Case Number: PC-2018-4716
Filed in Providence/Bristol County Superior Court
Submitted: 4/27/2020 8:28 PM
Envelope: 2569600
Reviewer: Zoila C.

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

STATE OF RHODE ISLAND, Plaintiff,	:	
v.	:	
	:	P.C. No. 2018-4716
CHEVRON CORP.; CHEVRON U.S.A. INC.; 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 PETROLEUM CORP.; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; HESS CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; LUKOIL PAN AMERICAS, LLC; GETTY PETROLEUM MARKETING, INC.; AND DOES 1 through 100, inclusive, Defendants.	:	

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

Defendants file this Reply Memorandum of Law pursuant to Rhode Island Rule of Civil Procedure 12(b)(6), in Support of their Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted. This Court should dismiss all claims against Defendants with prejudice.

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I. INTRODUCTION

The State's Opposition to Defendants' Motion to Dismiss for Failure to State a Claim ("Opp.") fails to show that Plaintiff has stated a claim. The Complaint seeks to remedy harms that Plaintiff alleges result in part from decades of human combustion of fossil fuels around the world by holding a small subset of energy companies liable for the global phenomenon of climate change, even though these companies produced and promoted lawful products that fulfill energy demands of nations worldwide.

The Opposition confirms that the State's claims fail under binding precedent from the Rhode Island Supreme Court. *See State v. Lead Industries Association*, 951 A.2d 428 (R.I. 2008) ("*Lead Industries*"). *Lead Industries* forecloses the State's nuisance claims, and its products liability and trespass claims fail for lack of duty, causation, consent, and control. The State's alleged harm stems not from Defendants' lawful production or promotion of fossil fuels, but from the independent actions of countless governments and billions of consumers worldwide that combust these products. These governments, businesses, and consumers decide every day—as they have for many decades—whether to consume fossil fuels, which fossil fuels to consume, how much of those fossil fuels to consume, and whether to reduce or limit the emissions of greenhouse gases from fossil fuel combustion. As a result, the State's nuisance, products liability, and trespass claims fail, as do its statutory claims.

The United States Supreme Court has already determined that the claims asserted by the State cannot survive here where—as logic compels—federal law controls, and the Clean Air Act displaces Plaintiff's claims. Further, were State law to govern the claims, they are plainly preempted by federal law. Finally, regardless of what law applies, the State's claims are barred by a number of federal and constitutional doctrines, further supporting dismissal.

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Addressing climate change is an important global issue. But the complex decisions that require balancing between worldwide needs for energy and the goal of reducing emissions are committed to the political branches. A state-law nuisance lawsuit is not the mechanism to make these important policy decisions.

The Court should dismiss the State's claims because they fail under both state and federal law.

II. ARGUMENT

A. Plaintiff's State Law Claims Should Be Dismissed

1. Plaintiff Fails to Plead a Viable Claim for Nuisance

As shown in Defendants' opening brief ("Mot."), the Court should dismiss the State's public nuisance claims because: 1) Rhode Island law forecloses nuisance claims based on the sale of lawful products; 2) Defendants do not control the alleged instrumentality of the harm; 3) any alleged interference with a public right was not unreasonable; and 4) the State has not adequately pleaded causation, *see infra* II.A.5.

a) The *Lead Industries* Decision Forecloses Public Nuisance Claims Based on the Sale of Lawful Products

Lead Industries forecloses Plaintiff's claim that Defendants' sale of lawful products constitutes a public nuisance. The State argues that its nuisance claim is based on "Defendants' 'promotion and sale of fossil fuels[.]'" Opp. at 7 (citation omitted). The Complaint alleges more broadly that Defendants' production, distribution, and sale of fossil fuels caused the public nuisance. Compl. ¶¶ 229(a), 230. Defendants' opening brief explained why production and sale fail as a basis for the claim asserted. *See* Mot. at 15–19. The State's Opposition emphasizes "Defendants' 'promotion and sale of fossil fuels[,]'" Opp. at 7, but that shift to promotion cannot redeem the public nuisance claim. Indeed, it dooms the claim for the reasons the Rhode Island

Supreme Court stated in *Lead Industries*: it shows that the claim, at root, concerns a product and its alleged defects, which is the essence of a products liability claim, not a nuisance claim.

In *Lead Industries*, the Rhode Island Supreme Court dismissed the State's nuisance claim explaining that the "proper means of commencing a lawsuit against a manufacturer . . . for the *sale* of an unsafe product is a *products liability action*," not a nuisance claim. *Lead Industries*, 951 A.2d at 456 (emphasis added). "Public nuisance focuses on the *abatement of annoying or bothersome activities*," such as emitting noxious gases into the air or dumping pollutants into rivers. *Id.* at 456 (emphasis added); *see also City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876, 883 (Cal. Ct. App. 1994) ("[N]uisance cases 'universally' concern the use or condition of property, not products." (citation omitted)). "[T]he proper means of commencing a lawsuit against a manufacturer . . . for the sale of an unsafe product is a products liability action. The law of public nuisance never before has been applied to products, however harmful." *Lead Industries*, 951 A.2d at 456. "Products liability law, on the other hand . . . is designed specifically to hold manufacturers liable for harmful products that the manufacturers have *caused to enter the stream of commerce*." *Id.* (emphasis added). The Rhode Island Supreme Court emphasized in *Lead Industries* that "even if a lawsuit is characterized as a public nuisance cause of action, the suit nonetheless *sounds in products liability* if it is against a manufacturer based on harm caused by its products." *Id.* (emphasis added). Disregarding the distinctions between the law of public nuisance and the law of products liability would turn nuisance into "a monster that would devour in one gulp the entire law of tort." *Id.*

The State's nuisance claim targeting fossil fuel manufacturers is not meaningfully different from the State's nuisance claim targeting lead pigment/lead paint manufacturers that the Rhode Island Supreme Court rejected in *Lead Industries*. In both cases, the State sought (or seeks) to

impose liability for the manufacture, promotion, and sale of lawful products to millions of private parties and federal, state, and local governments.

The State nonetheless contends that the claims here should survive the motion to dismiss because Defendants' sale of lawful products allegedly occurred under a cloud of disinformation that hid the dangers of fossil fuels and their contribution to climate change. Opp. at 7. That theory fails for multiple reasons. First, this argument cannot be squared with the Complaint's own acknowledgement that the consumption of fossil fuels has continued for decades despite widespread knowledge of the causes and risks of climate change. Second, *Lead Industries* rejected the same argument advanced by the State here, ruling that promotion—even if deceptive—cannot convert a products liability claim into a nuisance claim. The State's complaint in *Lead Industries* was replete with allegations that the pigment manufacturers misrepresented and concealed the dangers that lead paint posed to children. Indeed, at trial—the longest in Rhode Island's history—the State presented evidence that the pigment manufacturers had promoted their products with a campaign to deceive the public regarding the dangers of lead, and argued that this misleading promotion created a public nuisance. *Id.* at 440–41; *see* Complaint, *State of Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 34873477, ¶¶ 30, 36, 39 (R.I. Super. Ct. 2001); *State of Rhode Island v. Lead Indus. Ass'n*, No. 99-5226, 2007 WL 711824, at *12–15 (R.I. Super. Ct. Feb. 26, 2006); Brief of Appellee on the Public Nuisance Claim, *State v. Lead Indus. Ass'n*, No. 07-121A, 2008 WL 5748820, at *35–38 (R.I. Mar. 17, 2008). The Supreme Court reversed the jury verdict in favor of the State, not because it found the evidence of disinformation or promotion insufficient to prove the allegations, but because *as a matter of law* a deceptive program of promotion could not be the basis for a public nuisance claim. *Lead Industries*, 951 A.2d at 455–56.

The State attempts to distinguish *Lead Industries* on the ground that the public nuisance claim there failed because the aggregation of individual injuries suffered by children who ingested lead did not constitute an interference with "public rights," whereas rising sea levels do. Opp. at 9–11. But whether public nuisance law applies to the sale of lawful products does not turn on the nature of the resulting harm or the distinction between public and private rights. Plaintiff must still prove an "unreasonable interference" "by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." *Lead Industries*, 951 A.2d at 446. Allowing the State's claims—premised on the production, distribution, and sale of lawful products—to move forward as a public nuisance claim would obliterate the significant doctrinal distinctions that *Lead Industries* made clear exist between public nuisance claims and product liability claims.

Unable to explain how its public nuisance claim survives *Lead Industries*, Plaintiff instead relies on an unpublished Superior Court decision that declined to dismiss a public nuisance claim against opioid manufacturers. Opp. at 8 (citing *State v. Purdue Pharma L.P.*, 2019 WL 3991963 (R.I. Super. Ct. Aug. 16, 2019)). The Plaintiffs in *Purdue Pharma*, however, defined the nuisance as the "unreasonable overabundance of highly addictive prescription opioids in the community." *Id.* The premise of *Purdue Pharma* is that illegal and unreasonable activities by manufacturers and distributors in Rhode Island enabled the diversion of opioids from lawful and legitimate medical uses to unlawful and illegitimate abuse in Rhode Island. 2019 WL 3991963, at *10. Plaintiff here does not allege any unlawful use of fossil fuels—in Rhode Island or anywhere else; nor does it make any similar "unreasonable overabundance" argument.

Indeed, *Purdue Pharma* did not even address the Rhode Island Supreme Court's admonition that it is "essential" to keep the "two causes of action" for public nuisance and products

liability "separate and distinct." *Lead Industries*, 951 A.2d at 457. Accepting Plaintiff's theory here would blur the distinction between these two causes of action, and throw "open the courthouse doors to a flood of limitless, similar theories of public nuisance . . . against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id.* (quoting *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003)). This Court should follow the Supreme Court's instruction and dismiss Plaintiff's public nuisance claim.

b) Defendants Did Not Control the Fossil Fuels When the Alleged Harm Occurred

Plaintiff's public nuisance claim also fails to allege that Defendants exercised control "at the time the damage occur[ed]." *See* Mot. at 14–15. Indeed, the Complaint demonstrates that Defendants did not exercise control when the alleged harm occurred. Plaintiff's alleged damages are all consequences of climate change caused in part by greenhouse gas emissions. *See* Compl. ¶¶ 1–2, 12. The alleged damage thus occurred when billions of individuals, governments, and businesses (other than Defendants) *combusted* fossil fuels—not when Defendants produced, promoted, or sold them. *Lead Industries* is dispositive: "control *at the time the damage occurs* is critical in public nuisance cases, especially where the principal remedy for the harm caused by the nuisance is abatement." *Id.* "Indeed, 'a product manufacturer who builds and sells the product and *does not control the enterprise in which the product is used* is not in the situation of one who creates a nuisance.'" *Id.* at 450 (quoting 2 Am. L. Prod. Liab. 3d § 27:6 at 11 (3d 2006) (emphasis added)).

