MAYOR AND CITY COUNCIL OF BALTIMORE,	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY
Plaintiffs,	*	
v.	*	Case No. 24-C-18-004219
B.P. p.l.c., *et al.*,	*	
Defendants.	*	

MOTION FOR LEAVE TO FILE BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Proposed Amicus Curiae the United States, by and through undersigned counsel, respectfully moves for leave to file the accompanying Brief of the United States as Amicus Curiae in Support of Defendants' Motion to Dismiss, consistent with Maryland Rule 8-511(a) through (c) regarding amicus curiae participation in Maryland appellate courts. A proposed order is attached.

Counsel for Proposed Amicus Curiae the United States conferred with counsel for the parties. Defendants consented to this motion. Plaintiffs did not consent to this motion. Maryland rules do not prescribe the timing for filing an amicus brief in Maryland Circuit Court; however, this motion is timely pursuant to Maryland Rule 8-511(c)(1), which requires that an amicus curiae brief be filed at or before the time specified for the filing of the principal brief of the appellee in Maryland appellate

courts. Here, Plaintiffs' opposition to the Motion to Dismiss is due by April 7, 2020. Because this motion is timely filed and because the United States is uniquely positioned to be helpful to this Court, Proposed Amicus Curiae the United States requests that the Court grant the United States leave to file the attached Brief of the United States as Amicus Curiae In Support of Defendants' Motion to Dismiss.

ARGUMENT

At issue in this case is, *inter alia*, whether the claims brought by the Mayor and City Council of Baltimore (collectively, "Baltimore") are preempted or displaced by federal law. Among other grounds in their Motion to Dismiss, Defendants argue that Baltimore's claims are barred by the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and by the foreign affairs doctrine and foreign commerce clause. *See* Mem. Support of Defs.' Mot. Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 37-47 (filed Feb. 7, 2020). The United States requests leave to participate as amicus curiae because the Environmental Protection Agency (EPA) has a strong interest in the interpretation of the CAA. The United States government also engages internationally in diplomacy and foreign affairs related to climate change. For these reasons, the United States is uniquely positioned to be helpful to this Court.

Although the Maryland Rules do not set forth the manner and circumstances in which an amicus brief may be filed in Circuit Court, this Court has previously

granted requests for leave to participate as amicus curiae. *See, e.g., Deane v. Conway*, No. 24-C-04-5390, 2006 WL 148145, at *2 (Md. Cir. Ct. Jan. 20, 2006) (observing that motions had been granted on behalf of various organizations to participate as amicus in marriage equality case). Other Maryland Circuit Courts also have allowed participation by amicus curiae. *See Doe v. Montgomery Cty. Bd. of Elections*, No. 293857-V, 2008 Md. Cir. Ct. LEXIS 7, at *2 (Md. Cir. Ct. July 24, 2008) (noting that a proponent of the challenged referendum was twice permitted to file amicus briefs); *Sunrise Atl. v. Moaddab*, No. 24-C-06-9362, 2008 Md. Cir. Ct. LEXIS 91, at *3-4 (Md. Cir. Ct. July 16, 2008) (referring to an order appointing an amicus curiae in tax foreclosures cases); *Savage v. City Place Ltd. P'ship*, No. 240306, 2004 Md. Cir. Ct. LEXIS 31 at *10 (Md. Cir. Ct. Dec. 20, 2004) (noting that the Disability Rights Council had filed an amicus brief addressing standing).

An amicus curiae brief from the United States is desirable because the United States is uniquely positioned to provide this Court with a helpful perspective in this matter. As the agency with primary responsibility for administering certain programs under the CAA, including decisions involving the regulation of greenhouse gas emissions, EPA has a strong interest in the interpretation of the CAA. Internationally, the United States engages with the important and complex questions of diplomacy and foreign affairs relating to climate change. In the accompanying brief, the United States argues that federal law preempts Baltimore's

state-law claims (or displaces Baltimore's claims if they arise under federal common law) under the CAA and the foreign commerce clause and foreign affairs power.

The United States notes that, at its request, Defendants have provided the United States with a copy of the service list and their Motion to Dismiss in this case, the Court's recent instruction on filing while the courthouse is closed to the public, and an example of a motion seeking and order granting admission *pro hac vice* to this Court. The United States has received no monetary or other contribution to the preparation or submission of the attached brief.

CONCLUSION

For the foregoing reasons, Proposed Amicus Curiae the United States respectfully requests that the Court grant this motion and treat the United States' attached brief as filed.

Dated: March 20, 2020.

Respectfully submitted,

s/ Andrea L. Berlowe CWE

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The United States as amicus curiae, by its undersigned attorneys and consistent with Maryland Rule 8-511(a) through (c), submits this Brief in Support of Defendants' Motion to Dismiss. For the reasons set forth below, this Court should dismiss all claims against Defendants.

