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Plaintiffs,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; SHELL PLC; SHELL OIL COMPANY; and AMERICAN PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

Docket No. MER-L-1797-22

Civil Action
CBLP Action

JOINT OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

Plaintiffs the Attorney General of New Jersey and two of its agencies (collectively, the "State" or "Plaintiffs") seek to impose liability on thirteen energy companies and an energy industry trade association under *state* law for the alleged effects of *global* climate change. While the state-law labels Plaintiffs attach to their claims may be familiar, the substance and reach of the claims are extraordinary. Plaintiffs seek to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people outside of New Jersey rely to heat their homes, power their hospitals and schools, produce and transport their food, and manufacture countless items essential to the safety, wellbeing, and advancement of modern society—in the process distorting the scope and content of state tort law beyond recognition. Allowing such claims to proceed would not only usurp the power of the legislative and executive branches (both federal and state) to set climate policy, but would do so retrospectively and far beyond the geographic boundaries of this State. It is therefore unsurprising that "[n]o plaintiff has ever succeeded in bringing" such claims "based on global warming." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). This Court should likewise dismiss the Complaint.

First, although Plaintiffs purport to plead state-law claims, state law cannot constitutionally apply here and thus is preempted. As the U.S. Supreme Court has long made clear, the federal Constitution's structure generally precludes States from using their own laws to resolve disputes caused by out-of-state and worldwide conduct. Thus, in cases involving "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Consistent

with this principle, the Supreme Court has consistently recognized that one State cannot apply its own law to claims that "'deal with air and water in their ambient or interstate aspects'"; in that context, "borrowing the law of a particular State would be inappropriate." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421–22 (2011) ("*AEP*") (citation omitted); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") ("basic interests of federalism . . . demand[]" this result). Such matters "involving 'uniquely federal interests'" are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted).

Every federal court to consider this question has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. Most recently, the U.S. Court of Appeals for the Second Circuit affirmed dismissal of a case raising substantially similar claims. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Describing "the question before us" as "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under [state] law," the court held: "Our answer is simple: no." *Id*. at 91. This is because "disputes involving interstate air . . . pollution," such as climate change litigation, "implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *Id*. at 91–92. When a plaintiff seeks "to hold [energy companies] liable, under [state] law, for the *effects of emissions made around the globe*," "[s]uch a sprawling case is simply beyond the limits of state law." *Id*. at 92 (emphasis added).

The same is true here: the federal system does not permit a State to apply its laws to claims seeking redress for injuries allegedly caused by interstate or worldwide emissions. But Plaintiffs

here seek to impose liability based on the theory that Defendants allowed—through alleged deception and failure to warn—emissions to enter the worldwide atmosphere at a level that Plaintiffs believe to be too high and thus unlawful. The Constitution bars the application of state law here to avoid subjecting the same interstate and worldwide emissions to adjudication under conflicting state laws, and thus preempts the state-law causes of action Plaintiffs assert.

***Second*,** Plaintiffs' claims are preempted by the Clean Air Act. In an analogous matter, the U.S. Supreme Court held more than thirty years ago that the Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source" because doing so would "upset[] the balance of public and private interests so carefully addressed by the Act." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). The preemptive scope of the Clean Air Act is materially identical to that of the Clean Water Act. The "Clean Air Act entrusts such complex balancing" of total permissible nationwide greenhouse gas emissions "to EPA." *AEP*, 564 U.S. at 427. The Clean Air Act thus precludes Plaintiffs' attempt to use New Jersey law to obtain damages for injuries allegedly caused by innumerable worldwide sources of greenhouse gas emissions.

Third, Plaintiffs' claims raise vital questions of public policy that are non-justiciable under the political question doctrine. Indeed, the sweeping policy justifications that Plaintiffs assert in support of their claims underscore their unfitness for judicial resolution. Plaintiffs' claims lack the judicially discoverable and manageable standards required to ensure that the Court does not overstep its constitutional bounds and touch upon issues—including how to balance environmental interests with interests of economic growth, energy independence, and national security—that have been committed to the political branches.

Fourth, Plaintiffs' claims premised on Defendants' alleged scheme of "deception" allegedly to conceal the risks of climate change are barred by New Jersey's statute of limitations.

The Complaint fails to allege a single act of "deception" within the ten-year limitations period. In fact, the most recent alleged statement was made in 1998—*more than 24 years* before Plaintiffs filed their Complaint. Accordingly, any claims premised on such allegations should be dismissed.

Fifth, each of the putative state-law claims in Plaintiffs' Complaint fails on its own terms. As a threshold matter, Plaintiffs' claims for nuisance, trespass, negligence, and Impairment of the Public Trust are subsumed by the New Jersey Product Liability Act ("PLA"), because each of those claims asserts harm allegedly caused by Defendants' fossil-fuel products, and the PLA provides the exclusive remedy under New Jersey law for all product-liability theories of harm. And even if they were not subsumed, each of Plaintiffs' state-law claims is also independently meritless.

Plaintiffs' nuisance claims fail because New Jersey law does not recognize nuisances allegedly attributable to products, as opposed to the use of land. The New Jersey Supreme Court has squarely rejected attempts, like Plaintiffs' here, to expand nuisance law to cover the promotion and sale of lawful consumer products, explaining that "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance." *In re Lead Paint Litig.,* 191 N.J. 405, 423 (2007). In that case, and dispositive here, the Supreme Court declined to allow a public nuisance claim based on the promotion and sale of lead pigment, notwithstanding the harmful effects of lead poisoning, because doing so would "stretch the concept of public nuisance far beyond recognition and would create a new and *entirely unbounded tort* antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Id.* at 421 (emphasis added). Nor can Plaintiffs allege facts showing that Defendants exercised control over the "instrumentality" allegedly causing the nuisance—*i.e.*, the concentration of greenhouse gases in the Earth's atmosphere. Moreover, Plaintiffs improperly attempt to recover

damages as private plaintiffs, despite allegedly suffering injuries characteristic of a public entity and failing to plead any special injury.

Plaintiffs' trespass claim fails because New Jersey no longer favors common-law-trespass claims for environmental injury. Even if it did, Plaintiffs' trespass claim fails because it does not allege that Defendants or their products unlawfully entered Plaintiffs' property, and Plaintiffs never held exclusive possession of the subject property or the natural resources alleged to have been impacted.

Plaintiffs' negligence and failure to warn claims fare no better. These claims fail because Defendants owe no duty to warn Plaintiffs—let alone the entire world—about the potential dangers of using oil-and-gas products and those risks have been well known to Plaintiffs and the public for decades.

The Court should dismiss Plaintiffs' claim based on the Public Trust Doctrine because their allegations fall well outside the limits codified in N.J.S.A. § 13:1D-150. The Public Trust Doctrine preserves the public's right of access to tidally flowed waters and their adjacent shorelines, but as set forth in the Complaint, Defendants' alleged misconduct is limited to deception regarding their fossil-fuel products, not preventing New Jerseyans from accessing their public beaches. Plaintiffs' claim therefore falls outside the ambit of the Public Trust Doctrine and must be dismissed.

* * *

As Judge Alsup of the Northern District of California remarked in dismissing similar claims, "the development of our modern world has literally been fueled by oil and coal," and "[a]ll of us have benefitted" from their development—including Plaintiffs. *City of Oakland*, 325 F. Supp. 3d at 1023; *see also City of New York*, 993 F.3d at 86 ("[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via

FedEx, Amazon, or UPS—contributes to global warming."). Fossil fuels support the safety, health, security, and wellbeing of our Nation—and that of billions of consumers worldwide. Plaintiffs ask this Court to ignore the central importance of fossil fuels in the world economy and, instead, to impose liability and damages on a select group of energy companies under *New Jersey* law because of their—and many others'—*global* production, promotion, and distribution of those lawful products and their end-use emissions.

II. BACKGROUND

This lawsuit is part of a series of ill-conceived climate change-related actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Every federal court to consider these actions on motions to dismiss has dismissed them as nonjusticiable or non-viable.

The first such lawsuit unsuccessfully asserted state and federal nuisance claims against automobile companies for alleged contributions to climate change. *See California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissing for failing to state a claim and because claims were nonjusticiable).[1] The next round of litigation asserted claims against direct emitters, such as power companies, but that effort, too, failed. *See AEP*, 564 U.S. at 429 (holding that claims seeking abatement of alleged public nuisance of climate change fail because the federal common law that necessarily governs was displaced by the Clean Air Act); *Kivalina*, 663 F. Supp. 2d at 868 (dismissing as nonjusticiable and for lack of standing federal common-law nuisance claims against energy and utility companies); *Native Vill. of Kivalina v. ExxonMobil*

[1] Pursuant to Rule 1:36-3, all unpublished opinions relied on herein are included as exhibits to the Certification of Joshua D. Dick, Esquire.

Corp., 696 F.3d 849, 854 (9th Cir. 2012) (plaintiffs alleged that defendants "misle[d] the public about the science of global warming").

Undeterred, Plaintiffs reach even further back in the supply chain by suing companies that provide the raw material used by direct emitters[2]—that is, the fuel that billions of people depend on every day. Over the past six years, States and municipalities across the country, largely represented by the same private counsel, have brought more than two dozen similar cases against energy companies seeking damages for the alleged impacts of climate change. Only a few of these cases have proceeded to the merits, but, in those that have, *federal courts uniformly have dismissed them for failure to state a claim*. *See City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81; *City of Oakland*, 325 F. Supp. 3d at 1019. *But see City & Cty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022), *appeal pending*, SCAP-22-0000429 (Haw.). As here, plaintiffs in those cases alleged that the defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," and "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *City of New York*, 993 F.3d at 86–87; *see also, e.g.*, Compl. ¶¶ 1–20. And, like Plaintiffs here, those plaintiffs suggested that the defendants are "primarily responsible for global warming and should bear the brunt of these costs," even though "every single person who uses gas and electricity . . . contributes to global warming." *City of New York*, 993 F.3d at 86; *see also, e.g.*, Compl. ¶¶ 3–5, 49–53.

The Complaint here asserts eight causes of action: (1) failure to warn, (2) negligence, (3) Impairment of the Public Trust, (4) trespass, (5 & 6) public and private nuisance, and

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[2] Plaintiffs have also sued API, a trade association that does not sell, transport, or refine fossil fuels anywhere, let alone in New Jersey. *See* Compl. ¶ 30(a).

(7 & 8) violations of the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, *et seq.* Compl. ¶¶ 235–333. Plaintiffs seek compensatory damages; natural resource damages; punitive damages; abatement of the alleged nuisance and trespass; declaratory judgment, injunctive relief, and disgorgement under the CFA; and attorneys' fees and costs. *See* Compl. at 193–94 (Prayer for Relief).

Plaintiffs have characterized this case as being about Defendants' "decades-long campaign of marketing and deceptive promotion of oil, coal, and nature gas." Compl. ¶ 2. But fundamentally, Plaintiffs' alleged injuries depend on the "sharp rise in atmospheric concentration of CO_2." *Id.* ¶ 45. The Complaint itself alleges that emissions are the mechanism of the alleged nuisance: "[f]ossil fuel emissions—especially CO_2–are far and away the dominant driver of global warming." *Id.* ¶ 4. As one court explained in dismissing similar claims: "The harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels." *City of Oakland*, 325 F. Supp. 3d at 1024; *see also City of New York*, 325 F. Supp. 3d at 471–72 ("[T]he amended complaint makes clear that the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels.").

Emissions, the mechanism of Plaintiffs' alleged injuries, are the result of billions of daily choices—over more than a century and around the world, by governments, companies, and individuals—about what types of fuels to use and how to use them. Plaintiffs candidly admit that *worldwide* conduct, not conduct that occurred in New Jersey, caused its alleged injuries. Compl. ¶¶ 3–8. As Plaintiffs acknowledge, "it is not possible to determine the source of any particular individual greenhouse gas molecule in the atmosphere attributable to anthropogenic sources, because such greenhouse gas molecules do not bear markers that permit tracing them to their source,

and because greenhouse gases quickly diffuse and comingle in the atmosphere." *Id.* ¶¶ 248, 266, 280, 293, 308. Moreover, Plaintiffs' requested relief seeks recovery from *all* harm caused by the purported effects of *all global emissions*, both in the past and in the future. *See* Compl. at 193–94 (Prayer for Relief). Plaintiffs' claims, therefore, seek to impose liability and damages for alleged conduct outside New Jersey and, indeed, around the world.

