No. ACM-REG-1290-2024

IN THE APPELLATE COURT OF MARYLAND

September Term 2024

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff – Appellant,

v.

BP P.L.C., et al.
Defendants – Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
CASE NO. 24-C-18-004219
(THE HONORABLE VIDETTA A. BROWN, PRESIDING)

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

The Mayor and City Council of Baltimore ("Baltimore" or "City") alleges Defendants—among them the world's largest oil-and-gas companies—orchestrated a pervasive, decades-long, "sophisticated disinformation campaign" to mislead consumers and the public about climate change and the central role their fossil-fuel products play in causing it. *Mayor & City Council of Baltimore v. BP P.L.C.* (*Baltimore IV*), 31 F.4th 178, 233 (4th Cir. 2022), *cert. denied*, 143 S.Ct. 1795 (2023). Beginning at least as early as the 1960s, Defendants intensively researched global warming and its causes, accurately foresaw the catastrophic effects their products would cause, and invested to protect their own assets and infrastructure from those dangers. E.41, E.43-44, E.110-29, ¶¶ 1, 5-7, 141-76. Publicly, however, Defendants "took affirmative steps to misrepresent the nature of those risks," including by "casting doubt on the integrity of scientific evidence" and "advancing their own pseudo-scientific theories" that they knew to be false, directly and through paid surrogates. *Baltimore IV*, 31 F.4th at 234 n.23; *see* E.110-26, E.147-48, E.155-56, ¶¶ 141-70, 221, 241-42.

Defendants' strategy worked, muddling public and consumer understanding of their products' climate risks. E.123-26, ¶¶ 163-70. Their deception "drove consumption, and thus greenhouse gas pollution, and thus climate change," significantly exacerbating the harms Defendants knew would occur. *Baltimore IV*,

31 F.4th at 233–34; *see* E.87-90, E.126, E.129-33, ¶¶ 91-102, 170, 177-82. As a result, the City and its residents have suffered and will suffer severe harms from sea-level rise, flooding, extreme precipitation and storms, and extreme heat. E.44-46, E.77-78, E.80-87, E.138-46, ¶¶ 8-10, 14-17, 59-62, 67-90, 195-217.

To mitigate those harms, the City brought this suit on July 20, 2018, alleging claims for public and private nuisance, trespass, and strict liability and negligent failure to warn. E.36-172.[1] Defendants removed to federal court. The district court remanded for lack of subject-matter jurisdiction, holding in relevant part that the City's claims do not arise under federal common law and do not present questions of federal pollution regulation or foreign policy. *Mayor & City Council of Baltimore v. BP P.L.C.* (*Baltimore I*), 388 F.Supp.3d 538, 554–61, 574 (D. Md. 2019) (Hollander, J.). The Fourth Circuit affirmed, *see* 952 F.3d 452, and the U.S. Supreme Court vacated on procedural grounds, *see generally BP P.L.C. v. Mayor & City Council of Baltimore* (*Baltimore III*), 593 U.S. 230, 141 S.Ct. 1532 (2020). On remand, the Fourth Circuit again affirmed, agreeing that the City's claims "do not involve the regulation of emissions" and do not "disturb foreign relations." *See Baltimore IV*, 31 F.4th at 214, 216.

[1] The City's Complaint also asserts claims for negligent and strict liability design defect, and under the Maryland Consumer Protection Act. Md. Comm. L. § 13-408. *See* E.157-63, E.168-69, ¶¶ 249-69, 291-97. The City does not appeal the dismissal of those three claims.

After those appeals resolved, the circuit court heard Defendants' joint motion to dismiss for failure to state a claim, which it granted on July 10, 2024. The court fundamentally misconstrued the City's case, adopting a "characterization of Baltimore's complaint differ[ent] from *Baltimore IV*'s" and contrary to the City's "characterization of its own complaint." E.10. It recharacterized the City's claims as "entirely about addressing the injuries of global climate change," and expressly did "not accept[]" the City's description of "the goal of its complaint." E.11. The court held that the City's claims, as recharacterized, were "beyond the limits of Maryland state law," E.14, because adjudicating them "would operate as a *de facto* regulation on greenhouse gas emissions," E.19 (quoting *City of New York v. Chevron Corp.*, 993 F.3d 81, 96 (2d Cir. 2021)). The court thus found the claims preempted by a combination of "the [U.S.] Constitution's federal structure," the federal Clean Air Act ("CAA"), 42 U.S.C. § 4701 *et seq.*, and a defunct body of federal common law the CAA displaced. E.10-19.