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SUMMARY OF ARGUMENT

"It is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states . . . in favor of the nebulous rules of public nuisance." *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 306 (4th Cir. 2010). Under the Clean Air Act, "the law of the states where emissions *sources are located* . . . applies in an interstate nuisance dispute." *Id.* (emphasis added). "[F]ield and conflict preemption principles" otherwise do not "allow[] state nuisance law to contradict joint federal-state rules so meticulously drafted." *Id.* at 303.

The tort claims brought by the Mayor and City Council of Baltimore (together, "Baltimore") violate these limits. Baltimore seeks to impose liability on Defendants for all "their extraction, promotion, marketing, and sale of their fossil fuel products . . . between 1965 and 2015"—and across the entire world. *See, e.g.*, Compl. ¶¶ 7, 18 & 94. Its Complaint does not limit liability to emissions sourced from or acts within the State of Maryland. In fact, its overbroad attempt to impose liability for all Defendants' emissions over a 50-year period is *the very premise* of its factual allegations of causation. *See id.* ¶ 18. So its emissions-based claims fail without this central pillar. "Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in

comparison with the judicially managed nuisance decrees" which Baltimore pursues here. *North Carolina*, 615 F.3d at 304; *see also American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). And Baltimore's nuisance and tort claims would "penalize[] some private action that the federal [law] . . . may allow, and pull[] levers of influence that the federal [law] does not reach." *Crosby v. Nat'l For. Trade Council*, 530 U.S. 363, 376 (2000). This suit—premised on imposing liability on out-of-state conduct and including emissions now regulated by EPA—is preempted (or displaced) by federal law and should be dismissed.

1. Baltimore asserts claims under the common law of Maryland based on alleged harms from out-of-state greenhouse gas emissions. Those claims are preempted by the CAA. The United States Supreme Court has held that the Clean Water Act (CWA)—which has a structure parallel to the CAA—preempts state common law nuisance claims that regulate out-of-state pollution sources. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *see also Washington Suburban Sanitary Com'n v. CAE-Link Corp.*, 330 Md. 115, 134-35 (1993). By analogy, every federal court of appeals to consider the question has applied that holding to the CAA, as well. *See, e.g., North Carolina*, 615 F.3d at 306. That bars Baltimore's tort claims here.

2. Baltimore's claims also are preempted because they challenge production and consumption of fossil fuels abroad, which interferes with the conduct

of foreign commerce and foreign affairs and exceeds the State's authority under the Due Process Clause.

3. If Baltimore's claims arise under federal common law (as argued by Defendants), they also fail. First, the United States Supreme Court has held that federal common law claims challenging air pollution as a nuisance are displaced by the CAA. *American Electric Power Co.*, 564 U.S. at 410. Second, the Supreme Court has confirmed that the assertion of federal common law in the international context is even more problematic. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

INTEREST OF THE UNITED STATES

This case presents questions of federal law as to which the United States has a substantial interest. Domestically, the United States Environmental Protection Agency (EPA) has primary responsibility, pursuant to a delegation from Congress, for administering certain programs under the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, including decisions involving the federal regulation of greenhouse gas emissions. Rather than address out-of-state emissions by tort and nuisance claims, "Congress opted instead for an expert regulatory body, guided by and subject to congressional oversight, to implement, maintain, and modify emissions standards and to do so with the aid of the rulemaking process and a cooperative partnership with states." *North Carolina*, 615 F.3d at 306. Internationally, the United States

government engages in important and complex questions of diplomacy and foreign affairs relating to climate change, including through the United Nations Framework Convention on Climate Change of 1992, an international treaty ratified by the President with the advice and consent of the Senate. S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).

BACKGROUND

A. The Clean Air Act and related regulations

The CAA establishes a comprehensive program for controlling air pollutants and improving the nation's air quality through both state and federal regulation. After the United States Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), EPA determined that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" under 42 U.S.C. § 7521(a). *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). In so determining, EPA considered several effects of climate change. These included "coastal inundation and erosion caused by melting icecaps and rising sea levels." *American Electric Power Co.*, 564 U.S. at 417 (*AEP*) (citing 74 Fed. Reg. at 66,533).

Consistent with this finding, EPA issued greenhouse gas emissions standards for new motor vehicles. *See, e.g.*, 77 Fed. Reg. 62,624 (Oct. 15, 2012); 81 Fed. Reg. 73,478 (Oct. 25, 2016). EPA and the Department of Transportation also regulate

greenhouse gas emissions from mobile sources through fuel economy standards. *See, e.g.*, Proposed Rule, 83 Fed. Reg. 42,986 (Aug. 24, 2018). EPA has also promulgated regulations aimed at reducing such emissions from stationary sources. These include technology-based standards for certain facilities regulated by the CAA's New Source Performance Standards, 40 C.F.R. Part 60. *See, e.g.*, Proposed Rule, 83 Fed. Reg. 65,424 (Dec. 20, 2018). EPA has promulgated emissions guidelines for States to develop plans to address greenhouse gas emissions from existing sources in specific source categories, such as electric utility generating units. *See, e.g.*, 84 Fed. Reg. 32,520 (July 8, 2019). Finally, under the Prevention of Significant Deterioration (PSD) program, EPA and States have issued permits containing greenhouse gas emissions limitations based on the best available control technology for new major sources or major modifications to stationary sources.