In *Lead Industries*, several of the defendants not only made, sold, and promoted lead pigment, but also were leading sellers of lead paint. *See State v. Lead Indus. Ass'n*, 2007 WL 711824, at *11. That did not save the State's public nuisance claim, because the pigment manufacturers did not control the pigment or the paint *when children consumed the lead* from old,

deteriorated paint in houses. *Lead Industries*, 951 A.2d at 455. The Court found that, "[f]or the alleged public nuisance to be actionable, the state would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment *at the time it caused injury* . . . in Rhode Island." *Id.* (emphasis added). It did not matter that the pigment manufacturers controlled the supply chain and, according to the State, concealed the risk that lead paint would poison children.[1] Here, because the State can allege no set of facts showing the requisite control, *Lead Industries* compels dismissal of its public nuisance claim.

Seeking to avoid the clear holding of *Lead Industries*, the State relies on *State of Rhode Island v. Atlantic Richfield Co.* ("*Atlantic Richfield*"), 357 F. Supp. 3d 129 (D.R.I. 2018). However, that case included direct allegations that defendants not only manufactured the MTBE-containing gasoline but also caused a dangerous environmental condition when they negligently released it into the environment, allowing MTBE to contaminate groundwater throughout the state. *Id.* at 134. In that case, the harm was the contamination of the water table, and the harm-causing event was the negligent release of MTBE-containing gasoline into the environment *by the defendants*. *See id.* at 143 (MTBE was alleged to have entered the environment through "releases, leaks, overfills, and spills" along the defendant-controlled supply chain (citation omitted)); Opp. at 12. Because the MTBE-containing gasoline was the instrumentality of the nuisance, the claims against the defendants could proceed because the defendants allegedly controlled the instrumentality at the time it was released into the environment. The manufacturing and promotion of MTBE was not the instrumentality of the nuisance.

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[1] Similarly, in *City of Manchester v. National Gypsum Company*, 637 F. Supp. 646, 656 (D.R.I. 1986), the court granted defendants' motion to dismiss a public nuisance claim relating to asbestos-containing products on the basis that, after the time of manufacture and sale, plaintiff controlled the instrumentality—the products containing asbestos materials—and defendants no longer had the power to abate the nuisance.

Here, by contrast, no alleged harm occurred as the fossil fuels moved through the alleged defendant-controlled supply chain. Indeed, whereas in *Atlantic Richfield* environmental release of the product itself was the instrumentality of the nuisance, Plaintiff does not contend that it has been injured by the presence of fossil fuels in Rhode Island. The harm-causing event asserted by Plaintiff—the emission of greenhouse gases resulting from the combustion of fossil fuels—occurs only *after* the fossil fuels have left both the alleged supply chain and Defendants' control. Compl. ¶¶ 41–42. As the State concedes, Defendants do not control the fossil fuels at the point of combustion. Opp. at 12. Even more so than the defendants in *Lead Industries*, and unlike those in *Atlantic Richfield*, the Defendants here "passed control of their products" to consumers before the alleged damages occurred. *Atlantic Richfield*, 357 F. Supp. 2d at 143 (distinguishing *Lead Industries*, 951 A.2d at 457). *Atlantic Richfield* is therefore inapposite.

Plaintiff's reliance on *Purdue Pharma* to support their control argument is similarly misplaced. There, the court concluded that defendants maintained "control" over the opioids distribution and sale because the "Manufacturers and Distributors continued to misrepresent the risks and benefits of opioids, *funnel excessive amounts of medicines into Rhode Island communities*, and falsely promote and distribute these medicines generally," 2019 WL 3991963 at *10 (emphasis added).[2] Only by defining the nuisance as an overabundance of opioids in Rhode Island was the court able to find that the defendants in that case controlled the instrumentality of the nuisance; after all, if defendants stopped flooding Rhode Island with pills, the nuisance would abate. Here, where the nuisance is rising sea levels resulting from the consequences of global

[2] Although the case is distinguishable on its facts, this control analysis in *Purdue Pharma* fails to apply the clear holding in *Lead Industries*.

climate change caused by worldwide greenhouse gas emissions, Plaintiff cannot allege that Defendants controlled the instrumentality of the nuisance at the time of the alleged harm.

Nor can the mere alleged foreseeability of harms caused by use of their products establish that Defendants "controlled" the instrumentality of the nuisance at the time of the harm, as Plaintiff asserts. In *Atlantic Richfield*, the claim was not sustained because it was foreseeable that MTBE-containing gasoline would be released into the environment sometime after defendants sold it; rather, the Court sustained the pleading because it alleged that such releases actually occurred "along this *Defendant-controlled supply chain*." 357 F. Supp. 3d at 143 (citation omitted) (emphasis added).

Like the defendants in *Lead Industries*, Defendants here have "passed control of their products" to consumers before the alleged harms occur. The control argument here is even weaker than that rejected by the Rhode Island Supreme Court in *Lead Industries*. There, the lead paint causing the harm was a product certain defendants had made and sold to Rhode Island consumers who put it on their walls, 951 A.2d at 438–39, whereas here, Plaintiff alleges that the emissions causing the harm emanate from countless consumers worldwide, long after consumers purchased fossil fuel products from any of numerous producers. *See* Compl. ¶ 248.

The State's Opposition tries to obscure Defendants' lack of control over greenhouse gas emissions—which result from the independent decisions of billions of individuals around the world to combust fossil fuels—by disavowing emissions as the instrumentality of the alleged nuisance. *See* Opp. at 12. Rather, the State argues that the instrumentality of the alleged harm is Defendants' allegedly deceptive marketing activities and purported control of the supply chain. *Id.* The State, however, cannot avoid dismissal by running away from the Complaint's repeated allegations that the alleged public nuisance is the environmental effects of climate change, and that

climate change is caused by the accumulation of *greenhouse gas emissions* in the atmosphere resulting from the worldwide *combustion* of fossil fuels. Compl. ¶ 3.

As the State concedes, the control requirement is linked to the traditional common law remedy of abatement. Opp. at 11–12. "The party in control of the instrumentality causing the alleged nuisance is best positioned to abate it and, therefore, is legally responsible." *Lead Industries*, 951 A.2d. at 449. And as the Supreme Court made crystal clear in *Lead Industries*, a party that cannot abate the alleged nuisance cannot be held liable. In *Lead Industries*, the landlords, not the pigment manufacturers, controlled the application (and maintenance) of lead paint to houses in Rhode Island. *Id.* at 457. Because the pigment manufacturers were not in a position to abate the alleged nuisance, the Supreme Court held they could not be held liable. *Id.* Defendants here are not liable for the same reason: private and public parties control the purchase and combustion of fossil fuels every day. They could stop tomorrow or continue to consume fossil fuels for decades. They can invest in alternative energy sources, or not. They can invest in more efficient control technology, or not. Those third parties control the propagation and continuance of the nuisance alleged by the State. Whether they purchased fossil fuels from Defendants, or relied on promotion by Defendants, they are no different from the landlords in *Lead Industries* who bought paint from and relied on promotion by those defendants—the Supreme Court has plainly held that control is absent in either case.

Plaintiff conflates abatement of the harm with damages, claiming that "[a]n abatement *award* could be fashioned, for example, [by] requiring Defendants to cease their deceptive marketing and promotion and contribute equitably to the State's mitigation measures." Opp. at 13 (emphasis added). If climate change is the nuisance, ceasing promotion of fossil fuels would not abate it, and "mitigation" measures, such as building seawalls, are just that, *mitigation* of the

consequences of the nuisance, not abatement of it. Plaintiff fails to cite, nor have Defendants found, *any* legal authority for such a reconceptualization of abatement.

The Court should reject Plaintiff's public nuisance claim because Defendants relinquished control over the fossil fuel products long before the alleged harm occurred.

c) Defendants' Lawful Conduct Does Not Constitute an Unreasonable Interference with Public Rights

The State contends that Defendants acted unreasonably by providing some of the fossil fuels that the State uses to run its trucks and heat its buildings, that Rhode Island residents use to operate their cars and heat their homes, and that the power plants in Tiverton and Pawtucket use to generate electricity. Because the State predicates its claim on *global* contributions to climate change, the State also necessarily contends that Defendants acted unreasonably in providing, for example, some of the fossil fuels that power most of the vessels in the Navy's fleet, the tanks of the Rhode Island National Guard, the planes in the Air Force, and virtually every tank and vehicle that supports our Army. The State alleges that Defendants acted unreasonably every time they provided fossil fuels for combustion by residents, governments, hospitals, and military units around the world.

The scope of the State's allegations and claims are sweeping and unprecedented, and the claims are incompatible with the public interest. The State does not allege—because it cannot—that Defendants or anyone else can meet the world's massive demand for energy by producing fuels that do not release greenhouse gases when combusted. By any measure, Defendants' actions in supplying fossil fuels are not only "reasonable," but essential to support our governments, lives,

and economies.[3] Plaintiff concedes that extraction and production of fossil fuels are legal activities. "The plaintiff bears the burden of showing that a legal activity is unreasonable." *Lead Indus.*, 951 A.2d at 447. Plaintiff cannot meet that burden here.

First, the State argues that Defendants' activities could be considered unreasonable because they were not "expressly authorized." Opp. at 13–15. But the State does not address the substance of any of the statutes cited in Defendants' opening brief, which authorize and encourage the precise activities of Defendants challenged in the Complaint.[4] The policymaking branches of this State have long espoused and recognized the necessity of the continued flow of fossil fuels into Rhode Island as an "important . . . energy source." R.I. Gen. Laws §§ 46-12.5.1–6; *see also* R.I. Gen. Laws § 5-55-2 ("[T]he distribution and retail sale of motor fuels at reasonable prices and in adequate supply throughout the state vitally affects the public health, welfare, and safety[.]"); *id.* § 42-98-1(a) ("[R]easonably priced, reliable sources of energy are vital to the well-being and prosperity of the people of this state[.]"); *id.* § 39-1-1 ("The businesses of . . . producing and transporting manufactured and natural gas . . . [are] affected with a public interest."); *id.* § 42-140-3 (defining purpose of Rhode Island Energy Resources Act is "to promote, encourage and assist the efficient and productive use of energy resources," including "natural gas . . . and heating oil"); *id.* § 42-81-2; *id.* § 39-31-5 (authorizing public utilities to "[p]rocure incremental, natural-gas

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[3] The State recently reaffirmed the vital importance of fossil fuels in its designation of critical businesses during the COVID-19 crisis. *See* Rhode Island Department of Business Regulation, List of Critical and Non-Critical Retail Businesses, available at https://dbr.ri.gov/documents/DBRCriticalRetailBusinessesList_04032020.pdf (last visited Apr. 26, 2020).

