MAYOR AND CITY COUNCIL OF BALTIMORE	*	IN THE
	*	CIRCUIT COURT
Plaintiff,		
v.	*	FOR BALTIMORE CITY
BP P.L.C., *et al.*	*	Case No. 24-C-18-004219
Defendants.	*	

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

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The Mayor and City Council of Baltimore ("the City") respectfully submits this opposition to Defendants' Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted.[1]

I. INTRODUCTION

Climate change is already causing enormous harms to the City of Baltimore ("Baltimore") and its public infrastructure.[2] Applying established state law principles and traditional tort remedies, the City's Complaint seeks to help the City and its taxpayers survive the devastating effects felt in Baltimore. The Fourth Circuit accurately summarized the City's allegations in its opinion affirming the remand order that returned this case to state court:

> Defendants substantially contributed to climate change by producing, promoting, and (misleadingly) marketing fossil fuel products long after learning the dangers associated with them. Specifically, Baltimore alleges that, despite knowing about the direct link between fossil fuel use and global warming for nearly fifty years, Defendants have engaged in a "coordinated, multi-front effort" to conceal that knowledge; have tried to discredit the growing body of publicly available scientific evidence by championing sophisticated disinformation campaigns; and have actively attempted to undermine public support for regulation of their business practices, all while promoting the unrestrained and expanded use of their fossil fuel products.

Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020), *petition for cert. filed* (Mar. 31, 2020) ("*Baltimore*"). Defendants' wrongful conduct has substantially contributed to the growing need to rebuild public infrastructure in the face of climate change-related harms, and the City asks that Defendants pay their share to remedy those local injuries.

Contrary to Defendants' assertions, the City has not pleaded a novel "'climate change' tort" and is not seeking to stop global carbon dioxide emissions or rewrite current or future climate change policies. *See* Defendants' Motion to Dismiss for Failure to State a Claim for Which Relief

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[1] Per stipulation, the parties are briefing motions to dismiss for lack of personal jurisdiction separately.

[2] In this memorandum, the words "City" and "Plaintiff" refer to the Mayor and City Council of Baltimore, unless otherwise stated. The word "Baltimore" refers to Baltimore City's geographic area, and specifically non-federal lands within its boundaries, unless otherwise stated.

Can Be Granted, PC-2018-4716, at 2 (Feb. 7, 2020) ("Mot."). This is a Maryland state law action arising under public nuisance, other common law claims, and the Maryland Consumer Protection Act, to remedy specific harms to Baltimore. Each of the City's claims is supported by detailed factual allegations, and each element of those claims is pleaded expressly and with specificity.

Maryland law has long recognized that companies may be held liable when their conduct is a substantial factor in creating or contributing to a nuisance, and the City's allegations state public and private nuisance claims. *See* Part IV.A.1, *infra*. Any "defendant who created or substantially participated in the creation of the nuisance may be held liable," particularly where, as here, that defendant "had extensive knowledge of the environmental hazards associated with [its products]," "intentionally and deceptively promoted [those products] despite this knowledge," and "failed to warn" consumers and the public of those dangers. *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 468 (D. Md. 2019) ("*Exxon*") (denying motion to dismiss public nuisance claim against manufacturers over groundwater contamination from gasoline additive MTBE); *see also Mayor & City Council of Baltimore v. Monsanto Co.*, No. RDB-19-0483, 2020 WL 1529014 (D. Md. Mar. 31, 2020) ("*Monsanto*") (denying motion to dismiss public nuisance claim against manufacturer for PCB water contamination). Although the City is not required to allege special harm as a public entity, it alleges special harm to City property, including by identifying the increased burden and expense of maintaining municipal infrastructure, addressing public health impacts, and planning for and mitigating the impacts from climate change in Baltimore that Defendants' challenged conduct has unleased upon the City. *See* Part IV.A.1.a.2, *infra*.

Defendants' position that there can be no nuisance because fossil fuels are not illegal is meritless. No law authorizes a company to produce and promote fossil fuels at levels they knew would be harmful; no law authorizes misleading and deceptive marketing of products that the

manufacturer or marketer knows to be dangerous; and no law authorizes a multi-decade campaign of deceit to undermine public confidence in climate-related science to prolong or increase the use of the companies' products at the expense of other, safer alternatives. *See, e.g.*, *Exxon*, 406 F. Supp. 3d at 420 (denying motion to dismiss nuisance claim for contamination by lawful fuel additive). *See* Part IV.A.1.c, *infra*.

Defendants' other Maryland law arguments also fail. Defendants are liable for wrongfully marketing and promoting products they knew would cause climate change: they knew what the harmful consequences would be, but callously engaged in a comprehensive campaign to discredit the relevant scientific evidence and failed to issue *any* warnings that would have enabled the public to mitigate those harms going forward. *See* Part IV.A.2, *infra*. Defendants are liable for trespass because they knowingly caused invasions onto the City's real property, including by rising seawaters. Nothing in Maryland trespass law requires Defendants themselves to have physically encroached upon the City's land before liability attaches. It is enough that that their products have a connection with that encroachment, as the City alleges. *See* Part IV.A.3, *infra*. Defendants violated the Maryland Consumer Protection Act because they engaged in deceptive trade practices that falsely promoted their products without providing warnings about the harmful effects they had internally acknowledged for years. *See* Part IV.A.4, *infra*. And the City properly alleges that Defendants' conduct was a proximate cause of each claimed injury. *See* Part IV.A.5, *infra*.

Defendants' federal law arguments fare no better. The federal district court in this case already rejected Defendants' argument that the City's state law claims are "governed by" federal common law. *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 554–58 (D. Md. 2019), *as amended* (June 20, 2019), *aff'd on other grounds*, 952 F.3d 452 (4th Cir. 2020), *petition for cert. filed* (Mar. 31, 2020) ("*Baltimore*"). Because the City's claims do not arise under

federal common law, they cannot be "displaced" by any federal statute. *See* Part IV.B.1, *infra*. The City's claims are likewise not preempted by the federal Clean Air Act ("CAA"). State law governs unless preempted by federal statutes, and nothing in the CAA's scope even applies to this case, since the City does not challenge any point source emissions in Maryland or elsewhere, does not seek to modify or revoke any permit issued under the CAA, and does not seek to modify any emissions standard. *See* Part IV.B.2, *infra.*

Nothing in the hodgepodge of federal energy statutes cited by Defendants preempts the City's claims either. Those statutes broadly recite federal policy regarding oil and gas development, and the City's claims do not conflict with them or stand as an obstacle to any of Congress's objectives. *See* Part IV.B.3, *infra.* Nor do the City's claims conflict with the dormant Commerce Clause, because they do not seek to control out-of-state commercial activities, but rather merely seek local remedies for local harms. *See* Part IV.B.4, *infra.* The foreign affairs doctrine only prohibits state action that directly attempts to craft competing foreign policy, which the City's Complaint plainly does not do. *See* Part IV.B.5, *infra.* The Due Process Clause does not bar the City's claims either, because this case does not involve retroactive application of any statutory or common law rule and because it was entirely foreseeable that Defendants' wrongful conduct would be actionable. *See* Part IV.B.6, *infra.* Finally, the First Amendment does not protect misleading or untruthful speech, particularly commercial speech, which is what the City is challenging here. *See* Part IV.B.7, *infra.*

II. BACKGROUND

A. Defendants Knowingly Obscured the Dangers of Climate Change Caused by Their Fossil Fuel Products, and Misled the Public, for a Half Century.

Defendants have known for more than 50 years that their oil, gas, and coal products, when used as promoted, create greenhouse gas pollution that warms the oceans, changes our climate,

and causes sea levels to rise. Complaint ¶¶ 1, 5, 103–40[3] (describing fossil fuel industry research between 1958 and 1998). As early as 1968, for example, a report commissioned by the American Petroleum Institute ("API") for its members, including many of Defendants here, concluded that "there seems no doubt that the potential damage to our environment [from burning fossil fuels] could be severe," including "melting of the Antarctic ice cap, a rise in sea levels, warming of the oceans and an increase in photosynthesis." ¶ 107. A supplement prepared by the same authors the following year predicted atmospheric CO_2 concentrations in the year 2000 with near-pinpoint accuracy, warning that the "balance between environmental sources and sinks has been disturbed by the emission to the atmosphere of additional CO_2 from the increased combustion of carbonaceous fuels" and that it was "unlikely that the observed rise in atmospheric CO_2 has been due to changes in the biosphere," rather than fossil-fuel combustion. ¶ 108.

By 1977, Exxon scientists had warned the Exxon Corporation Management Committee that "[t]here is general scientific agreement that the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels," and that "[m]an has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical." ¶ 112. Defendants' internal research provided them with more detailed and precise knowledge in the subsequent years—which they withheld rather than sharing it with the public. *See* ¶¶ 113–40 (describing research efforts between 1978 and 1998). By the 1980s, Defendants were taking steps to protect their own corporate assets from rising seas and extreme storms (e.g., raising the height of planned deep-sea platforms to protect against high seas and more intense storms), and developing new technologies to profit economically from

[3] Unless otherwise specified, all citations herein beginning with "¶" refer to paragraphs in the City's Complaint.

the global warming they knew was coming (e.g., patenting technologies to allow drilling in arctic areas that would become accessible with reduced sea ice and glaciers). ¶¶ 5, 171–76.

Despite knowing about the inevitable global-warming consequences of using their fossil-fuel products as promoted, Defendants for decades engaged in a coordinated, multi-front effort to conceal and dispute these known truths, to discredit the growing body of publicly available science, and persistently to create doubt in the minds of customers, consumers, regulators, and the media about the causes of the growing evidence of worldwide climate change. ¶¶ 141–70. An API memorandum from 1998, for example, outlined Defendants' strategy, stating that unless "climate change becomes a non-issue . . . there may be no moment when we can declare victory for our efforts," and that "[v]ictory will be achieved when . . . average citizens 'understand' (recognize) uncertainties in climate science; [and when] recognition of uncertainties becomes part of the 'conventional wisdom.'" ¶ 158. Starting in 1988, Defendants launched multi-million-dollar public relations campaigns to deny the existence or consequences of global warming; create a false "controversy" surrounding the very facts that their internal communications had accepted as scientific reality; and deceive the public in order to continue aggressively marketing and promoting the increased—and increasingly profitable—use of their fossil-fuel products. ¶¶ 162–67. *That* is what this case is about.

B. The City and Its Residents Have Suffered and Will Continue to Suffer Tremendous, Wide-Ranging Harms.

The impacts of global warming are readily observable. Sea levels are rapidly rising due to the oceans' thermal expansion and the melting of polar ice, ¶¶ 46–60; the atmosphere is warming, causing fewer cold days and more frequent extreme heat days, ¶¶ 61–68; and the frequency and intensity of storms are increasing, as are periods of drought, ¶¶ 69–85, among other changes.

Baltimore and its residents are particularly vulnerable to the localized effects of climate change, which they have already begun to experience. Baltimore sits on 60 miles of waterfront, where there are greater-than-average rates of rising sea levels, and which "will continue to rise significantly." ¶¶ 58–59, 196. The City "will continue to experience injuries due to . . . more frequent and intense precipitation events and associated floods," causing infrastructure damage imposing significant costs for city planning and remediation. ¶ 201–06. "Baltimore is and will continue to be impacted by increased temperatures," and "is already experiencing a . . . shift toward winters and springs with more extreme precipitation events contrasted by hotter, drier, and longer summers." ¶ 16; *see also* ¶¶ 72–74, 76–83. Baltimore is now expected to see more excessive heat days, from an average of 8 to 45 per summer, resulting in serious public health risks and increased stress on its electricity grid as more electricity is required for cooling. ¶ 208; *see also* ¶¶ 67, 68.

The City has suffered and will continue to suffer severe flooding, ¶¶ 80–82, 202–03; damage to public roads and railways, ¶ 199; power outages and other damage to public energy infrastructure, ¶ 206; damage to the Inner Harbor and public ports, ¶ 197; flooding and damage to stormwater and sewage management infrastructure, ¶ 204; and expenses in planning and preparing for, treating and responding to, and educating residents about public health impacts associated with extreme weather, heat, vector-borne illnesses, and sea-level rise, ¶ 210. Each of these impacts interferes with the health, safety, peace, comfort, or convenience of Baltimore's residents.

The City's complaint, in eight causes of action, alleges that Defendants' tortious conduct was a substantial factor in creating this crisis and that Defendants must be held legally responsible for remedying the consequences to the City of their deliberate and wrongful conduct.

III. LEGAL STANDARD

"In reviewing a motion to dismiss, [the court] accept[s] all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party . . . because the object of a motion to dismiss is to argue that relief could not be granted on the facts alleged as a matter of law." *Sprenger v. Pub. Serv. Comm'n of Md.*, 926 A.2d 238, 249–50 (Md. 2007) (internal citations and quotations omitted). "In the end, dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ruffin Hotel Corp. of Md. v. Gasper*, 17 A.3d 676, 687 (Md. 2011) (quotations and alterations omitted). "[I]n determining whether a petitioner has alleged claims upon which relief can be granted, there is a big difference between that which is necessary to prove the commission of a tort and that which is necessary merely to allege its commission, and, when that is the issue, the court's decision does not pass on the merits of the claims; it merely determines the plaintiff's right to bring the action." *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 264–65 (Md. 2007) (citations, quotations, and alterations omitted).

IV. ARGUMENT

A. The City Pleads Actionable Claims Under Maryland Law.

1. The City's Complaint Sufficiently Pleads Its Nuisance Claims.

a) The City's Complaint States a Claim for Public Nuisance.

Maryland applies the definition of public nuisance from the Restatement (Second) of Torts § 821B: "A public nuisance is an unreasonable interference with a right common to the general

public."[4] *See Tadjer v. Montgomery Cty.*, 479 A.2d 1321, 1327 (Md. 1984); *Gallagher v. H.V. Pierhomes, LLC*, 957 A.2d 628, 639–40 (Md. Ct. Spec. App. 2008) (same).

The City alleges that Defendants' tortious overproduction, overpromotion, and profligate sale of fossil fuel products, combined with their concerted operation to misinform the public and conceal the fact that their products cause devastating changes to the climate, has caused severe and unreasonable interference with the City's public rights (*see, e.g.*, ¶¶ 140, 169–70, 193, 221, 226), including public waterfront and harbor access, public roads, public transit services, police and fire infrastructure, storm water and sewer systems, and public utilities (*see* ¶¶ 191–217), and that the City has suffered resulting injuries, including damage to its real and personal property, increased costs including from maintenance expenses, emergency services, and public health services, and increased planning and mitigation costs (*see, e.g.*, ¶¶ 204–215). These allegations more than meet the City's pleading burden.

(1) *Defendants' Conduct Invades Rights Common to the Public.*

"A public right is one common to all members of the general public, rather than one peculiar to one individual, or several." *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 251 (D. Md. 2000) (quotations omitted). Public rights encompass "the public health, the public safety, the public peace, the public comfort or the public convenience." *Tadjer*, 479 A.2d at 1327–28 (quoting Rest. § 821B). That is why "pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water," may not be public nuisance, while pollution that "prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish," clearly is. *Id.* at 1328 (quoting Rest. § 821B, cmt. g). Access

[4] Unless otherwise noted, all references to the "Restatement" herein refer to the Restatement (Second) of Torts.

to roadways, waterways, and natural resources are well-recognized public rights. *See, e.g.*, *Adams*, 193 F.R.D. at 256 (flammable gas leak interfered "with the common right of the general public to have free access to public roads and sidewalks . . . without the threat of an explosion").