Consistent with the Act's cooperative federalism approach, *see* 42 U.S.C. § 7401(a)(3), States likewise can play a meaningful role in regulating greenhouse gas emissions from sources within their borders. In particular, States have the initial responsibility to adopt plans (subject to EPA approval) to implement emissions guidelines for greenhouse gas emissions from existing sources (including electric utility generating units). *See id.* § 7411(d). In addition, many States implement the PSD permitting program through a state-run permitting process that is approved by EPA and incorporated into State Implementation Plans (SIPs). *Id.* § 7410(a)(2)(C).

For in-state stationary sources, the Act generally preserves the ability of States to adopt and enforce air pollution control requirements and limitations, so long as those are at least as stringent as the corresponding federal requirements. *See* 42 U.S.C. § 7416. For out-of-state sources, however, the Act provides a more limited role for States, even if the pollution causes harm within their borders. For example, affected States can comment on proposed EPA rules, *see id.* § 7607(d)(5), PSD permits, *see id.* § 7475(a)(2), and other States' SIP submissions to EPA (including any provisions that may address PSD requirements for greenhouse gases), *see id.* § 7410(a)(2)(C); 40 C.F.R. § 51.102(a); seek judicial review if their concerns are not addressed, *see* 42 U.S.C. § 7607(b); and petition EPA to recall another State's previously approved but allegedly deficient SIP, *see id.* § 7410(k)(5) and 5 U.S.C. § 553(e).

B. International climate change-related efforts

The United States has engaged in international efforts to address global climate change for decades. The United States is a party to the United Nations Framework Convention on Climate Change (UNFCCC). This establishes a cooperative multilateral framework for addressing climate change. *See* S. Treaty Doc. No. 102-38. The United States is engaged in ongoing international relations regarding greenhouse gas emissions and climate change. In this and other fora, the United States actively participates in international discussions and negotiations

related to addressing greenhouse gas emissions around the world. Recently, the United States submitted formal notification of its withdrawal from the Paris Agreement, an agreement negotiated under the auspices of the UNFCCC. Michael R. Pompeo, Press Statement, On the U.S. Withdrawal from the Paris Agreement, *available at* https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ (last accessed Mar. 20, 2020). This will become effective on November 4, 2020. *Id.* Secretary Pompeo explained that the Paris agreement imposes an "unfair economic burden" on the United States. *Id.*

C. Baltimore's Complaint and Allegations

Baltimore's Complaint and claims seek to directly or indirectly impose liability upon and regulate out-of-state conduct of Defendants that is subject to federal law and policies. Baltimore seeks to impose liability on Defendants, collectively, for all of their emissions, worldwide—either directly emitted by Defendants or emitted by users of Defendants' products—over a 50-year period. It alleges "Defendants' products—based on the volume of oil, gas, and coal these companies extracted from the earth—are directly responsible for at least 151,000 gigatons of CO2 emissions between 1965 and 2015." Compl. ¶ 7.

Baltimore's allegations of causation are similarly premised on this collective theory of liability. Baltimore alleges these combined emissions:

> represent[] approximately 15 percent of total emissions of that potent greenhouse gas during that period. *Accordingly, Defendants are*

> *directly responsible* for a substantial portion of past and committed sea level rise (sea level rise that will occur even in the absence of any future emissions), as well as for a substantial portion of changes to the hydrologic cycle, because of the consumption of their fossil fuel products.

E.g., Compl. ¶ 7 (emphasis added); *see also id.* ¶ 8 ("As a direct and proximate consequence of Defendants' wrongful conduct described in this Complaint . . . .").

Baltimore also seeks to impose liability on Defendants for emissions of oil, gas, or coal that they did not extract, but which they otherwise touched in international and national commerce. It alleges "Defendants, individually and collectively, have made even greater contributions to fossil fuel pollution based on their shares of 'downstream' operations, that is, refinery output, as well as wholesale and retail sales of their products." Compl. ¶ 7. Baltimore also seeks to impose liability for alleged "leadership roles in denialist campaigns to confuse and obscure the role of their products in causing climate change." *Id.*

ARGUMENT

As the United States discusses below, the emissions-based claims Baltimore asserts in this action are inconsistent with and barred by federal law. With respect to regulation of greenhouse gases, the United States Supreme Court has cautioned that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *AEP*, 564 U.S. at 428. This warning

is magnified here. Baltimore is pursuing parties that are even further down the chain of causation than the defendant fossil-fuel fired power plant operators in *AEP*.

