STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND

Plaintiff,

vs.

Case No.: PC-2018-4716

CHEVRON CORP.;
CHEVRON U.S.A. INC.;
EXXONMOBIL CORP.;
BP P.L.C.;
BP AMERICA, INC.;
BP PRODUCTS NORTH AMERICA, INC.;
ROYAL DUTCH SHELL PLC;
MOTIVA ENTERPRISES, LLC;
SHELL OIL PRODUCTS COMPANY LLC;
CITGO PETROLEUM CORP.;
CONOCOPHILLIPS;
CONOCOPHILLIPS COMPANY;
PHILLIPS 66;
MARATHON OIL COMPANY;
MARATHON OIL CORPORATION;
MARATHON PETROLEUM CORP.;
MARATHON PETROLEUM COMPANY LP;
SPEEDWAY LLC;
HESS CORP.;
LUKOIL PAN AMERICAS, LLC;
GETTY PETROLEUM MARKETING, INC.; AND
DOES 1 through 100, inclusive,

Defendants.

**PLAINTIFF STATE OF RHODE ISLAND'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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## I. INTRODUCTION

Climate change, as Defendants concede, is occurring and has been for years, impacting the State of Rhode Island ("the State"). This suit is not about stopping climate change, but surviving the grave harms Rhode Island has suffered, is suffering, and will suffer due to the climatic changes to which Defendants substantially contributed. The State seeks to recover some of the costs of adaptation and mitigation measures it will necessarily expend to protect its citizens, and the public resources to which they are entitled.

Contrary to Defendants' ominous assertions, the State has not pleaded a novel "'climate change' tort" to control global carbon dioxide emissions and climate change policy. *See* Defendants' Motion to Dismiss for Failure to State a Claim For Which Relief Can Be Granted, PC-2018-4716, at 1 (Jan. 13, 2020) ("Mot."). The State has pleaded traditional Rhode Island law claims, exercising its sovereign police powers, to remedy concrete harms within its own borders. Each of the State's claims is supported by ample allegations, and the Court should deny Defendants' motion to dismiss.

The State's public nuisance claim alleges that Defendants' tortious production, deceptive marketing, and sale of fossil fuel products and associated communications campaign of deception and denial have substantially caused severe and unreasonable invasions of public rights including public roads, public beaches, fishing resources, waters, natural resources, and public infrastructure. *See* Part IV.A.1, *infra*. Defendants' argument that "the promotion and sale of lawful products" is immune from nuisance liability, Mot. at 1, misstates the law. Nothing in *State v. Lead Industries Association, Inc.*, 951 A.2d 428 (R.I. 2008) ("*Lead Indus.*"), so holds. The Court there held that individuals' injuries from lead poisoning implicated no "public right," and that the lead paint manufacturers were not in control of the instrumentality of the nuisance (the paint) when it injured Rhode Islanders. *Id.* at 454–55. Here, by contrast, each injury the State alleges is to a "right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights of way" squarely within the law of nuisance. *See id.* at 448. Moreover, Defendants controlled the instrumentality of the nuisance by flooding the marketplace with disinformation concerning their products, and by "[c]ontrolling every step of the fossil fuel product supply chain" from extraction, to marketing, to consumer sales. Complaint ¶ 229(a).[1]

[1] All "¶" citations refer to paragraphs in the State's Complaint, unless otherwise noted.

Defendants' position that there can be no nuisance because fossil fuels are not illegal is equally meritless. Conduct "which the law authorizes cannot be a public nuisance," *Nugent ex rel. Collins v. Vallone*, 161 A.2d 802, 806 (R.I. 1960), but no law authorizes Defendants 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-decadal campaign of deceit that undermined public confidence in climate-related science and scientists. *See State v. Purdue Pharma, L.P.*, Case No. PC-2018-4555, 2019 WL 3991963 (R.I. Super. Ct. Aug. 16, 2019) (denying motion to dismiss nuisance claim against prescription opioids manufacturers despite lawful sale and distribution); *see also Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129 (D.R.I. 2018) ("*Atl. Richfield*") (denying motion to dismiss public nuisance claim against gasoline manufacturers over lawful fuel additive leaking into groundwater).

Defendants' other arguments based on Rhode Island law also fail. Defendants are liable for marketing and promoting a product they knew would cause climate change and attendant harms, while failing to issue *any* warnings that would enable reasonable consumers to obtain an informed expectation about the products' dangers. *See* Part IV.A.2, *infra*. Defendants are liable for trespass because they knowingly caused invasions onto the State's real property, including by seawater; the State need not allege, as Defendants suggest, that Defendants themselves or their products encroached on the State's land. *See* Part IV.A.3, *infra*. The State has pleaded a proper claim for violation of public trust resources, based on its *parens patriae* right to protect natural resources held in trust for Rhode Island citizens. *See* Part IV.A.4, *infra*. Finally, the State has properly pleaded a claim under the State Environmental Rights Act, which it is authorized to do through the Office of the Attorney General. *See* Part IV.A.5, *infra*. And the State has properly pleaded that Defendants are the factual and legal cause in each instance. *See* Part IV.A.6, *infra*.

Defendants' arguments based on federal law fare no better. Chief Judge Smith for the District of Rhode Island has already rejected Defendants' argument that the State's wholly state law claims are "governed by" federal common law. *Rhode Island v. Chevron Corp.* ("*Chevron*"), 393 F. Supp. 3d 142, 148 (D.R.I. 2019).[2] Because those claims do not rest upon federal common

[2] The opinions 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

law, they cannot be "displaced" by any federal statute. *See* Part IV.B.1, *infra*. Likewise, nothing in the Clean Air Act ("CAA") preempts the State's claims for the simple reason that they do not challenge any point source emissions in Rhode Island or elsewhere, do not seek to modify or revoke any permit issued under the CAA, and do not seek to modify any emissions standard. Moreover, the CAA includes express savings clauses that preserve claims like the State's here. *See* Part IV.B.2, *infra*.

Nothing in the hodgepodge of cited federal energy statutes preempts the State's claims. Those statutes broadly recite federal policy regarding oil and gas development, but the State'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 State's claims conflict with the Commerce Clause, because they do not seek to control out-of-state commercial activities, but merely to provide local remedies for local harms. *See* Part IV.B.4, *infra.* The foreign affairs doctrine only prohibits state action that directly attempts to craft foreign policy, which the State's Complaint plainly does not. Any hypothetical incidental impacts from the State's claims on international affairs are irrelevant, and do not warrant dismissal. *See* Part IV.B.5, *infra.* The Due Process Clause similarly does not bar the State's claims, because this case does not involve retroactive application of any statute, or even a common law rule. Legal relief for past conduct does not violate Defendants' due process, especially when the alleged harms were foreseeable. *See* Part IV.B.6, *infra.* Finally, the State's claims do not violate the First Amendment, because the First Amendment does not protect misleading or untruthful speech, and to the extent Defendants argue their commercial speech is protected by the First Amendment or the Rhode Island Anti-SLAPP Act, those fact-intensive determinations are not ripe for determination on a motion to dismiss. *See* Part IV.B.7, *infra.*

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*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.), are inapposite, and were wrongly decided. Both cases inappropriately converted the plaintiffs' state law claims into ones under federal common law, and found they were barred by generalized foreign affairs and separation of powers concerns. Defendants' argument that the State's claims here are "governed by" federal common law was already rejected by the federal district court. Their further vague assertions that any remedy would have dire effects on the United States' power to negotiate with foreign countries and would place global climate change policy in the hands of individual judges is patently false—not least because the State does not seek any changes to emissions policy as relief.

## 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 intended, create greenhouse gas pollution that warms the oceans, changes our climate, and causes sea levels to rise. ¶¶ 1, 5, 106–46 (describing fossil fuel industry research between 1958 and 1998). As early as 1968, for example, a report commissioned by the American Petroleum Institute ("API"), of which numerous Defendants are and were members, informed its members that "there seems no doubt that the potential damage to our environment [from burning fossil fuels] could be severe," including "the melting of the Antarctic ice cap, a rise in sea levels, warming of the oceans and an increase in photosynthesis." ¶ 111. A supplement prepared by the same authors the following year predicted atmospheric $CO_2$ concentrations in the year 2000 with near pinpoint accuracy, stating 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 seemed "unlikely that the observed rise in atmospheric $CO_2$ has been due to changes in the biosphere." ¶ 112.

By 1977, Exxon scientists 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." ¶ 116. Defendants' research provided them more robust and more precise knowledge in the years that followed. *See* ¶¶ 118–45 (describing research efforts between 1978 and 1998). By the 1980s, Defendants were taking steps to protect their own assets from rising seas and more extreme storms (such as by raising the height of planned deep-sea platforms to protect against high seas and more intense storms), and developing new technologies to profit from a warming world (such as patenting technologies to allow drilling in arctic areas that would become accessible with reduced sea ice and glaciers). ¶¶ 5, 178–83.

Despite their knowledge, Defendants for decades engaged in a coordinated, multi-front effort to conceal and dispute these truths, discredit the growing body of publicly available science, and persistently create doubt in the minds of customers, consumers, regulators, and the media—while serious changes to the climate occurred and associated harms mounted. ¶¶ 147–77. A 1998

API memorandum, for example, stated 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.'" ¶ 164. 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 facts their internal communications accepted as scientific reality, and deceive the public, while continuing to market and promote their products aggressively to increase production and profits. ¶¶ 168–73.

### B. The State and Its Citizens Have Suffered and Will Continue to Suffer Tremendous, Wide-Ranging Harms.

The impacts of global warming are now readily observable. Sea levels are rapidly rising due to the oceans' thermal expansion and the melting of polar ice, ¶¶ 47–62; the atmosphere is warming, causing fewer cold days and more extreme heat days, ¶¶ 63–69; the frequency and intensity of storms and other extreme precipitation events are both increasing, as are periods of drought, ¶¶ 70–83; and oceans are becoming more acidic, harming wide ranges of sea life. ¶¶ 84–87. Defendants can no longer deny these truths.

Rhode Island—the Ocean State, with more than 400 miles of coastline—and its citizens are especially vulnerable to the local effects of climate change, and have already begun to experience them. The scope of the injuries in Rhode Island are severe and long-lasting: "Rhode Island is and will continue to be impacted by increased temperatures and disruptions to the hydrologic cycle," and "is already experiencing a climatic and meteorological shift toward winters and springs with more extreme precipitation events contrasted by hotter, drier, and longer summers." ¶ 17. "Rhode Island is experiencing and will continue to experience greater sea level rise than the global average, due to several factors including changes in ocean circulation as a result of climate change and land subsistence." ¶ 59. "Rhode Island experienced more extreme precipitation events between 2005 and 2014 than any prior decade in the State's history." ¶ 76. "Critical facilities, existing roadways, wastewater treatment facilities, residential neighborhoods, industrial areas including ports, highways, rail lines, emergency response routes and facilities, beaches, and parks have suffered and/or will suffer injuries due to sea level rise expected by the end of this century." ¶ 206; *see also* ¶¶ 212(a)–(m).

The State "has experienced and will continue to experience injuries due to changes in the hydrologic cycle," including "[i]ncreased intensity and frequency of storms" which "results in flooding and erosion and impacts transportation, infrastructure, businesses, homes, and public health." ¶ 209. "Climate change has and will [continue to] subject beaches to increased storm surge, erosion, coastal flooding and sea level rise." ¶ 212(f). Public beaches in Rhode Island have been and will be reduced or lost to erosion and closed to the public more frequently due to the presence of bacteria, which grows more easily in warmer waters. *Id.* Moreover, ocean acidification and warming waters caused by Defendants' conduct has substantially harmed shellfish and bony fish populations in Narragansett Bay. ¶ 212(k). These harms to public beaches and fisheries are paradigmatic public interferences with public rights.

More broadly, the State has suffered and will continue to suffer severe flooding within the state, ¶¶ 210–11; damage to public roads and railways, ¶ 212(a), (b); power outages and other damage to public energy infrastructure, ¶ 212(c); damage to dams, ¶ 212(d); damage to public ports ¶ 212(e); reduced seasonal precipitation and saltwater intrusion into coastal groundwater aquifers, harming drinking water supplies, ¶ 212(g); flooding and interference with public wastewater treatment and pumping systems, ¶ 212(h); overburdening and damage to stormwater and flood management infrastructure, which will in turn "release pathogens and other pollutants during storm events, causing property damage, water quality impairments, beach closures, closure of shellfish growing areas, and other public health risks," ¶ 212(i); and damage to historic landmark properties along Narragansett Bay, ¶ 212(j). Each of these impacts "interferes with the health, safety, peace, comfort or convenience of the general community" of the citizens of Rhode Island. The State's complaint, in eight causes of action, alleges that Defendants' tortious conduct was a substantial factor in creating this existential crisis and that Defendants, in turn, must be found legally responsible for remedying the consequences of their wrongful conduct on the State.

## III. LEGAL STANDARD

A motion to dismiss for failure to state a claim may "only be granted 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Hyatt v. Vill. House Convalescent Home, Inc.*, 880 A.2d 821, 824 (R.I. 2005) (quoting *Hendrick v. Hendrick,* 755 A.2d 784, 793 (R.I. 2000)). "[T]he trial justice must look no further than the complaint, assume that all

allegations in the complaint are true, and resolve any doubts in a plaintiff's favor." *McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005).

