allegedly deceptive promotion and marketing rather than the decision to combust a fossil fuel comes straight out of the State's playbook in *Lead Industries*, and fails for the same reason it failed there. Conf. Tr. at 10:9, Nov. 7, 2019. There, the State made similar allegations that the lead pigment manufacturers promoted and sold lead pigment despite knowing it was hazardous, that the defendants "failed to warn Rhode Islanders" of the hazard, and that defendants "concealed the[] hazards from the public or misrepresented they were safe." 951 A.2d at 440. Yet none of these theories convinced the supreme court to create a new nuisance theory untethered to traditional bases for nuisance liability. Just as the Court did not allow nuisance claims to "devour" products liability law given that nuisance claims lacked the "strict requirements that surround a product liability action," *id.* at 456–57, this court should not allow nuisance to swallow fraud or misrepresentation theories given that nuisance lacks critical elements of a misrepresentation claim,

such as justifiable reliance. *See Manchester v. Pereira*, 926 A.2d 1005, 1012 (R.I. 2007) ("It is well established that, in order to prevail on a misrepresentation claim, one must prove justifiable reliance on the misrepresentation.") (citation omitted). Indeed, the Restatement (Second), on which *Lead Industries* relied, explains that the "individual right that everyone has not to be . . . defrauded" is a private right, not a public right that could support a public nuisance claim. Restatement (Second) of Torts § 821B, cmt. g.[8]

The decision in *Lead Industries* comports with precedent outside of Rhode Island, as courts have uniformly rejected climate change-based nuisance claims filed against producers and sellers of lawful products. *See City of Oakland*, 325 F. Supp. 3d at 1023 ("No plaintiff has ever succeeded in bringing a nuisance claim based on global warming"); *see also Native Village of Kivalina v. ExxonMobil Corp. ("Kivalina")*, 696 F.3d 849, 855–58 (9th Cir. 2012) (holding that plaintiff's federal common law public nuisance claims were displaced by the CAA and EPA actions it authorizes); *City of New York*, 325 F. Supp. 3d at 472–74 (holding that plaintiff's public nuisance claims were displaced by the CAA). This Court should decline Plaintiff's invitation to upend hundreds of years 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. As in *Lead Industries*, Plaintiff's public nuisance claim should be dismissed.

[8] The D.C. Circuit rejected one plaintiff's attempt to premise a public nuisance claim on misleading statements as "radical" and "potential[ly] . . . brook[ing] 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). Furthermore, the *Noerr-Pennington* doctrine provides First Amendment protection to Defendants statements and forecloses liability under state tort law. *See infra* III.B.5.

b) Plaintiff's Public Nuisance Claims Fail Because Defendants Did Not Possess the Requisite Control over the Alleged Instrumentality of Harm.

In *Lead Industries*, the Rhode Island Supreme Court rejected Plaintiff's public nuisance claim because "no set of facts alleged in the state's complaint . . . could have demonstrated that . . . defendants had control over the product causing the alleged nuisance *at the time* children were injured." 951 A.2d at 455 (emphasis added). "[L]iability in a public nuisance action turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance . . . at the time that the damage occurred." *Id.* at 449 (quotation marks and citation omitted). As the supreme court explained, "control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement." *Id.*; *see also City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986). In *Lead Industries*, the nuisance the State defined was old paint deteriorating for lack of maintenance. The supreme court reversed the trial judge because the lead pigment manufacturers did not control the buildings where the deteriorating paint was present. *Lead Indus.*, 951 A.2d at 456–58.

Plaintiff alleges that "*combustion* of fossil fuel products" is the "dominant cause" of its alleged damages because combustion causes the emissions of carbon dioxide and other greenhouse gases that accumulate in the atmosphere over time and contribute to increased global temperatures. Compl. ¶ 49 (emphasis added); *see also id.* ¶¶ 2, 3, 42–43, 51, 244, 255(c)–(f). Those emissions did not occur while Defendants controlled or possessed these fossil fuels, and Plaintiff does not allege otherwise. In fact, Plaintiff expressly states that it "does *not* seek to impose liability on Defendants" for their own emissions. *Id.* ¶ 12. The emissions of which Plaintiff complains occurred after Defendants relinquished control over these fossil fuels to third parties. Ultimately, consumers combusted these fossil fuels, producing the emissions that the State contends cause climate change. Plaintiff does not and cannot allege that Defendants controlled the fossil fuel

products when third parties (overwhelmingly outside of Rhode Island) combusted fossil fuels, much less controlled the resulting greenhouse gas emissions. The "instrumentality" alleged here is the combustion of the fossil fuels by third parties, which occurs as a result of decisions by billions of individuals, organizations, governments, and companies, to use (or not use) energy.

Plaintiff asserts Defendants should be liable based on their production, promotion, and sales of fossil fuels. *See id.* ¶¶ 10, 175. Plaintiff describes Defendants' control in terms of communications and "knowledge about how it would be used and combusted." Conf. Tr. at 12:11–12, Nov. 7, 2019. Such allegations of knowledge do not reflect control of the instrumentality at the time of injury, and are plainly insufficient to establish that element of control under *Lead Industries*.[9] In sum, there is "no set of facts alleged in the [S]tate's [C]omplaint that, even if proven, could . . . demonstrate[] that . . . defendants had control over the product causing the alleged nuisance at the time [Plaintiff was] injured." *Lead Industries*, 951 A.2d at 455.

[9] Plaintiff may rely on *State of Rhode Island v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963 (R.I. Super. Ct. Aug. 16, 2019), in which the State sued opioid manufacturers and distributors in public nuisance based on their alleged role in the opioid crisis. The Rhode Island Superior Court denied the defendants' motion to dismiss, finding that defendants could be held liable in public nuisance based on their alleged direction and control of the supply of prescription opioids into the state.

Defendants submit the decision misapplied *Lead Industries* and is incorrect. It is, in any event, distinguishable. The Superior Court accepted, for purposes of the motion, Plaintiff's allegation that the nuisance was not the harm from the use of opioids by individuals but rather the "unreasonable overabundance of highly addictive prescription opioids in the community" and that the opioid manufacturers controlled the instrumentality of that nuisance. *Id.* at *10. The court further concluded that the complaint alleged control over the instrumentality of the nuisance (the prescription opioids) even after the opioids left defendants' hands, because the "Manufacturers and Distributors continued to misrepresent the risks and benefits of opioids, funnel excessive amounts of medicines into Rhode Island communities, and falsely promote and distribute these medicines generally." *Id*. Here, by contrast, Plaintiff alleges that the public nuisance is the effects of climate change, caused by emissions from the combustion of fossil fuels. Compl. ¶ 227. It is those emissions—not the production or promotion of fossil fuels—that the Complaint alleges contribute to the effects of climate change, and Plaintiff does not and cannot allege these Defendants control end users' consumption of fossil fuels. *Cf. id.* ¶ 230 (failing to allege control of end user emissions). In addition, opioids are a controlled substance whose sale and consumption is highly restricted, regulated, and tracked because they are considered dangerous. This is manifestly not the case for fossil fuels.

c) Plaintiff's Public Nuisance Claims Fail Because Federal and State Laws Specifically Authorize the Production, Sale, and Use of Fossil Fuels.

Defendants' production and sale of fossil fuels is not only legal, it is authorized and encouraged by statute, and thus cannot constitute a nuisance. It is well established that the "[e]xercise of the right to do that which the law authorizes cannot be a public nuisance." *Nugent ex rel. Collins v. Vallone*, 161 A.2d 802, 806 (R.I. 1960) (citation omitted); *see also Richmond Realty, Inc. v. Town of Richmond*, 644 A.2d 831, 832 (R.I. 1994) ("[A]ctions [] authorized by law [] cannot constitute a public nuisance."); *N.C. ex rel Cooper v. TVA*, 615 F.3d 291, 309 (4th Cir. 2010) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government.") (quotation marks omitted); Restatement (Second) of Torts § 821B cmt. f ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.").[10]

Here, numerous federal and state statutes authorize, encourage, and even require production of fossil fuels.[11] The Rhode Island General Laws state that "[o]il is important as an energy source to the people of the state." R.I. Gen. Laws § 46-12.5.1-6; *see also* R.I. Gen. Laws § 5-55-2 ("The legislature finds and declares that the distribution and retail sale of motor fuels at reasonable prices and in adequate supply throughout the state vitally affects the public health, welfare, and safety."); R.I. Gen. Laws § 42-98-1(a) ("The general assembly recognizes that

[10] Rhode Island's definition of public nuisance "largely is consistent with that of . . . the Restatement (Second) of Torts." *Lead Indus.*, 951 A.2d at 446.

[11] Relevant federal statutes include, but are not limited to, *e.g.*, Energy Policy Act of 1992, 42 U.S.C. §§ 13401, 13411(a), 13412, 13415(b)–(c); Energy Policy Act of 2005, 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B), 15927; Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451(j); Federal Land Policy & Management Act of 1976, 43 U.S.C. § 1701(a)(12); Deep Water Royalty Relief Act of 1995, 43 USC § 1337(a); Mineral Leasing Act of 1920, 30 U.S.C. § 226; Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352; Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. § 6501-6507.

reasonably priced, reliable sources of energy are vital to the well-being and prosperity of the people of this state."); R.I. Gen. Laws § 39-1-1 ("The general assembly finds and [] declares that [t]he businesses of . . . producing and transporting manufactured and natural gas . . . [are] affected with a public interest."); R.I. Gen. Laws § 42-140-3 (defining purpose of Rhode Island Energy Resources Act as "to promote, encourage and assist the efficient and productive use of energy resources," including "natural gas . . . and heating oil").