The interests that Defendants' conduct infringes upon fall squarely within the traditional categories of public rights. *See generally* ¶¶ 191–217. Baltimore is already experiencing the consequences of rising sea levels, ocean temperatures, ocean acidity levels, average land temperatures and extreme heat days, as well as more frequent and severe storm events, including hurricanes and flash floods, all of which harm public health, safety, comfort, and public order. ¶ 8; *see also* Part II.B, *supra*. These and other impacts threaten to overwhelm public roads, public transit systems, storm water infrastructure, public utilities, communications infrastructure, drinking water infrastructure, public health infrastructure, and cultural sites, as well as real property and other assets the use and enjoyment of which is shared equally by the public. *See* ¶¶ 8, 16, 86–90, 201–09; *see also* Part II.B, *supra*. The Complaint therefore alleges that Defendants have wrongfully interfered with rights belonging to the public at large.[5]

(2) *The City Need Not Allege Special Harm.*

Defendants contend that the Complaint should be dismissed because of a purported failure to allege "special damages" to the city, different in kind from those suffered by the public. Mot. at 15–16. Under the Restatement sections adopted in Maryland, however, "'a public official or public agency' that 'represent[s] the state or a political subdivision in the matter' need not show special

[5] Defendants' suggestion that the Complaint only pleads a "right not to be defrauded," Mot. at 14, ignores the detailed allegations of injuries to a broad range of well-recognized public rights resulting from Defendants' promotion, marketing and sale of fossil fuels *in conjunction with* their campaign to downplay and deny the link between those products and their known climate-related dangers. *See* Part II.B, *supra*; ¶¶ 140, 169–70, 193, 221.

harm."[6] *Monsanto*, 2020 WL 1529014, at *9 (quoting Rest. § 821C(2)(b)). All of Defendants' authorities concern actions brought by private, non-governmental plaintiffs and are thus inapposite. *Cf. Ray v. Mayor & City Council of Baltimore*, 59 A.3d 545, 557 (Md. 2013) (under Restatement § 821C, a "private individual" must suffer special harm to state a claim for public nuisance). The "special harm" or "special injury" element of public nuisance does not apply to the City's claims.

(3) *Nevertheless, the City Alleges Special Harm.*

Even if the City were required to allege it has suffered special harms—and it is not—it meets that burden. The City's Complaint alleges special injuries ranging from harm to City assets, infrastructure, and roadways that have suffered and will suffer damage due to sea level rise and associated flooding (¶¶ 199, 214); increased costs of irrigation due to summer droughts and heatwaves (¶ 207); increased expenses to educate the public and implement policies to mitigate and adapt to climate change impacts, including promoting water efficiency and renewable energy (¶ 212); and expenses in planning and preparing for, treating and responding to, and educating residents about the public health impacts" of climate change, including resulting heat-induced illnesses, vector-borne illnesses, and flooding related injuries, ¶¶ 209–10. Importantly, the City has "incurred and will incur significant expenses related to planning for and predicting future sea level rise-related and hydrologic cycle change-related injuries to its real property, improvements thereon, municipal infrastructure, and citizens, and other community assets," ranging from

[6] Some cases analyze special injury in the context of whether an entity has standing to bring a public nuisance claim. *See, e.g., United Food & Comm. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 137 A.3d 355, 372 (Md. Ct. Spec. App. 2016) (discussing whether plaintiff "suffered a special injury different in kind from that suffered by the public generally, so as to give it standing to sue for public nuisance"), *aff'd*, 162 A.3d 909 (Md. 2017). Defendants do not challenge the City's standing.

"disruption to electrical and communications utilities within Baltimore" to "significantly increase[d] costs of maintaining, replacing and repairing roads," due to "increased flooding, higher temperatures, and elevated freeze-thaw cycles." ¶¶ 201, 213.

Accepting these allegations as true, as the Court must, the City has met any possible burden to plead special injuries from Defendants' public-nuisance-causing activities. *See Monsanto*, 2020 WL 1529014, at *9 (impacts from PCB contamination to municipal stormwater system and the City's impervious surface restoration efforts constitute special harm). These impacts are "different not merely in degree, but different in kind, from that experienced in common with other citizens," entitling the City to relief. *Hoffman v. United Iron & Metal Co., Inc.*, 671 A.2d 55, 64 n.9 (Md. Ct. Spec. App. 1996); *see also* Rest. § 821B, cmt. c. ("When the public nuisance causes . . . physical harm to [a plaintiff's] land or chattels, the harm is normally different in kind from that suffered by other members of the public and the [public nuisance] action may be maintained.").

(4) *The Alleged Harms to Public Rights Are Clearly Unreasonable.*

In determining what constitutes an "unreasonable" interference with public rights, Maryland courts are guided by the Restatement and the common law principles that underlie it. The Restatement provides:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> …
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Rest. § 821B (quoted in *Tadjer*, 479 A.2d at 1327–28).

The City alleges that Defendants' knowing misrepresentations of the risks of fossil fuels, coupled with Defendants' continued extraction, production, and promotion of those products, gravely interfered with public health and safety in Baltimore, and is causing long-lasting harmful consequences for the City, its residents, and its public resources. *See, e.g.*, ¶¶ 140, 169–70, 193, 221, 226. No more is necessary to plead this element of the public nuisance claim.

b) The City States a Claim for Private Nuisance.

The City also sufficiently alleges the elements of a private nuisance, which Defendants effectively concede. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180, 190 (Md. 1994) (quoting Rest. § 821D). A private nuisance injury is actionable when it is "of such a character as to diminish materially the value of the property" for its intended purpose, "and seriously interfere[s] with the ordinary comfort and enjoyment of it." *Slaird v. Klewers*, 271 A.2d 345, 348 (Md. 1970). "Virtually any disturbance of the enjoyment of the property may amount to a nuisance so long as the interference is substantial and unreasonable and such as would be offensive or inconvenient to the normal person." *Wash. Suburban Sanitary Comm'n v. CAE-Link Corp.*, 622 A.2d 745, 750 (Md. 1993).

The City alleges a host of injuries actionable as private nuisances, including several actionable as private *and* public nuisances. For example:

- Many "critical City assets and roadways, including highways, rail lines, emergency response facilities, wastewater facilities, and power plants, have suffered and/or will suffer injuries due to sea level rise and associated flooding" resulting from Defendants' conduct, ¶ 199;
- "Changes to the hydrologic cycle, including more frequent and intense precipitation events and associated floods," have increased the costs to maintain City property, including by "significantly increas[ing] the costs of maintaining, replacing and repairing roads," ¶ 201; and

- The City has incurred and will be forced to incur substantial increased costs that "include, but are not limited to, infrastructural repair, planning costs, and response costs to flooding and other acute incidents" on City property, ¶ 207, 214.

In sum, the City's Complaint alleges unreasonable interference with the normal use and enjoyment of its real property, and Defendants do not seriously contend otherwise.

c) Defendants' Generalized Arguments Against the City's Nuisance Claims Are Without Merit.

(1) *No Provision of Law "Fully Authorizes" Defendants' Tortious Conduct.*

Defendants' contention that their tortious conduct is fully authorized by law and therefore could not cause a nuisance is wrong both legally and factually. No law authorizes Defendants to produce and promote fossil fuels at levels they knew would be harmful; no law authorizes them to engage in misleading and deceptive marketing of products that they knew to be dangerous; and no law authorizes a 50-year campaign of deceit designed to undermine public confidence in climate-related science and scientists. *See generally* Part II, *supra*. Defendants' references to various state and federal laws that have some relation to fossil fuel policy do not come close to establishing that Defendants' wrongful conduct is statutorily immunized from liability. *See* Mot. at 11–13.

While it is true, as a general matter, that "conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability," Rest. § 821B, cmt. f, none of the laws cited by Defendants address—let alone provide statutory immunity for—the specific wrongful conduct alleged in the Complaint. "Legislation prohibiting some but not other conduct is not ordinarily construed as authorizing the latter." *Id.* To provide a defense against nuisance liability, legislation must specifically and expressly authorize the particular conduct at issue, not merely regulate a company's product or the industry in which it operates. Indeed, the Court of Appeals has held that "it makes no difference that the business was lawful and one useful

to the public and conducted in the most approved method" if that business operated in a manner that caused a nuisance. *Bishop Processing Co. v. Davis*, 132 A.2d 445, 449 (Md. 1957) (upholding nuisance against lawfully operating processing plant).

Numerous cases illustrate the limited scope of the "fully authorized" exception to nuisance liability. In *East Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 50 A.2d 246, 248–49 (Md. 1946), Defendants' principal authority, a truck collided with an unlit streetlamp on a highway median, causing a fire and fatal injuries. The streetlamp had been struck and repaired many times before, and the plaintiff alleged that failing to provide warning devices around the streetlamp constituted a public nuisance. *Id.* at 250. The court rejected the plaintiffs' claim because the applicable ordinance gave city officials authority to place lamp posts on highway medians, and because "competent municipal authority" chose the location of that specific streetlamp in an exercise of the delegated "judgment of the City department having charge of such matters." *Id.* at 253. Because the location of that streetlamp was specifically authorized by the governing legislative body, that placement could not be found to be an actionable nuisance. *Id.* Even so, the Court of Appeals later ruled in that same case that if it was reasonably foreseeable an obstruction would be dangerous, the city could be held liable even if the obstruction was authorized by the proper municipal and legislative authorities. *See East Coast Freight Lines v. Mayor & City Council of Baltimore*, 58 A.2d 290, 300 (Md. 1948); *see also Coates v. S. Md. Elec. Co-op., Inc*., 731 A.2d 931, 938 (Md. 1999) (recognizing city's liability in the *East Coast* case).

Defendants cite a handful of statutes that generally regulate the energy market, state a general policy in favor of access to energy access, and refer to the economic importance of fuel and energy. *See* Mot. at 11–13. None specifically authorize the wrongful conduct alleged in the

City's Complaint, such as Defendants' deceptive marketing and misinformation campaign, and none provide statutory immunity to Defendants here.[7]

(2) *The City's Nuisance Claims Apply Well-Recognized Maryland Law.*

Defendants contend that Maryland nuisance law cannot apply to nuisances caused by "deceptive marketing" of a company's products because nuisance law *only* "protect[s] against unreasonable interference with the use and enjoyment of real property" resulting from a defendant's use of its own property. *See* Mot. at 14. That novel construction of Maryland nuisance law is wholly without legal basis.

[7] Many cases in Maryland and elsewhere illustrate the proposition that authorizing conduct must be specifically and narrowly addressed by statute or regulation, including those cited by Defendants. *See, e.g.*, *N.C. ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 309–10 (4th Cir. 2010) (power plant emissions not a nuisance where plant operated under state-issued permits required by federal law, and "in issuing emissions permits the state takes into account the same factors that would be considered by a court in a nuisance case"); *Cityco Realty Co. v. City of Annapolis*, 150 A. 273, 278 (Md. 1930) (sewer system discharging into creek not a nuisance where Maryland legislature "authorize[d] the state department of health . . . to assent, on the part of the state, to the discharge of sewage into [that] creek" and "the state department of health has expressly authorized the construction of new sewers which discharge their effluent into those waters"); *Garrett v. Lake Roland El. Ry. Co.*, 29 A. 830, 831 (Md. 1894) (large abutment and elevated path obstructing road not a nuisance where defendant, by city ordinance, was expressly "authorized to bridge the Northern Central Railway Company's tracks on North street, by means of an elevated structure"); *Agbebaku v. Sigma Aldrich, Inc.*, No. 24-C-02-004175, 2003 WL 24258219, at *13 (Md. Cir. Ct. June 24, 2003) (mercury emissions from coal burning power-plant not a nuisance where it was "uncontradicted that Maryland has authorized Defendants to produce electricity by power plants that emit mercury"); *Whaley v. Park City Mun. Corp.*, 190 P.3d 1, 6–8 (Utah Ct. App. 2008) (sound from outdoor music venues not a nuisance where "the public at large, through its elected officials, issued licenses and passed specific ordinances authorizing amplified, outdoor concerts" and permit holders' conduct was "explicitly authorized and invited by that very community"); *Hedel-Ostrowski v. City of Spearfish*, 679 N.W.2d 491, 496–97 (S.D. 2004) (swing set on municipal playground not a nuisance where statute authorized city to "establish, improve, maintain, and regulate public parks, public squares, parkways, boulevards, swimming pools, camping, and other facilities" and city duly authorized and approved construction of park and swing set); *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 808 P.2d 58, 62 (N.M. Ct. App. 1991) (bridge project across Rio Grande not a nuisance where defendant city, after lengthy process, "in furtherance of its constitutional and statutory powers, determined that construction and implementation of the project was necessary and in the public interest"); *id.* (collecting cases).

Maryland courts have recognized for decades that nuisance liability is not limited to those who create a nuisance, but also extends those who engage in "some active participation in the continuance of it" or "some positive act evidencing its adoption." *Gorman v. Sabo*, 122 A.2d 475, 478 (Md. 1956) (affirming nuisance verdict against husband who knew of and encouraged wife's nuisance-causing conduct). Nuisance liability also extends to parties whose products substantially contributed to the creation of a public nuisance even if the nuisance would not have occurred without the participation of others, for "[i]t has been held that where the finished product of a third party constitutes a public nuisance, the third party may be held liable for creation of the public nuisance, even though it no longer has control of the product creating the public nuisance." *Adams*, 193 F.R.D. at 256–57 (collecting cases); *see also Monsanto*, 2020 WL 1529014, at *9 ("[C]ontrol is not a required element to plead public nuisance under Maryland law."); *Maenner v. Carroll*, 46 Md. 193, 215 (1877) ("[E]very person who does or directs the doing of an act that will of necessity constitute or create a nuisance, is personally responsible for all the consequences resulting therefrom, whether such person be employer or contractor.").

The scope of Maryland nuisance law is perhaps best demonstrated by two recent federal court cases that applied Maryland law in denying motions to dismiss. The first case involved the State of Maryland's nuisance claim against manufacturers of gasoline containing MTBE, s*ee Exxon*, 406 F. Supp. 3d at 469, and the second case the City's nuisance claim against a PCB manufacturer, *Monsanto*, 2020 WL 1529014, at *9–10. In *Exxon*, Judge Hollander concluded that "no case law forecloses [a] theory of public nuisance liability" based on the deceptive marketing of a dangerous product—thus directly rejecting Defendants' argument here—and held that the State properly alleged a nuisance claim "premised on [the defendants'] manufacture, marketing, or supply of MTBE gasoline," even though "in those capacities, [the defendants] did not have

control over the MTBE gasoline when it was allegedly released into the State's waters." *Id.* at 467–68. The court emphasized that, under the governing state law, it was clear that "a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality." *Id.* at 468 (collecting cases).

In *Monsanto*, Judge Bennett followed Judge Hollander's reasoning, and held that "even though Defendants may not have maintained control over the contaminants once disseminated in the City's waters . . . [t]he City has alleged that Monsanto manufactured, distributed, marketed, and promoted PCBs, resulting in the creation of a public nuisance that is harmful to health and obstructs the free use of the City's stormwater and other water systems and waters." *Monsanto*, 2020 WL 1529014, at *10.

In *Exxon* and *Monsanto*, as here, the public entity plaintiffs alleged that the defendants "had extensive knowledge" of the environmental harms associated with their products, intentionally withheld information about those harms, deceptively promoted and made misrepresentations about their products, "manufactured and distributed" their products in Maryland and Baltimore, ultimately caused harm, and thus stated a claim for nuisance. *Exxon*, 406 F. Supp. 3d at 468–69; *Monsanto*, 2020 WL 1529014, at *10. Those allegations are closely analogous to the City's allegations here, and the same reasoning should apply.

In sum, the City's claims are well recognized under Maryland law of public and private nuisance, and all the elements of those claims are properly pleaded. The Court should deny the motion to dismiss those claims.

2. The City Adequately Alleges Products Liability Claims.

The City also properly pleads causes of action for failure to warn and design defect, sounding in both strict liability and negligence. Defendants' over-exacting challenges to those claims fall far short.

The Court of Appeals has adopted the consumer-expectation test for product liability claims set forth in Section 402A of the Restatement. *See Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1150, 1152 (Md. 2002). Under that test, a plaintiff must prove:

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

Id. (internal quotation omitted). To recover in a products liability action sounding in negligence, the plaintiff must show:

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

Gourdine v. Crews, 955 A.2d 769, 779 (Md. 2008).

