MAYOR AND CITY COUNCIL OF BALTIMORE,	*	IN THE
	*	CIRCUIT COURT FOR
Plaintiff,	*	BALTIMORE CITY,
v.	*	MARYLAND
BP P.L.C., *et al.*,	*	Case No. 24-C-18-004219
Defendants.		

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

UNOPPOSED MOTION OF THE ATTORNEY GENERAL OF MARYLAND FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Attorney General of Maryland Anthony G. Brown hereby moves for leave to file the attached brief as amicus curiae in opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted. In support of the motion, undersigned counsel states as follows:

1. Maryland Rule 8-511, governing amicus curiae participation in appellate proceedings, confers on the Attorney General a right to participate as an amicus curiae "in any appeal in which the State of Maryland may have an interest." Md. Rule 8-511(b). Unlike all other parties, the Attorney General need not obtain the permission of an appellate court before submitting an amicus curiae brief. *See id.*

2. No provision analogous to Rule 8-511 governs circuit court proceedings, and the Attorney General therefore requests leave to file the attached amicus brief.

3. The importance of this matter to the Attorney General is discussed on page 1 of the amicus brief.

4. No person other than the movant, its members, or its attorneys has made a monetary or other contribution to the preparation or submission of the amicus brief.

5. Plaintiff has consented to this motion. Defendants have consented to this motion, on the condition that they reserve their right to seek permission to file a response brief not to exceed the length of the amicus brief.

WHEREFORE, this motion should be granted and the attached amicus brief filed.

December 22, 2023

Respectfully submitted,

ANTHONY G. BROWN
Attorney General of Maryland

Joshua M. Segal /s/ w/ authority

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

BRIEF OF THE ATTORNEY GENERAL OF MARYLAND AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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December 22, 2023

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INTEREST OF AMICUS CURIAE

The Attorney General of Maryland has an interest in preserving the capacity of Maryland common law and statutory law to remedy harm caused by commercial entities within the State. That interest extends to claims brought in state court for climate change-related harms alleged to result from the deceptive conduct of fossil fuel producers and sellers. This amicus brief addresses Defendants' argument that the City's claims under Maryland law are federally preempted. It also explains that climate change is a problem with state and local dimensions that often demands state and local responses.

SUMMARY OF ARGUMENT

Federal law does not preempt the City's claims. The City seeks damages arising from Defendants' allegedly deceptive marketing and distribution of dangerous products. It does not seek to regulate emissions, nor does it seek to penalize emissions. Thus, although federal law may preempt some efforts to regulate or penalize cross-boundary emissions, that preemptive effect is irrelevant here. Rather, the City's claims are no more preempted than any other use of state tort law to seek recompense for deceptive marketing and distribution of a product.

The fact that those claims implicate climate change does not change this conclusion. Defendants' contrary arguments rest on the notion that climate change is a distinctly national or global problem, demanding only a national or global response. Climate change is indeed a national and global problem, but its effects—from rising temperatures to rising seas—often are felt at the local level. State and local governments, in turn, have undertaken

a wide array of measures, some with upstream effects, to address climate change or its consequences. Particularly in this light, state-law tort liability for in-state harms that Defendants allegedly have caused via deceptive conduct is unremarkable and does not raise constitutional concerns.

ARGUMENT

I. THE CITY'S CLAIMS ARE NOT PREEMPTED.

The City's complaint seeks to hold Defendants liable on well-established state tort law theories. Compl. ¶ 11. Its claims focus on Defendants' allegedly tortious conduct as marketers and distributors of fossil fuels—products whose use results in the emission of greenhouse gases. *See, e.g., id.* ¶¶ 1-7, 10. More specifically, the City alleges that Defendants have unlawfully marketed and sold fossil fuels despite knowing those products to be dangerous. *See, e.g., id.* ¶¶ 5-7. The City alleges that Defendants' tortious conduct caused harm to the City, in Maryland. *See, e.g., id.* ¶¶ 8. And the City seeks compensation for the damage that Defendants' tortious conduct allegedly has caused. *See, e.g., id.* ¶ 12.