Under the "notably lenient standards of [Rhode Island's] Rule 12(b)(6) jurisprudence," a reviewing court should "not deal with the likelihood of success on the merits, but rather with the viability of a plaintiff's bare-bones allegations and claims as they are set forth in the complaint." *Hyatt*, 880 A.2d at 823. "[N]o magic words are required to state a claim; rather, all that is required of a complaint is 'a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks.'" *Konar v. PFL Life Ins. Co.*, 840 A.2d 1115, 1122 (R.I. 2004) (quoting Super. R. Civ. P. 8). "A plaintiff is not required 'to plead the ultimate facts that must be proven.'" *Id.* (quoting *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992)).

## IV. ARGUMENT

### A. The State Pleads Actionable Claims Under Rhode Island Law

#### 1. The State's Public Nuisance Claim Satisfies Rhode Island Law.

A public nuisance is "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." *Lead Indus.*, 951 A.2d at 446. Here, the State alleges: (1) severe and unreasonable interference (*see* ¶¶ 200, 228); (2) with public rights including public roads, beaches, fishing waters, natural resources, and infrastructure (*see* ¶¶ 197–224); (3) by Defendants that both controlled (and control) every step of the oil and gas supply chain and led a concerted operation to misinform the public and conceal the fact that Defendants' products cause devastating changes to the climate, all while knowingly promoting their harmful products (*see* ¶¶ 106–46, 229). Those allegations plainly suffice to state a claim under Rhode Island law.

The State's nuisance claim arises from Defendants' "promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign," *Chevron*, 393 F. Supp. 3d at 152, which together comprise the instrumentality that created nuisance conditions in Rhode Island. Other courts considering analogous claims for climate crisis injuries have likewise recognized that such claims stem from the deceptive promotion of products Defendants produced and sold while climate change injuries were already mounting. The Fourth Circuit U.S. Court of Appeals recently articulated similar claims as rooted in the fossil fuel defendants' tortious deception campaign:

> Baltimore alleges that, despite knowing about the direct link between fossil fuel use and global warming for nearly 50 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.*, No. 19-1644, __ F.3d __, 2020 WL 1069444, at *1 (4th Cir. Mar. 6, 2020); *see also 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*, No. 19-1330 (10th Cir.) ("Plaintiffs allege that Defendants substantially contributed to the harm through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers."). Understood in those terms, the State's allegations show Defendants controlled the instrumentality (their own production and deceptive promotion) that caused unreasonable injuries to public rights in Rhode Island.

This case closely resembles *State v. Purdue Pharma, L.P.*, 2019 WL 3991963. There, the State alleged manufacturers and distributors of lawful opioids "conducted a campaign to unlawfully promote and distribute" their products, resulting in a public nuisance in the form of "unprecedented levels of addiction, overdose, and death." *Id.* at *1. Just as in *Purdue Pharma*, Defendants' "promotion of their fossil fuel products despite knowing the dangers associate[d] with those products; [and] their dogged campaign against regulation of those products based on falsehoods, omissions, and deceptions," ¶ 105, caused and contributed to the immense harms suffered by the State and its citizenry.[3] And, just as in *Purdue Pharma*, this Court should deny the instant motion.

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[3] Defendants posit that *Purdue Pharma* was wrongly decided, and that, in any event, it is distinguishable based on Defendants' own purported lack of control over the instrumentality of the nuisance, and the fact that fossil fuel products are not regulated as controlled substances. Mot. at 15, n.9. As made evident in the sections that follow, *Purdue Pharma* was properly decided and reflects the correct application of Rhode Island law to the public nuisance at issue there. Judge Gibney is only one of many judges who have ruled that public nuisance claims can be brought against manufacturers and distributors of lawful opioids due in part to their marketing and promoting campaigns. *See, e.g.*, *City of Boston v. Purdue Pharma, L.P.*, No. 1884CV02860, 2020 WL 977056, at *5 (Mass. Super. Ct. Jan. 31, 2020); *Commonwealth v. Purdue Pharma, L.P.*, No. 1884CV01808BLS2, 2019 WL 5495866, at *5 (Mass. Super. Ct. Sept. 17, 2019); *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 4019929, at *12 (Okl. Dist. Ct. Aug. 26, 2019) (bench trial verdict concluding "that Defendants engaged in false and misleading marketing of both their drugs and opioids generally" and "this conduct constitutes a public nuisance under extant Oklahoma law"); *In re Nat'l*

### *a) Defendants' Conduct Invades Public Rights.*

"A public nuisance is an unreasonable interference with a right common to the general public: it is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community." *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980) ("*Waterman Lake*"). The Supreme Court in *Lead Industries* reaffirmed "the long-standing principle" that a public right protected under public nuisance law "is a right of the public to shared resources such as air, water, or public rights of way." *Lead Indus.*, 951 A.2d at 455. Thus, "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, but 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. Rest. (2d) Torts § 821B, cmt. g (1979).

The State's allegations fall squarely within the traditional categories described in *Waterman Lake*, *Lead Industries*, and the Restatement. *See generally* ¶¶ 197–224. Defendants have caused enormous climatic changes felt heavily in Rhode Island, including current and projected increases in sea level, ocean temperatures, ocean acidity levels, average land temperatures and extreme heat days, and more severe storm events and hurricanes. ¶ 8. These and other impacts have adversely impacted and threaten to overwhelm public beaches, wetlands, and other natural resources, public roads and bridges, railroad systems, dams, ports, and water supplies, as well as real property and other assets essential to community health, safety, and well-being. *Id.*; *see also* ¶¶ 17, 59, 76, 206, 209, 212; Part II.B, *supra*. Public rights have clearly been infringed.

Defendants' argument that "the distribution of a lawful product" can never give rise to tort liability, Mot. at 10, misstates the law. Defendants, relying on *Lead Industries*, argue that manufacturers and sellers of products can never violate public rights, because their products are purchased and used by individuals. Mot. at 10–11. But *Lead Industries* did not sweep so broadly. Rather, the Court held that incidents of lead poisoning in children from exposure to lead paint were injuries to the *private* and *individual* rights of the children affected, not a *public* and *shared* right of the community at large. The asserted "right to be free from the hazards of unabated lead" could

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*Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 3737023, at *9–11 (N.D. Ohio June 13, 2019); *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *22 (N.Y. Sup. Ct. June 18, 2018). Thus, *Purdue Pharma* provides useful precedent for assessing the issue of control, *see* IV.A.1.b, *infra*, and makes clear that the legal bases for Defendants' production of fossil fuels are irrelevant, *see* IV.A.1.c, *infra*.

not sustain a public nuisance cause of action in that case because "a public right is more than an aggregate of private rights by a large number of injured people." *Lead Indus.*, 951 A.2d at 448, 453–54. That lead paint was not illegal when sold had nothing to do with whether the State had adequately alleged injuries to public, rather than private, rights.[4]

The State's allegations here are different in kind: rather than aggregated violations of individual rights, the State complains of injuries to shared public rights and resources—public beaches, fisheries, public infrastructure, public health, and more. ¶ 212; *see also Atl. Richfield*, 357 F. Supp. 3d at 142–43 (finding "no doubt" that the State had alleged violation of a public right by "various oil and chemical companies" that lawfully produced, transported, marketed and sold gasoline in the state that contaminated the groundwater with the gasoline additive MTBE); *Purdue Pharma*, 2019 WL 3991963, at *9 (defining "the opioid crisis as a public right under Rhode Island law, and more specifically, . . . freedom from an overabundance of prescription opioids is a public right."). The State's interest and duty in protecting those public rights is well established. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 604 (1982) (states have *parens patriae* interest "in the abatement of public nuisances, instances in which the injury to the public health and comfort [is] graphic and direct"). There is no authority supporting Defendants' contention that conduct involving non-criminal manufacture and sale of consumer products *per se* cannot violate a public right.

[4] Courts around the country have rejected Defendants' position that sale of a "lawful product" gives rise to no claim. *See, e.g.*, n.3 (collecting opioids cases), *supra*. In *County of Santa Clara v. Atlantic Richfield Co.*, defendants made a similar argument: that public nuisance actions could not be brought against product manufacturers for a nuisance caused by the product. 40 Cal. Rptr. 3d 313, 328 (Cal. Ct. App. 2006), *rev. denied* (June 21, 2006). The court rejected the argument, finding the plaintiffs properly premised liability on the defendants' "*promotion of lead paint for interior use* with knowledge of the hazard that such use would create," noting "[t]his conduct is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product; indeed, it is quite similar to instructing the purchaser to use the product in a hazardous manner, which . . . *could* create nuisance liability." *Id*. (emphasis in original). *See also Stevens v. Parke, Davis & Co.*, 507 P.2d 653 (Cal. 1973) (finding that jury could reasonably infer from circumstantial evidence that doctor prescribed dangerous drug because of manufacturer's overpromotion and watered-down warnings); *City of Modesto v. Dow Chem. Co.*, 227 Cal. Rptr. 3d 764, 780–84 (Cal. Ct. App. 2018) (analyzing proof of causation based on manufacturer's overpromotion and marketing and holding "[l]iability 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"), *as modified on denial of reh'g* (Feb. 6, 2018).

***b) Defendants Controlled the Instrumentality of the Nuisance.***

"[L]iability in a public nuisance action turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise." *Lead Indus.*, 951 A.2d at 449. The control element is principally directed at ensuring fairness among the parties and providing an adequate remedy, which here means making Rhode Island resilient to climate change. *Id.* ("The party in control of the instrumentality causing the alleged nuisance is best positioned to abate it and, therefore, is legally responsible.").

Defendants here controlled the instrumentality of the nuisance in Rhode Island in two distinct but interrelated ways. First, Defendants control "every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products[;] … the refining and marketing of those fossil fuel products; and the placement of those fossil fuel products into the stream of commerce." ¶ 229(a). Second, Defendants have "promot[ed] their fossil fuel products despite knowing the dangers associated with those products," engaged in "efforts to conceal the hazards of those products from consumers," and "embarked on a decades-long campaign designed to maximize continued dependence on their products" "which focused on concealing, discrediting, and/or misrepresenting information that tended to support restricting consumption of" fossil fuels. ¶¶ 105, 151–52. The combination of Defendants' control over the production supply chain and their deceptive promotion of their products "created, contributed to, assisted in creating, and/or were a substantial contributing factor in the creation of the public nuisance." ¶ 228; *see also* ¶¶ 229–31.

*Purdue Pharma* is instructive. There, the opioid manufacturer and distributor defendants argued that they "were not in control of the opioids at the time they were taken," and that pharmacists, doctors, and the patients themselves controlled the drugs and their ingestion. 2019 WL 3991963, at *10. Presiding Judge Gibney found that because the State "frame[d] the nuisance as the opioid epidemic [in Rhode Island] itself, rather than specific instances of individuals being harmed by use or misuse of pharmaceuticals," the State's allegations of misrepresentation, false promotion, and distribution sufficiently pleaded that defendants controlled the instrumentality of the public nuisance—namely the opioid epidemic. *Id.* at *10–11; *see also* n.3, *supra*. Likewise here, the nuisance is the local impacts of the climate crisis itself, not a single flooding event on an individual property. This crisis was caused by Defendants' knowing misrepresentations regarding the risks of fossil fuels as well as their continued extraction, production and promotion of those fossil fuels even as those foreseen harms mounted. *See* ¶¶ 106–46, 227–29. Accepting these

allegations as true, as it must, this Court should therefore deny Defendants' motion, just as Judge Gibney did in *Purdue Pharma*. 2019 WL 3991963, at *10.

*Atlantic Richfield Co*. is also on point. There, the defendant manufacturers argued that they could not have controlled the instrumentality of the nuisance, because their MTBE-containing gasoline product passed through numerous hands prior to the point of sale, including through trucks and pipelines owned by third parties, as well as gas stations and underground storage tanks managed by lessees, franchisees, and other third parties. 357 F. Supp. 3d at 137. Because the State alleged the defendants controlled "every step of the supply chain," however, environmental pollution through "releases, leaks, overfills, and spills" was foreseeable, and the court concluded that the State had alleged sufficient control by the manufacturers. *Id.* at 142–43. Here, too, Defendants control "every step of the fossil fuel product supply chain," including the manufacture, marketing, and sales of their fossil fuel products, and the harms to the State were foreseeable—and, indeed, actually foreseen by Defendants. *See* ¶¶ 229–30.

Defendants' arguments that intervening actors break the chain of control are the same as those rejected in *Purdue Pharma* and *Atlantic Richfield*. Defendants insist, as a factual matter, that "countless third parties," are responsible for "fossil fuel combustion that Defendants do not control," Mot. at 3 &12, but this position misapprehends the nuisance and instrumentality at issue. Here, the State does not allege that fossil fuel combustion constitutes the instrumentality of the nuisance, any more than the State in *Purdue Pharma* alleged that the sale and consumption of prescription opioid medications in Rhode Island was the instrumentality of the opioid epidemic, or any more than the State in *Atlantic Richfield* alleged that storage of MTBE-containing gasoline by gas stations was the instrumentality of groundwater contamination. Defendants' claim that they "relinquished control over [their] fossil fuels to third parties" therefore misses the mark. Mot. at 14. It is sufficient that the State has alleged Defendants control the supply chain of their products, and continue to control the decades-long stream of misleading marketing and wrongful promotion, which are the instrumentality of the nuisance conditions in Rhode Island. *See, e.g.*, ¶ 229.