Rhode Island has "establish[ed] a state set-aside system for propane, middle distillates, motor gasoline, residual fuel oil, and aviation fuels," to "satisfy Rhode Island's energy needs" in the event of "shortages of residual fuel oil and refined petroleum products." R.I. Gen. Laws § 42-81-2; *see also* R.I. Gen. Laws § 39-31-5 (authorizing public utilities to "[p]rocure incremental, natural-gas pipeline infrastructure and capacity into New England to help strengthen energy system reliability and facilitate the economic interests of the state"). To support fossil fuel production, Rhode Island law prescribes standards for the construction of "major energy facilities," R.I. Gen. Laws § 42-98-2, defined as "facilities for the extraction, production, conversion, and processing of coal; . . . for the conversion, gasification, treatment, transfer, or storage of liquefied natural and liquefied petroleum gases; . . . [and] for the refining of oil, gas, or other petroleum products." *Id.* § 42-98-3. Rhode Island law also establishes specifications for the sale of gasoline in the state. *See* R.I. Gen. Laws § 31-37-7.1; *id.* § 31-37-1; R.I. Gen. Laws § 47-8-8; R.I. Gen. Laws § 23-28.20-6. Rhode Island laws "reflect the General Assembly's chosen means of responding to [fossil fuel production]." *Lead Indus.*, 951 A.2d at 457.

These laws do not prohibit the manufacture, sale, or use of fossil fuels—they encourage it. Accordingly, and as a matter of law, Defendants' fossil fuel production and marketing activities cannot be the basis for a nuisance claim. *See Nugent*, 161 A.2d at 806.[12]

Even Rhode Island's climate laws and regulations do not forbid fossil fuel production or consumption. Rather, ever since the Rhode Island Climate Risk Reduction Act of 2010, later repealed and replaced by the Resilient Rhode Island Act of 2014, 42 R.I. Gen. Laws § 42-6.2-1 *et seq.*, sets targeted emissions reductions over time, and has established an Executive Climate Change Council to address the impacts of climate change. *Id.* The legislation does not bar the production or marketing of fossil fuels. In any event, Plaintiff does not allege that Defendants violated any provisions of Rhode Island's climate change legislation, let alone that Defendants' marketing or sales are preventing the State from achieving its emissions reduction targets. In fact, the State's "Resilient Rhody" plan to adapt to climate change recognizes the importance of ensuring that petroleum is still delivered to the State and its citizens.[13]

As the Rhode Island Supreme Court observed: "however grave the problem . . . is in Rhode Island, public nuisance law simply does not provide a remedy for this harm. The state has not and cannot allege facts that would fall within the parameters of what would constitute public nuisance

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[12] As the federal government recently emphasized in its *amicus* brief in the *City of Oakland* case, "the United States has strong economic and national security interests in promoting the development of fossil fuels," the very conduct that Plaintiff seeks to label a public nuisance. Br. for the United States as Amicus Curiae at 1, *City of Oakland v. BP P.L.C.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The government cautioned that these state common law claims premised on global climate change have "the potential to . . . disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." *Id.* at 2.

[13] *See Resilient Rhody: An Actionable Vision for Addressing the Impacts of Climate Change in Rhode Island* 31 (2018), http://climatechange.ri.gov/documents/resilientrhody18.pdf (hereinafter "*Resilient Rhody*") ("Direct impacts of delays in fuel distribution include lost revenues, disability of critical services like public transit and emergency services, and associated macroeconomic consequences.").

under Rhode Island law." *Lead Indus.*, 951 A.2d at 435. Accordingly, the Court should dismiss Plaintiff's public nuisance claim with prejudice.

2. Plaintiff Fails to Plead a Viable Products Liability Claim.

Plaintiff asserts four products liability causes of action—design defect and failure to warn, each in negligence and strict liability. Compl. ¶¶ 238–84. These claims fail because Plaintiff has not alleged facts that, if true, would show that Defendants sold defective or unreasonably dangerous products, or that Defendants owed Plaintiff a duty to warn about the risks of climate change. Moreover, as further explained in Section III.A.6, *infra*, Plaintiff has failed to show that Plaintiff's injuries were caused by any defect in Defendants' products.

a) Plaintiff's Allegations Confirm that Defendants' Products Are Neither Defective Nor Unreasonably Dangerous.

Plaintiff cannot predicate a claim on the theory that fossil fuels are defectively designed because the *use* of those products causes greenhouse gas emissions, which in turn "cause numerous global and local changes to Earth's climate." Compl. ¶ 255. The emission of greenhouse gases upon use or combustion of fossil fuel is not a product design defect; it is an inherent characteristic of the product itself. *See 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 an 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 claim of design defect 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").

Plaintiff has also failed to allege facts showing that Defendants' fossil fuel products are "unreasonably dangerous" due to the emissions of greenhouse gases resulting from their combustion. Compl. ¶¶ 252, 255. To evaluate design defect claims, Rhode Island courts utilize the "consumer expectation" test, which inquires 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 its characteristics." Restatement (Second) of Torts § 402A (defining strict liability); *see also Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988) ("[T]his court embraced the consumer-expectation test" to determine whether a product "would be deemed 'defective' under § 402A."); *Jackson v. Corning Glass Works*, 538 A.2d 666, 669 (R.I. 1988) (product is not unreasonably dangerous if its risks are "well known to any reasonable consumer"); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 262 (R.I. 1971) (product is unreasonably dangerous only if it is "in a condition not contemplated by the ultimate consumer") (quotation marks omitted). Indeed, even with respect to cigarettes, in *Guilbeault v. R.J. Reynolds Tobacco Co.*, the District of Rhode Island held on a motion to dismiss that cigarettes sold after 1964 were not unreasonably dangerous under Rhode Island law, and thus dismissed the product liability claim, because of "the community's common knowledge of the general disease-related health risks associated with smoking, including the risk of contracting cancer, as of 1964." 84 F. Supp. 2d 263, 273 (D.R.I. 2000) (relying in large part on the Surgeon General's much publicized report officially concluding that smoking caused lung cancer). Thus, the court concluded, the fact that cigarettes cause cancer did not render them dangerous to an extent beyond what the ordinary consumer would expect. *Id*. at 273–75.

The facts alleged in the Complaint preclude any finding of defect under the consumer expectation test. The Complaint alleges widespread, longstanding knowledge of the characteristics

of the fossil fuels that Plaintiff points to as being unreasonably dangerous. Plaintiff affirmatively 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. ¶¶ 106–08. Plaintiff even alleges that in 1965, President Lyndon B. Johnson and his science advisory committee publicly acknowledged and forewarned of anthropogenic climate change. *Id.* ¶ 106. Just as the court in *Guilbeault* found that the government unequivocally acknowledged that smoking causes cancer made that fact common knowledge, Plaintiff's allegation here that the government acknowledged anthropogenic climate change in the 1960s made its risk common knowledge thereafter. *See Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 272 (D.R.I. 2000) Those allegations disprove Plaintiff's claim that fossil fuel products "have not performed as safely as an ordinary consumer would expect them to" with regard to greenhouse gas emissions. *Id*. ¶ 255. Notwithstanding the widespread knowledge that combustion of fossil fuels produces greenhouse gases, Plaintiff and billions of consumers continue to use fossil fuels and rely on the benefits. Fossil fuels are not defective.[14]

b) Plaintiff Cannot Establish that Defendants Owed a Duty to Plaintiff to Warn About the Risk of Climate Change.

Plaintiff's failure to warn claims should be dismissed because Plaintiff cannot adequately plead the existence of a duty. In Rhode Island, strict liability for failure to warn is "measured . . . by the same standard as the duty to warn that is enforceable in a negligence cause of action." *DiPalma v. Westinghouse Elec. Corp.*, 938 F.2d 1463, 1466 (1st Cir. 1991) (citing *Thomas v. Amway Corp.*, 488 A.2d 716, 722 (R.I. 1986)). To succeed on either variety of failure to warn

[14] Rhode Island's own climate change mitigation plan recognizes the importance of a continued supply of petroleum products. *See Resilient Rhody* at 31. As the *City of Oakland* court, addressing nearly identical issues to those raised here, explained: "[O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefited." 325 F. Supp. 3d at 1023.

claim, "a plaintiff must demonstrate a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." *Oliver v. Narragansett Bay Ins. Co.*, 205 A.3d 445, 450 (R.I. 2019) (quotation marks omitted); *see also Ouch v. Khea*, 963 A.2d 630, 633 (R.I. 2009) ("In the absence of a legal duty, plaintiffs' claim must fail as a matter of law."); *Schenck v. Roger Williams Gen. Hosp.*, 382 A.2d 514, 516 (R.I. 1977) (it is the "plaintiff's burden to establish that the defendant had a duty to act or refrain from acting"). A plaintiff must establish that a legal duty is owed to it by the defendant before the other three factors of the failure to warn claim may be considered. *Oliver*, 205 A.3d at 450. Here, Plaintiff is unable to satisfy this threshold inquiry.