III. ARGUMENT

Defendants may raise "by motion" defenses to a plaintiff's claims, including "failure to state a claim upon which relief can be granted." *R*. 4:6-2(e). Courts deciding such motions are required to "search[] the complaint with liberality to ascertain whether the fundament of a cause of action may be gleaned." *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 177 (2021) (internal quotation marks omitted). Despite this "generous standard," New Jersey courts grant motions to dismiss where elements are missing or under-pled. *See, e.g.*, *Nostrame v. Santiago*, 213 N.J. 109, 126 (2013). Likewise, at the pleadings stage, New Jersey courts dismiss claims that are preempted by federal law. *See Glukowsky v. Equity One, Inc.*, 180 N.J. 49, 71–72 (2004).

A. Plaintiffs' Claims Are Preempted Because State Law Cannot Constitutionally Be Applied Here.

Because Plaintiffs seek damages for alleged harms caused by *interstate and international* emissions and *global* warming, their claims cannot be governed by state law. Under our federal constitutional system, States cannot use their laws to resolve claims seeking redress for injuries allegedly caused by out-of-state and worldwide emissions.

Federal law necessarily governs, and thus preempts, state-law claims seeking damages for interstate emissions. The U.S. Supreme Court has long held that—under the U.S. Constitution's structure—"a few areas, involving 'uniquely federal interests,' are so committed by the Constitution . . . to federal control that state law is pre-empted." *Boyle*, 487 U.S. at 504 (citation

omitted). These exclusively federal areas include "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," and other areas "in which a federal rule of decision is necessary to protect uniquely federal interests"; in such cases, "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 640–41 (quotation marks omitted). "[T]he Constitution implicitly forbids that exercise of power because the interstate . . . nature of the controversy makes it inappropriate for state law to control." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (quotation marks omitted).

Applying this principle, the U.S. Supreme Court has long explained that a State cannot apply its own law to claims dealing with "air and water in their ambient or interstate aspects"; in that context, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 421–22 (quotation omitted). The "basic interests of federalism . . . demand[]" that "the varying common law of the individual States" cannot govern such disputes. *Milwaukee I*, 406 U.S. at 105 n.6, 107 n.9; *see also Ouellette*, 479 U.S. at 488 ("interstate . . . pollution is a matter of federal, not state, law"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("state law cannot be used" to resolve such disputes).

Accordingly, "the basic scheme of the Constitution" requires that federal law govern disputes involving "air and water in their ambient or interstate aspects" because they are not "matters of substantive law appropriately cognizable by the states." *AEP*, 564 U.S. at 421 (quotations omitted). And Supreme Court precedent makes clear that "state law cannot be used" to resolve claims seeking redress for injuries allegedly caused by out-of-state pollution. *Milwaukee II*, 451 U.S. at 313 n.7.

For this reason, *every federal court* to consider this question has held that state law cannot be used to obtain relief for the alleged consequences of global climate change. For example, the

Second Circuit, in considering largely identical claims, squarely held that "a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law." *City of New York*, 993 F.3d at 91. The Second Circuit's decision is directly on point and demonstrates why Plaintiffs' claims must be dismissed. There, the plaintiff alleged that certain energy companies (including some Defendants here) were liable under state law for injuries caused by global climate change because of their "production, promotion, and sale of fossil fuels." *Id.* at 88. But the court held that such "sprawling" claims, which sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law." *Id.* at 92.

In reaching this conclusion, the Second Circuit emphasized that under our constitutional structure, federal law must govern because the dispute "implicate[d] two federal interests that are incompatible with the application of state law," namely, the "overriding need for a uniform rule of decision on matters influencing national energy and environmental policy" and the "basic interests of federalism." *City of New York*, 993 F.3d at 91–92 (cleaned up). As the court explained, applying state law would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93. That is why, as the Second Circuit noted, "[f]or over a century, a mostly unbroken string of [U.S. Supreme Court] cases has applied federal law to disputes involving interstate air or water pollution." *Id.* at 91. Consistent with this controlling precedent, the Second Circuit likewise recognized that federal law "preempts state law." *Id.* at 95. Other federal courts to consider the question have reached the same conclusion. *See City of New York*, 325 F. Supp. 3d at 471–72 (claims of this sort "are ultimately based on the 'transboundary' emission of greenhouse

gases," so "'our federal system does not permit the controversy to be resolved under state law'" (citation omitted)); *City of Oakland*, 325 F. Supp. 3d at 1022 (reaching the same conclusion). *But see City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380, Dkt. 618 (Haw. Cir. Ct. Mar. 29, 2022).

In *AEP*, eight States and various other plaintiffs sued five utility companies, alleging that "the defendants' carbon-dioxide emissions" had substantially contributed to global warming, thereby "creat[ing] a 'substantial and unreasonable interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." 564 U.S. at 418. But Justice Ginsburg, writing for the majority, similarly explained that such claims are fit for "federal law governance" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 421–22. The issues involve "questions of national or international policy," requiring "informed assessment of competing interests," and Congress and the "expert agency here, EPA," are "better equipped to do the job than individual district judges issuing *ad hoc*, case-by-case injunctions." *Id.* at 427–28; *see also id.* at 428 (noting that "judges lack the scientific, economic, and technological resources" that EPA possesses). Individual federal and state courts may not lawfully adjudicate such policy questions. As the United States has explained as *amicus* in a similar case, claims based on climate change-related injuries are "inherently federal in nature," and greenhouse gas "emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming." Oral Arg. Tr., *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, 2021 WL 197342, at *31 (U.S. Jan. 19, 2021).

This unbroken line of federal precedent should be followed here. The alternative—a patchwork of fifty different state-law answers to this necessarily global issue—would be unworkable and is preempted under our federal constitutional system. *See North Carolina ex. rel.*

Cooper v. TVA, 615 F.3d 291, 298 (4th Cir. 2010) ("If courts across the nation were to use the vagaries of [state] public nuisance doctrine to overturn the carefully enacted rules governing air-borne emissions, it would be increasingly difficult for anyone to determine what standards govern.").

Congress, of course, may displace federal common-law remedies—as it did for claims based on domestic emissions through the Clean Air Act—but such displacement does not allow state law to govern matters that it was never competent to address in the first place. As the Seventh Circuit has explained, a State "cannot apply its own state law to out-of-state discharges" even after statutory displacement of federal common law. *Illinois v. City of Milwaukee*, 731 F.2d 403, 409–11 (7th Cir. 1984). The Second Circuit, too, has recognized that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"; it concluded, such an argument is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98–99.

Federalism and comity concerns embodied in the Constitution also preclude the application of state law to claims like those asserted here. Climate change is by its very nature global, caused by the cumulative effect of actions far beyond the reach of any one State's borders. Applying state law to claims seeking redress for injuries allegedly caused by global climate change resulting from emissions around the world would necessarily require applying that law beyond the State's jurisdictional bounds. Thus, allowing state law to govern such areas would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Federal law necessarily governs and preempts state claims seeking damages for international emissions. State law also cannot apply here because Plaintiffs' claims are premised

on international emissions. Only federal law can govern claims based on foreign emissions, and "foreign policy concerns foreclose" any state-law remedy. *City of New York*, 993 F.3d at 101. A State may not dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Yet, that is exactly what Plaintiffs' state-law claims would do. If Plaintiffs succeed, Defendants may be subject to ongoing future liability for producing and selling fossil fuel products abroad unless they do so in the manner that New Jersey law is deemed to require (regardless of whether New Jersey law conflicts with that of Delaware, Hawaii, Maryland, or any of the other 50 States, to say nothing of foreign jurisdictions). That is the paradigmatic example of a State improperly using "damages" to "regulat[e]" an industry's extraterritorial operations, *Kurns v. R.R. Friction Prods. Corp*., 565 U.S. 625, 637 (2012) (quotation omitted), by forcing Defendants to "change [their] methods of doing business . . . to avoid the threat of ongoing liability," *Ouellette*, 479 U.S. at 495. "Any actions" Defendants "take to mitigate their liability" in New Jersey "must undoubtedly take effect across every state (and country)." *City of New York*, 993 F.3d at 92.

Plaintiffs do not seek to hold Defendants liable only for the "effects of emissions released" in New Jersey, or even in the United States. *City of New York*, 993 F.3d at 92. Rather, Plaintiffs "intend[] to hold [Defendants] liable . . . for the effects of emissions made *around the globe* over the past *several hundred years*." *Id.* (emphases added); *see, e.g.*, Compl. ¶ 1 ("[Defendants'] successful climate deception campaign had the purpose and effect of inflating and sustaining the market for fossil fuels, which . . . drove up greenhouse gas emissions, accelerated *global* warming, and brought about devastating climate change impacts . . . ." (emphasis added)). "In other words, [Plaintiffs] request[] damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *City of New York*, 993 F.3d at 92. And "[s]ince

'[g]reenhouse gases once emitted become well mixed in the atmosphere,' 'emissions in [New Jersey] may contribute no more to flooding in [New Jersey] than emissions in China.'" *Id.* at 92 (citation omitted). Plaintiffs thus would be imposing liability and standards of care, based on New Jersey tort law, on activities in other countries, and thus regulating conduct globally.

Because the Clean Air Act "does not regulate foreign emissions," federal common law is "still require[d]" to apply to extraterritorial aspects of claims challenging undifferentiated global emissions. *City of New York*, 993 F.3d at 95 n.7; *see also id*. at 101. Given that federal common law continues to apply in this area, even after the enactment of the Clean Air Act, it necessarily preempts Plaintiffs' state-law claims. *See Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used.").

This conclusion flows from the constitutional principle that States lack the power to regulate international activities or foreign policy and affairs, and that such matters "must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425. State "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), which calls for a unified federal law rather than a set of "divergent and perhaps parochial state interpretations," *Sabbatino*, 376 U.S. at 425.

Regardless of Plaintiffs' framing of their claims, this suit plainly seeks damages for alleged harms resulting from interstate and international emissions. There is no doubt that Plaintiffs' claims are predicated on interstate and international emissions. Plaintiffs seek damages for claimed injuries in New Jersey allegedly caused not by actions in New Jersey, but by the cumulative impact of actions taken in every State in the Nation and every country in the world. The Complaint repeatedly concedes this point, alleging that Defendants caused an increase in "*global* greenhouse gas pollution," Compl. ¶ 156, that "[f]ossil fuel emissions . . . are far and away the

dominant driver of *global* warming," *id.* ¶ 4 (emphasis added), and that it has "to mitigate and adapt to the consequences of climate change," *id.* ¶ 231. And Plaintiffs candidly acknowledge that "[*t*]*he mechanism*" of "global warming"—and thus of its alleged injuries—is "emissions." *Id.* ¶ 40 (emphasis added). In short, Plaintiffs identify no harms "other than those caused by emissions." *City of New York*, 993 F.3d at 97 n.8.

Plaintiffs thus seek to recover damages for harms caused by global greenhouse gas emissions. The effect of Plaintiffs' claims is to say that Defendants are responsible for having allowed—through alleged deception and failure to warn—some amount of emissions to enter the atmosphere that the State deems excessive and therefore unlawful. *See, e.g.*, Compl. ¶ 17 ("Defendants' concealment and misrepresentation of fossil fuel products' known dangers—together with their simultaneous promotion of those products' unrestrained use—drove fossil fuel consumption . . . , resulting in greater greenhouse gas pollution and more dire impacts from the climate crisis in New Jersey and elsewhere."). Irrespective of Plaintiffs' allegations of deception and failure to warn, however, Plaintiffs cannot use New Jersey tort law to regulate out-of-state activities that they believe resulted in excessive emissions. Plaintiffs' theory would use New Jersey law to impose a duty of care and standards on activities across the country and around the world, even if such activities are completely lawful in the jurisdictions where they took place.