The Court in *Lead Industries* found that lead paint defendants did not control the instrumentality of the nuisance at the time injuries from lead paint exposure occurred, because the exposure resulted from years of disrepair in public and private housing decades after lead paint was taken off the market. *See Lead Indus.*, 951 A.2d at 455. Here, in contrast, the State expressly

alleges that Defendants' control over the production and marketing of fossil fuels was a substantial factor in causing climate damages to public interests in the State. ¶ 228; *see also* ¶¶ 229–31.

Moreover, Defendants, who long knew their products would cause harm and yet sought to sow confusion on the issue, and who continued to produce, deceptively promote, and sell their products despite their knowledge, are in the best position to abate the harms they have caused. *See Lead Indus.*, 951 A.2d at 449; *cf. People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 516–17, 536, 569 (Cal. Ct. App. 2017) (affirming public nuisance judgment where manufacturers' "[p]romotion of lead paint for interior residential use necessarily implied that lead paint was safe for such use" even though science had previously "recognized that lead paint is toxic"), *review denied* (Feb. 14, 2018), *cert. denied*, 139 S. Ct. 377 (2018); *Santa Clara*, 40 Cal. Rptr. 3d at 329 ("We do not believe that the fact that defendants were manufacturers and distributors of lead means that they may not be held liable for their intentional promotion of the use of lead paint."). An abatement award could be fashioned, for example, requiring Defendants to cease their deceptive marketing and promotion and contribute equitably to the State's mitigation measures.

The State's Complaint amply alleges that Defendants controlled and control the instrumentality of the nuisance under Rhode Island law.

***c) Defendants Caused an Unreasonable Interference with Public Rights.***

"Whether an interference with a public right is unreasonable will depend upon the activity in question and the magnitude of the interference it creates." *Lead Indus.*, 951 A.2d at 447. But, "[i]n public nuisance law, as in other areas of the law, what is reasonable *vel non* is not determined by a simple formula." *Id.* Under the Restatement,

> 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. (2d) Torts § 821B. "Activities that do not violate the law but that nonetheless create a substantial and continuing interference with a public right . . . generally have been considered unreasonable." *Lead Indus.*, 951 A.2d at 447 (citing to cases).

The State alleges that through Defendants' knowing misrepresentations regarding the risks of fossil fuels as well as their continued extraction, production, and promotion of those fossil fuels, Defendants have gravely interfered with the public health and public safety of residents of the State, and knowingly produced long-lasting harmful consequences for the State, its citizens, and its public resources. ¶¶ 88–93, 197, 201, 204–13. No more than that is necessary to state a claim.

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 or reasonable as a matter of law. *See* Mot. at 16. The cases Defendants cite for the proposition that "exercise of the right to do that which the law authorizes cannot be a public nuisance," *Nugent*, 161 A.2d at 806, have nothing to do with this case. In *Nugent*, a *qui tam* relator sought to enjoin construction of a pier that he alleged would interfere with riparian rights and constitute a public nuisance. *Id.* at 804. The pier had been approved, however, by the state director of public works, the chief of the state division of harbors and rivers, and the Army Corps of Engineers. *Id.* at 806. On those facts, the Court held that the "mere construction of the proposed pier" was not a nuisance because public officials expressly and specifically approved it. *Id.* However, the Court also stated that "[w]hether the manner in which the pier is hereafter used will amount to such a nuisance is quite another question." *Id*. The statutes Defendants cite here, generally relating to fossil fuels in Rhode Island, are different in kind from the specific, explicit, personalized authorization of the conduct in *Nugent*, and as the *Nugent* Court noted, even specific approval to take a particular action does not forever immunize a party from public nuisance claims.

*Richmond Realty, Inc. v. Town of Richmond*, 644 A.2d 831 (R.I. 1994), is similarly inapplicable. There, plaintiffs sought to enjoin the Town of Richmond from operating a new storm-drainage system, which the plaintiffs alleged could lead to contamination of groundwater. *Id.* at 831–32. The Court held that the storm-drainage system could not constitute a public nuisance, because it was expressly authorized: the Town complied with all planning, application, and construction requirements imposed by the Rhode Island Department of Environmental Management ("DEM") and Department of Transportation, and its plan was approved by DEM's Division of Groundwater and Fresh Water Wetlands. *Id.* Because the system was specifically,

explicitly approved by state agencies, its construction and operation were not a nuisance. Defendants' alleged conduct has none of the specific authorization present in *Town of Richmond*.[5]

In sum, the State has adequately pleaded that Defendants' activities have caused an unreasonable interference with the State's public rights.

**2. The State Has Properly Pleaded Products Liability Claims.**

The State has properly pleaded causes of action for failure to warn and design defect, sounding in both strict liability and negligence. Defendants' various over-exacting arguments are insufficient to defeat them at the motion to dismiss stage. The Rhode Island Supreme Court has adopted the elements of products liability claims from the "consumer-expectation" test expressed in Section 402A of the Restatement (Second) of Torts (1965). *See Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 263 (R.I. 1971). Under that test, a plaintiff must prove:

> (1) that there was a defect in the design or construction of the product in question; (2) that the defect existed at the time the product left the hands of defendant; (3) that the defect rendered the product unreasonably dangerous, and by unreasonably dangerous it is meant that there was a strong likelihood of injury to a user who was unaware of the danger in utilizing the product in a normal manner; (4) that the product was being used in a way in which it was intended . . . ; and (5) that the defect was the proximate cause of . . . plaintiff's injuries.

*Raimbeault v. Takeuchi Mfg. (U.S.), Ltd*., 772 A.2d 1056, 1063 (R.I. 2001) (quotations omitted). "This approach seeks to protect the consumer or user who was unaware of the danger involved in using a product in a way that it was intended to be used." *Id.*

The Rhode Island Supreme Court has recognized product defect claims for both failure to warn and design defect. *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988). As to failure to warn, strict liability and negligence claims have merged into the same cause of action—in either case, manufacturers or sellers are liable for failure to warn when they have "actual or constructive knowledge" of their products' dangers. *Id.* at 782. The elements of a design defect claims sounding in strict liability and negligence are the same, except the "negligence claim [has] the additional requirement that the defendant 'knew or had reason to know . . . that [the product] was defective.'" *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000) (quoting *Ritter*, 283 A.2d at 259).

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[5] The court in *City of Oakland* "recognize[d] but [did] not resolve" the question regarding whether the defendants' conduct was unreasonable, because it held (wrongly) that the plaintiff's nuisance claim was barred by the foreign affairs doctrine and separation of powers concerns. *City of Oakland*, 325 F. Supp. 3d at 1024; *see also* Parts IV.B.4 & IV.B.5 *infra*.

Here, the State has alleged all necessary elements. Defendants' products cause devastating climatic injuries when put to their intended use, which did not know and were prevented from knowing, and Defendants had a duty to warn of those dangers. ¶¶ 239, 255, 267, 274. Defendants' products "reached the consumer in a condition substantially unchanged from that in which it left Defendants' control" as fossil fuels. ¶ 259. The massive climate dangers posed by Defendants' products created a strong likelihood of harm to users and bystanders alike, and Defendants actively and successfully worked to keep that knowledge from consumers for many years. ¶¶ 244–45, 255, 258. Defendants knew for decades that their products were defective and dangerous, but hid that knowledge from consumers and the public. ¶¶ 242, 265, 275–76. Fossil fuel products have been used as intended or in a foreseeable manner, through combustion. ¶¶ 259, 279. The dangerous quality of Defendants' products and their failure to warn of those dangers proximately caused the State's injuries. ¶¶ 243, 247, 260, 268, 281. No more is required at the pleading stage, and Defendants' motion should be denied.

***a) Defendants Owed a Duty to Warn.***

Rhode Island imposes liability on sellers and manufacturers if they fail "'to warn purchasers of a dangerous defect in the product if [they] know[] or ha[ve] reason to know that the product poses a danger to consumers.'" *DiPalma v. Westinghouse Elec. Corp.*, 938 F.2d 1463, 1466 (1st Cir. 1991) (quoting *Scittarelli v. Providence Gas Co.*, 415 A.2d 1040, 1043 (R.I. 1980)). Defendants knew for decades that their fossil fuel products are the primary cause of climate change, and owed their customers, consumers (including the State), regulators, and the general public a duty to warn of those known and foreseeable risks. ¶¶ 106–46, 246, 274.

"[T]here is no set formula for finding a legal duty, and thus such a determination must be made on a case-by-case basis." *Oliver v. Narragansett Bay Ins. Co.*, 205 A.3d 445, 453 (R.I. 2019) (internal quotations omitted). The Rhode Island Supreme Court has promulgated relevant factors courts should consider, which include:

> (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.

*Id.*

Here, the State, again, has alleged all these elements. First, it was foreseeable that Defendants' conduct would result in harm to the State 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." ¶ 275, *see also* ¶¶ 106–46 (describing Defendants' research efforts and "superior knowledge of the reasonably foreseeable hazards of unabated production and consumption of their fossil fuel products"). The State "has sustained and will sustain . . . substantial expenses and damages" from climatic harms, "including damage to publicly owned infrastructure and real property," among other injuries. ¶ 281, *see also* ¶¶ 197–224 (describing injuries). The State suffered these injuries as a direct result of Defendants' failure to provide *any* warnings of the known harms. ¶¶ 197–224, 280. The State and its citizens will face tremendous future harms without adaptation and mitigation measures, which public policy must prevent. *See, e.g.* ¶ 187 (describing how delayed action on climate change drastically increases the cost of mitigating future harm). Finally, the burden on Defendants is necessary to remediate the State's injuries and is appropriate given Defendants' conscious disregard for the consequences of their conduct. ¶ 283. The State has more than sufficiently pleaded that Defendants owed a legal duty.

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 changed consumer behavior; (2) imposing a duty on them would create "unlimited liability"; (3) Defendants have no special relationship with the State; and (4) the relationship between greenhouse gas emissions and climate change has been known for decades. Mot. at 22. These arguments all fail.

***First***, there is no requirement that plaintiffs plead or prove that a warning would have changed consumer behavior and avoided all harm. Defendants' argument to that effect relies on a single sentence from a 45-year-old case that involved the sufficiency of evidence on a directed verdict after trial, not a pleading standard. *See* Mot. at 22–23 (citing *Salk v. Alpine Ski Shop, Inc.*, 342 A.2d 622, 626 (R.I. 1975)). Any such requirement is plainly inconsistent with Rhode Island's "notably lenient" pleading standards, *Hyatt*, 880 A.2d at 823, and the Supreme Court's instructions that "[a] plaintiff is not required to plead the ultimate facts that must be proven," *Konar*, 840 A.2d at 1122 (quotations omitted). Whether Defendants' failure to provide any warning caused the State's injuries is a factual issue "to be resolved at trial," not on the pleadings. *See Hennessey v. Pyne*, 694 A.2d 691, 699 (R.I. 1997) (denying summary judgment where genuine dispute of fact

existed over "[t]he possibility that such warning would have been unheard or ineffective or otherwise unavailing").[6]

***Second***, contrary to Defendants' assertion, Mot. at 22, 24, recognizing Defendants' duty to warn of known dangers in their own products would not "result in unlimited liability." "[O]ne who sells any product in such a condition of defectiveness as to render the product dangerous to person or property is subject to liability for harm thereby caused to any reasonably foreseeable person." *Klimas v. Int'l Tel. & Tel. Corp.*, 297 F. Supp. 937, 942 (D.R.I. 1969) (emphasis added). The Restatement (Third) of Torts, which the Rhode Island Supreme Court has adopted and relied on for other purposes in the products liability context, "does not limit a strict liability cause of action to the 'user or consumer,' and broadly permits any person harmed by a defective product to recover in strict liability." *See Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 54 & n.25 (3d Cir. 2009) (citing Restatement (3d) Torts §§ 1, 2 (1998), and collecting cases); *cf. Ruzzo v. LaRose Enterprises*, 748 A.2d 261, 266 n.6 (R.I. 2000) (noting consistency between Restatement (Third) of Torts § 5 and Restatement (Second) of Torts § 402A for purposes of warranty theory of strict liability). The fact that Defendants had a duty to warn "customers, consumers, regulators, and the general public"—*i.e.*, those who might foreseeably be harmed by Defendants' product—shows Defendants' *breach* and its attendant foreseeable harms were monumental, not that their duty is overbroad. *See* ¶ 246.

Defendants rely on a series of inapposite and irrelevant cases to support their argument that the alleged duty is purportedly "limitless." *See* Mot. at 24. But none of those cases involved a failure to warn, a product defect claim, or even foreseeable injuries to foreseeable third parties. The cases analyzed whether an accountant owed a duty to unknown third parties who later rely on the accountant's audit;[7] whether bystanders could recover for emotional distress or "outrage" after witnessing an injury;[8] whether a landowner owed a duty to control traffic on an adjacent public

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[6] Even if Defendants were correct that the State must plead the specific effect on consumers of Defendants' failure to warn, the State's allegation that its injuries from climate change would not have occurred *at the same magnitude* but for the failure to warn is sufficient. *See* ¶ 223 ("But for Defendants' conduct, Rhode Island would have suffered no or far less injuries and damages than they have endured."); *Gray v. Derderian*, 365 F. Supp. 2d 218, 232 (D.R.I. 2005) (denying motion to dismiss, crediting allegations that but for defendants' highly flammable foam insulation product, fatal nightclub fire "would not have occurred, *or would not have occurred at the magnitude it did*, with the same number of injuries" (emphasis added)).