[4] The Rhode Island General Assembly has never authorized a cause of action for public nuisance against fossil fuel companies. In *Lead Industries*, the Rhode Island Supreme Court emphasized that "[q]uite tellingly, the General Assembly's chosen means of remedying childhood lead poisoning in Rhode Island did not include an authorization of an action for public nuisance against the manufacturers of lead pigments," and that the Assembly instead "adopted several statutory schemes to address th[e] problem." 951 A.2d at 457–58.

pipeline infrastructure and capacity into New England to help strengthen energy system reliability and facilitate the economic interests of the state").

Second, Plaintiff argues that "'[a]ctivities that do not violate the law but that nonetheless create a substantial and continuing interference with a public right also generally have been considered unreasonable.'" Opp. at 14 (quoting *Lead Industries*, 951 A.2d at 447).[5] Ignoring the significance of its own laws and conduct, the State contends that "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." Opp. at 14. Nonsense. The State and other governments control and decide whether they and their residents will continue to rely on fossil fuels, whether laws or regulations will require or promote investment in technology to control greenhouse gas emissions created by combustion, and how much will be invested in alternative sources of energy. Government energy policy is manifest every day and undermines the State's contention here. Compare the State's argument that the supply of fossil fuels "gravely interfered with the public health and public safety of residents," Opp. at 14, with the State's legislative finding that "the distribution and retail sale of motor fuels at reasonable prices and in adequate supply throughout the state vitally affects the public health, welfare, and safety," R.I. Gen. Laws § 5-55-2.

This Court should reject the State's hypocritical proposition that the supply or marketing of fossil fuels are unreasonable activities. The State buys fossil fuels, relies on fossil fuels to

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[5] In the examples of this exception cited in *Lead Industries*, the activity alleged to be unreasonable itself constituted the interference—e.g., a chemical dump emitting noxious odors and catching fire; a swine operation emitting noxious odors; greenhouse emitting smoke, noise, and vibrations that traveled a distance. 951 A.2d at 447. Here, the production and alleged misrepresentations do not constitute the "interference," rather, the "interference" consists of events remote from that production—rising sea levels and weather events, of which the production and misrepresentations are alleged to be partial causes.

produce vital energy, and passes laws to ensure that the State and its citizens enjoy and benefit from an adequate supply of fossil fuels at reasonable prices. The State's real world actions refute the conclusions it advances in this case. Defendants' production of fossil fuels that are ultimately purchased and used in Rhode Island cannot be characterized as an unreasonable interference with a public right.[6]

In sum, the State's laws and actions demonstrate that the supply of fossil fuels to Rhode Island and to consumers around the world is not only reasonable, but vital to the welfare of citizens, governments, and economies across the globe. This Court should dismiss the State's public nuisance claim.

2. Plaintiff's Product Liability Claims Should Be Dismissed

This Court should dismiss the State's products liability claims, because: (1) Defendants do not owe Plaintiff a duty to warn of known harms; (2) Defendants' products are not defectively designed; and (3) Plaintiff's alleged injury is too remote from Defendants' alleged conduct.

a) Defendants Do Not Owe a Duty to Warn

There is no duty to warn of known harms. *See* Restatement (Second) of Torts § 402A, cmt. j (1965); Mot. at 21. Plaintiff concedes that human contribution to climate change was a known phenomenon, recognized by the federal government as far back as the 1960s, Compl. ¶ 106, and engendering "significant news coverage and publicity, including coverage on the front page of the New York Times," *id.* ¶ 149(a). Consumers of fossil fuels—including Plaintiff—are aware of the climatic impacts of fossil fuel combustion and continue to purchase and use those products nonetheless. Moreover, the Complaint acknowledges that the harms it alleges were "foreseeable"

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[6] Because the State's allegations capture the supply of fossil fuels throughout the world, the same analysis plays out for every state, province, county, and country in the world that continues to rely on and encourage a reasonable supply of fossil fuels.

by the State and consumers. *Id.* ¶ 108 (describing a 1963 Conservation Foundation report and a 1966 World Book Encyclopedia entry about the link between rising carbon dioxide levels and various climate impacts). Plaintiff cites no cases contradicting the Restatement (Second) of Torts, which says that a duty to warn does not extend to generally known dangers. Restatement (Second) of Torts § 402A, cmt. j (1965); Mot. at 25 (there is no duty to give futile warnings).

Plaintiff argues against judicial notice of the obvious: the widespread knowledge of climate change at this stage. Opp. at 22–23. While Defendants disagree that judicial notice is improper, it is not required here because the Court need only accept as true the allegations of the complaint itself to confirm that widespread knowledge. *E.g.*, Compl. ¶¶ 106, 149(a), 169. Based on Plaintiff's own pleadings, this case falls squarely in line with *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000), where the court dismissed a smoker's products liability claim against a cigarette manufacturer, because the smoker had not alleged that his use of tobacco products started before the time when the dangers of smoking became "common knowledge." *Id.* at 269.

Plaintiff's allegations also demonstrate that warning the State would have proved ineffective. Mot. at 21 (noting there is no duty to give futile warnings). The State alleges harms that are not the result of its own consumption of fossil fuels, but the result of combustion by countless actors worldwide over decades. No warning by Defendants to Plaintiff, even if one were required, could possibly have avoided the local consequences of what Plaintiff alleges to be worldwide activity. *See* Mot. at 22 (citing *Salk v. Alpine Ski Shop, Inc.*, 342 A.2d 622, 626 (R.I. 1975)). A warning to all "customers, consumers, regulators, and the general public," Opp. at 18, would also have been futile, and in any event, courts have rejected the imposition of duties to warn

the "general public."[7] *See Orzechowski v. State*, 485 A.2d 545, 549 (R.I. 1984) (rejecting a finding of duty that would be owed "to each and every individual member of the public"); *see also Fortes v. Ramos*, No. CIV. A. 96-5663, 2001 WL 1685601, at *13 (R.I. Super. Ct. Dec. 19, 2001) (rejecting argument that would "create a near limitless class of potential plaintiffs"); *R.I. Indus.-Recreational Bldg. Auth. v. Capco Endurance, LLC*, 203 A.3d 494, 503 (R.I. 2019) (resisting establishing duties of care that would expose defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class") (citation omitted).

b) Fossil Fuel Products Do Not Have a Design Defect

Defendants' products are not unreasonably dangerous. As described above, these products are foundational to the modern economy and society. *See supra* II.A.1.c. Plaintiff acknowledges public knowledge and recognition of climate change, Compl. ¶ 169, yet Plaintiff and other consumers throughout the world, including governments, major industries, and individuals, continue to use Defendants' products every day—that is a choice, not a tort. A product used despite risks that are "well known to any reasonable consumer" cannot be unreasonably dangerous. *Jackson v. Corning Glass Works*, 538 A.2d 666, 669 (R.I. 1988).

Plaintiff urges the Court to follow the consumer expectation test, Opp. 21–22, used to determine whether a product is defectively designed. But Plaintiff has not satisfied even its own formulation of that test: "A product is defective under the test when it is (1) 'in a condition not contemplated by the ultimate consumer,' . . . and (2) 'the defect in the product establishes a strong likelihood of injury to the user or consumer thereof.'" *Id.* at 22 (citations omitted). Fossil fuels perform as expected, and Plaintiff does not allege otherwise: when combusted, they produce

[7] Plaintiff's assertion that this is a question of breach, rather than duty, is incorrect, and Plaintiff has identified no case law to support that assertion. Opp. at 18.

energy that meets consumer needs for power. Plaintiff acknowledges that "the climate effects [causing its injuries are] inherently caused by the normal use and operation of [Defendants'] fossil fuel products," Compl. ¶ 275, and alleges that these effects of fossil fuel combustion were publicly known as early as 1965.

Plaintiff cites *Guilbeault* as authority for the proposition that it is sufficient to plead that there is something "wrong" with Defendants' products to establish a claim for products liability. Opp. at 21–22 (citing *Guilbeault*, 84 F. Supp. 2d at 279–80). However, "wrong" means significantly more than what Plaintiff alleges. As noted by the cases cited by *Guilbeault* for this proposition, "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1226 (1st Cir. 1990) (quoting Restatement (Second) of Torts, § 402A, cmt. i), *vacated on other grounds*, 505 U.S. 1215 (1992); *see also Thomas v. R.J. Reynolds Tobacco Co.*, 11 F. Supp. 2d 850, 853 (S.D. Miss. 1998) (noting that a safer alternative to tobacco manufacturer's products would be to avoid adding certain harmful ingredients to cigarettes). Here, Plaintiff does not allege that Defendants' products contain harmful additives or that there is a better way to produce or manufacture these products. It alleges only that the products *themselves* are "wrong" and thus defective. Compl. ¶¶ 252–53; Opp. at 22. To allow such a claim would be unprecedented and open the floodgates to lawsuits about any products that have societal costs associated with their use, but that are not themselves defective.

Plaintiff asserts that products liability claims may be premised on a high quantity of a given product or ingredient where that product has an inherent characteristic that poses risk. While Plaintiff asserts that "[c]ourts have *consistently* declined to apply an 'inherent characteristic limitation'" to design defect claims, it cites only two cases that rejected this limitation. *See* Opp. at 21 (citing *Hall v. Bos. Sci. Corp.*, No. 2:12-CV-08186, 2015 WL 874760, at *5 (S.D.W. Va.

Feb. 27, 2015); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 732 (Wis. 2001)).[8] These cases are not controlling authority in Rhode Island and are inapplicable, because Plaintiff does not allege that Defendants improperly manufactured or defectively designed fossil fuels, just that their *existence* as fossil fuels is a defect.

c) Plaintiff's Products Liability Claims Are Too Remote

The doctrine of remoteness bars the State's products liability claim. The concept of "remoteness" is analyzed in conjunction with proximate cause, addressed in further detail below. *See, e.g.*, *Rhode Island Laborers' Health & Welfare Fund ex rel. Trustees v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 177 (D.R.I. 2000) (analyzing remoteness and proximate cause together); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 903 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (addressing doctrine of remoteness as element of proximate cause); *infra* II.A.5.b.

The typical products liability case involves a consumer who purchases, uses, and then alleges injury caused by a defective product. Over time, some states other than Rhode Island have adopted the Restatement (Third) of Torts and expanded the scope of products liability to include reasonably foreseeable damages to third parties directly injured by the defective product, such as a bystander injured by a car that experiences sudden acceleration.[9] Rhode Island has not. The

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[8] Both *Hall* and *Green* are readily distinguishable. *Hall* is a case about transvaginal mesh, a product which was itself alleged to cause injury to direct consumers of that product when used as intended. *Hall*, 2015 WL 874760, at *1. Here, Plaintiff's alleged injuries are not tied to its use as a direct consumer, but rather to the downstream effects of the use of fossil fuels by countless individuals worldwide over decades. *Green* involves a claim for injury resulting from an allergic reaction to latex in gloves. *Green*, 629 N.W.2d at 731. Here, no injury results from contact with the fossil fuel products, and Plaintiff's allegations are not tied to the use of the products but rather the societal costs of accumulated use of these products over time.