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. ¶ 277. In other words, Plaintiff claims that Defendants *owed the State* a duty of care to warn *everyone* (apparently everywhere in the world) of the risks of climate change. But Defendants did not owe Plaintiff any such duty because (1) no warning would plausibly have changed consumers' conduct; (2) imposing a duty would result in unlimited liability; (3) Defendants have no special relationship with Plaintiff; and (4) the relationship between greenhouse gas emissions and climate change has been publicly known for decades.

First, even assuming longstanding and widespread knowledge of the risk of climate change, Plaintiff does not plausibly plead "any causal connection between the [Defendants' purported] failure to warn and the injury." *Salk v. Alpine Ski Shop, Inc.*, 342 A.2d 622, 626 (R.I. 1975). Plaintiff admits that the emissions from use of fossil fuels by third-party users worldwide ultimately caused climate change, *see* Compl. ¶ 43, but does not allege that climate change would not have occurred if warnings had been given. Nor does the Complaint allege how any warning

from Defendants would have curbed the behavior of consumers across the globe dependent on fossil fuels for basic needs such as heating and transportation. *See Salk*, 342 A.2d at 626 (claim failed because "plaintiff did not allege that had he been warned of the inevitable dangers of skiing, he would not have skied"). Indeed, consumption trends over the last half-century through to the present make the contention that such warnings would have been effective implausible—consumers continue to burn fossil fuels today with knowledge of the effects of greenhouse gas. *See* Compl. ¶¶ 106, 108, 146 (public use of fossil fuels "continued unabated" in the 1990s even though "many specific consequences of rising levels of greenhouse gas pollution" were referenced in reports dating back to the 1960s). *See, e.g.*, *Bee v. Novartis Pharm. Corp.*, 18 F. Supp. 3d 268, 284 (E.D.N.Y. 2014) (no liability for failure to warn when "any given warning would have been futile"); 38 Am. Law Reports 5th 683 n.3 (collecting cases "discussing the requirement that a plaintiff demonstrate in a products liability failure-to-warn action that a proper warning would have made a difference in the conduct of the person warned").

Second, duty requires a "closeness of connection between the defendant's conduct and the injury suffered." *Oliver*, 205 A.3d at 453 (quotation marks omitted). Rhode Island courts have thus resisted the establishment of duties of care that would expose defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *R.I. Indus.-Recreational Bldg. Auth. v. Capco Endurance, LLC*, 203 A.3d 494, 503 (R.I. 2019) (quotation marks omitted); *see also Marchetti v. Parsons*, 638 A.2d 1047, 1051 (R.I. 1994) (discussing aim of "avoid[ing] limitless liability"). Here, by alleging that Defendants had a duty to warn "customers, consumers, regulators, and the general public" about the risk of climate change, Compl. ¶ 246, Plaintiff seeks to impose an expansive new duty of care that Defendants would owe to a limitless class of individuals and entities allegedly affected in some way by climate change.

Under Plaintiff's theory, Defendants would literally owe a duty "to each and every member of the public." *Orzechowski v. State*, 485 A.2d 545, 549 (R.I. 1984). Courts in Rhode Island have declined to impose duties of care that could result in such limitless liability. *See id*. (noting that "the potential for private lawsuits would be limitless"); *Fortes v. Ramos*, No. CIV. A. 96-5663, 2001 WL 1685601, at *13 (R.I. Super. Ct. Dec. 19, 2001) (rejecting argument that would "create a near limitless class of potential plaintiffs"). What Plaintiff seeks here is "protection of the public in general," but this is a duty allocated to the government in its legislative capacity, not a duty vindicated in tort suits. *Ferreira v. Strack*, 636 A.2d 682, 686 (R.I. 1994) (quotation marks omitted).[15] And here, the State has notably declined to ban the combustion of fossil fuels in Rhode Island; to the contrary, the State's public policy, defined through its enacted laws, protects and encourages such use, even as it has recognized for over a decade that "climate change impacts have already arrived in Rhode Island" and that "[a]verage temperatures in the state have increased by one point five degrees Fahrenheit (1.5° F) since 1970." R.I. Gen. Laws § 23-84-2(1) (legislative findings of the Rhode Island Climate Risk Reduction Act of 2010).

Third, Plaintiff does not plead any special relationship that could give rise to a duty to warn. Plaintiff claims that because Defendants owed a duty to warn "Plaintiff, the public, consumers, and public officials" about the risk of climate change, those third parties engaged in conduct that ultimately harmed Plaintiff. Compl. ¶ 239. But there is "no duty to control the conduct of a third party to prevent injury to another person unless a defendant has a special relationship with either the person whose conduct needs to be controlled or with the intended

[15] Although Plaintiff alleges that "the ordinary consumer would not recognize that the use of fossil fuel products causes global and localized changes in climate . . . and could not ordinarily discover or protect themselves against those dangers in the absence of adequate warnings," Compl. ¶ 244, it is implausible that "ordinary consumers" were not adequately warned by the deluge of media over the past decades discussing the role of fossil fuel combustion in climate change. Further, there is no question that the State knew, and it continues to permit and encourage the use of fossil fuels.

victim of the conduct." *Gushlaw v. Milner*, 42 A.3d 1245, 1257 (R.I. 2012) (quoting *Santana v. Rainbow Cleaners*, 969 A.2d 653, 658 (R.I. 2009)). No such special relationship is pleaded (or could plausibly be pleaded) here.

Fourth, a seller's duty to warn does not extend to "products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized." Restatement (Second) of Torts § 402A cmt. j (1965); *see also Thomas*, 488 A.2d at 722 (adopting comment j for Rhode Island). This is exactly the situation here.[16] Plaintiff seeks to impose a duty to warn of the risk of greenhouse gases resulting from combustion of fossil fuels, which Plaintiff contends Defendants caused to be consumed "in excessive quantity," and which contributed to climate change only after over a century of accumulation in the atmosphere. But the rate and consequences of consumption are both controlled by governments and third parties and Plaintiff concedes that the risk of fossil fuels contributing to climate change has been known widely at least as early as 1965. Compl. ¶¶ 106–08. Defendants owed no duty to warn of this widely acknowledged long-term risk.[17]

For all of these reasons, Plaintiff fails to plead a viable products liability claim.

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[16] For example, governments and consumers decide whether to take RIPTA or drive an SUV to work, whether to subsidize or penalize less efficient automobiles, and what level of air pollution control technology to impose on industry.

[17] Plaintiff asserts that the "impacts of the use of [Defendants'] fossil fuel products on the Earth's climate" were "foreseeable." Compl. ¶ 153; *see also, e.g.*, *id.* ¶¶ 1, 146, 189, 196, 249, 262, 271, 283. But "[f]oreseeability should not be confused with duty," because foreseeability only "determines the scope of duty after it has been determined that there is a duty." 57A Am. Jur. 2d Negligence § 337 (emphasis added). Because Defendants did not owe Plaintiff (or anyone else) a duty to warn about the risks of climate change, they cannot be held liable for their alleged failure to warn fossil fuel consumers that combustion of Defendants' products might contribute, in some way, to Plaintiff's alleged injuries.

3. Plaintiff Fails to Plead a Viable Claim for Trespass.

The Complaint fails to state a trespass claim. Plaintiff alleges that Defendants are liable for trespass because climate change has caused sea water, floodwaters, and "other materials to enter its property." Compl. ¶ 288. To plead trespass, Plaintiff must show that Defendants "intentionally and without consent or privilege enter[ed its] property." *Ferreira*, 652 A.2d at 969 (quoting Black's Law Dictionary 1504 (6th ed. 1990)); *see also Smith v. Hart*, No. 99-109, 2005 WL 374350 at *5 (R.I. Super. 2005) (citing *State v. Verrechhia*, 766 A.2d 377 (R.I. 2001)); *Mesolella v. City of Providence*, 508 A.2d 661, 668 n.8 (R.I. 1986) (citing provision defining trespass to property in Restatement (Second) of Torts § 158 at 277 (1965)). Plaintiff's factual allegations fail to plausibly establish *any* of these elements.

First, although the State alleges that climate change generally has "inundated," Compl. ¶ 221, "submerge[ed]," *id.* ¶ 289, or rendered "unusable," *id*., land, it has not identified any specific portion of Rhode Island's extensive ocean shoreline that has been affected specifically because of climate change. Plaintiff speculates about *future* invasions that may potentially result from Defendants' conduct. *See, e.g.*, *id*. ¶ 8 ("[A]s a direct and proximate consequence of Defendants' wrongful conduct . . . average sea level *will* rise substantially along Rhode Island's coast . . . .") (emphasis added); *id.* ¶ 17 (Rhode Island "*will continue to be impacted* by increased temperatures and disruptions to the hydrologic cycle") (emphasis added). But Plaintiff cannot state a trespass claim based on such forecasts because "[t]o sustain an action for trespass in Rhode Island, a plaintiff must show that a defendant *entered* his property." *Ciampi v. Zuczek*, 598 F. Supp. 2d 257, 262 (D.R.I. 2009) (citing *Ferreira*, 652 A.2d at 969; *Berberian v. Avery*, 205 A.2d 579, 581–82

(R.I. 1964)) (emphasis added). Numerous courts have held that future invasions that have not yet occurred—and may never occur—are not actionable.[18]