Just as important is what the City's complaint does not do. It does not seek to hold Defendants liable as emitters, or "for" any emission. *See id.* ("The City does not seek to impose liability on Defendants for their direct emissions of greenhouse gases and does not seek to restrain Defendants from engaging in their business operations.") It does not ask the Court to require any polluting source to stop emitting, or to control its emissions. And it certainly does not ask the Court to accomplish or require any overall reduction in emissions.

Still, relying on cases such as *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), and *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), Defendants argue that the City's claims are preempted by federal law, essentially because they arise out of out-of-state emissions. *See, e.g.*, Mem. of L. in Supp. of Defs.' Joint Mtn. to Dismiss Pl.'s Compl. for Failure to State a Claim upon Which Relief Can Be Granted ("Defs.' Br.") 8-15. Defendants are wrong because the City does not seek to hold Defendants liable as emitters of pollutants *anywhere*, whether in-state or out-of-state. Rather, the City is suing Defendants as allegedly deceptive marketers and distributors of products whose use has harmed the City. And it is doing so on the basis of well-established state law tort theories. Whatever legal principles may govern a suit against a power plant for its transboundary emissions of greenhouse gases, those principles have nothing to do with the City's claims. *See City & County of Honolulu v. Sunoco LP*, No. SCAP-22-0000429, 2023 WL 7151875, at *2 (Haw. Oct. 31, 2023) (declining to find suit preempted because it "does not seek to regulate emissions and does not seek damages for interstate emissions"); *id.* at *22 (stressing that "the source of Plaintiffs' alleged injury is Defendants' allegedly tortious marketing conduct, not pollution traveling from one state to another").

Given that the City's claims arise out of conduct other than emissions, and do not seek to regulate emissions, they are not barred by federal law. They are not subject to any body of federal common law, whether or not displaced. And they can fully coexist with emissions regulation under the Clean Air Act. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (stressing that conflict preemption exists only if state law "stands as an obstacle to the accomplishment and execution of [federal law's] full purposes and

objectives"); *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 486 (2017) (explaining that when "weighing whether a state law poses an obstacle to congressional purposes or objectives," a court must "apply a presumption that Congress did not intend to preempt state law").

The *Ouellette* decision does not help Defendants. *Ouellette* held that the Clean Water Act preempts a suit against an out-of-state polluter when brought under the receiving state's law. 479 U.S. at 497. Attempting to analogize this case to *Ouellette*, Defendants argue that the City's claims under Maryland law are likewise preempted. *See* Defs.' Br. 22-23. But that analogy fails, because Defendants are not being sued as out-of-state polluting sources. *See Ouellette*, 479 U.S. at 492 (emphasizing the Clean Water Act's creation of an "all-encompassing program of water *pollution* regulation" (emphasis added)). Again, they are being sued as allegedly deceptive marketers and distributors of products. *Ouellette*, which relies heavily on the Clean Water Act's comprehensive permitting scheme *for polluting sources*, says nothing about a suit like this.

For similar reasons, there is no merit to the notion that the City's claims are preempted because they purportedly ask the Court to regulate emissions or impose liability for emissions. *See* Defs.' Br. 16, 20-23. The City's claims seek no such thing. Instead, they seek recompense for Defendants' allegedly tortious marketing and distribution of their

products. No result in this Court would interfere or overlap with any decision by any other entity—state or federal—to regulate or penalize emissions as such.[1]

Nor does the Supreme Court's decision in *AEP* aid arguments for preemption, whether by the Clean Air Act or otherwise. *See* Defs.' Br. 22. For one thing, *AEP* concerned the scope of the Clean Air Act's displacement of federal common law, not preemption. *See, e.g.*, *AEP*, 564 U.S. at 424. More specifically, *AEP* held that the Clean Air Act displaced the federal common law of nuisance as applied to abatement of greenhouse gas emissions. *Id.* at 423. Whether the Clean Air Act displaces federal common law logically has nothing to do with whether it preempts *state* law.