[9] The Restatement (Second) of Torts, which Rhode Island has adopted in both design defect and failure to warn cases, *see Ruzzo v. LaRose Enters.*, 748 A.2d 261, 266 (R.I. 2000); *Thomas v. Amway Corp.*, 488 A.2d 716, 722 (R.I. 1985), limits strict liability claims to the user or consumer (or to his property). *See* Restatement (Second) of Torts § 402A ("One who sells any product in a *defective condition unreasonably dangerous to the user or*

State's products liability claim, however, seeks to impose liability with no regard for established doctrine that requires connecting Defendants to an injury caused by the alleged defect in Defendants' products.

The State's products liability claim is not based on the sale of defective fossil fuels to the State or to residents of Rhode Island, or on injuries caused by the use of those fuels in Rhode Island. Rather, the claim is based on the lawful sale of fossil fuels (not just by Defendants but by many third-party producers, including sovereign states, e.g. Saudi Aramco), to governments and to billions of consumers across the globe who, for decades, combusted those fuels in various ways. The State's Complaint is based on the accumulation of greenhouse gas emissions resulting from countless actions by countless companies, governments, and people worldwide; those people used fossil fuels over decades, resulting in climatic changes affecting Rhode Island.

Judge Silverstein applied the doctrine of remoteness to dismiss the State's strict liability, misrepresentation, and fraud claims in *Lead Industries*. *State v. Lead Indus. Ass'n, Inc.*, No. 99-5226, 2001 WL 345830, at *13 (R.I. Super. Ct. Apr. 2, 2001).[10] There, the State alleged that the decision by owners and landlords to purchase and apply lead paint damaged the State by requiring it to incur various costs, including abating lead, detecting lead poisoning and providing medical care, and providing education programs. *Id.* at *13. Judge Silverstein dismissed the State's claim as too remote: "the State would not have suffered its alleged injuries unless, for example, some consumer(s) chose to purchase lead-products and subsequently exposed residents of Rhode Island

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consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property.") (emphasis added). The federal case which Plaintiff uses to articulate the Third Restatement's expanded liability rule lists the states that have also adopted the rule, and Rhode Island is not on that list. *See Berrier* v. *Simplicity Mfg., Inc.*, 563 F.3d 38, 54 (3d Cir. 2009)

[10] In *Lead Industries*, the State tried to prosecute claims based on alleged misrepresentations to thousands of third parties not in the suit. 2001 WL 345830, *12. Even if the State could prove that third parties relied and acted on those misrepresentations, it was not the State's claim to bring. *Id.*

to lead. These expenditures construed as injuries by the State are inescapably contingent on direct or speculative harm to such persons and accordingly are too derivative, remote, or contingent to support a cognizable tort claim." *Id.* at *14.

The State's products liability claims here are even more remote than those in *Lead Industries*. That case involved the purchase and use of lead-based paint in Rhode Island homes by Rhode Island consumers, and purported harm to those Rhode Island consumers. *Id.* at *1. There, the State sought compensation for derivative injuries (e.g., health care costs, property remediation) resulting from that purchase and use. *Id.* Here, the State's claims encompass the sale of fossil fuels to anyone, anywhere in the world, and the incremental contribution to greenhouse gases resulting from consumer use anywhere and everywhere—*without any allegation that any such consumer was harmed by using the product*. The State did not participate in those billions of underlying transactions occurring outside of Rhode Island. Rather, the Complaint alleges sea level rise affecting Rhode Island as a local consequence resulting from the phenomenon of worldwide fossil fuel consumption. Compl. ¶ 1. The Complaint does not allege that the use of the product *in* Rhode Island, by Rhode Island consumers, caused the alleged injuries *in* Rhode Island.

Indeed, the chain of causation in the State's products liability claim includes more than a dozen links. That is the profile of the State's claim, regardless of whether the combustion involves a power plant in Sydney, a fleet of jets in Bahrain, or individuals driving cars anywhere in the United States. The State's alleged damages are "inescapably contingent" on the actions of billions of third parties, and its products liability claim is too derivative, remote, or contingent to support a cognizable tort claim.

3. Plaintiff's Trespass Claim Should Be Dismissed

Plaintiff has failed to plead any of the requisite elements of trespass. Mot. at 26–28. Notably, Plaintiff has failed to assert that Defendants controlled the items that allegedly entered

its property; namely, the oceans, clouds, and precipitation. Compl. ¶ 287. Plaintiff nevertheless argues that Defendants' products have "cause[d] something to" enter Plaintiff's land, and that Defendants' conduct constitutes a "continuing trespass." Opp. at 24 (quoting *Mesolella v. Providence*, 508 A.2d 661, 668 n.8 (R.I. 1986); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 151 (D.R.I. 1989)). A *continuing* trespass is one in which the thing that has wrongfully entered the land *remains* on the land. *Mesolella*, 508 A.2d at 668 n.8 ("A 'continuing trespass' is defined as '[a]n unprivileged remaining on land in another's possession[.]'" (quoting Restatement (Second) of Torts § 158 at 280)). Plaintiff does not allege that any of the alleged entering elements, such as flood waters, precipitation, and other materials, *see* Compl. ¶ 287, have remained on its land continuously, and thus has not alleged a continuing trespass.

Further, Plaintiff fails to cite a single trespass case with a chain of causation remotely similar to what is alleged here. Plaintiff cites multiple trespass cases where defendants directly deposited waste onto the land of another, or contaminated water with chemicals from their own products. Opp. at 25–26. But all of these cases involve the defendant's own products or waste physically entering the property of another, generally as a result of the defendant's direct actions. None of the cases even approaches the type of attenuated circumstances alleged here: atmospheric effects resulting from the cumulative use of fossil fuels worldwide (some of which are products Defendants made), some of which are allegedly as a result of Defendants' promotion of such products. While smoke from a cigar shop entering a plaintiff's property may constitute a trespass, *see Cigar Masters Providence, Inc. v. Omni R.I., LLC*, No. 16-471-WES, 2017 WL 4081899, at *13 (D.R.I. Sept. 14, 2017); Opp. at 25, Defendants are not aware of any court finding that a cigar manufacturer can be held responsible for general environmental impacts of cigar smoke produced by remote users.

The causal chain here is much more attenuated than in *Cigar Masters Providence* or any other case cited by Plaintiff. Plaintiff's complaint is not that there was oil or gasoline spilled in Rhode Island. Nor is it even about greenhouse gases that resulted from combustion of Defendants' products *in* Rhode Island. It is that greenhouse gases (from all sources natural and manmade, including the combustion of fossil fuels from all sources by consumers worldwide for the past century) accumulated in the global atmosphere, collectively caused climate change, and that climate change resulted in trespass by weather. Compl. ¶ 287. Plaintiff's Opposition argues that a claim for trespass based on actions causing foreign matter to enter property is sufficient where "an act is done with knowledge that it will to a *substantial certainty* result in [that] entry." Opp. at 25 (quoting Restatement (Second) of Torts § 158, cmt. i) (emphasis added) (quotation marks omitted). But the Complaint alleges only that Defendants had general "knowledge" that fossil fuel combustion causes climate change, not that they had any specific knowledge about how their lawful commercial conduct would affect Rhode Island. Applying that standard, *every person, business, and government in the world* that contributed to climate change in any way would be liable for trespass in Rhode Island if they had the same generalized knowledge about the connection between fossil fuel combustion and climate change. This Court should reject Plaintiff's invitation to create such a boundless tort.

Plaintiff relies on *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litigation*, 725 F.3d 65, 120 (2d Cir. 2013), which reflects the most expansive view of the "certainty" contemplated by the Restatement (Second). In *MTBE*, the court concluded that a defendant was liable in trespass for downstream contamination of public water with chemical byproducts containing MTBE, a component of defendant's fossil fuel products. *Id.*; *see also Atlantic Richfield*, 357 F. Supp. 3d 129. Unlike in *MTBE*, however, neither Defendants' products, nor any

of their components, are entering Plaintiff's property. Rather, the trespassing element is alleged sea level rise, which is many steps removed in the causal chain from Defendants' production, sales, or promotion of fossil fuels. Defendants' production, sale, and promotion of some of those fossil fuels are not comparable to a trespass caused by a defendant's release of its own MTBE product directly onto another's property.

Plaintiff argues that even if it consented to Defendants' alleged trespass, it did not "consent to the excess." Opp. at 26. However, "excess" use of a product must be alleged to have been a significant amount of additional use above that which was consented to for a court to find that the bounds of consent were exceeded. Restatement (Second) of Torts § 892A, cmt. c. Here, the Complaint contains no allegation regarding any purported wrongful excess. Plaintiff also does not allege or argue that any purported wrongful excess resulted from any change in production (or marketing) by Defendants. In addition, the harm must be severable from the behavior consented to in order to allege that Defendants exceeded the scope of consent. *See id.* cmt. h. (when "the harm caused by the excess is severable from that resulting from the privileged act, the actor is subject to liability only for the excess"). Plaintiffs do not allege that any of Defendants' conduct can be "severed" for purposes of identifying emissions or climate change that did and did not contribute to Plaintiffs' alleged harms. There is no allegation that Plaintiff at any time articulated to Defendants any limits on their activity beyond which point they would be "exceeding" consent, which courts have generally required to accept a consent argument. *See, e.g.*, *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 127 (D.D.C. 2018); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1073 (N.D. Cal. 2016).

4. Plaintiff's Statutory and Constitutional Claims Should Be Dismissed

a) The Public Trust Doctrine Is Not Sufficient Standing Alone to Support a Claim Against Defendants

Article 1, Section 17 allows the State to "regulate and control the *use*" of public land and water, but there are no allegations that Defendants are *using* Rhode Island land in any manner for any purpose. R.I. Const. art. I, § 16 (emphasis added). Instead, the Complaint seeks to remedy alleged *effects* of worldwide conduct on public land and water, which it contends are the downstream results from worldwide combustion of Defendants' and others' products. *See* Compl. ¶ 311. As it has not cited to any regulation or control of land use created by the legislature, it is clear Plaintiff seeks judicial lawmaking (1) to impose a regulation on Defendants' activities insofar as they allegedly affect public resources through the actions of countless third parties, and (2) to enforce such a regulation.

