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|---|---|---|
| MAYOR AND CITY COUNCIL OF BALTIMORE | * | IN THE |
| | * | CIRCUIT COURT |
| Plaintiff, | | |
| v. | * | FOR BALTIMORE CITY |
| BP P.L.C., *et al.* | * | Case No. 24-C-18-004219 |
| Defendants. | * | Specially Assigned to the Hon. Videtta A. Brown |
| | * | |

* * * * * * * * * * * * *

**PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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## I. INTRODUCTION

This case is about Defendants' failure to warn and deceptive promotion of products in Maryland that they knew would cause harm in Maryland. Defendants—among them the world's largest oil-and-gas companies—have waged a sophisticated, long-running disinformation campaign to discredit the science of global warming and mislead the public about their fossil fuel products' environmental impacts. Defendants' tortious conduct worsened climate change and its local impacts to Plaintiff the Mayor and City Council of Baltimore (the "City") and its residents. The City accordingly "seeks to hold Defendants liable on well-established state tort law theories" for the local injuries they have caused. *See* Br. of Amicus Curiae Attorney General of Maryland in Opp. to Defendants' Mot. to Dismiss for Failure to State a Claim at 2, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Apr. 23, 2020).

Defendants' arguments for dismissal all attack an imagined caricature of the Complaint ("Compl."). Their arguments that the City's claims are preempted by federal common law or the federal Clean Air Act ("CAA") and present nonjusticiable federal questions all hinge on the faulty assumption that this case asks the Court to "usurp the power of the legislative and executive branches (both federal and state) to set climate policy." *See* Mem. of Law in Support of Defs' Mot. to Dismiss for Failure to State a Claim ("Mot.") at 1. The Fourth Circuit rejected that characterization of the Complaint in affirming the remand order that returned this case to state court: "None of Baltimore's claims concern emission standards, federal regulations about those standards, or pollution permits. Their Complaint is about Defendants' fossil-fuel products and extravagant misinformation campaign that contributed to its injuries." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022) ("*Baltimore IV*"), *cert. denied*, 143 S. Ct. 1795 (2023)). "Numerous [other] courts have [likewise] rejected similar attempts by oil and

gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers." *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1201 (Haw. 2023) (affirming denial of motions to dismiss for failure to state a claim and lack of personal jurisdiction).[1] This Court should do so as well. When the City prevails, Defendants will not need to reduce fossil fuel production to avoid future liability, and this case does not and could not regulate interstate or international pollution.

Each of Defendants' arguments based on federal law fails. Federal common law does not preempt the City's claims because those claims do not come within any such body of law, and there has never been a federal common law concerning consumer deception. Whatever previously operative body of federal common law concerning interstate air pollution might once have applied no longer exists. It has been displaced by the CAA, and "after displacement, federal common law does not preempt state law." *Id.* at 1181. The CAA also does not preempt the City's claims because the case does not seek to regulate any pollution source, but rather remedy injuries from misleading and deceptive marketing behavior. Even assuming this case might indirectly affect greenhouse gas emissions, the CAA still would not preempt the City's claims because that statute does not occupy the field of air pollution regulation, and adjudicating the case would not pose an obstacle to

[1] *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1113 (9th Cir. 2022) ("This case is about whether oil and gas companies misled the public about dangers from fossil fuels. It is not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the [outer continental shelf]."), *cert. denied*, 143 S. Ct. 1795 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1264 (10th Cir. 2022) ("The Municipalities' claims do not concern CAA emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits. Indeed, their suit is not brought against emitters."), *cert. denied*, 143 S. Ct. 1795 (2023); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("[T]he State's action here is far more modest than the caricature Defendants present. States have both the clear authority and primary competence to adjudicate alleged violations of state common law and consumer protection statutes, and a complex injury does not a federal action make."), *aff'd sub nom. Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023), *cert. petition filed*, No. 23-168 (U.S. Aug 22, 2023); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud.").

accomplishing the statute's purposes or lead to irreconcilable state and federal requirements. This case also does not present any nonjusticiable political questions because the rights and remedies the City seeks to vindicate are well known to Maryland law. The City's claims would not interfere with the regulatory authority of the elected branches because, again, the City does not seek to regulate emissions, enjoin or reduce pollution, or set climate and energy policy.

There is also no basis to dismiss the City's claims under Maryland law. The City sufficiently alleges all elements of its claims for public and private nuisance, trespass, failure to warn and design defect sounding in negligence and strict liability, and violations of the Maryland Consumer Protection Act ("MCPA"). The City properly asserts nuisance claims because, by wrongfully promoting their fossil fuel products while concealing and downplaying those products' risks, Defendants actively participated in creating unreasonable climate-related interferences with public health, safety, and welfare in Baltimore, and with the normal use and enjoyment of City property. Such conduct fits within Maryland's expansive definition of nuisance. The Complaint also properly alleges Defendants interfered with the City's interest in exclusive possession of its property by knowingly causing water and other foreign materials to invade that property through sea level rise, flooding, extreme precipitation, and other climate-related impacts exacerbated by their tortious conduct—invasions the City alleges are already occurring and will only worsen. Defendants owed a duty to issue adequate warnings to protect the City and others foreseeably harmed by their fossil fuel products of the hazards attending those products' intended uses, which Defendants researched and understood in depth. The dangers of Defendants' products were not obvious to ordinary consumers, due in large part to Defendants' deliberate efforts. Defendants breached their duty by failing to warn and instead deploying a lengthy campaign of deception and denial, causing the City's injuries. Defendants' deceptive tactics deprived consumers of the ability

to understand that the normal use of fossil fuel products causes grave climate dangers, such that those products were far more dangerous than a reasonable consumer would expect. Finally, the City properly asserts an MCPA claim because Defendants' misleading and deceptive statements and omissions deceived consumers about the risks of Defendants' fossil fuel products, increasing and prolonging demand for fossil fuels and exacerbating the City's climate-related injuries.

The Court should reject Defendants' attempts to impose nonexistent limitations on Maryland law and their requests to prematurely adjudicate factual questions, and deny the Motion.

## II. STATEMENT OF FACTS

For more than half a century, Defendants have known that their fossil fuel products create greenhouse gas emissions that change Earth's climate. Compl. ¶¶ 1, 5. Beginning in the 1950s, Defendants researched the link between fossil fuel consumption and global warming, amassing a comprehensive understanding of their products' climate impacts. *Id.* ¶¶ 103–40. They understood that only a narrow window of time existed to prevent "catastrophic" climate change. *E.g.*, *id.* ¶¶ 112, 118, 120, 124, 127, 129. Defendants capitalized on their superior knowledge by investing to protect their own assets and exploit new opportunities in a warming world. *Id.* ¶¶ 5, 171–76.

Instead of sharing their knowledge with consumers and the public (or indeed anyone outside their companies), Defendants deployed a sophisticated campaign of deception to misrepresent and conceal their products' risks. *Id.* ¶¶ 1, 6–7, 141–70. Over many decades, Defendants affirmatively promoted their fossil fuel products without warning of their risks, while spreading disinformation and casting doubt on the growing scientific consensus about climate change. *Id.* ¶¶ 141–70. Defendants relied in large part on trade associations and industry groups like the American Petroleum Institute ("API"), the Global Climate Coalition, and the Information Council for the Environment to disseminate climate change denial and disinformation on their

behalf. *See id.* ¶¶ 30–31, 150–68.

When public awareness of climate change began catching up to Defendants' own knowledge, many Defendants launched marketing campaigns repositioning themselves as moving away from fossil fuel production and toward renewable energy. *E.g.*, *id.* ¶¶ 184–88. But Defendants' "forays into the alternative energy sector were largely pretenses," *id.* ¶ 184, and Defendants often contradicted their asserted commitments to renewable energy development by continuing and intensifying their focus on fossil fuel production, *id.* ¶¶ 184–88. Defendants' strategy has worked as intended, inflating and prolonging demand for (and profits from) fossil fuels, while substantially increasing greenhouse gas emissions and their concomitant climate impacts. *Id.* ¶¶ 91–102, 169–70, 177–82.

As a result, the City and its residents have suffered, and will continue to suffer, severe climatic harms. *Id.* ¶¶ 8–10, 14–17, 59–60, 62, 67–68, 195–217. Baltimore, which encompasses over 60 miles of waterfront land, is particularly susceptible to flooding and inundation exacerbated by sea level rise, extreme precipitation, and coastal storms. *Id.* ¶¶ 8, 14–17, 59, 72–82, 85–86, 196–204. The City is also especially vulnerable to rising temperatures and extreme heat events, which add to the heat load of its urban infrastructure and worsen the "urban heat island" effect. *Id.* ¶ 67–68. These climate impacts, among myriad others, jeopardize City property, critical infrastructure including roads and wastewater facilities, cultural and natural resources, and City residents' health and safety. *Id.* ¶¶ 8, 15–17, 196–217. The City faces mounting costs to protect its resources and residents from these worsening climate impacts, as well as decreased tax revenue due to impacts on private property and the City's shipping and tourism industries. *Id.* ¶¶ 15–17, 197–204, 207, 210–15. The City filed this lawsuit to ensure that Defendants—rather than the City or its taxpayers—bear the costs of the local injuries their tortious conduct is causing. *Id.* ¶ 12.

Defendants removed the case from this Court to federal court, and City successfully moved to remand. *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, *Baltimore IV*, 31 F.4th 178, *cert. denied*, 143 S. Ct. 1795 (2023).

## III. LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim, the court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can reasonably be drawn from those pleadings." *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021) (cleaned up); *see also Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 169 (2021). The court must view the well-pleaded facts and allegations "in a light most favorable to the non-moving party." *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 604 (2019) (cleaned up). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 614 (2011) (cleaned up).

Maryland's pleading requirements serve multiple purposes, including "provid[ing] notice to the parties as to the nature of the claim or defense"; among those purposes, "notice is paramount." *Scott v. Jenkins*, 345 Md. 21, 27–28 (1997); *Tshiani v. Tshiani*, 436 Md. 255, 270 (2013) ("The primary purpose behind our pleading standards is notice."). Thus, "[i]n determining whether a plaintiff has alleged claims upon which relief can be granted, there is a big difference between that which is necessary to prove the elements, and that which is necessary to merely allege them." *Wheeling*, 473 Md. at 374 (citing *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121 (2007)).

## IV. ARGUMENT

### A. The City's Claims Are Not Preempted by Federal Common Law.

Defendants' argument that federal common law preempts the City's claims because "'the

basic scheme of the Constitution'" prohibits applying state law in any case "seeking redress for injuries allegedly caused by out-of-state pollution," Mot. at 10, fails for at least four reasons.

*First*, the federal common law of interstate pollution nuisance Defendants invoke could not preempt the City's claims here, because the City's claims look nothing like any federal common law causes of action ever recognized. The City's Complaint does not seek to cap, enjoin, or regulate any pollution source, as the Fourth Circuit recognized in affirming remand to this Court:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil-fuel production in the Complaint, which spans 132 pages. But, by and large, these references only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil-fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate-change-related injuries, it is not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

*Baltimore IV*, 31 F.4th at 233–34. Because "the source of [the City's] alleged injury is Defendants' allegedly tortious marketing conduct, not pollution traveling from one state to another," the City's claims "would not be preempted by" the federal common law of interstate pollution nuisance. *Honolulu*, 537 P.3d at 1201. Defendants' heavy reliance on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is therefore misplaced. Even assuming that case was correctly decided, the court there found the plaintiff's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," and that the defendants could only avoid future liability if they "cease[d] global production altogether," which is not true here. *Id.* at 93.

*Second*, even if City's claims would have once come within the federal common law on which Defendants rely, that body of law has been "displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions," namely the CAA, and has no effect. *Am. Elec. Power*

*Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"). "When federal common law is displaced, it 'no longer exists,'" and cannot preempt state law. *Honolulu*, 537 P.3d at 1199, n.11 (quoting *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1260 (10th Cir. 2022)); *see also AEP*, 565 U.S. at 423; *Baltimore IV*, 31 F.4th at 205.

*Third*, there has never been a federal common law of "foreign emissions," Mot. at 13, and to the extent Defendants rely on the foreign affairs doctrine, they have not made a serious showing that it applies. Defendants vaguely urge that "States lack the power to regulate international activities or foreign policy and affairs," and that the City's claims invade federal foreign relations prerogatives. Mot. at 14. But they "never detail[] what those foreign relations are and how they conflict with [the City's] state-law claims." *Honolulu*, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203). "A state or local law is not invalid if it has only 'some incidental or indirect effect in foreign countries,'" and that is the most Defendants assert here. *Bd. of Tr. of Emps.' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City*, 317 Md. 72, 127 (1989) ("*Baltimore Emps. Ret. Sys.*") (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

*Fourth*, there is no basis to craft *new* federal common law, even assuming this Court has authority to do so. Federal "common lawmaking" is only ever appropriate where it is "necessary to protect uniquely federal interests," *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)), and there are "no 'uniquely federal interests' in regulating marketing conduct, an area traditionally governed by state law," *Honolulu*, 537 P.3d at 1202. To the extent the Second Circuit Court of Appeals purported to recognize a new federal common law of international pollution nuisance in *City of New York*, that decision "is not persuasive in that respect" because the court "'essentially evade[d] the careful analysis that the Supreme Court requires during a significant-conflict analysis.'"

*Honolulu*, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203).

**1. Even If It Were Still Operative, the Federal Common Law of Interstate Pollution Nuisance Would Not Apply Here.**

The common law on which Defendants rely never recognized claims like the City's, and there has never been a federal common law pertaining to consumer deception. The U.S. Supreme Court only ever recognized a "federal common law of interstate nuisance" in cases where a state plaintiff sued to enjoin or restrict pollution being discharged from a specific point source located in another state. *See AEP*, 564 U.S. at 418, 421.[2] The City's claims look nothing like that—the City challenges the Defendants' alleged deceptive promotion and failure to warn, which federal common law has never recognized as a basis for liability under any cause of action. *See Baltimore IV*, 31 F.4th at 208. Even if this Court were to find that some vestigial federal common law of air pollution nuisance survived the CAA, it would not preempt the City's claims.

Defendants badly contort the Complaint to fit the City's claims within federal common law. They argue that the City "asks this Court to regulate the nationwide—and even worldwide—marketing and distribution of lawful products on which billions of people" depend, and "set climate policy," Mot. at 1; "regulate international activities or foreign policy and affairs," *id.* at 14; and "regulate interstate emissions," *id.* at 23. In the jurisdictional context, the Fourth Circuit correctly rejected Defendants' mischaracterizations of the City's Complaint and held that "Defendants have failed to show that federal common law truly controls this dispute involving their fossil-fuel products and misinformation campaign." *Baltimore IV*, 31 F.4th at 208. The City does not seek a reduction or cessation of emissions from any source, and does not seek injunctive

[2] *E.g.*, *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236, 238 (1907) (sulfuric acid gas from copper smelter); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (sewage discharged into New York Harbor); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (garbage dumped into New York Harbor); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") (sewage discharged into Lake Michigan).

relief that would limit Defendants' ability to extract, refine, and sell fossil fuels or anyone's ability to burn them. *See* Compl. ¶ 12.

"Numerous [other] courts have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers," *Honolulu*, 537 P.3d at 1201 (collecting cases), and the Hawai'i Supreme Court's discussion in *Honolulu* is squarely on point. The defendants argued there that the plaintiffs were "seeking to regulate interstate and international greenhouse gas emissions," but the court "agree[d] with [the] Plaintiffs" that their "suit d[id] not seek to regulate emissions and does not seek damages for interstate emissions." *Id.* at 1181. To the contrary, the plaintiffs brought "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products." *Id.* at 1187. The court quoted the Fourth Circuit's description of this very case, holding that the plaintiffs "clearly s[ought] to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Id.* at 1181 (quoting *Baltimore IV*, 31 F.4th at 233). Because "[t]he source of Plaintiffs' injury [wa]s not pollution, nor emissions," but rather the "Defendants' alleged failure to warn and deceptive promotion," the court held that "even if federal common law had not been displaced, Plaintiffs' claims would not be preempted by it." *Id.* at 1201. The *Honolulu* opinion confirms that the Fourth Circuit's understanding of the City's Complaint in its jurisdictional analysis applies with equal force here, on the merits.

Even if Defendants' caricature of the Complaint were accurate, federal common law nuisance claims were only ever available to *states*. The U.S. Supreme Court never "decided whether private citizens . . . or political subdivisions . . . may invoke the federal common law of nuisance to abate out-of-state pollution." *AEP*, 564 U.S. at 422. The Court in *AEP* declined to

resolve the "academic question whether, in the absence of the Clean Air Act," those types of plaintiffs "could state a federal common-law claim," because "[a]ny such claim would be displaced." *Id.* at 423. There has simply never been a federal common law cause of action the City could have asserted.