The court also ruled that the City had not stated claims under Maryland law. E.20-34. It held that the City's nuisance claims were not viable because nuisance liability "must relate to a defendant's use of land" and cannot arise from the "deceptive marketing" of dangerous products. E.22-23. The court dismissed the failure-to-warn claims because they would purportedly impose a duty on Defendants to warn "every single human being on the planet" who has used fossil fuels. E.26.

Lastly, the court dismissed the trespass claim because Defendants lacked "control of the foreign matter" invading City property, and Defendants' deceptive conduct was "far to[o] attenuated" from the City's injuries to support liability. E.32-33.

The City timely noticed this appeal on August 9, 2024.

QUESTIONS PRESENTED

1. Whether federal common law, the "Constitution's federal structure," or the federal Clean Air Act preempt the City's Maryland-law claims.

2. Whether the Complaint states claims for public and private nuisance.

3. Whether the Complaint states a claim for trespass.

4. Whether the Complaint states claims for strict liability and negligent failure-to-warn.

STATEMENT OF FACTS

For more than fifty years, Defendants have known their fossil-fuel products create greenhouse gas emissions that change Earth's climate. E.41, E.43, ¶¶ 1, 5; *see* E.90-110, ¶¶ 103-40. By the 1970s, their internal scientists warned that "five to ten years" remained before "hard decisions regarding changes in energy strategies might become critical." E.95-96, ¶ 112. Instead of sharing their knowledge of those existential threats with the public, however, Defendants misrepresented and concealed their products' risks. E.41, E.43-44, E.110-26, ¶¶ 1, 6-7, 141-70. Defendants ramped up their efforts in the late 1980s, spending millions of dollars to

fund organizations that misrepresented the scientific consensus on global warming, and placing misleading advertisements to do the same. E.113-24, ¶¶ 145-65.

Today, Defendants agree "[t]here is no question that global warming and climate change are wreaking havoc on our environment." E.1. Baltimore faces threats ranging from more frequent and intense heatwaves and storms, to more frequent sunny-day flooding, to increased coastal water acidification. E.137-46, ¶¶ 191-217. Those impacts and others severely jeopardize City property, critical infrastructure, cultural and natural resources, and Baltimoreans' health and safety. *Id.*

SUMMARY OF ARGUMENT

1. The circuit court erred in finding the City's claims preempted for multiple reasons, all of which stem from its misunderstanding of the Complaint. As federal courts reviewing the same Complaint observed, "[n]one of Baltimore's claims concern emission standards, federal regulations about those standards, or pollution permits," or "involve the regulation of emissions." *Baltimore IV*, 31 F.4th at 216, 217; *Baltimore I,* 388 F.Supp.3d at 559–61. Instead, as the Hawai'i Supreme Court held in a materially similar case, "Defendants' liability is causally tethered to their failure to warn and deceptive promotion, and nothing in this lawsuit incentivizes—much less compels—Defendants to curb their fossil fuel production or greenhouse gas emissions." *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1201 (Haw.

2023) (cleaned up), *cert. denied*, 604 U.S. __, 2025 WL 76704 & 76706 (Jan. 13, 2025). "Numerous 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," and this Court should too. *Id.* (collecting cases); *see also Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, 2024 WL 3204275, at *19–20 (Colo. Dist. Ct. June 21, 2024) (same, denying motions to dismiss) (nonprecedential), *review granted*, 552 P.3d 539 (Colo. July 29, 2024).

Properly understood, the City's claims are not preempted. Under the City's Complaint, "production and use of Defendants' fossil-fuel products" are "not the source of tort liability." *Baltimore IV*, 31 F.4th at 217, 233. "Rather, [the City] alleges that defendants breached various duties under state law by, *inter alia*, failing to warn" and deceptively marketing their products. *Baltimore I*, 388 F.Supp.3d at 560; *accord Baltimore III*, 141 S.Ct. at 1535–36 (Baltimore "sued various energy companies for promoting fossil fuels while allegedly concealing their environmental impacts"). As the United States recently explained in briefing before the U.S. Supreme Court, neither the federal common law nor the CAA preempt claims like these. *See* Brief of the United States as *Amicus Curiae*, *Sunoco LP v. City & Cnty. of Honolulu*, Nos. 23-947 & 23-952 (S.Ct. Dec. 10, 2024), 14–18 & n.3

(recommending denial of certiorari petitions), *available at* https://perma.cc/9FX6-TZQ8.