For another thing, *AEP* involved claims against emitters, arising out of their emissions. *See id.* at 418 (recounting plaintiffs' allegations that "the defendants are the five largest emitters of carbon dioxide in the United States," and describing tort claims arising out of "the defendants' carbon-dioxide emissions"). *AEP* thus involved conduct—emitting greenhouse gases—that is different from the allegedly deceptive marketing and distribution of fossil fuels at issue in this case. The existence of "federal legislation

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[1] The federal appellate decisions on which Defendants rely do not establish preemption under *Ouellette*, for each of them involved claims that the defendants themselves had unlawfully emitted pollutants. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015) (addressing "whether the Clean Air Act preempts common law claims brought against an emitter based on the law of the state in which the emitter operates"); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189-90 (3d Cir. 2013) (addressing "whether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution located within the state"); *North Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010) (overturning injunction "based on the district court's determination that [defendant's] plants' emissions constitute a public nuisance").

authorizing EPA to regulate carbon-dioxide emissions," *id.* at 422, is therefore irrelevant here.

So is the statement in *AEP* that "[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." Defs.' Br. 11-12. In so stating, the *AEP* Court was contrasting the judiciary's role with that of EPA, which "Congress designated" in the Clean Air Act "as best suited to serve as primary regulator of greenhouse gas emissions." *Id.* at 428; *see id.* (chiding plaintiffs for "propos[ing] that individual federal judges determine in the first instance, what amount of carbon-dioxide emissions is 'unreasonable,' and then decide what level of reduction is 'practical, feasible and economically viable'" (citations omitted)). Here, unlike in *AEP*, the City is not asking the Court to regulate or penalize greenhouse gas emissions; it is asking the Court to hold the Defendants accountable for their allegedly deceptive marketing and distribution of products whose use has harmed the City.

If anything, *AEP* provides support for the *City's* position. After finding that the Clean Air Act had displaced federal common law, the Supreme Court expressly declined to invalidate the plaintiffs' state-law nuisance claims. 564 U.S. at 429. Instead, it remanded for the lower court to consider the availability of state nuisance law to remedy the defendants' conduct. *See id.*[2] Relying on *AEP* to hold the City's claims preempted would turn the Supreme Court's decision on its head.

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[2] In remanding, *AEP* noted *Ouellette*'s holding that the Clean Water Act "does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State." *AEP*, 564 U.S. at 429. As explained above, however, *Ouellette* articulated

II. CLIMATE CHANGE HAS STATE AND LOCAL DIMENSIONS AND OFTEN DEMANDS STATE AND LOCAL RESPONSES.

A recurring theme of Defendants' brief is that climate change is a peculiarly national or global problem that can be addressed only with a national or global response. *See, e.g.*, Defs.' Br. 2, 9, 12-13, 15-16, 25. In fact, climate change often has discrete local consequences, *see, e.g.*, *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 522-23 (2007), and state and local governments play a critical role in crafting and implementing solutions.

Rising sea levels, for example, are a global phenomenon—but that phenomenon often takes its toll at the local level. In the Chesapeake Bay, for instance, sea levels are rising at a rate double the global average. *See* Benjamin D. DeJong et al, *Pleistocene Relative Sea Levels in the Chesapeake Bay Region and Their Implications for the Next Century*, GSA Today, Aug. 2015, at 4, https://www.geosociety.org/gsatoday/archive/25/8/pdf/gt1508.pdf (reporting annual sea level rise in Chesapeake Bay of 3.4 mm/year, compared to 1.7 mm/year global average). Swiftly rising seas are affecting communities from Smith Island, the last inhabited island in the Chesapeake, to Baltimore City. The Maryland Commission on Climate Change's Adaptation and Resiliency Working Group continues to study the threat presented by rising sea levels and to develop recommendations

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that limitation in the context of claims brought against out-of-state *polluters*, so it has no relevance here.

for adaptation measures and funding.[3] Whatever measures are undertaken, the cost to state and local governments will be enormous.[4]

The direct effects of rising temperatures also are felt locally. Urban development means that temperatures often are highest in densely populated inner-city neighborhoods.[5] In Baltimore City, for example, temperatures can vary significantly even from one neighborhood to the next. Baltimore Office of Sustainability, *Urban Heat Island Sensors*, https://www.baltimoresustainability.org/urban-heat-island-sensors/ (last visited Dec. 22, 2023). This "heat islanding" can increase the health risk to sensitive populations like the elderly, children, and people with preexisting pulmonary conditions. *Id.*

States, for their part, have long been recognized as having the power to combat environmental harms. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (local regulation of ships' smoke "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power").