The Second Circuit's reasoning in City of New York does not counsel a different result, because the complaint in that case was materially different from the City's. The plaintiff there "acknowledge[d]" that the conduct on which it premised liability was "lawful commercial activity," and the Second Circuit held that the City's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," requiring the defendants to "cease global production altogether" to avoid ongoing liability. 993 F.3d at 87, 93 (cleaned up). Defendants say the City "pursues the exact same theory of liability" here, Mot. at 17, but that is simply incorrect. In the appellate brief Defendants cite, the *City of New York* plaintiff explained that its "particular theory of the claims asserted . . . d[id] not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation," and instead relied on "a narrower theory that would require Defendants to pay for the severe harms resulting from their lawful and profitable commercial activities." Br. for Appellant at 19, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018); *see also id.* ("Nuisance and trespass offer a means to reallocate the costs imposed by lawful economic activity."). The "source of tort liability" here is not Defendants' production and sale of fossil fuels, but rather their "concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use." *Baltimore IV*, 31 F.4th at 233–34.

**2. The Body of Federal Common Law on Which Defendants Rely Has Been Displaced by the Clean Air Act and No Longer Exists.**

Defendants' contention that federal common law preempts the City's claims because "'the basic scheme of the Constitution' requires that federal law govern disputes involving 'air and water in their ambient or interstate aspects'" would remain wrong on its own terms even if that body of law applied here. Mot. at 14 (quoting *AEP*, 564 U.S. at 421). Congress "displaced federal common law governing interstate pollution damages suits" through the CAA, and "after displacement, federal common law does not preempt state law." *Honolulu*, 537 P.3d at 1181.

Federal common law "plays a necessarily modest role" under the Constitution, which "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717. Courts thus "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*") (cleaned up), and ultimately the fate and scope of "federal common law is 'subject to the paramount authority of Congress,'" *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). Congress can eliminate judge-made federal law even without intending to: "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law . . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34. "When a federal statute displaces federal common law, the federal common law ceases to exist." *Baltimore IV*, 31 F.4th at 205 (cleaned up); *Honolulu*, 537 P.3d at 1195 (same).

Defendants agree that Congress "displace[d] federal common-law remedies" for "claims based on domestic emissions" when it passed the CAA, and that the Supreme Court so held in *AEP*. Mot. at 12. The plaintiffs in *AEP* brought federal and state common law nuisance claims against electric power companies, seeking injunctive relief that would have required each defendant to reduce its greenhouse gas emissions. 564 U.S. at 418–19. The Court "h[e]ld that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions," because "the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. "In light of our holding that the Clean Air Act displaces federal common law," the Court continued, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.* at 429. Because the parties had not "briefed preemption or otherwise addressed the availability of a claim under state nuisance law," however, the Court "le[ft] the matter open for consideration on remand." *Id.*

State and federal courts have echoed *AEP*'s conclusion and declined to recognize the federal common law's continued vitality. *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (affirming dismissal of federal common law claims because "federal common law addressing domestic greenhouse gas emissions has been displaced"); *Baltimore IV*, 31 F.4th at 205; *Honolulu*, 537 P.3d at 1195. The "underlying legal basis" for the former federal common law Defendants invoke "is now pre-empted by statute" and has no effect. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981).

**3. Displaced Federal Common Law Cannot Preempt State Law.**

Despite conceding that the federal common law of interstate pollution nuisance has been displaced, Defendants insist that "such displacement does not allow state law to govern matters that it was never competent to address in the first place," and that the non-existent federal common

law still preempts state law. Mot. at 12. That assertion is directly contrary to the U.S. Supreme Court's analysis of federal environmental statutes and their relation to federal common law.

The Supreme Court of Hawai'i rejected Defendants' exact line of reasoning in *Honolulu* and affirmed denial of motions to dismiss a closely analogous complaint. As the City does here, the plaintiffs in *Honolulu* brought state common law claims alleging that fossil fuel companies "knowingly concealed and misrepresented the climate impacts of their fossil fuel products," which ultimately caused "property and infrastructure damage in Honolulu." 537 P.3d at 1181. And like Defendants here, the defendants in *Honolulu* "acknowledge[d] that the federal common law that once governed interstate pollution damages and abatement suits was displaced by the CAA," but argued that "federal common law still lives but only with enough power to preempt state common law claims 'involving interstate air pollution.'" *Id.* at 1198 (cleaned up). The court declined to adopt the defendants' argument that "federal common law is both dead and alive," because it "engages in backwards reasoning" and "cannot be reconciled with *AEP*." *Id.* at 1198–99.

The Hawai'i Supreme Court traced the U.S. Supreme Court's reasoning in *AEP*, and observed that the Court "did not analyze the federal common law's preemptive effect because it was displaced by the CAA." *Id.* Instead, *AEP* "made clear that whether the state law nuisance claims were preempted depended *only* on an analysis of the CAA because 'when Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears.'" *Id.* (quoting *AEP*, 564 U.S. at 423); *see also Milwaukee II*, 451 U.S. at 314. "And if federal common law retained preemptive effect after displacement," the Court in *AEP* "would have instructed the trial court on remand to examine whether displaced federal common law preempted the state law claims," which it did not. *Honolulu*, 537 P.3d at 1199. The Hawai'i court thus held that "displaced federal common

law plays no part in this court's preemption analysis," which "requires an examination *only* of the CAA's preemptive effect." *Id.* at 1199, 1200.

The reasoning in *Honolulu* comports with the U.S. Supreme Court's consistent treatment of displaced federal common law, pre-dating *AEP*. The Court followed the same approach in its series of cases analyzing the relationship between state law, displaced federal common law, and the federal Clean Water Act ("CWA"). The Court had recognized a federal common law of interstate water pollution nuisance in *Milwaukee I*, but shortly thereafter "Congress enacted the Federal Water Pollution Control Act Amendments of 1972," which created an elaborate permitting framework to control water pollution. *Milwaukee II*, 451 U.S. at 307, 310–11. In *Milwaukee II*, the Court held that "establishment of such a self-consciously comprehensive program by Congress" left "no room for courts to attempt to improve on that program with federal common law." *Id.* at 319. The Court added that "the comprehensive nature of [Congress's] action suggest[ed] that [the CWA] was *the exclusive source* of federal law." *Id.* at 319 n.14 (emphasis modified).

The Court confronted the separate question of whether *state* law could still apply to claims involving interstate water pollution in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and held that it could, to the extent not preempted by the CWA. The Court performed a traditional statutory preemption analysis and held that "[t]he [CWA] pre-empts state law to the extent that the state law is applied to an out-of-state point source," but does not preempt claims under the law of the state where the pollution source sits. *Id.* at 500. The Court reasoned that "[a]n action brought against [a pollution source in New York with a CWA permit] under New York nuisance law would not frustrate the goals of the CWA," in part because "[a]lthough New York nuisance law may impose separate standards and thus create some tension with the permit system, [the] source only [would be] required to look to a single additional authority, whose rules should be relatively

predictable." *Id.* at 498–99. The Court did *not* hold that the displaced federal common law or the CWA prohibited all application of state law to such a dispute, and did *not* analyze the federal common law's preemptive effect. As the Court reiterated later in *AEP*, where a statute "displaces federal common law, the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act." 564 U.S. at 429.[3]

The Second Circuit in *City of New York* opined that because air pollution "is an interstate matter raising significant federalism concerns," state law did not "snap back into action" after the CAA displaced federal common law, and that "[s]uch an outcome is too strange to seriously contemplate." 993 F.3d at 92, 98–99; *see also* Mot. at 12. But that is exactly what *Milwaukee II*, *Ouelette*, and the U.S. Supreme Court's other precedents instruct: "Whether interstate in nature or not, if a dispute implicates [c]ommerce among the several States[,] Congress is authorized to enact the substantive federal law governing the dispute." *Milwaukee II*, at 451 U.S. at 315 n.8 (cleaned up). And while "interstate disputes frequently call for the application of a federal rule when Congress has *not* spoken," it is clear that "[w]hen Congress *has* spoken its decision controls, even in the context of interstate disputes." *Id.* (emphasis added). Once a statute like the CAA displaces federal common law, that statute may preempt state law, but the displaced common law cannot.[4]

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[3] Defendants' repeated contention that there is a "constitutional prohibition against using state law to impose liability for harms arising from interstate emissions," Mot. at 17, is irreconcilable with *Oullette* and *AEP*, and with federalism principles more broadly. "The cases are many in which a person acting outside the State may be held responsible according to the law of the state for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258–59 (1933); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (state law may apply to out-of-state conduct if the application is "supported by the State's interest in protecting its own consumers and its own economy").

[4] Defendants cite *Burgoyne v. Brooks*, 76 Md. App. 222, 225 (1988), for its statement that "[w]henever federal common law governs a particular issue, it must be applied." Mot. at 12. That is true so far as it goes, but the case is not instructive. The court in *Burgoyne* followed precedent holding that "States must follow federal law with respect to slander or libel committed by a federal employee," 76 Md. App. at 225, relying in part on the Supreme Court's statement six months earlier in *Westfall v. Erwin* that "the scope of absolute official immunity afforded federal employees is a matter of federal law, to be formulated by the courts in the absence of legislative action by Congress," 484 U.S. 292, 295 (1988), (citation omitted). This case has nothing to do with official immunity. More importantly,

### 4. Defendants' References to Foreign Affairs Do Not Present a Preemption Defense.

To the extent Defendants rely on federal foreign policy concerns as a basis for applying or crafting federal common law in this case, they cannot satisfy their burden. There has never been a federal common law of "foreign emissions," and the separate foreign affairs doctrine has no application here.

Under the foreign affairs doctrine, state laws that "take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility" are *per se* preempted. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003). But state law only invades federal foreign policy prerogatives if it "produce[s] something more than [an] incidental effect in conflict with express foreign policy of the National Government." *Id.* at 420; *see also Baltimore Emps. Ret. Sys.*, 317 Md. at 80, 147 (city ordinance prohibiting employee pension fund from investing in "banks or financial institutions that make loans to South Africa or Namibia" did not "interfere[e] with the Nation's ability to achieve its foreign policy objectives" concerning apartheid, including those expressed through the federal Anti-Apartheid Act). Defendants make no meaningful argument that the doctrine applies.[5]

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Congress passed the so-called Westfall Act only a few months later, which "establishe[d] the absolute immunity for Government employees that the Court declined to recognize under the common law" in *Westfall*. *See United States v. Smith*, 499 U.S. 160, 163 (1991); 28 U.S.C § 2679. That is, the common law discussed in *Westfall* and *Burgoyne* has since been *displaced by statute*. The City is aware of no authority suggesting that *Westfall*'s common law rule retains any force, to preempt state law or otherwise.

[5] Defendants' passing citations to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012), *see* Mot. at 13, are not instructive. In *Sabbatino*, "an instrumentality of the Cuban Government" sued an American commodities broker for conversion to recover proceeds from certain sales of sugar, based on the Cuban government's authority to "nationalize by forced expropriation property or enterprises in which American nationals had an interest." 376 U.S. at 401, 404–06. The Court held that while "it cannot of course be thought that every case or controversy which touches foreign relations lies beyond judicial cognizance," federal separation of powers principles cautioned against courts "passing on the validity of foreign acts of state." *Id.* at 423. As such, the Court held that "the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case." *Id.* at 439. This case is not remotely similar, and Defendants do not raise the act of state doctrine as a defense. *Kurns*, meanwhile, did not involve foreign affairs at all, but rather whether a railroad employee's state law products liability claims for asbestos exposure were preempted by the Locomotive Inspection Act, which "occup[ies] the entire field of regulating locomotive equipment." 565 U.S. at 628, 631. As discussed below, the CAA does not preempt the field of dealing with air pollution, and Defendants do not argue any other statute does.

The Second Circuit in *City of New York* arguably recognized a new federal common law of "foreign emissions," but to the extent it did so the case was wrongly decided. The court held that because the claims there "implicat[ed] the conflicting rights of states and our relations with foreign nations, this case poses the quintessential example of when federal common law is most needed." 993 F.3d at 92 (cleaned up). Because "the Clean Air Act does not regulate foreign emissions," the court held that the plaintiff's claims "still require[d] [it] to apply federal common law." *Id.* at 95 n.7. That analysis is incorrect for multiple reasons, and is inapplicable here.

*First*, no court had ever previously recognized a federal common law of "foreign emissions," and the Second Circuit "essentially evade[d] the careful analysis that the Supreme Court requires" before a court may craft new federal common law. *Honolulu*, 537 P.3d at 1200 (quoting *Baltimore IV*, 31 F.4th at 203). *Second*, even if there were a pre-existing federal common law of nuisance related to foreign pollution, the CAA displaced that too, just it displaced federal common law nuisance claims concerning interstate air pollution. A proper displacement analysis would not ask whether the CAA "regulate[s] foreign emissions," as the Second Circuit discussed, 993 F.3d at 95 n.7, but only whether "the Act 'speaks directly' to" those emissions, *AEP*, 564 U.S. at 424. It does: if the EPA Administrator "has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country," the Administrator must notify the Governor of the source state and that state must take certain actions. 42 U.S.C. § 7415(a), (b). Importantly, those requirements "apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country." *Id.* § 7415(c). Because Congress has spoken to the issue, any federal common law of "foreign emissions" that might once have existed does not

any longer, and "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Nw. Airlines, Inc.*, 451 U.S. at 95 n.34.

*Third*, as discussed above, even if the Second Circuit correctly held that *City of New York* involved regulating emissions (including international emissions) because the plaintiff's complaint assumed defendants engaged only in "lawful commercial activity," this case is entirely different. 993 F.3d at 87 (cleaned up). Because the plaintiff in *City of New York* expressly argued that the defendants had not violated any statutory or common law duty, the Second Circuit held that its complaint would "effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at 93. On those allegations, the court held that if the defendants "want[ed] to avoid all liability, then their only solution would be to cease global production altogether." *Id.* The complaint thus "would regulate cross-border emissions in an indirect and roundabout manner, [but] would regulate them nonetheless." *Id.* In this case, defendants can avoid unlimited future liability by stopping their tortious failure to warn abetted by a sophisticated disinformation campaign. Plaintiffs' success at trial here will not regulate emissions at all, directly or indirectly, and Defendants' "lawful commercial activity" will not be impeded.

**5. There Is No Basis to Recognize New Federal Common Law Because the City's Claims Do Not Conflict with Any Uniquely Federal Interest.**

Finally, to the extent Defendants ask the Court to stretch the now-displaced federal common law to embrace the City's claims, they have not come close to carrying their "heavy burden" to do so. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1997). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez*, 140 S. Ct. at 716. Only a "few," "restricted" areas exist where judge-made federal law is appropriate absent express congressional authorization, because "a

federal rule of decision is necessary to protect uniquely federal interests." *Tex. Indus., Inc.*, 451 U.S. at 640 (cleaned up). And "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. First, state law must be in "significant conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994). The conflict must implicate a "genuinely identifiable (as opposed to judicially constructed) federal policy," *id.* at 89, and must be "specifically shown" by the proponent of the federal rule, *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Miree v. DeKalb Cnty., Ga.*, 433 U.S. 25, 31–32 (1977) (same).

As an initial matter, the City is aware of no authority suggesting that this Court (or any state court) could create new federal common law, which would necessarily constitute federal "lawmaking," *see Rodriguez*, 140 S. Ct. at 717, and Defendants offer none. Even assuming the Court has that power, none of the necessary conditions are satisfied here. The City's case pursues the core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct traditionally regulated by the States. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (advertising); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (unfair business practices); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (consumer protection). It pursues tort remedies rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it seeks to redress injuries that "states have a legitimate interest in combating," namely "the adverse effects of climate change." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). There are simply "no 'uniquely federal interests' in regulating marketing conduct" that would justify new federal common law. *Honolulu*, 537 P.3d at 1202.

There is likewise no significant conflict between the City's claims and any federal interest. Defendants say state law conflicts with an "overriding need for a uniform rule of decision on matters influencing national energy and environmental policy," and with vague "basic interests of federalism." Mot. at 2, 9, 10 (cleaned up). But the U.S. Supreme Court has held that federal common law cannot rest on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," and requires instead a "specific, concrete federal policy or interest" with which state law conflicts. *O'Melveny*, 512 U.S. at 88. Defendants do not identify any uniquely federal interest or any significant conflict, and thus cannot satisfy "the most basic" preconditions for crafting federal common law. *Rodriguez*, 140 S. Ct. at 717.

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

Because any existing federal common law of interstate air pollution nuisance has been displaced by the CAA, this Court "must only consider whether the CAA preempts state law." *Honolulu*, 537 P.3d at 1181. Defendants' Motion is ambiguous as to whether Defendants raise a conflict preemption or field preemption challenge to the Complaint, but both fail. There is no field preemption because the CAA's savings clauses make clear Congress did not intend to bar all state regulation of air pollution. To the contrary, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The City's case is also not preempted under any conflict preemption analysis, because no aspect of its claims would make Defendants' compliance with the CAA impossible, or stand in the way of the CAA's purposes and objectives.

Under the field preemption doctrine, "[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Congressional intent

to occupy a field "may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (cleaned up). "The presence of a savings provision," however, "is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field there would be nothing to 'save.'" *Farina v. Nokia Inc.*, 625 F.3d 97, 121 (3d Cir. 2010) (cleaned up).