Second, the claim fails because Plaintiff does not allege that *Defendants or their products* intruded upon any state-owned property. Rather, Plaintiff alleges that "floodwaters, extreme precipitation, landslides, saltwater, and other materials" have "enter[ed] its property *as a result of* the use of Defendants' fossil fuel products." Compl. ¶ 288 (emphasis added). But to state a claim for trespass, Plaintiff must allege that Defendants controlled the thing that entered its property. *City of Manchester*, 637 F. Supp. at 656. Defendants do not control the oceans, clouds, or precipitation.[19]

Plaintiff alleges that Defendants should nevertheless be held liable because they introduced "fossil fuel products into the stream of commerce," Compl. ¶ 290, and these products, when combusted by billions of third-party users around the world over more than a century, generated greenhouse gas emissions that contributed to climate change. But, as explained below, Plaintiff cannot adequately allege cause in fact or proximate causation based on this theory. *See infra* Section III.A.6. Furthermore, "modern courts do not favor trespass claims for environmental pollution" or endorse efforts "to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." *In re Paulsboro Derailment Cases*, Nos. 13–784, 12–7586, 13–410, 13–721, 13–761, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal quotation marks

[18] *See, e.g.*, *Aldrich v. Howard*, 7 R.I. 87, 91 (1861) ("[I]t will be time enough for the plaintiff to seek the interference of this court to enjoin the defendant . . . when that use actually proves to be a nuisance . . . ."); *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (Md. 2013) ("General contamination of an aquifer that may or may not reach a given Appellee's property at an undetermined point in the future is not sufficient to prove invasion of property."); *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 14 (N.Y. 2013) ("A threat of future harm is insufficient to impose liability against a defendant in a tort context."); *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 986 F. Supp. 1406, 1420 (N.D. Ga. 1997) ("[T]o recover for trespass, a plaintiff must prove that the trespass has actually caused some damage to the property. It is not enough that a plaintiff might suffer damage at some point in the future.") (citations omitted).

[19] The control requirement in *Lead Industries* is also instructive here. *See supra* Section III.A.1.b.

omitted); *see also In re Nassau Cty. Consol. MTBE (Methyl Tertiary Butyl Ether) Prod. Liab. Litig.*, 918 N.Y.S.2d 399, at *18 (Sup. Ct., Nassau Co. 2010) (unpublished table decision) (dismissing trespass claim where plaintiff "only alleged that [defendants] committed a trespass by their participation in the chain of distribution").

Third, the State fails to plead lack of consent. Plaintiff asserts that it "did not give permission for Defendants . . . to cause floodwaters, extreme precipitation, saltwater, and other materials to enter its property as a result of the use of Defendants' fossil fuel products." Compl. ¶ 288. But the State itself is a substantial user of the identified products and the State has elected not to prohibit the use of fossil fuels.[20] Plaintiff has consented to the consequences resulting from its actions, including the alleged invasion of its property.

4. Plaintiff Fails to Plead a Viable Claim for Impairment of Public Trust Resources.

The Complaint's seventh cause of action purports to assert a claim for "Impairment of Public Trust Resources" in violation of Article I, Sections 16 and 17 of the Rhode Island Constitution. Compl. ¶¶ 295–96, 301. Rhode Island does recognize the public trust doctrine, *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003), but Defendants have not located any case that recognized a cause of action for damages or injunctive relief pursuant to the doctrine. Instead, the doctrine has been utilized by courts to determine who owns or regulates lands below the high water mark. Plaintiff's attempt to base a public trust claim on sections 16

[20] *See e.g.*, R.I. Div. of Planning, *Energy 2035: Rhode Island State Energy Plan*, p. 2, http://www.planning.ri.gov/documents/LU/energy/ energy15.pdf (noting that "Fossil fuels such as natural gas and petroleum still supply virtually all of the energy needs [of Rhode Island]."); U.S. Energy Information Administration, *Rhode Island State Profile and Energy Estimates*, July 18, 2019, https://www.eia.gov/state/?sid=RI (noting that 93% of Rhode Island's electricity is generated through the burning of natural gas); U.S. Energy Information Administration, Table F16: Total Petroleum Consumption Estimates, 2017, https://www.eia.gov/state/seds/data.php?incfile=/state/seds/sep_fuel/html/fuel_use_pa.html&sid=US (showing that Rhode Island burned 15,107,000 barrels of petroleum in 2017).

and 17 of the Constitution fail because those constitutional provisions concern the State's regulatory powers, and set a broad framework for the exercise of those powers; they do not create a cause of action.

Section 16 provides that "[p]rivate property shall not be taken for public uses, without just compensation." R.I. Const. art. I, § 16 (the "takings clause"). It then states that "[t]he powers of the state" to "regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore" shall be "an exercise of the police powers of the state" and "shall not be deemed to be a public use of private property." *Id.* The section clarifies that notwithstanding the takings clause, the state may invoke its police powers to legislate and regulate land and water to protect natural resources. *See Creditors' Serv. Corp. v. Cummings*, 190 A. 2, 10 (R.I. 1937) (noting that public safety and health fall within the police power vested exclusively in the legislature). Nothing in Section 16 creates an environmental injury claim for the State to assert in court.

Section 17 also defines state regulatory powers and does not provide any basis for the Complaint's public trust resources claim. That section states that Rhode Island citizens "shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state" and "shall be secure in their rights to the use and enjoyment of the natural resources of the state." R.I. Const. art. I, § 17. Section 17 obligates the state legislature to "provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state," and to "adopt all means necessary and proper by law to protect the natural environment of the people of the state." *Id.* It imposes obligations on the "general assembly," not on Defendants. *Id.*; *see also In re Request for*

Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 936 (R.I. 2008) (observing that the General Assembly has duties under Section 17).

Moreover, under Rhode Island law, a cause of action may be based on a constitutional provision only if the provision is "self-executing." *A.F. Lusi Const., Inc. v. R.I. Convention Ctr. Auth.*, 934 A.2d 791, 798 (R.I. 2007) (a plaintiff suing under a constitutional provision must meet the "necessary precondition" of establishing that the provision is self-executing). A constitutional provision is self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." *Bandoni v. State*, 715 A.2d 580, 587 (R.I. 1998) (quoting *Davis v. Burke*, 179 U.S. 399, 403 (1900)) (emphasis omitted). A provision is not self-executing if it "merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Id.* (quoting *Davis*, 179 U.S. at 403).

Section 17 is not self-executing. It does not specify any means to enforce the general principles it states. Indeed, caselaw holds that Section 17 "was intended to be carried into effect by legislative regulation." *Cherenzia v. Lynch*, 847 A.2d 818, 824 (R.I. 2004) (quotation marks omitted); *cf. Bandoni*, 715 A.2d at 587 (self-executing provisions do not direct the legislature to take further action (citation omitted)). Plaintiff therefore can state no claim under these provisions.

5. Plaintiff's State Environmental Rights Act Claim Fails on Both Procedural and Substantive Grounds.

Plaintiff's eighth cause of action seeks equitable relief under Rhode Island's State Environmental Rights Act ("SERA"). But this cause of action is procedurally and substantively defective, and should be dismissed. SERA authorizes "any city or town" to "maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution,

impairment, or destruction." R.I. Gen. Laws § 10-20-3(b). It authorizes appointment of an "environmental advocate . . . by the attorney general," and delegates to the advocate authority to "[m]aintain and/or intervene in civil actions authorized by [SERA]." *Id.* § 10-20-3(c)-(d). SERA further provides that "[n]o action may be commenced by a city or town pursuant to this act unless the municipality seeking to commence the suit shall" give "the intended defendant" "written notice" of its intention to sue "at least sixty (60) days prior to the commencement" of the lawsuit. *Id.* § 10-20-3(e).[21]

Plaintiff cannot state a claim under the SERA because it is not a "city or town" and thus has no authority under the statute to "maintain an action" against Defendants. Nor does the Complaint suggest that this action was instituted by the "environmental advocate" designated "[w]ithin the department of attorney general." R.I. Gen. Laws § 10-20-3(a), (c), (d)(5). Any claim under SERA would fail on the merits for the same reason as Plaintiff's other claims: Plaintiff does not allege facts showing that Defendants' conduct—as opposed to the intervening actions of billions of third parties—has caused "the pollution, impairment or destruction of [Rhode Island's] air, water, land, or other natural resources." R.I. Gen. Laws § 10-20-4(b); *see infra* Section III.A.6.

The SERA claim also fails because the Complaint is directed to and seeks equitable relief with respect to activities beyond Rhode Island's borders. The Complaint does not allege that any of the purportedly tortious extraction, refining, or production of fossil fuels occurred in Rhode Island; by definition, worldwide emissions are produced almost entirely outside of the state. SERA does not grant, nor could it grant, authority to award "equitable relief" with respect to activities

[21] No reported cases have been located reflecting enforcement of this chapter of the Rhode Island General Laws, or interpreting its provisions.

"outside the territorial limits of the state in which it is located." Restatement (Second) of Judgments § 4 cmt. c (1982).