Product liability claims based on both failure to warn and design defect theories are well recognized in Maryland. *See, e.g.*, *Nissan Motor Co. v. Nave*, 740 A.2d 102, 117 (Md. Ct. Spec. App. 1999) (collecting cases). In the failure to warn context, "negligence concepts and those of strict liability have 'morphed together'" under Maryland law, and a plaintiff must prove under either theory simply that the manufacturer or seller knew or should have known of the product's dangerous propensity. *See May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 997 (Md. 2015) (quoting *Gourdine*, 955 A.2d at 782); Rest. § 402A, cmt. j.

The City pleads all necessary elements of its products liability claims. The Complaint alleges that Defendants knew or should have known their products would cause devastating climatic injuries when put to their intended use, ¶¶ 103–140, and that Defendants' disinformation campaign prevented the City, the public, consumers, and public officials from gaining access to comparable knowledge, ¶¶ 141–170, which is why Defendants had a duty to warn of those dangers. ¶¶ 239–42, 255, 264, 272–75; *see* Part IV.2(b), *infra*. The Complaint further alleges that Defendants' products "reached the consumer in a condition substantially unchanged from the time of manufacture," ¶ 256, and that the use of Defendants' products, as intended, caused the precise harms that Defendants had reasonably foreseen, both directly and proximately, because those products were dangerous and because of Defendants' failure to reasonably warn about those dangers. ¶¶ 191–217, 244–46, 265–67. No more is required at the pleading stage.

a) The City Properly Brings Its Product Liability Claims as a Bystander.

Defendants argue that in addition to the elements of its products liability claims, the City must also allege "that its injury arises from its *own* use and consumption" of Defendants' products." Mot. at 17–18 (emphasis added). As the recent *Exxon* and *Monsanto* decisions explain, however, the opposite is true: "Maryland courts have never limited recovery in strict liability for design defect to ultimate users of the product. . . . [B]ystanders may recover in strict liability for foreseeable injuries caused by the defective design of a product." *Exxon*, 406 F. Supp. 3d at 461 (citing *Valk Mfg. Co. v. Rangaswamy*, 537 A.2d 622, 631–32 (Md. Ct. Spec. App. 1988) ("bystanders . . . are protected under the doctrine of strict liability in tort"), *rev'd on other grounds*, 562 A.2d 1246 (Md. 1989)); *accord Monsanto*, 2020 WL 1529014, at *11; *ACandS, Inc. v. Godwin*, 667 A.2d 116, 123–26 (Md. 1995) (upholding damages award to bystanders where defendants' product was a substantial cause of their injuries); *Georgia-Pacific Corp. v. Pransky*,

800 A.2d 722, 723–26 (Md. 2002) (same). Maryland's Civil Pattern Jury Instructions likewise state that "[t]hird parties, in addition to 'consumers' and 'users,' can recover in strict liability." MPJI-Cv 26:11.

Maryland's recognition of bystander claims promotes the purposes behind product defect claims generally, and is commonly accepted in other jurisdictions. The *Exxon* court noted that "the majority of courts that have addressed the issue have allowed bystanders to recover in strict liability against sellers for foreseeable injuries caused by defective products," and that public policy favors allowing such claims because they "plac[e] the risk of harm on the entity most capable of controlling the risk." *Exxon*, 406 F. Supp. 3d at 462 (collecting cases); *see also Monsanto*, 2020 WL 1529014, at *11 (same). As the Court of Appeals has emphasized, "there is no reason why a party injured by a defective and unreasonably dangerous product, which when placed on the market is impliedly represented as safe, should bear the loss of that injury when the seller of that product is in a better position to take precautions and protect against the defect." *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 963 (Md. 1976).

Here, the City alleges that its injuries were entirely foreseeable and were directly caused by Defendants' actions in extracting, producing, and selling fossil fuel products while simultaneously promoting the expanded, unrestrained use of those products and concealing and misrepresenting their known dangers. *See* ¶¶ 103–40 (describing Defendants' knowledge of the effects of their products), ¶¶ 191–217 (describing City's injuries resulting from Defendants' conduct). Those allegations are sufficient to state a claim, and the City may recover as an injured bystander. Accordingly, just as in *Exxon*, 406 F. Supp. 3d at 462, and *Monsanto*, 2020 WL 1529014, at *11, this Court should reject Defendants' argument that the City can only recover for injuries resulting from its own use of Defendants' products.

b) The City Adequately Alleges Defendants Failed to Warn.

"Products liability law imposes on a manufacturer a duty to warn if the item produced has an inherent and hidden danger that the producer knows or should know could be a substantial factor in causing injury." *Virgil v. Kash N' Karry Serv. Corp.*, 484 A.2d 652, 657 (Md. Ct. Spec. App. 1984). Defendants knew for decades that their fossil fuel products were the primary cause of climate change, and Defendants owed the public, public officials, and consumers (including the City) a duty to warn of those known and foreseeable risks. ¶¶ 103–40, 238, 271.

The Court of Appeals has emphasized that there is no set formula for finding a legal duty. Instead, "the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts of the defendant." *Gourdine*, 955 A.2d at 783. However, the Court has set forth several "classic factors" it uses to decide questions of duty:

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

Kennedy Krieger Inst., Inc. v. Partlow, 191 A.3d 425, 440 (Md. 2018) (internal quotations and alterations omitted). "[F]oreseeability is perhaps 'most important' among these factors . . . ." *Kiriakos v. Phillips*, 139 A.3d 1006, 1034 (Md. 2016) (quoting *Ashburn v. Anne Arundel Cty.*, 510 A.2d 1078, 1083 (Md. 1986)).

Each of the classic factors supports a finding that Defendants owed a duty to warn. First, it was certainly foreseeable that Defendants' conduct would result in harm to the City and others because Defendants "knew or should have known . . . of the climate effects inherently caused by the normal use and operation of their fossil fuel products." ¶ 272, *see also* ¶¶ 103–40 (describing

Defendants' research efforts and "superior knowledge of the reasonably foreseeable hazards of unabated production and consumption of their fossil fuel products"). That harm includes the "substantial expenses and damages" that the City has sustained and will sustain from climatic injuries, "including damage to publicly owned infrastructure and real property" and other harms. ¶ 278, *see also* ¶¶ 191–217 (describing injuries). The City suffered these harms as a direct result of Defendants' failure to provide *any* warnings of the known harms that would result from the expanded use of their products as promoted. ¶¶ 191–217, 241. Moral blame may be attributed to Defendants because they had actual knowledge that their products were defective and dangerous, but rather than providing warnings against those dangers or acting to mitigate them, Defendants engaged in a campaign of disinformation regarding global warming in order to continue profiting from those products and delay the development and use of alternative energy sources. ¶¶ 169–70, 221, 247. Finding Defendants liable for failure to warn under these circumstances may prevent future harm because it will incentivize Defendants and others to act truthfully. ¶ 170. While Defendants will incur an economic burden, that burden is the inevitable consequence of remediating the City's injuries and is appropriate given Defendants' deliberate disregard for the consequences of their conduct—especially where, as here, Defendants' actions delayed mitigation, dramatically increasing the costs the City will bear in the future. ¶¶ 178–80, 280. Finally, insurance is not available to offset all the injuries and damages that City and its residents have borne and will bear. *See, e.g.*, ¶¶ 191–217. For these reasons, the City sufficiently pleads that Defendants owed a duty to warn.

Defendants argue they never owed a duty to warn anyone about the pressing dangers their products posed (and which they extensively researched) because: (1) no warning would have been sufficient to "abate the alleged harms Plaintiff has suffered" (that is, no warning would have

changed consumer behavior and the dangers their products posed were "clear and obvious" and "generally known"); (2) imposing a duty on Defendants would create "unlimited liability"; and (3) Defendants have no special relationship with the City. Mot. at 18–19. These arguments fail.

First, the City has no obligation to plead that a warning would have been sufficient to avoid all harm.[8] It is enough for a plaintiff to allege that its injuries would not have occurred *to the same magnitude* had the defendant provided adequate warnings. *See* ¶ 216 ("But for Defendants' conduct, Plaintiff would have suffered no or far less serious injuries and harms than [it has] endured."); *see also*, *e.g.*, Rest. § 402A (and cases collected therein). Nor is there any need for the City to plead or prove affirmatively that a warning would have altered anyone's actual behavior; "Maryland law recognizes a presumption in failure to warn cases that, to avoid injury, 'plaintiffs would have heeded a legally adequate warning had one been given.'" *Exxon*, 406 F. Supp. 3d at 464 (citing *U.S. Gypsum Co. v. Mayor & City Council of Baltimore*, 647 A.2d 405, 413 (Md. 1994)). Ultimately, whether Defendants' failure to provide any warning caused the City's injuries is an issue "for the trier of fact to consider," and cannot be decided on a motion to dismiss. *See U.S. Gypsum Co.*, 647 A.2d at 413.

Likewise, Defendants' argument that they had no duty to warn because "a reasonable consumer would have fully appreciated the alleged risks of using fossil fuels," Mot. at 20, ignores

[8] Defendants' cited cases are inapposite. *See* Mot. at 20 (citing *Estate of Schatz v. John Crane, Inc.*, 196 A.3d 74 (Md. 2019), and *Georgia Pac., LLC v. Farrar*, 69 A.3d 1028 (Md. 2013)). Both cases were decided at trial, not the motion to dismiss stage, and both rested upon fact-intensive trial court findings based on conflicting evidence. Moreover, in both cases the appellate court found no duty based, in large part, on trial evidence that the danger from "take home" exposure of asbestos was not known to manufacturers at the time the plaintiffs were exposed, and because "in the era before home computers and social media" it was not feasible for the defendants to issue warnings through intermediaries like the exposed person's employer or premises owners. *See Estate of Schatz*, 196 A.3d at 79, 82; *see also Georgia Pac.*, 69 A.3d at 1039. These facts are not present here, and the allegations of the City's Complaint must be accepted as true.

the Complaint's allegations of Defendants' knowingly false misrepresentations, which the Court must accept as true. Defendants "widely disseminated marketing materials, refuted the scientific knowledge generally accepted at the time, advanced pseudo-scientific theories of their own, and developed public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate changes." ¶ 242; *see also* ¶¶ 147–70 (describing Defendants' "affirmative steps to conceal . . . the foreseeable impacts of the use of their fossil fuels on the Earth's climate"). Whether Defendants can establish at trial that the climate-related consequences of using their products were "generally known and recognized," given Defendants' concerted efforts to suppress that knowledge, is for the jury to decide. *See Figgie Int'l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 624 A.2d 1285, 1291–92 (Md. Ct. Spec. App. 1993) ("Whether a particular danger is obvious or patent can depend on a number of things . . . . It necessarily is a question of fact then, and, if there is any dispute about it, the question is for the jury to decide." (quoting *Banks v. Iron Hustler Corp.*, 475 A.2d 1243, 1251 (Md. Ct. Spec. App. 1984)). The City's detailed allegations regarding Defendants' public misinformation campaign are sufficient to allege a duty to warn.

Nothing in *Mazda Motor of Am., Inc. v. Rogowski*, 659 A.2d 391 (Md. Ct. Spec. App. 1995), cited in passing by Defendants, *see* Mot. at 16–17, counsels otherwise. There, the Court of Special Appeals reversed a failure-to-warn jury verdict in favor of a plaintiff who was severely injured after he fell asleep behind the wheel of a truck and collided with a tree. *Id.* at 392. The plaintiff testified at trial, in relevant part, that "if he had [been warned] that the seat belt would not restrain him from contact with interior parts of the vehicle in the event of a collision, he would have bought another vehicle." *Id.* The court held that the plaintiff's subjective belief was irrelevant, and that whether a particular danger is objectively obvious is typically "a jury issue because

reasonable minds could differ on it." *Id.* at 396 (quoting *Nicholson v. Yamaha Motor Co.*, 566 A.2d 135, 145 (Md. Ct. Spec. App. 1989)). It nonetheless held that the defendant did not need to warn that seatbelts do not provide perfect protection against all injuries, because "[i]t borders on the absurd to suggest that persons of ordinary intelligence would not appreciate the fact that seat belts, no matter how well designed and made," cannot protect against all danger in all circumstances, and reversed the verdict. *Id.* at 397. The *Rogowski* case only highlights why the "open and obvious" inquiry cannot be resolved on this motion. Whether and when persons of ordinary intelligence came to appreciate the climatic dangers posed by fossil fuels is a hotly disputed question that should only be answered by the trier of fact on a complete record.[9]

Second, contrary to Defendants' assertion, recognizing Defendants' duty to warn of known dangers in their own products would not create an unlimited "duty to the world." Mot. at 21. Again, the federal court in *Exxon* squarely rejected this same argument:

> Of course, there is no duty to "warn the world." [*Gourdine*, 955 A.2d at 786.] However, the duty to warn extends "'not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use.'" [*Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1033 (Md. 2013)] (quoting Rest. (2d) Torts § 388 cmt. d).

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[9] Defendants' reliance on two tobacco cases is misplaced. *See* Mot. at 20 (citing *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 434 (D. Md. 2005); *Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000)). Both *Waterhouse* and *White* were decided on summary judgment, based on uncontradicted and "overwhelming" evidence showing that an ordinary consumer would have contemplated the danger of cigarettes during the years the plaintiffs smoked. *Waterhouse*, 368 F. Supp. 2d at 436; *White*, 109 F. Supp. 2d at 432. These cases do not support dismissal here, where the Complaint expressly alleges that Defendants knowingly misrepresented and concealed the dangers of their products to ensure that reasonable consumers would *not* have contemplated their danger. *See, e.g., Standish-Parkin v. Lorillard Tobacco Co.*, 786 N.Y.S.2d 13, 14 (N.Y. App. Div. 2004) (triable issues of fact regarding public's knowledge of the risks of cigarettes prior to 1969, and "whether [plaintiff] had relied upon defendants' various allegedly fraudulent misrepresentations and concealments of the truth concerning the safety and health risks of cigarettes"); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389–90 (N.Y. App. Div. 2003) (reversing dismissal of failure to warn claim because "the plaintiff . . . raised issues of fact as to whether consumers were fully aware of the health hazards posed by smoking cigarettes . . . particularly considering that the respondents disseminated information, at the relevant time, disputing the validity of the scientific evidence linking cigarette smoking to cancer and other diseases.").

Exxon, 406 F. Supp. 3d at 463. The court in *Monsanto* also rejected this argument on the same ground, holding that the City sufficiently pleaded a claim for failure to warn "based on Defendant's duty to warn the general public, whom they allegedly knew and expected would be endangered." *Monsanto*, 2020 WL 1529014, at *11.

Here, the City alleges that Defendants knew or should have known that the City, consumers, and the public would be endangered by the unrestricted use of their products. ¶¶ 103–40, 238–40. These injuries were foreseeable and Defendants, in fact, foresaw them but withheld warnings nonetheless. Of import here, Defendants have long known that the dangers of their products included "flooding on much of the U.S. East Coast, including the State of Florida and Washington, D.C.," which would foreseeably include Baltimore. ¶ 127. Defendants similarly long warned internally of "direct operation consequences" from their products' climatic consequences, including to "offshore installations, coastal facilities and operations (e.g. platforms, harbours, refineries, depots)." *See* ¶ 133. In 1991, Defendant Shell internally discussed potential responses if "[i]n 2010, a series of violent storms causes extensive damage to the eastern coast," potentially "caused by climate change." ¶ 137. At a minimum, the City was clearly a foreseeable, and foreseen, potential victim of Defendants' dangerous products. The fact that Defendants' duty may extend to many other bystanders in addition to the City—i.e., those who might foreseeably be harmed by Defendants' products—shows Defendants' *breach* and its attendant, foreseeable harms were monumental, not that their duty is overbroad. *See* ¶ 238; *cf. Moran v. Faberge, Inc.*, 332 A.2d 11, 15–16 (Md. 1975) ("[T]he duty of the manufacturer to warn of latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those which are reasonably foreseeable.").