[7] *R.I. Indus.-Recreational Bldg. Auth. v. Capco Endurance, LLC*, 203 A.3d 494, 500–03 (R.I. 2019).

[8] *Marchetti v. Parsons*, 638 A.2d 1047, 1051 (R.I. 1994) (car accident); *Fortes v. Ramos*, No. CIV. A. 96-5663, 2001 WL 1685601, at *13 (R.I. Super. Ct. Dec. 19, 2001) (unpublished) (medical malpractice).

street;[9] and whether the state's parole board owed a duty to a police officer who was later injured by a paroled inmate.[10] In those contexts, each court held that imposing a duty would create potentially unlimited liability to unknown and unforeseeable third parties. Here, the State has properly alleged under Rhode Island law that the injuries to the State were foreseeable and Defendants, in fact, foresaw them but withheld warnings nonetheless.

***Third***, Defendants' assertion that the State must allege a special relationship because "there is 'no duty to control the conduct of a third party to prevent injury to another person unless a defendant has a special relationship with either the person whose conduct needs to be controlled or with the intended victim of the conduct,'" Mot. at 24–25 (quoting *Gushlaw v. Milner*, 42 A.3d 1245, 1257 (R.I. 2012)), is inapposite. The State does not allege that Defendants had a duty to control the conduct of any third party, but rather that Defendants had a *duty to warn* "of the known and foreseeable risks posed by their fossil fuel products" used as intended, and Defendants' failure to do so caused the State's injuries. *See, e.g.*, ¶¶ 239, 246. Nothing more is required. *See, e.g.*, *Raimbeault*, 772 A.2d at 1064 (seller has duty to warn of reasonably foreseeable dangers if it has "reason to know about the product's dangerous propensities"); *Atl. Richfield*, 357 F. Supp. 3d at 141 ("Rhode Island law provides that a product seller must warn consumers of the reasonably foreseeable dangers associated with the use of its product.").

Defendants' citation to *Gushlaw* is highly misleading. The Court there considered whether a "duty to third parties existed on the part of the defendant-driver to prevent his intoxicated passenger from later operating his own motor vehicle." 42 A.3d at 1247. The Court held that absent a special relationship (such as innkeeper/guest or custodian/ward) between himself and either his passenger or the injured plaintiff, the defendant driver did not owe a duty to prevent his passenger from drunk driving. *See id.* at 1258; *see also id.* at 1252–56 (discussing "fact-specific and intricate scrutiny" necessary to determine "a defendant's alleged failure to control the tortious conduct of a third party, particularly when the consumption of alcohol is involved"); Rest. (2d) Torts §§ 314–15. The facts and allegations here are entirely different, and the State need not allege any special relationship with Defendants.

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[9] *Ferreira v. Strack*, 636 A.2d 682, 686 (R.I. 1994).

[10] *Orzechowski v. State*, 485 A.2d 545, 549–50 (R.I. 1984).

***Fourth***, Defendants' argument that they had no duty because climate change was a "widely acknowledged long-term risk," *see* Mot. at 25, simply ignores the Complaint's actual allegations, 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 campaigns and materials that prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate changes." ¶ 245; *see also* ¶¶ 147–77 (describing Defendants' "affirmative steps to conceal . . . the foreseeable impacts of the use of their fossil fuels on the Earth's climate"). Whether and when the dangers of Defendants' products were "generally known and recognized," despite Defendants' efforts to suppress them, is plainly a question of fact for the jury. *See* Rest. (2d) Torts § 402A; *Sheehan v. Corometric Med. Sys., Inc.*, No. C.A. 91-40157-GN, 1993 WL 23715, at *3 (D. Mass. Jan. 28, 1993) (denying motion for summary judgement in part because "[i]t is for a jury, not the Court, to resolve" whether danger from defendant's medical device "was generally known"). The multitude of allegations regarding Defendants' public misinformation campaign suffices to plead Defendants' duty to warn.[11]

***b) The State Has Sufficiently Alleged a Defect in Defendants' Products.***

Defendants argue that: (1) a design defect claim cannot rest on an "inherent characteristic of the product itself," Mot. at 19; and (2) the State fails to allege that fossil fuel products are unreasonably dangerous under the consumer expectations test because the dangers were widely known, Mot. at 20–21. Neither case law nor the Complaint's allegations support Defendants' arguments.

[11] *See, e.g., Standish-Parkin v. Lorillard Tobacco Co.*, 786 N.Y.S.2d 13, 14 (N.Y. App. Div. 2004) (finding 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.").

**(1) There is no "inherent characteristic" limitation that applies to design defect claims in Rhode Island.**

Rhode Island courts have never adopted the rule Defendants advocate—that "inherent characteristics" of a product cannot comprise a defect—nor would such a rule make sense here. The State has not alleged that Defendants' products are defective because they contain carbon, but because they do not perform as safely as a reasonable consumer would expect—and that Defendants' conduct prevented consumers from appreciating those dangers. *See Baltimore,* 2020 WL 1069444, at *9 n.10 (noting strict liability design defect claim rested on "allegation that Defendants' promotional efforts deprived reasonable consumers of the ability to form expectations that they would have otherwise formed" under Maryland's consumer expectation test). Defendants' cases are distinguishable on their facts in any event.[12]

Courts have consistently declined to apply an "inherent characteristic" limitation where, as here, the plaintiff alleged it was injured not by the mere presence of an ingredient used but the amount of that ingredient or quantity of the product. *See, e.g.*, *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 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 or feature of design).

Even if Rhode Island were to adopt the "inherent characteristic" limitation—which it has not—the State's claim would survive because the Complaint alleges that "it was practical for Defendants . . . to pursue and adopt known, practical, and available technologies, energy sources, and business practices that would have mitigated their greenhouse gas pollution and eased the transition to a lower carbon economy, reduced global $CO_2$ emissions, and mitigated the harms associated with the use and consumption of such products." ¶¶ 257(e), 267(c). *See Guilbeault,* 84

[12] In *Town of Lexington*, 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—not that *any* claim of a defect that relates to a product's inherent characteristics must fail. *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 266–69 (D. Mass. 2015). In *Godoy*, the claim was based solely on presence of lead in white lead carbonate pigment. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 684–85 (Wis. 2009). The court also discussed and cited with approval another case that successfully alleged a defective design related to an ingredient. *Id.*

F. Supp. 2d at 279–80 (plaintiff stated a design defect claim by pleading something was "wrong" with defendant's product, as it was possible plaintiff could prove a feasible design alternative); *see also Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1015 (Mass. 2013) (affirming jury finding that cigarettes were defective, rejecting argument that "carcinogenic levels of tar and addictive levels of nicotine are inherent in all ordinary cigarettes, and the inherent risks of smoking cannot be removed without fundamentally altering the nature of the product") (internal quotations and alterations omitted).

**(2) The State has adequately pleaded violations of the consumer expectation test.**

Rhode Island uses the consumer expectation test to determine whether a product is defective under the Restatement (Second) Section 402A, *Castrignano*, 546 A.2d at 779, and the State has amply satisfied that test. The consumer expectation approach "seeks to protect the consumer or user who was unaware of the danger involved in using a product in a way that it was intended to be used." *Id.* A product is defective under the test when it is (1) "in a condition not contemplated by the ultimate consumer," *Ritter*, 283 A.2d at 262, and (2) "the defect in the product establishes a strong likelihood of injury to the user or consumer thereof," *i.e.* it is unreasonably dangerous. *Castrignano*, 546 A.2d at 779.

Defendants brazenly argue that the State has "failed to allege facts showing that Defendants' fossil fuel products are 'unreasonably dangerous'" under the consumer expectations test. Mot. at 20. The State has alleged, however, that Defendants' fossil fuel products did not perform as safely as a reasonable consumer would expect because Defendants' campaign of deception prevented a reasonable consumer from understanding the products' true dangers. *See* ¶¶ 255, 256. A reasonable consumer would not 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 State has alleged. *See, e.g.*, ¶ 255(a)–(i). Indeed, Defendants' disinformation campaign worked exactly as intended, and rendered the products unreasonably dangerous.

Defendants' further argument that the public's supposed "widespread and longstanding knowledge" that fossil fuels cause climate change precludes a design defect claim is wrong, and whether the general public is aware of a complex danger from a complex product is a question of fact for the jury. *See* Mot. 20–21 (citing *Guilbeault*, 84 F. Supp. 2d at 263). In *Guilbeault*, the court took judicial notice of certain publications and the fact that government mandated warnings were

placed on cigarettes packs starting in 1966, and concluded that after 1964 "all reasonable consumers should be charged" with the knowledge that smoking causes cancer. 84 F. Supp. 2d at 274. Numerous other courts have held, however, that "there is no consensus on the issue of common knowledge of the dangers of smoking . . . [and therefore] taking judicial notice of it would be improper." *See Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 106 (Mo. Ct. App. 2006).[13] As one court aptly stated:

> [T]he judicial notice inquiry would focus on the state of popular consciousness concerning cigarettes before 1969. The Court is simply unwilling to take judicial notice of something as intangible as public knowledge over three decades in the past. The exercise seems inherently speculative and an inappropriate topic for judicial notice.

*Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 844 (W.D. Ky. 1999). If anything, *Guilbeault* provides a cautionary tale that a "common knowledge" defense should not be resolved on the pleadings.

Even if *Guilbeault* is properly reasoned, the facts here could not be more different. Congress has not passed any law regulating greenhouse gas emissions or restricting the production of oil and gas, nor are there any federal statutes or regulations requiring warnings on fossil fuel products. The Complaint alleges that Defendants waged a decades-long campaign to sow doubt in the mind of the public about the very thing Defendants now claim the public has always known. *See* ¶¶ 147–77, 256. Indeed, shortly *after* the State filed this Complaint, President Trump expressed doubt that a scientific consensus on climate change exists or that climate change is actually occurring.[14] Whether and when the dangers of climate change became "common knowledge" cannot be resolved on a motion to dismiss, and is certainly not subject to judicial notice.

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[13] *See also, e.g.*, *Evans*, 990 N.E.2d at 1022 ("[A] reasonable jury could find that the risks of cigarette smoking were certainly not obvious before 1966, . . . and were still not obvious before 1970 . . . ."); *Gerald v. R.J. Reynolds Tobacco Co.*, No. ST-10-CV-631, 2017 WL 5009691, at *14 (V.I. Super. Ct. Aug. 29, 2017) (denying summary judgment on design defect claim in part because whether dangers of smoking were common knowledge "can only be determined through a weighing of the evidence by the fact-finder"); *Wright v. Brooke Grp. Ltd.*, 114 F. Supp. 2d 797, 818 (N.D. Iowa 2000) (where allegations in complaint were "at war with the claim that [cigarette] consumers knew they were buying a dangerous product," court "[could] not conclude that dismissal based on the common knowledge doctrine is appropriate").

[14] *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.").

### 3. The State Has Sufficiently Pleaded a Claim for Trespass.

The State's trespass allegations are sufficient to state a claim. "[T]o be liable for trespass to property, one must enter the land in the possession of another *or cause something to do so*, remain on the land, or fail to remove from the land a thing that he is under a duty to remove." *Mesolella v. Providence*, 508 A.2d 661, 668 n.8 (R.I. 1986) (emphasis added). Here, the State alleges that it "owns, leases, occupies, and/or controls real property throughout the State" and that Defendants have caused "flood waters, extreme precipitation, landslides, saltwater, and other materials, to enter Plaintiff's property" as a result of Defendants' conduct. ¶¶ 286–87.

Defendants make three arguments against the State's trespass claim, each of which mischaracterizes both the law and the Complaint. First, Defendants claim that the State only pleads future invasions, which (they argue) are not actionable. Second, Defendants argue that "Plaintiff must allege that Defendants controlled the thing that entered its property," and glibly assert that "Defendants do not control the oceans, clouds or precipitation." Mot. at 27. Third, Defendants argue that the State has consented to the alleged invasion of its property by using fossil fuels. Each of these arguments fails.

As an initial matter, the State has pleaded a substantial number of past invasions caused by Defendants. *See, e.g.*, ¶ 15 ("Rhode Island is already experiencing sea level rise and associated impacts."); ¶ 60 ("[O]ver 10 inches of sea level rise since 1930."); ¶ 76 ("Over the past 80 years …the State has experienced a doubling of the frequency of flooding and an increase in the magnitude of flood events."); ¶ 212(i) ("Climate change is already challenging [the] capacity and performance" of the State's stormwater drainage systems.); ¶ 220 ("Rhode Island has incurred sea level rise-related, extreme heat-related, and hydrologic regime change-related injuries and harms. These include, but are not limited to, infrastructural repair, planning costs, and response costs to flooding and other acute incidents."); ¶ 221 ("… Rhode Island has been inundated by sea water, and extreme precipitation, among other climate-change related intrusions, which has caused injury and harms to its real property and to improvements thereon …"). Defendants' assertion that the State has pleaded only future injuries is simply wrong.

At the same time, the State's allegations regarding future invasions independently establish a claim for continuing trespass. *See Regan v. Cherry Corp.*, 706 F. Supp. 145, 151 (D.R.I. 1989) (holding "the Rhode Island Supreme Court has long recognized the doctrine of continuing trespass" and collecting cases); Rest. (2d) Torts § 930(1) ("If one causes continuing or recurrent

tortious invasions on the land of another … and it appears that the invasions will continue indefinitely, the other may at his election recover damages for the future invasions in the same action as that for the past invasions.").