For a court to grant relief on these claims would intrude impermissibly on the role of the representative branches of government. It is for them to determine what level of greenhouse gas regulation is reasonable. As the Supreme Court observed, the "appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum." *Id.* at 427. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* Such a sensitive and central determination "is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Estate of Burris v. State*, 360 Md. 721, 748 (2000) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); MD. CONST., Declaration of Rights, art. 8. The novel and intrusive nature of the remedies in this case further support the view that they cannot be reconciled with federal law.

1. Federal law preempts Baltimore's state-law claims.

Baltimore purports to allege state-law causes of action. It does so on a novel theory of liability. Baltimore collectivizes multiple Defendants' direct conduct, with indirect liability for the users of Defendants' products, over a fifty-year period, worldwide. It then alleges that Defendants' collectivized, fifty-year, worldwide

conduct is sufficiently robust to "represent[] approximately 15 percent of total emissions of that potent greenhouse gas during that [fifty-year] period." Compl. ¶ 7. "As a direct and proximate consequence of" this worldwide, 50-year collective of all such greenhouse gas emissions, Baltimore alleges "flooding and storms will become more frequent and more severe, and average sea level will rise." *Id.* ¶ 8. These novel, collectivized claims are preempted by federal law, including the CAA (with respect to interstate emissions) and because they interfere with the conduct of foreign commerce and foreign affairs (with respect to international emissions).

A. Baltimore's common-law claims alleging harm from domestic sources are preempted by the Clean Air Act.

Baltimore's collectivized claim of liability under Maryland common law incorporates — indeed, is overwhelmingly — a challenge to out-of-state emissions. This novel theory is therefore preempted by the CAA. Three federal courts of appeal have addressed whether the CAA preempts state common law claims attempting to impose liability on air emissions. All three reiterate *Ouellette*'s holding that state common law would be preempted to the extent the emissions in question originated out-of-state. *North Carolina*, 615 F.3d at 306; *Bell v. Cheswick Generating Station*, 734 F.3d 188, 195 n.6 (3d Cir. 2013); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015). In the one case that sought to apply non-source state law to emissions from outside of the state, as Baltimore seeks to do here, the court ruled that the claims were preempted by the CAA. *North Carolina*, 615 F.3d at 301.

The United States Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), provided the roadmap for reaching this conclusion. In *Ouellette*, property owners on the Vermont side of Lake Champlain sued a paper company. Its plant discharged effluent into the lake from New York. The plaintiffs alleged the New York facility violated Vermont's nuisance law. *Id.* at 483-84.

The Supreme Court nevertheless explained that the CWA creates a "comprehensive" and "all-encompassing program of water pollution regulation" that leaves available "only state[-law] suits . . . specifically preserved by the Act." *Id.* at 492. Allowing any other suits would "undermine" the comprehensive "regulatory structure" created by Congress in the CWA. *Id.* at 497. Based on the CWA's savings clause, which permits States to impose stricter standards than the CWA, 33 U.S.C. § 1370, the Court concluded that the only state-law suits preserved by the CWA are suits "pursuant to the law of the *source* State." 479 U.S. at 497 (emphasis added); *see also id.* at 499; *AEP*, 564 U.S. at 429 (explaining that the CWA "does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State' ").

The state-law claims here are preempted by the CAA for the same reasons that the state-law nuisance claims in *Ouellette* were preempted by the CWA.[1] Like the

[1] The United States notes that Defendants have argued that Baltimore has failed to allege a plausible claim under the Maryland Consumer Protection Act (MCPA). *See* Mem. Support of Defs.' Mot. Dismiss for Failure to State a Claim Upon Which

CWA, the CAA contains a comprehensive program of emissions regulation that preempts all state-law suits involving emissions regulation except those preserved by the Act. "Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with [] judicially managed nuisance decrees." *North Carolina*, 615 F.3d at 304; *cf. Ouellette*, 479 U.S. at 492. Both the CWA and CAA authorize EPA to promulgate standards addressing water or air pollution, respectively, to enforce the law, and to assess civil and criminal penalties for violations; both include similar savings clauses and citizen suit provisions. *See Ouellette*, 479 U.S. at 492. Recognizing these parallels, each federal court of appeals to have reached the question has applied *Ouellette*'s reasoning to analyze state-law claims related to air emissions. *See North Carolina*, 615 F.3d at 301; *Bell*, 734 F.3d at 194-96; *Merrick*, 805 F.3d at 691-92. *See also Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 138 (1993) (*WSSC*) (applying *Ouellette* in analyzing a nuisance action challenging "obnoxious odors" from a sewage-composting plant).

The CAA savings clause generally provides that nothing in the Act "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or

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Relief Can Be Granted at 28-30 (filed Feb. 7, 2020). The United States takes no position at this time as to whether *Ouellette* also preempts Baltimore's claim under the MCPA.