Third, Defendants' argument that "[t]here is no duty to control a third person's conduct so as to prevent personal harm to another, unless a 'special relationship' exists," Mot. at 21, is inapposite. "Although a special relationship certainly may be the basis for a duty of care, duty can be established in other ways." *Kennedy Krieger Inst., Inc. v. Partlow*, 191 A.3d 425, 451 (Md. 2018). The City does not, and need not, allege that Defendants had a duty to control the conduct of any third party. Rather, as discussed above, the City alleges that Defendants had a duty to warn "of the known and foreseeable risks posed by their fossil fuel products" used as intended, and that Defendants' failure to do so caused the City's injuries. *See, e.g.*, ¶¶ 239, 246. Maryland law requires nothing more.

c) The City Adequately Alleges a Defect in Defendants' Products.

Defendants argue that a design defect claim cannot be based (1) on a product, or the "inherent characteristics" of a product, that functions as intended, Mot. at 22; or (2) upon a product that is not unreasonably dangerous because the dangers were widely known, Mot. at 24–25. These arguments fail as well.

Maryland courts generally apply the consumer expectation test to determine whether a product is defectively designed. *Halliday*, 792 A.2d at 1150.[10] Under that test, derived from Restatement Section 402A,

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

[10] Maryland courts use the risk-utility test as well, but "only when the product 'malfunctions in some way.'" *Exxon*, 406 F. Supp. 3d. at 460 (quoting *Halliday*, 792 A.2d at 1150). As Defendants acknowledge, Mot. at 25 n.14, a product malfunction is not at issue here, and therefore the consumer expectation test applies, as it did in *Exxon* and *Monsanto*. *See Exxon*, 406 F. Supp. 3d at 460 (applying consumer expectation test rather than risk-utility test where state alleged that product was "defective and unreasonably dangerous when used in its ordinary and intended way"); *Monsanto*, 2020 WL 1529014, at *10 (same).

> be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."

Exxon, 406 F. Supp. 3d at 460 (quoting *Halliday*, 792 A.2d at 1150).

Defendants cite several cases for the proposition that "a product which functions as intended and as expected is not defective." Mot. at 22–23 (quotations omitted) (citing *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701 (Md. 1988); *Halliday*, 792 A.2d at 1158). As the Fourth Circuit explained in this case, however, the City's "design-defect claim hinges on its ability to demonstrate that Defendants' promotional efforts *deprived reasonable consumers of the ability to form expectations that they would have otherwise formed*." *See Baltimore*, 952 F.3d at 467 n.10 (emphasis added). The City is not alleging that Defendants' products are defective because, for example, they contain carbon or because they produce greenhouse gases upon combustion. They are defective because they do not perform as safely as a reasonable consumer would expect as a consequence of Defendants' deliberate efforts to prevent consumers from appreciating the climate-related dangers inherent in their use. ¶ 253. None of Defendants' cases undercut this theory.[11]

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[11] In *Cofield v. Lead Indus. Ass'n, Inc.*, No. CIV.A. MJG-99-3277, 2000 WL 34292681, at *2 (D. Md. Aug. 17, 2000), the court required the plaintiff "to plead and prove the presence of a safer, commercially reasonable, alternative" to defendant's allegedly defective product. But a plaintiff pleading "strict liability due to a design defect [is] under no obligation to provide a 'safer alternative' to establish their claim" under the consumer expectation test. *Green v. Wing Enters., Inc.*, No. CV RDB-14-1913, 2016 WL 739060, at *2 (D. Md. Feb. 25, 2016) (citing cases). In *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 266–69 (D. Mass. 2015), the court decided on summary judgment that "an inherent danger in the product at issue is not *conclusive* of a design defect" where plaintiffs failed to offer any other evidence of a defect. In *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 684–85 (Wis. 2009), the claimed defect was based solely on the presence of lead in white lead carbonate pigment, but the court cited with approval another case that successfully alleged defective design based on a single product ingredient. *Id.* (citing *Hall v. Bos. Sci. Corp.*, No. 2:12-CV-08186, 2015 WL 874760, at *5 (S.D.W. Va. Feb. 27, 2015)) (Wisconsin law did not bar claim because "the plaintiff in this case does not argue that the mere presence of an ingredient creates a defect in the product's design," but instead "primarily focuses on the amount of

Defendants also argue that the City has "failed to allege facts showing that Defendants' fossil fuel products are 'unreasonably dangerous,'" as required by the consumer expectations test. Mot. at 24. As discussed above, however, the City alleges that Defendants' fossil fuel products did not perform as safely as a reasonable consumer would expect because Defendants affirmatively prevented reasonable consumers from understanding their products' true dangers. *See* ¶¶ 239, 246. No reasonable consumer would expect that Defendants' products, when used as intended, would lead to accelerated sea-level rise, extreme precipitation events, extreme heat, droughts, and all the other harms the City alleges. *See, e.g.*, ¶ 191–215. As the City's Complaint makes clear, Defendants' disinformation campaign worked exactly as intended and thereby made their products unreasonably dangerous.

Defendants also make the related argument that the public's "widespread, longstanding knowledge" that fossil fuels cause climate change precludes a design defect claim. Mot. at 25. Defendants will have the opportunity to present that defense at trial, but the Complaint alleges the exact opposite and details the many ways in which Defendants waged a decades-long campaign to sow doubt in the mind of the public, *see* ¶¶ 147–77, 256—a campaign that continues to cause confusion to this day.[12] Whether and when (if ever) the dangers of climate change became

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the ingredient used in the design"); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 732 (Wis. 2001) (plaintiff adequately alleged design defect regarding inherent characteristic where defect related to quantity of product). These cases stand for the proposition that "an inherent danger in the product at issue is not *conclusive* of a design defect"—not that any claim of a defect that relates to a product's inherent characteristics must fail, as Defendants claim. *Town of Lexington*, 133 F. Supp. at 269 (emphasis added).

[12] *Read the Transcript of AP's Interview with President Trump*, THE ASSOCIATED PRESS (Oct. 16, 2018), https://apnews.com/a28cc17d27524050b37f4d91e087955e (President Trump responding to a question about climate change: "[N]obody really knows. And you have scientists on both sides of the issue. And I agree the climate changes, but it goes back and forth, back and forth. So we'll see.").

"common knowledge" cannot be resolved on a motion to dismiss. Defendants' motion to dismiss the City's products liability claim must be denied.

3. The City Adequately Alleges Trespass.

The City properly states a claim for trespass. In order to prevail on a cause of action for trespass, the plaintiff must establish:

> (1) an interference with a possessory interest in his property; (2) through the defendant's physical act or force against that property; (3) which was executed without his consent.

Uthus v. Valley Mill Camp, Inc., 221 A.3d 1040, 1049 (Md. Ct. Spec. App. 2019). Here, the City met its pleading burden by alleging that it "owns, leases, occupies, and/or controls real property throughout the City," that Defendants have caused "flood waters, extreme precipitation, saltwater, and other materials to enter the City's property," and that the City did not consent to such trespasses. ¶¶ 283–85.

Defendants make three arguments in seeking dismissal of the City's trespass claim. First, Defendants contend that the City has failed to identify any specific parcel of City-owned land that has been trespassed upon and pleads only speculative future invasions. Mot. at 26. Second, Defendants assert that the City does not allege that Defendants themselves physically intruded upon City property because "Defendants do not control the oceans, clouds or precipitation." Mot. at 26–27. Third, Defendants argue that the City has implicitly consented to the alleged invasion of its property through its own use of fossil fuels. These arguments fail.

First, a plaintiff need not identify the exact parcels of property that have been subjected to Defendants' trespass. As in *Exxon*, a complaint for trespass "does not require the State to identify the precise locations of all the State properties that were contaminated by MTBE." *Exxon*, 406 F. Supp. 3d at 471. Maryland's pleading standard is similar to the federal standard, requiring only "a

clear statement of the facts necessary to constitute a cause of action," Md. Rule 2-305 (adapted in part from Fed. R. Civ. P. 8(a)), and the same result should apply here as well. The purpose of the state and federal pleading rules is to provide enough notice of plaintiff's claim to satisfy due process. Surely Defendants understand what the City is alleging in pleading trespass and how Defendants' conduct is claimed to have interfered with the City's rights with respect to the public property within its jurisdiction. Additionally, Defendants' argument that the Complaint "speculates about *future* invasions," Mot. at 26, is demonstrably wrong, for the Complaint alleges many specific past and current invasions too.[13] These allegations of past and current invasions of City-owned property distinguish the Complaint from *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 94 (Md. 2013), which reversed a jury's award of damages for trespass because "general contamination of the aquifer that may or may not reach a given [plaintiff's] property" did not constitute an invasion of the plaintiffs' property.

Second, Defendants' contention that the City failed to plead the "control necessary" to establish a trespass claim misreads the applicable authorities. *See* Mot. at 27. "A trespass occurs 'when a defendant interferes with a plaintiff's interest in the exclusive possession of the land by

[13] *See, e.g.*, ¶ 8 ("[T]he City has already spent significant funds to study, mitigate, and adapt" to "[c]limate change impacts [that] already adversely affect Baltimore and jeopardize City-owned or operated facilities deemed critical . . . ."); ¶ 14 ("Baltimore is already experiencing sea level rise and associated impacts."); ¶ 16 ("Baltimore is . . . impacted by increased temperatures and disruptions to the hydrologic cycle. Baltimore is already experiencing a climatic and meteorological shift toward winters and springs with more extreme precipitation events . . . [which] have led to increased property damage, economic injuries, and impacts to public health."); ¶ 68 ("Baltimore has already seen an increase in the number of heat waves"); ¶ 80 ("The City . . . experienced extreme rainfall and flooding during major storms in July 2016, and again in May 2018."); ¶¶ 81–82 & ¶ 202 (describing "1,000-year storm[s]" that occurred in July 2016 and May 2018 and damages resulting therefrom); ¶ 196 ("Warming-related sea level rise has already increased the likelihood of extreme floods in Baltimore by approximately 20 percent."); ¶ 195 ("The City has already incurred, and will foreseeably continue to incur, injuries and damages due to anthropogenic global warming, including sea level rise and associated impacts, increased frequency and severity of extreme precipitation events, increased frequency and severity of drought, increased frequency and severity of extreme temperatures.").

entering *or causing something to enter* the land.'" *Exxon*, 406 F. Supp. 3d at 469 (quoting *Exxon Mobil Corp. v. Albright*, 71 A.3d at 94) (emphasis added). Maryland courts have long recognized that a trespass claim can succeed when property "is invaded by an inanimate or intangible object," as long as the defendant has "some connection with or some control over [the] object." *Rockland Bleach & Dye Works Co. v. H.J. Williams Corp.*, 219 A.2d 48, 54 (Md. 1966); *see also Litz v. Md. Dep't of Env't*, 76 A.3d 1076, 1091 (Md. 2013) (plaintiff established trespass claim where defendants were alleged to approve septic systems that ultimately channeled pollution that flowed onto plaintiff's property). *JBG/Twinbrook Metro Ltd. P'ship v. Wheeler*, 697 A.2d 898, 909 (Md. 1997), applied the *Rockland* rule that "the defendant must have some connection with or control over" the trespass. In *Wheeler*, the court found that the defendant Exxon was disconnected from a gasoline spill where the gas station owner had contractually assumed liabilities from leaking underground storage tanks—a factual scenario not present here. *Id.* at 909–11.[14]

Here, the City alleges that Defendants "caused flood waters, extreme precipitation, saltwater, and other materials to enter the City's real property" by encouraging the increased use of their fossil fuel products, despite "knowing [that] those products in their normal or foreseeable operation and use" would cause climate change and inflict physical damage on City properties and public infrastructure. *See* ¶ 284. Defendants also "[c]ontrol[] every step of the fossil fuel product

[14] To the extent Defendants argue that courts outside of Maryland have come to different conclusions, Mot. at 27 n. 15, the cited cases are both legally and factually inapposite and contradict established Maryland law. *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013), involved "the entry of airborne particles alone," a different and more novel factual scenario than presented here and one for which New Jersey courts had not recognized a negligent theory of trespass. Although *In re Nassau Cty. Consol. MTBE Prods. Liab. Litig.*, 918 N.Y.S.2d 399, at *18 (Sup. Ct., Nassau Cty. 2010), dismissed a trespass claim against two gasoline distributor defendants, it allowed it to proceed against other distributors that plaintiffs alleged "had good reason to know or expect" contaminants in their products would reach plaintiffs' wells.

supply chain," ¶ 221, and "could have contributed to the global effort to mitigate the impacts of greenhouse gas emissions" but failed to do so, ¶ 169. Taken together, these facts plausibly allege that Defendants had, at a minimum, "some connection" to the climatic harms that now injure Baltimore. *See, e.g.*, Rest. § 158 cmt. a (trespass action will lie "if an act is done with the knowledge that it will to a substantial certainty result in the entry of the foreign matter").

Given that "Maryland allows claims for trespass where a defendant caused an invading substance to enter plaintiff's property without actually entering it himself," *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 315 (S.D.N.Y. 2006), these facts are sufficient to state a trespass claim.

Third, the City has not impliedly consented to Defendants' trespass through its own use of fossil fuels or its acquiescence in others' uses. Defendants cite no case law to support this argument, Mot. at 27–28, and it fails for at least three reasons. First, consent is only a defense "so long as the scope of that consent is not exceeded." *Mitchell v. Baltimore Sun Co.*, 883 A.2d 1008, 1015 (Md. 2005). "If the actor exceeds the consent, it is not effective for the excess." Rest. § 892A(4); *Royal Inv. Grp., LLC v. Wang*, 961 A.2d 665, 688 (Md. Ct. Spec. App. 2008) (citing Rest. § 892A). Even if the City had impliedly consented in some manner to some use of fossil fuel products, it did not consent to the excess, i.e. to allow 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." ¶ 285. Second, "[i]f the person consenting to the conduct of another . . . is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm." Rest. § 892B. Here, Defendants' campaign of misrepresentation regarding global warming and the climactic effects of fossil fuels vitiated any consent the City could have given. *See* ¶¶ 141–70. Third, "[t]he determination of whether consent was given is a

question of fact." *Royal Inv. Grp., LLC*, 961 A.2d at 688. Thus, the defense of consent cannot be decided on a motion to dismiss, and Defendants' motion must be denied.

4. The City States a Claim Under the Maryland Consumer Protection Act.

To state a claim for unfair or deceptive trade practices under Section 13-301 of the Maryland Consumer Protection Act ("CPA"), a plaintiff must allege: (1) an unfair and deceptive statement; (2) reliance upon the statement; and (3) an identifiable injury or loss. *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 277 (Md. 2007). "[A]ny person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by [the CPA]." Md. Code Ann., Com. Law § 13-408(a). "The CPA . . . constitutes remedial legislation that is intended to be construed liberally in order to promote its purpose of providing a modicum of protection for the State's consumers." *Wash. Home Remodelers, Inc. v. Consumer Prot. Div.*, 45 A.3d 208, 219 (Md. 2012); *see also* Md. Code Ann., Com. Law § 13-105 (requiring CPA to be "construed and applied liberally to promote its purpose").

In relevant part, the CPA defines unfair or deceptive trade practices as any "[f]alse, falsely disparaging, or misleading oral or written statement . . . which has the capacity, tendency, or effect of deceiving or misleading consumers" and the "[f]ailure to state a material fact if the failure deceives or intends to deceive." Md. Code Ann., Com. Law § 13-301(1) & (3). A fact or an omission is material "if a significant number of unsophisticated consumers would find that information important in determining a course of action." *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1059 (Md. 1999). "Whether a misrepresentation substantially induces a consumer's choice is ordinarily a question of fact for the trier of fact." *Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 532 (D. Md. 2011).