Conflict preemption occurs where state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009), or where "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43. As those descriptions suggest, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up). Preemption cannot rest on "brooding federal interest[s]," "judicial policy preference[s]," or "abstract and unenacted legislative desires." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901, 1907 (2019) (lead opinion). Courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (cleaned up).

The Hawai'i Supreme Court considered at length a CAA preemption challenge to substantially similar claims in *Honolulu*, and rejected preemption under any theory. The CAA "does not occupy the field of emissions regulation such that state law is preempted," and "even if it did, the City's claims do not seek to regulate emissions, and so a claim of field preemption in the field of emissions regulation is inapposite." *Honolulu*, 537 P.3d at 1204. One of the CAA's savings clauses "expressly protects a state's right to adopt or enforce any standard or limitation

respecting emissions unless the state policy in question would be less stringent than the CAA," *id.*, and the U.S. Supreme Court held in *Ouellette* that a nearly identical savings clause in the CWA "negates the inference that Congress 'left no room' for state causes of action." 479 U.S. at 492.

The Hawai'i court also held there was no obstacle preemption because the plaintiffs' claims "ar[o]se from Defendants' alleged failure to warn and deceptive marketing conduct, not emissions-producing activities regulated by the CAA." *Honolulu*, 537 P.3d at 1205. The claims could "potentially regulate marketing conduct while the CAA regulates pollution," so there was no "'actual conflict' between Hawai'i tort law and the CAA." *Id.* at 1205 (citation omitted). There was finally no impossibility preemption, because the defendants could "avoid federal and state liability by adhering to the CAA and separately issuing warnings and refraining from deceptive conduct as required by Hawai'i law; it is not a 'physical impossibility' to do both concurrently." *Id.* at 1207.[6] The analysis from *Honolulu* applies with equal force here. The City's claims are not preempted by the Clean Air Act.

### C. The City's Claims Do Not Present Nonjusticiable Political Questions.

The City's claims also do not present any nonjusticiable political question, and instead turn on traditional tort law questions clearly within judicial competence. Maryland courts apply the U.S. Supreme Court's test from *Baker v. Carr*, 369 U.S. 186 (1962), to determine whether a case presents a political question. *See Est. of Burris v. State*, 360 Md. 721, 745 (2000). The *Baker v. Carr* test considers, among other issues, whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable

[6] *Accord, e.g.*, *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 672–73 (9th Cir. 2003) (state ban on gasoline additive "enacted for the purpose of protecting groundwater" did not interfere with CAA's "central goal of . . . reduc[ing] air pollution" or "inhibit federal efforts to fight air pollution"); *In re MTBE*, 725 F.3d at 95–96, 104 (state common law claims for injuries caused by same gasoline additive not preempted because defendants "could have complied with [the CAA]" without violating state tort duties).

and manageable standards for resolving" the case, "the impossibility of deciding [the dispute] without an initial policy determination of a kind clearly for nonjudicial discretion," or "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Id.* at 745 (quoting *Baker*, 369 U.S. at 217). "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217.

The Second Circuit's opinion in *AEP*, holding that the plaintiffs' claims there did not present a political question, is instructive. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). The court there discussed the political question doctrine in exhaustive detail, and reasoned that the plaintiffs' complaint would not intrude on any issue committed to another branch of government because the plaintiffs did not "ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches," and a district court would have no power to "set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit." *Id.* at 325. Similarly, the court found discoverable standards existed to govern the case, because "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." *Id.* at 326. And finally, the court held "where a case 'appears to be an ordinary tort suit, there is no impossibility of deciding [the case] without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 331 (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007)). Likewise here, the City has brought "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products," and is seeking traditional relief courts are competent to provide. *See Honolulu*, 537 P.3d at 1187.

The cases Defendants cite in support of their political question argument are all distinguishable and inapposite. In *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), the plaintiffs brought claims against the federal and state government, respectively, expressly demanding that the government broadly reduce greenhouse gas emissions. The Ninth Circuit held that the *Juliana* plaintiffs lacked standing because "[t]he crux of the plaintiffs' requested remedy is an injunction requiring the [federal] government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions," all of which was beyond the judiciary's power to grant. 947 F.3d at 1170–73. The court did not rely on the political question doctrine, and instead held that the plaintiffs lacked standing because Article III courts could not "provide the plaintiffs the redress they seek." *Id.* at 1164; *see also id.* at 1174 n.9 ("[W]e do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns.").

In *Sagoonick*, the Alaska Supreme Court held the political question doctrine barred the plaintiffs' suit because "the remedy plaintiffs [sought] in th[at] case would require courts to make decisions that article VIII [of the Alaska constitution] has committed to the legislature," including ordering state agencies to measure, account for, and reduce greenhouse gas emissions statewide. 503 P.3d at 798. The Alaska constitution expressly states that "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State . . . , for the maximum benefit of its people," Alaska Const. art. 8, § 2. The court found that language, and the article's provisions taken as a whole, "reflect[] careful consideration of each government branch's role in managing Alaska's resources and textually establishes the legislature's importance in this policy-making area." *Id.* at 785. "[S]eparation of powers considerations therefore [we]re

clearly implicated," and the plaintiffs' claims were nonjusticiable. *Id.* at 798. The City requests no analogous relief, and Maryland's constitution does not commit any issue presented here to the political branches.

The other cases Defendants cite are equally distinguishable because they all alleged injuries directly from emissions themselves, and sought relief also directly related to emissions. *See* Mot. at 25–27; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). In each case, the plaintiff sought to hold the defendants strictly liable for climate-related injuries caused by the defendants' lawful production, promotion, and sale of fossil fuels or fuel-consuming equipment.[7] The courts in each case found they would have to determine how the costs of responding to global warming writ large should be distributed, and make first-order policy determinations concerning the appropriate or acceptable levels of greenhouse gas emissions nationwide. None of those concerns are implicated here. For the reasons laid out by the Second Circuit in *AEP*, moreover, those cases were likely wrongly decided. *See* 582 F.3d at 323–334. The Fifth Circuit in fact *reversed* the *Comer* decision's political question holding after considering the *Baker v. Carr* factors, because "[i]n th[at] case the only 'issues' [we]re those inherent in the adjudication of plaintiffs' Mississippi common law tort claims for damages," which were "well within the authority of the federal judiciary" to adjudicate. *Comer v. Murphy Oil USA*, 585 F.3d 855, 875 (5th Cir. 2009), *vacated on reh'g en banc on other grounds*,

[7] *See Kivalina*, 663 F. Supp. 2d at 868 (seeking to hold fossil-fuel companies liable for their "contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming"); *Gen. Motors*, 2007 WL 2726871, at *14 ("seeking to impose damages for the Defendant automakers' lawful worldwide sale of automobiles"); *Comer*, 839 F.Supp.2d at 852 ("The plaintiffs also contend that the defendants should be held strictly liable for the injuries that result from their emissions.").

607 F.3d 1049 (5th Cir. 2010).[8] And while the Ninth Circuit affirmed *Kivalina*, it did so because the federal common law claims the plaintiff asserted were displaced; it did not discuss the political question doctrine or affirm on that basis. *See* 696 F.3d at 858; *supra* Part IV.A.2.

Defendants' assertion that "[t]he Maryland executive and legislative branches . . . have weighed the benefits and costs of fossil fuel use in enacting policies they believe best serve the State," Mot. at 28, proves nothing. Again, the City does not ask this Court to "weigh[] the costs and benefits of fossil fuel use" or "enact policies." *Id.* Moreover, the fact that a subject "ha[s] been considered by the executive and legislative branches," Mot. at 29, does not mean courts lose all ability to adjudicate claims that touching on that subject. Every state in the union extensively regulates the operation of motor vehicles, for example, *see, e.g.*, Md. Code Ann. Transp. § 11-101 *et seq.*, but car accidents remain the classic, archetypal common law tort action. It cannot be the case here that the City's claims are nonjusticiable because "Maryland enacted legislation to reduce greenhouse emissions and combat climate change." Mot. at 28. That result would be nonsensical.

### D. The City Pleads Actionable Claims Under Maryland Law.

#### 1. The City Sufficiently Pleads Its Nuisance Claims.

##### a. The Complaint States a Claim for Public Nuisance.

Following the Restatement (Second) of Torts ("Rest."), Maryland recognizes that "[a] public nuisance is an unreasonable interference with a right common to the general public." *See Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984) (quoting Rest. § 821B)); *Gallagher v. H.V.*

[8] The panel decision from *Comer* was later vacated for unusual reasons unrelated to its holdings. The Fifth Circuit granted a petition for rehearing *en banc*. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010) (Mem.). After voting to hear the appeal *en banc*, however, one of the judges recused, such that "th[e] en banc court lost its quorum." *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010). The court held that it lacked authority to reinstate the panel opinion and dismissed the appeal, such that "there [wa]s no opinion or judgment in th[e] case upon which any mandate may issue." *Id.* at 1055. Neither the opinion of the court nor the two dissents discussed the merits of the earlier opinion. While the panel opinion is no longer controlling precedent in the Fifth Circuit, its reasoning is sound and provides persuasive authority here.

*Pierhomes, LLC*, 182 Md. App. 94, 114 (2008). Traditional public rights include "the public health, the public safety, the public peace, the public comfort [and] the public convenience." *Tadjer*, 300 Md. at 552 (quoting Rest. § 821B). The Complaint here amply alleges all the elements of a public nuisance cause of action.

The City alleges that Defendants created, assisted in creating, or were a substantial factor in contributing to a nuisance by, among other conduct, "[c]ontrolling every step of the fossil fuel product supply chain" including "marketing of those fossil fuel products," "promoting the sale and use of fossil fuel products which Defendants knew to be hazardous and knew would cause or exacerbate global warming and related consequences," "concealing the hazards that Defendants knew would result from the normal use of their fossil fuel products," and "[d]isseminating and funding the dissemination of information intended to mislead customers" about those hazards. Compl. ¶¶ 221(a)–(d). That conduct "maximize[d] continued dependence on their products," *id.* ¶ 145, and delayed efforts to address climate change, substantially increasing "the magnitude and costs to remediate" its effects, *id.* ¶ 179; *see also id.* ¶¶ 10, 191–95. The increased emissions attributable to Defendants' tortious conduct have engendered significant climate impacts in Baltimore including sea level rise, flooding and inundation, extreme precipitation and storms, drought, extreme heat, and rising air temperatures—each of which interferes with fundamental public rights including public health, safety, comfort, and convenience.[9] *Id.* ¶¶ 8–10, 14–17, 59–60, 62, 67–90, 102, 195–217, 219–26. The interferences with public rights flowing from Defendants' conduct are unreasonable because they are significant—resulting in impacts as severe

[9] Defendants' argument that the Complaint pleads only interference with a private "right not to be deceived," Mot. at 37–38, misses the mark. Unlike in the sole case Defendants cite, the City does not allege that Defendants' campaign of deception and disinformation or failures to warn are in and of themselves a public nuisance. *Cf. Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988, 1002 (D.C. Cir. 1973) (rejecting claim that false or deceptive "advertisements [of a drug] constitute a public nuisance"). Instead, Defendants' misleading and deceptive conduct has *caused* unreasonable interferences with public rights that are quintessential public nuisances requiring abatement. *See* Compl. ¶¶ 191–217.

as inundation of low-lying areas, destruction of critical electric and wastewater infrastructure, and loss of life, *e.g.*, *id.* ¶¶ 15, 77, 81, 87, 199–209, just as Defendants predicted they would, *e.g.*, *id.* ¶¶ 103–40, 181—and will have permanent or long-lasting effects on the City and its residents, *id.* ¶¶ 220, 224. *See Tadjer*, 300 Md. at 552.[10]

As discussed in greater detail below, those allegations state a claim for public nuisance under Maryland law, which is in accord with the numerous state courts that have found nuisance liability sufficiently alleged in similar circumstances. *See infra* Part IV.D.1.c.

**b. The Complaint States a Claim for Private Nuisance.**

The City also alleges an actionable private nuisance, defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (quoting Rest. § 821D). A private nuisance injury is actionable when it is "of such a character as to diminish materially the value of the property" for its intended purpose, "and seriously interfere[s] with the ordinary comfort and enjoyment of" the property. *Slaird v. Klewers*, 260 Md. 2, 9 (1970). The seriousness of the interference is measured by whether it "would be offensive or inconvenient to the normal person." *Wash. Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 125 (1993).

Defendants' tortious conduct is causing flooding, inundation, and other damage to City property, including roads, emergency response facilities, dock and harbor facilities, and the City's stormwater drainage system and wastewater facilities; that conduct also increases the cost of protecting the City's critical infrastructure and natural resources. *Id.* ¶¶ 77–83, 197–215. These injuries substantially interfere with the normal use and enjoyment of City property. *Id.* ¶¶ 230–33.

[10] Defendants' conduct is also a nuisance *per se* because it violates the MCPA. *See* Compl. ¶ 225; *infra* Part IV.D.4.

### c. The City's Nuisance Claims Apply Well-Recognized Maryland Law.

Defendants do not challenge the Complaint's satisfaction of any element of a public or private nuisance claim. Instead, they assert that nuisance claims can only arise from a defendant's use of land, that the City cannot assert nuisance claims based on harms caused by products, and that Defendants cannot be liable because they did not control their fossil fuel products at the time of combustion. Mot. at 30–39. Maryland law imposes none of those constraints on nuisance liability.

### d. Maryland Nuisance Liability Extends to the Wrongful Promotion of Dangerous Products, Consistent with the Nationwide Trend.

Maryland does not limit nuisance claims to the use of land or categorically exclude liability for nuisances created by wrongful promotion of hazardous products. Maryland courts have long recognized that nuisance liability extends to all those who actively participate in the creation of a nuisance. *See Gorman v. Sabo*, 210 Md. 155, 161 (1956) ("One who does not create a nuisance may be liable for some active participation in the continuance of it or by the doing of some positive act evidencing its adoption."); *Maenner v. Carroll*, 46 Md. 193, 215 (1877) ("[I]t is certainly true, that every person who does or directs the doing of an act that will of necessity constitute or create a nuisance, is personally responsible for all the consequences resulting therefrom."). Historically and today, parties whose products substantially contribute to a nuisance may be liable even if the nuisance would not have occurred without another's participation. *See Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256–57 (D. Md. 2000) (citing *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Balt.*, 187 Md. 385, 397 (1946)). This accords with the Restatement: a defendant "is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." Rest. § 834.

Applying the Restatement definitions, federal district courts sitting in Maryland have recognized that nuisance liability under Maryland law can extend to a defendant who misleadingly markets products for uses the defendant knows will likely cause environmental or health hazards and those nuisance conditions arise. *See State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 467–69 (D. Md. 2019) (denying motion to dismiss public nuisance claim against manufacturers over groundwater contamination from gasoline additive); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *9–10 (D. Md. 2020) (same as to nuisance claim against manufacturer for PCB contamination of stormwater infrastructure). In *State v. Exxon*, Judge Hollander concluded that "no case law forecloses [a] theory of public nuisance liability" based on deceptive promotion of a dangerous product, and held the State adequately pleaded a nuisance claim "premised on [the defendants'] manufacture, marketing, and supply of MTBE gasoline" with "extensive knowledge of the environmental hazards associated with MTBE." 406 F. Supp. 3d at 467–69. Judge Bennett came to a similar conclusion in *Baltimore v. Monsanto*, finding that the City sufficiently alleged the defendants substantially participated in creating a public nuisance by marketing and promoting PCBs while withholding their "extensive knowledge about PCB's harmful effects" from consumers and the public. 2020 WL 1529014, at *9–10. Defendants here likewise had extensive knowledge of the climatic harms that would arise from their products' intended use, but concealed that knowledge while misleadingly promoting their products. *See* Compl. ¶¶ 103–70.

Resisting this conclusion, Defendants cite cases involving nuisances caused by land use, and argue that nuisance liability can arise *only* from a defendant's use of land. *See* Mot. at 4, 33–37 Defendants' cases do not stand for that proposition, and Maryland nuisance law is not so limited. *See, e.g.*, *Maenner*, 46 Md. at 215. At common law, a defendant historically could create

an actionable nuisance by selling harmful products such as "meat, food, or drink" that was "injurious to health," "obscene pictures, prints, books[,] or devices," or "horse[s] affected with glanders"; and through publication of "false reports" that "create false terror or anxiety" or "posting placards in the vicinity of [a] plaintiff's business, calculated to bring the plaintiff into contempt and to prevent people from trading with him." *See* H. G. Wood, *The Law of Nuisances* 72–73, 75, 143, 147 (1875) [Ex. 1] (collecting cases).[11] Professor Prosser[12] likewise explained that "nuisance is a field of tort liability rather than a type of tortious conduct," and thus the scope of nuisance liability is defined by "reference to the interests invaded . . . not to any particular kind of act or omission which has led to the invasion." Prosser, *Handbook of Law of Torts* 573 (4th ed. 1971) [Ex. 2].[13]

Courts across the country have recognized nuisance claims against manufacturers and sellers of products who wrongfully promoted their products for a use the defendant knew to be dangerous, while concealing or misrepresenting those dangers.[14] Most recently, the Delaware

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[11] Maryland courts have looked to Wood's treatises as persuasive guidance on tort law. *See, e.g., Greene Tree Home Owners Ass'n, Inc. v. Greene Tree Assocs.*, 358 Md. 453, 458, 466, 472, 475–76 (2000); *Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 303 (1991); *Garner v. Garner*, 31 Md. App. 641, 650 (1976).