Moreover, the State fails to address the clear statement of *Bandoni v. State*: Rhode Island courts will not "create a private cause of action by judicial rule" where a constitutional provision or statute is not expressly self-executing or does not provide a remedy. 715 A.2d 580, 584 (R.I. 1998); Mot. at 30. There is no express cause of action created by R.I. Const. art. I, § 17, which is not self-executing. Because this provision does not "suppl[y] a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced," it is not self-executing. *Bandoni*, 715 A.2d. at 587.

Finally, Plaintiff's argument that it has raised the claim in its *parens patriae* capacity is immaterial as to whether it can bring a claim under the public trust doctrine. *Parens patriae* may provide standing for a sovereign to sue for injuries to its citizens, *see generally Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Bare*, 458 U.S. 592 (1982), but it does not allow a sovereign to create a new cause of action merely by filing a complaint. This claim should be dismissed.

b) The State Environmental Rights Act ("SERA") Does Not Provide a Generalized Cause of Action for Any and All Environmental Impacts

The State's SERA claim similarly seeks judge-made regulation. While Plaintiff accurately notes that SERA is not meant to displace other judicial remedies for environmental harms, that does not mean SERA is itself a vehicle for courts to create new environmental standards. Specifically, SERA says that the State may bring an action to enforce any *standard* that protects the environment. R.I. Gen. Laws § 10-20-3(a). Plaintiff has identified no such standard governing Defendants' production, promotion, and sale of fossil fuels here—indeed, the State's laws *encourage* fossil fuel production and distribution. SERA is too vague to constitute a cause of action against Defendants standing on its own, and SERA does not provide a remedy for any of Defendants' alleged conduct. Plaintiff characterizes the prohibited conduct under SERA as "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[.]" Opp. at 31–32. Plaintiff has not alleged a violation of any standard, so it must rest its claim on Defendants' conduct. But Plaintiff has not alleged that Defendants' conduct in Rhode Island is the cause of the environmental impacts it asserts, as discussed below. *See infra* II.A.5. Without an express remedy in the statute, SERA alone does not provide a viable cause of action for the State. *See Bandoni*, 715 A.2d at 587. Defendants are not aware of any case in which a plaintiff has brought a claim under SERA absent regulatory or statutory authorization to do so, and Plaintiff has not identified any such case in its Opposition. This claim should be dismissed.

5. Plaintiff Has Not Adequately Pleaded Causation

Plaintiff's Opposition confuses the two forms of causation that it must allege under Rhode Island law. Under Rhode Island law, a tort plaintiff bears the burden of establishing (1) causation in fact and (2) legal (or proximate) causation. Contrary to Plaintiff's argument, Rhode Island

courts apply the but-for test to determine cause-in-fact. *Lead Industries*, 951 A.2d at 451 (R.I. 2008) (using cause-in-fact and but-for causation interchangeably, as distinct from proximate causation). Plaintiff's claims also rest on an attenuated chain of causation insufficient to establish proximate causation.

Plaintiff's claims rest on an alleged chain of causation that includes countless steps. For example, with respect to motor vehicles alone, which comprise a limited percentage of overall greenhouse gas emissions: (1) governments authorized production of fossil fuels; (2) Defendants produced fossil fuels or the products from which those fuels were made; (3) governmental entities worldwide permitted the use of vehicles and mass transportation powered by those products; (4) other companies produced and marketed vehicles that run on fossil fuels; (5) consumers and public and private entities purchased such vehicles; (6) Defendants promoted their fossil fuel products; (7) those consumers combusted those fossil fuel products for energy without adequate controls to capture the greenhouse gases; (8) combustion emitted greenhouse gases that entered the atmosphere; (9) those gases combined with similar gases from other sources and remained in the atmosphere, trapping heat; (10) over time, that heat increased average atmospheric temperatures, changing the earth's atmosphere; (11) as the generation of greenhouse gases from fossil fuels and many other sources continued and accelerated over several decades, those changes became more profound, and resulted in climatic effects including rising sea levels, among others; (12) such incremental sea level rise has occurred in places throughout the globe, including Rhode Island; and (13) someday, if governments and consumers continue to rely on the combustion of fossil fuels for energy, the rise in sea levels will cause flooding in the coastal areas of Rhode Island.

a) Plaintiff Has Failed to Allege Cause-in-Fact

Plaintiff confuses the but-for test with a requirement that a defendant's conduct be the "sole or overarching" cause of plaintiff's harm. Opp. at 33, 33 n.18, 35. Defendants do not claim that

their conduct must be the "sole" cause of Plaintiff's harm for this element of causation to be satisfied. Instead, Defendants contend that Plaintiff's allegations fail to satisfy its burden of establishing that any individual defendant's conduct (or even Defendants' cumulative conduct) is a cause without which Plaintiff's claims would not have arisen (*i.e.*, but-for causation). Mot. at 33–35.

Plaintiff attempts to circumvent the traditional but-for requirement by arguing that Rhode Island adopts a different test in multi-contributor cases. That is incorrect. First, *Lead Industries* was also a multi-contributor case, and the Court there nevertheless concluded that but-for causation was the appropriate test to determine cause-in-fact. 951 A.2d at 451. Second, Plaintiff's multi-contributor authorities from Rhode Island courts either (1) locate the but-for requirement under the proximate cause analysis, but in no way eschew the requirement,[11] or (2) apply reasoning derived in the asbestos context.[12]

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[11] *See Almonte v. Kurl*, 46 A.3d 1, 18 (R.I. 2012) (proximate cause is demonstrated by establishing that "the harm to the plaintiff would not have occurred but for the defendant's negligence") (citation omitted); *Pierce v. Providence Retirement Bd.*, 15 A.3d 957, 964 (R.I. 2011) ("The word 'proximate,' in the legal context of 'proximate cause,' requires a factual finding that the 'harm would not have occurred but for the [accident] and that the harm [was a] natural and probable consequence of the [accident].'") (citation omitted); *Martinelli v. Hopkins*, 787 A.2d 1158, 1169 (R.I. 2001); *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994) (requiring that defendant's conduct be not only a "but for" cause but a "primary cause" of plaintiff's injury); *Nichols v. Allis Chalmers Product Liability Trust*, 2018 WL 1900256, at *9 (R.I. Super. Ct. Apr. 16, 2018) ("The defendant is the 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].'") (citation omitted).

[12] *See Claiborne v. Duff*, No. PC 10-6330, 2015 WL 3936909, at *9 (R.I. Super. Ct. June 23, 2015) (acknowledging that the "frequency, proximity, and regularity" test applies in asbestos cases); *Lapointe v. 3M Co.*, No. PC06-2418, 2007 WL 4471136 (R.I. Super. Ct. Nov. 5, 2007) (asbestos exposure case). The test used in asbestos cases would be inapplicable here in any event based on Plaintiff's allegations. To make out its claim, Plaintiff would have to show, "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Claiborne*, 2015 WL 3936909, at *10. But Plaintiff's theory is that its climate change-based harms are caused by the accumulation of greenhouse gas emissions in the atmosphere resulting from the worldwide combustion of fossil fuel. Compl. ¶¶ 3, 7. The "frequency, proximity, and regularity" test is incompatible with that theory, which does not depend on regular exposures resulting from close proximity to a defendant's hazardous product.

Contrary to Plaintiff's argument, Rhode Island courts apply the substantial factor test only in limited "situations where two or more causes exist, each of which by itself is sufficient to bring about injury." *HNY Holding Co. v. Danis Transp. Co.*, 2004 WL 2075158, at *4 (R.I. Super. Ct. 2004) (citation omitted). Here, the State has not alleged (and cannot plausibly allege) that any Defendant's conduct, or even Defendants' collective conduct, was independently sufficient to cause Rhode Island's alleged climate change-based injuries. The substantial factor test is therefore simply not applicable here.

Even if Rhode Island were to apply the substantial factor test, Defendants' production and promotion of fossil fuels are not a substantial factor in causing the harms alleged by Plaintiff. *See Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994). Notably, the State alleges that Defendants produced less than 15% of fossil fuel products worldwide since 1965. Compl. ¶ 7. Under that theory, no individual Defendant is allegedly responsible for more than 4% of worldwide emissions. These allegations are insufficient as a matter of law to support the claim that any Defendant is a substantial factor in causing the climatic effects that result in Plaintiff's alleged harms.

Massachusetts v. EPA, 549 U.S. 497 (2007) does not support Plaintiff's causation argument. The U.S. Supreme Court in that case found that there was a sufficient link between vehicles that emit greenhouse gases and climate change for purposes of Article III standing. *Id.* at 525. Consistently, *Massachusetts* involved governmental entities *asking the federal government to regulate emissions—not* production or promotion of fossil fuels, and the Supreme Court held that Congress has vested that authority in the EPA through the Clean Air Act. Defendants agree that federal law controls here, as discussed below. *See infra* II.B. Moreover, Plaintiff relies on the Court's analysis of Massachusetts's standing to challenge an EPA denial of a rulemaking

petition, which has nothing to do with the cause-in-fact standard for the tort claims here. *Massachusetts*, 549 U.S. at 514.

b) Plaintiff Has Not Adequately Alleged Proximate Cause

Plaintiff argues that proximate cause turns on foreseeability, and claims to have pleaded foreseeability by alleging that Defendants knew their products would be combusted in the course of their intended use and that the alleged harm of climate change from accumulated greenhouse gases would result. Proximate cause, however, requires a plaintiff to demonstrate more—that a defendant's act be "so closely connected with the result" that the law justifies imposing liability. *Lead Industries*, 951 A.2d at 451 (internal quotation marks omitted). "Liability cannot be predicated on a prior and remote cause which merely furnishes the condition or occasion for an injury resulting from an intervening unrelated and efficient cause, even though the injury would not have resulted but for such a condition or occasion." *Id.* (internal quotation and citation omitted; alteration omitted). Here, an enormous chasm exists between Defendants' production and sale of fossil fuels and the climate change injuries Plaintiff alleges. Every day, governments, companies, and consumers make countless decisions about whether, when, and how to combust fossil fuels, in addition to decisions about all the other anthropogenic sources of greenhouse gas emissions. All of those decisions allegedly contribute to climate change. *Lead Industries* does not permit a finding of causation for conduct so remote from the claimed injury. *Id.* Further, the foreseeability of third-party actions that Plaintiff argues cannot bridge that chasm: foreseeability that consumers would continue for decades to choose fossil fuels over more expensive alternative sources of energy—and that governments would endorse those choices—does not make these Defendants responsible for them. Plaintiff's assertion, in conclusory fashion, that these effects are somehow traceable to Defendants' promotional activity ignores these choices, decisions, and actions by

consumers and governments, and fails to establish that Defendants' promotion is "so closely connected with" climate change and its consequences to justify imposing liability.