(2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Because this savings clause is virtually identical to the savings clause in the CWA, the best reading of the CAA is that (like the CWA) it preempts state-law suits involving emissions of air pollutants except those "pursuant to the law of the source State." *Ouellette*, 479 U.S. at 497; *see also North Carolina*, 615 F.3d at 303-04. Although the plain language of the clauses makes clear that some state regulation is preserved, Congress did not intend to allow every State affected by air pollution to sue out-of-state sources under its own laws, irrespective of interstate boundaries. Courts "cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended." *North Carolina*, 615 F.3d at 304. Allowing Baltimore to apply Maryland law to out-of-state emissions would interfere with the "full purposes and objectives of Congress." *Ouellette*, 479 U.S. at 493.

The structure of the CAA makes plain that only suits under the law of the source State survive. The Act establishes a comprehensive system of federal regulation, *see North Carolina*, 615 F.3d at 301, while preserving States' role in controlling air pollution within their borders, *see* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution control at *its source* is the primary responsibility of States and local governments." (emphasis added)); *id.* § 7416. Allowing an affected State to hold sources outside its borders accountable to its own pollution laws would disrupt and

undermine the source States' authority under the Act. In this scenario, for example, this Court in Maryland could assess penalties requiring a source of Defendants' in another State—or even a source operated by an independent third-party using the gasoline Defendants produce—to change pollution-control methods, notwithstanding the source's compliance with all source state and federal obligations. Affected States could thereby "do indirectly what they could not do directly — regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495; *see also North Carolina*, 615 F.3d at 296, 302-04 (noting the "unpredictable consequences and potential confusion" that could flow from application of the nuisance laws of multiple States, with "the prospect of multiplicitous decrees or vague and uncertain nuisance standards"). Allowing States to reach conduct beyond their own borders in this manner also raises due process concerns. *Cf. BMW of North America v. Gore*, 517 U.S. 559 (1996).

Here, Baltimore did not sue Defendants under the laws of the many States in which their fossil fuels were produced, sold, and combusted. Instead Baltimore collectively sued Defendants for all emissions, direct and indirect, over fifty years, worldwide, only under the law of the "affected State" of Maryland. *E.g.*, Compl. ¶¶

7-8. Baltimore's common-law claims are thus preempted just as the nuisance claim under Vermont law was preempted in *Ouellette*.[2]

Aware of *Ouellette* and the many cases applying its holding to the CAA, Baltimore purports to disavow an intent to regulate emissions. It tries to suggest its harm comes from the production and sale of fossil fuels, not their emissions. *Compare* Compl. ¶ 12 ("The City does not seek to impose liability on Defendants for their direct emissions of greenhouse gases.") *with id.* ¶ 10 (identifying "Defendants' production, promotion, marketing of fossil fuel products" and alleged concealment of hazards as the cause of Baltimore's injuries). This is mere smoke and mirrors. Baltimore strives to paper over the chain of causation that it pled from Defendants' conduct, to harm caused, to remedy sought.

But Baltimore's allegations of injury from Defendants' conduct come from the effects of climate change. Compl. ¶¶ 7-8. This in turn traces through the emission of greenhouse gases from burning fossil fuels, not the mere production and sale. *See, e.g.*, Compl. ¶¶ 1 (alleging that Defendants knew that "their fossil fuel

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[2] Because Baltimore's novel collectivized tort is not limited to purely in-state sources, the United States does not address how such claims might be analyzed. *Cf. WSSC.*, 330 Md. at 133-39 (declining to apply Clean Water Act preemption on facts involving purely localized activities and harms). Likewise, many States have a wide range of state-level programs relating to climate change. *See* Brief for Amici Curiae State of Maryland et al., *Mayor and City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir. filed Sept. 3, 2019) at 19-21 (Doc. 92-1). This brief is not intended to address those programs or any preemption analysis that might apply to them.

products create greenhouse gas pollution that warms the planet and changes our climate"), 18 ("Defendants are responsible for a substantial portion of the total greenhouse gases emitted since 1965."). Thus, Baltimore seeks to hold Defendants liable based on the same conduct (greenhouse gas emissions) and the same alleged harms (e.g., sea level rise) that the United States Supreme Court in *AEP* concluded conflicted with the Clean Air Act. 564 U.S. at 417, 423-25. As the U.S. District Court for the Northern District of California rightly observed: "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." *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *appeal argued*, No. 19-18663 (9th Cir. Feb. 5, 2020). Indeed, each court that has considered merits arguments like those Baltimore asserts here has rejected similar attempts to distinguish *AEP*. *See id.*; *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *appeal argued*, No. 19-15499 (9th Cir. Feb. 5, 2020); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018), *appeal argued*, No. 18-2188 (2d Cir. Nov. 22, 2019).