Take, for example, Plaintiffs' failure to warn claim. Plaintiffs assert that failures to warn across the globe have resulted in increased consumption of oil and gas, leading to increased emissions that have, in turn, resulted in Plaintiffs' injuries. *See id.* ¶ 98 (alleging that Defendants "should have warned civil society"—generally—about the risks of climate change). This means the State is seeking damages under New Jersey law for increased emissions resulting from alleged failures to warn in, say, Texas, China, and Zimbabwe, even if there was no duty to warn in those

jurisdictions. This, Plaintiffs cannot do. The global causal mechanism on which Plaintiffs' claims depend triggers the exclusive and preemptive effect of federal law.

Plaintiffs cannot evade the preemption of state law by arguing that their claims are based solely on misrepresentations. The question whether Plaintiffs' claims are based on misrepresentations as opposed to production does not change the preemption analysis, because Plaintiffs admit that their alleged injuries stem from interstate and international emissions. Plaintiffs allege that "[f]ossil fuel emissions—especially CO_2—are far and away the dominant driver of global warming," Compl. ¶ 4, that its injuries are "*all* due to anthropogenic global warming," *id.* ¶ 9 (emphasis added), and that "*[t]he mechanism*" of global warming is emissions, *id.* ¶ 40 (emphasis added).

Just as in *City of New York*, "[i]t is precisely because fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [Plaintiff] is seeking damages." 993 F.3d at 91 (emphasis omitted). Indeed, the same misrepresentation theory was alleged in *City of New York*, which focused not just on the "production and sale of fossil fuels," but also their "promotion." *See* 993 F.3d at 88, 91, 97 & n.8. The City alleged there, as Plaintiffs do here, that "Defendants have known for decades that their fossil fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists" yet "extensively promoted fossil fuels for pervasive use, while *denying* or *downplaying* these threats." *City of New York*, 325 F. Supp. 3d at 468–69 (emphases added). The City argued that the defendants were liable for "nuisance and trespass" damages because "for decades, Defendants promoted their fossil-fuel products by *concealing* and *downplaying* the harms of climate change [and] *profited* from the misconceptions they promoted." Br. for Appellant at 27, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018) (emphases added). Plaintiffs pursue the exact same theory of liability. *See, e.g.*,

Compl. ¶ 6 (alleging Defendants "concealed and misrepresented the dangers of fossil fuels" and risks of climate change); ¶ 127 (describing "Defendants' goal to use disinformation to plant doubt about the reality of climate change in an effort to maintain consumer demand for their fossil fuel products and their large profits").

The Second Circuit rejected the City of New York's similar attempt to cast its claims as "focus[ed] on" an "earlier moment in the global warming lifecycle" (*i.e.*, sales activity rather than emissions), holding that this was "merely artful pleading and d[id] not change the substance of its claims." *City of New York*, 993 F.3d at 97 (quotation marks omitted). The crucial consideration was that emissions were the "singular source of the City's harm." *Id.* at 91. Accordingly, the Second Circuit refused to allow the City to deny the obvious: its "case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally," as confirmed by the fact that "the City does not seek any damages for the [defendants'] production or sale of fossil fuels that do not in turn depend on harms stemming from emissions." *Id.* at 97.

The Third Circuit, too, rejected a similar attempt to deny the obvious: Although "Delaware and Hoboken tr[ied] to cast their suits as just about misrepresentations . . . their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022). The same is true here: Plaintiffs' claims attempt to collect damages for injuries allegedly stemming from worldwide emissions. And because Plaintiffs' claimed injuries allegedly result from emissions—specifically, from a level of emissions that Plaintiffs allege is too high—the constitutional prohibition against using state law to impose liability for harms arising from interstate emissions fully applies here.

Cases rejecting Defendants' removal arguments arose in a different procedural posture and did not address the preemption question presented here. Some recent federal appellate decisions have addressed the question whether claims alleging climate change-related harms "arise under" federal common law for purposes of conferring federal jurisdiction. Those cases resolved a different question in a different procedural posture. As the Second Circuit explained, the defendants "sought to remove those cases to federal court, arguing that they anticipated raising federal preemption defenses." *City of New York*, 993 F.3d at 94. In that posture, those courts could *not* consider the "preemption defense on its own terms," but had to apply "the heightened standard unique to the removability inquiry." *Id.*

That is exactly why the Third Circuit distinguished *City of New York*, reasoning that it "involved [an] ordinary-preemption defense to a case first filed in federal court" as opposed to the propriety of removal. *City of Hoboken*, 45 F.4th at 708. Similarly, the Fourth Circuit distinguished *City of New York*: it "was in a completely different procedural posture" and "was not required to consider a heightened standard" because "New York City initially filed suit in federal court as opposed to state court." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 203 (4th Cir. 2022) (quotation marks omitted).

"Ordinary preemption," which Defendants raise here, "is a federal defense to a plaintiff's claims." *Id.* at 198–99. And such "important questions of ordinary preemption" are "*for the state courts to decide upon remand*." *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) (emphasis added).[3]

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[3] *See also Minnesota ex rel. Ellison v. Am. Petroleum Inst*., 63 F.4th 703, 710 (8th Cir. 2023) (noting that "the Second Circuit recently held that federal common law still provides a defense—ordinary preemption—to state-law public nuisance").

Now that the parties are back in state court, this Court must decide whether Defendants' preemption defenses bar Plaintiffs' claims *on the merits*. The answer to that question is "yes," as every federal court to address the preemption defense on the merits has held.

B. Plaintiffs' State Law Claims Are Preempted By The Clean Air Act.

Even if the Constitution did not preclude the application of state law to Plaintiffs' claims, those claims would still fail because the Clean Air Act preempts state-law causes of action that would have the effect of regulating out-of-state greenhouse gas emissions.

Through the Clean Air Act, Congress evaluated and balanced the societal harms and benefits associated with extraction, production, processing, transportation, sale, and use of fossil fuels. And it has already comprehensively regulated fossil fuels and greenhouse gas emissions through an "informed assessment of competing interests," including the "environmental benefit potentially achievable" and "our Nation's energy needs and the possibility of economic disruption." *AEP*, 564 U.S. at 427. Under the authority of the Clean Air Act, EPA chooses levels of emissions reduction (and hence the level of permissible emissions) for many of Defendants' products.

For example, Title II of the Clean Air Act governs greenhouse gas emissions standards for vehicles, aircraft, locomotives, motorcycles, and nonroad engines and equipment. 42 U.S.C. §§ 7521(a)(1)–(2), (3)(E), 7571(a)(2)(A), 7547(a)(1), (5). Based on this authority, EPA has set vehicle-specific greenhouse gas emission standards that appropriately balance environmental and other national needs. 40 C.F.R. §§ 86.1818-12, 86.1819-14. Indeed, just in recent months, EPA has proposed new pollution standards for cars and trucks aimed at accelerating the transition to clean vehicles. EPA Press Office, *Biden-Harris Administration Proposes Strongest-Ever Pollution Standards for Cars and Trucks to Accelerate Transition to a Clean-Transportation Future* (Apr. 12, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-proposes-strongest-

ever-pollution-standards-cars-and. Although States may apply more stringent standards for vehicles sold *in-state* under carefully prescribed circumstances, *see* 42 U.S.C. § 7507, they cannot regulate emissions from vehicles sold in *other* States.

The Clean Air Act also governs "whether and how to regulate carbon-dioxide emissions from powerplants" and other stationary sources. *AEP*, 564 U.S. at 426; *see also* 42 U.S.C. §§ 7411(b)(1)(A)–(B), (d). EPA has issued comprehensive regulations to control greenhouse gas emissions up and down the fossil fuel supply chain, which include: limiting emissions of methane (the second-most prevalent greenhouse gas) and emissions from crude oil and natural gas production, including the facilities operated by some of the Defendants, *see* 40 C.F.R. § 60, subpart OOOOa; regulating carbon dioxide emissions from fossil fuel-fired power plants; and requiring many major industrial sources—including Defendants' oil refineries and gas-processing facilities, as well as manufacturers that use Defendants' products—to employ control technologies constituting the best system of emissions reduction to limit greenhouse gas emissions. 42 U.S.C. § 7475.

The Clean Air Act's Renewable Fuel Standard Program regulates the consumption and use of many of the same fossil fuel products at issue in the Complaint; specifically, the Program requires many Defendants and other fuel companies to reduce the quantity of petroleum-based transportation fuel, heating oil, or jet fuel sold by blending in renewable fuels, resulting in lower greenhouse gas emissions on a lifecycle basis. *See* 42 U.S.C. § 7545(o).

More than thirty years ago, the U.S. Supreme Court concluded that "[t]he [Clean Water] Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Ouellette*, 479 U.S. at 500. In that Act, Congress established a "comprehensive" regulatory regime and charged EPA with primary authority to balance the "costs and benefits" of regulation. *Id.* at

492, 494–95. Although the Act preserves a State's ability (subject to EPA review) to regulate pollution from *within* that State, *id.* at 489–90, it does not permit States to regulate *out-of-state* pollution, *id.* at 490–91. And although the Act includes a savings clause, "it is clear that the only state suits that remain available are those specifically preserved by the Act," and "[a]n interpretation of the saving[s] clause that preserved actions brought under an affected State's law would disrupt th[e] balance of interests" struck by the Act. *Id.* at 492, 495. The Act accordingly left no room for state tort suits seeking damages for harms caused by out-of-state emissions, which would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494; *see also id.* at 500 ("The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution.").

The Clean Air Act shares all of the features of the Clean Water Act that led the Supreme Court to find preemption of state regulation of interstate pollution. Both laws authorize "pervasive regulation" and direct EPA to engage in a "complex" balancing of economic costs and environmental benefits, *id.* at 492, 494–95; both laws provide States with a circumscribed role that is "subordinate" to EPA's role as the federal environmental regulatory agency, *id.* at 491; both laws have analogous savings clauses that preserve state regulation only over *in-state* pollution sources, *see* 33 U.S.C. §§ 1365(e), 1370; and both laws confirm that "control of interstate pollution is primarily a matter of federal law," *Ouellette*, 479 U.S. at 492. Both laws accordingly "preclude[] a court from applying the law of an affected State against an out-of-state source." *Id.* at 494.

Because the structure of the Clean Air Act so closely parallels that of the Clean Water Act, courts have consistently construed *Ouellette* to mean that the Clean Air Act preempts state laws to the extent they purport to regulate air pollution originating out of state. *See, e.g.*, *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 Clean Air Act."); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194–96 & n.6 (3d Cir. 2013) (same); *Cooper*, 615 F.3d at 301, 306 (same). Because Plaintiffs' claims seek remedies for harms allegedly caused by cumulative worldwide greenhouse gas emissions over more than a century, imposition of those remedies would necessarily regulate interstate emissions, thereby upsetting the careful balance Congress struck through the comprehensive Clean Air Act regime overseen by EPA. As the Supreme Court explained in *AEP*, regulation via tort law "cannot be reconciled with the decisionmaking scheme Congress enacted." 564 U.S. at 429. "Congress designated an expert agency . . . , EPA, as best suited to serve as primary regulator of greenhouse gas emissions," and "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id*. at 428.

While *AEP* did not address the narrow question whether state-law claims may be brought under "the law of each State *where the defendants operate powerplants*," 564 U.S. at 429 (emphasis added), its articulation of that potential exception proves the rule—one State cannot apply its law to claims based on emissions from *another* State. Here, Plaintiffs intentionally and explicitly target global emissions: the emissions allegedly causing Plaintiffs' claimed injuries come from every State in this Nation and every country in the world. *See, e.g.*, Compl. ¶¶ 1, 4, 17. But Plaintiffs are suing under *one* State's law—which federal law prohibits. *See Ouellette*, 479 U.S. at 495; *City of New York*, 993 F.3d at 92 ("Any actions [defendants would] take to mitigate their liability . . . must undoubtedly take effect across every state (and country).").

It is no response that Plaintiffs' claims also seek to recover *damages* for emissions-related harms in addition to abating emissions. As the U.S. Supreme Court has explained, state damages suits equally constitute state regulation: "[A] liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel v. Medtronic, Inc*., 552 U.S.