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[3] *See, e.g.*, Maryland Commission on Climate Change, *Maryland Climate Adaptation and Resilience Framework Recommendations 2021-2030*, https://mde.maryland.gov/programs/air/ClimateChange/MCCC/Documents/MD%20Climate%20Adaptation%20and%20Resilience%20Framework%20Recommendations.pdf (last visited Dec. 22, 2023).

[4] *See, e.g.*, United States Global Change Research Program, *Fourth National Climate Assessment*, Vol. II, at 1321 (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf; *id.* at 760 (describing $235 million spent by Charleston, South Carolina as of 2016 to respond to increased flooding).

[5] *See* Nadja Popovich & Christopher Flavelle, *Summer in the City Is Hot, but Some Neighborhoods Suffer More*, N.Y. Times (Aug. 9, 2019), https://www.nytimes.com/interactive/2019/08/09/climate/city-heat-islands.html; *see also* United States Global Change Research Program, *Fourth National Climate Assessment*, Vol. II, at 441 (depicting projected change in number of "very hot days" for five U.S. cities).

As to climate change in particular, one federal court of appeals deemed it "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *American Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Massachusetts*, 549 U.S. at 522-23); *see id.* (noting that states' "broad police powers" allow them "to protect the health of citizens in the state").

And indeed, states have used their police powers to do just that.[6] Maryland's Renewable Portfolio Standard (RPS), for instance, requires that each utility company operating in the state provide at least 50% of its electricity from certain renewable sources by the year 2030. Md. Code Ann., Pub. Util. § 7-703(b)(25). New York not only requires 70% of all retail electricity sales to come from renewable sources by 2030, but also requires the statewide electrical demand system to be zero-emission by 2040. N.Y. Pub. Serv. Law § 66-P(2). Oregon requires its largest utilities to achieve 35% reliance on renewables by 2030 and 50% by 2040, Or. Rev. Stat. § 469A.052(1)(f), (h), and to cease reliance on coal-generated electricity by 2030, *id.* § 757.518(2). And Connecticut has required utilities to obtain 30% of their energy from renewable sources by 2024 and 40% by 2030, Conn. Gen. Stat. §§ 16-245a(a)(20), (25), while also creating funding sources for encouraging private renewable growth, *see id.* § 16-245n.

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[6] The overwhelming scientific consensus is that immediate and continual progress toward net-zero greenhouse gas emissions by mid-century is necessary to avoid catastrophic consequences. *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report, Summary for Policymakers* 19-22 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

Other state measures mandate direct emissions reductions or prescribe other steps to reduce a state's carbon footprint. For example, California has codified its objective of reducing emissions to forty percent below 1990 levels by 2030. Cal. Health & Safety Code § 38566. Oregon, in addition to shaping its utilities' energy portfolios, has adopted a Clean Fuels Program to reduce the carbon intensity of fuel. Or. Rev. Stat. §§ 468A.265 to 468A.277; Or. Admin. R. 340-253-0000 to 340.253.8010. And New Jersey's Global Warming Response Act requires reductions in carbon dioxide emissions—culminating in a 2050 level that is 80% lower than 2006—and establishes funding for climate-related projects and initiatives. N.J. Stat. Ann. §§ 26:2C-37 to -58.

States also have collaborated on successful regional efforts to reduce greenhouse gas emissions in an economically efficient manner—even though such efforts may have upstream effects on global energy production and sales. Maryland, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia currently participate in the Regional Greenhouse Gas Initiative (RGGI), a regional cap-and-trade program codified and implemented through the laws and regulations of each state, which uses increasingly stringent carbon emissions budgets to reduce carbon pollution from power plants over time.[7] Participating states have reduced

[7] *See* Regional Greenhouse Gas Initiative, *Elements of RGGI*, https://www.rggi.org/program-overview-and-design/elements (last visited Dec. 22, 2023). Earlier this year, the Virginia State Air Pollution Control Board voted to repeal Virginia's RGGI regulation and withdraw Virginia from RGGI after December 31, 2023; that decision has been challenged in court. *See* Gregory S. Schneider, *Va. Environmentalists Sue to Block Youngkin from Exiting Carbon Market*, Wash. Post, Aug. 22, 2023, https://www.washingtonpost.com/dc-md-va/2023/08/21/youngkin-virginia-rggi-environmental-suit/.