[12] Maryland courts frequently cite Professor Prosser for nuisance principles. *See, e.g., Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 403 (2011); *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 649–50 (2020); *Gambril v. Bd. of Educ. of Dorchester Cnty.*, 481 Md. 274, 317 (2022); *Tadjer*, 300 Md. at 551–52.

[13] The two law review articles Defendants cite, Mot. at 32, are contrary to this weight of authority and to the litany of cases nationwide that have since embraced public nuisance claims based on wrongful promotion of products. *See* Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743, 764–74 (2003) (acknowledging numerous cases upholding public nuisance claims against product manufacturers); Schwartz & Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543, 556, 560 (2006) (recognizing some courts have allowed such claims to proceed). In any event, the City does not seek to hold Defendants liable for mere "manufacture or distribution of lawful products," Gifford, 71 U. Cin. L. Rev. at 834, but for their tortious promotion of their products and their failures to warn of those products' hazards.

[14] *See, e.g., In re MTBE*, 725 F.3d 65, 121–23 (2d Cir. 2013) (upholding jury verdict for public nuisance against MTBE manufacturer who knew its gasoline would be stored in tanks that leaked); *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 628–30 (S.D.N.Y. 2001) (plaintiffs stated viable nuisance claims under California, Florida, Illinois, and New York law by alleging defendants manufactured and distributed MTBE gasoline with knowledge of its dangers while failing to warn downstream handlers of those dangers, misrepresenting the chemical properties of MTBE, and

Supreme Court reversed dismissal of public nuisance claims brought by the state against the primary manufacturer of PCBs, who "took affirmative steps to conceal the toxic nature of PCBs" despite knowing "PCBs would eventually end up causing long lasting contamination to state lands and waters." *Delaware v. Monsanto Co.*, 299 A.3d 372, 376, 386–87 (Del. 2023). That court discussed and agreed with the District of Maryland's decision in *Baltimore v. Monsanto*, and confirmed the longstanding "common-sense notion that public nuisance liability extends . . . to those who substantially participate in creating [a] public nuisance." *Id.* at 381.

The handful of exceptions Defendants cite are inapplicable because they did not involve allegations that a manufacturer wrongfully promoted products while concealing or downplaying the products' risks, allegations central to the City's claims here. *Compare Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[N]uisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building."),

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concealing its risks); *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 650–51 (Pa. Commw. Ct. 2021) (denying motion to dismiss public nuisance claim against PCB manufacturers "where Plaintiffs allege that the marketed uses of the PCB products themselves created the nuisance" and that defendants knew the products' use "as intended" would result in contamination); *Oregon v. Monsanto Co.*, 2019 WL 11815008, at *7 (Or. Cir. Ct. Jan. 9, 2019) (PCBs); *City of Spokane v. Monsanto Co.*, 2016 WL 6275164, at *7–9 (E.D. Wash. Oct. 26, 2016) (PCBs); *Port of Portland v. Monsanto Co.*, 2017 WL 4236561, at *9 (D. Or. Sept. 22, 2017) (PCBs); *People v. ConAgra Grocery Prods. Co.* ("*ConAgra*"), 17 Cal. App. 5th 51, 91–101 (2017) (lead paint); *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 304–13 (2006) (lead paint); *Johnson v. 3M*, 563 F. Supp. 3d 1253, 1342–43 (N.D. Ga. 2021) (PFAS); *Northridge Co. v. W.R. Grace & Co.*, 556 N.W.2d 345, 351–52 (Wis. Ct. App. 1996) (asbestos); *Evans v. Lorillard Tobacco Co.*, 2007 WL 796175, at *1, *18–19 (Mass. Super. Ct. Feb. 7, 2007) (cigarettes); *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 645–51 (N.D. Cal. 2020) (e-cigarettes); *City of Bos. v. Smith & Wesson Corp.*, 2000 WL 1473568, at *13–14 (Mass. Super. Ct. July 13, 2000) (guns); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141–1144 (2002) (guns); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1209–15 (9th Cir. 2003) (guns); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187, 194–96, (N.Y. Sup. Ct. 1994) (pesticides); *Alaska v. Purdue Pharma L.P.*, 2018 WL 4468439, at *4 (Alaska Super. Ct. July 12, 2018) (opioids); *Arkansas v. Purdue Pharma L.P.*, 2019 WL 1590064, at *3–4 (Ark. Cir. Ct. Apr. 5, 2019) (opioids); *Kentucky v. Endo Health Sols. Inc.*, 2018 WL 3635765, at *6 (Ky. Cir. Ct. July 10, 2018) (opioids); *Massachusetts v. Purdue Pharma, L.P.*, 2019 WL 5495866, at *4–5 (Mass. Super. Ct. Sept. 17, 2019) (opioids); *In re Opioid Litig.*, 2018 WL 3115102, at *21–22 (N.Y. Sup. Ct. June 18, 2018) (opioids); *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *7–11 (R.I. Super. Ct. Aug. 16, 2019) (opioids); *Tennessee v. Purdue Pharma L.P.*, 2019 WL 2331282, at *5–6 (Tenn. Cir. Ct. Feb. 22, 2019) (opioids); *New Hampshire v. Purdue Pharma Inc.*, 2018 WL 4566129, at *13–14 (N.H. Super. Ct. Sept. 18, 2018) (opioids).

*with Honolulu*, 537 P.3d at 1187 (explaining that Honolulu's complaint does not challenge defendants' production and sale of fossil fuels, but rather "Defendants' *failures to disclose and deceptive promotion* increased fossil fuel consumption, which—in turn—exacerbated the local impacts of climate change in Hawai'i." (citation omitted) (emphasis added)).

Most of Defendants' cases involved the unforeseeable or even criminal *misuse* of a manufacturer's products by third parties. For example, the court in *Oklahoma v. Johnson & Johnson* declined to recognize "a public right to be free from the threat that others may *misuse* or *abuse* prescription opioids." 499 P.3d 719, 727 (Okla. 2021) (emphasis added).[15] The claim in New Jersey's *In re Lead Paint Litigation* sought to hold lead paint manufacturers liable for "merely offering an everyday household product for sale," and the conduct actually giving rise to the lead poisoning hazard was the property owners' "poor maintenance" of lead paint on their premises. 924 A.2d 484, 501–02 (N.J. 2007).[16] In *Rhode Island v. Lead Industries Association, Inc.*, similarly, the court noted that the state legislature had "placed the burden on landlords and property owners to make their properties lead-safe," such that any hazards from the lead paint were attributable to those property owners, not the manufacturers. 951 A.2d 428, 435–36 (R.I. 2008).[17]

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[15] *Philadelphia v. Beretta U.S.A. Corp.*, Mot. at 36, 37, similarly alleged a public nuisance arising from the "*misuse*" of the defendants' handguns "by criminals and others unlawfully in possession of firearms." 126 F. Supp. 2d 882, 910, 911 (E.D. Pa. 2000) (emphasis added), *aff'd*, 277 F.3d 415, 419, 422 (3d Cir. 2002) ("The defendants are not in control of the guns at the time they are *misused*" by "criminals and children." (citation omitted and emphasis added)).

[16] Notably, the court acknowledged that nuisance liability might apply to product-based harms in other contexts. 924 A.2d at 505 ("[T]here may be room, in other circumstances, for an expanded definition of the tort of public nuisance.").

[17] The complaint there also failed to allege the defendants' interference with a public right, which the court defined as "those indivisible resources shared by the public at large, such as air, water, or public rights of way." 951 A.2d at 453. The City's Complaint, meanwhile, alleges Defendants interfered with quintessential public rights, including by contaminating drinking water, warming the air, and inundating roads and other rights of way. *See* Compl. ¶¶ 236–40. Since *Lead Industries Ass'n*, moreover, several lower courts in Rhode Island have allowed public nuisance claims to proceed where, as here, a defendant manufacturer inflated the market for a dangerous product by "misrepresent[ing]" the product's risks, supplying "excessive amounts" of the product, and "falsely promot[ing] and distribut[ing] [the product] generally." *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *10 (R.I. Super. Ct. Aug. 16, 2019). *See also Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d 129, 134 (D. R.I. 2018) (nuisance claim alleging MTBE manufacturers knew about hazards "but instead of alerting the public . . . waged an obfuscation campaign, downplaying the risks it knew about" was viable under Rhode Island law notwithstanding *Lead Industries Ass'n*).

Not so here. The Complaint alleges that the incremental greenhouse gas emissions resulting from Defendants' wrongful promotion of their fossil fuel products arise from the only intended uses of those products, which Defendants knew would create nuisance conditions. *See* Compl. ¶¶ 5, 8, 264(d), 265–66, 277–78. Those allegations state a claim for nuisance under Maryland law.

**e. The Complaint Satisfies Any "Control" Requirement.**

Defendants invent another limitation on Maryland nuisance law, contending they cannot be liable because they "did not control the instrumentality alleged to cause the nuisance." Mot. at 36–39. Maryland nuisance law imposes no such control requirement. Multiple Maryland federal district courts have concluded that "control is not a required element to plead public nuisance under Maryland law." *Baltimore v. Monsanto*, 2020 WL 1529014, at *9; *see also State v. Exxon*, 406 F. Supp. 3d at 467–68. Instead, Maryland courts have long imposed liability on all who actively participate in creating a nuisance. *See Gorman*, 210 Md. at 161; *Maenner*, 46 Md. at 215.

Defendants chiefly cite *Cofield v. Lead Industries Association, Inc.*, 2000 WL 34292681 (D. Md. Aug. 17, 2000), for the proposition that Maryland law requires a plaintiff to prove the defendant's control over the instrumentality of the nuisance. *See* Mot. at 36. But as Judge Hollander explained in *State v. Exxon*, the *Cofield* court inaccurately imported a control element not found in Maryland law:

> Maryland courts have never adopted the 'exclusive control' rule for public nuisance liability outlined by the court in *Cofield*. To the contrary, Maryland courts have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality.

406 F. Supp. 3d at 468 (collecting cases); *see also Adams*, 193 F.R.D. at 256–57 (nuisance liability may be premised on conditions created by product manufactured by defendant, even when a defendant "no longer has control of the product creating the public nuisance").

The other cases Defendants cite are plainly distinguishable. In *Callahan v. Clemens*, a

plaintiff landowner alleged that a retaining wall on an adjoining tract had begun to crumble, encroaching and spreading dirt onto the plaintiff's property. 184 Md. 520, 523 (1945). Clemens, the relevant defendant, "had, at most, only a nominal fee in" a portion of an alley above the retaining wall, "by a quirk of [his late brother's] conveyancing" the adjoining property to a since-defunct development company. *Id.* at 523, 527. Critically, the plaintiff's "complaint [wa]s not that the wall [wa]s a nuisance per se, but that it was negligently *constructed*," and "neither of the Clemens brothers attempted to or could exercise any control over the manner in which the work was performed" by the development company and its contractors. *Id.* at 525 (emphasis added). The court held Clemens was not liable because giving "[p]ermission to erect the wall would not itself constitute a tortious act." *Id.* at 527. Liability against Clemens also could not be "predicated upon failure of an owner to abate a nuisance," because his alleged title in the alley was "highly technical" and insufficient to impose "an obligation to maintain the alley, and the wall supporting it." *Id.* at 526–527. The facts here have nothing in common with *Callahan*. The City does not allege Defendants passively gave consumers "[p]ermission to" use their fossil fuel products, and Defendants' relationship to the nuisance is not a "highly technical" one premised "upon ownership of a naked legal title." *See id.* at 525–27. Rather, Defendants contributed to the nuisance conditions through affirmative, knowing misrepresentations about their products' effects. *See* Compl. ¶¶ 221, 226, 231, 235.

*East Coast Freight* does not help Defendants, either. *See* Mot. at 36. The court there held that a gas company was not liable when a driver struck a lamp pole the company had installed on a grass median "in the middle of the highway," because the pole was not "such a dangerous instrumentality as to make the contractor who placed it there liable." 187 Md. at 388–89, 401. The court did not dismiss claims against the gas company because it lacked control over the pole, but

because "the dangerous condition, if there was such a condition, was not due to the pole." *Id.* at 401. Instead, the City of Baltimore's decision to establish the median and place the pole on it "without proper warning of its beginning to approaching travelers" created any nuisance. *Id.*

Defendants' control argument, moreover, "rests upon a false premise that the instrumentality of the nuisance is the [emissions resulting from the fossil-fuel] product itself." *JUUL Labs*, 497 F. Supp. 3d at 649 (cleaned up); *see Baltimore v. Monsanto*, 2020 WL 1529014, at *10 (city sufficiently alleged defendants "created or substantially participated in" creating nuisance, "even though Defendants may not have maintained control over the contaminants once disseminated"). Here, the nuisance-causing instrumentality is "Defendants' conduct in carrying out their business activities," *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019), namely "their ongoing conduct of marketing, distributing, and selling [fossil fuels]" while misrepresenting their hazards, *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1143 (Ohio 2002). Nuisance law does not require Defendants to control "the actual use" of their fossil-fuel products. *Id. See also, e.g.*, *Delaware v. Monsanto*, 299 A.3d at 376 ("[W]hether there is control of the product once sold . . . [is] not [an] element[] of an environmental-based public nuisance . . . .").

Even if Maryland law did impose a control requirement, the Complaint would satisfy it. Defendants exercised control over the instrumentality of the nuisance by "[c]ontrolling every step of the fossil fuel product supply chain," "affirmatively and knowingly promoting the sale and use of fossil fuel products" they knew to be hazardous, and "knowingly concealing" those hazards. Compl. ¶ 221(a), 221(b); *see Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d at 142–43 (finding MTBE manufacturers exercised sufficient control by controlling "every step of the supply chain" and contamination through "releases, leaks, overfills, and spills" was foreseeable).

The decision in *Philadelphia v. Beretta U.S.A. Corp.*, *see* Mot. at 36, is inapposite. The court there held that Pennsylvania's Uniform Firearms Act prohibits "municipalities such as Philadelphia from suing gun manufacturers for the production and distribution of firearms" and "clearly refers to nuisance actions because it mentions 'abatement,'" such that the City of Philadelphia's nuisance claims against gun manufacturers were a "transparent attempt at an end run around the legislature's statutory prerogatives." 126 F. Supp. 2d at 890, 911. The other private plaintiffs lacked Article III standing because their theory of liability asserted that straw buyers purchased the defendants' guns for use in crimes, "[n]one of [which] are natural consequences of the gun manufacturers' distribution scheme." *Id.* at 897. And in *In re Paraquat Products Liability Litigation*, Mot. at 36, the court held that because that MDL proceeding "involve[d] injuries to individuals allegedly caused by direct exposure to" a pesticide and the plaintiffs "s[ought] damages for their alleged injuries rather than abatement of any true public nuisance," the plaintiffs "ha[d] not alleged any interference with a public right." 2022 WL 451898, at *10 (S.D. Ill. Feb. 14, 2022). In turn, the court considered "application" of the pesticide to be the instrumentality of harm, and the defendants "exerted no control over [the pesticide] at the time of its application" when injuries allegedly occurred. *Id.* at *11; *compare In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (rejecting argument that "addiction and death is the nuisance and the physical opioid drugs causing the addition and death are the instrumentality," and holding distributors controlled instrumentality of opioid epidemic nuisance "by virtue of their control over their own opioid marketing, distribution, or dispensing practices"). Unlike in *In re Paraquat*, the City does not allege that each use of Defendants' products caused a discrete injury, or that releasing greenhouse

gas itself constitutes a nuisance.[18]

At minimum, Defendants' alleged control over the fossil fuel supply chain and their own marketing raises questions of fact "inappropriate for resolution on a motion to dismiss." *JUUL Labs*, 497 F. Supp. 3d at 649 (cleaned up); *see Connecticut v. Tippetts-Abbett-McCarthy-Stratton*, 527 A.2d 688, 693 (Conn. 1987) (control "for nuisance liability normally is a jury question").

**f. The Court Is Well Equipped to Resolve the City's Nuisance Claims.**

Finally, Defendants' concern that this Court may not recognize new causes of action is misguided because the City does not plead a new cause of action. *See* Mot. at 30. It seeks to apply age-old public and private nuisance claims to contemporary facts.[19] The Hawai'i Supreme Court considered closely similar nuisance claims in *Honolulu*, and held that the plaintiffs' allegations presented "a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products." *See Honolulu*, 537 P.3d at 1187. In affirming denial of the defendants' motions to dismiss, the court quoted the trial court's statement that "the causes of action may seem new, but in fact are common," and "[c]ommon law historically tries to adapt to such new circumstances." *See id.* at 1185. This state's high court takes the same approach: "One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court." *Boblitz v. Boblitz*, 296 Md. 242, 259 (1983)).[20] This Court is equipped to apply existing law to the facts alleged.

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[18] *See Honolulu*, 537 P.3d at 1206 ("[T]he . . . tortious conduct is Defendants' alleged deceptive marketing and failure to warn about the dangers of using their products.").