Nor can Baltimore avoid preemption merely because it seeks various remedies that may not be available under the CAA. The United States Supreme Court has foreclosed that canard, as well. State common law is preempted by the federal government's comprehensive environmental regulatory schemes even when a federal statute does not provide precisely the same remedies. *See Ouellette*, 497 U.S.

at 498. There, it was argued that compensatory damages awarded pursuant to state law would not interfere with the CWA. It was said those "only require the source to pay for the external costs created by the pollution, and thus do not 'regulate' in a way inconsistent with the Act." 479 U.S. at 498 n.19. The Supreme Court disagreed. A defendant "might be compelled to adopt different or additional means of pollution control from those required by the Act, regardless of whether the purpose of the relief was compensatory or regulatory." *Id.* Such a result is irreconcilable with the CWA's exclusive grant of authority to EPA and the source State. *Id.*

Baltimore cannot distinguish *Ouellette* by framing these claims as production and sale rather than emissions, or by seeking damages in lieu of an injunction. Because Baltimore seeks to hold Defendants accountable under Maryland common law for countless emissions sources outside the State, collectivized, over a fifty-year period, its claims are preempted.

B. Baltimore's state-law claims alleging harm from sources outside the United States also are preempted by the Foreign Commerce Clause and the foreign affairs power.

Baltimore's claims are also preempted by the U.S. Constitution's Foreign Commerce Clause and the foreign affairs power. Baltimore asks this Court to conclude that Defendants' international fossil fuel production and sale, and the resulting emissions in foreign countries, constitute various torts under Maryland law. It also brings claims under the Maryland Consumer Protection Act (MCPA). Where,

as here, Baltimore seeks to project state law into the jurisdiction of other nations, the potential is particularly great for inconsistent legislation and resulting interference with United States foreign policy.

The U.S. Constitution grants authority to Congress to "regulate commerce with foreign nations" (the Foreign Commerce Clause), art. I, § 8, cl. 3; and to the President to "make Treaties" (among other authorities collectively described as the "foreign affairs" power), art. II, § 2, cl. 2. By extension of the rule established by the Interstate Commerce Clause, the Foreign Commerce Clause prohibits a State from regulating commerce wholly outside its borders, whether or not effects are felt within the State. *See Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). As the Maryland Court of Appeals has held, state regulation affecting foreign commerce is "undoubtedly subject to more intensive Commerce Clause scrutiny." *Board of Trustees of Employees' Retirement System of City of Baltimore v. Mayor and City Council of Baltimore City*, 317 Md. 72, 145 (1989).

Here, based on the same elementary principals of logic and economics that the Supreme Court recognized in *Ouellette*, a monetary award to Baltimore based on Defendants' foreign extraterritorial conduct "would have [Defendants] change its methods of doing business and controlling pollution to avoid the threat of ongoing liability." 479 U.S. at 495. This would have the "practical effect" of curbing fossil fuel production in foreign countries — an outcome inconsistent with the Foreign

Commerce Clause because it "control[s] conduct beyond the boundaries of the [country]." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999) (quoting *Healy*, 491 U.S. at 336), *aff'd*, 530 U.S. 363 (2000).

Decisions by foreign governments about energy production are a species of "uniquely sovereign" acts. *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984). Such governments also have their own laws and policies to regulate greenhouse gas emissions. In contrast, the interest of a single American State in foreign energy and environmental regulatory regimes is so attenuated as to raise serious due process concerns. *See, e.g., BMW*, 517 U.S. at 568-73. Such concerns are amplified by the novel nature of these claims, which depend on the combustion of products and subsequent emissions of greenhouse gases by countless sources in every corner of the globe. *See AEP*, 564 U.S. at 422.

Moreover, as discussed in the previous section, the CAA limits the authority of States to apply their laws to air emissions outside their borders, underlining the limited authority of the State in this arena. "[S]tate laws relating to foreign affairs may be unconstitutional . . . if the 'State's policy may disturb foreign relations.' " *Board of Trustees*, 317 Md. at 121 (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)). The MCPA could likewise interfere with foreign commerce to the extent it is construed to apply to relevant conduct outside of the United States, such as statements made abroad, which is properly subject to any applicable consumer

protection requirements of the nations in which Defendants are operating. Because Baltimore's claims interfere with these foreign regulatory regimes, they are preempted by the Foreign Commerce Clause.

Such interference would further undermine the exclusive grants of authority to the representative branches of the federal government to conduct the Nation's foreign policy. Efforts to address climate change, including in a variety of multilateral fora, have for decades been a focus of U.S. foreign policy. This includes foreign policy carried out through the UNFCCC. This treaty, ratified by the President with the advice and consent of the Senate, is the law of the land. S. Treaty Doc. No. 102-38. By it, the United States has taken definitive action to establish federal foreign policy with respect to addressing climate change, including as relates to international emissions of greenhouse gases.