The federal common law of interstate pollution cannot preempt the City's claims because it has been displaced by the CAA and has therefore "cease[d] to exist." *Baltimore IV*, 31 F.4th at 205. That federal common law would not preempt the City's Complaint even if it still existed, moreover, because it encompassed only a narrow category of nuisance claims "to enjoin further pollution" by out-of-state polluters. *Honolulu*, 537 P.3d at 1200; *Boulder*, 2024 WL 3204275, at *21. The separate contention that "the Constitution's federal structure" federalizes all questions of law "involving air and water in their ambient state," E.11, E.12, is baseless. The authorities from which that proposition supposedly derives address the application of federal common law, and do not analyze or depend on the Constitution at all. Because the CAA displaced any relevant federal common law, "[t]he correct preemption analysis requires an examination *only* of the CAA's preemptive effect." *Honolulu*, 537 P.3d at 1200. Finally, the CAA does not preempt the City's claims because it "does not concern itself in any way with" Defendants' alleged tortious conduct: "the use of deception to promote the consumption of fossil fuel products." *Id.* at 1205; *see Boulder*, 2024 WL 3204275, at *23–27.

2. The circuit court also erred in applying Maryland law. The Complaint states claims for public and private nuisance because Defendants substantially participated

in creating unreasonable climate-related interferences with public rights and with City property. Maryland law extends liability to nuisances caused by tortious promotion or sale of dangerous products, and is not limited to nuisances caused by the use of land. The Complaint states a claim for trespass because Defendants have knowingly caused seawater and other foreign materials to invade City property. And Defendants owed a duty to issue adequate warnings to protect the City from foreseeable climate injuries caused by Defendants' fossil-fuel products.

STANDARD OF REVIEW

An order granting a motion to dismiss is "review[ed] *de novo,* with no deference given to the trial court." *Chavis v. Blibaum & Assocs., P.A.*, 476 Md. 534, 551 (2021). The court assumes the truth of all well-pleaded facts and all reasonable inferences drawn from them. *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374 (2021).

ARGUMENT

I. The City's Claims Are Not Preempted.

The U.S. Supreme Court has carefully articulated the tests for federal preemption, and "at least one feature unites them: Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion) (citation omitted). Instead, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state

law." *Id.* (cleaned up); *see also, e.g.*, *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (same).

The court below did not apply any recognized preemption test or rely on any provision of the Constitution or CAA, and instead held that "the Constitution's federal structure does not allow the application of state law to claims like" the City's, E.11, which it found preempted by a combination of the CAA, the Constitution, and federal common law. As the district court and Fourth Circuit held, however, the contention that federal law bars the City's suit "rest[s] on a fundamental confusion," *Baltimore IV*, 31 F.4th at 217, and "mischaracterization of the City's claims," *Baltimore I*, 388 F.Supp.3d at 560.

The decisions of the Hawai'i Supreme Court in *Honolulu* and the Colorado District Court in *Boulder* illustrate the errors in the circuit court's reasoning and apply the correct analysis. As in those cases, the City's claims cannot regulate pollution or emissions because the acts that trigger liability are Defendants' failure to warn and deceptive promotion, and the City does not ask the court to enjoin or order reductions in fossil-fuel production or emissions. *See Honolulu*, 537 P.3d at 1201; *Boulder*, 2024 WL 3204275, at *18–20. Thus, "neither federal common law nor the [CAA]," nor the Constitution, preempts the City's claims. *Honolulu*, 537 P.3d at 1207; *see Boulder*, 2024 WL 3204275, at *18–29.