[19] In the case Defendants cite, Mot. at 30 n.5, the petitioners expressly "urge[d] th[e] Court to *abolish the contributory negligence standard* and *replace it* with a form of comparative negligence." *Coleman v. Soccer Ass'n of Colum.*, 432 Md. 679, 691 (2013) (emphasis added).

[20] Defendants' two cited cases declining to recognize public nuisance claims by tenants against landlords for "improper maintenance of individual rental units," *Little v. Union Tr. Co. of Md.*, 45 Md. App. 178, 185 (1980), or for "negligent[]

### 2. The City Sufficiently States a Claim for Trespass.

A trespass occurs "[w]hen a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land." *Rosenblatt*, 335 Md. at 78. Exclusive possession entails "the possessory right to exclude [another] from entering the property without permission." *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 388–89 (2021).

The City properly states a claim for trespass by alleging that it "owns, leases, occupies, and/or controls real property throughout the City," Compl. ¶ 283, and that Defendants "have intentionally, recklessly, or negligently caused flood waters, extreme precipitation, saltwater, and other materials[] to enter" that real property, *id.* ¶ 284; *see also id.* ¶¶ 286–87, without the City's consent, *id.* ¶ 285. Defendants did so by concealing and misrepresenting the climate impacts of their products, *e.g.*, *id.* ¶¶ 141–70, which inflated and extended demand for fossil fuels and significantly increased greenhouse gas emissions, resulting in substantial interferences with the City's property and infrastructure, *e.g.*, *id.* ¶¶ 77–83, 197–215, 282–89. Defendants knew their conduct would cause water and other matter to enter City lands. *Id.* ¶¶ 103–40, 289.

Defendants' counterarguments are unavailing. *First*, Defendants take issue with allegations that they have caused water and other materials to invade the City's real property, contending that they are "left to speculate about which property Plaintiff refers to" and whether the City has exclusive possession of such property. Mot. at 48–49. At the pleading stage, however, a plaintiff need not specify each precise parcel that has been invaded. In fact, courts have rejected attempts to dismiss trespass claims on this basis. *See, e.g.*, *State v. Exxon*, 406 F. Supp. 3d at 471 (to state a claim for trespass in Maryland, a plaintiff need not "identify the precise locations of all the State

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install[ation]" of a hot water heater resulting in carbon monoxide poisoning, *State v. Feldstein*, 207 Md. 20, 24–26, 35 (1955), are inapposite. Here, the City alleges Defendants caused the nuisances—which interfere broadly with public health, safety, and convenience in Annapolis—by knowingly and *intentionally* deploying campaigns of deception to conceal their knowledge of the hazards of fossil fuel products. *See* Compl. ¶¶ 64–141, 161–221, 243–61.

properties that were contaminated"); *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 438 (S.D.N.Y. 2005) (plaintiffs "need not make such a showing at the pleading stage"). Defendants provide no contrary authority. Their cited cases stand for the unrelated propositions that 1) interference with an exclusive possessory right occurs when a defendant causes something "to enter onto the plaintiff's land" causing a "physical intrusion," *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013), and 2) if a person consents to entry onto its land for a certain purpose, "it d[oes] not give up its right to exclude from its property others entering for [other] purpose[s]," *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 235 (2016). Here, the Complaint provides sufficient specificity to state a claim for trespass based on allegations that flooding, sea level rise, and other climate-related invasions threaten "the City's stormwater drainage system, especially in the vicinity of Jones Falls, Gwynns Falls, and Herring Run," Compl. ¶ 79, among other City-owned, -leased, or -controlled property and infrastructure, *see id.* ¶¶ 197, 199, 201–08, 213–15, 283–85.[21]

*Second*, Defendants insist that neither they nor their products intruded on City property, and "no precedent supports" the City's trespass theory. Mot. at 49. Under Maryland law, however, a party is liable for trespass when it interferes with another's possessory interest in its property "by entering *or causing something to enter* the land." *Albright*, 433 Md. at 408 (emphasis added); *see In re MTBE Prods. Liab. Litig.*, 457 F. Supp. 2d 298, 315 (S.D.N.Y. 2006) ("Maryland allows claims for trespass where a defendant caused an invading substance to enter plaintiff's property

[21] To the extent Defendants suggest the City lacks exclusive possession over the invaded properties, that is incorrect. The Complaint alleges that the City "owns, leases, occupies, and/or controls real property throughout the City," and "did not give permission for Fossil Fuel Defendants, or any of them, to cause floodwaters, extreme precipitation, saltwater, and other materials to enter its property . . . ." Compl. ¶¶ 283, 285. It alleges that Defendants' conduct has caused injuries including, as one example among many, flooding in the City's Inner Harbor *Id.* ¶¶ 197, 199–201. The City has exclusive control over public docks along the Inner Harbor, and exercises that control through, among other means, the City Code. *See, e.g.*, Balt. City Code art. 10 § 6-3(a)(1) ("No vessel shall enter any public dock without permission from the Harbor Master . . . .")

without actually entering himself."). Maryland recognizes trespass claims when property "is invaded by an inanimate or intangible object," and the defendant has "some connection with or some control over [the] object." *Rockland Bleach & Dye Works Co. v. H.J. Williams Corp.* ("*Rockland*"), 242 Md. 375, 387 (1966). This comports with the Restatement, which provides that "one is subject to liability to another for trespass . . . if he intentionally" "causes a thing" to enter another's land. Rest. § 158. The foreign matter need not be placed there directly; it suffices if "an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.* cmt i. Numerous courts applying the Restatement—as Maryland does[22]—recognize that trespass may lie even if there are intervening steps between the defendant's conduct and the invasion.[23] Defendants substantially contributed to invasions of City property by misleadingly and deceptively marketing their fossil fuel products, knowing that emissions from those products would cause the very climate-related invasions alleged here. *See* Compl. ¶¶ 103–140, 191–217, 221–23, 231, 234.

The cases Defendants cite do not suggest otherwise. In *Rockland*, the defendant caused a trespass by placing fill material that was carried onto the plaintiff's land by "foreseeable seasonal rains." 242 Md. at 387. The City's Complaint likewise alleges that Defendants designed, manufactured, marketed, and sold fossil fuel products whose intended use would foreseeably cause trespasses on City property. *See* Compl. ¶¶ 103–140, 284, 286–89. The decision in *JBG/Twinbrook Metro Ltd. P'ship v. Wheeler* involved whether Exxon assumed liability to maintain underground

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[22] *See, e.g., Bramble v. Thompson*, 264 Md. 518, 522 (1972); *Kirby v. Hylton*, 51 Md. App. 365, 371 (1982).

[23] *See, e.g., Delaware v. Monsanto*, 299 A.3d at 389 (holding that Delaware stated a claim for trespass against a defendant that "substantially contributed to the entry [of PCBs] onto the State's land by supplying PCBs to Delaware manufacturers and consumers, knowing that their use would eventually trespass onto other lands," even though defendant did not "dump[] the PCBs directly onto the State's land"); *City of Bristol v. Tilcon Materials, Inc.*, 931 A.2d 237, 259 (Conn. 2007) (upholding trespass liability where defendant "had reason to know that leachate from the landfill might invade the groundwater and migrate downhill to off-site locations," including plaintiffs' property).

storage tanks ("USTs") it paid to install at a gas station as part of a larger renovation, in consideration for exclusive rights to supply gasoline at the station. 346 Md. 601, 606, 622, 625–26 (1997). The court held Exxon lacked sufficient control over the tanks because under the plain terms of the contract, once the renovations were complete the station owner "became the owner of the USTs with the obligation to maintain them," such that Exxon was not liable for contents that leaked from the tanks and invaded the plaintiff's neighboring property. *Id.* The case does not hold, as Defendants suggest, that Exxon lacked sufficient control "over the *gasoline*" it supplied to the station, and does not say Exxon's conduct was "too attenuated" for common law duties to attach. Mot. at 44 (emphasis added). The court considered only Exxon's *contractual* duties with respect to the *tanks* after paying for their installation.

*Third*, Defendants contend the City's trespass claim is unripe to the extent based on future invasions, and that "virtually all of Plaintiff's alleged injuries are entirely speculative." Mot. at 50. Not so. The Complaint alleges numerous invasions of City property that have already occurred, *e.g.*, Compl. ¶¶ 195–96, 201–210, 286, 288–90, and costs the City has already incurred to address those invasions, *id.* ¶ 86, 195, 201, 205, 210, 212, 214. Those allegations distinguish *Albright*, where the court reversed a damages award because the "general contamination of an aquifer that may or may not reach a given [plaintiff's] property," was insufficient to show an invasion of the plaintiffs' property where the plaintiffs had not yet detected any contamination. 433 Md. at 408. Nor does Maryland law bar recovery of future damages. *See Gillespie-Linton v. Miles*, 58 Md. App. 484, 499–500 (1984) (explaining that an award of future damages is proper if based on sufficient evidence (citing *Hutzell v. Boyer*, 252 Md. 227 (1969)); *DiLeo v. Nugent*, 88 Md. App. 59, 77 (1991) (expert testimony "was sufficient for the jury to award future damages with reasonable probability"). As alleged, "[e]ven if all carbon emissions were to cease, Baltimore

would still experience greater future committed sea level rise due to the 'locked in' greenhouse gases already emitted." Compl. ¶ 196. The City will prove its injuries at trial, and the reasonably probable damages that flow from them.[24]

### 3. The City Adequately Alleges Strict Liability and Negligent Failure to Warn.

The Maryland Supreme Court has adopted the requirements of § 402A of the Restatement for product liability claims sounding in strict liability. *See Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 432 (1992). Under that test, a plaintiff must prove that:

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

*Id.* (cleaned up). "In a strict liability failure to warn case, the alleged defect is the failure of the seller to give an adequate warning," *id.* at 438 n.8, which "will, without more, cause the product to be unreasonably dangerous as marketed," *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md. App. 318, 325 (1995) ("*Mazda*") (quoting 3 Am. Law of Prods. Liab. 3d § 32:2 (1993)).[25]

To recover under a negligence theory, the plaintiff must show that:

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

*Gourdine v. Crews*, 405 Md. 722, 738 (2008) (cleaned up). In practice, for failure-to-warn claims,

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[24] Defendants separately argue trespass claims for environmental pollution are disfavored. Mot. at 44–45. But their two cases from a single federal district court do not accurately reflect the nationwide trend of courts recognizing viable trespass claims for environmental harms. *See, e.g.*, *State v. Exxon*, 406 F. Supp. 3d at 469–71 (trespass via MTBE groundwater contamination); *In re MTBE*, 725 F.3d at 119–20 (same); *Rhode Island v. Atl. Richfield Co.*, 357 F. Supp. 3d at 143–44 (same); *Bristol*, 284 Conn. 55 (trespass via groundwater contamination by toxic chemicals); *Bradley v. Am. Smelting & Refining Co.*, 104 Wash. 2d 677, 683 (1985) (en banc) (trespass via smokestack pollution).

[25] *See also Zenobia*, 325 Md. at 433 ("a product containing an adequate warning" is not defective or unreasonably dangerous (citing Rest. § 402A, cmt. j)); *Werner v. Upjohn Co.*, 628 F.2d 848, 858 (4th Cir. 1980) ("[U]nder a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous.").

"negligence concepts and those of strict liability have 'morphed together,'" and a plaintiff must prove under either theory that the manufacturer or seller owed a duty because it knew or should have known of the product's dangerous propensity. *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 24 (2015) (quoting *Gourdine*, 405 Md. at 743); *see also* Rest. § 402A, cmt. j.

The City sufficiently pleads its failure-to-warn claims. The Complaint alleges Defendants knew or should have known that their fossil fuel products would cause devastating climate injuries when used as intended. Compl. ¶¶ 239–40, 272–73; *see also id.* ¶¶ 103–40. Defendants accordingly had a duty to issue adequate warnings to protect the City and others foreseeably harmed by their products' intended use. *Id.* ¶¶ 238, 271. They breached their duty by failing to issue adequate warnings, as reasonable manufacturers and sellers would have done, *id.* ¶¶ 241–43, 274–76, and instead undertaking a decades-long campaign to conceal and misrepresent those hazards, *id.* ¶¶ 141–70. Defendants' failure to warn of the dire climatic risks resulting from using their fossil fuel products, along with their affirmative efforts to deceive about those risks, "prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate changes," *id.* ¶¶ 242, 275, such that those products were significantly more dangerous than reasonable consumers' expectations, *see id.* ¶¶ 239–42, 272–75. Defendants' failure to warn was a direct, proximate, and substantial-factor cause of the City's climate-related injuries, resulting in extensive damage and expenses. *Id.* ¶¶ 244, 277.

**a. Defendants Had a Duty to Adequately Warn Consumers and Bystanders.**

Contrary to their arguments, Defendants owed the City and other consumers a duty to warn of their products' known climatic hazards. Compl. ¶¶ 103–40, 238, 271; Mot. at 41–44. The Supreme Court has emphasized that ultimately "the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts

of the defendant." *Gourdine*, 405 Md. at 745. Duty can be analyzed using several "classic factors":

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

*Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 633–34 (2018) (cleaned up). "Foreseeability is perhaps [the] most important" one. *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016) (cleaned up).

Each of those factors supports a finding that Defendants owed a duty to warn. Most importantly, it was not only foreseeable but *foreseen* by Defendants more than half a century ago that their fossil fuel products' intended use would result in the very climate-related harms the City and others now face. *See* Compl. ¶¶ 103–40, 239, 272. The Complaint details the myriad injuries the City has suffered, and will continue to suffer, *e.g.*, *id.* ¶¶ 191–217, as a direct result of Defendants' failure to provide *any* warnings of the harms from using their products as promoted, *id.* ¶¶ 241, 274. Defendants have earned moral blame because they had actual knowledge that their products were dangerous, and deployed a decades-long campaign of deception and disinformation to obscure those dangers and maximize their profits. *Id.* ¶¶ 1, 5, 30, 141–70, 247, 280. Defendants took concrete steps to protect their *own* infrastructure from rising seas and worsening storms, *id.* ¶¶ 171–76, but withheld their superior knowledge from the City, the public, consumers, and others. Imposing liability under these circumstances will further the policy of preventing future harm by incentivizing defendants to act truthfully and warn of known product dangers. The economic burden Defendants will incur is the inevitable consequence of remediating the injuries they have caused the City and is appropriate given Defendants' deliberate disregard for the consequences of their conduct, *id.* ¶¶ 247, 280, especially since that conduct delayed mitigation and dramatically increased the costs the City will bear, *id.* ¶¶ 179–80. Finally, insurance availability to offset the

City's injuries is at best unclear. *See, e.g., id.* ¶¶ 191–217.

Recognizing Defendants' duty to warn would not create an unlimited "duty to warn the world," as Defendants contend. *See* Mot. at 40. The federal court in *State v. Exxon* squarely rejected that argument in a comparable case, explaining:

> Of course, there is no duty to warn the world. However, the duty to warn extends not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use.

406 F. Supp. 3d at 463 (cleaned up).[26] *See also Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (defendants had "duty to warn the general public, whom they allegedly knew and expected would be endangered"). Maryland courts agree that foreseeable "bystanders . . . are protected under the doctrine of strict liability in tort." *See Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 323 (1988), *rev'd on other grounds*, 317 Md. 185 (1989)); *ACandS, Inc. v. Godwin*, 340 Md. 334, 349–55 (1995) (upholding damages award where defendants' product was a substantial cause of bystanders' injuries); *Ga.-Pac. Corp. v. Pransky*, 369 Md. 360, 363–68 (2002) (same). Defendants knew the City and others would be endangered by their products' intended uses, and owed a duty to issue adequate warnings to protect the City and other foreseeable victims of those dangers.

**b. The Dangers of Defendants' Products Were Not Open and Obvious.**

Defendants' assertion that the dangers of climate change were open and obvious, *see* Mot. at 41–42, ignores the whole substance of the Complaint and seeks to prematurely adjudicate factual questions. The City alleges Defendants spent decades working to conceal the exact dangers they now insist were obvious (despite their efforts). *See* Compl. ¶¶ 103–40. "It necessarily is a question

[26] *Accord, e.g., Pennsylvania v. Monsanto*, 269 A.3d at 665–66; *In re MTBE*, 725 F.3d at 123 ("[A] manufacturer 'has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known,'" which "extends 'to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn.'" (citations omitted)); *In re MTBE*, 175 F. Supp. 2d at 625–26.

of fact" whether Defendants can establish that the climate-related harms of using their fossil fuel products were open and obvious, because "[w]hether a particular danger is obvious or patent can depend on a number of things," including potential "distractions." *See Figgie Int'l, Inc., Snorkel-Econ. Div. v. Tognocchi*, 96 Md. App. 228, 240 (1993) (quotation omitted). Where, as here, that question is disputed, it is "for the jury to decide." *Id.*; *see also Mazda*, 105 Md. App. at 329 (obviousness of danger is typically "a jury issue because reasonable minds could differ on it").