Plaintiff relies on *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017), for the proposition that lapse of time does not preclude a finding of causation for promotional activities. Opp. at 38. That California decision cannot be squared with *Lead Industries*,[13] and does not reflect the law of this State. Further, *ConAgra* is distinguishable because promotion there was directly tied to use of a product, lead pigment in paint, that was alleged to harm consumers directly, and which was later banned by legislation.[14] *ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d at 520. Here, fossil fuels remain lawful, and indeed, essential products, used and relied upon regularly today by the State and billions of other consumers around the globe.

B. Plaintiff's Claims Are Governed by Federal Common Law and Displaced by the Clean Air Act

As two federal courts facing nearly identical climate tort lawsuits have previously held, because Plaintiff's claims "are ultimately based on the transboundary emission of greenhouse gases" the claims "arise under federal common law and require a uniform standard of decision." *City of New York v. B.P. P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (quoting *Tex. Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); *California v. B.P. P.L.C.*, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018). Plaintiff's interstate pollution claims "raise[] exactly

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[13] Moreover, the proposition that lapse of time does not preclude a finding of causation is not supported by the Restatement to which Plaintiff cites. Opp. at 38. The Restatement explicitly notes that lapse of time is an important consideration in determining causation. Restatement (Second) of Torts § 433(c). The comment to which Plaintiff cites also makes clear that "[w]here the time has been long, the effect of the actor's conduct may thus become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed." *Id.* cmt. f.

[14] *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 122 n.43 (2d Cir. 2013) is distinguishable as well. There, the court's rejection of defendants' causation argument hinged not on lapse of time, but on geographical remoteness. *Id.* at 121–22.

the sort of federal interests that necessitate a uniform solution," and must be governed by federal common law. *California v. B.P. P.L.C.*, 2018 WL 1064293, at *2; *City of New York*, 325 F. Supp. 3d at 471. And as the Supreme Court held in *AEP*, federal common law claims seeking to regulate interstate greenhouse gas emissions are displaced by the Clean Air Act ("CAA"). *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("*AEP*") ("Congress designated [the EPA] as best suited to serve as primary regulator of greenhouse gases."); *see also* Mot. at 37–38.

Plaintiff tries to dodge the issue of how Rhode Island law could govern its interstate—and indeed, global—pollution claims by arguing that its claims "arise under and are pleaded under state law, and for that reason alone are not 'displaced' by the Clean Air Act." Opp. at 39. Plaintiff contends that the "Supreme Court clearly reached that holding in *AEP*." *Id.* Not so. Far from holding that climate change claims "arise under" state law, the Court dismissed plaintiffs' federal common law claims *on the merits* because they were displaced by the CAA, and explicitly declined to reach the availability of the state law claims plaintiffs had also pleaded because the parties had not "briefed preemption or otherwise addressed the availability of a claim under state nuisance law." *Id*. The Supreme Court simply noted that "the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal [CAA]."[15] 564 U.S. at 429 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 489, 491, 497 (1987)). In determining that plaintiff's federal common law claims lacked merit, the Supreme Court did not determine, as the State contends, that state common law claims were viable or that they must "arise under" state law. Opp. at 39. It simply left "open for consideration on remand" the question of whether state law claims based on "the law of each State where the defendants operate" were viable given, "*inter alia*, the preemptive

[15] For the reasons explained below, *see infra* II.C.1, the CAA also preempts Plaintiff's climate change claims as pleaded under state law.

effect of the [CAA]." 564 U.S. at 429 (citing *Ouellette*, 479 U.S. at 488). However, the lower court never had occasion to reach the merits of the state law claims because plaintiffs declined to pursue those claims on remand. Notice of Voluntary Dismissal, *Connecticut v. Am. Elec. Power Co.*, No. 04-CV-05669, ECF No. 94 (S.D.N.Y. Dec. 6, 2011). Notably, the plaintiffs' state law claims in *AEP* were brought under "the law of each State where the defendants operate[d] power plants," e.g., the law of the source state of the greenhouse gas emissions, as required by the Supreme Court's decision in *Ouellette*, 479 U.S. 481 (1987) (holding that Vermont law could not apply to New York point source of pollution even where it was causing injury in Vermont). That question is not relevant here, because Plaintiff's claims are not based on Defendants' Rhode Island-based conduct. And the absurdity of applying state law to Plaintiff's claims here becomes apparent, as they would have to be pleaded under the laws of at least all 50 states given that Plaintiff seeks damages for harms caused by emissions from all 50 states and around the world.

Plaintiff also contends that the remand order issued by the District of Rhode Island "already held" that "[b]ecause the State's claims are pleaded entirely under state law, displacement of those claims by the CAA is impossible." Opp. at 39. But in granting remand, the federal District Court explicitly declined to determine the appropriate source of law for Plaintiff's claims, finding that this was a merits question relating to the viability of those claims. *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019). Defendants believe that the District Court erred in finding that the appropriate source of law for Plaintiff's interstate pollution claims was a merits question instead of an issue it was required to resolve in determining whether it had federal question

jurisdiction;[16] however, the District Court explicitly declined to "peek beneath the purported state-law façade" of Plaintiff's complaint to determine the appropriate source of law, even if "to have a chance at viability" the claims would need to be "based on federal common law." *Chevron Corp.*, 393 F. Supp. 3d at 148.

Plaintiff's decision to plead its claims under state law does not answer the question of the appropriate source of law. As the Supreme Court has repeatedly emphasized, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *see also AEP*, 564 U.S. at 421. Plaintiff's claims seek relief for injuries caused by cumulative, global greenhouse gas emissions. *See* Mot. at 41 n.28. Allowing these claims to move forward under state law will lead to a morass of conflicting state law standards applicable to the same worldwide conduct.

C. Federal Law Preempts Any State Law Claims

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

The interstate pollution claims pleaded by Plaintiff also fail as a matter of law because the CAA preempts application of Rhode Island law to greenhouse gas emissions outside the State. *See Ouellette*, 479 U.S. at 499 (holding that the Clean Water Act preempts all state law tort claims other than claims applying the law of the source state); Mot. at 42.

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[16] As the First Circuit held in *United States v. Swiss American Bank, Ltd.*, determining whether a claim arises under federal law requires a "two-part approach [that] involves what may be characterized as the source question and the substance question. The former asks: should the source of the controlling law be federal or state? The latter (which comes into play only if the source question is answered in favor of a federal solution) asks" how the Court should "defin[e] the substance of the rule[.]" 191 F.3d 30, 43 (1st Cir. 1999) (citing *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)). The source of law is thus a separate question from whether a plaintiff can state a claim under that law. Whether a claim "arises under" federal law "turns on the resolution of the source question"—which is not a merits determination—and thus should have been determined by the District Court. *Id*. at 44.

Plaintiff argues that "the *Ouellette* source state rule" is limited to "cases involving pollution from a stationary point source," and that "common law claims like those here that challenge unlawful marketing of a dangerous product rather than a stationary source of pollution" are not preempted. Opp. at 40–41. Plaintiff's attempt to distinguish *Ouellette* fails. Even accepting at face value Plaintiff's characterization of its claims as being premised on "unlawful marketing of a dangerous product," Opp. at 41, it is not the marketing itself that led to Plaintiff's injuries, but the greenhouse gas emissions due to combustion of fossil fuels allegedy caused by the marketing. Compl. ¶ 2 ("[A]tmospheric CO_2 and other greenhouse gases [are] the main driver of the gravely dangerous changes occurring to the global climate."); *see also* Mot. at 8 n.6. Plaintiff does not allege that these emissions came from Rhode Island sources—indeed, the State does not identify the source of any of the emissions and admits that greenhouse gas molecules "quickly diffuse and comingle in the atmosphere" and cannot be "trace[d] . . . to their source." *See* Compl. ¶ 248. Plaintiff also concedes that the vast majority of these emissions stem from combustion of fossil fuels produced by third parties not before this Court. *See id.* ¶ 7. Thus, even if Plaintiff does not base liability on Defendants' *own* emissions—apparently attempting to avoid the holdings of *AEP* and *Kivalina*—it is clear that in seeking to apply Rhode Island law to Defendants' allegedly tortious marketing and promotion, Plaintiff is seeking to regulate greenhouse gas emissions by third parties outside of Rhode Island (which, under Plaintiff's theory, are the result of that allegedly tortious marketing and promotion). Plaintiff cannot contend otherwise because to do so would admit that relief from Defendants' allegedly deceptive promotion and marketing would have no effect on fossil fuel consumption and emissions.

Ouellette and its progeny under both the CWA and CAA hold that while states may impose more stringent standards than those imposed by the EPA "on *their own* point sources," when it

comes to "[a]pplication of an affected State's law to an out-of-state source," state law is preempted. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194 (3d Cir. 2013) (quoting *Ouellette*, 479 U.S. at 497); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) ("[C]laims based on the common law of a non-source state . . . are preempted by the [CAA.]"); *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 304 (4th Cir. 2010) (disallowing plaintiffs from "ascrib[ing] to a generic savings clause [in the CAA] a meaning that the Supreme Court in *Ouellette* held Congress never intended"). Because *Ouellette* would require this Court to apply Rhode Island law to sources not merely in a neighboring state, but in all 50 states and around the world, Plaintiff's claims under Rhode Island law are preempted by the CAA.[17]

Plaintiff contends that Rhode Island law may apply because the Complaint seeks "local remedies for local harm," but that was also true in *Ouellette*—property owners in Vermont sought "local remedies" (damages and remediation) for "local harm" (pollution on the Vermont side of the lake). The Supreme Court nonetheless found the Vermont-law claim preempted because only source-state law could apply. *See Ouellette*, 479 U.S. at 494 ("[W]e conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.").