Further, even if Plaintiff had otherwise made out a *prima facie* case under SERA (which it has not), Plaintiff's SERA claim should be dismissed because SERA itself is unconstitutionally vague as applied to Defendants. The U.S. Supreme Court has recognized that statutes are unconstitutionally vague where they fail to inform "regulated parties . . . what is required of them" or where they permit "those enforcing the law [to] act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)); *see also State v. Berker*, 328 A.2d 729, 730-31 (R.I. 1974) (invalidating an ordinance because "it contains no standards by which conduct may be measured and thus fails to give a person of ordinary intelligence fair notice of what conduct it attempts to forbid"). Plaintiff seeks to hold Defendants liable for "materially adversely affect[ing] the environment." Compl. ¶ 308. But SERA did not put Defendants on notice that they could be liable under the Act for lawfully extracting, producing, and/or selling fossil fuels around the world (nor did Plaintiff provide the required 60-day notice). *See* R.I. Gen. Laws. § 10-20-3(e). Because the allegedly prohibited conduct was not "clearly define[d]" in the statute, Defendants cannot be held liable under SERA. *United States v. Kalb*, 234 F.3d 827, 831 (3d Cir. 2000) (upholding environmental regulations because they left "no need for speculation"); *see also Texas v. EPA*, 389 F. Supp. 3d 497, 505 (S.D. Tex. 2019) (enjoining a change made by the EPA to a final rule regulating certain waterways because "interested parties" cannot be forced "to parse through such vague references like tea leaves to discern an agency's regulatory intent").

6. Plaintiff Fails to Plead Cause in Fact or Proximate Causation.

Under Rhode Island law, a tort plaintiff carries the "burden to establish that there was a causal relation between the act or omission of the defendant and the injury to the plaintiff."

Schenck, 382 A.2d at 516–17 (citation omitted). Causation "is a binary inquiry, comprised of (1) causation in fact or actual causation and (2) proximate, or legal, causation." *HNY Holding Co. v. Danis Transp. Co.*, No. Civ.A. PB 02-6561, 2004 WL 2075158, at *4 (R.I. Super. Ct. Sept. 9, 2004) (citations omitted); *see also Lead Indus.*, 951 A.2d at 451 (tort plaintiff must prove both "that a defendant is the cause-in-fact of an injury" and also "proximate causation"). Plaintiff fails to allege this fundamental requirement adequately for any of its claims.

a) Plaintiff Fails to Plead But For Causation.

Rhode Island courts "apply the 'but for'" test to causation-in-fact. *Almonte,* 46 A.3d at 18; *see also HNY Holding*, 2004 WL 2075158, at *4 (citing *Gercey v. United States*, 409 F. Supp. 946, 954 (D.R.I. 1976)). Under the but for test, "[t]he defendant's conduct is not a cause of the event[] if the event would have occurred without it." *Gercey*, 409 F. Supp. at 954.

Plaintiff simply cannot allege that if Defendants refrained from producing and selling fossil fuels, climate change would not have occurred, or its injuries would have been avoided. Plaintiff alleges that Defendants' collective production, when combusted, accounted for only 15% of greenhouse gas emissions from fossil fuel combustion since 1965 (though it relies on a fundamentally flawed analysis for this number). Compl. ¶ 97. However, Plaintiff recognizes that it cannot trace its injuries to any specific greenhouse emissions because, as Plaintiff admits, CO_2 emissions "comingle" in the atmosphere. *Id.* ¶ 235. Thus, the "undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time . . . make[s] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time." *Kivalina*, 663 F. Supp. 2d at 880; *see also Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135-36 (D.N.M. 2011) (discussing the untraceable nature of climate change effects to a particular person or entity).

Moreover, fossil fuel supply is elastic and accommodates demand. Plaintiff does not allege that if Defendants had curtailed their production, other producers would not have increased output to meet consumer demand.[22] Other courts have rejected similar climate change claims due to the impossibility of showing that "if there had been a reduction in the amount of greenhouse gases emitted by [Defendants], those reductions would not have been offset by increased emissions elsewhere on the planet." *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 11–cv–41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011).

Because it cannot allege that Defendants' production of fossil fuels caused climate change, or that other producers would not have replaced Defendants' production, Plaintiff asserts only that Defendants' conduct contributed (indirectly) to *total* worldwide emissions, which have collectively caused climate change over more than a century. That is not a "but for" causation allegation. Indeed, when there are "other contributing causes of the harm sustained," a defendant "is not liable unless his or her actions were the *primary cause* of that harm."[23] *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994) (quotation marks omitted and emphasis added) (examining causation requirement in breach of contract action and observing that the "fundamental requirement" that "the breach of contract be the cause in fact of the loss" is "similar to that imposed in tort cases"). Plaintiff makes only conclusory statements suggesting that Defendant's activities were a "substantial factor" in contributing to climate change. Compl. ¶ 199; *see also id.* ¶ 223

[22] Even according to Plaintiff's flawed analysis, producers other than Defendants account for 85% of the world's fossil fuels. *See* Compl. ¶ 97 (attributing 14.5% of the world's fossil fuels to Defendants). Those other producers include independent domestic producers Plaintiff has not sued, state-owned oil companies around the world, and members of the Organization of the Petroleum Exporting Countries, which have voluntarily limited oil production for decades. Plaintiff does not, and could not plausibly, allege that, if the named Defendants here had cut production, state-owned oil companies or other producers would have followed.

[23] Those other contributing causes here include the primary cause acknowledged in the Complaint: the decisions by billions of consumers to combust fossil fuels without sufficient control technologies to fully address climate change.

(stating that, but for Defendant's conduct, the State "would have suffered no or far less injuries and damages than they have endured"). Plaintiff therefore has not pleaded "causation in fact," which is only established when the alleged harm "would not have occurred but for the breach [of a legal duty]." *Russo v. Baxter Healthcare Corp.*, 140 F.3d 6, 10 (1st Cir. 1998) (applying Rhode Island law) (citing Restatement (Second) of Torts § 432(1)).

Plaintiff also argues that Defendants' alleged lobbying efforts (either directly or through trade associations) are somehow responsible for delayed regulatory "action on climate change," and that absent Defendants' conduct, regulatory action would have been taken to "restore[] the earth's energy balance and halt[] future global warming." Compl. ¶ 187. As an initial matter, Plaintiff relies on Defendants' alleged lobbying of the U.S. government, and appears to assume that the United States, unilaterally, could have "halt[ed]" climate change. Even if this dubious proposition were the case, Plaintiff's alternative history theory is too speculative a basis for causation-in-fact. *See Cooley v. Kelly*, 160 A.3d 300, 305 (R.I. 2017) ("[T]he causal connection between negligence and a plaintiff's injury . . . may not be based on conjecture or speculation.") (internal quotation marks omitted). This theory is also undermined by Plaintiff's admission that climate change has been recognized at the highest levels of the U.S. government since at least 1965, when a presidential committee reported that CO_2 emissions driven by fossil fuel use "modify the heat balance of the atmosphere to such an extent that marked changes in climate . . . could occur." Compl. ¶ 103.[24]

Plaintiff has therefore failed to adequately plead but for causation.

[24] As noted below, Plaintiff's "promotion" and "lobbying" theories also seek to premise liability on conduct protected by the First Amendment. *See infra* III.B.5. Among other things, this also prevents such conduct from being a "proximate" or legal cause of climate change, as discussed below.

b) Plaintiff Fails to Plead Legal Causation.

Even if Plaintiff could demonstrate causation-in-fact (which it cannot), it fails to allege facts sufficient to establish proximate causation, which requires Plaintiff to establish that Defendants were "a substantial or primary cause of the plaintiff's injuries." *Wells*, 635 A.2d at 1191. Proximate cause limits "legal responsibility . . . to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Lead Indus.*, 951 A.2d at 451 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 at 264 (5th ed. 1984)). Proximate causation asks "whether legal liability *should* attach, given cause in fact," and "focuses on legal culpability" for the alleged injury. *Am. Commerce Ins. Co. v. Porto*, 811 A.2d 1185, 1195 (R.I. 2002). It requires a "factual finding that the harm would not have occurred but for the [act] and that the harm [was a] natural and probable consequence of the [act]." *Almonte*, 46 A.3d at 18 (quotation marks omitted). As the Rhode Island Supreme Court explained, "[l]iability cannot be predicated on a prior and remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such a condition or occasion." *Lead Indus.*, 951 A.2d at 451 (quotation marks omitted).

Plaintiff seeks to hold a small subset of energy companies liable for the cumulative effects of greenhouse gas emissions worldwide caused by countless independent actors using an entire industry's products for transportation, heat, electricity generation, and countless other uses. Proximate causation requires that the defendant's conduct "in natural, unbroken and continuous sequence produce[] the event about which complaint is made." *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 692 (R.I. 1999). Because the chain of causation that led to Plaintiff's alleged injuries involves the conduct of thousands and thousands of national and local governments around the world, and billions of individual third parties over more than a century, all making separate and

independent decisions about whether, why, how and when to burn fossil fuels, the named Defendants cannot be a proximate cause of Plaintiff's alleged injuries. Plaintiff's claims here are "dependent on a series of events far removed both in space and time from the Defendants'" alleged misconduct. *Kivalina*, 663 F. Supp. 2d at 881.

In rejecting virtually identical climate change claims brought by San Francisco and Oakland, a court recently described plaintiffs' theory as "breathtaking" in scope and noted that it would create liability for "anyone who supplied fossil fuels with knowledge of the problem." *City of Oakland*, 325 F. Supp. 3d at 1022. The doctrine of proximate cause was designed to prevent precisely this kind of all-encompassing liability. *See Lead Indus.*, 951 A.2d at 451 ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.") (quotation marks omitted).