Here, the Complaint alleges that Defendants "widely disseminated marketing materials, refuted the scientific knowledge generally accepted [about climate change], advanced pseudo-scientific theories of their own, and developed public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuel products would cause grave climate change." Compl. ¶ 275; *see also id.* ¶¶ 141–70 (detailing how Defendants "affirmatively acted to obscure th[e] harms" of their products). Over many decades, Defendants employed and financed industry associations and front groups to "misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products," *id.* ¶ 31, deploy "national climate change science denial campaign[s]," *id.* ¶ 150, and covertly "bankroll scientists" holding "fringe opinions" to "[c]reat[e] a false sense of disagreement in the scientific community" regarding the reality and causes of climate change, *id.* ¶¶ 162–63; *see also id.* ¶¶ 158–68. A jury could conclude that the dangers of Defendants' fossil fuel products were not open and obvious *because of* Defendants' intentional and misleading conduct, which distracted consumers from the harms. Maryland courts have found far less egregious distractions sufficient to preclude a finding that a danger was obvious. *See, e.g.*, *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 395 (1997) (in slip and fall case, "the jury would be entitled to consider whether appellant's attention was reasonably focused on selecting produce that was on display" at grocery and did not notice slipping hazard on floor).

The allegations Defendants cite do not show any dangers were open and obvious. *See* Mot. at 43–44. The fact that an expert science advisory panel to President Johnson, scientists including those at NASA, and United Nations bodies recognized the risks of greenhouse gas pollution, *see* Compl. ¶¶ 103, 143, does not show that the risks of using Defendants' fossil fuel products were objectively obvious to "the average consumer," *Mazda*, 105 Md. App. at 327 (quotation omitted), in Maryland or otherwise. The entire thrust of the City's allegations is that *despite* increasing scientific understanding of climate change, Defendants dedicated substantial resources to obscuring their products' dangers, attacking climate science and scientists, and convincing the public their products' dangers were unproven. Compl. ¶¶ 141–76. Nor do the allegations regarding a film Shell released in 1991 about climate change, or a 1997 speech by BP's former CEO at Stanford University mentioning climate impacts, *see id.* ¶¶ 136, 181, show that the dangers of Defendants' products were obvious. The Complaint does not allege those media accurately portrayed the risks of using fossil fuel products, or that they were shared with the users or foreseeable bystanders. It is for a jury to decide whether the dangers were obvious.

Defendants' cited cases only reinforce the point—they were all decided by juries, or on directed verdicts or summary judgment based on a developed record. In *Mazda*, the court reversed a jury verdict on failure-to-warn claim because it was "absurd to suggest that persons of ordinary intelligence would not appreciate" that in a head-on collision with a tree, a seatbelt might not entirely prevent all injury. *See* 105 Md. App. at 321, 330. In *Virgil v. Kash N' Karry Service Corp.*, obviousness was not in issue at all; rather, the court directed a defense verdict on a failure-to-warn claim "because there was no evidence that either of the [defendants] knew or should have known that the thermos bottle presented a danger." 61 Md. App. 23, 33 (1984). Defendants' reliance on two tobacco cases is similarly misplaced, as both were decided at summary judgment based on

uncontradicted and "overwhelming" evidence that ordinary consumers understood the dangers of cigarettes during the years the plaintiffs smoked. *See Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 437 (D. Md. 2005), *aff'd*, 162 F. App'x 231 (4th Cir. 2006); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 435 (D. Md. 2000). Here, by contrast, the City alleges that Defendants misrepresented and concealed their products' dangers to ensure reasonable consumers would *not* have contemplated those dangers.[27] The trier of fact should consider obviousness based on a developed record.[28]

#### 4. The City Adequately Pleads Negligent and Strict Liability Design Defect Claims.

Maryland courts generally apply the consumer expectation test derived from Restatement § 402A to determine whether a product is defectively designed. *See Halliday v. Sturm, Ruger & Co.*, 368 Md. 186, 193–95 (2002).[29] Under that test:

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

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[27] *See Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1023 (Mass. 2013) (obviousness was jury question because "cigarette manufacturers[] engaged in a calculated effort . . . to raise doubts [about] the causative link between cigarettes and cancer"); *Standish-Parkin v. Lorillard Tobacco Co.*, 786 N.Y.S.2d 13, 14 (N.Y. App. Div. 2004) (triable issues of fact existed as to public knowledge of the risks of cigarettes prior to 1969, and "whether [plaintiff] had relied upon defendants' various allegedly fraudulent misrepresentations and concealments of the truth"); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389–90 (N.Y. App. Div. 2003) (reversing dismissal of failure to warn claim because "plaintiff . . . raised issues of fact as to whether consumers were fully aware of the health hazards posed by smoking cigarettes," "particularly considering that the respondents disseminated information, at the relevant time, disputing the validity of the scientific evidence linking cigarette smoking to cancer and other diseases").

[28] Defendants state in passing that the City does not allege a warning would have prevented its injuries, Mot. at 39, but Maryland recognizes a presumption that "plaintiffs would have heeded a legally adequate warning had one been given." *State v. Exxon*, 406 F. Supp. 3d at 464 (quoting *U.S. Gypsum Co. v. Mayor & City Council of Baltimore*, 336 Md. 145, 161–63 (1994)). Ultimately, whether Defendants' failure to provide any warning caused the City's injuries is an issue "for the trier of fact to consider," not for resolution on the pleadings. *U.S. Gypsum*, 336 Md. at 162.

[29] Maryland courts use the risk-utility test as well, but "only when the product 'malfunctions in some way.'" *State v. Exxon*, 406 F. Supp. 3d. at 460 (quoting *Halliday*, 792 A.2d at 1153). As Defendants acknowledge, the consumer expectation test applies here, Mot. at 46–47, as it did in *State v. Exxon* and *Baltimore v. Monsanto*. *See State v. Exxon*, 406 F. Supp. 3d at 461 (applying consumer expectation test rather than risk-utility test where state alleged that product was "defective and unreasonably dangerous when used in its ordinary and intended way"); *Baltimore v. Monsanto*, 2020 WL 1529014, at *10 (same).

knowledge common to the community as to its characteristics."

*State v. Exxon*, 406 F. Supp. 3d at 460 (quoting *Halliday*, 368 Md. at 193).

The City adequately alleges design defect claims. In addition to failing to warn of their products' dire climatic risks, Defendants "took affirmative steps to misrepresent the nature of those risks, such as by disseminating information aimed at casting doubt on the integrity of scientific evidence that was generally accepted at the time and by advancing their own pseudo-scientific theories." *Baltimore IV*, 31 F.4th at 234 n.23; *see* Compl. ¶¶ 250–55, 264, 275. In doing so, Defendants breached the duty of care owed to consumers and reasonably foreseeable victims. *See id.* ¶¶ 262–64. Defendants' affirmative conduct "prevented reasonable consumers from forming an expectation that fossil fuel products would cause grave climate changes," *e.g.*, Compl. ¶ 254, such that those products were unreasonably dangerous and defective, *id.* ¶¶ 250, 253, 255. In other words, Defendants' products were more dangerous than an ordinary consumer would have expected precisely *because of* "Defendants' promotional efforts" and affirmative campaign to conceal and deceive consumers about their products' risks, and were thus defective. *See Baltimore IV*, 31 F.4th at 234 n.23. Those defects were a direct, proximate, and substantial-factor cause of the City's climate-related injuries, resulting in extensive damage and costs. *Id.* ¶¶ 257, 265–66.[30]

Defendants' counter-arguments are unpersuasive. *First*, Defendants insist that their fossil fuel products were not defective because the products, and their inherent characteristics, functioned as intended. Mot. at 45–46. Defendants cite several cases for the proposition that "a product which functions as intended and as expected is not defective." Mot. at 45 (quotations

[30] As described above, because Defendants knew of the grave climatic risks posed by their fossil fuel products, *id.* ¶ 262, they owed a duty "to all persons whom [their] fossil fuel products might foreseeably harm, including [the City]," *id.* ¶ 250; *see also id.* ¶ 263. Defendants breached that duty by embarking on a campaign to promote unrestricted use of their fossil fuel products, while misrepresenting the harms that they know would arise from those products' intended use, *id.* ¶¶ 141–70, 264, causing the City's injuries, ¶¶ 257, 265–67. Thus, Defendants' affirmative deceptive promotion of their fossil fuel products both breached their duty and rendered their products defective.

omitted) (citing *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701 (Md. 1988); *Halliday*, 792 A.2d at 1158). As the Fourth Circuit explained in this case, however, the City's "design-defect claim hinges on its ability to demonstrate that Defendants' promotional efforts deprived reasonable consumers of the ability to form expectations that they would have otherwise formed." *See Baltimore IV*, 31 F.4th at 234 n.23. The City is not alleging that Defendants' products are defective because, for example, they contain carbon or because they produce greenhouse gases upon combustion. They are defective because they do not perform as safely as a reasonable consumer would expect, as a consequence of Defendants' deliberate efforts to prevent consumers from appreciating that the products' normal use would cause sea levels to rise, air temperatures to increase, and extreme weather events to multiply, jeopardizing human life, natural resources, and public and private property. *See* Compl. ¶ 253. That sets the City's claim apart from that in *Dudley v. Baltimore Gas & Elec. Co.*, where the alleged defect was that natural gas is "flammable and highly explosive," 98 Md. App. 182, 202–03 (1993), and there was no evidence that the defendant gas company concealed those facts. None of Defendants' other cases undercut the City's theory, either.[31]

[31] In *Cofield v. Lead Indus. Ass'n, Inc.*, the federal district court required the plaintiff "to plead and prove the presence of a safer, commercially reasonable, alternative" to the defendant's allegedly defective product. 2000 WL 34292681, at *2. But a plaintiff pleading "strict liability due to a design defect [is] under no obligation to provide a 'safer alternative' to establish their claim" under the consumer expectation test. *Green v. Wing Enters., Inc.*, 2016 WL 739060, at *2 (D. Md. Feb. 25, 2016) (citing cases). In *Town of Lexington v. Pharmacia Corp.*, 133 F. Supp. 3d 258, 266–69 (D. Mass. 2015), the court decided on summary judgment that "an inherent danger in the product at issue is not conclusive of a design defect" where the plaintiffs failed to offer any other evidence of a defect. In *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, the claimed defect was based solely on the presence of lead in white lead carbonate pigment, but the court cited with approval another case that successfully alleged defective design based on a single product ingredient. 768 N.W.2d 674, 684–85 (Wis. 2009). *But see Hall v. Bos. Sci. Corp.*, 2015 WL 874760, at *5 (S.D.W. Va. Feb. 27, 2015) (Wisconsin law did not bar claim because "the plaintiff in this case does not argue that the mere presence of an ingredient creates a defect in the product's design," but instead "primarily focuses on the amount of the ingredient used in the design"); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 732 (Wis. 2001) (plaintiff adequately alleged design defect regarding inherent characteristic where defect related to quantity of product). These cases stand for the proposition that "an inherent danger in the product at issue is not *conclusive* of a design defect"—not that any claim of a defect that relates to a product's inherent characteristics must fail, as Defendants claim. *Town of Lexington*, 133 F. Supp. at 269 (emphasis added).

*Second*, Defendants contend that the City has failed to allege that their products are unreasonably dangerous, as required by the consumer expectation test. Mot. at 46–47. As described above, however, the City alleges that Defendants' fossil fuel products did not perform as safely as a reasonable consumer would expect because Defendants affirmatively prevented reasonable consumers from understanding their products' true dangers. *See* Compl. ¶¶ 239, 246. Particularly in light of Defendants' aggressive campaigns to spread disinformation and deceive consumers about the risks of their fossil fuel products, *see id.* ¶¶ 141–70, reasonable consumers could not and did not expect the climatic harms Defendants knew their products would cause, *see, e.g.*, *id.* ¶¶ 191–215.[32] As alleged, Defendants' disinformation campaign worked exactly as intended and thereby made their products unreasonably dangerous under the consumer expectation test.

*Finally*, Defendants purport that their products were not unreasonably dangerous—as a matter of law—because their hazards were "publicly known." Mot. at 47–48. Defendants repeat their reliance on select allegations that an expert science advisory panel to President Johnson and other scientists recognized the risks of greenhouse gas pollution. *See* Compl. ¶¶ 103–05. But as described above, *see supra* Part IV.3.b, those allegations do not show that reasonable consumers in Maryland would appreciate the dangers of Defendants' products.[33] That is particularly so because Defendants spent millions of dollars seeking to discredit the emerging scientific consensus

[32] Defendants also protest that the Complaint does not allege that Defendants' fossil fuel products "are dangerous to the user." Mot. at 47. But as Judge Hollander explained in *State v. Exxon*, "Maryland courts have never limited recovery in strict liability for design defect to ultimate users of the product," and bystanders who are foreseeably harmed by the use of defective products may properly assert design defect claims. 406 F. Supp. 3d at 461–62 ("I reject defendants' argument that the State's design defect claim fails because its alleged injury was not the result of its use of MTBE gasoline as a consumer product" but rather foreseeably resulted from the widespread use of MTBE gasoline by others); *accord Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (declining to dismiss design defect claim based on allegations that it was foreseeable to defendant that its PCB products, "when used as intended, would become a global contaminant and cause toxic contamination of waterways and wildlife, such as the City's stormwater system").

[33] Nor do Defendants' citations to irrelevant extra-Complaint sources regarding the Biden Administration's actions in relation to fossil fuels. *See* Mot. at 48.

on global warming, deny the link between their fossil fuel products and climate change, and "persistently create doubt in the minds of . . . consumers" about the risks of their products. *See, e.g.*, Compl. ¶¶ 1, 147, 158. It is for a jury to decide if, and when, reasonable Maryland consumers appreciated the true dangers of Defendants' fossil fuel products.

### 5. The City Pleads Actionable Violations of the MCPA.

The MCPA prohibits "any unfair, abusive, or deceptive trade practice" in the sale or "offer for sale" of consumer goods. Md. Code Ann., Com. Law § 13-303(1)–(2).[34] To state a claim under § 13-301 of the MCPA, one must allege: (1) an unfair or deceptive trade practice; (2) reliance upon the practice; and (3) an identifiable injury. *Lloyd*, 397 Md. at 142–43. Unfair and deceptive trade practices include "[f]alse, falsely disparaging, or misleading oral or written statement[s], . . . which ha[ve] the capacity, tendency or effect of deceiving or misleading consumers," Md. Code Ann., Com. Law § 13-301(1); "[f]ailure to state a material fact if the failure deceives or tends to deceive," *id.* § 13-301(3); and "[d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that the consumer rely on the same in connection with . . . the promotion or sale of any consumer goods," *id.* § 13-301(9). A fact is material "if a significant number of unsophisticated consumers would find that information important in determining a course of action," *Green v. H & R Block, Inc.*, 355 Md. 488, 524 (1999), which "is ordinarily a question of fact for the trier of fact," *Bank of Am. v. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 532 (D. Md. 2011); *see Green*, 355 Md. at 524.

The Complaint satisfies each element of an MCPA claim. *First*, it identifies numerous unfair and deceptive trade practices Defendants have committed over the course of many decades:

- Defendants' false and misleading statements about climate change, their fossil fuel

[34] "[A]ny person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by [the MCPA]." *Id.* § 13-408(a).

products' leading role in causing it, and their own commitments to invest in energy sources other than fossil fuels, *see* Compl. ¶¶ 141–70, 184–87, 295–96, have "the capacity, tendency, or effect of deceiving or misleading consumers," Md. Code Ann., Com. Law § 13-301(1), into believing that Defendants and their fossil fuel products do not contribute to climate change as much as they do, *see* Compl. ¶¶ 295–96.

- Defendants' ongoing failure to disclose, as far back as the 1980s, the material fact that profligate use of their fossil fuel products would lead to catastrophic consequences for the planet, *see* Compl. ¶¶ 141–70, 295–96, has deceived consumers including the City, *see id.* ¶ 170; *see* Md. Code Ann., Com. Law § 13-301(3) (proscribing the "[f]ailure to state a material fact if the failure deceives or tends to deceive"); *Proctor v. Am. Offshore Powerboats, LLC*, 2005 WL 8174466, at *2 (D. Md. Feb. 8, 2005) (denying motion to dismiss MCPA claim because allegations that plaintiffs were deceived by defendant's "failure to disclose the powerboat's defects and associated risks" sufficed to state a claim under § 13-301(3)).[35]

- Defendants' rampant use of deception, misrepresentations, and knowing concealment and omissions about the dire climatic risks of their fossil fuel products in connection with the promotion and sale of those products, *see* Compl. ¶¶ 141–70, 184–87, 295–96, qualify as unfair or deceptive trade practices under § 13-301(9). *See Lloyd*, 397 Md. at 150–54 (plaintiffs stated a claim under § 13-301(9) based on allegations that defendant automakers knew the risk of injury from weak seatbacks but "engaged in a 30-year cover up of the product malfunction" and "concealed" that defect); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 545–46, 548 (D. Md. 2011) (plaintiffs stated claim under MCPA by alleging that defendant "concealed, suppressed, and omitted material facts regarding the inherent defect within the torque converter system," "knew the vehicles were defective[,] and intended for the Plaintiffs to rely on its concealment of those material facts, thereby misleading its customers"). Defendants intended for consumers to rely on their misrepresentations and omissions to continue purchasing fossil fuel products. *See* Compl. ¶ 296–297.