Second, contrary to Defendants' assertions, the State need not allege that Defendants themselves, or their products, intruded upon State property. "The Rhode Island Supreme Court looks to the Restatement of Torts in deciding trespass claims." *In re IDC Clambakes, Inc.*, 727 F.3d 58, 65 n.3 (1st Cir. 2013). "According to Restatement (Second) Torts, § 158 at 277 (1965), to be liable for trespass to property, one must enter the land in the possession of another *or cause something to do so,* remain on the land, or fail to remove from the land a thing that he is under a duty to remove." *Mesolella*, 508 A.2d at 668 n.8 (emphasis added). "[I]t is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." Rest. (2d) Torts § 158, cmt. i.

Accordingly, under Rhode Island law, courts have regularly recognized trespass claims against defendants who have caused, but not necessarily controlled, the thing that invaded the plaintiff's property—particularly with respect to pollution.[15] *See, e.g., Paolino v. Ferreira*, 153 A.3d 505, 512 (R.I. 2017) (discussing trial judge's discretion to remedy continuing trespass that included "discharge flowing from defendants' property onto plaintiffs' property"); *Atl. Richfield*, 357 F. Supp. 3d at 143 (denying motion to dismiss Rhode Island's "trespass claim[, which] attempts to hold Defendants responsible for the [synthetic gasoline additive] MTBE that has allegedly entered waters and property statewide"); *Cigar Masters Providence, Inc. v. Omni R.I., LLC*, No. CV 16-471-WES, 2017 WL 4081899, at *13 (D.R.I. Sept. 14, 2017) (finding the presence of smoke from a cigar shop "constitutes a trespass"); *Regan*, 706 F. Supp. at 150 (denying motion to dismiss trespass claim based on defendants' disposal of hazardous waste in the context of a continuing trespass).

Here, the State has alleged that Defendants' knowledge provided them with substantial certainty that greenhouse gas emissions from their fossil fuel products would cause sea level rise

[15] On the other hand, Defendants cited a single inapposite case—a federal district court interpreting New Hampshire law—for the proposition that "Plaintiff must allege that Defendants controlled the thing that entered its property." *See* Mot. at 27 (citing *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986)).

and flood events—an invasion of water onto State properties. *See* ¶¶ 106–46, 197–224. The magnitude of Defendants' conduct and the resulting harms does not place them beyond the reach of the law. *See, e.g.*, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig*. ("*MTBE II*"), 725 F.3d 65, 120 (2d Cir. 2013) (rejecting "Exxon's argument that its actions as a 'mere refiner and supplier' of gasoline were 'too remote … to be deemed an immediate or inevitable cause of any trespass'" because Exxon knew that its product—sold and used across the state—was substantially certain to cause contamination), *cert. denied*, 572 U.S. 1080 (2014).

Third, the State has not consented to Defendants' trespass by using fossil fuels or allowing them to be used. Defendants cite no case law to support their argument to the contrary, but the Restatement discusses consent in three important respects. First, "[i]f the actor exceeds the consent, it is not effective for the excess." Rest. (2d) Torts § 892A(4). Even *if* the State consented in some manner to the use of fossil fuel products, it did not consent to the excess, i.e. to allow Defendants "to cause floodwaters, extreme precipitation, landslides, saltwater, and other materials to enter its property as a result of the use of Defendants' fossil fuel products," as alleged in the Complaint. ¶ 288. 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. (2d) Torts § 892B. Here, Defendants' campaign of misrepresentation regarding global warming and the climactic effects of fossil fuels vitiated any consent the State could have given. Third, the "[e]xistence of apparent consent is a fact issue." *Id.* § 892, cmt. c, reporter's note. Thus, at best, the issue of consent cannot be decided on a motion to dismiss, and Defendants' motion must be denied.

#### 4. The State Has Sufficiently Pleaded a Claim for Impairment of the Public Trust.

"[T]he public trust doctrine … is codified in article 1, section 17, of the Rhode Island Constitution." *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1166 (R.I. 2003). Section 17 states:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, … and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values.

R.I. CONST. art. I, § 17. The Constitution further provides that

> the powers of the state … to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural

> environment … shall be an exercise of the police powers of the state [and] shall be liberally construed.

*Id.* § 16. "It is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the high-water mark, and it holds such land in trust for the use of the public." *Hall v. Nascimento*, 594 A.2d 874, 877 (R.I. 1991).

Defendants argue that the State cannot make a claim for impairment of public trust resources for two interrelated reasons: first, because Sections 16 and 17 of the State Constitution do not explicitly create a cause of action; and second, because their provisions are not self-executing. *See* Mot. at 28–30. Defendants' first argument fails because the Rhode Island Supreme Court has recognized the Attorney General's right to bring a public trust action. Moreover, the State has a common law *parens patriae* right to enjoin and remedy harms to public resources, including those within the public trust. Either of these suffices to allow the State to bring a claim for impairment of public trust resources. Defendants' second argument fails because Article 17 articulates specifically enforceable rights codified from the common law and is therefore self-executing.

First, the public trust doctrine as codified in Article I, Section 17 of the Constitution gives rise to a cause of action that may be brought by the Attorney General. In *Nugent*, private plaintiffs sought to enjoin construction of a pier for violating waters held in public trust. 161 A.2d at 803. The Supreme Court allowed the action to proceed, but only because the Attorney General had expressly consented to the suit. The Court explained: "Without the permission of the attorney general the relators could not maintain a bill for such relief on the grounds alleged therein, *since suit for the enforcement of purely public rights may be brought only by the proper public officer*." *Id*. at 804 (emphasis added). Thus, a cause of action arises under the public trust doctrine, but it may be only be brought by the Attorney General or with the Attorney General's consent. *See also Jackvony v. Powel*, 21 A.2d 554 (R.I. 1941) (suit by Attorney General for an injunction to prevent members of a beach commission from erecting barriers on the shore in violation of Article I, Section 17).[16]

[16] Many other state courts have held that the public trust doctrine creates a claim in favor of the state as well. *See, e.g., State v. Hess Corp.*, 20 A.3d 212 (N.H. 2011), *as modified on denial of reconsideration*

Separate from the cause of action that arises under Article I, Section 17, the State also has a common law *parens patriae* right to enjoin and remedy harms to public resources. In the State's case against MTBE polluters, Judge Smith summarized the *parens patriae* doctrine as follows:

> A state may proceed *parens patriae* to protect its "quasi-sovereign" interests, which are the set of interests that the State has in the well-being of its populace. . . . If the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.

*Atl. Richfield*, 357 F. Supp. 3d at 143–44 (citations and quotations omitted). Here, as in *Atlantic Richfield*, the State is properly proceeding as *parens patriae* and has standing to bring a claim for the protection of the natural resources the State holds in public trust.

Second, the constitutional provisions are self-executing. "[C]onstitutional provisions . . . merely declaratory of common law are usually considered self-executing." *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 (Va. 1985). As the Supreme Court has recognized, Article I, Section 17 merely codified the common law public trust doctrine, which is rooted in English common law and was embodied in Rhode Island's colonial charter. *Champlin's Realty Assocs.*, 823 A.2d at 1166.

Additionally, at least one court has held that similar constitutional public trust provisions are self-executing and require no implementing legislation. *See Penn. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 936–37 (Pa. 2017) (reaffirming Pennsylvania Supreme Court's prior holding that with respect to a constitutional amendment that "itself declares and creates a public trust of public natural resources … and that [states] the Commonwealth is made trustee of said resources … [n]o implementing legislation is needed"). Here, as in Pennsylvania, Section 17

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(Mar. 22, 2011) ("The [public trust] doctrine allows a state attorney general, as trustee, to bring a cause of action for damages to natural resources held in trust by the State."); *Attorney Gen. v. Hermes*, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983) ("If indeed the state is trustee of its waters, it must be empowered to bring suit to protect the trust corpus."); *State, Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co.*, 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (affirming holding "that the State had the right and the fiduciary duty to seek damages for the destruction of wild life which are part of the public trust"), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) ("We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property."); *State of Md., Dep't of Nat. Res. v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1067 (D. Md. 1972) ("The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public.").

"itself declares and creates a public trust of public natural resources for the benefit of all people" and makes the State the trustee of those resources. *Id*. at 937; *see also Hall*, 594 A.2d at 877 ("[P]ursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the high-water mark, and it holds such land in trust for the use of the public."). Accordingly, "[n]o implementing legislation is needed to enunciate these broad purposes and establish these relationships," and the provision is therefore self-executing. *See Penn. Envtl. Def. Found.*, 161 A.3d at 937. Indeed, the Supreme Court has recognized the Attorney General's authority to bring such claims under Section 17, and has never found such a claim barred because the provisions are not self-executing. *See, e.g.*, *Nugent*, 161 A.2d at 804 (finding that "suit for the enforcement of purely public rights" including Section 17 "may be brought only by the proper public officer," which includes the attorney general); *Jackvony*, 21 A.2d at 558 (finding law allowing barriers on the shore unconstitutional under Article 1, Section 17 in suit filed by attorney general). Additionally, even if Section 17 were not self-executing, Defendants have not, and cannot, cite to any authority that holds that the State's long-held *parens patriae* right to sue to protect natural resources has been abrogated by codifying the public trust doctrine into the State Constitution.

In sum, the State has sufficiently pleaded a claim against Defendants for unreasonably interfering with and impairing Rhode Island's coastline, tidal waters, and fisheries—quintessential public trust resources the State holds in trust for the benefit of the public. By substantially contributing to sea level rise, storm surges, and ocean acidification, Defendants' conduct has damaged the State's beaches, coastline, and coastal wetlands and marshes; impaired the commercial and recreational use of its tidal waters; and adversely impacted Rhode Island fisheries. *See* ¶¶ 301–02, 212 & 212(e), (f), (k) & (l). The State's cause of action is properly pleaded and should not be dismissed.

**5. The State Has Sufficiently Pleaded a State Environmental Rights Act Claim.**

Defendants argue that the State's claim under the State Environmental Rights Act ("SERA" or "Act") fails for three reasons: (1) the Act only allows a city, town, or designated environmental advocate to pursue a claim; (2) the Complaint seeks relief for activities outside Rhode Island's borders; and (3) SERA is unconstitutionally vague. The Court should reject these arguments.

***First***, the Attorney General has standing to bring a claim under the Act. *See Whitehouse v. New England Ecological Dev., Inc.*, No. 98-4525, 1999 WL 1001188, at *4 (R.I. Super. Ct. Oct. 28, 1999) (unpublished) ("[T]he Attorney General is … authorized to bring suit to insure compliance with the provisions of the Environmental Rights Act and any environmental quality standard"). The Act broadly provides that "it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." R.I. Gen. Laws § 10-20-1. Section 10-20-3 explicitly authorizes "any city or town [to] maintain an action,"[17] and allows the Attorney General to appoint an environmental advocate, who shall also "[m]aintain and/or intervene in civil actions authorized by this chapter" and "take all possible action, including but not limited to … formal legal action, to secure and insure compliance with the provisions of this chapter." *Id*. § 10-20-3(a), (c)–(d). However, far from prohibiting the Attorney General from bringing suit to enforce the Act, the Act expressly states: "No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by § 10-20-3. The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available." *Id*. § 10-20-10. As the Rhode Island Supreme Court has long "recognized that the Attorney General is vested with the authority to maintain suits seeking redress of a public wrong," the Attorney General is permitted to bring this claim to enforce the Act without appointing an environmental advocate for that special purpose. *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005) (citing *McCarthy v. McAloon*, 83 A.2d 75, 78 (R.I. 1951) & *President and Fellows of Middlebury College v. Central Power Corp. of Vermont*, 143 A. 384 (Vt. 1928) ("[T]he state, through the Attorney General, is a proper party to maintain and defend the rights of the public.")); *see also Lead Indus.*, 951 A.2d at 473 ("[T]he Attorney General in Rhode Island has broad powers and responsibilities pursuant to the Rhode Island Constitution, several Rhode Island statutes, and the common law. In the course of exercising those powers, the Attorney General is vested with broad discretion." (footnotes omitted)).

[17] The requirement to provide pre-suit notice to defendants is limited to suits initiated by cities or towns, and therefore does not apply here. *See* R.I. Gen. Laws § 10-20-3(e) ("No action may be commenced by a city or town pursuant to this act unless the municipality seeking to commence the suit shall, at least sixty (60) days prior to the commencement thereof, direct a written notice of the intention by certified mail to … the intended defendant.").

***Second***, Defendants argue that "[t]he SERA claim also fails because the Complaint is directed to and seeks equitable relief with respect to activities beyond Rhode Island's borders." Mot. at 31. It does not. The State's SERA claim (and its other claims) seek relief for localized injuries, and the State seeks no relief against extraterritorial conduct. *See infra* Part IV.B.4.

***Third***, Defendants argue that SERA is "unconstitutionally vague" because it did not put Defendants on notice. Mot. at 32. "A statute is unconstitutionally vague if it compels a person of average intelligence to guess and to resort to conjecture as to its meaning and/or as to its supposed mandated application." *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 10 (R.I. 2005) (internal quotations omitted); *F.C.C. v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) (holding that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required").