B. Plaintiff's Claims Are Also Barred by Federal Law.

As demonstrated above, the Complaint can and should be dismissed on myriad state law grounds for failure to state a claim. In addition, there are further bases under federal law for dismissal. Courts have repeatedly declined to create a climate change tort of the type Plaintiff asserts here. Such claims call on individual courts to supplant domestic regulation and international agreements that are the province of Congress and the executive branch. And multiple courts have found such claims barred by the Clean Air Act and the foreign affairs doctrine.

Approximately fifteen years ago, various plaintiffs filed the first tranche of climate change cases seeking abatement and damages from utility companies and energy companies. The U.S. Supreme Court shut down those cases when it ruled in *AEP* that Congress, through the CAA, tasked the EPA—and not the courts—with regulating greenhouse gas emissions. *See AEP*, 564 U.S. at 427–28 (affirming dismissal of nuisance claims premised on interstate pollution brought

by eight states, city, and several large land trusts against five large electric power producers, on the basis that the CAA made the EPA the "primary regulator of greenhouse gas emissions," precluding federal judges from "setting emissions standards by judicial decree under federal tort law"). *AEP* rested on earlier decisions that made clear that federal (not state) common law governs "interstate pollution," and that a state cannot apply its law to pollution emanating from sources in other states. *AEP*, 564 U.S. at 421; *Ouellette*, 479 U.S. at 492; *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."); *Kivalina*, 696 F.3d at 855–58 (holding that federal public nuisance claims brought by Alaskan village against oil and gas companies for climate change-related injuries such as rising sea levels were "transboundary pollution" claims to which federal common law applied).[25]

In *Kivalina*, the Ninth Circuit affirmed dismissal of public nuisance claims brought by local governmental entities against a broad array of oil, gas, and coal producers (many of which are named as Defendants here) as well as dozens of electric power producers. 696 F.3d at 856–58. The Ninth Circuit held that such claims were displaced by the CAA because "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Id.* at 856. And in 2006, the State of California brought climate change public nuisance claims against six major automobile manufacturers. The Northern District of California dismissed the case on the basis that it presented a political question and noted the "authority to regulate carbon dioxide lies with the federal government, and more specifically

[25] The plaintiffs in *Kivalina* and *AEP* had alternatively asserted state law claims, but those claims were not considered by the courts on appeal. *See Kivalina*, 696 F.3d at 854–55; *AEP*, 564 U.S. at 429. Following the dismissal of their federal claims, the plaintiffs on remand in both cases did not attempt to pursue any alternative state law claims.

with the EPA as set forth in the CAA." *California v. Gen Motors Corp.*, No. C06–05755 MJJ, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007).

The second round of these climate cases began over two years ago when state and local governmental entities filed more than a dozen identical climate change suits against overlapping groups of oil, gas, and coal companies.[26] Seeking to avoid established law that ended the first round of climate change cases, these new cases pursue a theory of injury *even more attenuated* than the plaintiffs' theories in the first round of cases. Instead of suing companies for producing emissions that contribute to climate change, Plaintiff here has sued companies that produce or sell fossil fuels that eventually are combusted by billions of end users around the world, resulting in the emissions that contribute to climate change and allegedly caused Plaintiff's injury. So far, two courts have reached the merits of these new claims, and both have dismissed for failure to state a claim. *See City of New York*, 325 F. Supp. 3d at 468; *City of Oakland*, 325 F. Supp. 3d at 1019.

Those courts rejected plaintiffs' attempts to distinguish their claims from previously dismissed climate change cases. *City of Oakland*, 325 F. Supp. 3d at 1024 (remarking that although "defendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel," "[t]he harm alleged . . . remains a harm caused by fossil fuel emissions, not the mere extraction or even sale of fossil fuels."); *City of New York*, 325 F. Supp. 3d at 471–73 ("Here, the City seeks damages for global warming-related injuries

[26] *See Cty. of San Mateo v. Chevron Corp*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City & Cty. of San Francisco v. BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pac. Coast Fed. of Fishermen's Ass'ns v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019); *King County v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, No. 18-cv-01672 (D. Colo.).

caused by greenhouse gas emissions resulting from the combustion of Defendants' fossil fuels."). The courts recognized that federal common law controlled and concluded that U.S. Supreme Court and Ninth Circuit precedent rejecting prior attempts to create a climate change tort foreclosed Plaintiff's claims. *City of Oakland*, 325 F. Supp. at 1026–27; *City of New York*, 325 F. Supp. 3d at 475.[27]

Regardless of whether federal or state common law governs Plaintiff's claims, however, the result is the same—Plaintiff's claims are barred. If governed by federal common law, Plaintiff's claims are displaced by the CAA; if governed by state law, they are *preempted* by the CAA because states cannot regulate pollution sources in other states. In addition, because Plaintiff seeks to apply Rhode Island tort law extraterritorially and retroactively to curtail Defendants' lawful out-of-state energy production, its claims are also barred by the foreign affairs doctrine and the Commerce and Due Process Clauses of the U.S. Constitution.

1. Plaintiff's Claims Are Barred by the Clean Air Act.

a) Plaintiff's Federal Common Law Claims Are Displaced Under *AEP*.

First, if Plaintiff's claims are governed by federal common law, as Defendants contend they must be, *see supra* Section III.B, they are displaced by the CAA, as the U.S. Supreme Court concluded regarding similar interstate pollution claims in *AEP*. In the CAA, Congress established a system by which federal and state resources are deployed to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive

[27] This case was removed but the federal court remanded when it found no basis to exercise federal jurisdiction. *Rhode Island*, 393 F. Supp. 3d at 152. In remanding the case, the federal court simply declined to exercise federal jurisdiction and allowed the state court to consider the viability of the claims, including whether federal law barred the claims. *Id.* Similar rulings are reflected in other cases that were removed but remanded to state court. *See generally Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 557 (D. Md. 2019).

Defendants have appealed the federal district court's remand order in this case. *Rhode Island v. Chevron*, No. 19-1818 (1st Cir.).

capacity of its population." 42 U.S.C. § 7401(b)(1). Because "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 & Michigan*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), "federal common law does not provide a remedy" "when federal statutes directly answer the federal question." *Kivalina*, 696 F.3d at 856. The Supreme Court held in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions" or damages due to climate change-related injuries caused by greenhouse gas emissions. *AEP*, 564 U.S. at 424; *see also Kivalina*, 696 F.3d at 857. Two federal district courts applied *AEP* to dismiss identical claims brought in New York and California that were identical to Rhode Island's claims. *See City of New York*, 325 F. Supp. 3d at 473 ("under *AEP* and *Kivalina*, the Clean Air Act displaces the City's claims seeking damages for past and future domestic greenhouse gas emissions brought under federal common law"); *City of Oakland*, 325 F. Supp. 3d at 1024 ("[T]he Clean Air Act and the EPA's authority thereunder to set emission standards have displaced federal common law nuisance claims to enjoin a defendant's emission of greenhouse gases.").

The result is no different for Plaintiff's product liability, trespass, Impairment of Public Trust Resources, and State Environmental Rights Act claims, because like the nuisance claims, each of these claims is aimed at harms allegedly caused by the emission of greenhouse gases and their accumulation in the atmosphere.[28] Because Congress has displaced any remedy available to Plaintiff, Plaintiff cannot state a claim under federal common law.

[28] *See* Compl. ¶¶ 225–37 (nuisance claims based on theory that Defendants' production of oil and gas and deceptive lobbying caused climate change); *id.* ¶¶ 238–50, 273–84 (failure to warn claims based on Defendants' alleged breach of duty to warn of alleged climate change risks posed by use of oil and gas); *id.* ¶¶ 251–72 (design defect claims based on allegation that oil and gas are "unreasonably dangerous" for foreseeable uses and that Defendants had duty to prevent reasonably foreseeable harms from use of their products); *id*. ¶¶ 285–93 (trespass claim based on Defendants allegedly causing sea level rise and other alleged climate change harms); *id.* ¶¶ 294–305 (impairment of public trust resources claim based on allegation that the result of fossil fuel products is injury to "the public trust resources over which the State serves as trustee"); *id.* ¶¶ 306–15 (state environmental rights act claim based on Defendants' alleged damage to Rhode Island's natural resources).

b) Plaintiff's State Common Law Claims Are Preempted Under *Ouellette*.

Second, even if Plaintiff were able to state claims under state law, such claims would be preempted by the CAA because the claims would effectively regulate interstate greenhouse gas emissions. State law must yield to federal law if compliance with both federal and state regulations would be impossible and where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is such a case.The U.S. Supreme Court held more than thirty years ago that the Clean Water Act ("CWA") preempted state law claims for injury from water pollution where the pollutant was discharged into the environment from a point outside of the state where the injury occurred. *See Ouellette*, 479 U.S. at 499 (holding that property owners in Vermont could not apply Vermont law to New York for discharges into Lake Champlain, affecting property owners on the Vermont side). The Court held that the only state law claims "not pre-empted [by the CWA are] those alleging violations of the laws of the polluting, or 'source,' State." *Id.* at 485; *cf*. *Healy*, 491 U.S. at 332 ("a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid"). Because the structure of CAA parallels the structure of the CWA, including containing an analogous savings clause, courts have consistently applied *Ouellette* to find that the CAA preempts state law claims challenging air pollution originating out-of-state. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("claims based on the common law of a non-source state . . . are preempted by the [CAA]"); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190–91 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301 (4th Cir. 2010) (same). Plaintiff has not even attempted to plead its claims under the laws of the state where the allegedly harm-causing

emissions occurred—which would require pleading its claims under the laws of all 50 states. *See Ouellette*, 479 U.S. at 485.