Here, the City makes the CPA claim on its own behalf, in its proprietary capacity as well as on behalf of its consumer residents. *See* ¶¶ 295–96; *see, e.g.*, *Anne Arundel Cty. v. Purdue Pharma L.P.*, No. CV GLR-18-519, 2018 WL 1963789, at *1 (D. Md. Apr. 25, 2018) (CPA claims against opioid manufacturers alleged to have caused widespread opioid use and extraction of a high monetary cost from the county). The CPA states that "any person" may bring an action under the Act, § 13-408(a), and broadly defines "person" to include "an individual, corporation, . . . or any other legal or commercial entity," § 13-101(h). Here, the City satisfies the definition of a "person" under the statute and therefore has a right to bring a claim. Although one court has held that a plaintiff could not bring a CPA claim where he did not meet the definition of a "consumer" because he used the purchased good exclusively for business purposes, here, the City is not a business but instead a legal entity acting in its own consumptive capacity and for the public welfare. *See Boatel Indus., Inc. v. Hester*, 550 A.2d 389, 399 (Md. Ct. Spec. App. 1988). As the Supreme Court held,

> States and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. These important responsibilities set state and local government apart from a typical private business.

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–43 (2007) (citation omitted). The City adequately pleads all elements of a CPA claim.[15]

[15] The City is not required to plead each of its allegations with particularity, because they arise under Sections 13-301(1) & (3). Only claims under Section 13-301(9) must be alleged with particularity. *McCormick v. Medtronic, Inc.*, 101 A.3d 467, 493 (Md. Ct. Spec. App. 2014). Even so, however, the City's allegations meet the requirements for particularity by alleging "who made what false statement, when, and in what manner (i.e., orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (i.e., that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement." *Id.* at 492–93; *see also* ¶¶ 141, 148–68.

a) The Complaint Identifies Unfair and Deceptive Statements.

In relevant part, the City alleges Defendants

> violated the CPA by engaging in the deceptive marketing and promotion of their products both by (1) making false and misleading statements regarding the known severe risks posed by their fossil fuel products that had the capacity, tendency, or effect of misleading consumers and by (2) making false representations and misleading omissions of material fact regarding the known severe risks posed by their fossil fuel with the intent that consumers would rely on those representations.

¶ 295. By 1988, Defendants knew that their products were causing global climate change and they had amassed a comprehensive body of scientific knowledge about the role of anthropogenic greenhouse gases. ¶ 141. Nonetheless, Defendants knowingly made false and misleading public statements and omissions, including but not limited to the following:

- "Scientific uncertainty and the evolution of energy systems indicate that policies to curb greenhouse gas emissions . . . could be premature. . . ." (¶ 149);
- Stating, "taking drastic action immediately is unnecessary since many scientists agree there's ample time to better understand the climate system," describing the greenhouse effect as "definitely a good thing," falsely stating that computer models that projected the future impacts of unabated fossil fuel consumption had "proved to be inaccurate," stating that "a warmer world would be far more benign than many imagine" and would reduce mortality rates, and attributing the rise in temperature since the late 19th century to "natural fluctuations that occur over long periods of time" (¶ 153);
- Denying the human connection to climate change by falsely stating that no "scientific evidence exists that human activities are significantly affecting sea levels, rainfall, surface temperatures or the intensity or frequency of storms" (¶ 154);
- Misleadingly stating "most of the greenhouse effects comes from natural sources" and "[i]t's bad public policy to impose very costly regulations and restrictions when their need has yet to be proven" (¶ 155);
- Deceptively stating that climate change "has absolutely nothing to do with pollution and air quality" and "[t]here is absolutely no agreement among climatologists on whether or not the planet is getting warmer, or, if it is, on whether the warming is the result of man-made factors or natural variations in the climate . . . . [T]he view that burning fossil fuels will result in global climate change remains an unproved hypothesis" (¶ 156);
- Deceptively stating that many climate models "have been criticized as seriously flawed" (¶ 157);
- Funding advertising campaigns and distributing material to generate public uncertainty around the climate debate (¶ 161);

- Funding numerous organizations publicly misrepresenting the scientific consensus that Defendants' fossil fuel products were causing climate change, sea level rise, and injuries to Baltimore, among other coastal communities (¶ 167); and
- Engaging in deceptive corporate reputation advertising by misinforming the public about the portions of their businesses dedicated to non-fossil fuel energy (¶¶ 184–87).

b) The City Pleads Reliance and Injury.

The City pleads reliance and injury on its own behalf as a consumer and on behalf of its resident consumers. "As a result of Defendants' tortious, false and misleading conduct, reasonable consumers of Defendants' fossil fuel products and policy-makers have been deliberately and unnecessarily deceived about: the role of fossil fuel products in causing global warming . . . [and] that the continued increase in fossil fuel product consumption that creates severe environmental threats and significant economic costs for coastal communities, including Baltimore." ¶ 170. "By reason of [Defendants' deception, misrepresentations, and omissions of material fact,] the City of Baltimore incurred harm and was damaged in ways it would not otherwise have been." ¶ 298. "[T]he delayed action on climate change, exacerbated by Defendants' actions, already have drastically increased the cost of mitigating further harm." ¶ 180. Had Defendants not engaged in a deceptive campaign of misinformation about their products and their relation to climate change, the City and its residents would have bought fewer or no fossil fuels. *See* ¶¶ 216, 295–96. However, because of Defendants' unfair and deceptive trade practices, the City has suffered—and will continue to suffer—substantial injury due to sea level rise, changes in the hydrologic cycle, and ocean acidification. The future injuries that the City will sustain as a result of committed sea level rise also qualify as an actual loss: these injuries are neither conjectural nor potential, but instead result directly from past emissions. ¶ 179.

The City states an actionable claim under the CPA.

5. The City Adequately Alleges Causation.

To prove causation the City must prove that the defendants' tortious conduct was (1) a cause in fact and (2) a legally cognizable cause of its injuries. *Exxon*, 406 F. Supp. 3d at 453. The causation-in-fact inquiry first asks "whether defendant's conduct actually produced an injury." *Id*. If so, the inquiry turns to "whether the injuries were a foreseeable result of the [tortious] conduct." *Pittway Corp. v. Collins*, 973 A.2d 771, 788 (Md. 2009). As explained in Maryland's Civil Pattern Jury Instructions: "For the plaintiff to recover damages, the plaintiff's injuries must result from and be a reasonably foreseeable consequence of the defendant's negligence." MPJI-Cv 19:10. Determinations of proximate cause usually involve questions of fact for the jury; proximate cause becomes a matter of law only where reasonable minds cannot differ. *See Collins v. Li*, 933 A.2d 528, 548 (Md. Ct. Spec. App. 2007); *see also Pittway*, 973 A.2d at 792 (holding that a court may only dismiss a complaint as to causation where "reasoning minds cannot differ" and the allegations "are susceptible of but one inference").

The Complaint properly alleges both cause in fact and legal causation. Specifically, it alleges that Defendants are responsible for the release of billions of tons of greenhouse gases into the atmosphere through their relentless, deceptive promotion and concealment of the known dangers of unrestrained use of their fossil fuel products, which they encouraged the public to combust in ever-increasing amounts despite the availability of non-fossil fuel energy sources that would be far less damaging to the environment. *See* ¶¶ 94–102, 145–70. This expanded use of Defendants' products in the last several decades has altered and continues to alter the climate, causing and exacerbating a range of irreversible harms to the City (¶¶ 36–102), all of which Defendants foresaw and deliberately concealed over the course of decades (¶¶ 103–70). *See also* ¶¶ 1–12. As the Fourth Circuit explained in its order affirming remand from federal court:

> Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Baltimore, 952 F.3d at 467. Reasonable minds could easily draw the inference that Defendants' challenged conduct was a direct and proximate cause of the climate change conditions now confronting the City. Consequently, the City has amply satisfied its pleading burden as to causation.

a) Cause in Fact

Where, as here, two or more independent acts bring about an injury, Maryland courts have adopted the substantial factor test set forth in the Restatement to determine liability. *See Exxon*, 406 F. Supp. 3d at 453. Under that test, "the requisite causation may be found if it is more likely than not that the defendant's conduct was a substantial factor in producing the plaintiff's injuries." *Id.* (quoting *Copsey v. Park*, 160 A.3d 623, 637 (Md. 2017)). Courts look to the following considerations, drawn from the Restatement, to determine whether conduct is a substantial factor:

> (a) The number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces of which the actor is not responsible; and
>
> (c) lapse of time.

Pittway, 973 A.2d at 787 (quoting Rest. § 433); *see also* Rest. § 431 ("The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to

lead reasonable men to regard it as a cause.").[16] The City pleads sufficient facts to satisfy the substantial factor standard. Defendants' arguments to the contrary rest upon fact-based defenses that are not appropriate for resolution on a motion to dismiss.

First, Defendants contend that where multiple actors contribute to a harm, none of those actors can itself be *the* cause-in-fact, so all contributing tortfeasors should be entirely immune from liability. That has never been the law, for obvious reasons.

The City recognizes that there are multiple sources of fossil fuel products and greenhouse gas emissions. But "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution." Rest. § 840E. As the Restatement emphasizes: where defendants "contribute[] to a nuisance to a relatively slight extent" such "that [their] contribution taken by itself would not be an unreasonable one," they may be liable if "the contribution of all is a substantial interference, which becomes an unreasonable one." *Id.* § 840E, cmt. b. Courts relying on the Restatement have similarly found causation "where the defendant's act or omission had such an effect in producing the injury that reasonable people would regard it

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[16] Although Defendants contend that the City must prove that each Defendant was an independently sufficient cause-in-fact of the alleged harms, the substantial-factor test has never been construed so rigidly in cases involving multiple tortfeasors. As the Court pointed out in *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445 (Md. 1992), Prosser and Keaton offered an alternative formulation of the substantial factor rule to apply in those circumstances:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 459 n.11 (quoting *Prosser & Keaton on The Law of Torts*, at 268 (5th ed. 1984)). Adopting this test, the court in *Eagle-Picher* found substantial factor causation based on expert testimony that the causal impacts of exposure to multiple defendants' asbestos products was "cumulative." *Id.* at 459; *see also Yonce v. SmithKline Beecham Clinical Labs. Inc.*, 680 A.2d 569, 576 (Md. Ct. Spec. App. 1996) (substantial factor test in Maryland created initially to address situation where "two independent causes concur to bring about an injury, and either cause, standing alone, would have wrought the identical harm . . . but has been used frequently in other situations").

as a cause of the injury"—not necessarily the sole or even primary cause of the injury. *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 116 (2d Cir. 2013) ("*In re MTBE*"); *City of Modesto v. Dow Chem. Co.*, 227 Cal. Rptr. 3d 764, 783 (Cal. App. 2018) (causation "can be proven by sufficient circumstantial evidence that would allow a reasonable fact-finder to find that *all of defendants' conduct* . . . was a contributing factor to the pollution" (emphasis added)). Here, the City alleges that Defendants "individually and together" caused its injuries by producing and misleadingly promoting their fossil fuel products—which is all the law requires. *See* ¶ 102, 216, 226.

Defendants' authorities do not hold otherwise. The district court's Article III standing decision in *Kivalina* was affirmed on other grounds, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), and the same reasoning was thoroughly rejected by the Second Circuit in *Connecticut v. American Electric Power Co.* ("*AEP*"), which held that the defendants' argument "that many others contribute to global warming in a variety of ways . . . does not defeat the causation requirement." 582 F.3d 309, 347 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). The court in *Amigos Bravos v. U.S. Bureau of Land Management*, 816 F. Supp. 2d 1118 (D.N.M. 2011), rejected the defendants' argument that plaintiffs were required to trace each greenhouse gas emission to particular defendants, applying instead the "meaningful contribution" standard articulated in *Massachusetts v. EPA*, 549 U.S. 497 (2007). *See Amigos Bravos*, 816 F. Supp. 2d at 1134–35 ("[I]n finding causation, the Court only need consider whether a defendant's emissions 'meaningfully contributed' to climate change." (citing *Mass. v. EPA*, 549 U.S. at 523–25)).[17]

[17] In *Massachusetts v. EPA*, the Supreme Court concluded that in cases alleging climate-related harms, a causal connection exists where the emissions "make a *meaningful contribution* to greenhouse gas

The City alleges that Defendants' fossil-fuel extraction and production accounted for 151,000 gigatons of carbon dioxide emissions, approximately 15% of global emissions, between 1965 and 2015—many times higher than the 2.5% the court found satisfactory in *AEP*; that Defendants' refining, wholesaling, and retailing operations account for an even greater total volume, *see* ¶¶ 7, 18, 94, 100–01; and that Defendants' deceptive promotion and marketing practices are responsible for far more emissions still, which would not have occurred in the absence of Defendants' relentless push for increased use of fossil fuels instead of safer fuel alternatives. ¶ 102. These allegations are sufficient to plead that Defendants' contribution to greenhouse gas emissions is "substantial" or "meaningful," by any measure.[18]

Second, Defendants seem to argue that the foreseeable and intended use of their fossil fuel products by consumers breaks the causal chain. Mot. at 33. This argument runs contrary to Maryland law, which recognizes that "[i]f a later event or act could have been reasonably foreseen, the defendant is not excused for responsibility for any injury caused by the defendant's negligence." MPJI-Cv 19:11; *see also Sindler v. Litman*, 887 A.2d 97, 112 (Md. 2005) ("[T]he connection is not actually broken, if the intervening event is one which might, in the natural and

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contributions and hence . . . to global warming." 549 U.S. at 524 (emphasis added); *see also id.* at 524–25 (vehicle emissions from the U.S. transportation sector, which accounted for approximately 6% of global emissions, constituted a meaningful contribution and thus satisfied causation for standing purposes); *AEP*, 582 F.3d at 347 (2.5% of global emissions satisfies causation prong of constitutional standing inquiry). Recent opioid lawsuits also confirm that even where a manufacturer was responsible for "less than one percent" of the market, it is "for the jury to decide" whether that defendant is liable. *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4194293, at *2 (N.D. Ohio Sept. 4, 2019).

[18] The City's causation allegations are certainly more than "de minimis." *See* Mot. at 32 n.19. Defendants' citations on that point are not relevant to the causation burden in this case. *Aldridge* declined to find causation because defendants produced only several of the chemicals used in a factory, and it was unknown which chemicals cause the plaintiff's injury; here, in contrast, it is undisputed that Defendants' products produce greenhouse gas emissions that cause climate change. *See Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp. 2d 1010, 1018–19 (D. Md. 1999).

ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." (quoting *State ex rel. Schiller v. Hecht Co.*, 169 A. 311, 313 (Md. 1933))). Indeed, the superseding-cause defense "arises primarily when 'unusual' and 'extraordinary' independent intervening acts occur that could not have been anticipated by the original tortfeasor." *Pittway*, 973 A.2d at 789 (citation omitted). Here, encouraging increased consumer use of fossil-fuel products was the whole point of Defendants' tortiously deceptive scheme. ¶¶ 6, 145, 147.

The sole authority that Defendants rely on, *Aldridge*, 34 F. Supp. 2d at 1018, held that the plaintiffs there had failed to offer sufficient proof *on summary judgment* that their exposure to defendant's chemicals was a substantial factor causing their injuries. The decisive factor to the court's opinion was not, as Defendants assert, that the chemicals did not become toxic until they were used, but rather that the plaintiffs did not offer evidence that the defendants' chemicals actually caused any injury. Here, the City alleges (and Defendants now do not dispute) that climate change is caused by elevated atmospheric levels of greenhouse gases, which their products produce through normal use. *Aldridge* is inapposite.

Third, Defendants' "lapse of time" assertion is also unsupported by relevant authority and is irrelevant to the City's pleading burden. As comment f. to Restatement § 433 underscores, "where it is evident that the influence of the actor's [tortious conduct] is still a substantial factor, mere lapse of time, no matter how long" does not preclude proximate cause. Rest. § 433 cmt. f.