Plaintiff analogizes this case to *Counts v. General Motors, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), in which a federal district court rejected a CAA preemption argument, Opp. at 42, but *Counts* is inapposite. In *Counts*, the Court found that the CAA did not preempt breach of contract, fraudulent concealment, and deceptive advertising claims against an automobile

[17] Insofar as Plaintiff's claim is premised on mobile third party combustion of fossil fuels and the attendant third-party greenhouse gas emissions from mobile sources, such an approach entirely fails to consider the comprehensive CAA preemption scheme that limits state regulation under Title II of the CAA. *See* 42 U.S.C. §§ 7416, 7543, 7545(c)(4).

manufacturer based on the allegation that GM installed "defeat devices" in vehicles to make them appear more fuel efficient in testing. 237 F. Supp. 3d at 572. The plaintiffs in *Counts* were not claiming damages based on injuries stemming from the emissions themselves but based on injuries from the deception, tied to the decreased value of their less-efficient vehicles. *Counts*, 237 F. Supp. 3d at 582. Those claims plainly were not an attempt "to tighten emissions regulations or introduce separate state emissions regulations," the court held that they were not preempted by the CAA. *Id*. at 592. But "tighten[ing] emissions regulations" and introducing a "separate" standard based on Rhode Island law is exactly what Plaintiff seeks to do here. Plaintiff claims it only seeks damages and does not seek to stop production and consumption of fossil fuels, but the gravamen of Plaintiff's complaint is that Defendants' activities led to consumption of fossil fuels at excessive levels.[18] *See* Compl. ¶ 152; Opp. at 2 ("[N]o law authorizes Defendants to produce and promote fossil fuels at levels they knew would be harmful[.]"). Plaintiff does not specify what the level should be or should have been—although its Complaint alleges that a 15% annual reduction in global greenhouse gas emissions would be required to "restore the Earth's energy balance by the end of the century"—leaving this Court, rather than the EPA, to decide that issue and determine damages accordingly. Compl. ¶ 187. Allowing these claims to move forward thus implicates the very policy considerations Plaintiff admits underlie *Ouellette* by creating a risk of "contradictory or inconsistent obligations that would undermine the CAA's permitting scheme," Opp. at 42, and unleashing a "chaotic patchwork of state standards" that federal preemption seeks to avoid. *Counts*, 237 F. Supp. 3d at 592 (internal quotation omitted).

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[18] Plaintiff's position here is a smokescreen. As the Rhode Island Supreme Court ruled in *Lead Industries*, the primary remedy for a nuisance is abatement. 951 A.2d at 449. The State contorts that plain concept by arguing that abatement here means building seawalls. One does not abate climate change by collecting a damages award that the State may or may not use to build sea walls.

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

In response to Defendants' argument that Plaintiff's claims are barred by the multiple federal statutes promoting the production and sale of domestic oil, Plaintiff mischaracterizes the breadth of its claims and understates their plain conflict with federal energy law. Under fundamental separation-of-powers principles, Plaintiff's claims implicate issues that are committed to the political branches. Plaintiff's claims, if adjudicated under Rhode Island law, would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in various energy statutes. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Plaintiff contends that "[g]enerally invoking a federal interest" is not a sufficient basis for preemption of state law, and characterizes its claims as merely seeking to "hold[] [Defendants] accountable for their long-standing disinformation campaign," which it contends is not in conflict with the "vague federal interest in promoting domestic oil production" reflected in the statutes cited by Defendants. Opp. at 43–44.[19] But Plaintiff's claims necessarily rest on Defendants' production and sale of fossil fuels. *See, e.g.*, Compl. ¶ 2 (claiming that "pollution from the production and use" of Defendants' fossil fuel products has caused "gravely dangerous changes . . . to the global climate"); *id.* ¶ 49 (alleging that "pollution largely from the production, use, and combustion of fossil fuel products[] is the dominant cause of global mean sea level rise"); ¶ 229a (noting Defendants' control of "every step" of the fossil fuel supply chain). Plaintiff's claims are in conflict with federal law because they ultimately seek to limit, or discourage through

[19] Plaintiff seemingly concedes that the federal government promotes the use of fossil fuel products, despite knowing about the effects of climate change, yet it seeks tort liability from Defendants based on the same alleged knowledge and promotion.

large damage awards, activities that federal law seeks to promote. As the Supreme Court recognized in *Ouellette*, subjecting Defendants' lawful business activities to expansive tort liability may force them to withdraw from these activities altogether. *See Ouellette*, 479 U.S. at 495 (noting that common law environmental tort damage awards lead to defendants "chang[ing] methods of doing business and controlling pollution to avoid the threat of ongoing liability"). If Plaintiff's claims were allowed to proceed, Defendants would face the threat of litigation in all 50 states and conflicting judgments about the same underlying activity, and given that the production and promotion on which Plaintiff relies as causing its alleged harms occurred in the past, there would be nothing Defendants could do to avoid this liability. This would undoubtedly conflict with the Energy Policy Act's direction to "increase the recoverability of domestic oil resources." 42 U.S.C. § 13411(a); *see also* 42 U.S.C. § 15927(b) ("[O]il shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports[.]"). Plaintiff's claims undermine the clear and manifest purpose of federal energy law and policy, including the production and marketing of federally owned oil and gas resources, and on these grounds should be dismissed.

The allegations here are very different from *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238 (1984), on which Plaintiff relies for the proposition that "[o]bstacle preemption exists where 'state law stands as an obstacle to the accomplishment of Congressional objectives.'" Opp. at 43. In *Silkwood*, the company's failure to comply with federal guidelines caused a nuclear accident at a single location; state law claims for punitive damages were not preempted because they were not an attempt by the state to regulate *conduct* already regulated by the federal government. 464 U.S. at 244–45. In contrast, here, the dangers Plaintiff complains of are not the result of any failure on

the part of Defendants to comply with applicable law; rather, they are a result of the normal use of Defendants' products across the globe, and Plaintiff seeks to regulate Defendants' conduct in producing and promoting them.

In arguing that conflict with "vague federal interests" is not sufficient to support preemption, Plaintiff also relies on the Second Circuit's determination that state law nuisance claims aimed at pollution of groundwater by MTBE were not preempted by the CAA, even though it encouraged the use of gasoline additives, of which MTBE was one, to reduce emissions. Opp. at 44. But there, the tortious conduct was not the mere use of MTBE, but faulty supply and storage practices that caused gasoline (and its component MTBE) to leak into groundwater. *MTBE*, 725 F.3d at 104. There is no similar allegation here—again, even with respect to Plaintiff's allegation of deceptive promotion, it was not the promotion itself that caused the alleged harms, or even the increased production allegedly resulting from the promotion, it was the supposed increase in consumption of fossil fuels by consumers—an activity whose lawfulness Plaintiff does not dispute.

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

Plaintiff argues that its claims do not violate the dormant Commerce Clause, again characterizing its Complaint as seeking "a local remedy for locally suffered harms" with limited extraterritorial effect. Opp. at 45. Once again, Plaintiff misstates the scope of its own claims and the relief sought.

Plaintiff's claims concern fossil fuel production in Texas, that became a refined product in Louisiana, then sold to a customer in Mississippi, who hears advertising from a Tennessee media market, and emits greenhouse gases in Mississippi. There is no Rhode Island connection there, and Rhode Island law cannot apply to that conduct. *See City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018) (Plaintiff's "breathtaking[ly]" broad claims "would reach the sale of fossil fuels anywhere in the world"). The State may claim to be seeking only money

damages, but "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Imposition of unlimited tort liability on this select group of energy companies would undoubtedly affect their ability to conduct their businesses.

These claims are vastly different from the securities fraud claims at issue in *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018) (appeal pending), which focused on alleged statements to investors. And Plaintiff's claims go far beyond allegations of a deceptive marketing campaign by Defendants—the harms alleged and the requested relief are tied to production and sale of fossil fuels, which Plaintiff claims tie Defendants to 15% of global greenhouse gas emissions, not the value of products sold through deception. Compl. ¶ 7. Plaintiff makes no allegation regarding what subset of these emissions are attributable to the alleged "deception." Allowing the claims to proceed would thus require this Court to regulate lawful business activities in all 50 states and around the world, including fossil fuel sales and emissions that are not the result of deception. Plaintiff's claims will thus have the "practical effect of regulating commerce occurring wholly outside [Rhode Island]." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989) (internal quotation marks omitted). Rhode Island law simply cannot regulate worldwide conduct. *Cf. K&W Automotive, LLC v. Town of Barrington*, 224 A.3d 833, 838 (R.I. 2020) (striking a local ordinance for its Rhode Island-wide effect and noting that "the potential impact of municipalities across the state enacting their own various regulations would have some significance" (citing *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 122 (R.I. 1992))).

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

Plaintiff argues that its claims are not barred by the foreign affairs doctrine because they "do not implicitly or explicitly seek to change foreign policy" and their "impacts on foreign companies or governments" are "incidental" and "insufficient to invoke the [foreign affairs]

doctrine." Opp. at 46. Plaintiff repeats that "the State seeks local remedies for concrete local harms to public resources that fall well within its traditional powers," and retreats from the 15% annual reduction in CO_2 emissions worldwide it claims will be necessary in its Complaint. Opp. at 47. But nothing in Plaintiff's claims hinges on Rhode Island injury or effect.

As the Supreme Court has held, "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). In determining whether such "exercise of state power" should yield to the foreign policy of the U.S. Government, courts "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted [by the foreign affairs doctrine]." *Garamendi*, 539 U.S. at 426. As with the California statute at issue in *Garamendi*, Plaintiff's claims will interfere with the U.S. Government's international efforts to address climate change (not to mention its domestic regulation of greenhouse gases, addressed above). *See* Mot. at 40–44; *supra* II.C.1–2. As Plaintiff asserts, "climate change is a global crisis," Opp. at 48, and has been the subject of international concern and action. Plaintiff seeks to usurp the federal government's prerogative in this area by suing a select group of energy companies (which it admits correspond to only a fraction of world supply of fossil fuels) to pay for its alleged climate change injuries. Plaintiff contends that it does not seek to regulate, but merely seeks "local remedies"—*i.e.*, damages, for "local harms." But as the Supreme Court has recognized, "regulation can be . . . effectively exerted through an award of damages," which is a "potent method of governing conduct and controlling policy." *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012); *see*

also California v. Gen. Motors Corp., 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (dismissing climate change nuisance action because "by seeking to impose damages . . . Plaintiff's nuisance claims sufficiently implicate the political branches' powers over . . . foreign policy"). Rhode Island's "traditional powers" do not encompass the ability to regulate the global production, promotion, and consumption of fossil fuels. Compl. ¶ 19 (alleging that Defendants are responsible for "more than one in every seven tons of CO_2 and methane emitted worldwide"); *City of New York*, 325 F. Supp. 3d at 475 ("[Plaintiff] seeks to hold Defendants liable for the emissions that result from their worldwide production, marketing, and sale of fossil fuels.").

Moreover, Rhode Island's approach to addressing climate change through tort actions is in conflict with federal foreign policy. As the federal government has itself noted in an amicus brief, "[a]pplication of state nuisance law . . . would substantially interfere with the ongoing foreign policy of the United States." Br. for the United States as Amicus Curiae at 16, *City of New York v. B.P. P.L.C.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019); 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) (noting the case's "potential to shape and influence broader policy questions concerning domestic and international energy production and use"). "There is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). The fact that Plaintiff alleges a "decades-long campaign of deception" does not change the fact that its injuries stem from global conduct that has been the subject of decades of international negotiations. Mot. at 48; Compl. ¶ 151.