A. The City's Claims Cannot Regulate Greenhouse Gas Emissions.

The Complaint targets Defendants' "extravagant misinformation campaign that contributed to [the City's] injuries" in breach of Maryland tort duties. *Baltimore IV*, 31 F.4th at 217. It does not allege Defendants violated a legal duty by manufacturing or burning fossil fuels, or by polluting. As in *Honolulu* and *Boulder*, "the acts that trigger liability" are Defendants' "use of deception to promote the consumption of fossil fuel products." *Honolulu*, 537 P.3d at 1205; *Boulder*, 2024 WL 3204275, at *18–20. The Complaint "is not … asking the Court to regulate or limit fossil fuel emissions," *Boulder*, 2024 WL 3204275, at *20, or seeking relief that would do so. Defendants therefore will not have to reduce production or change pollution control practices to avoid future liability. "So long as Defendants start warning of their products' climate impacts and stop spreading climate disinformation, they can sell as much fossil fuel as they wish without fear of incurring further liability." *Honolulu*, 537 P.3d at 1186. Numerous federal courts have construed similar complaints the same way: Claims like the City's do not regulate air pollution.[2]

[2] *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."); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1264 (10th Cir. 2022) (similar claims "do not concern CAA emissions standards or limitations"); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 55 n.8 (1st Cir. 2022) (similar claims did "*not* [seek] to regulate

The decision in *City of New York*, 993 F.3d 81, is not to the contrary. The Second Circuit there held that New York City's claims against fossil-fuel companies "would regulate cross-border emissions," and affirmed their dismissal. 993 F.3d at 93. But New York City's claims and theories of liability differed fundamentally from the City's here. New York City sought to hold defendants liable for impacts caused by their "admittedly legal commercial conduct" in producing and selling fossil fuels. *Id.* at 86. In the Second Circuit's view, those claims would "effectively impose strict liability" such that the defendants could not "avoid [future] liability" unless they "cease[d] global production [of fossil fuels] altogether." *Id.* at 93. The City's claims here differ from the *de facto* strict liability claims in *City of New York*, and cannot control production or consumption of fossil fuels.

Because each of the circuit court's preemption holdings flows from its incorrect reading of the Complaint, each must be reversed.

B. Displaced Federal Common Law Addressing Interstate Pollution Cannot Preempt or Replace the City's Claims.

The federal common law of interstate pollution cannot preempt the City's claims because it has been displaced by statute. Even if it still existed, it would not

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greenhouse-gas emissions"); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) (nonprecedential) (similar claims did not "seek[] a referendum" on fossil-fuel or pollution regulation), *aff'd*, 63 F.4th 703 (8th Cir. 2023); *Massachusetts v. Exxon Mobil Corp.*, 462 F.Supp.3d 31, 44 (D. Mass. 2020) (rejecting "ExxonMobil's caricature of the complaint").

preempt the claims here because the City alleges liability based on deceptive marketing, which has never been a subject of federal common law and involves no uniquely federal interests. To the contrary, advertising, consumer protection, and public safety are within core state police powers.

Federal common law is rare. "[O]nly limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020). There must be a "uniquely federal interest[]" at stake, *id.*, and "a significant conflict" between that "federal policy or interest and the use of state law," *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994). Federal common law is also fragile—"[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue." *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 424 (2011) (cleaned up); *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981). In turn, "[w]hen Congress legislates to displace federal common law, the statute governs the extent to which state law is preempted," not "the preemptive effect of (any residual) federal common law." *D.C. v. Exxon Mobil Corp.*, 89 F.4th 144, 152–53 (D.C. Cir. 2023); *see Honolulu*, 537 P.3d at 1198–1200.

1. Displaced Federal Common Law Is Wholly Abrogated and Cannot Preempt or Supplant State Law.

The CAA displaced federal common law concerning interstate air pollution. *See AEP*, 564 U.S. at 424. That federal common law thus "*no longer exists* due to

Congress's displacement." *Honolulu*, 537 P.3d at 1195 (quotation omitted); *Baltimore IV*, 31 F.4th at 205 (same). Therefore, "[t]he correct preemption analysis requires an examination *only* of the CAA's preemptive effect," and "displaced federal common law plays no part." *Honolulu*, 537 P.3d at 1200; *see D.C.*, 89 F.4th at 153 (same).