The touchstone of causation in this case is foreseeability. The City pleads foreseeability by alleging that Defendants knew their products would be combusted in the course of their intended use and that the resulting global warming impacts would be inevitable. *See, e.g.*, ¶¶ 1, 5, 30, 182, 190, 221, 226, 239, 240, 262, 272, 273. Defendants not only knew about the harms that would

result, but they knew many decades ago that the lag in time between the combustion of fossil fuels and the resulting observable effects would be significant and would mask the inevitability of more significant and, indeed, "catastrophic" future effects. ¶¶ 120, 124.

Defendants again wrongly rely on the district court's Article III standing decision in *Kivalina*, which resulted in a dismissal that the Ninth Circuit upheld on other grounds, and which the Second Circuit in *AEP* squarely rejected. *See AEP*, 582 F.3d at 346–47 (rejecting identical arguments about space and time in nuisance context). Courts regularly reject arguments like Defendants', particularly where defendants acted intentionally and with knowledge of the dangers. *See, e.g.*, *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 104 (2017) (lead paint companies were liable for product promotions from decades earlier "even [where] the actions of others in response to those promotions and the passive neglect of owners also played a causal role"); *In re MTBE*, 725 F.3d at 122 n.43 (concerns about "proximity" turn on "whether the defendant knew that its product would endanger the public health").

Fourth, contrary to Defendants' assertion, the Complaint's allegations linking Defendants' promotion of fossil fuels to the City's injuries are not "wholly speculative." *See* Mot. at 34. The only authority Defendants cite for this proposition addresses the plaintiff's burden at trial, not in the context of a threshold motion to dismiss. *See Lyon v. Campbell*, 707 A.2d 850 (Md. Ct. Spec. App. 1998) (concluding causation evidence presented to jury was insufficient to support plaintiff's verdict). Whether Defendants' actions prevented the development and adoption of fossil fuel alternatives (¶ 182) and exacerbated the costs of mitigating further harm to the City (¶ 189) are fact-intensive questions not appropriate for resolution at this stage.

b) Legal Cause

Proximate cause analysis "focuses on foreseeability." *Exxon*, 406 F. Supp. 3d at 453; *see also Collins*, 933 A.2d at 549 (foreseeability is "the touchstone of any determination of proximate cause"); *Pittway*, 973 A.2d at 788 ("The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the defendant's tortious conduct."). In assessing foreseeability, courts ask "whether the 'actual harm to a litigant falls within a general field of danger that the actor should have anticipated or expected.'" *Exxon*, 406 F. Supp. 3d at 453 (quoting *Pittway*, 973 A.2d at 787). Here, the City pleads foreseeability by alleging that Defendants knew their products would be combusted in the course of their intended use and that the resulting harmful impacts on the City and its public infrastructure would be inevitable. ¶¶ 1, 5, 30, 182, 190, 221, 226, 239, 240, 262, 272, 273.

Defendants' argument that the City's injuries are "'out of proportion' to Defendants' alleged culpability" grossly misreads the Complaint and rests upon contested factual issues. Far from alleging that the City's injuries were caused by "conduct that is lawful and encouraged," Mot. at 36, the Complaint alleges that Defendants concealed known hazards of their fossil fuel products from consumers; promoted those products without warnings despite knowing the dangers associated with their use; and engaged in a persistent public opinion campaign based on falsehoods, omissions, and deceptions to discredit scientific research and create doubt in the public's mind about the reality and consequences of fossil fuel pollution, among other unlawful conduct. ¶¶ 1, 5, 6, 102, 141–170, 221, 239–242, 254, 264, 272–76, 295–96. Due to the magnitude of harm from their fossil fuel products that was both foreseeable to and foreseen by Defendants, the injuries to the City are within the "general field of danger" and legally cognizable.

Moreover, Defendants' contention that the "lapse of time" between Defendants' conduct and the City's injuries insulates them from liability repeats the same meritless argument from the cause-in-fact test, which must be rejected. *See* Part IV.A.5.a, *supra*.

c) Alternative Causation

While the City sufficiently pleads that Defendants caused the City's harm according to traditional Restatement theories of causation, alternative theories of causation, such as "commingled product causation" also validate the City's allegations. Causation is for the finder of fact to determine, and a plaintiff is not required to elect any particular theory of liability at the pleading stage. *See Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory . . . .").

Courts interpreting Maryland law have recognized that traditional causation principles must sometimes be adapted to avoid an unjust result. As Judge Hollander explained in *Exxon*:

> The Maryland Court of Appeals has said that "'the common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.'" *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 140, 497 A.2d 1143, 1150 (1985) (quoting *Harrison v. Mont. Cty. Bd. of Educ.*, 295 Md. 442, 460, 456 A.2d 894 (1983)). The court has demonstrated a tendency to fashion the common law to allow plaintiffs to pursue recovery when the facts and circumstances of their actions presented obstacles to relief.

Exxon, 406 F. Supp. 3d at 457–58. Here, too, "rather than support the rigid application of traditional causation principles, Maryland courts [c]ould endorse the application of an alternative theory of liability." *Id.* at 458.

In *Exxon*, the court allowed the State to proceed under the commingled product theory of causation, which applies where "certain gaseous or liquid products . . . were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury." *Id.* at 456 (quoting *In re MTBE Prods.*

Liab. Litig., 379 F. Supp. 2d 348, 377–78 (S.D.N.Y. 2005)). If the plaintiff proves that each defendant actually contributed to the harm, damages under that theory are "apportioned by proof of a defendant's share of the market." *Id.*[19] Similarly in this case, the City alleges facts demonstrating that greenhouse gases from Defendants' fossil fuel products were present in a blended state in the atmosphere at the time they caused the climatic injuries that harm the City. ¶¶ 235, 246, 258, 267, 279, 288. Considering alternative approaches to demonstrating causation requires an underlying factual basis that is developed through discovery. *See In re MTBE*, 447 F. Supp. 2d 289, 304–05 (S.D.N.Y. 2006) ("The applicability of alternative theories of liability . . . ultimately depends on the evidence put forward at trial or in response to a summary judgment motion . . . .").

B. No Federal Law Bars the City's Claims.

1. The City's Claims Are Not Displaced by the Clean Air Act.

The City's claims arise under state law, and for that reason alone cannot have been "displaced" by the Clean Air Act. The Supreme Court clearly reached that holding in *AEP*, and Defendants' prevarications about the purpose and scope of the CAA cannot overcome the Supreme Court's clear instructions. Because the City pleads its claims entirely under Maryland law, displacement of those claims by the CAA is impossible, as Judge Hollander already held in this case. *See Baltimore*, 388 F. Supp. 3d at 557–58.

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[19] To the extent Defendants argue market share liability is inapplicable, the court recognized in *Exxon* that market share liability was only rejected in the asbestos context, and may still apply outside of that context. *See Exxon*, 406 F. Supp. 3d at 456 (citing *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 211 A.3d 1166, 1174–76 (Md. 2019)). Nevertheless, evidence of Defendants' market shares may be relevant to traditional substantial factor causation or commingled product liability as "part of the mosaic of circumstantial evidence that helps the jury determine the scope of the defendant's contribution to the plaintiff's injury." *In re MTBE*, 725 F.3d at 117 (discussing market share evidence as relevant to substantial factor causation).

"[L]egislative displacement" occurs whenever Congress "speak[s] directly" on a subject that judge-made federal common law previously governed in the absence of legislation. *See, e.g.*, *Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 787 (4th Cir. 2019), *as amended* (Mar. 22, 2019). Federal *preemption* of *state* common law, by contrast, implicates potential federalism concerns and thus occurs only when Congress evinces a "clear and manifest purpose to do so." *AEP*, 564 U.S. at 423. The Supreme Court unambiguously 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 from fossil-fuel fired powerplants." *Id.* at 424 (emphasis added). The Court was equally unambiguous, however, that a separate analysis would be required to determine whether the CAA preempts any state common law causes of action, and declined to perform that analysis because the issue was not before the Court. *Id.* at 429. Defendants' contention that the Court in *AEP* determined the plaintiffs' alternative state law claims were "governed by federal common law," and were thus eliminated by the CAA's displacement of federal common law, simply misstates the *AEP* decision. Mot. at 40.

Defendants' reading of the Ninth Circuit's decision in *Kivalina* is equally mistaken. The court there also had no state law claims before it: after dismissing the plaintiff's federal claims, the district court declined to exercise supplemental jurisdiction over the plaintiff's alternative state law claims and dismissed them without prejudice, which dismissal the plaintiff did not appeal. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009). Thus, in affirming dismissal of the plaintiff's *federal* common law claims, the Ninth Circuit merely applied *AEP*'s holding that "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Kivalina*, 696 F.3d at 856. The holding applied only to the plaintiff's federal claims. The court did not convert,

and could not have converted, the plaintiff's state law claims into displaced federal ones. *See also id.* at 866 ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." (Pro, J., concurring)). Nothing in *AEP* or *Kivalina* stands for the proposition that state law tort actions involving climate change have been wholesale displaced by the CAA. The opposite is true.

Judge Hollander rejected these same federal-common-law-displacement arguments in remanding this case to state court. Defendants' assertion that Judge Hollander "declined to decide whether federal common law must necessarily govern [the City's] claims," *see* Mot. at 30 & n.20, *supra*, is just not true. Judge Hollander held that "no federal question jurisdiction exists over the City's public nuisance claim" because it "*is founded on Maryland law*." *Baltimore*, 388 F. Supp. 3d at 558 (emphasis added). Although the court appropriately declined to determine whether the City's public nuisance claim was "viable *under Maryland law*," *id.* at 558 (emphasis added)—the issue now before this Court—it squarely, and correctly, held that none of the City's claims "arise under" or "are governed by" federal common law. *Id.* at 557–58.

Defendants' contention that the City's claims are "governed by" federal common law was therefore fully and fairly adjudicated and rejected on its merits by Judge Hollander. Her rejection of that argument is entitled to full faith and credit. *See, e.g., Osteoimplant Tech., Inc. v. Rathe Prods., Inc.*, 666 A.2d 1310, 1312 (Md. Ct. Spec. App. 1995); Md. Code Ann., Cts. & Jud. Proc. §§ 11-801, 11-802. The district court's reasoning was correct in any event, and this Court should adopt it even if it were not preclusive.[20]

[20] Three other district courts have reached the same conclusion as Judge Hollander. *See Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 970 (D. Colo. 2019), *appeal pending*,

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

Defendants next pivot to arguing that the City's state law claims are preempted by the CAA and by the "source state rule" first articulated in *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). Mot. at 41–43. Defendants' argument mischaracterizes the nature of the City's state law claims and misunderstands the conditions under which a federal statute may preempt state law. The City's claims do not implicate conduct regulated by the CAA and are outside the scope of cases it could preempt. Even if they were within the Act's scope, they would be expressly preserved by its savings clauses.

"Federal law may preempt state law under the Supremacy Clause in three ways—by 'express preemption,' by 'field preemption,' or by 'conflict preemption.'" *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007). Defendants do not assert express or field preemption applies here, and their argument for conflict preemption fails. Under any theory, the preemption analysis begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

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No. 19-1330 (10th Cir.); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019), *appeal pending*, No. 19-1818 (1st Cir.); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *appeal pending*, No. 18-15499 (9th Cir.).

Defendants cite orders granting motions to dismiss in *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), *appeal pending*, 18-16663 (9th Cir.), and *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *appeal pending*, N. 18-2188 (2d Cir.), but those orders are legally insupportable. The trial courts in both cases improperly treated plaintiffs' state law claims as if they arose under federal common law, and then found that plaintiffs had no valid federal common law claims, including because they were barred by foreign affairs and separation of powers concerns. Neither defense is supported by the applicable case law or controlling Fourth Circuit precedent. Defendants' assertions that localized tort remedies would deprive the United States of its authority to negotiate climate-change agreements with foreign governments ignores the limited nature of the plaintiffs' allegations and requested remedies, which would apply to the private company defendants only and are limited to neutralizing the economic impacts of those companies' past wrongful conduct, not to affect any future formulation of federal government policy or its engagement with other sovereign nations.

Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotations and alterations omitted); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002) (same). Thus, "when assessing congressional intent and weighing whether a state law poses an obstacle to congressional purposes or objectives, courts must also apply a presumption that Congress did not intend to preempt state law." *Chateau Foghorn LP v. Hosford*, 168 A.3d 824, 837–38 (Md. 2017); *see also Bd. of Trs. of Emps.' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City*, 562 A.2d 720, 741 (Md. 1989) (noting that "in areas traditionally regulated by state and local governments, there is a strong presumption against finding federal preemption"). "[T]he presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2014) (quoting *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988)).

a) The Clean Air Act's "Cooperative Federalism" Structure Expressly Preserves State Law Claims Like the City's.

In enacting the CAA, Congress expressly found "that air pollution prevention . . . and air pollution control at its sources is the primary responsibilities of States and local governments," and the Act rests on "cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C. §7401(a)(3), (4). The CAA creates obligations for the EPA to work with states in setting and enforcing air quality standards and permitting stationary emissions sources. *Id.* §§ 7402 *et seq.*, 7661 *et seq.* The Act creates certain "citizen suit" causes of action to challenge emissions permits issued under the Act, challenge decisions of the EPA, or challenge construction of unpermitted major emitting facilities. *Id.* § 7604(a)(1)–(3). The Act, however, expressly disclaims any intent by Congress to "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation *or to seek any other relief*." *Id.* § 7604(e) (emphasis added). To the contrary,

Congress's purpose, made clear in the language and structure of the Act, was to preserve the states' traditional primacy in protecting the health of their citizens, even in matters that fall within the Act's focus on regulating emissions.

Against that backdrop, Defendants contend that adjudicating the City's state law claims in this case would interfere with federal regulation of stationary point sources under the CAA, and are therefore preempted. *See* Mot. at 41–42. Conflict preemption can occur when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives," *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 248 (1984), and Defendants argue the City's claims are such an obstacle to the CAA. Defendants' "burden [in] establishing obstacle preemption . . . is heavy." *In re MTBE*, 725 F.3d at 101. They must first "ascertain [Congress'] objectives," and then show that "the repugnance or conflict is so direct and positive that [federal and state law] cannot be reconciled or consistently stand together." *Id.* (rejecting preemption under CAA for tort claims arising out of water pollution and failure to warn); *see also Hosford*, 168 A.3d at 838 ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."); *id.* at 841, 853–54 (federal Section 8 housing statute and regulations did not preempt state landlord-tenant law, which was "in the traditional domain of state law" and did not impede federal goals).