Finally, Plaintiff cannot circumvent the CAA by seeking to hold Defendants liable for the emissions of others. The court in *Oakland* recognized that the CAA displaced federal common law nuisance claims against a party for its own emissions and that, as a result of that displacement, a third party could not be sued as a result of someone else's emissions. 325 F. Supp. 3d at 1024; *see also City of New York*, 325 F. Supp. 3d at 474–75 (finding that claims alleging climate change-related injuries against fossil-fuel producers were predicated on emissions and were displaced by federal law).

2. **Plaintiff's Claims Are Barred by Federal Energy Law.**

Even framed as challenging Defendants' role in fossil fuel *production* rather than emissions, Plaintiff's claims are still displaced by federal law because Congress also has spoken directly to that issue through numerous statutes, including the Energy Policy Act of 2005, the Energy Policy Act of 1992, the Federal Land Policy and Management Act of 1976, the Coastal Zone Management Act of 1972, and the Mining and Minerals Policy Act of 1970, which address, and promote, fossil fuel production and development. *See* 16 U.S.C. § 1451(j); 30 U.S.C. § 21a; 42 U.S.C. §§ 13401, 15927; 43 U.S.C. § 1701(a)(12).

For example, the Energy Policy Act of 1992 provides that "[i]t is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil." 42 U.S.C. § 13401. The statute directs the Secretary of Energy "to increase the recoverability of domestic oil resources," *id.* § 13411(a), and to investigate "oil shale extraction and conversion" in order "to produce domestic supplies of liquid fuels from oil shale," *id.* § 13412. The 2005 Act declared it "the policy of the United States that . . . oil shale, tar sands, and other unconventional fuels are

strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports," *id.* § 15927(b), and offered financial incentives to fossil fuel producers to increase domestic fossil fuel production. Even the tax code encourages the extraction and refining activities of fossil fuel companies in order to promote production. *See* I.R.C. §§ 263(c), 613A(c)(1), 617.

The cited legislation directly addresses, and refutes, the proposition that Defendants' fossil fuel production and related activities are "unreasonable" or tortious because of the potential threat of climate change. Plaintiff's claims challenging these activities are therefore displaced. *See City of Oakland*, 325 F. Supp. 3d at 1025 ("[N]ot long ago, the problem wasn't too much oil, but too little, and our national policy emphasized the urgency of reducing dependence on foreign oil.").

3. Plaintiff's Claims Are Barred by the Foreign Affairs Doctrine.

Just as Plaintiff may not use Rhode Island tort law to regulate fossil fuel production and greenhouse gas emissions in other states, Plaintiff may not use Rhode Island law to regulate these activities worldwide. The foreign affairs doctrine preempts state law that would "impair the effective exercise of the Nation's foreign policy." *Garamendi*, 539 U.S. at 419 (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)); *see also United States v. Pink*, 315 U.S. 203, 230–31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."). This prohibition extends to state law causes of action.

Plaintiff's claims would interfere with the U.S. Government's conduct of foreign policy, now and prospectively, which includes efforts to address climate change and the allocation of costs through multilateral negotiations. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 119–20 (2d Cir. 2010). Efforts to address climate change, including in a variety of multilateral

fora, have been an important element of U.S. foreign policy and diplomacy for decades.[29] The U.S. is a party to the United Nations Framework Convention on Climate Change ("UNFCCC"), which aims to stabilize greenhouse gas concentrations while also enabling sustainable economic development. UNFCCC (1992), art. 2, https://unfccc.int/resource/docs/convkp/conveng.pdf. The United States also has acted at the national level to address climate change while balancing key economic and social interests. In 1978, Congress established a "national climate program" to improve the country's understanding of climate change through enhanced research, information collection and dissemination, and international cooperation. *See* Nat'l Climate Program Act, 15 U.S.C. §§ 2901 *et seq.* In the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of climate change and directed the Secretary of State to coordinate U.S. negotiations on this issue. *See id.* § 2901(5); *see also id.* § 2952(a). Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of GHG emissions. *See id.* § 13389(c)(1); id. §§ 17001 *et seq.*

Indeed, that claims like those brought by Plaintiff have the potential to interfere with the government's conduct of foreign affairs is underscored by the United States' filing an amicus brief in *City of Oakland* highlighting that case's "potential to shape and influence broader policy questions concerning domestic and international energy production and use." Br. for the United States as Amicus Curiae at 1, *City of Oakland v. BP P.L.C.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The United States filed a similar amicus brief in the Second Circuit appeal

[29] *See* Nat'l Climate Program Act of 1978, 15 U.S.C. § 2901, *et seq*. (establishing "national climate program" to improve country's understanding of climate change through research and international cooperation); Global Climate Protection Act, Title XI of Pub. L. 100-204, 101 Stat. 1407 (1987), note following 15 U.S.C. § 2901 (recognizing uniquely international character of climate change and directing Secretary of State to coordinate U.S. negotiations on the issue); 15 U.S.C. § 2952(a) (prompting President to "direct the Secretary of State . . . to initiate discussions with other nations leading toward international protocols and other agreements to coordinate global change research activities").

of *City of New York*, noting that "international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders," and argued that "[a]pplication of state nuisance law . . . would substantially interfere with the ongoing foreign policy of the United States." Br. for the United States as Amicus Curiae at 15–16, *City of New York v. BP P.L.C.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019).

The need to balance greenhouse gas regulation with the benefits of fossil fuels continues to be a subject of debate in the U.S. Government and presumably will remain so, as different administrations come and go. *See, e.g.*, S. Res. 98, 105th Cong. (1997) (unanimous resolution of the U.S. Senate urging the President not to sign the Kyoto Protocol if it would cause serious harm to the U.S. economy or fail to sufficiently reduce other countries' emissions).[30] As the district court dismissing virtually identical claims brought by the City of Oakland explained, "Global warming is already the subject of international agreements," and the "United States is also engaged in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework." *City of Oakland*, 325 F. Supp. 3d at 1026; *see also City of New York*, 325 F. Supp. 3d at 475 (climate change "is the subject of international agreements, including—although the United States has expressed its intent to withdraw—the Paris Climate Accords.").

[30] *See also* The White House, Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/; The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord (announcing United States withdrawal from Paris Climate Accord based on financial burdens, energy restrictions, and failure to impose proportionate restrictions on Chinese emissions); Emre Peker, *Trump Administration Seeks to Avoid Withdrawal from Paris Climate Accord*, The Wall Street Journal (Sept. 17, 2017), https://on.wsj.com/2frk9h4 (focus is on negotiating "a better deal for the U.S.").

Plaintiff asks this Court to abate a purported nuisance allegedly attributed to global emissions resulting from the global combustion of fossil fuels, and suggests that a global cap of "15% annual reduction" in CO_2 emissions would be required to do so. Compl. at 140 (Prayer for Relief), ¶ 187. But neither the Plaintiff nor the courts can determine or enforce what they believe to be "reasonable" global emissions levels because the Constitution and our laws vest foreign relations authority in the executive branch. *See AEP* 564 U.S. at 427–29 (dismissing claim that would have required "setting emissions standards by judicial decree" and explaining the "appropriate amount" of greenhouse gas emissions is a "question of … international policy," where "informed assessment of competing interests is required" including "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption …."); *City of Oakland*, 325 F. Supp. 3d at 1025–26 (recognizing that resolution of climate change claims would "require a balancing of policy concerns" that "demand[s] the expertise" of the political branches). Because Plaintiff's claims would "undermine[] the President's capacity . . . for effective diplomacy" by "[c]ompromis[ing] the very capacity of the President to speak for the Nation," the foreign affairs doctrine preempts them. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

4. Plaintiff's Claims Are Barred by the Commerce Clause.

Because the relief the State seeks would have "the practical effect" of "control[ling] conduct beyond the boundaries of [Rhode Island]," its claims also are barred by the Commerce Clause, which "protects against inconsistent legislation arising from the projection of one state

regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336–37; *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69–70 (1st Cir. 1999).[31]

The Complaint alleges that Defendants wrongfully "manufactured, promoted, marketed, and sold . . . fossil fuel products" around the world, and that this "worldwide" conduct has injured Plaintiff. Compl. ¶ 197; *see, e.g.*, *id*. ¶ 23(b) (noting BP production in Trinidad, India, and the Gulf of Mexico); *id.* ¶ 28(b) (noting Hess production in Denmark, Equatorial Guinea, Malaysia, Thailand, and Norway). Plaintiff's "breathtaking[ly]" broad theory of liability "would reach the sale of fossil fuels anywhere in the world." *City of Oakland*, 325 F. Supp. 3d 1022. The damages and equitable relief Plaintiff seeks would necessarily regulate fossil fuel extraction and production far beyond Rhode Island's boundaries.

Indeed, if this Court awarded "abatement of the nuisances" that Plaintiff alleges Defendants created, Compl. at 140 (Prayer for Relief), it would necessarily regulate—and could bring an end to—Defendants' lawful business activities in other states, which presumably have their own different interests in regulating conduct within their borders. Because the vast majority of the activity the Complaint targets occurs outside of Rhode Island, Plaintiff's abatement remedy would require the regulation of out-of-state conduct. But no state may use its tort law to "impos[e] its regulatory policies on the entire nation," because "one State's power to impose burdens on the interstate market" is "constrained by the need to respect the interests of other States." *BMW of N. Am. v. Gore ("BMW")*, 517 U.S. 559, 571, 585 (1996).