SERA's meaning and application is clear. The Act "provide[s] an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." R.I. Gen. Laws § 10-20-1. Specifically, it allows certain parties, including the Attorney General, to file suit to "enforce, or to restrain the violation of, any environmental quality standard which is designed to prevent or minimize pollution, impairment, or destruction of the environment." *Id*. § 10-20-3(a) & (c). Where there is no established environmental quality standard, a city or town may file an action for declaratory and equitable relief for the protection of the environment from pollution, impairment, or destruction. *Id*. § 10-20-3(b). The Act defines the term "natural resources" as including "all mineral, animal, botanical, air, water, land, timber, soil, quietude, and recreational resources," defines "environmental quality standard" as "any statute, ordinance, limitation, regulation, rule, order, license, stipulation, agreement, or permit of the state" and defines "pollution, impairment, or destruction," as "conduct by any person which violates, or is likely to violate, any environmental quality standard which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment." *Id*. § 10-20-2 (2), (3), & (6). Section 10-20-4 explains the burden of proof in cases brought under SERA, including affirmative defenses available to defendants, and Section 10-20-6 sets forth the relief that may be granted.

SERA specifically enumerates: (a) the resources protected under the Act; (b) the prohibited conduct (i.e. violating an environmental quality standard, or, where such a standard is not

available, conduct that materially adversely affects the environment or is likely to do so); and (c) the burden of proof and rights and remedies of the parties. Its bounds are understandable to a person of average intelligence, and it gives fair notice of prohibited conduct. "The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague." *United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004). Moreover, although Defendants complain that SERA "did not put [them] on notice that they could be liable under the Act for lawfully extracting, producing, and/or selling fossil fuels around the world," Mot. at 32, SERA *does* put Defendants on notice for the violations the Complaint actually alleges: conduct that materially adversely affects the environment or is likely to do so. *See, e.g.*, ¶¶ 311–12; *see also URI Student Senate v. Town of Narragansett*, 707 F. Supp. 2d 282, 294–95 (D.R.I. 2010) (discussing void for vagueness doctrine and holding "[t]he Ordinance thus need not enumerate every conceivable breach of local, state, or federal law that might trigger [it]."), *aff'd*, 631 F.3d 1 (1st Cir. 2011). The State adequately pleads its SERA cause of action, and Defendants' motion should be denied.

**6. The State Properly Alleges Causation**

The causation element of the State's nuisance and other claims consists of (1) causation in fact or actual causation and (2) proximate, or legal, causation. *Lead Indus.*, 951 A.2d at 451. Causation "is usually a question for the trier of fact." *Benoit, III v. A.W. Smith Corp.*, No. 07-3755, 2009 WL 3328525, at *4 (R.I. Super. Ct. May 14, 2009); *Purdue Pharma*, 2019 WL 3991963, at *10. Indeed, "[w]hen reasonable minds could infer that causation exists, the question [of causation] must be submitted to the jury." *Hill v. State*, 398 A.2d 1130, 1131 (R.I. 1979). The requirements for pleading causation are "no more stringent than they are for any other element of a legal theory," and thus where a complaint provides notice of the claim to the defendants, it satisfies the pleading burden. *Gray v. Derderian*, 472 F. Supp. 2d 172, at 180–81 (D.R.I. 2007).

To prove cause-in-fact at trial, a plaintiff must show "a causal relation between the act or omission of the defendant and the injury." *Almonte v. Kurl*, 46 A.3d 1, 18 (R.I. 2012); *see also Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1132 (R.I. 2004) (for products liability, the plaintiff must "establish a sufficient connection between the product and its alleged manufacturer or supplier"); *Claiborne v. Duff*, No. PC 10-6330, 2015 WL 3936909, at *9 (R.I. Super. Ct. June 23,

2015) (Gibney, P.J.).[18] The defendant is a proximate cause of the injury if "'the harm would not have occurred but for the [act] and that the harm [was a] natural and probable consequence of the [act].'" *Almonte*, 46 A.3d at 18 (alterations in original) (quoting *Pierce v. Providence Ret. Bd.*, 15 A.3d 957, 964 (R.I. 2011)). A proximate cause "need not be the sole and only cause. It need not be the last or latter cause. It's a proximate cause if it concurs and unites with some other cause which, acting at the same time, produces the injury of which complaint is made." *Pierce*, 15 A.3d at 966. "In other words, '[proximate] cause' is that [the defendant's conduct] shall have been a *substantial* factor in bringing about the harm." *Sweredoski v. Alfa Laval, Inc.*, No. PC 2011-1544, 2013 WL 3010419, at *2 (R.I. Super. Ct. June 13, 2013) (alterations in original) (quoting *Wells v. Uvex Winter Optical, Inc*., 635 A.2d 1188, 1191 (R.I. 1994)). Proximate cause "involves an assessment of foreseeability," in which the inquiry is "whether the injury is of a type that a reasonable person would see as a likely result of his conduct." *Lead Indus.*, 951 A.2d at 451.

As explained below, the Complaint properly alleges both cause in fact and proximate cause. Specifically, Defendants caused the release of billions of tons of greenhouse gases into the atmosphere by extracting, producing, and selling fossil fuel products while simultaneously promoting the unrestrained use and consumption of those products by concealing and misrepresenting the known dangers of fossil fuels. *See* ¶¶ 97, 105, 151–77. This pollution altered and continues to alter the climate, causing and exacerbating the harm to the State (¶¶ 37–93, 103), and Defendants foresaw these harms from their products decades ago (¶¶ 106–46). *See also* ¶¶ 1–12, 98, 229. Reasonable minds could infer the actions of Defendants caused the current climate change conditions and events that harm the State, and thus the State has amply satisfied its pleading burden for both cause-in-fact and proximate cause.

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[18] Contrary to Defendants' assertion, *Almonte* does not hold that "causation-in-fact" requires a showing of "but-for" causation in the sense that a defendant's tortious conduct must be the sole or overarching cause of the plaintiff's injury. *See* Mot. at 33. Rather, the phrase "but-for" is used in *Almonte* appears when describing the formulation of the proximate cause, or legal cause, prong, and is alternately defined as a "substantial factor" requirement. *Almonte*, 46 A.3d at 18 ("In most cases, proximate cause may be demonstrated by establishing that the harm to the plaintiff would not have occurred but for the defendant's negligence." (citation omitted)). That test in any event requires "a factual finding" that is not appropriate for resolution on the pleadings. *Id.* Moreover, as discussed *infra*, the "but for" requirement is consistently relaxed in multi-defendant cases to avoid the absurd result of allowing all tortfeasors to avoid liability where it is impossible to prove any particular defendant's contribution to the harm. *See, e.g.*, *Atl. Richfield*, 357 F. Supp. at 138, 141 (multiple sources of MTBE pollution from gasoline producers led the court to "adapt[] [the causation principle] to suit the extraordinary circumstances of this case"); *Claiborne*, 2015 WL 3936909, at *9–12 (multiple sources of lead exposure); *Nichols v. Allis-Chalmers Prod. Liab. Trust*, No. PC-2008-1134, 2018 WL 1900256, at *9–10 (R.I. Super. Ct. Apr. 16, 2018) (multiple sources of asbestos exposure).

### *a) Cause in Fact*

Defendants erroneously argue that no single company nor any group of companies can be found a cause-in-fact of the State's harms, for two reasons. First, Defendants argue that no one is legally responsible for climate change impacts in Rhode Island because multiple actors have and are causing those impacts. Second, Defendants argue that no one is legally responsible for these impacts because they cannot be traced to individual sources. But as explained below, case law supports a finding that Defendants' actions are the cause-in-fact for the State's harms, particularly in this early stage in the case, where the State's allegations must be taken as true.

***First***, Defendants erroneously argue that where multiple actors contribute to harms, no one is legally responsible. Defendants' argument that "a defendant is not liable unless his or her actions were the primary cause" of the alleged injury, *see* Mot. at 34 (citing *Wells*, 635 A.2d at 1191) misstates the applicable standard for cause-in-fact in Rhode Island. *See Almonte*, 46 A.3d at 18; *Clift*, 848 A.2d at 1132. Indeed, the language Defendants quote from *Wells*—which involved a former employee suing his employer for breach of severance agreements, 635 A.2d at 1188, and does not address the situation at issue here (multiple alleged tortfeasors contributing to an indivisible harm)—addressed proximate cause, not cause-in-fact. What's more, Defendants misconstrue its import. *Wells*, and the overwhelming weight of Rhode Island authority, hold that for proximate cause a plaintiff need only show that a defendant's conduct is a "substantial" cause of the injury for liability to attach—not that it is necessarily the "primary" cause. *Id.* at 1191 (defendant's actions "must have been *a substantial or* primary cause of [plaintiff's] injuries" (emphasis added)); *see also, e.g.*, *Martinelli v. Hopkins*, 787 A.2d 1158, 1170 (R.I. 2001) ("[P]laintiff was not required to prove that the town's negligence was *the* proximate cause for his injuries and damages, but only that it was *a* proximate cause which, standing alone, or in combination with any other defendant's negligence, contributed to the plaintiff's injuries." (emphasis added)); *Pierce*, 15 A.3d at 965–66 (one of several accidents, which was "part of the causal matrix" but not sufficient by itself to be a but-for cause, was "one of the proximate causes" of plaintiff's disability); *Claiborne*, 2015 WL 3936909, at *9–10 (summary judgment denied where evidence showed that lead exposure from multiple sources "was a significant contributor" to child's behavioral problems, and noting that "'*where there are potentially multiple, concurrent causes of a plaintiff's injury, application of the 'but for' formula may allow each actor responsible for the plaintiff's injuries to escape liability*'" (quoting Lawrence G. Cetrulo, 1 TOXIC TORTS

LITIGATION GUIDE § 5:3 (2014)) (emphasis added in decision)); *Lapointe v 3M Co.*, No. PC06-2418, 2007 WL 4471136 (R.I. Super. Ct. Nov. 5, 2007) ("[I]t also is for a jury to determine whether [defendant's products] were substantial factors in causing [plaintiff's] illness.").

This view is consistent with the Restatement (Second) of Torts Section 840E, comment b: 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." Other courts relying on the Restatement have found causation satisfied "where the defendant's act or omission had such an effect in producing the injury that reasonable people would regard it as a cause of the injury"—not necessarily the sole or primary cause of the injury. *See, e.g.*, *MTBE II*, 725 F.3d 65 at 116; *City of Modesto*, 227 Cal. Rptr. 3d at 783 (holding that 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)); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019) (explaining Maryland has adopted the substantial factor causation standard as set forth in the Restatement, under which "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" (quotations omitted)). Here, the State has alleged that Defendants "individually and together" contributed to the State's injuries by producing and misleadingly promoting their fossil fuel products. ¶ 105. As alleged in the Complaint, the actions of all Defendants are a cause-in-fact of the State's harms, and the law does not hold otherwise.

***Second***, Defendants erroneously argue that no one can be an actual cause of the State's harms because the State "cannot trace its injuries to any specific greenhouse gas emissions." *See* Mot. at 33. As alleged, the State's injuries result from and are exacerbated by the overall increase in atmospheric greenhouse gases—a scientific fact Defendants do not dispute. Defendants cite the district court's standing decision in *Kivalina*, but that case was not affirmed on those grounds, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), and its reasoning was thoroughly rejected in *Connecticut v. American Electric Power Co.* ("*AEP*"), which unambiguously held that the 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). And although Defendants also cite to *Amigos Bravos v. U.S. Bureau of Land Management*, 816 F. Supp. 2d 1118 (D.N.M. 2011), the court in that case

rejected the notion of tracing molecules of greenhouse gases to particular defendants, applying instead the *Massachusetts v. EPA*, 549 U.S. 497 (2007), "meaningful contribution" standard. *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)).

In *Massachusetts v. EPA*, the U.S. Supreme Court articulated that, in cases alleging climate-related harms, a causal connection exists where the emissions "make a *meaningful contribution* to greenhouse gas contributions and hence . . . to global warming." *Mass. v. EPA*, 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).[19] Here, the State alleges that Defendants together are responsible for 14.5% of global emissions between 1965 and 2015 simply by virtue of their fossil fuel extraction and production—many times higher than the 2.5% the court found satisfactory in *AEP*—as well as even greater contributions associated with their refining, wholesaling, and retailing operations. *See* ¶¶ 97, 104. This, in combination with Defendants' deceptive promotion and marketing of their fossil fuel products, establishes that Defendants' contribution to greenhouse gas emissions is "substantial" or "meaningful" by any measure. *See* ¶¶ 177, 241.

Defendants' argument regarding the elasticity of supply for fossil fuel products (Mot. at 34) is irrelevant and legally unsupported.[20] The State has alleged that *in addition to* producing

[19] 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).