*Second*, "[a]s a result of Defendants' tortious, false and misleading conduct, reasonable consumers of Defendants' fossil fuel products . . . have been deliberately and unnecessarily deceived about: the role of fossil fuel products in causing global warming . . . [and] that the continued increase in fossil fuel product consumption that creates severe environmental threats

[35] Although the Complaint expressly refers to only §§ 13-301(1) and 13-301(9), *see* Compl. ¶ 292, the Complaint also states a violation of § 13-301(3). Specifically, the Complaint alleges that the climatic risks of fossil fuel products are material to Maryland consumers, *see id.* ¶¶ 295–96, and that Defendants failed to warn of their products' climatic risks while marketing and selling those products, *see id.* ¶¶ 141–70, 241, 274, which has deceived consumers, *id.* ¶ 170. These allegations state a § 13-301(3) claim against Defendants. *See Tavakoli-Nouri v. State*, 139 Md. App. 716, 730 (2001) ("The critical inquiry is not whether the complaint specifically identifies a recognized theory of recovery, but whether it alleges specific facts that, if true, would justify recovery under any established theory."). If the Court disagrees, the City respectfully requests leave to amend to expressly assert violations of § 13-301(3).

and significant economic costs for coastal communities, including Baltimore." *Id.* ¶ 170. Defendants' tactics expanded the use of fossil fuels and delayed action on climate change, which "drastically increased the cost of mitigating further harm," *id.* ¶¶ 179–80, while enabling them to obtain profits they would not have been able to earn absent their unfair and deceptive trade practices, *see id.* ¶ 297. *Third*, "[b]y reason of [Defendants' deceptive and misleading] conduct," which resulted in increased greenhouse gas emissions and exacerbated local climate impacts, "the City of Baltimore incurred harm and was damaged in ways it would not otherwise have been," *id.* ¶ 298, imposing significant costs to mitigate local climate impacts, *see id.* ¶¶ 191–217.[36]

**a. The City's MCPA Claim Is Timely.**

The City's MCPA claim is timely because Defendants' fraudulent concealment of their conduct tolled the statute of limitations until the City reasonably could have discovered the facts essential to its MCPA claim—a jury question.

Under Maryland's discovery rule, "a claim accrues when the plaintiff knew or reasonably should have known of the wrong," *i.e.*, "the operative facts giving rise to the cause of action." *Cain v. Midland Funding, LLC*, 475 Md. 4, 35, 37 (2021) (cleaned up). However, under the fraudulent concealment doctrine, if an adverse party's fraud keeps the plaintiff from gaining knowledge of the claim, "the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." *Doe v. Archdiocese of*

[36] The cases Defendants cite in which courts found the reliance element lacking, *see* Mot. at 45, are all distinguishable. *Mitchell Living Trust* involved a partial grant of *summary judgment* based on *uncontroverted facts* showing that the party asserting the MCPA claim "could not have relied on [the opposing party's] alleged misrepresentation." 822 F. Supp. 2d at 534. In *Farwell v. Story*, the private plaintiff argued that "she need not prove reliance to establish a violation of the Act," and did not even attempt to allege as much. 2010 WL 4963008, at *8–9 (D. Md. Dec. 1, 2010). And in *Bey v. Shapiro Brown & Alt, LLP*, the plaintiff failed to oppose the defendant's argument that the complaint "failed to allege reliance," and, moreover, the allegations affirmatively "show[ed] that he opposed [requests made by the defendants] and therefore *did not rely* on Defendants' representations." 997 F. Supp. 2d 310, 319 (D. Md. 2014) (emphasis added). Here, by contrast, the City adequately alleges reliance, as described above. *See Lloyd*, 397 Md. at 149 (finding plaintiffs stated MCPA claim by "alleg[ing] that, as a result of the [defendants'] misrepresentation or omission, they suffered a loss" based on the cost of repairing their automobile defect).

*Wash.*, 114 Md. App. 169, 186–87 (1997) (quoting Md. Code Ann., Cts. & Jud. Proc. § 5-203); *see also Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 617–18 (2013). Determining when the plaintiff should have discovered the cause of action "is inevitably a fact-intensive inquiry" and "ordinarily . . . to be determined by the factfinder, typically a jury." *Mathews*, 435 Md. at 618, 620–21 (reversing grant of summary judgment because whether defendant's fraudulent concealment tolled the statute of limitations was a jury question); *Geisz v. Greater Baltimore Med. Ctr.*, 313 Md. 301, 304 (1988) (similar because it was a jury question of fact when plaintiff should have discovered the claim); *Poffenberger v. Risser*, 290 Md. 631, 638 (1981) (same due to factual dispute as to when plaintiff "possessed knowledge from which actual notice may be inferred").

Here, Defendants "deliberately obscured" the existence and operation of their deception campaigns by using trade associations, front groups, and think tanks to deploy climate denial and disinformation on their behalf, Compl. ¶¶ 166–67; *see also id.* ¶¶ 31, 150–68. For example, "[a] key strategy in Defendants' efforts to discredit [the] scientific consensus on climate change . . . was to bankroll scientists" advancing "fringe opinions" to "[c]reat[e] a false sense of disagreement in the scientific community" regarding the reality and causes of climate change. *Id.* ¶¶ 162–63. Defendants' role in funding these scientists—either directly or "through Defendant-funded organizations like API"—was often undisclosed, *id.* ¶ 162. Defendants also funded front groups like the Global Climate Science Team, which did not in fact include any scientists, and "developed a strategy to spend millions of dollars manufacturing climate change uncertainty" on Defendants' behalf. *Id.* ¶ 165. These covert tactics ensured that outside observers like the City would view the disinformation and deception as coming from unconnected neutral sources, rather than Defendants. Defendants' affirmative acts to promote disinformation, conceal their knowledge about their products' harms, and cast doubt on the scientific consensus—while covering their tracks through

use of third parties—"kept the [City] in ignorance of" its MCPA claim. *See Doe*, 114 Md. App. at 187. A jury should resolve the factual question of when the City could reasonably have traced the threads of climate disinformation to Defendants. *See Mathews*, 435 Md. at 618, 620–21.

Defendants again point to allegations that scientists—including Exxon's own scientists, certain politicians, and United Nations bodies—have acknowledged a link between fossil fuels and climate change for decades. *See* Mot. at 53–54. Setting aside whether the City should have possessed comparable knowledge to a presidential advisory panel, industry scientists, or international organizations focused on climate change, Defendants conflate knowledge of climate change and its impacts with knowledge of the facts underpinning the deceptive nature of their own statements and omissions—including *Defendants'* own early knowledge about the severe risks posed by their products, and the companies' efforts to undermine the public's understanding of those risks. Defendants did not violate the MCPA by producing fossil fuels; they did so by concealing and misrepresenting the dangers of their products and by attacking the very knowledge and reporting they now seek to hide behind.[37] The City's evolving understanding of climate change and its impacts did not cause the limitations period to begin running, nor did the General Assembly's enactment of legislation intended to reduce greenhouse gas emissions. *See* Mot. at 55.

Next, Defendants assert that their deception campaigns were "widely publicized" through two news articles from the late 1990s, such that the City was on notice of their deception. *See id.* at 54. But even assuming those articles described the facts essential to the City's MCPA claim, "[t]he fact that news about some event was available at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news." *Johnson v. Multnomah Cnty.*

[37] *See Honolulu*, 537 P.3d at 1181 (confirming that, as here, Honolulu's similar "complaint 'clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign,'" not merely defendants' production and sale of fossil fuels (quoting *Baltimore IV*, 31 F.4th at 233)).

*Dep't of Cmty. Just.*, 178 P.3d 210, 216 (Or. 2008) (en banc). Defendants cite the filing of unrelated lawsuits raising distinct theories in *AEP* and *Kivalina*, as well as the City's filing of a petition in *Massachusetts v. EPA*, 549 U.S. 497 (2007), to support their argument that other lawsuits "alleg[ed] a link between fossil fuels and climate change more than a decade before this suit." Mot. at 54–55. But neither the existence of these separate lawsuits (none of which raised consumer-protection claims, and which did not result in any factual findings or assignments of liability), nor the City's statement acknowledging that global warming is "the most pressing environmental challenge of our time," *Id.* at 55 (citation omitted), demonstrate *as a matter of law* that the City should have been aware of the facts underpinning the its own MCPA claim against Defendants here. Defendants' arguments only highlight the factual issues in determining when the City should have discovered the facts underpinning its MCPA claim, which a jury should resolve.

**b. Defendants' Misrepresentations About Climate Change Are Actionable.**

The MCPA "defines sales to include not only sales, but also offers and attempts to sell." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 538 (1995). Defendants' fossil fuel products qualify as "consumer goods" under the MCPA, and the Complaint plausibly alleges that Defendants' unfair and deceptive trade practices—including their misleading statements and omissions about the reality and severity of the climatic risks resulting from continued profligate use of their products—were made in the sale, offer for sale, or in attempt to sell their fossil fuel products and were intended to induce consumers (including the City) to purchase those products. *See* Md. Code Ann., Com. Law § 13-303(1)–(2); Compl. ¶¶ 141–70, 291–98. Defendants' cases merely stand for the propositions that the MCPA does not apply to post-sale representations, *Rutherford v. BMW of N. Am., LLC*, 579 F. Supp. 3d 737, 751 (D. Md. 2022), or to statements to non-consumers, *Morris*, 340 Md. at 541–42, neither of which is at issue here.

Although the question is premature at the pleading stage, Defendants have not shown (and cannot show) as a matter of law that none of their statements about climate change were made as "attempts to sell" their fossil fuel products. *See Morris*, 340 Md. at 538. Indeed, the Complaint expressly alleges that Defendants' climate change denial campaigns were "designed to influence consumers to continue using Defendants' fossil fuel products," Compl. ¶ 147, and that such tactics did deceive consumers about their products' climatic risks, *id.* ¶ 170. *Exxon Mobil Corp.*, 2021 WL 3493456, at *13 (Mass. Super. Ct. June 22, 2021) (quotation omitted). The Court should similarly allow the jury to make that determination here. In any event, Defendants are wrong that the allegations "relate only to the effects of climate change writ large." Mot. at 52. Among other misconduct, the Complaint challenges misrepresentations Defendants made about their fossil fuel products' contributions to climate change. *See, e.g.*, Compl. ¶¶ 153, 156.

## V. CONCLUSION

The Court should deny Defendants' Motion in its entirety.[38]

Dated: December 12, 2023

**Respectfully submitted,**

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[38] In the alternative, to the extent the Court finds the Complaint deficient in any regard, the City respectfully requests dismissal without prejudice with leave to amend so that it may amend to cure any deficiencies. In Maryland, "it is well-established that leave to amend complaints should be granted freely to serve the ends of justice and that it is the rare situation in which a court should not grant leave to amend." *RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 673 (2010); *see also* Md. Rule 2-341 ("Amendments shall be freely allowed when justice so permits."); *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 269 (2015) ("[L]eave to amend should be generously granted." (quotation omitted)), *aff'd*, 447 Md. 31 (2016). Here, Defendants do not even attempt to justify their passing request for the Court to depart from this presumption and instead award them dismissal with prejudice. Mot. at 5, 50.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of December, 2023, a copy of the *Mayor and City Council of Baltimore's Memorandum of Law in Opposition to Defendants' Motion to Dismiss for Failure to State a Claim* was served upon all counsel of record via email (by agreement of the parties).

*/s/ Matthew K. Edling*
Matthew K. Edling

# EXHIBIT 1

# A PRACTICAL TREATISE

ON

# THE LAW OF NUISANCES

IN THEIR

## VARIOUS FORMS;

INCLUDING

## REMEDIES THEREFOR AT LAW AND IN EQUITY.

BY H. G. WOOD,
ATTORNEY AND COUNSELOR AT LAW.

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ALBANY, N. Y.
JOHN D. PARSONS, JR., PUBLISHER.
1875.

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PRINTERS AND STEREOTYPERS,
ALBANY, N. Y.

# PREFACE.

I can assure the profession that it is with no small degree of trepidation that I submit this work to their criticism. But, whatever may be the reception with which it meets at their hands, I have the consciousness that I have labored earnestly, faithfully and honestly to make it a work worthy their patronage and favor. That it is not free from faults, I am fully aware, but it must be remembered that I was a pioneer in this "wilderness" of law, with no compass to guide me, but left to find my way through the entangled mass, as best I might. No work upon the subject has previously been written, and, while there are numerous works in which a single chapter is devoted to the subject, yet, in every instance, I have found those chapters worse than useless, as affording any light upon the subject. They are necessarily superficial views of the subject, and calculated to mislead, rather than to serve as a guide.

I have examined most of the decided cases bearing upon the various branches of the subject in the reports of the courts, both of this country and England, that were within my reach. I believe that none of any importance have escaped my attention. If so, it has been through inadvertence, and not design.

That the work may be found useful, both to the student and practicing lawyer, is my earnest wish, and, if I have failed to grasp the subject with that vigor, or to set it forth with the

clearness desirable, I have the satisfaction of knowing that I have at least cleared the way for some abler and more vigorous writer, who may hereafter take up the subject.

ALBANY, N. Y., *April* 12, 1875.

H. G. WOOD.

NOTE. — Since this work went to press, the Supreme Court of Illinois, in the case of *Stone* v. *The F. P. & N. W. R. R. Co.* (Am. Law Times, vol. 2, p. 54), have held that a railroad company which, in the operation of its road, casts smoke, dust or cinders over or upon the estate of one whose lands have not been taken for the construction of its road, is liable for all damages resulting therefrom, whether to the property itself or its comfortable enjoyment. This doctrine conflicts with *Brand* v. *Hammersmith R. R. Co.*, 4 H. L. Cas. 451, but it is sustained by substantial justice, and rests upon sound principles. See, also, *Eaton* v. *Boston, Concord & Maine R. R. Co.*, 51 N. H. 504, where, in effect, a similar doctrine is held.

H. G. W.

courts were established. The learned judges must have lost sight entirely of the principles controlling this class of wrongs. If any servant in the course of my employment, but without my knowledge, and even contrary to my orders, creates a public nuisance, as by obstructing a public highway, or polluting the waters of a stream, I am liable therefor civilly and criminally, even though in the view of the learned judge I could in no sense be said to have done the act.[1] In *Rex* v. *Medley*, 6 C. & P. 292, the directors of a gas company were held liable upon an indictment for acts done by their superintendent and engineer under a general authority to manage the works, although they were personally ignorant of the particular plan adopted, and which was a departure in fact from the one originally agreed upon, and when they supposed that the original design was being carried out. DENMAN, C. J., said: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

SEC. 31. Thus, it will be seen that it is not necessary, in order to charge a person with criminal liability for a nuisance, that he should commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely. If a landlord lets his premises to another in a populous neighborhood, to be used for a slaughter-house or other noxious trade, he is jointly liable with the tenant, both civilly and criminally, for the consequences thereof. Why then is he not equally liable as a keeper of a bawdy house, when he lets his premises for that purpose, and thereby creates a nuisance? He clearly is, both upon principle and authority.[2]

SEC. 32. It has sometimes been thought by people in some sections of the country, that nuisances of this character can be abated by the acts of persons living in their vicinity, and offended thereby as much as any other. But this is a serious mistake. No nuisance, whose effect is merely moral, can be abated except by the

[1] Commonwealth v. Gillespie, 7 S. & R. (Penn.) 469; Rex v. Dixon, 3 M. & S. 11; Rex v. Medley, 6 Car. & P. 292; Regina v. Same, 6 C. & P. 298.

[2] Pedley's Case, 1 Ad. & E. 822; 28 Eng. Com. Law, 220; Commonwealth v. Park, 1 Gray (Mass.), 553; Commonwealth v. Mayor, 6 Dana (Ky.), 293.

mon-law offense, it would seem that this would be regarded as a defense, where the parties are competent to contract marriage, for at common law such cohabitation would create the relation of husband and wife. But this could not be held where the parties, or either of them, are incompetent to marry. However, these offenses are regulated by legislation, and resort to an indictment for the common-law offense will seldom be had.

SEC. 69. So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purposes of exhibition or sale may be indicted therefor at common law, because they are clearly in derogation of public morals and common decency.[1]

### ACTS AFFECTING HEALTH.

SEC. 70. It is a public nuisance, for a person afflicted with an infectious or contagious disease, to expose himself in a public place, whereby the health of others is jeopardized.[2] So, too, it is an offense of the same character for a person to expose one afflicted with such a disease in a public place.[3] So, too, a hospital for the reception and treatment of patients with contagious diseases, established in a public place, is a public nuisance, and indictable as such.[4] So a depot for the landing of emigrants in a public place, near to places of business or private residences, is a public nuisance.[5] So, too, it is a public nuisance for a person to take a horse afflicted with glanders or other infectious diseases into a public place, particularly to water it at a public watering place.[6] But a person sick in his own house, or in a room in a hotel, is not a nuisance.[7] Nor is it a nuisance for a person to use his own premises for a hospital for the treatment of horses or cattle affected with contagious diseases, or to pasture sheep upon his own premises affected with foot rot.[8] But it would be an

[1] Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S. & R. (Penn.) 91.