312, 324 (2008) (quotation marks omitted); *see also BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."). Indeed, *Ouellette* itself held that state-law claims for damages caused by interstate pollution were preempted. 479 U.S. at 484, 493–94. Because Plaintiffs seek damages based on harms allegedly caused by diffuse and commingled emissions, any liability award would result in one State regulating interstate emissions, so Plaintiffs' claims are preempted. *See Bell*, 734 F.3d at 192, 196–97 (holding that "*Ouellette* controls" claims for "damages under three state common law tort theories: (1) nuisance; (2) negligence and recklessness; and (3) trespass").

Plaintiffs cannot evade the dispositive force of *Ouellette* by casting their claims as based solely on Defendants' alleged deception, rather than on greenhouse gas emissions. Plaintiffs' theory of harm and damages is premised on the notion that Defendants' conduct has resulted in an excessive level of emissions in the atmosphere. *See, e.g.*, Compl. ¶ 40 ("The mechanism by which human activity causes global warming and climate disruption is well established: ocean and atmospheric warming is overwhelmingly caused by anthropogenic greenhouse gas emissions."); ¶ 41 ("Greenhouse gases are largely byproducts of humans combusting fossil fuels to produce energy and using fossil fuels to create petrochemical products. While there are several greenhouse gases contributing to climate change, CO_2 is the primary greenhouse gas emitted from human activities."). It is thus beyond dispute that "the *singular source* of [Plaintiffs'] harm" is the nationwide greenhouse gas emissions regulated by the Clean Air Act and the worldwide emissions that state law cannot regulate. *City of New York*, 993 F.3d at 91 (emphasis added). Thus, Plaintiffs' theory of harm and requested relief are central to the preemption inquiry under the Clean Air Act. As *Ouellette* recognized, if a downwind court rules that upwind defendants are liable based on the

effects of pollution downwind, the defendant "would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability"—regardless of whether "the source had complied fully with its [source] state and federal . . . obligations." 479 U.S. at 495. The stated goal of the Clean Air Act is to "prevent and control air pollution," *see* 42 U.S.C. § 7401, and the statute achieves that goal by regulating pollution-generating emissions and carefully delegating authority for setting emissions standards. 40 C.F.R. § 50 *et seq.* Allowing the tort law of a downwind State to impose liability for emissions from out-of-state sources is entirely incompatible with the Clean Air Act's "delegation of authority and its comprehensive regulation" of emissions. *Ouellette*, 479 U.S. at 500.

At least one New Jersey court, citing U.S. Supreme Court precedent, has recognized that conflict preemption analysis turns not just on the pleaded causes of action, but on the impact that the harm alleged and the relief sought would have on the overall federal scheme. In that case, the court determined that the plaintiffs' state law tort claims for interference with collective bargaining agreements were preempted by the National Labor Relations Act. *Loc. Union No. 502 of Hod Carriers' Bldg. & Common Laborers' Union v. Park Arlington Corp.*, 73 N.J. Super. 427 (Ch. Div. 1962). Quoting extensively and favorably from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the court adopted wholesale the Supreme Court's rule for determining whether the subject matter of a particular litigation is preempted. *See Loc. Union No. 502*, 73 N.J. Super. at 433–34. Relevant here, the court noted that "[r]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Id.* at 434 (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted).

Moreover, the court recognized that such state regulation can be exerted through the relief

requested—such as a demand for damages—because "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted)); *see also Riegel*, 552 U.S. at 324; *BMW*, 517 U.S. at 572 n.17. And since "remedies form an ingredient of any integrated scheme of regulation," a remedy that has the effect of "regulat[ing] activities that are potentially subject to the exclusive federal regulatory scheme" "only accentuates the danger of conflict." *Loc. Union No. 502*, 73 N.J. Super. at 434 (quoting *Garmon*, 359 U.S. at 244) (internal quotation marks omitted).

Plaintiffs' claims impermissibly seek to regulate out-of-state emissions through the imposition of damages awards. As the Second Circuit put it, permitting claims seeking "damages caused by global greenhouse gas emissions" to proceed would replace the "carefully crafted frameworks" Congress established in the Clean Air Act "with a patchwork of claims under state nuisance law." *City of New York*, 993 F.3d at 85–86. Congress and EPA have concluded that selling and using fossil fuel products should be regulated by balancing the risks to the climate with the benefits to the public and the United States. But Plaintiffs' lawsuit would wield New Jersey law to impose damages liability on Defendants for out-of-state emissions that were lawful under the CAA and the regulatory regimes of the source States. "The inevitable result of [sustaining these claims] would be that [New Jersey] and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495.

C. Plaintiffs' Claims Raise Non-Justiciable Political Questions.

Plaintiffs' claims also fail because they would require the Court to usurp the political branches' power to set energy and climate policy, in violation of the political question doctrine. Under New Jersey law, the purpose of the political question doctrine, otherwise known as the separation of powers doctrine, "is to safeguard the 'essential integrity' of each branch of government," *Gilbert v. Gladden*, 87 N.J. 275, 281 (1981) (quoting *Massett Bldg. Co. v. Bennett*, 4

N.J. 53, 57 (1950)), and it is "designed to prevent a single branch from claiming or receiving inordinate power," *Brown v. Heymann*, 62 N.J. 1, 11 (1972).

The Supreme Court of New Jersey has adopted the political question doctrine as articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). *See Gilbert*, 87 N.J. at 281. Under that articulation, a political question will present at least one of the following formulations: "'a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 282 (quoting *Baker*, 369 U.S. at 217).

Both are true here. As the U.S. Supreme Court has recognized, "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" raises "questions of national or international policy" that require an "informed assessment of competing interests." *AEP*, 564 U.S. at 427. And the judiciary lacks the "the scientific, economic, and technological resources" to deal with these issues. *Id.* at 428. As the Supreme Court explained: "Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located." *Id.*

The Weight of Authority Confirms That Climate-Related Claims Are Non-Justiciable. *Kivalina* is directly on point. There, as here, the plaintiffs alleged that the defendant energy companies were "substantial contributors to global warming" and had, among other things, "conspir[ed] to mislead the public about the science of global warming." *Kivalina*, 696 F.3d at 854. Also, as here, "Plaintiffs' global warming claim [was] based on the emissions of greenhouse gases from innumerable sources located throughout the world and affecting the entire planet and its atmosphere." 663 F. Supp. 2d at 875 (emphasis omitted). And "Plaintiffs acknowledge[d] that the

global warming process involves 'common pollutants that are mixed together in the atmosphere that cannot be similarly geographically circumscribed.'" *Id.* (alteration omitted).

The court held that the claims in *Kivalina* presented nonjusticiable political questions because they would require the trier of fact to "balance the utility and benefit of the alleged nuisance against the harm caused." *Kivalina*, 663 F. Supp. 2d at 874. "Stated another way," the court explained, "resolution of [the] nuisance claim is not based on whether the plaintiff finds the invasion unreasonable, but rather 'whether reasonable persons generally, *looking at the whole situation* impartially and objectively, would consider it unreasonable.'" *Id.* The plaintiffs had "fail[ed] to articulate any particular judicially discoverable and manageable standards that would guide the factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions." *Id.* at 875. The same is true here.

That court reached a similar result in *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). There, California sued General Motors and other automakers for creating or contributing to climate change. *Id.* at *1–2. The court found it lacked "guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe." *Id.* at *15. The court rejected the notion that global climate change cases are just like any other trans-boundary pollution case, explaining that the State sought to impose damages on an "unprecedented scale" that left the court no way to distinguish one emitter from another. *Id.*

Similarly, the plaintiffs in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), brought nuisance and trespass claims against a group of energy companies alleging that their products "led to the development and increase of global warming, which produced the conditions

that formed Hurricane Katrina, which damaged their property." *Id.* at 852. The court rejected these claims as requiring "the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants' emissions are 'unreasonable.'" *Id.* at 864. "Simply looking to the standards established by the Mississippi courts for analyzing nuisance, trespass, and negligence claims would not provide sufficient guidance to the Court or a jury." *Id.*

More recently, the Alaska Supreme Court rejected similar climate change claims under the political question doctrine. *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022). The court explained that "[t]he political question doctrine maintains the separation of powers by 'exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to' the political branches of government." *Id.* at 795. Notably, the court found that plaintiffs' claims require balancing the social utility of defendants' conduct with the harm it inflicts, *id.*, at 796, a process that, "by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants," *Kivalina*, 663 F. Supp. 2d at 876.[4]

Plaintiffs' claims present even greater hurdles to judicial resolution than those in the cases discussed above. Again, Plaintiffs do not seek to hold Defendants liable for their *own* emissions, but rather for production of fossil fuel products that countless *third parties* combusted and for alleged misrepresentations that supposedly caused those third parties to consume more of those products than they otherwise would have. *See* Compl. ¶¶ 49–53. Under tort law, Plaintiffs would

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[4] *See also Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014) ("The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature, just as in *AEP* the inquiry was better reserved for the EPA.").

need to prove that Defendants' actions were "unreasonable." But the concept of "reasonableness" provides no guidance for resolving the far-reaching economic, environmental, foreign affairs, and national-security issues raised by Plaintiffs' claims—together "with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427; *see Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) ("'Fairness' does not seem to us a judicially manageable standard."); *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (reversing judgment holding opioid manufacturers liable under public nuisance theory and "defer[ring] the policy-making to the legislative and executive branches"). In short, Plaintiffs' "global warming nuisance tort claim seek[ing] to impose damages on a much larger and unprecedented scale by grounding the claim in pollution originating both within, and well beyond, the borders of the State" presents nonjusticiable political questions and should be dismissed. *Gen. Motors*, 2007 WL 2726871, at *15.

New Jersey's Political Branches Actively Address Climate-Related Issues. The political questions implicated by Plaintiffs' claims are not theoretical. The New Jersey executive and legislative branches have known about climate change for decades—including about the alleged climate risks that Plaintiffs accuse Defendants of concealing—and, with that knowledge, have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve the State. *See, e.g.*, *infra*, at 35–36. For example, when Governor Murphy released his Energy Master Plan in January 2020, his commitment to "100 percent clean energy by 2050" reflected a recognition that certain sectors, like transportation, will at least partially rely on fossil fuels for the foreseeable future. Accordingly, the Plan committed to "100 percent carbon-neutral electricity generation and *maximum* electrification of the transportation and building sectors." State of New Jersey, *About the Energy Master Plan* (2023), https://www.nj.gov/emp/energy/ (emphasis added).

These issues are political questions that have been considered by the executive and legislative branches for decades, resolution of which belongs in their hands, not the judiciary's.

An Abatement Would Infringe on the Authority of the Other Branches. Finally, the relief Plaintiffs seek—an "order that provides for abatement of the trespasses [and public and private nuisances]," Compl. ¶¶ 281, 295, 311—presumably would require this Court to estimate potential future damages resulting from global climate change over the next century and to oversee and administer a fund to pay for and address those future injuries. The Ninth Circuit rejected a similar request in *Juliana v. United States*, 947 F.3d 1159, 1169–75 (9th Cir. 2020), because it is beyond the power of the court "to order, design, supervise, or implement" such a remedial plan, which "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171.

The same is true here. Administering "abatement" of the kind sought by Plaintiffs would "entail a broad range of policymaking," such as determining what infrastructure projects—from sea walls, to transit, to levees—are supposedly necessary to prevent climate change-related harms and how to prioritize such projects. *Juliana*, 947 F.3d at 1172. And "given the complexity and long-lasting nature of global climate change, the court would be required to supervise the [fund] for many decades," if not forever. *Id.*

D. Plaintiffs' Claims Based On A Purported "Campaign Of Denial and Disinformation" Are Barred By The Statute of Limitations.

New Jersey law establishes a ten-year limitations period for "any civil action commenced by the State." N.J.S.A. § 2A:14-1.2. As such, Plaintiffs must, at a minimum, allege a misstatement within the ten years preceding the filing of their Complaint on October 18, 2022—*i.e.*, an act that occurred after October 18, 2012.