carbon emissions from the electricity generating sector by more than fifty percent since the program launched.[8] In addition, on the West Coast, the Pacific Coast Collaborative represents a series of agreements among California, Oregon, Washington, British Columbia, and the cities of Los Angeles, Oakland, San Francisco, Portland, Seattle, and Vancouver to reduce greenhouse gas emissions by at least 80 percent by 2050. *See* Pacific Coast Collaborative, http://pacificcoast collaborative.org/about/ (last visited Nov. 28, 2023). The backbone of these regional agreements is state law that aims to reduce carbon pollution.

Further, the compatibility of state action with national and global efforts to address climate change is borne out by the breadth of state-law cases that courts already hear related to the issue. A database maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 557 past and ongoing lawsuits throughout the country raising state-law claims related to climate change.[9] The claims in these cases derive from a wide range of laws. For example, courts routinely address climate change in the context of challenges to land-use decisions under state equivalents to the National Environmental Policy Act. *See, e.g.*, *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 3 Cal. 5th 497 (2017); *Cascade Bicycle Club v. Puget*

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[8] Regional Greenhouse Gas Initiative, *CO_2 Emissions from Electricity Generation and Imports in the Regional Greenhouse Gas Initiative: 2019 Monitoring Report* 7 (June 15, 2022), https://www.rggi.org/sites/default/files/Uploads/Electricity-Monitoring-Reports/2019_Elec_Monitoring_Report.pdf.

[9] Sabin Center for Climate Change Law, *State Law Claims*, http://climatecasechart.com/case-category/state-law-claims/ (last visited Dec. 22, 2023).

Sound Reg'l Council, 175 Wash. App. 494 (Ct. App. 2013). They also adjudicate the operation and validity of states' regulatory efforts to reduce greenhouse gas emissions. *See, e.g.*, *Maryland Off. of People's Counsel v. Maryland Pub. Serv. Comm'n*, 461 Md. 380, 406 (2018) (observing that "[r]enewable energy, distributed generation, and related practices have the potential to advance Maryland environmental policy" with respect to climate change, and upholding the manner in which Maryland's Public Service Commission took account of these issues); *California Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 613-14 (Ct. App. 2017) (upholding California's economy-wide cap-and-trade program); *New England Power Generators Ass'n, Inc. v. Department of Envt'l Prot.*, 480 Mass. 398, 411 (2018) (upholding Massachusetts' greenhouse gas emissions limits for power plants).

Especially when viewed in this light, the City's claims are unremarkable. The City does not seek to impose a system of global emissions regulation—or, indeed, emissions regulation of any sort. Instead, it seeks to hold Defendants accountable for foreseeable harms that their allegedly deceptive conduct has caused in Maryland, in a fashion providing no basis for dismissal.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

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Attorney General of Maryland

Joshua M. Segal /s/ w/ authority

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

[PROPOSED] ORDER

Upon consideration of the Unopposed Motion of the Attorney General of Maryland for Leave to File Amicus Curiae Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim, it is this _____ day of _____, 20____, hereby

ORDERED that the Unopposed Motion of the Attorney General of Maryland for Leave to File Amicus Curiae Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim is **GRANTED**; it is further

ORDERED that the Brief of the Attorney General of Maryland as Amicus Curiae in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim is deemed filed; and it is further

ORDERED that the Clerk of the Court shall deliver copies of this Order to all parties of record.

_____

Judge Videtta A. Brown
Circuit Court for Baltimore City

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Plaintiff,	*	BALTIMORE CITY,
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Defendants.		

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

CERTIFICATE OF SERVICE

I certify that, on this 22nd day of December, 2023, true and correct copies of the Unopposed Motion of the Attorney General of Maryland for Leave to File Amicus Curiae Brief in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim, Brief of the Attorney General of Maryland as Amicus Curiae in Opposition to Defendants' Joint Motion to Dismiss for Failure to State a Claim, and Proposed Order are being served on all counsel of record via email (by agreement of the parties).

Joshua M. Segal /hlw
Joshua M. Segal w/ authority