[2] Rex v. Vantadillo, 4 M. & S. 73.

[3] Rex v. Burnett, 4 M. & S. 472; Rex v. Sutton, 4 Burr. 2116; 1 Russ. on Crimes, 113.

[4] Rex v. Vantadillo, 4 M. & S. 73; Wolcott v. Mellick, 3 Stockt. (N. J.) 309.

[5] Brower v. New York, 3 Barb. (N. Y.) 234.

[6] Mills v. Railroad Co., 2 Rob. (N. Y.) 326; Barnum v. Van Dusen, 16 Conn. 200 (sheep afflicted with foot rot).

[7] Mills v. Railroad Co., 2 Rob. (N. Y. Sup. Ct.) 326.

[8] Fisher v. Clark, 41 Barb. (N. Y. Sup. Ct.) 329.

indictable offense for a person to take sheep affected with foot rot to a public fair or other public place where the disease would be likely to be communicated to the sheep of many persons.

SEC. 71. So it is a public nuisance for a person to sell diseased or corrupted meat, or unwholesome or adulterated foods or drinks of any kind deleterious to health.[1] In order to constitute the offense, the meat, food, or drink must be of such a noxious, unwholesome and deleterious quality as to be injurious to health if eaten.[2] But it has been held that it is not necessary to set forth in the indictment that the articles were sold to be eaten.[3] In order to make out the offense it is necessary to show that the person knew that the provisions were diseased or adulterated, although the taint or adulteration is imperceptible to the senses, and produces no perceptible injury to the health of those consuming it.[4] Knowledge of the diseased condition of meat, or of the noxious and unwholesome quality of food, may be inferred from circumstances.

Thus in *Goodrich* v. *People*, 5 E. D. Smith (N. Y.), 549, it was held that the jury might infer guilty knowledge on the part of the respondent, from the fact that he knew that the abscess or the sore in the head of the cow (for the selling of the meat of which he was indicted) had existed and been increasing several months, and that he was liable, even though the taint was imperceptible to the senses, and produced no apparently injurious consequences to those who ate it. In *Rex* v. *Dixon*, 3 Maule & Selwyn, 11, the respondent was convicted on an indictment for selling bread in which alum was mixed, and it was held that he was chargeable, even though the bread was mixed by his servants, as it would be presumed that the adulteration was made with his knowledge and by his directions.

SEC. 72. A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the

[1] State v. Smith, 3 Hawks. 376; State v. Norton, 2 Iredell (N. C.), 40; Goodrich v. People, 2 Parker's Crim Rep. (N. Y.) 622; Goodrich v. People, 5 E. P. Smith (N. Y.), 549; Rex v. Dixon, 3 M. & S. 11; Daly v. Webb, 4 Irish R. (C. L.) 309.

[2] State v. Norton, 2 Iredell (N. C.), 40; State v. Smith, 3 Hawkins (N. C.), 378.

[3] Goodrich v. People, 8 Parker's Crim. Rep. (N. Y.) 622.

[4] Goodrich v. People, 5 E. D. Smith (N. Y. C. P.), 549.

to the injury, which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases, once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate every thing near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or instantly inflammable nature." And in this case (*Weir* v. *Kirk*), the erection of a powder magazine, intended for the reception of large quantities of powder, on the line of a public highway over a half mile distant from the plaintiff's residence, was enjoined. Thus it will be seen that the fact of *negligent* keeping is not regarded as an element. The fact of its presence in a locality where it *may* result disastrously is sufficient.

SEC. 74. Any thing that creates unnecessary alarm or anxiety in the public mind, such as the publication of false reports of an intended invasion, or of the reported presence in a community of a child-stealer, which is calculated to disturb the public mind and create false terror or anxiety, is a public nuisance, and was so held in *Commonwealth* v. *Cassidy*, 6 Phila. R. (Penn.) 82. In that case a false hand-bill was circulated, cautioning the public to look out for a child-stealer, who was represented to be a black woman, and then in the city, and fully describing her. The statement was wholly false, but naturally created great alarm in the city. The person circulating the bills was indicted therefor as for a public nuisance, and the court held that the indictment would lie, "that mental anxiety, induced from any cause, is a fruitful source of bodily disease, as well as of death itself, and any false publication, calculated unnecessarily to excite it, is a public nuisance."

SEC. 75. There are, in addition to the matters previously named in this chapter, a multitude of uses of property that are indictable as public nuisances; but, as these matters will be specifically treated in other chapters of this work, it will be unnecessary to treat of them *in extenso* here. All obstructions of a highway, or

principle, a loaded gun is regarded as a nuisance, and any person who, by its use in a public place, injures another, is liable therefor. So, too, if he intrusts it to an incompetent person he is liable for all the consequences that result therefrom; or if he leaves it exposed in a careless situation where others are liable to come in contact with it, he is liable if actual injury results therefrom.[1] The rule in reference to such injuries is, that if the wrong and legal damages are known by common experience to be the natural and ordinary sequence of an act, and that damage, naturally, according to the ordinary course of events, follows the wrong, the wrong and damage are sufficiently concatenated, as cause and effect to support an action.[2] In *Vanderburgh* v. *Truax*, 4 Denio (N. Y. S. C.), 464, the defendant had a quarrel with a boy, and picking up a pick-axe pursued him through the street, and the boy, to escape from his pursuer, ran into a wine store, and upset a cask of wine. In an action against the pursuer, it was held that he, and not the boy, was liable for the damage. In *Scott* v. *Shepard*, 3 Wilson, 403, the defendant threw a lighted squib into the market house, in the market place, during a fair, and the squib falling upon a gingerbread stall, the stall-keeper, for his own protection, threw it across the market place, where it fell upon another stall, where it was thrown off and exploded near the plaintiff's eye, and blinded him. DeGray, C. J., in delivering the opinion of the court, said: "All the injury was done by the first act of the defendant; that, and all the intervening acts, are to be treated as only one act."

Sec. 143. There are a class of nuisances that arise from an interference, by force or fraud, with the free exercise of another's trade or occupation, by preventing persons by threats from trading with the plaintiff,[3] or by posting placards in the vicinity of the plaintiff's place of business, calculated to bring the plaintiff into contempt and to prevent people from trading with him,[4]

[1] Illidge v. Goodwin, 5 C. & P. 190; Lynch v. Nurdin, 1 Q. B. 29; Scott v. Shepard, 3 Wils. 403.

[2] Gerhard v. Bates, 2 Ell. & Bl. 490.

[3] Tarleton v. McGawley, Peake, 270; Bell v. Midland R. R., 30 L. R. 273; Springhead Spinning Co. v. Riley, L. R., 6 Eq. Cas. 551; Keeble v. Hickeringill, 11 East, 576 n.

[4] Gilbert v. Mickle, 4 Sand. Ch. (N. Y.) 357.

there kicked a child who was lawfully in the highway. The court held that the defendant could not be made responsible for the injury unless he was aware that the horse was likely to commit such acts. But the doctrine of this case does not commend itself to courts or the profession, as being consistent with reason or sound policy. The horse was *unlawfully* in the highway, the child was *lawfully* there, and there seems to be no good reason why the owner or keeper of the horse should not be responsible for the injuries inflicted upon the child while so unlawfully at large. Judge REDFIELD, in an article entitled "Recent developments in English Jurisprudence," 4 Am. Law Reg. (N. S.), pp. 140–1, severely criticises this case, and gives it, as his opinion, that knowledge of the propensities of the horse, under such circumstances, is not essential to fixing liability for injuries inflicted.

SEC. 148. While a man may keep horses affected by glanders or other contagious diseases upon his own premises, yet he has not a right to allow them to go at large in the street, or to drink at public watering places; and if he does do so he is answerable as for a nuisance to any person sustaining damage therefrom.[1] And for a person to sell a horse affected with glanders, knowing it be so affected, is so far a fraud and opposed to sound policy that he may be made liable, even though there be no warranty.[2] A person may keep horses afflicted with glanders upon his own premises, or sheep afflicted with the foot-rot, but he must keep them there at his peril; for, while he will not be liable for a spread of the disease therefrom among his neighbors' horses or sheep so long as he keeps them on his own land, yet if they escape upon the land of another, he will be liable for all the damage from a spread of the disease resulting from their escape.[3] But this is only the case when the duty is imposed upon him to fence the lands. When the duty to fence is upon another, or when the lands are left common, he is only bound to give those interested notice of the diseased state of his cattle and flocks, and that he intends to turn them into his pastures.[4]

[1] Mills v. N. Y. & H. R. R. Co., 2 Rob. (N. Y. Sup. Ct.) 326.
[2] Blakemore v. Bristol & Ex. R. R. Co., 8 Ell. & Ell. 1051; Anderson v. Buckton, 1 Str. 192.
[3] Fisher v. Clark, 41 Barb. (N. Y. Sup. Ct.) 329; Anderson v. Buckton, 1 Str. 192.
[4] Walker v. Herron, 22 Tex. 55.

# EXHIBIT 2

# LAW OF TORTS

William L. Prosser

*Hornbook Series*

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# OF
# THE LAW OF TORTS

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edy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large,[16] which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure.[17] As in the case of other crimes, the normal remedy is in the hands of the state. The two have almost nothing in common, except that each causes inconvenience to someone,[18] and it would have been fortunate if they had been called from the beginning by different names. Add to this the fact that a public nuisance may also be a private one, when it interferes with the enjoyment of land,[19] and that even apart from this there are circumstances in which a private individual may have a tort action for the public offense itself,[20] and it is not difficult to explain the existing confusion.

If "nuisance" is to have any meaning at all, it is necessary to dismiss a considerable number of cases[21] which have applied the term to matters not connected either with land or with any public right, as mere aberration, adding to the vagueness of an already uncertain word. Unless the facts can be brought within one of the two categories mentioned there is not, with any accurate use of the term, a nuisance.[22]

## 87. BASIS OF LIABILITY

Another fertile source of confusion is the fact that nuisance is a field of tort liability, rather than a type of tortious conduct. It has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion.[23] The attempt frequently made to distinguish between nuisance and negligence,[24] for example, is based upon an entirely mistaken emphasis upon what the defendant has done rather than the result

16. Salmond, Law of Torts, 8th Ed. 1934, 238. "Public nuisances may be considered as offenses against the public by either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." Russell, Crimes and Misdemeanors, 8th Ed. 1923, 1691.

17. A very good case on the distinction between the two is Mandell v. Pivnick, 1956, 20 Conn.Sup. 99, 125 A.2d 175, which found neither. Plaintiff was injured by a defectively installed awning on defendant's building. It was held that no private nuisance was pleaded, because there was no allegation of any interference with rights in land; and no public nuisance, because there was no allegation that the awning interfered with the public highway, or with plaintiff's rights as a member of the general public.

In accord is Radigan v. W. J. Halloran Co., 1963, 97 R.I. 122, 196 A.2d 160 (personal injury from negligent operation of a crane).

18. "Public and private nuisances are not in reality two species of the same genus at all. There is no generic concept which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbor." Salmond, Law of Torts, 8th Ed. 1934, 233.

"What generic conception, it has been asked, connects public nuisances like the woman who is a common scold, or the boy who fires a squib, with private nuisances like blocking up the ancient lights of a building or excessive playing on the piano? The only link which we can suggest is inconvenience, and loose as this term is, it is probably the best that can be offered. At any rate, be the ground of the distinction what it may, the distinction itself cannot be cast aside without departing from settled legal terminology, and ignoring not only the fact that a public nuisance may become a private one but also the very practical consequence of the distinction which is that a public nuisance is a crime while a private nuisance is a tort." Winfield, Law of Tort, 1937, 466.

19. See infra, p. 589.

20. See infra, p. 586.

21. For example, Carroll v. New York Pie Baking Co., 1926, 215 App.Div. 240, 213 N.Y.S. 558.

22. Mandell v. Pivnick, 1956, 20 Conn.Sup. 99, 125 A. 2d 175; Dahlstrom v. Roosevelt Mills, Inc., 1967, 27 Conn.Sup. 355, 238 A.2d 431.

23. Restatement of Torts, Scope and Introductory Note to chapter 40, preceding § 822; Peterson v. King County, 1954, 45 Wash.2d 860, 278 P.2d 774.

24. See Hogle v. H. H. Franklin Mfg. Co., 1910, 199 N.Y. 388, 92 N.E. 794; Bell v. Gray-Robinson Const. Co., 1954, 265 Wis. 652, 62 N.W.2d 390; Winfield, Law of Tort, 5th Ed. 1950, § 138; Lowndes, Contributory Negligence, 1934, 22 Geo.L.J. 674, 697; Note, 1915, 1 Corn.L.Q. 55.

which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance.[25] The same is true as to the attempted distinction between nuisance and strict liability for abnormal activities, which has plagued the English [26] as well as the American courts.

Again the confusion is largely historical. Early cases of private nuisance seem to have assumed that the defendant was strictly liable, and to have made no inquiry as to the nature of his conduct. As late as 1705, in a case where sewage from the defendant's privy percolated into the cellar of the plaintiff's adjoining house, Chief Justice Holt considered it sufficient that it was the defendant's wall and the defendant's filth, because "he was bound of common right to keep his wall so his filth would not damnify his neighbor." [27] Over a period of years the general modifications of the theory of tort liability to which reference has been made above [28] have included private nuisance. Today liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability. With very rare exceptions, there is no liability unless the case can be fitted into one of these familiar categories.[29]

Any of the three types of conduct may result in liability for a private nuisance.[30] By far the greater number of such nuisances are intentional. Occasionally they proceed from a malicious desire to do harm for its own sake; [31] but more often they are intentional merely in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.[32] Thus a defendant who continues to spray chemicals into the air after he is notified that they are blown onto the plaintiff's land is to be regarded as intending that result,[33] and the same is true when he knows that he is contaminating the plaintiff's water supply with his slag refuse,[34] or that blown sand from the land he is improving is ruining the paint on the plaintiff's house.[35] If there is no reasonable justifica-

25. See infra, notes 37–44.

26. See Winfield, Law of Tort, 5th Ed.1950, § 143; Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480.

27. Tenant v. Goldwin, 1705, 1 Salk. 360, 91 Eng.Rep. 314, adding, "and that it was a trespass [the action was on the case] on his neighbor, as if his beasts should escape, or one should make a great heap upon his ground, and it should tumble and fall down upon his neighbor's." See also Sutton v. Clarke, 1815, 6 Taunt. 29, 44, 128 Eng.Rep. 943; Humphries v. Cousins, 1877, 2 C.P.D. 239, 46 L.J.C. P. 438.

28. Supra, p. 17. See, 8 Holdsworth, History of English Law, 2d Ed. 1937, 446–459.

29. Wright v. Masonite Corp., M.D. N.C.1965, 237 F. Supp. 129 affirmed 368 F.2d 661, cert. denied 386 U.S. 934; Power v. Village of Hibbing, 1930, 182 Minn. 66, 233 N.W. 597; Schindler v. Standard Oil Co. of Ind., 1921, 207 Mo.App. 190, 232 S.W. 735; Rose v. Socony Vacuum Corp., 1934, 54 R.I. 411, 173 A. 627; Ettl v. Land & Loan Co., 1939, 122 N.J.L. 401, 5 A.2d 689.

30. See the excellent discussion in Taylor v. City of Cincinnati, 1944, 143 Ohio St. 426, 55 N.E.2d 724. Also Rose v. Standard Oil Co. of N. Y., 1936, 56 R. I. 272, 185 A. 251, reargument denied, 1936, 56 R.I. 472, 188 A. 71.

31. See for example the spite fence cases, infra, p. 598. Also Medford v. Levy, 1888, 31 W.Va. 649, 8 S.E. 302; Smith v. Morse, 1889, 148 Mass. 407, 19 N.E. 393; Christie v. Davey, [1893] 1 Ch. 316; Hollywood Silver Fox Farm v. Emmett, [1936] 2 K.B. 468; Collier v. Ernst, 1941, 31 Del.Co., Pa., 49. See Friedmann, Motive in the English Law of Nuisance, 1954, 40 Va.L.Rev. 583.

32. See supra, § 8.

33. Vaughn v. Missouri Power & Light Co., Mo.App. 1935, 89 S.W.2d 699; Smith v. Staso Milling Co., 2 Cir. 1927, 18 F.2d 736; Jost v. Dairyland Power Cooperative, 1969, 45 Wis.2d 164, 172 N.W.2d 647. Cf. Morgan v. High Penn Oil Co., 1953, 238 N.C. 185, 77 S.E.2d 682; E. Rauh & Sons Fertilizer Co. v. Shreffler, 6 Cir. 1943, 139 F.2d 88. See Note, 1955, 8 Vand.L.Rev. 921.

34. Burr v. Adam Eidemiller, Inc., 1956, 386 Pa. 416, 126 A.2d 403.

35. Waters v. McNearney, 1959, 8 App.Div.2d 13, 185 N.Y.S.2d 29, affirmed, 1960, 8 N.Y.2d 808, 202 N.Y. S.2d 24, 168 N.E.2d 255.