The Complaint asserts two distinct courses of conduct or "schemes": (1) a "campaign of denial and disinformation" that started in the *late 1980s*, *see* Compl. ¶¶ 97–142; and (2) a "greenwashing" campaign consisting of Defendants' purported efforts to "promot[e] themselves as sustainable energy companies committed to finding solutions to climate change, including by investing in alternative energy," *id*. ¶¶ 6, 158–200. And the Complaint makes clear that these are *distinct* theories of liability based on *distinct* acts of alleged deception. The Complaint alleges: "*After* having engaged in a long campaign to deceive consumers and the public about the science behind climate change, Defendants are *now* engaging in 'greenwashing.'" *Id.* ¶ 159 (emphasis added). The Complaint has one entire section entitled "Defendants Did Not Disclose Known Harms Associated with the Extraction, Promotion, and Consumption of Their Fossil Fuel Products, and Instead Affirmatively Acted to Obscure Those Harms and Engaged in a Campaign to Deceptively Protect and Expand the Use of their Fossil Fuel Products." *Id.* ¶¶ 97–142. And it has a separate section entitled "Defendants Continue to Mislead About the Impact of Their Fossil Fuel Products on Climate Change Through Greenwashing Campaigns and Other Misleading Advertisements in New Jersey and Elsewhere." *Id.* ¶¶ 158–200.

The last purportedly deceptive statement Plaintiffs allege that any Defendant made as part of their purported "campaign of denial and disinformation" occurred in 1998 through a public "national media relations program"—*14 years before the limitations period began in 2012*. *See* Compl. ¶ 126. Thus, because Plaintiffs themselves allege that the purported "campaign" ended before 2012, Plaintiffs' claims based thereon are barred by the statute of limitations and must be dismissed. *See Pereira v. Azevedo*, 2015 WL 1257926, at *3 (N.J. Super. Ct. App. Div. 2015) (dismissing claims because "Plaintiff took no legal action until" after the statute of limitations expired).

Any attempt by Plaintiffs to invoke the so-called "discovery rule" to save their claims fails because Plaintiffs have not pleaded, and cannot plead, facts showing that they lacked knowledge of the basis of their claims before October 2012. Under the discovery rule, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another." *Baird v. Am. Med. Optics*, 155 N.J. 54, 68 (1998). Plaintiffs' own allegations make clear that they had knowledge of these claims, or at a minimum, were on notice of facts upon which they now belatedly base their claims.

As an initial matter, Plaintiffs allege that the supposed misrepresentations were part of Defendants' "*public* deception campaigns," so these statements were not secret or hidden. Compl. ¶ 17 (emphasis added); *see also id.* ¶ 99 (Defendants' "public campaign aimed at deceiving consumers and the public"); ¶ 103 (Defendants' "campaign included . . . a plan to influence consumers . . . by affecting public opinion"); ¶ 117 ("Defendants . . . mounted a deceptive public campaign"). And Plaintiffs' own allegations make clear that—well before 2012—the general public was on notice of the potential effects of fossil fuel use on the climate. *See, e.g.*, *id.* ¶¶ 56–57 (describing a Columbia University symposium in 1959 warning about "the danger from increased carbon dioxide content in the atmosphere"); ¶ 58 ("By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community"); ¶ 99(a) ("In 1988, National Aeronautics and Space Administration (NASA) scientists confirmed that human activities were actually contributing to global warming"); ¶ 132 (a "2007 Yale University-Gallup Poll" found that "71% of Americans personally believed global warming was happening").

Even a cursory review of the allegations in the Complaint confirms that Plaintiffs have long had notice of the bases of their claims. The Complaint alleges that in "1990, the IPCC published

its First Assessment Report on anthropogenic climate change," which concluded that "there is a natural greenhouse effect which already keeps the Earth warmer than it otherwise would be." Compl. ¶ 99(d). And "world events [in the early 1990s] marked a shift in public discussion of climate change, and the initiation of international efforts to curb anthropogenic greenhouse emissions." *Id.* ¶ 100. At a bare minimum, Plaintiffs' Complaint confirms that they were on notice of their potential claims in 1997 when they allege the "established scientific consensus" was that burning fossil fuels warmed the Earth. *Id.* ¶ 122. Moreover, Plaintiffs allege that the Intergovernmental Panel on Climate Change ("IPCC") issued its Fourth Assessment Report in 2007 highlighting for the world that "'there is *very high confidence* that the net effect of human activities since 1750 has been one of warming.'"[5] *Id.* ¶ 133 (emphasis in original). In fact, that report asserted that "[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* [greater than 90% chance] due to the observed increase in anthropogenic greenhouse gas concentrations. . . . Discernible human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns."[6] The Fourth Assessment Report emphasized that increased use of fossil fuel use was the biggest driver in "global increases in in carbon dioxide concentration."[7] *See Cohen v.*

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[5] The IPCC is an intergovernmental body, under the auspices of the United Nations, created to provide the international community with scientific information as to climate change. The IPCC publishes regular "assessment reports," which summarize the current state of scientific knowledge regarding climate change. The IPCC's Fourth Assessment Report described the global community's level of scientific knowledge as to climate change as of 2007, when it was published. *See* The Intergovernmental Panel on Climate Change, *About the IPCC* (2023), https://www.ipcc.ch/about/.

[6] IPCC, *Climate Change 2007: The Physical Science Basis – Working Group I Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 10 (2007), https://www.ipcc.ch/site/assets/uploads/2018/05/ar4_wg1_full_report-1.pdf.

[7] *Id.* at AR2 ("The primary source of the increased atmospheric concentration of carbon dioxide since the pre-industrial period results from fossil fuel use.").

Telsey, 2009 WL 3747059, at *12 (D.N.J. Nov. 2, 2009) ("When the gist of the action is fraud concealed from the plaintiff, the statute [of limitations] begins to run on discovery of the wrong or facts that reasonably should lead the plaintiff to inquire into the fraud." (citation omitted)). Given Plaintiffs' own allegations demonstrate that the potential link between fossil fuel combustion and climate change has been well-known for decades, it goes without saying that if, as alleged by Plaintiffs, Defendants downplayed, denied, or failed to warn about those risks in a supposed large-scale "public deception campaign[]," Compl. ¶ 17, Plaintiffs would have known, or at least could have discovered, the basis for the claims they assert here.

And, indeed, there has been abundant information in the public record for many decades—let alone by 2012—that confirms that Plaintiffs were on notice of their claims regarding the role of fossil fuels in contributing to climate change.[8] In 1989, for example, New Jersey Governor Thomas Kean issued an Executive Order describing "emissions of carbon dioxide" as "a necessary byproduct of the combustion of fossil fuels and a major contributor to global climate change." State of New Jersey, "Executive Order #219," Oct. 23, 1989, https://nj.gov/infobank/circular/eok219.htm. The Executive Order concluded that a "scientific consensus exists that emissions of certain gases . . . are causing significant changes in the composition of the Earth's atmosphere" and "that these emissions are likely to cause significant

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[8] "In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, *matters of public record*, and documents that form the basis of a claim." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 182–84 (2005) (emphasis added). The Court may take judicial notice, for example, of "determinations of all governmental subdivisions and agencies thereof," *see Matter of Adoption of N.J.A.C. 7:9B*, 2022 WL 2822746, at *31 (N.J. Super. Ct. App. Div. July 20, 2022) (quoting N.J.R.E. 201(a)); executive orders, *see, e.g.*, *Green v. State Health Benefits Comm'n*, 373 N.J. Super. 408, 418 n.4 (App. Div. 2004); and federal court records, *see* N.J.R.E. 201(b)(4); *see also Easley v. N.J. Dep't of Corrs.*, 2019 WL 3213954, at *19 (N.J. Super. Ct. App. Div. July 17, 2019); *State v. Silva*, 394 N.J. Super. 270, 272–78 (App. Div. 2007).

changes in the Earth's climate, including overall warming, increased drought, an increase in the intensity of hurricanes and other major storms, as well as increased incidence of harmful ultraviolet radiation." *Id.*

In 1998—*more than two decades before this lawsuit was filed*—the New Jersey Department of Environmental Protection ("NJDEP") published a report stating: "Global warming of the atmosphere and ocean resulting from increasing concentrations of carbon dioxide and greenhouse gases (greenhouse gas warming) will control the rise of global sea level." Peter Sugarman, "Sea Level Rise in New Jersey," New Jersey Department of Environmental Protection, October 1998, available at: https://www.nj.gov/dep/njgs/enviroed/infocirc/sealevel.pdf (last visited Oct. 16, 2023). The report also found that "the prevailing scientific view is that continued and increased emissions of greenhouse gases will disrupt the Earth's climate in the foreseeable future." *Id.* In fact, the report maintained that "[a]s sea level rises, coastal storms" would "penetrate farther inland" and lead to "increased flooding." *Id*. And critically, in 2004, the State of New Jersey filed a complaint seeking to enjoin emissions from power companies, alleging that "[t]here is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion." *Connecticut v. Am. Elec. Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y. July 21, 2004), Dkt. 1, Compl. ¶ 79. New Jersey's lawsuit and the allegations therein are dispositive on this issue.

Nor can Plaintiffs claim that they were not aware of Defendants' alleged deception until recently. The same accusations that Plaintiffs make here regarding a purported "campaign of denial and disinformation" by energy companies have been widely publicized by other parties for decades. *Cf.* Compl. ¶¶ 226–32. As early as 1997, *The Washington Post* published an op-ed charging that, "[e]ven as global warming intensifies, the evidence is being denied with a ferocious disinformation

campaign. Largely funded by oil and coal interests, it is being carried out on many fronts." Ross Gelbspan, *Hot Air, Cold Truth*, Wash. Post (May 25, 1997), https://tinyurl.com/46djyytx. A year later, the Sunday edition of *The New York Times* reported on its front page that oil-and-gas "[i]ndustry opponents of a treaty to fight global warming have drafted an ambitious proposal to spend millions of dollars to convince the public that the environmental accord is based on shaky science." John H. Cushman, Jr., *Industrial Group Plans to Battle Climate Treaty*, N.Y. Times (Apr. 26, 1998), https://tinyurl.com/fakcbkph.[9] And given that Plaintiffs allege that the *Washington Post* and the *New York Times* are publications "with substantial circulation to New Jersey," Compl. ¶ 129, Plaintiffs cannot seriously contend that these articles did not provide them with at least reasonable notice of their potential claims.

In addition, States and municipalities filed suits alleging a link between fossil fuels and climate change more than a *decade* before this suit, including in cases that reached the U.S. Supreme Court. *See, e.g.*, *AEP*, 564 U.S. at 418 (suits filed in 2004); *Kivalina*, 663 F. Supp. 2d at 869 (suit filed in 2008). In fact, Plaintiffs' alleged "disinformation campaign" was the centerpiece of the *Kivalina* lawsuit, which was filed in 2008 and includes many of the same allegations that Plaintiffs make here. As *The New York Times* reported, that suit alleged "'a long campaign by power, coal and oil companies to mislead the public about the science of global warming,'" which "contributed 'to the public nuisance of global warming by convincing the public at large and the victims of global warming that the process is not man-made when in fact it is.'" Felicity Barringer, *Flooded Village Files Suit, Citing Corporate Link to Climate Change*, N.Y. Times (Feb. 27, 2008),

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[9] Defendants deny the accuracy of these materials and do not offer them for the truth of their contents, but only to show that Plaintiffs knew or should have known of their claims. Accordingly, the Court may take judicial notice of the fact that these allegations were made. *See supra* n.8.

https://tinyurl.com/4f6fr4j9; *see also Kivalina*, No. 4:08-cv-01138 (N.D. Cal.), Dkt. 1 Compl. ¶¶ 189–248, 269–77.

Plaintiffs allege no actionable conduct related to the purported campaign of climate obfuscation within the ten years before they filed suit, and as demonstrated by the sources cited in the Complaint, Plaintiffs had actual or constructive knowledge of their potential claims and injuries well before that time. Thus, their claims based on purported climate deception are barred by the statute of limitations and must be dismissed. *See Grewal v. Purdue Pharma L.P.*, 2018 WL 4829660, at *18 (N.J. Super. Ct. Ch. Oct. 2, 2018) (finding "that all alleged acts or omissions that occurred prior to [the limitations period] are time-barred").[10]

E. Plaintiffs' Complaint Fails To State A Claim Under New Jersey Law.

As demonstrated above, Plaintiffs' claims are preempted by federal law, nonjusticiable, and untimely. But even if they were not, the Complaint would nevertheless be subject to dismissal for failure to state a claim under New Jersey law.