[20] The argument that Defendants are not the proximate cause of the State's injuries because other entities would have produced fossil fuels had they not done so resembles the "perfect substitute" argument offered by federal agencies in a number of cases challenging the adequacy of environmental reviews under the National Environmental Policy Act ("NEPA"), which posits that fossil fuel extraction will not cause an increase in fossil fuel consumption because the same quantity of fuel would be produced elsewhere and eventually consumed even if the agency does not approve the proposal. Courts have rejected this argument as "illogical" because increasing coal supply would affect coal prices and the demand for coal relative to other fuel sources. *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1198 (D. Colo. 2014); *see also WildEarth Guardians v. U.S. Bur. of Land Mgmt.*, 870 F.3d 1222, 1228 (10th Cir. 2017); *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont.

fossil fuel products, Defendants engaged in a long-running campaign to mislead the public about the dangers of their products and increase demand for them. *See, e.g.*, ¶¶ 151–77. The State is not required to plead (or prove) that hypothetical fossil fuel companies would not have engaged in the same overproduction and misleading overpromotion as Defendants in order to establish causation. Defendants' citation to *Sierra Club v. U.S. Defense Energy Support Center*, No. 11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011), is also inapposite. There, the court held that plaintiffs did not establish causation for standing purposes because the government's inclusion or exclusion of a lifecycle greenhouse gas emission certification for purchases of crude oil could not have impacted how the oil was produced or sold to third parties and, presumably, could not have made a meaningful contribution to global greenhouse gas emissions. *Id.* at *4. Here, the relevant fossil fuel producers before the Court are responsible for nearly 15% of anthropogenic $CO_2$ globally since 1965, ¶ 7, which under the relevant caselaw is more than enough to form a substantial contribution to the State's injuries. And again, the State has not merely alleged that Defendants produced, marketed, or sold fossil fuels, but that they did so deceptively and tortiously, withholding critical information about their products. The connection between Defendants' conduct and the State's injuries does not require the "logical leaps and attenuated assumptions" that the *Sierra Club* court found fatal to the plaintiffs' standing. *See Sierra Club*, 2011 WL 3321296, at *5.

And finally, contrary to Defendants' assertion, the Complaint's allegations regarding Defendants' actions that prevented the development of fossil fuel alternatives are not "speculative." *See* Mot. at 35. The authority Defendants cite addresses the plaintiff's burden *at summary judgment*, not on a motion to dismiss where no evidence has been entered. *See Cooley v. Kelly*, 160 A.3d 300, 304 (R.I. 2017) (affirming summary judgment in favor of defendant where "plaintiff had failed to provide any competent evidence"). As with causation issues generally, the question of whether Defendants' actions exacerbated the costs of mitigating further harm to the State (¶ 187), is fact-intensive and not appropriate for resolution at this stage.

***b) Proximate Cause***

Defendants argue that any involvement they might have in the causal chain is too distant and remote for proximate cause to attach. Mot. at 36. However, "the proper inquiry regarding legal

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2017), *amended in part, adhered to in part*, 2017 WL 5047901 (D. Mont. Nov. 3, 2017); *WildEarth Guardians v. Zinke*, No. 1:17-cv-00080, 2019 WL 2404860, at *11 (D. Mont. Feb. 11, 2019).

[proximate] cause involves an assessment of foreseeability." *Lead Indus.*, 951 A.2d at 451. Here, the State has pleaded foreseeability by alleging that Defendants knew their products would be burned in the course of their intended use and that harm would be inevitable. ¶¶ 240, 242, 253, 267, 277; *see also AEP*, 582 F.3d at 346–47 (rejecting identical arguments about space and time in nuisance context).

Chief Judge Smith's reasoning in the MTBE decision forecloses Defendants' argument here. The court's lengthy discussion of proximate cause led to the conclusion that "to shield tortfeasors from liability because they had the foresight (or luck) to pollute without demarcation would be contrary to Rhode Island law and policy." *Atl. Richfield*, 357 F. Supp. 3d at 138; *see also id.* at 137–41 (shifting burden for "apportioning harm" onto MTBE defendants if State is able to prove other elements of its claim, where commingled nature of the harm left State unable to identify source defendant for any particular spill or contamination from MTBE). Here, too, Defendants' conduct as the producers, sellers, marketers, and promoters of harmful products are not "remote" from their products' consequences simply because there are intervening steps between Defendants' conduct and the injury. As the comment 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. 2d (Torts) § 433 cmt. f.

In this case, to a unique degree, time lags do not preclude causation; the touchstone, instead, is foreseeability. Defendants not only knew that harm would result, but knew decades ago that time lags between using fossil fuels and observed effects on the climate would mask more significant and possibly "catastrophic" effects in the future. ¶ 129. Courts regularly reject arguments like Defendants', particularly where defendants acted intentionally and with knowledge of the dangers. *See, e.g.*, *ConAgra*, 227 Cal Rptr. 3d at 546 (lead paint companies 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"); *MTBE II*, 725 F.3d at 122 n.43 (concerns about "proximity" really turn on "whether the defendant knew that its product would endanger the public health").

### B. No Federal Law Bars the State's Claims

#### 1. The State's Claims Are Not Preempted or Displaced by the Clean Air Act.

The State's claims arise under and are pleaded under state law, and for that reason alone are not "displaced" by the Clean Air Act. The Supreme Court clearly reached that holding in *AEP*, and Defendants' various prevarications about the purposes and scope of the CAA cannot overcome the Supreme Court's clear instructions. Because the State's claims are pleaded entirely under state law, displacement of those claims by the CAA is impossible, as Chief Judge Smith of the District of Rhode Island already held. *See Chevron*, 393 F. Supp. 3d at 148.

In *AEP*, the Supreme Court unambiguously held that the "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." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (emphasis added). But because "displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law," *id.* at 423 (citation omitted), the Court was equally unambiguous that "the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal [CAA]," *id.* at 429. The Court expressly did not hold, as it could have, that the plaintiffs' alternative state law claims were "governed by federal common law" and thus displaced, as Defendants urge.

The Ninth Circuit's decision in *Kivalina* is no different. The court there had no state law claims before it, and in affirming dismissal of federal common law claims the court 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 court did not purport to convert any 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.

Chief Judge Smith rejected Defendants' same arguments in the District of Rhode Island in granting the State's motion to remand this case to this Court: "Defendants, in essence, want the Court to peek beneath the purported state-law façade of the State's public-nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law)." *Chevron*, 393 F. Supp. 3d at 148. But as the court correctly

held, "there is nothing in the artful-pleading doctrine that sanctions this particular transformation." *Id.* The issue whether the State's claims are "governed by" federal common law was "fully and fairly litigated and finally decided," before Chief Judge Smith, and his rejection of Defendants' argument is entitled to full faith and credit. *See Hawes v. Reilly*, 184 A.3d 661, 667 (R.I. 2018), *cert. denied*, 139 S. Ct. 1321 (2019); R.I. Gen. Laws §§ 9-32-1, 9-32-2 (full faith and credit statutes). The district court's reasoning was correct in any event, and this Court should adopt it even if it were not preclusive.[21]

**2. The Clean Air Act Does Not Preempt the State's Common Law Claims.**

Defendants' argument that the State's claims are preempted by the "source state rule" articulated in *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987), misconstrues the import of that rule and the substance of the State's claims. As explained below, the *Ouellette* rule

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[21] Three other district courts have joined Chief Judge Smith. *See Boulder Cty.*, 405 F. Supp. 3d at 970 (*AEP* "held only that the Clean Air Act displaced federal common law nuisance action related to climate change; it did not review whether the Clean Air Act would preempt state nuisance law."); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 557 (D. Md. 2019), *as amended* (June 20, 2019) (city's state law nuisance claim against oil and gas companies was not "governed by" federal common law and therefore not displaced), *aff'd on other grounds*, 2020 WL 1069444 (4th Cir. Mar. 6, 2020); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (*AEP* "noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve)."). In contrast, the courts in *City of Oakland*, 325 F. Supp. 3d at 1021–22, and *City of New York*, 325 F. Supp. 3d at 471–72, incorrectly ruled that a generalized national interest in climate change strips states of their ability to remedy local injuries from the climate crisis, and therefore that those plaintiffs' claims were "governed by" federal common law. But those cases were wrongly decided. The Supreme Court recently reiterated that "cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 716 (2020). Justice Gorsuch, writing for a unanimous Court, emphasized that "only limited areas exist in which federal judges may appropriately craft the rule of decision," including "admiralty disputes and certain controversies between States." *Id.* at 717. "But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied," with "one of the most basic" being that "common lawmaking must be 'necessary to protect uniquely federal interests.'" *Id.* (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). The *City of Oakland* and *City of New York* courts concluded that federal common law "governed" and replaced state law claims based on sweeping generalizations that without fossil fuels "virtually all of our monumental progress would have been impossible," and that "[o]ur industrial revolution and our modern nation, to repeat, have been fueled by fossil fuels," without receiving any evidence. *See City of Oakland*, 325 F. Supp. 3d at 1023, 1025. Even if those conclusions were accurate, remedying climate crisis harms is not a uniquely federal interest, and "[i]t is well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Mass. v. EPA*, 549 U.S. at 522–23). The State here does not seek to control any aspect of climate or emissions policy, but rather seeks local remedies for purely local harms. There is no "uniquely federal interest" in those remedies.

applies in cases involving pollution from a stationary point source, to prevent permitted point source emitters from being beholden to contradictory or inconsistent obligations that would undermine the CAA's permitting scheme. The rule has never been applied to preempt state common law claims like those here that challenge unlawful marketing of a dangerous product rather than a stationary source of pollution. None of the State's claims are preempted by the source state rule.

*Ouellette*'s source state rule is far narrower than Defendants contend, and, when understood in context, has no application to the State's claims here. The *Ouellette* plaintiffs, Vermont residents, alleged that a paper mill was discharging effluent into the New York side of Lake Champlain, which caused various ill effects on the Vermont side of the lake, and brought claims under Vermont nuisance law. *Id.* at 483–84. The Court reviewed the framework of the CAA, which requires "all point sources [on] virtually all bodies of water" to obtain a permit before discharging pollutants, and "sets forth the procedures for obtaining a permit in great detail." *Id.* at 492. The CAA moreover expressly gives States "a strong voice in regulating their own pollution" through close involvement in establishing permitting standards, but "affected States occupy a subordinate position to source States in the federal regulatory program." *Id.* at 490–91. A state affected by permitted water pollution originating in another state may comment on the permit and apply to the EPA administrator to have the permit changed or revoked, for example, but may not set up its own regulatory scheme governing out-of-state pollution or prevent the issuance of a permit to an out-of-state source. *Id.* at 490–91. Against that backdrop, the Court reasoned that subjecting a permitted point source to the laws of a different jurisdiction would create potentially conflicting obligations and undermine reliance on the permit: "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.* Likewise, all the cases Defendants cite applying the rule in the CAA context involved a single stationary source of air 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) (coal power plant); *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010) (four power plants).

None of the statutory and policy considerations animating the *Ouellette* rule apply where, as here, the plaintiff does not challenge the conduct of a point source emitter, and instead alleges

common law violations stemming from the tortious 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 various 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 were under normal driving conditions. *Id.* at 578. GM moved to dismiss, arguing in relevant part that the plaintiffs' claims were attempts to enforce automobile emissions standards, which power the Clean Air Act vests exclusively in the EPA. *See id.* at 588; 42 U.S.C. § 7543. The court rejected the argument, holding that the claims could not be understood as attempts to enforce any emissions rule, because they did not depend on the violation of an emissions rule at all. *Counts*, 237 F. Supp. 3d at 591; *see also In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189 (2016). The court thus found that the plaintiffs' state law claims were not preempted.

Finally, the court's reasoning Defendants cite from *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" is irrelevant here. *See* 325 F. Supp. 3d at 1024; Mot. at 43. As already noted, the court there determined that the plaintiff's claims arose under federal common law, which had been displaced by the CAA. *See id.* The State's claims here do not arise under federal common law, as Chief Judge Smith already determined, *see Chevron*, 393 F. Supp. 3d at 148, and in any event the State does not seek to impose liability for anyone's emissions, but rather Defendants' production, deceptive promotion, and deceptive marketing of known dangerous products. Defendants' reliance on this reasoning is a non-sequitur.

The State does not allege that a point source in another state has violated Rhode Island law, or that Defendants violated a CAA emissions permit, and does not declare any chemical a hazardous air pollutant, or create any other restriction whatsoever on air pollution conceivably governed by the Act. Instead, as in *Counts* and cases like it, the State alleges that Defendants have violated wholly separate state law duties that are not implicated or governed by the CAA, and which would not subject Defendants to conflicting obligations or "effectively override" the regulatory decisions concerning emissions made by another sovereign. The source state rule is simply inapplicable.

### 3. No Energy Statute Preempts the State's Claims.

The various federal energy statutes Defendants cite do not preempt the State's claims. Mot. at 43–44. It is well established that 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 Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotations and alterations omitted); *Pedaraza v. Shell Oil Co.*, 942 F.2d 48, 50 (1st Cir. 1991). Areas of traditional state authority at issue here include "tort rules and kindred state law provisions," *Pedaraza*, 942 F.2d at 50, "ensuring the availability of compensation for injured plaintiffs," *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985), and mitigation efforts "relat[ing] to public health and safety," *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.* ("*MTBE I*"), 457 F. Supp. 2d 324, 329 (S.D.N.Y. 2006). There is no indication Congress intended to preempt the State's tort claims, far less a "clear and manifest purpose."

Nor is there any merit to Defendants' argument that holding them accountable for their long-standing disinformation campaign would stand as an obstacle to achievement of select statutes' broad purposes, as articulated in a few specific provisions. Obstacle preemption exists where "state law stands as an obstacle to the accomplishment" of Congressional objectives. *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 248 (1984). Defendants' "burden" in proving obstacle preemption "is heavy." *MTBE II*, 725 F.3d at 101. Defendants must first "ascertain [Congress'] objectives"; 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.* at 102.[22]

Here, the provisions Defendants invoke articulate broad public policies. 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).[23]

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[22] Defendants' secondary argument that the statutes' broad purposes show their conduct cannot be "unreasonable" does not concern preemption; rather, it reflects Defendants' argument, addressed in Part IV.A.1, *supra*, that they are not liable for nuisance.