Two seminal U.S. Supreme Court decisions make this point crystal clear. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court considered a Clean Water Act ("CWA") preemption challenge to Vermont common-law nuisance claims seeking to enjoin water pollution originating from a paper mill in New York. The Court observed that "[u]ntil fairly recently, federal common law governed the use and misuse of interstate water," *id.* at 487, but that amendments to the CWA "pre-empt[ed] all *federal* common law," *id.* at 489. So the Court "turn[ed] to the question presented: whether the [CWA] pre-empts Vermont common law to the extent that law may impose liability on a New York point source." *Id.* at 491. It applied a traditional conflict preemption analysis, asking whether Vermont law "actually conflict[ed] with [the] federal statute" or posed an obstacle to "the full purposes and objectives of Congress." *Id.* at 491–92 (cleaned up). "The Court repeatedly emphasized Congress's directives in the statute, rather than the preemptive effect of (any residual) federal common law," and "held the particular

state-law claim at issue was preempted" while "other state-law claims were not." *D.C.*, 89 F.4th at 153 (citing *Ouellette*, 479 U.S. at 491–500).

Applying the same analysis twenty years later, the Court held in *AEP* that the CAA "displace[s] 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' [power]plants." 564 U.S. at 424. Because "the [CAA] displaces federal common law," the Court reiterated that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA]" and remanded for consideration of that issue. *Id.* at 429. As in *Ouellette*, the Court "did not analyze the federal common law's preemptive effect." *Honolulu*, 537 P.3d at 1199. "[I]f federal common law retained preemptive effect after displacement, the Court would have instructed the trial court on remand to examine whether displaced federal common law preempted the state law claims," which it did not. *Id.* Courts have thus "overwhelmingly rejected [Defendants'] argument that even after the [CAA] the federal common law of interstate pollution overrides all state-law claims," because that result "cannot be squared with [*AEP*] or *Ouellette*." *D.C.*, 89 F.4th at 153 & n.5 (collecting cases).

The analysis is no different with respect to pollution originating internationally, despite the lower court's contrary finding. *See* E.14 (citing *City of New York*, 993 F.3d at 95 n.7, 100–01). The test for displacement of federal common

law is "simply whether the statute speaks directly to the question at issue," *AEP*, 564 U.S. at 424 (cleaned up), and the CAA *does* "speak directly" to international air pollution. *See* 42 U.S.C. § 7415 (titled "International Air Pollution"). No federal common law of pollution—interstate or international—survives the CAA.

2. Federal Common Law Would Not Encompass Claims Like the City's Even if It Still Existed.

Even if some vestigial federal common law survived the CAA, the City's claims would not fit within it. That body of law imposed certain duties not to pollute interstate waterways, and recognized a small class of nuisance claims seeking to reduce or enjoin further pollution.[3] In such cases, "the source of the injury … [wa]s pollution traveling from one state to another" and the defendants' liability arose from violating the federal common law duty not to pollute. *Honolulu*, 537 P.3d at 1201. The City here does not allege Defendants violated such a duty and does not seek to enjoin pollution from any source. As in *Honolulu*, the City alleges Defendants violated state-law tort duties by deceptively marketing their products.

[3] *See, e.g.*, *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 311–12 (1981) (sewage flowing into Lake Michigan); *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 off New Jersey coast); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (sulfuric acid gas drifting into Georgia); *Missouri v. Illinois*, 180 U.S. 208, 242–43 (1901) (sewage draining into Mississippi River).

Further, there is no "uniquely federal interest" here that could support federal common law. *Rodriguez*, 589 U.S. at 136. The "interest in ensuring the accuracy of commercial information in the marketplace" has long been recognized as a core *state* interest, not a federal one. *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); *see also, 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). Because the breach of duty alleged here is "tortious marketing conduct, not pollution traveling from one state to another," *Honolulu*, 537 P.3d at 1201, the federal common law of interstate pollution would never have applied.

C. No Constitutional Provision Bars the City's Claims.

The circuit court's apparent conclusion that the City's claims "must be brought under federal common law" as a constitutional matter, E.15, was clear error. Nothing in the Constitution places all matters "involving … ambient" air or water outside the reach of state law, E.12, and no Supreme Court precedent stands for that sweeping, atextual rule.

"Constitutional analysis must begin with 'the language of the instrument,' … which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022). Notwithstanding that clear instruction, the circuit court did not cite, let alone

analyze, any constitutional text. Tellingly, neither did Defendants. Their briefing below cites only the Supremacy Clause (once, on reply), without discussion. E.365. Defendants cannot cure that deficiency on appeal, and their constitutional arguments fail for that reason alone.