1. The Product Liability Act Subsumes Plaintiffs' Putative Claims For Negligence, Trespass, Nuisance, And Impairment Of The Public Trust.

Plaintiffs' claims for nuisance, trespass, negligence, and Impairment of the Public Trust face a dispositive preliminary hurdle: none of those causes of action, as pled, exist under New Jersey state law. Plaintiffs seek to recover for harms allegedly caused by the use and combustion of fossil fuel products. But the New Jersey Product Liability Act subsumes all claims based on product liability theories. Because the PLA provides the exclusive remedy for claims alleging harms caused

[10] New Jersey courts regularly grant partial dismissals of claims on statute of limitations grounds. *See, e.g.*, *Halpern v. Twp. of Irvington*, 2016 WL 6543638, at *3 (N.J. Super. Ct. App. Div. Nov. 4, 2016); *Munoz v. Perla*, 2011 WL 6341182, at *4 (N.J. Super. Ct. App. Div. Dec. 20, 2011).

by a product, Plaintiffs' "complaint[] cannot be understood to state" such putative claims, and those claims should be dismissed. *Lead Paint*, 191 N.J. at 435–37.

New Jersey's PLA is "both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." *Id.* at 436–37. It broadly defines a "product liability action" as "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty." N.J.S.A. § 2A:58C-1(b)(3). "Harm" is defined as "(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph." N.J.S.A. § 2A:58C-1(b)(2).

Plaintiffs' claims fall within these definitions. Though couched in the language of nuisance, trespass, negligence, and Impairment of the Public Trust, the "essential nature" of Plaintiffs' claims "sound[s] in products liability causes of action." *Lead Paint*, 191 N.J. at 437. The New Jersey Supreme Court already reached this result in an analogous case: in *Lead Paint*, that Court held that municipalities' and counties' public-nuisance claims were subsumed under the PLA, as the "central focus" of those claims was that "defendants were aware of dangers associated with lead—and by extension, with the dangers of including it in paint intended to be used in homes and businesses—and failed to warn of those dangers." *Id*. Similarly here, Plaintiffs allege that Defendants were "aware[] of the negative impacts of fossil fuel consumption," Compl. ¶ 5, but "misled consumers and the public about climate change . . . rather than warn consumers and the public," *id*. ¶ 1. This failure-to-warn theory "is squarely within the theories included in the PLA." *Lead Paint*, 191 N.J. at 437. And Plaintiffs' alleged harms—*see*, *e.g.*, Compl. ¶¶ 10–12 (describing property damage,

personal physical illness, and derivative losses)—fall within the categories enumerated by statute. *See Lead Paint*, 191 N.J. at 437; *see also Grewal*, 2018 WL 4829660, at *17 (in opioids context, dismissing Plaintiff's public nuisance claim with prejudice under the NJPLA because "[t]he roots of the State's claimed injuries are the physical effects of the opioids on patients"); *Green v. General Motors Corp.*, 310 N.J. Super. 507, 517 (App. Div. 1998) ("Under the [PLA], the causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action, the essence of which is strict liability."); *Brown ex rel. Est. of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 516 (D.N.J. 2002) (collecting cases where claims of negligence, negligent failure to warn, and breach of warranty were dismissed based on subsumption by the PLA). Thus, the PLA bars Plaintiffs' claims for nuisance, trespass, negligence, and Impairment of the Public Trust, and they should be dismissed.

2. Plaintiffs' Failure To Warn And Negligence Claims Fail Because Defendants Did Not Have A Duty To Warn Of Widely Publicized Risks Relating To Climate Change.

Plaintiffs bring claims for failure to warn and negligence. *See* Compl. ¶¶ 235–59. As an initial matter, although Count Two is nominally pled as a claim for "Negligence," Plaintiffs allege that the claim is premised on Defendants' "decades-long campaign to . . . conceal the existence, causes, and consequences of climate change from public awareness" and "knowing[] fail[ure] to warn consumers, the public, and the State." *Id*. ¶ 256. Accordingly, Defendants construe Plaintiffs' negligence claim as sounding in negligent failure to warn.[11]

Under a straightforward application of New Jersey law, Plaintiffs' failure to warn and negligent failure to warn claims fail from the very start because the alleged dangers of using oil and

[11] To the extent Plaintiffs intended to plead a different negligence theory, it is far too vague to be actionable.

gas were well known to Plaintiffs and the public. It is hornbook law—and simple logic—that Defendants had no duty to warn customers, let alone the public, of purported dangers of their products already well known to the public. *See, e.g.*, Restatement (Third) of Torts: Products Liability, § 2, cmt. j. The "obviousness" of a product's danger "is an absolute defense to [a] failure to warn action," because there is no "need to warn users of . . . obvious and generally known risks inherent to products . . . as a matter of law." *Mathews v. Univ. Loft Co.*, 387 N.J. Super. 349, 361–63 (App. Div. 2006), *certif. denied*, 188 N.J. 577 (2006); *see also Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 94–98 (1990).

In *Mathews*, the court looked to the Restatement (Third) of Torts, which provides:

> In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence.

Restatement (Third) of Torts: Products Liability, § 2, cmt. j.

Here, Plaintiffs allege that the environmental effects of burning oil and gas are obvious and well understood—and have been for decades—notwithstanding any alleged "deception campaign" by Defendants. For example, Plaintiffs allege:

- "Human-caused warming of the Earth is unequivocal. . . . The mechanism by which human activity causes global warming and climate disruption is well established." Compl. ¶¶ 39, 40;

- "By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest levels of the United States' scientific community. In that year, President Lyndon B. Johnson's Science Advisory Committee's Environmental Pollution Panel reported that a 25% increase in carbon dioxide concentrations could occur by the year 2000, that such an increase could cause significant global warming, that melting of the Antarctic ice cap and rapid sea-level rise could result, and that fossil fuels were the clearest source of carbon dioxide pollution." *Id.* ¶ 58;

- "In 1988, National Aeronautics and Space Administration ('NASA') scientists confirmed that human activities were actually contributing to global warming. On June 23 of that year, NASA scientist James Hansen's presentation of this information to Congress engendered

significant news coverage and publicity for the announcement, including coverage on the front page of *The New York Times*." *Id*. ¶ 99(a);

- "On July 28, 1988, Senator Robert Stafford and four bipartisan co-sponsors introduced S. 2666, 'The Global Environmental Protection Act,' to regulate CO_2 and other greenhouse gases. Four more bipartisan bills to significantly reduce CO_2 pollution were introduced over the following ten weeks, and in August, U.S. Presidential candidate George H.W. Bush pledged that his presidency would combat the greenhouse effect with 'the White House effect.' Political will in the United States to reduce anthropogenic greenhouse gas emissions and mitigate the harms associated with Defendants' fossil fuel products was gaining momentum." *Id*. ¶ 99(b);

- "In December 1988, the United Nations formed the IPCC, a scientific panel dedicated to providing the world's governments with an objective, scientific analysis of climate change and its environmental, political, and economic impacts." *Id*. ¶ 99(c);

- "In 1990, the IPCC published its First Assessment Report on anthropogenic climate change, which concluded that (1) 'there is a natural greenhouse effect which already keeps the Earth warmer than it would otherwise be,' and (2) that 'emissions resulting from human activities are substantially increasing the atmospheric concentrations of . . . greenhouse gases . . . .'" *Id*. ¶ 99(d);

- In 1992, the United Nations held the Earth Summit in Rio de Janeiro, Brazil, "a major, newsworthy gathering of 172 world governments, of which 116 sent their heads of state," and which resulted in the United Nations Framework Convention on Climate Change. *Id*. ¶ 99(e); and

- In 2007, the IPCC "published its Fourth Assessment Report, in which it concluded that 'there is very high confidence that the net effect of human activities since 1750 has been one of warming.'" *Id*. ¶ 133.

Likewise, as noted above, the public record makes clear that New Jersey government officials have been aware *for decades* of the effects that they allege oil and gas products have on the climate. *See, supra*, at Section III.D.

Plaintiffs' own allegations thus make clear that the risks of climate change from fossil-fuel use have been "obvious or generally known" for decades. Accordingly, Defendants had no duty to warn about these dangers, and Plaintiffs' failure to warn claims fail as a matter of law. *See Mathews*, 387 N.J. Super. at 355 (remanding for entry of a judgment dismissing the complaint because Defendant had no duty to warn against a danger that was "open and obvious"); *see also,*

e.g., *Calender v. NVR Inc.*, 548 Fed. App'x 761, 764 (3d Cir. 2013) (no duty to warn of danger of falling from attic); *McWilliams v. Yamaha Motor Corp., U.S.A.*, 987 F.2d 200, 204 (3d Cir. 1993) (no duty to warn motorcycle operators of risk of lower leg injury from motorcycle use); *Wasko v. R.E.D.M. Corp.*, 217 N.J. Super. 191, 199 (Law Div. 1986) (manufacturer of explosive fuses had no duty to warn of explosive nature of fuses).

3. Plaintiffs' Trespass Claim Fails Because New Jersey Law Disfavors Such A Claim And Plaintiffs Have Not Adequately Pleaded the Elements Of A Common Law Claim.

Plaintiffs' trespass claim also must be dismissed. New Jersey law no longer favors common law trespass claims for environmental injury, and, in all events, Plaintiffs cannot satisfy the elements of a common law trespass claim.

Most fundamentally, New Jersey has moved away from common law claims, like trespass and nuisance, in cases involving claims for environmental injury. *See Player v. Motiva Enters. LLC*, 2006 WL 166452, at *12 (D.N.J. Jan. 20, 2006), *aff'd*, 240 F. App'x 513 (3d Cir. 2007) (citing *Mayor & Council of Borough of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1053 (D.N.J. 1993)); *see also N.J. Dep't of Env't Prot. v. Sherwin Williams*, No. CAM-L-5032-19 (N.J. Super. Ct. Law Div. Aug. 26, 2021) (trespass claim dismissed); *N.J. Dep't of Env't Prot. v. SL Indus., Inc.*, No. CAM-L-4572-18 (N.J. Super. Ct. Law Div. May 17, 2021) (same); Tr. of Oral Decision at 37–41, *N.J. Dep't of Env't Prot. v. Pechiney Plastics Packaging, Inc.*, No. WRN-L-230-18 (N.J. Super. Ct. Law Div. Feb. 26, 2021) (same); *N.J. Dep't of Env't Prot. v. Handy & Harman*, No. BER-L-8605-19 (N.J. Super. Ct. Law Div. June 2, 2020) (same).

Instead, New Jersey courts have recognized a shift toward a legislatively imposed statutory liability regime. *See State, Dep't of Env't Prot. v. Ventron Corp.*, 94 N.J. 473, 492–95 (1983). For example, in *Kenney v. Scientific, Inc*, the court granted summary judgment to the defendant waste generators on plaintiffs' trespass claim because New Jersey's statutory framework for

environmental torts was a more appropriate basis to resolve defendants' liability than "endeavor[ing] to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned." 204 N.J. Super. 228, 256 (Law Div. 1985). As another court put it, "modern courts do not favor trespass claims for environmental pollution." *In re Paulsboro Derailment Cases*, 2013 WL 5530046, at *8 (D.N.J. Oct. 4, 2013) (internal citation and quotation marks omitted). And, as yet another court held, "use of trespass liability for [environmental pollution] has 'been held to be an inappropriate theory of liability' and an 'endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.'" *Woodcliff, Inc. v. Jersey Constr., Inc.*, 900 F. Supp. 2d 398, 402 (D.N.J. 2012).

Even if the common-law trespass framework were applicable here, moreover, Plaintiffs' trespass claim would still fail. New Jersey courts generally apply the Second Restatement's standard of liability for trespass claims. *Ross v. Lowitz*, 222 N.J. 494, 510 (2015). Under this standard, trespass is (1) the intentional entry onto another's land, regardless of harm, or (2) the entry onto another's land through recklessness, negligence, or as a result of abnormally dangerous activity if the entry causes harm. *Id.* (citing Restatement (Second) of Torts §§ 158, 165). Plaintiffs fail to allege adequately these elements, as New Jersey case law makes clear.