As in *Garamendi*, where "California [sought] to use an iron fist where the President has consistently chosen kid gloves," 539 U.S. at 427, Rhode Island seeks to address climate change

through tort law, an approach that conflicts with the combination of domestic regulation of greenhouse gases and international cooperation the federal government has employed. As opposed to the country-specific greenhouse gas reduction goals contemplated by the Paris Agreement, Rhode Island seeks to hold a small subset of energy producers responsible for its alleged climate change injuries. As in *Garamendi*, it is not up to this Court to determine "the efficacy of the one approach versus the other," since this Court's "business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress." 539 U.S. at 427.

Plaintiff relies on *Portland Pipe Line Corp. v. City of So. Portland* for the proposition that in order to "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.'" Opp. at 47. However, the conflict between Rhode Island's claims and the foreign policy of the U.S. is more than incidental—creating a climate change tort for use against private actors is at odds with the approach taken in the Paris Accords and Kyoto Protocols, which focus on emission reductions at the national level, so that nation states have the flexibility to make the complex policy determinations required to balance the need for energy with the need to address climate change. Moreover, the ordinance in *Portland Pipe Line* was far more specific and limited than Plaintiff's nuisance theory, prohibiting the loading of crude oil onto marine tank vessels in South Portland, which interfered with a new use the plaintiff wanted to make of a preexisting

pipeline. *Portland Pipe Line Corp. v. City of So. Portland*, 947 F.3d 11, 14 (1st Cir. 2020); *Portland Pipe Line*, 288 F. Supp. 3d at 383.[20]

Plaintiff fails to address what it calls the "laundry list of international accords" related to climate change identified by Defendants in their motion. Opp. at 48. Instead, Plaintiff makes a slippery slope argument, arguing that "[i]f 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." Opp. at 48. Though the State identifies "opioid medication, automobiles," and unspecified "environmental" claims as purported examples of the tort claims that would be preempted, it identifies no specific claims which would be impacted.

Nor does it matter, as Plaintiff contends, that Defendants challenge Plaintiff's common law claims instead of a statute. Opp. at 46. *Garamendi* refers to "state action" of any kind, not simply legislative enactments. 539 U.S. at 418; *see also In re Assicurazioni Generali, S.P.A.*, 340 F. Supp. 2d 494, 502 (S.D.N.Y. 2004) (holding that *Garamendi* required dismissal of a claim under federal law and "of the benefits claims arising under generally applicable state statutes and common law"); *Shiguago v. Occidental Petroleum Corp.*, 2009 WL 10671585, at *7 (C.D. Cal. Aug. 5, 2009) (finding the doctrine barred state common law claims); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187–88 (C.D. Cal. 2005) (same).

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[20] This decision was appealed to the First Circuit, which certified questions to the state supreme court regarding local state preemption, noting that, "In accordance with well-settled constitutional avoidance doctrine, *see Vaquería Tres Monjitas, Inc. v. Pagan*, 748 F.3d 21, 26 (1st Cir. 2014), we sidestep the federal quagmire for the moment. This dispute raises important questions of state law preemption doctrine and statutory interpretation that (in our view) are unresolved and may prove dispositive." *Portland Pipe Line*, 947 F.3d at 13. That certification request is pending.

City of Oakland and *City of New York*, in which federal district courts found that virtually identical claims encroached on the primacy of the federal executive branch in foreign affairs, are directly on point, contrary to Plaintiff's characterizations. Opp. at 47. The separation of powers and extraterritoriality concerns underlying the *City of New York* and *Oakland* decisions apply with equal, if not greater, force to state law claims. "[T]he Supreme Court has endorsed repeatedly, including in *Garamendi*, the notion of executive primacy in the sphere of foreign affairs." *In re Assicurazioni Generali S.p.a.*, 340 F. Supp. 2d 494, 502 (2d Cir. 2004) (collecting cases relying on the unique responsibility of the executive branch over foreign affairs). A single state does not have the power to usurp that executive primacy that other branches of the federal government do not have.

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

Defendants moved to dismiss Plaintiff's claims on the grounds that they violate due process by seeking retroactive punishment for conduct that was—and still is—lawful. Plaintiff responded by arguing that retroactive tort liability for lawful conduct is permissible and that, in any event, their claims are based on Defendants' alleged "decades-long campaign of deception to hide known serious harms caused by their products." Opp. at 48.

Plaintiff does not dispute that Defendants' production and sale of fossil fuels were and remain legal and encouraged by law, and yet Plaintiff seeks to impose liability for this conduct. While Plaintiff also claims an alleged campaign of "deception," it relies on the cumulative effects of global greenhouse gas emissions over time as causing its alleged injuries. *See* Compl. ¶ 7. Thus, Defendants' production and sale of fossil fuels underlie all of Plaintiff's claims.

The Supreme Court has held that a "State cannot," consistent with due process, "punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 421 (2003); *see also BMW of North Am., Inc. v. Gore*, 517 U.S. 559,

573 (1996) (prohibiting an attempt to "impose sanctions . . . to deter conduct that is lawful in other jurisdictions"). That *State Farm* pertained to punitive damages is not a meaningful point of distinction as, notably, many of Plaintiff's claims seek punitive damages. *See* Compl. ¶¶ 236, 249, 262, 283, 292, 304, 314 (seeking punitive damages). Plaintiff relies on *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991), but that case pertained to the retroactive application of a court decision to other nonparties operating under similar facts. Here, Defendants are the first and only parties on which Plaintiff seeks to impose new, sweeping tort liability, for conduct never previously deemed illegal.

Lastly, Plaintiff also misconstrues a test adopted by the Rhode Island Supreme Court. *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1153 (R.I. 1994) involved the Court's adjustment of an anachronistic common law doctrine. This was not a new law; the Court walked through the various ways other states had adjusted their doctrines, and followed the approach of a neighboring state. *Id*. at 1150–52. Likewise, *Marran v. Gorman*, 359 A.2d 694 (R.I. 1976) concerned the retroactive application of a U.S. Supreme Court opinion to an ongoing litigation that had been pending for several years prior (and the court there applied the opinion "in a purely prospective sense"). *Id*. at 696. Neither case involved massive retroactive tort liability for conduct lawful throughout the nation, and in which the Plaintiff itself still engages.[21] Plaintiff's claims seek to

[21] Plaintiff's claims would not survive even application of the test set out in Rhode Island case law. The test looks to: "(1) whether the new principle established was one whose adoption was clearly foreshadowed; (2) whether retroactive application will further or retard the purposes which motivated the adoption of the rule; and (3) whether inequitable results will ensue from a retroactive application." *Marran*, 359 A.2d at 653 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)). Establishing liability for these claims would be unprecedented and would conflict with established precedent of the U.S. Supreme Court. Inequitable results would certainly ensue—Defendants could face enormous liability and new regulations from every jurisdiction in the country. And it is certain that Plaintiff's goal will not be reached by applying retroactive liability; the Complaint makes clear the worldwide steps needed to stem climate change.

punish Defendants for lawful conduct, and should be dismissed as a violation of Defendants' due process rights.

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

Defendants moved to dismiss Plaintiff's claims on the grounds that: (1) it seeks to punish Defendants' speech and lobbying, Conf. Tr. at 9:9–10, Nov. 7, 2019; and (2) it targets speech protected by the First Amendment and the Rhode Island Strategic Litigation Against Public Participation Act ("anti-SLAPP Act"), R.I. Gen. Laws § 9-33-2. In response, Plaintiff contends that its Complaint does not target protected speech and that misleading commercial speech is not protected. Opp. at 49–51.

At the outset, Plaintiff fails to allege any misrepresentations at all on the part of most Defendants. Plaintiff largely targets Defendants "by and through their trade association memberships." Compl. ¶ 172; *see also id*. ¶¶ 165–66, 169–71. But this is not enough. "A member of a trade group or other similar organization does not necessarily endorse everything done by that organization or its members." *Pfizer Inc. v. Giles (In re Asbestos Sch. Litig.*), 46 F.3d 1284, 1290 (3d Cir. 1994). The few specific statements Plaintiff does identify are not misrepresentations; rather, the statements acknowledge the existence of climate change, but advocate for further studies to understand its underlying causes and effects. *See, e.g.*, Compl. ¶ 159 (alleging that Exxon's CEO advocated for "time to better understand the climate system"); *id.* ¶ 154 ("emphazi[ng] the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse Effect"); *id*. ¶ 155 ("emphasiz[ing] scientific uncertainty"); *id*. ¶ 161 (acknowledging the lack of "economic alternative[] [energy sources] on the horizon"). The Complaint thus targets protected commercial speech.

Moreover, although Plaintiff purports not to challenge Defendants' lobbying, nearly every statement attributed to Defendants in the Complaint comprises petitioning and lobbying activity.

See, e.g., *id.* ¶¶ 169–72 (describing the activities of various trade groups); *id.* ¶ 166 (alleging that "Defendants mounted a campaign against regulation of their business practices"). Lobbying activity is protected by the First Amendment. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961); *United Mine Works of Am. v. Pennington*, 381 U.S. 657, 671 (1965). Lobbying activity is also protected by the Rhode Island anti-SLAPP Act, which "emulates the First Amendment." *See* Opp. at 50. Plaintiff has not made allegations sufficient to establish application of the "sham exception," a narrow exception applicable to activities that "are not genuinely aimed at procuring favorable governmental action at all[.]" *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)). Indeed, Plaintiff alleges the opposite—that Defendants sought to influence government action in a manner favorable to Defendants and succeeded in doing so.[22] *See, e.g.*, Compl. ¶ 122 (Exxon scientists seek to "influence possible legislation"); *id.* ¶ 166 (alleging that "Defendants mounted a campaign against regulation of their business practices"); *id.* ¶ 172 (alleging that Defendants' activity "by and through their trade association memberships" has enabled them to "evade regulation of the emissions resulting from use of their fossil fuel products"); Br. for Senators Sheldon Whitehouse, Jack Reed, and Edward Markey at 8–9, *Rhode Island v. Chevron Corp.*, No. 19-1818 (1st Cir. Jan. 16, 2020) (describing Defendants' lobbying activities). This is the core of what *Noerr-Pennington* protects. Plaintiff's claims should thus be dismissed as barred by the First Amendment and the Rhode Island anti-SLAPP Act.

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[22] To the extent that Plaintiff alleges improper means of lobbying on the part of Defendants, such conduct is still protected by the First Amendment, as the sham exception is not for Defendants who "genuinely seek[] to achieve [a] governmental result, but do[] so through improper means." *City of Columbia*, 499 U.S. at 380 (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 508).

III. CONCLUSION

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

Dated: April, 27 2020

Respectfully submitted,

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Case Number: PC-2018-4716
Filed in Providence/Bristol County Superior Court
Submitted: 4/27/2020 8:28 PM
Envelope: 2569600
Reviewer: Zoila C.

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I served this document through the Rhode Island Judiciary's Electronic Filing System on all counsel who are registered for e-service. This document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

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