In particular, international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders. This is, at its core, the issue raised by Baltimore's suit. Application of state law to pay for the costs of adaptation—particularly on a theory that imposes that liability through the regulation of production and consumption of fossil fuels overseas—would substantially interfere with the ongoing foreign policy of the United States.

Notably, the policy enshrined in the UNFCCC is to stabilize greenhouse gas concentrations, while also enabling sustainable economic development. UNFCCC art. 2. Thus, a particularly contentious aspect of climate-related negotiations has been the provision of financial assistance. In this regard, the UNFCCC calls for the provision of financial resources through a mechanism to assist developing countries in implementing measures to mitigate and adapt to climate change. UNFCCC arts. 4.3, 11. Of particular relevance here, the United States' longstanding position in international negotiations is to oppose the establishment of sovereign liability and compensation schemes at the international level. *See, e.g.*, Todd Stern, Special Envoy for Climate Change, Special Briefing (Oct. 28, 2015), https://2009-2017.state.gov/s/climate/releases/2015/248980.htm ("We obviously do have a problem with the idea, and don't accept the idea, of compensation and liability and never accepted that and we're not about to accept it now.").

Baltimore's tort claims conflict with the United States' foreign policy, including the balance of national interests struck by the UNFCCC. *See, e.g.*, *In re Philippine National Bank*, 397 F.3d 768, 772 (9th Cir. 2005) (endorsing "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs" (internal quotation marks omitted)). Baltimore's novel theory of collectivized liability and causation seeks compensation for costs of climate adaptation allegedly caused by the

production and use of Defendants' products abroad. Such a result would not only conflict with the United States' international position regarding compensation, it also undermines the approach to the provision of financial assistance under the UNFCCC. *See American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 118 (2d Cir. 2010) (applying same principle to invalidate state statutory and common-law claims that sufficiently "conflicted with the Government's policy that [Holocaust] claims should be resolved exclusively through" an international body).

In addition, foreign governments may view an award of damages to Baltimore based on energy production within their borders as interfering in their own regulatory and economic affairs. This is a recognized infringement of the federal sphere. Other nations could respond to such liability—if sustained and imposed—by similarly seeking to prevent the imposition of these costs, by seeking payment of reciprocal costs, or by taking other action against the interests of the United States as a whole. *See, e.g., Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 269 (2010); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979) (explaining that affected foreign nations "may retaliate against American-owned instrumentalities present in their jurisdictions," causing the Nation as a whole to suffer).

Indeed, the emissions at issue here affect Baltimore only to the extent they add to all other worldwide emissions of greenhouse gas in the Earth's atmosphere. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (Pro, J., concurring) ("The 'line of causation' between the defendant's action and the plaintiff's harm must be more than attenuated."); *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141-42 (9th Cir. 2013) (same). *See also Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020) (identifying a genuine factual dispute as to whether defendants' actions were a "substantial factor" in plaintiffs' injuries). If other countries were to seek transnational compensation or funding for adaptation to climate change, such claims would need to be addressed by the federal government, not one or more States. The approach advanced by Baltimore would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000). *Cf.*, *Board of Trustees*, 317 Md. at 127 (concluding that divestment of City pension funds from apartheid South Africa was not preempted because its effect in foreign countries was only "incidental or indirect").

Because Baltimore's claims challenging production and consumption of fossil fuels outside the United States have the effect of regulating conduct beyond U.S.

boundaries and impermissibly interfere with the conduct of foreign affairs, they are preempted by the Foreign Commerce Clause and the foreign affairs power.

II. Baltimore likewise has no remedy if its claims arise under federal common law because any applicable federal common law claim is displaced.

The United States submits that, regardless of whether the City's claims arise under Maryland law or under federal common law (as Defendants allege that Baltimore's theory of collectivized liability must), Baltimore has no remedy. The result is the same under either analysis, requiring dismissal of the City's claims. As discussed above, Baltimore may not pursue its claims if they are viewed as arising under Maryland law. The same is true if these claims are viewed as arising under federal common law. The United States does not concede that Baltimore has a cognizable federal common law claim in this case.[3] But if any federal common law claims might theoretically exist in the present circumstances, then such claims would necessarily be displaced by the Clean Air Act and by the Constitution's allocation

[3] Federal common law remedies for interstate environmental harms are restricted to States, as opposed to subdivisions thereof. The Supreme Court has never authorized any party other than a State (or the United States) to bring such a claim. *See AEP*, 564 U.S. at 422 ("We have not yet decided whether private citizens . . . or political subdivisions . . . of a State may invoke the federal common law of nuisance to abate out-of-state pollution."). Judicial fashioning of such an expansive federal common law cause of action as that which Baltimore alleges here under state law would intrude on Congress' legislative power, expand the traditional role of the federal judiciary, and be inconsistent with principles of judicial restraint — all contrary to United States Supreme Court precedent. *See Bush v. Lucas*, 462 U.S. 367, 389-90 (1983); *United States v. Standard Oil Co.*, 332 U.S. 301, 316-17 (1947).

of authority over foreign commerce and foreign affairs to the federal government. The analysis of these displacement issues resembles the preemption analysis set forth above in Sections I.A and I.B.