The obvious flaw in Defendants' argument is that the City's state law claims have nothing to do with regulating point source emitters and do not "challeng[e] air pollution originating out of state," as Defendants contend. Mot. at 42. Instead, the City alleges that Defendants engaged in unlawful, deceptive marketing of products they knew to be dangerous. That conduct is not (and could not be) regulated by any emissions permit issued pursuant to the CAA, and claims to remedy

that conduct could not possibly impede the statutory permitting scheme—and Defendants provide no explanation why they would. Rather, this case arises at the core of the City's historic powers to protect the health, safety and welfare of its citizens. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (state common law product liability claims not preempted by federal statute because "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"); *Nw. Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) ("[t]o regulate and abate nuisances is one of a state's ordinary functions" under its "police powers"); *In re MTBE*, 725 F.3d at 96 (rejecting federal preemption of city's state tort claims arising out of MTBE contamination of drinking water, and holding that "[i]mposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn . . . falls well within the state's historic powers to protect the health, safety, and property rights of its citizens"). Indeed, States' police powers include "combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochem. Mrfs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). The City's claims are no "obstacle" to enforcement of the CAA, and indeed are in concert with the Act's structure of cooperative federalism, especially since they fall within classic areas of state police power. In sum, they are not preempted by the CAA.

b) **Ouellette*'s "Source State Rule" Has Nothing to Do with This Case.***

Defendants' reliance on *Ouellette* is misplaced. In *Ouellette*, Vermont residents brought suit under Vermont state nuisance law against a New York paper mill that was discharging effluent into the New York side of Lake Champlain, which allegedly flowed onto the plaintiffs' property on the Vermont side. 479 U.S. at 483–84. The Court began its analysis by reviewing the framework of the Clean Water Act ("CWA"), which requires "all point sources [on] virtually all bodies of water" to obtain a state- and federally-approved permit before discharging pollutants, and "sets

forth the procedures for obtaining a permit in great detail." *Id.* at 492. The Court reasoned that when a discharge from a permitted source crosses a state boundary and causes injury, applying the laws of the *affected* state, rather than the laws of the permit-issuing *source* state, could create potentially conflicting obligations and therefore interfere with the CWA's permitting scheme. To wit: "If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State." *Id.* Every case cited by Defendants that applies this principle involved claims directed against stationary sources of pollution, which the courts held were governed by the law of the source state. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015) (whiskey distillery); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), *cert. denied*, 572 U.S. 1149 (2014) (coal power plant); *N.C. ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (four power plants).[21]

[21] The proposed Brief of the United States as Amicus Curiae in Support of Defendants' Motion to Dismiss ("U.S. Amicus Br.") does not provide any information or argument concerning Clean Air Act preemption not already raised in Defendants' Motion, and—like Defendants—wholly mischaracterizes the City's allegations, claims, and available relief. *See* U.S. Amicus Br. at 10–17. The Supreme Court has long held that a federal agency's position on whether a federal statute preempts state law is not entitled to any deference. The Court has "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive,'" but "[e]ven in such cases, however, [the Court has] not deferred to an agency's *conclusion* that state law is pre-empted. Rather, [it has] attended to an agency's explanation of how state law affects the regulatory scheme." *See Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863 (2000)). The United States, like Defendants, argues that this case is really about controlling out-of-state emissions, and that this Court might award relief "requiring a source of Defendants' in another state . . . to change pollution-control methods" in derogation of a CAA permit. U.S. Amicus Br. at 13–14. Apart from that mischaracterization, the United States does not state or argue how the City's claims could have any impact on the CAA's permitting scheme. As explained, the City does not challenge any point source releases (in or outside Maryland), does not seek injunctive or monetary relief related to any releases, and fundamentally is not asking this Court to punish or stop any emissions by anyone. The City's allegations turn on injuries from Defendants' decades of deception, which is not and could not be subject to any CAA permit. The United States has offered no explanation how the City's actual claims and

None of the statutory, factual, or policy considerations underlying *Ouellette* apply where, as here, the plaintiff is not challenging the legality of any point-source emissions but is instead pleading violations of state statutory and common law duties stemming from the sale of a dangerous product through misleading means. *Counts v. General Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), is analogous and instructive. There, the plaintiffs brought common law misrepresentation and breach of contract claims, alleging that GM installed "defeat devices" in certain vehicles that made them appear more fuel-efficient during laboratory testing than they actually were under normal driving conditions. *Id.* at 578. GM moved to dismiss, arguing that the plaintiffs' claims were attempts to enforce automobile emissions standards and were thus preempted by the CAA, which expressly prohibits states from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles." *See id.* at 588 (quoting 42 U.S.C. § 7543). The court disagreed, holding that the plaintiffs' claims did not seek to enforce emissions rules, because they did not depend on the violation of an emissions rule at all; instead, they challenged GM's misleading representations to consumers and were therefore not preempted. *Counts*, 237 F. Supp. 3d at 591; *accord In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 990–1003 (N.D. Cal. 2018) (state law fraud claims alleging misrepresentations of defendants' diesel vehicle fuel efficiency not preempted by CAA under express or obstacle preemption theories); *In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189, 2016 WL 10880209, at *5–6 (Va. Cir. Ct., 2016) (plaintiffs' state law fraud and

actual relief interfere with its CAA policy or enforcement, because they do not. Its bare legal arguments are not entitled to any deference, are identical to those proffered by Defendants, and fail for the same reasons as Defendants' arguments. *Cf. Wheelabrator Baltimore LP v. Mayor & City Council of Baltimore*, 1:19-cv-01264, 2020 WL 1491409, at *1 n.1 (D. Md. Mar. 27, 2020) (denying motion for leave to file amicus brief where proposed amicus "d[id] not provide any legal analysis beyond the arguments raised in the parties' briefs").

consumer protection claims arising from emissions defeat devices "d[id] do not rely on emissions violations or enforcement to make out their claims" and thus were not preempted by CAA); *compare In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030, 1047–49 (N.D. Cal. 2018) (finding state law fraud claims based on defendant's alleged "noncompliance with EPA's emission standards" preempted by CAA, distinguishing cases where the plaintiffs' claims "were an attempt to hold the manufacturers liable for their false promises and deceit" about vehicle emissions and therefore not preempted).[22]

In any event, the CAA's two savings clauses explicitly preserve state law actions like this one. First, the CAA sets a *floor* for emissions standards and limitations, and does not restrict states' ability to enforce *stricter* standards. 42 U.S.C. § 7416. Second, and critically here, Congress specified that "nothing in" the chapter governing citizen suits "shall restrict any right which any person (or class of persons) may have under any statute or common law . . . to seek any other relief." *Id.* § 7604(e); *see also Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989) ("[T]he plain language of the [CAA's] savings clause . . . clearly indicates that Congress did not wish to abolish state control"). Congress thus did not intend the Act to provide the exclusive means of enforcing air quality standards, let alone the distinct types of injuries and conduct the Complaint alleges here. *Cf. Dep't of Treas. v. Fabe*, 508 U.S. 491, 502, 507 (1993) (statutory disclaimers of congressional intent to preempt, where their

[22] Defendants quote a single sentence from the district court's ruling in *City of Oakland* that "if an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's." Mot. at 43 (citing *City of Oakland*, 325 F. Supp. 3d at 1024). As noted elsewhere, that case was wrongly decided, conflicts with Judge Hollander's decision in this case, and is on appeal. *See* n.20, *supra*. In any event, the cited sentence adds nothing to the required analysis. The City is not suing Defendants on some theory of wrongful *emissions*, which is precisely why Judge Hollander was right to conclude that the City's claims do not arise under federal common law. *See Baltimore*, 388 F. Supp. 3d at 558.

terms apply, are controlling in cases involving implied conflict preemption, just as in cases involving other forms of preemption). The Complaint does not seek to impose, enforce, or modify any air quality standards or emissions permit, and the state law savings clause clearly preserves the type of traditional state common law claims pleaded here. Thus, even if the City's Maryland law claims were within the scope of the Act, which they are not, the clear intent of Congress is to preserve them. Numerous courts have similarly rejected arguments that state law claims are preempted because they purportedly conflict with the CAA.[23]

In sum, nothing in the CAA precludes this Court from adjudicating the challenges to Defendants' deceptive promotion and deceptive marketing of known dangerous products.

3. No Energy Statute Preempts the City's Claims.

The various federal energy statutes Defendants cite, Mot. at 43–44, do not preempt Baltimore's claims either. *See* Part IV.B.2, *supra* (discussing presumption against preemption). There is no merit to Defendants' argument that holding them accountable for their longstanding disinformation campaign would stand as an obstacle to achievement of the cited statutory provisions' broad purposes.[24]

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[23] *See, e.g.*, *Bell*, 734 F.3d at 198 (allowing state tort claims to proceed against coal-fired power plant, holding "[i]f Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd'"); *Merrick*, 805 F.3d at 690 (rejecting argument that "state common law [negligence, nuisance, and trespass] claims conflict with the Clean Air Act methods for regulating emissions" because "the Clean Air Act expressly preserves the state common law standards on which plaintiffs sue"); *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285–86 (D. Or. 2015) (the Act's "sweeping and explicit" savings clause demonstrates that, absent an affirmative EPA finding otherwise, the states retain their "traditional authority" to regulate air pollutants), *aff'd*, 903 F.3d 903 (9th Cir. 2018).

[24] Defendants' secondary argument that the cited federal statutes' broad purposes show their conduct cannot be "unreasonable" under Maryland nuisance law has nothing to do with preemption, but is rather a fact-based merits argument that cannot be resolved in the context of a motion to dismiss. *See* Part IV.A.1, *supra*.

Defendants refer vaguely to some statutes that articulate broad state and federal public policies concerning energy production and efficiency. Generally invoking a federal interest, however, "should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J., three justice opinion).[25] "Every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Abbot*, 844 F.2d at 1112 (citing *Hillsborough Cty. v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985)). The laws cited by Defendants impose no specific mandates, requirements, or limitations that constrain state law, and they contain no "evidence of pre-emptive purpose . . . in the[ir] text and structure," much less with respect to the claims here. *Va. Uranium*, 139 S. Ct. at 1907. Indeed, federal law concurrently affirmatively promotes alternative energy, conservation, and the need to reduce fossil fuel consumption.[26] No federal law preempts the City's claims.

A vague federal interest in promoting domestic oil production, moreover, does not mean those objectives must be accomplished "at all costs," and does not prohibit cities from relying on tort law or state police power laws to remedy harms relating to those activities. *See Silkwood*, 464

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[25] Defendants' assertion that "the United States has a strong economic and national security interest in promoting the development of fossil fuels," Mot. at 18, n.12 (quoting Br. for the United States as Amicus Curiae at 1, *City of Oakland v. BP P.L.C.*, No. 17-cv-6011, 2018 WL 2192113 (N.D. Cal. May 10, 2018)), even if true, is irrelevant to the preemption analysis. Besides, the City has an equally powerful interest in protecting its citizens from injuries caused by decades of deceptive marketing and promotion of dangerous products.

[26] Global Climate Protection Act of 1987, P.L. 100-204, Title XI, §1103(a) (uncodified), reprinted at 15 U.S.C. § 2901-note (U.S. policy is to "limit mankind's adverse effect on the global climate by–(A) slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term; and (B) stabilizing or reducing atmospheric concentrations of greenhouse gases over the long term"); Global Change Research Act of 1990, 15 U.S.C. § 2931(a)(2) ("human-induced changes, in conjunction with natural fluctuations, may lead to significant global warming and thus alter world climate patterns and increase global sea levels," with adverse effects on "coastal habitability" and "human health").

U.S. at 257 (award of state punitive damages for nuclear incident not preempted by Atomic Energy Act even where Act states broad purpose of promoting nuclear energy production); *Va. Uranium*, 139 S. Ct. at 1901–02 (state law banning uranium mining on private lands not preempted by Atomic Energy Act); *id.* at 1909–16 (Ginsburg, Sotomayor, Kagan, JJ., concurring in the judgment); *In re MTBE*, 725 F.3d at 101–04 (although CAA encouraged use of MTBE, state law claims for water contamination involving "additional tortious conduct" beyond "the mere use of MTBE" were not preempted).[27]

Congress, in fact, has declared that the production of oil should *not* come at the expense of compromising the environment or harming local communities. *See* 42 U.S.C. § 13401(3) ("It is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to reduce the air, water, and other environmental impacts (including emissions of greenhouse gases) of energy production, distribution, transportation, and utilization . . . ."); *id.* § 15927(b)(3) ("[I]t is the policy of the United States that . . . development of those strategic unconventional fuels should occur, with an emphasis on sustainability . . . while taking into account affected States and communities."). Nothing in any of Defendants' cited federal statutes indicates the slightest congressional intent to preempt or limit states or their subdivisions from seeking to protect their resources and citizens from climate change-related harm.[28]

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[27] In *Exxon*, Judge Hollander held that removal was warranted because the defendant had raised a "colorable defense" of preemption of the State's tort claims. 352 F. Supp. 3d 435, 461–62 (D. Md. 2018). Importantly, Judge Hollander declared: "I make no finding, however, about the merits of the preemption defense," and that "[a]fter further factual development, I could ultimately reject the defense." *Id.* at 462.

[28] *See, e.g.*, *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) ("[T]he language and legislative history of the [Coastal Zone Management Act] expressly disclaim an intent to pre-empt state regulation."); *Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018) (Federal Land Management Policy Act and Mining and Minerals Policy Act of 1970 do not preempt state restrictions on in-stream mining

4. The Commerce Clause Does Not Bar the City's Claims.

Defendants next contend that the City's claims, and the relief it seeks, constitute extraterritorial regulation in violation of the dormant Commerce Clause. This argument is incorrect. The Supreme Court has recognized in a limited number of instances that a state statute may be impermissibly extraterritorial if it "directly controls commerce occurring wholly outside the boundaries of a State [and] exceeds the inherent limits of the enacting State's authority." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). In examining claims of extraterritoriality, courts inquire whether the statute would have "the practical effect of regulating commerce occurring wholly outside the State's borders." *Star Sci. Inc. v. Beales*, 278 F.3d 339, 355 (4th Cir. 2002) (quoting *Healy*, 491 U.S. at 332). A violation only occurs "if the state law at issue 'regulate[s] the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (alterations in original)). The localized remedies for localized harm that the City seeks do not come close to meeting that standard.

None of the abatement or damages remedies sought in this lawsuit would have the "practical" or "inevitable" effect of regulating out-of-state commerce, transactions, or prices. Defendants indicate no way that a result here "directly controls commerce" in other states, *Healy*, 491 U.S. at 336, or requires Defendants to comply with any "in-state terms" in their out-of-state

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operations), *cert. denied*, 139 S. Ct. 1621 (2019); *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 500 (9th Cir. 2005) (acts amending the Energy Policy and Conservation Act, including the Energy Policy Act of 1992, do not preempt state statute); *Kelecseny v. Chevron U.S.A., Inc.*, No. 08-61294-CIV, 2009 WL 10667064, at *5 (S.D. Fla. Jan. 20, 2009) (Energy Policy Act of 2005 does not preempt failure to warn claim); *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1325 (D. Wy. 2001) (FLPMA does not preempt state tort law); *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 436 (Fla. 2000) (Energy Policy Act of 1992 does not preempt state law).

activities, *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). Defendants speculate that this case threatens their "business model." Mot. at 48. That may be true, to the extent that model rests upon Defendants continuing to market their products through a campaign of lies and deception, but it is irrelevant to dormant Commerce Clause analysis.

Defendants also warn that the City's lawsuit may indirectly affect the nation's "economy, national security, transportation, and even the ability to heat one's home and cook food." Mot. at 48–50. Such speculative impacts are overwrought and unsupported. Regardless, upstream impacts on companies and their consumers may result in many lawsuits against large corporate defendants, including lawsuits based on state environmental, product liability and public nuisance law, but "[s]imply because the manufacturers' profits might be negatively affected . . . does not necessarily mean that the [law] is regulating those profits." *Concannon*, 249 F.3d at 82. A dormant Commerce Clause challenge must fail where, as here, "[t]he extraterritorial effect described by [defendants] amounts to no more than the upstream pricing impact of a state regulation." *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220 (2d Cir. 2004); *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 713 (S.D.N.Y. 2018) (state investigation into fossil fuel company's securities disclosures did not seek to regulate extraterritorially), *appeal pending*, No. 18-1170 (2d Cir.).

None of the cases cited by Defendants support their argument. Most importantly, in *BMW of North America v. Gore*—which was not decided on extraterritoriality grounds[29]—the Supreme Court found an Alabama punitive damages award excessive because the court had imposed those damages to punish conduct that "had no impact on Alabama or its residents," namely BMW's nationwide policy of not disclosing certain minor damage to vehicles occurring prior to sale. 517

[29] *See Philip Morris. Inc. v. Reilly*, 267 F.3d 45, 64 (1st Cir. 2001) ("The Manufacturers' reliance on *BMW* . . . is also misplaced. *Gore* was a due process clause case, not a commerce clause case.").