[23] Defendants' assertion that "the United States has a strong economic and national security interest in promoting the development of fossil fuels" is therefore of no moment. 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, ECF No. 245 (N.D. Cal. May 10, 2018)). The State, as sovereign, has an equally powerful interest in protecting its citizens from injuries caused by decades of deceptive marketing and promotion of dangerous products, and a general

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. *Id.* at 1907. Accordingly, they do not preempt.

Like the government's interest in promoting nuclear power at issue in *Silkwood*, any vague federal interest in promoting domestic oil production does not mean "at all costs," and does not prohibit states from remedying harms arising from those activities. *See Silkwood*, 464 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); *MTBE II*, 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). Congress, in fact, announced its contrary intent that oil production should *not* compromise the environment or harm local communities. *See* 42 U.S.C. § 15927(b)(2)–(3); *id*. § 13401. It did not preempt states from seeking to protect their resources and citizens from environmental harm.[24]

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

The State's claims, and the relief the State seeks here, do not constitute extraterritorial regulation in violation of the dormant Commerce Clause. State regulation is impermissibly extraterritorial when it would have "the practical effect of regulating commerce occurring wholly outside that State's borders." *Pharm. Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 80 (1st Cir. 2001) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989)). A violation occurs only where a state law "*directly* controls commerce occurring wholly outside the [State's] boundaries" and where it "*necessarily* requires out-of-state commerce to be conducted according to in-state

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national interest in energy access cannot be read as conferring on Defendants a blanket immunity to tort liability.

[24] The limits of the preemptive reach of the various statutes cited by Defendants are evident in numerous cases. *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 ("FLPMA") and Mining and Minerals Policy Act of 1970 do not preempt state restrictions on in-stream mining 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).

terms." *Id.* at 79 (emphasis added). The local remedies the State seeks does not come close to meeting that standard.

The abatement and damages remedies the State seeks would in no way "directly control commerce" in other states, nor require Defendants to comply with any "in-state terms" in their out-of-state activities. *Id.* Defendants claim ominously that this case will "bring and end to" their business, and have various indirect impacts on them. Mot. at 47–50. But indirect impacts—whatever they may be—exist in many instances, including state environmental legislation and state product liability and public nuisance cases. Liability in Rhode Island, and in other states, would undoubtedly impact Defendants' profits, 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.

None of the cases cited by Defendants help their case. Most importantly, in *BMW of North America v. Gore*, the U.S. Supreme Court held a punitive damages award to be excessive, noting that Alabama courts could not impose punitive damages on BMW for commerce that "had no impact on Alabama or its residents." 517 U.S. 559, 572–73 (1996).[25] At the same time, the Court also stated that Alabama courts could enforce the State's disclosure laws and impose punitive damages for out-of-state activities with in-state impacts. *See id.* at 574. Here, the harms the State seeks to remedy are purely in the State's jurisdiction. If anything, *BMW* supports the State's ability to bring these claims. Other cases cited by Defendants are inapposite.[26]

In this case the State does not seek any regulatory relief, but rather a local remedy for locally suffered harms. Defendants fail to show how the State's claim could plausibly have the "practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 713 (S.D.N.Y.

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[25] As Justice Ginsburg noted in her dissent, *BMW* was not decided on Commerce Clause grounds: "The respect due the Alabama Supreme Court requires that we strip from this case a false issue: No impermissible 'extraterritoriality' infects the judgment before us; the excessiveness of the award is the sole issue genuinely presented. The Court ultimately so recognizes . . . ." *BMW*, 517 U.S. at 607–08; *see also 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.").

[26] Defendants claim in a footnote that the State's lawsuit also violates the dormant Commerce Clause because it would burden foreign commerce. Mot. at 48, n.31. This argument fails for the same reasons as the argument concerning domestic extraterritorial regulation—a remedy in this case would not impermissibly burden commerce with foreign countries.

2018) (holding state investigation into fossil fuel company's securities disclosures did seek to regulate extraterritorially) (internal citations and quotations omitted). If there are extraterritoriality concerns about the remedy that might be crafted here when the State prevails on the merits, the Court can, and should, address those concerns at the remedy stage, not on a motion to dismiss.[27]

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

The "foreign affairs doctrine" is inapposite and has no effect on the State's claims. The doctrine prohibits the several states from crafting foreign policy, which is the prerogative of the United States. The State's claims do not implicitly or explicitly seek to change foreign policy, and incidental impacts on foreign companies or governments are insufficient to invoke the doctrine.

"Under the foreign affairs doctrine, state laws that intrude on th[e] exclusively federal power [to administer foreign affairs] are preempted, under either the doctrine of conflict preemption or the doctrine of field preemption." *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016). But the only state laws that are preempted are those that "take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and the doctrine has therefore been applied almost exclusively to preempt state *legislation*, not common law causes of action. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) (affirming preemption of state legislation governing recovery of assets seized from Holocaust victims by Nazi government); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (affirming preemption of state legislation penalizing companies doing business in Burma). Thus, to

[27] Even if the relief the State seeks could be characterized as regulating commerce, regulation that "has only indirect effects on interstate commerce and regulates evenhandedly" does not violate the Commerce Clause. *Brown-Forman Distillers Corp. v. N.Y. Liquor Authority*, 476 U.S. 573, 578–79 (1986). *See, e.g.*, *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 "appellants' novel suggestion that because the economic market for petroleum products is nation-wide, 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 regulation that "encourage[d] ethanol producers to adopt less carbon-intensive policies" out of state, but did not directly control production). And that determination requires a fact-intensive "examin[ation of] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits" that cannot be resolved on a motion to dismiss. *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).

intrude on the federal government's foreign affairs power, an action must "produce something more than incidental effect in conflict with express foreign policy of the National Government." *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 421 (D. Me. 2017). The State's claims here do nothing of the sort.

As repeatedly stated in the Complaint and herein, the State seeks local remedies for concrete local harms to public resources that fall well within its traditional powers. Defendants' suggestion that the State has sought a "15% annual reduction" in $CO_2$ emissions worldwide, Mot. at 47, grossly misrepresents the Complaint. That reference describes the general "consequences of delayed action on climate change," and does not comprise any aspect of the relief the State seeks. ¶ 187. As the Fourth Circuit recently recognized when analyzing similar claims brought by the City of Baltimore, the State's descriptions of the impacts and consequences of climate change globally

> 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*, 2020 WL 1069444, at *1. The State seeks only that parties responsible for injuries in Rhode Island help compensate for them. That relief does not "produce something more than incidental effect in conflict with [any] express foreign policy," *Portland Pipe*, 288 F. Supp. 3d at 421, and the State's claims are not preempted.

The court's holding in *City of Oakland* that the plaintiffs' claims were barred by the foreign affairs doctrine, which the *City of New York* court adopted, is deeply flawed for multiple reasons. But, at its core it rests on the mistaken foundation that the *state* cause of action for nuisance is a *federal* cause of action for nuisance. 325 F. Supp. 3d at 1026. Both courts held that federal common law "governed" but that there was no existing cause of action, and the courts would not "formulat[e] new claims under federal common law" because any such hypothetical *new* federal claim might interfere with foreign policy prerogatives. *Id.* at 1024–35; *City of New York*, 325 F. Supp. 3d at 476 ("the Court will exercise appropriate caution and decline to recognize such a cause of action"). As detailed above, Chief Judge Smith already rejected the contention that the State's claims arise under some new, undefined body of federal common law. *See* Part IV.B.1, *supra*. They are traditional state-law claims, and the remedies they provide are local, with no direct impact on foreign affairs, foreign governments, or the federal foreign policy prerogative.

When the actual claims and relief are considered, it is clear that neither the *City of Oakland* plaintiffs, the *City of New York* plaintiffs, nor the State here "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 420 n.11. If the State's claims were preempted here by the foreign affairs doctrine, then so would virtually all tort claims addressing local injuries from any source 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 Defendants cite to do not change the result. Climate change is a global crisis, but the foreign affairs doctrine does not bar the State's claims.

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

Defendants' argument that all the State's claims would *per se* violate their federal due process rights is meritless. The State 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 authorized their deceptive and harmful conduct, and none exists. To the extent Defendants' relied on a non-existent legal right to mislead the public and sell defective and harmful products, they did so at their own risk.

There is plainly no general violation of due process in assigning tort liability for past conduct. 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) (Souter, J., opinion of the Court) (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). Rhode Island courts recognize narrow, case-specific exceptions in decisions "establishing a new principle of law in a civil case," where policy and equity factors counsel against retroactivity. *See, e.g.*, *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1153 (R.I. 1994) (citing *Marran v. Gorman*, 359 A.2d 694, 696 (R.I. 1976)). Defendants cite no case where those factors have been applied to find that a civil plaintiff has failed to state a claim, and the State is aware of none.

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." Moreover, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003), and *BMW*, 517 U.S. at 572–73, both considered the constitutional limitations of punitive damages, and addressed no questions of pleading or even liability.[28] 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. Enterprises v. Apfel*, 524 U.S. 498, 535–37 (1998), all addressed whether the retrospective aspect 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; *id.* at amend. V. None of the cases shed any light on the issues before this Court.

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

Defendants argue that all the State's claims are barred by the First Amendment "to the extent" they are premised on "Defendants' lobbying activity." Mot. at 53. But the State does not challenge Defendants' lobbying, or any other arguably protected conduct. Rather, as Defendants recognize, the Complaint alleges that Defendants engaged in a nationwide "campaign of deception and denial" that caused the extraordinary climate change impacts the State is experiencing and will experience in the future. *See* Mot. at 52–53, citing to Conf. Tr. at 9:9–10, Nov. 7, 2019; ¶¶ 153, 156, 158, 163, 173, 177.[29]

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

[28] 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 State has alleged that Defendants' conduct was both unlawful when it occurred and has caused extensive injuries in Rhode Island.

[29] Defendants contend that the Complaint "fails to tie each Defendant to such efforts or establish that such activities were directed at Rhode Island." Mot. at 52. This argument is unrelated to Defendants' claim for First Amendment protection, and merely reiterates Defendants' arguments on their Joint Motion to Dismiss for Lack of Personal Jurisdiction. The State will address these issues in its response to that motion.

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 contract, protects "petitioning of the legislative and executive branches . . . and governs approach of citizens . . . to administrative agencies . . . and to courts." *Amphastar Pharm. Inc. v. Momenta Pharm. Inc.*, 850 F.3d 52, 56 (1st Cir. 2017) (internal citations and quotations omitted). Here, the Complaint is replete with allegations that Defendants harmed the State 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 protection.

Nor is Defendants' wrongful promotion protected by the Strategic Litigation Against Public Participation ("anti-SLAPP") Act, R.I. Gen. Laws § 9-33-2. That statute provides that "[a] party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims." *Id*. § 9-33-2(a). The anti-SLAPP Act was intended to "emulate" the First Amendment. *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1210, 1211 (R.I. 2000); *see also Palazzo v. Alves*, 944 A.2d 144, 150 (R.I. 2008) (purpose of anti-SLAPP act is "to prevent vexatious lawsuits against citizens who exercise their First Amendment rights" (internal citations and quotations omitted)). As with the First Amendment, the anti-SLAPP Act does not protect misleading commercial speech. *See Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61 (R.I. 1996). The State does not challenge Defendants' petitioning activities, and Defendants' misleading promotion and marketing activities are not protected by the Anti-SLAPP Act for the same reasons they are not protected by the First Amendment.

To the extent Defendants claim their commercial speech qualifies as protected speech, they necessarily 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"); *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 both the *Noerr-Pennington* doctrine and the anti-SLAPP Act's protections. The conditional immunity available under the First Amendment and Section 9-33-2 renders "the petitioner or speaker immune from any civil claims for statements, or petitions, that were not sham by virtue of being objectively or subjectively baseless." *Global Waste Recycling*, 762 A.2d at 1211. Thus if the Court were to find either *Noerr-Pennington* or the anti-SLAPP Act potentially applicable here, whether Defendants' speech was a "sham" would present factual issue that cannot be resolved on a motion to dismiss. *Pound Hill Corp. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996) (sham exception analysis raises material issues of fact requiring trial).

## V. CONCLUSION

For the reasons stated above, no principal of state or federal law bars the State's claims. The State has sufficiently alleged all its causes of action to meet its low pleading burden, and the Court should deny Defendants' motion to dismiss.[30]

[30] In the alternative, and to the extent that the Court may find the Complaint deficient in any regard, the State respectfully requests that it be granted leave to amend. "[U]nless amendment could avail the plaintiff nothing, the order of dismissal should usually be with leave to amend." *Canwell, LLC v. High Street Capital Partners, LLC*, No. KM-2019-0948, 2019 WL 7041421, at *7 (R.I. Super. Ct. Dec. 16, 2019) (quoting Robert B. Kent et al., RHODE ISLAND CIVIL AND APPELLATE PROCEDURE, § 12:9). "[L]eave to amend should be denied only when the nonmoving party can establish that it would be unduly prejudiced by the amendment." *Weybosset Hill Invs., LLC v. Rossi*, 857 A.2d 231, 236 (R.I. 2004) (internal citations and quotations omitted).

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**CERTIFICATION**

I hereby certify that on the 13th day of March, 2020 I served the within, Plaintiff State of Rhode Island's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, via the ECF Filing System on each counsel of record for the above mentioned matters and that it is available for viewing and downloading.

*/s/ Victor M. Sher*