First, Plaintiffs do not have an actionable trespass claim because Plaintiffs never held exclusive possession of the subject property. Under New Jersey law, a trespass action requires that the invasion be to land in the *exclusive possession* of the plaintiff. *Ventron*, 94 N.J. at 488–89; *see N.J. Dep't of Env't Prot. v. Hess Corp.*, 2020 WL 1683180, at *6 (N.J. Super. Ct. App. Div. Apr. 7, 2020). Plaintiffs purport to rely on the Public Trust Doctrine to assert common law claims, including trespass. *See* Compl. ¶ 22 ("NJDEP brings this action in its capacity as trustee of New Jersey's natural resources, and pursuant to its *parens patriae*, proprietary, and regulatory powers.").

"The essence of the public trust doctrine is that the State holds the property in trust for the people," and therefore "land subject to the public trust" cannot be "in the 'exclusive possession' of the State." *N.J. Dep't of Env't Prot. v. Exxon Mobil Corp.*, 2008 WL 4177038, at *8 (N.J. Super. Ct. Law Div. Aug. 29, 2008) (*citing Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821)) (emphasis added).

Here, Plaintiffs are relying on their public trustee authority to assert common law claims, including trespass, for alleged injuries to trust resources. But, as numerous courts throughout New Jersey have determined, Plaintiffs' rights and authority as alleged trustee of natural resources for the public benefit do not grant the State the ***exclusive possessory interest*** in those natural resources necessary to maintain an action for trespass. *See, e.g., Hess*, 2020 WL 1683180, at *6 n.4 ("There are no cases applying the [public trust] doctrine to create an exclusive possessory interest in any land or waterways.").

Thus, contrary to Plaintiffs' cursory allegation of exclusive possession, Compl. ¶ 270, the State cannot allege exclusive possession of the land on which Defendants allegedly trespassed: "[l]and in the public trust is held by the State on behalf of a second party, the people. Such land cannot be in 'exclusive possession' of the State as the interest created by the doctrine is intended to ensure that others have use of the same land. It does not grant to the State the exclusive possession of property." *Hess*, 2020 WL 1683180, at *6. Because Plaintiffs do not have exclusive possession of the property and/or trust resources on which Defendants allegedly trespassed, the trespass claim must be dismissed. *Id.*

Second, Plaintiffs do not allege that Defendants, *or even their products*, intruded on State-owned property. Instead, Plaintiffs allege that increased "fossil-fuel consumption . . . accelerate[d] climate change . . . and cause[d] water and other tangible materials to enter the State's real property and natural resources." Compl. ¶ 275.

But no precedent supports the novel assertion that a party can be held liable in trespass because use of its product by third parties around the world over nearly a century may result in weather changes that affect another's property. In fact, the Restatement suggests the opposite, providing that an actor causes an object to trespass upon another's property when, "without himself entering the land, [he] may invade another's interest in its exclusive possession *by throwing, propelling, or placing a thing* either on or beneath the surface of the land or in the air space above it." Restatement (Second) of Torts § 158 cmt. i (emphasis added). Here, however, the alleged trespass is purported to be the *indirect* result of the purchase and use of oil and gas by billions of actors around the world over decades—not the "throwing, propelling, or placing" of anything by Defendants. *Id.* Nothing in the Restatement or in New Jersey law provides a basis for Plaintiffs' expansive conception of trespass.

Even if Plaintiffs could reframe their trespass claim to involve Defendants' products or emissions by third parties' use of Defendants' products, the claim would still fail because Defendants did not have control over the products or emissions at the time of the alleged trespass. As the Alaska Supreme Court has noted, "[t]he general consensus thus suggests that ownership or control of the intruding instrumentality is dispositive of an actor's trespass liability." *Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 664 (Alaska 2000). Indeed, the Court emphasized that "[s]everal cases have held that courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *Id.* (collecting cases); *see also, e.g.*, *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989) (same). Here, Plaintiffs allege that greenhouse gas emissions entered the atmosphere only after Defendants' products were combusted by billions of third parties around the world. *See, e.g.*, Compl. ¶ 41 ("Greenhouse gases are largely byproducts of humans combusting fossil fuels to

produce energy and using fossil fuels to create petrochemical products."). But it is undisputed that, at the time Defendants' fossil fuel products were combusted and, thus, released greenhouse gases into the atmosphere, Defendants had no control over those products (or the resulting emissions).

In short, New Jersey does not recognize a trespass claim where, as here, Plaintiffs seek damages for environmental pollution. That is especially so where, as here, Plaintiffs cannot even plead the elements of a traditional trespass claim. The Court should therefore dismiss Plaintiffs' claim for trespass.

4. Plaintiffs' Nuisance Claims Fail Because Plaintiffs Allege Harm Caused By Lawful Products, Defendants Did Not Control The Instrumentality Of The Nuisance, And Plaintiffs Improperly Seek Damages.

For years, plaintiffs have attempted to deploy nuisance law to hold companies liable for the sale of lawful products, from industrial chemicals to pharmaceuticals, that allegedly have caused harm when subsequently used by third parties. New Jersey courts have *consistently and repeatedly* rejected those efforts—as have many courts across the country when presented with similar claims. This Court should follow this well-settled precedent and dismiss Plaintiffs' nuisance claims because New Jersey law rejects nuisance claims based on promotion, distribution, and sale of a lawful consumer product rather than the use of land. Moreover, this Court should dismiss Plaintiffs' public nuisance claim for the additional reasons that Defendants lacked the requisite control over the instrumentality causing the alleged nuisance; and Plaintiffs, which are public entities, improperly attempt to recover damages as private plaintiffs.

First, at virtually every turn, Plaintiffs' nuisance claims clash with basic principles of nuisance doctrine articulated in 2007 by the New Jersey Supreme Court in *Lead Paint*, where the Court declined to allow a public nuisance claim based on the sale and promotion of lead pigment, notwithstanding the harmful effects of lead poisoning. As the Supreme Court warned: recognizing such an expansive claim would depart from "the well-recognized parameters" of public nuisance,

"stretch[ing] the concept of public nuisance far beyond recognition and . . . creat[ing] a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Lead Paint*, 191 N.J. at 409, 421. The same is true here. Plaintiffs allege that Defendants created a nuisance by "promoting the sale and use of fossil fuel products." Compl. ¶ 284. But the highest courts in numerous States—including the New Jersey Supreme Court in *Lead Paint*—have rejected similar attempts by government entities to expand common-law public nuisance claims to cover the sale, distribution, or promotion of lawful consumer products, including lead paint, asbestos, prescription opioids, firearms, and tobacco.

In *Lead Paint*, the New Jersey Supreme Court emphasized that the sale of consumer products in the ordinary course of commerce is not an appropriate basis for a public nuisance suit because it would convert "the conduct of merely offering an everyday household product for sale" into a strict liability theory "far exceed[ing] any cognizable cause of action" under public nuisance. *Lead Paint*, 191 N.J. at 432–36. Indeed, "[w]hatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce." *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (per curiam). Accordingly, the Supreme Court rejected the plaintiffs' attempts to bring a nuisance claim based on the sale and promotion of lead paint.

The New Jersey Supreme Court also rejected efforts to expand nuisance law to cover the sale and promotion of lawful consumer products because "essential to the concept of a public nuisance tort . . . is the fact that it has historically been linked to the use of land by the one creating the nuisance." *Lead Paint*, 191 N.J. at 423; *see also Rowe v. E.I. DuPont De Nemours & Co.*, 262 F.R.D. 451, 459 (D.N.J. 2009) ("To succeed on a private nuisance claim, Plaintiffs must show that

'there has been . . . use by a person of his real property which is resulting in a material annoyance, inconvenience, or hurt.'") (quoting *State, Dep't of Env't Prot. v. Exxon Corp.*, 151 N.J. Super. 464, 482–83 (Ch. Div. 1977))). That holding accords with multiple courts in other jurisdictions, which have found that "the idea of a wrongful use of property is central to the legal concept of a private nuisance." *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *6 (D. Md. Aug. 17, 2000) (citing *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 710 (1992)); *In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 417 (S.D.N.Y. 2005) ("Plaintiffs' nuisance claims must be dismissed because plaintiffs seek to recover from defendants in their capacity as manufacturers, and not as property owners or users."); *Prosser and Keeton on Torts*, § 86 (5th ed. 1984) at 618 ("If 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or with any public right, as mere aberration.").

Many federal and state courts outside of New Jersey agree that nuisance law addresses the use or condition of property, *not* the production and sale of products. As the Oklahoma Supreme Court explained in overturning a public nuisance judgment arising from a manufacturer's deceptive sale and promotion of opioids, public nuisance "has historically been linked to the use of land by the one creating the nuisance." *Hunter*, 499 P.3d at 724. In reaching its conclusion, the court recognized the "clear national trend to limit public nuisance to land or property use." *Id*. at 730.

The Rhode Island Supreme Court agrees, explaining that "[t]he law of public nuisance never before has been applied to products, however harmful." *State v. Lead Indus. Ass'n*, 951 A.2d 428, 456 (R.I. 2008). And, in affirming dismissal of public nuisance claims related to the production and sale of asbestos products, the Eighth Circuit explained that "cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of the

property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum*, 984 F.2d 915, 920 (8th Cir. 1993).

Moreover, allowing plaintiffs to pursue nuisance claims based on the production, promotion, and sale of lawful products would vitiate the carefully crafted rules governing products-liability law. Courts have long recognized that the boundaries between nuisance and products liability must be respected; otherwise, nuisance law would turn into "a monster that would devour in one gulp the entire law of tort." *Lead Paint*, 191 N.J. at 440 (quoting *Camden Cnty.*, 273 F.3d at 540, in turn quoting *Tioga Pub. Sch. Dist.*, 984 F.2d at 921). In particular, "[p]ublic nuisance focuses on the abatement of annoying or bothersome activities," whereas products liability is "designed specifically to hold manufacturers liable for harmful products." *Lead Indus. Ass'n*, 951 A.2d at 456. For this reason, courts "refus[e] to apply" nuisance law "in the context of injuries caused by defective product design and distribution." *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000); *see also Camden Cnty.*, 273 F.3d at 540 ("[C]ourts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); *Atl. Richfield Co. v. Cnty. of Lehigh*, 2023 WL 3266792, at *8 (Pa. Commw. Ct. May 5, 2023) ("The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance." (cleaned up)). Otherwise, plaintiffs would be able to circumvent important "requirements that surround a products liability action." *Lead Indus. Ass'n*, 951 A.2d at 456.

As the Oklahoma Supreme Court has recognized, "public nuisance is fundamentally ill-suited to resolve claims against product manufacturers," *Hunter*, 499 P.3d at 726, and "extending public nuisance law to the manufacturing, marketing, and selling of products . . . would allow consumers to convert almost every products liability action into a [public] nuisance claim," *id*. at

729–30. Indeed, applying nuisance law "to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers," which is why the "Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products." *Id.* at 725. Accordingly, Plaintiffs' public and private nuisance claims should be dismissed because the Complaint does not contend that the alleged nuisance arose from the use of Defendants' land.

Second, Plaintiffs' public nuisance claim fails because Defendants did not control the instrumentality that allegedly caused the purported nuisance of global climate change—namely, greenhouse gas emissions. Such control is an essential element of a public nuisance claim under New Jersey law. In *Lead Paint*, the New Jersey Supreme Court held that "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." 191 N.J. at 429. The Court also emphasized a temporal dimension to this control, noting a "necessary link" between "the conduct of defendants . . . at the time" of their control and the "interfere[nce] with the public health," or other harm. *Id.* at 434; *see also id.* at 412, 440 (reversing the lower court's holding "that parties, like defendants, may be liable for a public nuisance even if those parties do not control, at the time the nuisance is created or exists, the instrumentality causing the nuisance").