First, the Supreme Court's decision in *AEP* is directly applicable. It holds that the Clean Air Act displaces any federal common law claim that might apply on these facts. In *AEP*, the Court held that the CAA displaced "any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 564 U.S. at 424. The Court explained that "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 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*)). "[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id.* at 424. Instead, the test for whether legislation displaces federal common law is simply whether the statute "speak[s] directly to [the] question." *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *AEP* held that the CAA speaks directly to greenhouse gas emissions from fossil-fuel combustion at power plants, and accordingly found displacement. *Id.*

As explained in Section I.A above (pp. 10-17), the CAA likewise speaks directly to the regulation of greenhouse gas emissions. When the Act addresses regulation of the emissions that would form the basis of a federal common law claim,

the Supreme Court has determined there is "no room for a parallel track." *AEP*, 564 U.S. at 425; *see also Kivalina*, 696 F.3d at 853-57. *AEP* emphasized that displacement did not turn on how EPA exercised that authority. The "relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" 564 U.S. at 426 (quoting *Milwaukee II*, 451 U.S. at 324)). As set forth in Section I, the fact that Baltimore's collectivized claims purport to target production and sale of fossil fuels, rather than directly targeting the resulting emissions, is immaterial to the analysis. The chain of causation from conduct, to causation of harm, to remedy that Baltimore pleads traces through such worldwide emissions and effects. Compl. ¶¶ 1, 7-8.

Nor is the remedy sought by Baltimore relevant to displacement. Rather, the relevant issue is the scope of the challenged statute. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21-22 (1981) (holding that the "comprehensive scope" of the CWA sufficed to displace federal common law remedies that have no analogue in that statute, such as claims for compensatory and punitive damages); *see also Kivalina*, 696 F.3d at 857 ("[T]he type of remedy asserted is not relevant to the applicability of the doctrine of displacement.").

Second, the international dimensions of Baltimore's claims likewise trigger displacement. If a federal common-law cause of action could be fashioned here, it could not be extended to impose liability on production, sale, or combustion of fossil

fuels outside the United States. Nuisance claims under federal common law originated in disputes between States, and were premised on the original jurisdiction of the Supreme Court to adjudicate disputes among the states. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93-98 (1972) (*Milwaukee I*) (discussing history). These disputes are inherently domestic in scope and have a foundation in the Constitution. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 495-96 (1971).

As the Supreme Court recently reaffirmed in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), novel remedies like those sought by Baltimore are all the more out of place in the international context. There the risk that courts and litigants will encroach on the proper functions of Congress and the Executive Branch is acute. The *Jesner* plurality concluded that it would be inappropriate to extend liability through federal common law fashioned under the Alien Tort Statute (ATS) to corporations. To wit, "judicial caution . . . 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" *Id.* at 1407 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)); *accord id.* at 1408 (Alito, J., concurring in the judgment) (endorsing plurality's "judicial caution" rationale); *id.* at 1412 (Gorsuch, J., concurring in the judgment) (agreeing that "the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches"); *see also Kiobel*, 569 U.S. at 116-17 (holding that the presumption

against extraterritoriality applies to the fashioning of a federal common law cause of action under the ATS).

In sum, Baltimore's novel, collectivized theories of liability against private defendants for worldwide emissions of greenhouse gases over a fifty-year period cannot be premised on federal common law. Such theories are displaced by the CAA, or irreconcilable with the limited circumstances under which the Supreme Court has recognized such claims.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. Baltimore's novel expansion of the common law to create a collectivized cause of action, against multiple defendants, for fifty years of emissions, on a worldwide basis, that aggregated with the emissions of innumerable third-parties is alleged "will" cause harms, is preempted or displaced by federal law.

Dated: March 20, 2020.

Respectfully submitted,

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I HEREBY CERTIFY that on this 20th day of March, 2020, a copy of the Motion for Leave to File Brief of the United States as Amicus Curiae In Support of Defendants' Motion to Dismiss was sent by first-class mail, postage prepaid, or, with consent, was sent by e-mail to:

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

ORDER GRANTING LEAVE TO FILE AMICUS BRIEF

Upon consideration of the Motion for Leave to File Brief of the United States as Amicus Curiae In Support of Defendants' Motion to Dismiss (the "Motion") filed by Andrea L. Berlowe, and for good cause having been shown, it is this ____ day of March, 2020 by the Circuit Court for Baltimore County, Maryland, hereby:

ORDERED, that the Motion is **GRANTED**; and it is further

ORDERED, that the attached Brief of the United States as Amicus Curiae in Support of Defendants' Motion to Dismiss is filed.

CC: All counsel

Judge Videtta A. Brown

Circuit Court of Baltimore City