U.S. 559, 572–73 (1996). The Court concluded, however that the Alabama courts *could* enforce the state's disclosure laws, impose punitive damages against BMW based on "the interests of Alabama consumers, rather than those of the entire Nation," and consider out-of-state conduct to determine issues including "the degree of reprehensibility of the defendant's conduct." *See id.* at 574 & n.21. Here, all of the harms that the City seeks to remedy were suffered (or are being suffered) within Baltimore. To the extent *BMW* is relevant at all, it fully supports the City's ability to pursue these claims.[30]

The City does not seek any regulatory relief in this case, let alone extraterritorial regulatory relief. If legitimate concerns about extraterritoriality arise at the remedial stage of this litigation, the court can address those concerns then. Even if the relief the City seeks were characterized as regulating commerce, which it should not, regulation that "has only indirect effects on interstate commerce and regulates evenhandedly" does not per se violate the dormant Commerce Clause. *Brown–Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 578–79 (1986); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (burden imposed on out-of-state plastics industry by state law not clearly excessive in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems); *Exxon Corp. v. Maryland*, 437 U.S. 117, 125–28 (1978) (upholding state limits on petroleum marketing and rejecting "novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas"); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013) (sustaining

[30] Defendants' footnoted statement that the City's lawsuit also violates the dormant Commerce Clause because it would burden foreign commerce, Mot. at 47, n.28, fails for the same reasons as their argument concerning domestic extraterritorial regulation—the City's requested remedies in this case would not impermissibly burden commerce with any foreign countries.

regulation that "encourage[d] ethanol producers to adopt less carbon-intensive policies" out of state, but did not directly control production).

Further, even if Defendants were able to establish that the state laws at issue had a discriminatory effect on interstate commerce, under the dormant Commerce Clause analysis, laws that are facially neutral but discriminatory are evaluated under a fact-intensive balancing test that cannot be resolved in a motion to dismiss. This balancing test requires "examin[ation of] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (describing balancing test)*; see Colon Health Ctrs. of Am. LLC v. Hazel*, 733 F.3d 535, 544–45 (4th Cir. 2013) (noting purpose and effect analysis is fact-intensive); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 795 (8th Cir. 1995) (reversing grant of summary judgment on *Pike* balancing inquiry due to factual disputes).

5. The Foreign Affairs Doctrine Is Irrelevant Here and Does Not Preempt the City's Claims.

The "foreign affairs doctrine" is irrelevant to this case. To the limited extent it has been used, the doctrine prohibits the several states from crafting foreign policy, which is the sole prerogative of the United States. But the City's claims do not seek to establish or change foreign policy, either implicitly or explicitly, and any incidental impacts of domestic litigation on privately held foreign corporate defendants are insufficient to invoke the doctrine.

Under the foreign affairs doctrine, state law "must give way" to the foreign policy of the United States where there is "evidence of clear conflict between the policies adopted by the two." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–21 (2003) (state legislation that regulated recovery of assets seized by Nazis from Holocaust victims was preempted); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 369, 373 (2000) (state legislation imposing sanctions

preempted where it was "an obstacle to the accomplishment of Congress's full objectives" under federal statute directing President to develop comprehensive policy for Burma); *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016) ("[S]tate laws that intrude on th[e] exclusively federal power [to administer foreign affairs] are preempted . . . .").

For the doctrine to apply, the state laws at issue must "take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 429 n.11. General foreign policy concerns, even "plainly compelling" concerns related to "sensitive" interests, do not constitute substantive laws having potentially preemptive force over state law. *See Medellin v. Texas*, 552 U.S. 491, 523–24, 530 (2008) (President "may not rely on a non-self-executing treaty" to establish binding obligations that preempt state criminal procedure laws). To intrude on the foreign affairs power, an action must "produce something more than incidental effect in conflict with express foreign policy of the National Government." *Garamendi*, 539 U.S. at 420; *Employees' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City*, 562 A.2d 720, 744 (Md. 1989) ("[M]any state laws are entirely valid even though they 'involv[e] matters of significant concern to foreign relations.'" (quoting Rest. (2d) Foreign Relations Law of the United States, § 2 cmt. d (1965))). The City's claims have, at most, only an incidental effect.

The City's Complaint seeks local remedies for concrete local harms to public infrastructure. Defendants' suggestion that the City is somehow seeking a court order requiring a "15% annual reduction" in CO_2 emissions worldwide, Mot. at 46, grossly misrepresents the Complaint. The cited paragraph merely describes the general "consequences of delayed action on climate change" (¶ 180), and does not comprise any aspect of the relief the City seeks, which is specifically pleaded at Complaint Part VII ("Prayer for Relief"). As the Fourth Circuit recently

recognized in this very case, the City's descriptions of the impacts and consequences of climate change in its Complaint

> only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate change-related injuries, it is not the source of tort liability.

Baltimore, 952 F.3d at 467. The City's Complaint seeks to hold Defendants responsible for causing injuries in Baltimore and to compensate for those injuries—and only those injuries. That relief does not "produce something more than incidental effect in conflict with [any] express foreign policy," *Garamendi*, 539 U.S. at 420, and the City's claims are not preempted.

Defendants point to the United Nations Framework Convention on Climate Change, a variety of domestic statutes related to climate change research, and the existence of continuing international negotiations as evidence of foreign policy with preemptive effect. Mot. at 44–46. Several courts that have previously considered this argument have held that state regulation of greenhouse gases are not preempted by these efforts. *See Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396–97 (D. Vt. 2007) (holding that foreign-policy preemption did not apply to Vermont regulation of motor-vehicle greenhouse-gas emissions); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1183–88 (E.D. Cal. 2007) (California regulation not preempted by foreign policy).

Similarly, the Second Circuit in *AEP* rejected the argument that a federal public nuisance claim "will impermissibly interfere with the President's authority to manage foreign relations" because defendants "make conclusory statements but provide no support for their argument" and "[a] decision by a single . . . court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* . . . policy." 582 F.3d at 324–25 (emphasis in original); *see*

also id. at 388 (argument that federal common law nuisance claim "has been displaced by the President's conduct of foreign affairs . . . must be rejected for similar reasons"). Neither the UNFCCC nor federal climate change statutes nor ongoing negotiations implicate tort liability for conduct by *private* fossil fuel companies in any way.[31]

Defendants' reliance on the *City of New York* and *City of Oakland* cases now pending in the Second and Ninth Circuits, as previously noted, is misplaced, as those cases were wrongly decided. *See* n.20, *supra*. Defendants' citation to *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2d Cir. 2010) is also unavailing. There, the Second Circuit simply followed *Garamendi*, holding that the plaintiffs' claims were redressable only in the International Commission on Holocaust Era Insurance Claims, an international claims resolution organization designated through international negotiations to be "the exclusive forum and remedy for claims within its purview." *Id.* at 117 (citations and punctuation omitted). Here, neither Defendants, nor the amicus

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[31] The United States' proposed Amicus Brief in this case again adds no substance to Defendants' foreign affairs arguments. The United States generally asserts that it is involved in "international negotiations related to climate change," including "whether and how to share costs among different countries and international stakeholders" and "the provision of financial resources through a mechanism to assist developing countries in implementing measures to mitigate and adapt to climate change." U.S. Amicus Br. at 20–21. The only specific policy position the United States identifies is its "longstanding position . . . to oppose the establishment of sovereign liability and compensation schemes at the international level." *Id.* at 21. The City, of course, has not sued any sovereign entities, and does not seek anything like a "sovereign liability . . . scheme" to address the effects of the climate crisis generally. The United States' additional argument that foreign governments might retaliate if the City wins a remedy from a foreign corporation, *id.* at 22, is entirely speculative, and cites inapposite authority. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 269 (2010) (stating rule related to international securities transactions, and noting that multiple sovereign nations and sovereign banks filed amicus briefs illustrating interference with those country's securities laws that would occur if contrary rule were adopted); *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 450 (1979) (holding that state *ad valorem* property tax imposed on shipping containers owned, based, and subject to taxation in Japan, and used exclusively in international commerce, violated Congress' power to regulate commerce with foreign nations; noting in dicta that foreign governments may retaliate with reciprocal taxation if its citizens are subjected to international double-taxation). Fundamentally, the United States has not shown either that the City's claims "take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," or that adjudicating them would "produce something more than incidental effect in conflict with express foreign policy of the National Government." *Garamendi*, 539 U.S. 419, 420 & n.11.

brief they cite from the *City of New York* case, Mot. at 45–46, identifies a specific foreign policy position with which the City's claims would conflict. Absent a clear conflict with a clear and specific foreign policy determination, there can be no foreign policy preemption.

If the City's claims were preempted here by the foreign affairs doctrine, so too would virtually every tort claim seeking to redress local injuries caused, directly or indirectly, by any product or conduct that is the subject of international cooperation and negotiation—including opioid medication, automobiles, virtually all environmental harms, hazardous chemicals, and countless other subjects that have always been within the power of state tort law to address. The laundry list of international accords and discussions cited by Defendants cannot change the result. Climate change may be a global crisis, but the foreign affairs doctrine does not bar the City's state law claims for localized injury.[32]

6. The City's Complaint Does Not Violate Defendants' Due Process Rights.

Defendants' argument that any adjudication of the City's claims would *per se* violate their federal due process rights is meritless. It is patently absurd to suggest, as Defendants do here, that courts generally may not apply common law tort liability for past conduct; the very purpose of tort law is to remedy past tortious conduct.

The City alleges that Defendants engaged in a decades-long campaign of deception to hide known serious harms caused by their products. Defendants cite no provision of law that expressly

[32] Defendants also argue that the Ninth Circuit's recent decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), supports dismissal under foreign affairs preemption. *See* Mot. at 46–47. However, the split decision in that case, which is now the subject of an en banc petition, did not address foreign affairs preemption in any way. The panel majority dismissed the case on standing grounds only, holding that the court lacked authority to order the specific remedy the plaintiffs in that case sought—a nationwide program to reduce global greenhouse gas concentrations to 350 parts per million. *Juliana*, 947 F.3d at 1173.

authorized their deceptive and harmful conduct because none exists. To the extent Defendants expected their misleading promotion of harmful products to be lawful, they did so at their own risk.

The Supreme Court has long held that

> a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed . . . . This practice is overwhelmingly the norm, . . . and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law.

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). Likewise, even when construing new rights or causes of action created by the legislature, "the general rule in Maryland is that a new interpretation of a statute applies to the case before the court and to all cases pending where the issue has been preserved for appellate review." *Polakoff v. Turner*, 869 A.2d 837, 850 (Md. 2005). That is so because the judicial system "can scarcely permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from retroactive application of a new rule." *Id.* (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)). Even in the unusual circumstance where the Court of Appeals has "exercised [its] constitutional authority to change the common law," it has "reiterated the principle that ordinarily decisions which change the common law apply prospectively, *as well as to the litigants before the court*." *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992) (citation omitted) (emphasis added). Defendants cite no case where any of these principles has been applied to dismiss a claim because it *might* involve a change in the law that *might* apply to a litigant based on its past conduct, and the City is aware of none. There is simply no general due process problem when a court assigns tort liability "retroactively" to a defendant before it.

The few cases Defendants rely on involve principles and circumstances that are irrelevant here. *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978), held that due process is not violated "when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." The Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003), and *BMW*, 517 U.S. at 572–73, considered the constitutional limitations of punitive damages, and addressed no questions of pleading or even liability.[33] Finally, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988), *General Motors Corp. v. Romein*, 503 U.S. 181, 191–92 (1992), and *E. Enters. v. Apfel*, 524 U.S. 498, 535–37 (1998), all addressed whether the retrospective application of legislation or administrative rules effected an unconstitutional taking under the Fifth Amendment or violated the Contract Clause. *See* U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. amend. V. None of the cases shed any light on the issues before this Court, and none supports Defendants' argument that they had a due process right to deceptively promote products they knew to be dangerous.

7. The City's Claims Do Not Implicate the First Amendment.

Finally, Defendants argue that the City's claims are barred by the First Amendment to the extent they are "based on" "[c]ommunications seeking to influence regulation concerning the role of fossil fuels in national energy policy" and Defendants' "lobbying activity." Mot. at 52. The simple answer is that the City does not challenge Defendants' lobbying activities or any other arguably protected conduct. Rather, as Defendants themselves recognize, the Complaint alleges

[33] The Court held in *BMW*, moreover, that Alabama could not award punitive damages "for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*." 517 U.S. at 573 (emphasis added). Even if the decision were applicable here, and it is not, the Complaint alleges that Defendants' conduct was both unlawful when it occurred and has caused extensive injuries in Baltimore.

that Defendants engaged in a nationwide "campaign of disinformation" that caused the extraordinary climate change impacts the City is experiencing and will experience in the future. *See* Mot. at 51–52 (citing ¶¶ 30, 31, 143, 149, 221, 264).

Defendants' misleading commercial statements, "educational" activities and other related efforts are not protected by the *Noerr-Pennington* doctrine. The Supreme Court has long held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity" and that for commercial speech to warrant First Amendment protection "it at least must . . . not be misleading." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563, 566 (1980); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 (1976) ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (governments may restrict "false, deceptive, or misleading" commercial speech). The *Noerr-Pennington* doctrine, by contrast, protects "the right to petition . . . departments of the Government." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Here, the Complaint is replete with allegations that Defendants harmed the City through misleading and deceptive marketing and promotion activities, not through any petitioning activity directed at any government actor. Defendants' tortious commercial speech is not entitled to blanket protection.

To the extent Defendants claim their commercial speech qualifies as protected speech, they raise a factual question that may not be resolved on a motion to dismiss. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (applicability of *Noerr* immunity "varies with the context and the nature of the activity"); *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 360 (4th Cir. 2013) (explaining that

"the *Noerr–Pennington* doctrine is an affirmative defense" and that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "is a procedure that tests only the sufficiency of a complaint and cannot reach the merits of an affirmative defense . . . . [unless] all facts necessary to the affirmative defense clearly appear *on the face of the complaint.*") (internal citations and quotations omitted) (alterations and emphasis in original). *See also United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 26–27 (D.D.C. 2004) (whether statements constituted "petitioning or public relations" is a "fact-intensive inquiry that can only be resolved at trial").

Moreover, any such petitioning activities could fall into the "sham exception" to the *Noerr-Pennington* doctrine. *See Cal. Motor Transp. Co.*, 404 U.S. at 511. Thus, if the Court were to find *Noerr-Pennington* potentially applicable here, whether Defendants' speech was a "sham" would also present factual issues that cannot be resolved on a motion to dismiss. *Hamot v. Telos Corp.*, 970 A.2d 942, 951 (Md. Ct. Spec. App. 2009) (noting "fact-intensive nature of the sham exception").

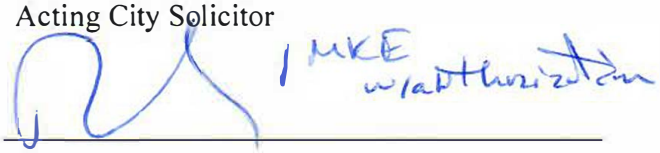
V. CONCLUSION

For the reasons stated above, no principle of state or federal law bars the City's claims. The City sufficiently alleges all of its causes of action, and the Court should deny Defendants' motion to dismiss.[34]

[34] In the alternative, and to the extent that the Court may find the Complaint deficient in any regard, the City respectfully requests that it be granted leave to amend. "Amendments shall be freely allowed when justice so permits." Md. Rule 2-341. "The decision to 'grant leave to amend rests within the discretion of the trial court,' which considers that leave to amend 'should be generously granted.'" *Asphalt & Concrete Servs., Inc. v. Perry*, 108 A.3d 558, 578 (Md. Ct. Spec. App. 2015), *aff'd*, 133 A.3d 1143 (Md. 2016) (quoting *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 674 A.2d 106, 121 (Md. Ct. Spec. App. 1996)). "[I]is well-established that leave to amend complaints should be granted freely to serve the ends of justice and that it is the rare situation in which a court should not grant leave to amend." *RRC Ne., LLC v. BAA Maryland, Inc.*, 994 A.2d 430, 451–52 (Md. 2010).

Dated: April 7, 2020

Dana Petersen Moore
Acting City Solicitor



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I hereby certify that on the 7th day of April, 2020, a copy of the foregoing **Mayor and City Council of Baltimore's Opposition to Defendants' Motion to Dismiss for Failure to State a Claim** was served via email on the following:

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