[31] Plaintiff's claims are also barred because the requested relief would burden foreign as well as interstate commerce. *See Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 449 (1979) ("The need for federal uniformity is . . . paramount in ascertaining the negative implications of Congress' power to regulate Commerce with foreign Nations under the Commerce Clause.") (quotations omitted); *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) ("It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.").

Plaintiff's request for monetary damages does not allow it to circumvent the regulatory effect and limitations of an abatement remedy, because a money damages award would have the same practical effect as abatement. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also BMW*, 517 U.S. at 572 n.17 ("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."). If Defendants' lawful business models were found to be a nuisance—or if their products are deemed defective—every day of continued, lawful production would give rise to new claims, and therefore perpetual liability, until the business model is terminated. *See Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 48 (D. Me. 1994) (holding that "[a]s long as the nuisance continues unabated, a plaintiff may bring successive actions for damages throughout its continuance . . . with the statute of limitations providing no bar, again since the tort is ongoing.") (internal citation omitted); *Ouellette*, 479 U.S. at 495 (recognizing that damages addressing common law environmental tort claims often force defendants to "change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability").

In short, whether this Court were to impose an injunction or award the damages Plaintiff seeks, the relief requested by Plaintiff would "directly control" commerce occurring wholly outside Rhode Island, in violation of the Commerce Clause. *Healy*, 491 U.S. at 336; *see also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) ("Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce."). Moreover, the "practical effect" of state action "must be evaluated" by considering "what effect would arise if not one, but many or every, State adopted" similar policies. *Healy*, 491 U.S. at 336. This is

more than a theoretical concern—there are a dozen other nearly identical cases pending in Maryland, New York, Washington, California, Colorado, among other states.

Courts must also consider how one state's regulations "may interact with the legitimate regulatory regimes of other States," many of which depend heavily on the production of petroleum resources for their economic prosperity and security. *Healy*, 491 U.S. at 336. Although Rhode Island is free to impose stricter limitations on the production and use of fossil fuels within its *own* borders, Plaintiff may not use the hammer of state tort law to "impose its own policy choice on neighboring states," let alone every state in the country. *BMW*, 517 U.S. at 571. Indeed, even where a law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it will not be upheld if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A judgment in Plaintiff's favor would have far more than incidental effects on interstate commerce. The nation's economy depends on fossil fuels for heat, energy, transportation, agriculture, defense, and many other necessities. The local interests of any one state cannot outweigh the massive burdens, shouldered not only by Defendants, but by the entire country with respect to the economy, national security, transportation, and even the ability to heat one's home and cook food, that would result if Plaintiff succeeds in effectively shutting down the fossil fuel industry. Therefore, Plaintiff's requested judgment would impose the type of excessive burdens on interstate commerce that the Constitution forbids.

5. Plaintiff's Claims Are Barred by the Due Process Clause.

Plaintiff does not allege that Defendants have violated *any* of the numerous federal and state laws regulating the extraction, production, promotion, or sale of fossil fuels. Yet it seeks massive damages based on emissions resulting from the use of products Defendants lawfully

produced and sold across the country and around the world for decades. *See* Compl. ¶¶ 2, 178, 185, 232, at 140 (Prayer for Relief). Imposing such extraordinary extraterritorial and retroactive liability on lawful, government-encouraged conduct would constitute "a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).[32]

Due process forbids States from "punish[ing] a defendant for conduct that may have been lawful where it occurred"—and there is no dispute that Plaintiff's suit seeks to impose liability based on conduct that was (and still is) legal where it occurred, in other states and around the globe. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (collecting cases). Due process similarly prohibits a state from "impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 517 U.S. at 572; *see also id.* at 573 (state could not "punish BMW for conduct that was lawful where it occurred" or "impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions"). This is effectively what Rhode Island seeks to do here by seeking damages and abatement predicated on violations of Rhode Island tort law based on Defendants' conduct in other states.

Due process also strongly disfavors the imposition of retroactive liability for lawful conduct because it deprives citizens of proper notice and upsets reasonable expectations. Plaintiff seeks to impose such retroactive liability here for production, promotion, and emissions going back decades. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (striking down a retroactive rule) (collecting cases); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (noting that retroactive legislation presents "problems of unfairness that are more serious than . . . prospective legislation"). In *Eastern Enterprises*, the Court invalidated a federal statute that made

[32] Such remedy is prohibited by the due process clause of both the U.S. Constitution and the Rhode Island Constitution. *See L.A. Ray Realty v. Town of Cumberland*, 698 A.2d 202, 218 (R.I. 1997) (" Rhode Island's constitution now includes the due process protections that are part of the Fourteenth Amendment to the United States Constitution.").

coal companies retroactively liable for the medical costs of former coal miners. The plurality struck down the statute because it "improperly place[d] a severe, disproportionate, and extremely retroactive burden on Eastern." *E. Enters.*, 524 U.S. at 538. Plaintiff demands similarly severe and disproportionate damages for Defendants' decades-old conduct, which was lawful at the time and remains lawful today. Because the State seeks to impose massive extraterritorial and retroactive liability based on Defendants' lawful conduct over many decades, its claims should be dismissed.

6. Plaintiff's Claims Are Barred by the First Amendment.

Finally, Plaintiff's claims also should be dismissed because they seek to punish Defendants for protected speech. According to Plaintiff, "[t]his case is about a campaign of deception and denial perpetrated by" Defendants. Conf. Tr. at 9:9-10, Nov. 7, 2019. Plaintiff asserts that the "instrumentality of the nuisance" here is Defendants' "misrepresentations" and the "promotion and sale" of their products. *Id.* at 10:9-10, 13:17. In support of this contention, Plaintiff alleges that "Defendants embarked on a concerted public relations campaign to cast doubt on the science connecting global climate change to fossil fuel products and greenhouse gas emissions, in order to influence public perception of the existence of anthropogenic global warming . . . ." Compl. ¶ 153.

While the Complaint alleges that these efforts included advertising campaigns and educational activities, *see, e.g., id.* ¶¶ 153, 156, 158, 163, it fails to tie each Defendant to such efforts or establish that such activities were directed at Rhode Island. The Complaint makes general allegations about "Defendants'" conduct, and attempts to tie various Defendants to a number of think tanks and industry groups, but does not present statements attributable to all Defendants. *See, e.g., id.* ¶¶ 154–68. Further, for the few statements Plaintiff *has* identified as attributable to a Defendant, there has been no showing that any statements targeted Rhode Island. Unlike in *Purdue Pharma*, where Plaintiff alleged opioid manufacturers funneled excessive

pharmaceuticals into Rhode Island specifically, causing injury in Rhode Island, 2019 WL 3991963, at *10, Plaintiff here only alleges that Defendants' marketing efforts misrepresented the impacts of climate change on "coastal communities, including Rhode Island." Compl. ¶¶ 173, 177.

To the extent Plaintiff premises its deceptive promotion theory on Defendants' lobbying activity,[33] that speech also is protected under the First Amendment and beyond the reach of any state's tort law. U.S. Const. amend. I.; *see E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961) (holding that lobbying activity is protected from civil liability); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965) (same). In adopting the *Noerr-Pennington* principles as applying to Rhode Island law, the Rhode Island Supreme Court stated "[t]he [U.S.] Supreme Court has long recognized the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment and that it is our tradition to allow the widest room for discussion, the narrowest range for its restriction." *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 62 (R.I. 1996)) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 765 (1976).[34]

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[33] *See*, *e.g.*, Compl. ¶ 151 (alleging Defendants attempted "to undermine national and international efforts, like the Kyoto Protocol, to rein in greenhouse gas emissions").

[34] Plaintiff seeks to hold Defendants liable on various tort theories because they allegedly "[d]isseminat[ed] and fund[ed] the dissemination of information intended to mislead . . . regulators," Compl. ¶ 229(d), and "engag[ed] in a campaign of disinformation regarding global warming," which "prevented . . . regulators . . . from taking steps to mitigate the inevitable consequences of fossil fuel consumption." *Id*. ¶ 267(d); *see also id*. ¶¶ 1, 6, 10, 149, 166, 172, 196, 199, 254, 267(b). While Defendants dispute the allegation that they misled anyone, *Noerr-Pennington* immunity applies even where it is alleged that "the campaign employ[ed] unethical and deceptive methods." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988); *see also New West, L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("[T]he holding of *Noerr* is that lobbying is protected whether or not the lobbyist used deceit.").

The *Noerr-Pennington* doctrine and the Strategic Litigation Against Public Participation ("anti-SLAPP") Act conditionally immunize "all legitimate petitioning activity that becomes the subject of a punitive civil claim." *Hometown Props.*, 680 A.2d at 60, 62–63; R.I. Gen. Laws § 9-33-2 ("A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims."). The statements that Plaintiff cites cannot be the basis for liability whether they attempt to shoehorn them into a public nuisance or any other tort theory. The First Amendment and *Noerr-Pennington* doctrine foreclose Plaintiff's claims to the extent they are based on Defendants' lobbying and marketing statements.

IV. CONCLUSION

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

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Reviewer: Carol M.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I filed and served this document through the Rhode Island Judiciary's Electronic Filing System on all counsel who are registered for e-service. This document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Ryan M. Gainor