Defendants here exercise even less control over the instrumentality of the alleged nuisance—global greenhouse gas emissions—at the time of the nuisance than paint manufacturers exercised over the instrumentality in that case—lead paint. Whereas the *Lead Paint* defendants did control lead paint when they sold it directly to third parties, whose downstream use of it then directly caused the alleged harms, Defendants here *never* had control of the instrumentality of the alleged nuisance because they did not sell or distribute greenhouse gas emissions or extreme weather events. Rather, they sold fossil fuel products that, when independently combusted by third-party

individuals, corporations, and governments through, for example, automobiles, airplanes, electric power generating facilities, homes, and hospitals, produced the emissions that—in combination with other anthropogenic and natural sources of emissions around the world over the course of many decades—allegedly interfered with public rights. *See* Compl. ¶¶ 39–46 (explaining that CO_2 *emissions* are the primary driver of climate change). In fact, Plaintiffs do not—and cannot—allege that Defendants exercised control over those emissions *at any time*, much less during the period when they accumulated at levels sufficient to create an alleged public nuisance.

As courts across the country have long recognized, it "would run contrary to notions of fair play" to hold sellers like Defendants[12] liable for a public nuisance when "they lack direct control over how end-purchasers use" their products. *City of Philadelphia*, 126 F. Supp. 2d at 911. Thus, the vast majority of courts have joined New Jersey in "refrain[ing] from applying public nuisance doctrine in cases where the instrument of the nuisance is a lawfully sold product which has left the manufacturer's control." *Id.*; *see also, e.g.*, *Hunter*, 499 P.3d at 727–28 ("Another factor in rejecting the imposition of liability for public nuisance . . . is that J&J, as a manufacturer, did not control the instrumentality alleged to constitute the nuisance at the time it occurred."); *Lead Indus. Ass'n*, 951 A.2d at 449 ("[A] defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*."); *Detroit Bd. of Educ.*, 196 Mich. App. at 712–13 ("If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."); *Tioga Pub. Sch. Dist.*, 984 F.2d at 920 ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance."). Imposing nuisance

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[12] Again, API does not sell, transport, or refine fossil fuels at all, making Plaintiffs' nuisance claim against it even more attenuated.

liability on the Defendants here for the far-reaching atmospheric processes allegedly precipitated by end consumers' combustion of fossil fuels would eviscerate the control requirement.

Third, Plaintiffs improperly attempt to recover damages as private plaintiffs, despite allegedly suffering injuries characteristic of a public entity. As the New Jersey Supreme Court has explained, in public nuisance, "the remedies available traditionally vary between public and private plaintiffs." *Lead Paint*, 191 N.J. at 434. While a public entity seeks to vindicate a "common right" and thus pursues "civil actions to abate the nuisance at the property owner's expense," a private plaintiff "seeks recompense for damages to the extent of the special injury sustained." *Id.* Accordingly, the Supreme Court has made clear that "there is no right either historically, or through the Restatement (Second)'s formulation, for [a] public entity to seek to collect money damages in general," which is "not a remedy available to a public entity plaintiff to the extent that it acts in the place of the 'sovereign.'" *Id.* at 428, 434–35. And subsequent cases have also rejected attempts by public entities to seek damages in public nuisance cases. *See, e.g.*, *N.J. Dep't of Env't Prot. v. E.I. du Pont de Nemours and Co*., 2021 WL 6049522, at *7 (D.N.J. Dec. 21, 2021) (limiting public entity plaintiffs' "public nuisance claims . . . to abatement and the costs of such abatement" in motion to dismiss context); *Hess*, 2020 WL 1683180, at *6–7 (affirming dismissal of public entity's public nuisance claim for damages).

Here, although Plaintiffs' public nuisance claim seeks damages, the State affirms in the *very next sentence* that it "pursue[s] these remedies in the State's sovereign and *parens patriae* capacity for the benefit of the general public." Compl. ¶ 295. New Jersey precedent bars a public entity, acting in its sovereign capacity, from collecting damages.[13]

[13] Moreover, Plaintiffs' public nuisance claim does not even attempt to allege any special injuries that might support damages in the private-plaintiff context. *See Lead Paint*, 191 N.J. at 434–35.

At bottom, the New Jersey Supreme Court, and many other courts, have rejected public nuisance claims that attempt to hold a party liable for the sale of lawful products that purportedly created a nuisance after leaving the seller's control. This Court likewise should reject Plaintiffs' "clever, but transparent attempt" to bring an improper claim in the guise of nuisance law. *City of Philadelphia*, 126 F. Supp. 2d at 911.

5. Plaintiffs Fail To Allege A Claim For Impairment Of The Public Trust

Plaintiffs' third cause of action for "Impairment of the Public Trust" also fails. Such a claim does not exist under New Jersey law. Nor is such a claim recognized by any other court in the country or the Restatement of Torts. Plaintiffs seek to invent an entirely new cause of action, but this Court should reject that effort.

""The essence of the public trust doctrine is that the State holds" certain resources (*e.g.*, beaches, public waterways, etc.) "in trust for the people." *Exxon Mobil Corp.*, 2008 WL 4177038, at *8 (*citing Arnold*, 6 N.J.L. 1). The doctrine provides the Legislature with authority to enact laws as appropriate to protect and preserve this common property for the benefit of the public. *See*, *e.g.*, *Gough v. Bell*, 21 N.J.L. 156, 165 (N.J. 1847) ("navigable streams, bays, and arms of the sea, belong to the public" and are held "in trust for the public . . . under the guardianship of the Legislature."); *Hackensack Riverkeeper, Inc. v. N.J. Dep't of Env't Prot.*, 443 N.J. Super. 293, 298 (App. Div. 2015) (NJDEP regulations governing public trust resources must be "authorized . . . by the Legislature's delegation of powers to DEP pursuant to the public trust doctrine."), *superseded by statute on other grounds*.

Plaintiffs cannot create a new claim out of whole cloth because it deems the Legislature's statutory enactments to be insufficient. Indeed, the Appellate Division has twice rejected NJDEP's previous attempts to unilaterally broaden its authority under the Public Trust Doctrine, holding that the doctrine grants the executive branch only the authority to enforce existing law. *See Hackensack*

Riverkeeper, Inc., 443 N.J. Super. at 303–307 (invaliding NJDEP regulations and rejecting argument that NJDEP may rely on the Public Trust Doctrine to promulgate regulations governing public access to beaches without express statutory authorization); *Borough of Avalon v. N.J. Dep't of Env't Prot.*, 403 N.J. Super. 590, 606 (App. Div. 2008) (same).

To the extent New Jersey courts have adjudicated claims relating to the Public Trust Doctrine, the vast majority involved challenges by the public to a governmental restriction on access to common resources; *i.e.*, tidally flowed waters and their adjacent shorelines.

For example, the Public Trust Doctrine was the basis to disapprove of municipal regulations that favored residents over non-residents with regard to access to and fees for using beaches, s*ee Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254, 1269 (D.N.J. 1982), and regulations limiting non-residents to a 50-foot strip of beach, *see Van Ness v. Borough of Deal*, 78 N.J. 174, 179–80 (1978); *see also Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 304 (1972) (municipality could not charge higher beach-access fees to non-residents). The Public Trust Doctrine has similarly been extended to require reasonable public access to beaches adjoining privately-owned dry sand. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 323–24 (1984) (private owners of beachfront land must provide public with "reasonable access to the sea"); *see also Raleigh Ave. Beach Ass'n. v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 53 (2005) (explaining that, under the Public Trust Doctrine, the public's interest in "privately-owned dry sand beaches" "'may [include both] a right to cross [such] privately owned . . . beaches in order to gain access to the foreshore . . . [and a] right to sunbathe and generally enjoy recreational activities' on the dry sands" (alterations in original)).

But the Complaint makes clear that Defendants' alleged misconduct is limited to so-called deception regarding their fossil-fuel products, not preventing New Jersey citizens from accessing

their beaches. The Complaint does not allege that Defendants violated any municipal regulation to limit beach access, or that they are the owners or operators of real property barring access to any beach. To the contrary, Plaintiffs allege that Defendants engaged in a "campaign of denial and disinformation" and (2) a "greenwashing" campaign. *See* Compl. ¶¶ 97–142, 158–200. No court applying New Jersey law, state or federal, has recognized a Public Trust Doctrine claim based on alleged misstatements and omissions. Plaintiffs' claim therefore falls outside the ambit of the Public Trust Doctrine as recognized by New Jersey jurisprudence and should be dismissed.

In the one case throughout the country to have addressed the existence of a claim like the one Plaintiffs advance here, the court soundly rejected that claim at the motion to dismiss stage. *See State of Vermont v. 3M Co.*, 2020 WL 13368654 (Vt. Super. Ct. May 28, 2020). The court held that plaintiff, the State of Vermont, could not "support the idea that" the Public Trust Doctrine is itself a "substantive cause[] of action." *Id.* at *6; *see also id.* at *5 ("The State relies on the rights of trustees to assert claims on behalf of the trust, but the trust must have a claim to start with for a trustee to assert."). It concluded:

> On a more basic level, if the State were correct, what would the elements of its claim be? What would it have to prove to win? To what source would the court look for these answers? ***There must be a recognized cause of action to litigate. Courts do not make such things up as we go along***.

Id. at *6 (emphasis added); *cf. U.S. v. Reserve Mining Co.*, 394 F. Supp. 233, 242 (D. Minn. 1974) (declining to "extend Wisconsin's public trust doctrine to provide an affirmative cause of action in addition to the traditional [common law] causes of action asserted by the State of Wisconsin.").

Plaintiffs also erroneously assert that their Impairment of the Public Trust claim, to the extent it is viable, is exempt from the Comparative Negligence Act ("CNA"). Compl. ¶ 267. The CNA bars plaintiffs asserting "negligence actions" from recovering damages if they are found to

be more than 50% at fault for their own injuries.[14] N.J.S.A. 2A:15-5.1, *et seq*. The CNA does not apply to actions brought by a governmental agency "pursuant to the *environmental laws*" of New Jersey. N.J.S.A. 2A:15-5.4 (emphasis added). Plaintiffs' claims, however, are not brought pursuant to any "environmental law." The Complaint makes clear that Plaintiffs' claims arise out of Defendants' alleged "disinformation campaign," Compl. ¶ 1, not the spilling or mishandling of toxic substances that define "environmental laws" under the CNA. *See* N.J.S.A. 2A:15-5.4 (citing the "Solid Waste Management Act, " "Water Pollution Control Act," the "Spill Compensation and Control Act," the "Major Hazardous Waste Facilities Siting Act," the ""Sanitary Landfill Facility Closure and Contingency Fund Act," the ""Environmental Cleanup Responsibility Act," the "Air Pollution Control Act (1954)," the "Toxic Catastrophe Prevention Act," the "Pesticide Control Act of 1971," and the "Radiation Protection Act").

Courts routinely apply the CNA to claims involving common law fraud and deception. *See Gennari v. Weichart Co. Realtors*, 148 N.J. 582, 609 (1997) (damages arising out of common-law fraud and violations of the Consumer Fraud Act could be apportioned under the CNA); *see also Belmont Condo. Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 88–90 (App. Div. 2013) (holding that damages were subject to apportionment under the CNA in a construction defect case in which the plaintiff asserted claims under the Consumer Fraud Act as well as common-law fraud); Sullivan, *New Jersey Consumer Fraud* § 13:2-5 (2018) ("The fault and damage-apportionment principles of New Jersey's Comparative Negligence Act (and the related Joint Tortfeasors Contribution Law) are fully applicable to claims arising under the Consumer Fraud Act."). Plaintiffs' case is no

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[14] "'Negligence Actions' includes, but is not limited to, civil actions for damages based upon theories of negligence, products liability, professional malpractice whether couched in terms of contract or tort and like theories. In determining whether a case falls within the term 'negligence actions,' the court shall look to the substance of the action and not the conclusory terms used by the parties." N.J.S.A. 2A:15-5.2(c)(1).

exception and, even if Impairment of the Public Trust were a viable cause of action, the CNA plainly applies to the purported claim.

IV. CONCLUSION

Plaintiffs are trying to hold a small number of corporations liable—based on their marketing and sale of a lawful consumer product—for the cumulative actions of billions of actors over the course of many decades. Plaintiffs' claims have many shortcomings, as detailed above, including that they are foreclosed by the structure of the federal Constitution and by the Clean Air Act; that those claims improperly seek to supplant the policy-making authority of the political branches of both state and federal governments; that the bulk of Plaintiffs' claims are brought long past the statute of limitations; and that they fail under New Jersey law, even if that law could be applied.

For all of the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

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