Instead of the Constitution's actual text, the supposed rule federalizing all "disputes involving air and water in their ambient state," E.12, purportedly derives from Supreme Court precedent. But none of the cases upon which the circuit court relied analyzes any provision of the Constitution, and none adopts any broad constitutional rule. The cases concern only the applicability of judge-made federal common law.[4] The circuit court appears to have relied primarily on dicta in *AEP* and *Ouellette* noting that "[e]nvironmental protection is undoubtedly an area within national legislative power," *see AEP*, 564 U.S. at 421, and that "control of interstate pollution is primarily a matter of federal law," *Ouellette*, 479 U.S. at 492. *See* E.12-13. But neither *AEP* nor *Ouellette* analyzed or cited the Constitution, and instead interpreted the preemptive reach of the CAA and CWA, respectively.

[4] *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–07 (1988) (discussing federal common law defense "immunizing Government contractors from liability for design defects"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) ("[W]e are unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged by petitioner…."); *AEP*, 564 U.S. at 423; *Milwaukee II*, 451 U.S. at 317–26 (discussing displacement of federal common law by 1972 CWA amendments); *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 104 (1972) (holding that "application of federal common law … is not inconsistent with" pre-amendment Water Pollution Control Act).

The circuit court further incorrectly determined that the City's claims must be pleaded under federal common law because its "injuries all stem from interstate and international emissions." E.11. But there is no constitutional barrier to applying state law just because relevant facts arise outside the forum state. To the contrary, a dispute "cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985); *see also, e.g.*, *Young v. Masci*, 289 U.S. 253, 258–59 (1933) ("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."). *Ouellette* illustrates that principle: the court held that "the particular state-law claim at issue was preempted under the [CWA], [but also] held that other state-law claims were not." *D.C.*, 89 F.4th at 153 (citing *Ouellette*, 479 U.S. at 497).

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

The only question remaining is whether the CAA preempts the City's claims. Defendants have never argued that federal law expressly preempts the City's claims, or that the statute occupies the field in which the City's claims arise. The question is thus whether there is an irreconcilable conflict between those claims and the CAA. There is no such conflict; on one hand, this case cannot regulate emissions, *see* § I.A, *supra*, and on the other, "[t]he CAA expresses no policy preference and does not

even mention marketing regulations," *Honolulu*, 537 P.3d at 1205.

Conflict preemption "includes cases where compliance with both federal and state regulations is a physical impossibility," and those "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 484 (2017) (cleaned up). "'[T]he purpose of Congress is the ultimate touchstone,'" and courts must "apply a presumption that Congress did not intend to preempt state law." *Id.* at 485, 519 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "Congress' intent 'primarily is discerned' by examining the language of the federal statute(s) that allegedly preempt the state law as well as the 'statutory framework'…." *Id.* at 485 (quoting *Medtronic*, 518 U.S. at 486). Conversely, "preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up), and there is no preemption "where the conflict with federal law is merely potential or speculative," *Bd. of Trs. of Emps.' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore*, 317 Md. 72, 120 (1989).

There is no actual conflict between the City's claims and the CAA because the CAA says nothing about the tortious deceptive conduct alleged in the Complaint. The CAA's stated purpose is "pollution prevention," *see* 42 U.S.C. § 7401(a)(3) &

(c), which it achieves by "regulat[ing] pollution-generating emissions" from stationary and moving sources, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014); *see also N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298, 300 (4th Cir. 2010). As the Fourth Circuit observed, "[n]one of Baltimore's claims concern emission standards, federal regulations about those standards, or pollution permits"—they instead target Defendants' "extravagant misinformation campaign that contributed to [the City's] injuries." *Baltimore IV*, 31 F.4th at 217.

The Hawai'i Supreme Court's holding in *Honolulu* is directly on point. In rejecting CAA preemption, the court explained that "while the CAA regulates pollution," it "expresses no policy preference and does not even mention marketing regulations." *Honolulu*, 537 P.3d at 1205; *see Boulder*, 2024 WL 3204275, at *23–27 (similar). Likewise here, there is no risk of interfering with CAA emissions regulations or subjecting Defendants to irreconcilable obligations. The City's claims and requested remedies "do not subject Defendants to *any* additional emissions regulation," and "[t]he CAA does not bar Defendants from warning consumers about the dangers of using their fossil fuel products." *Honolulu*, 537 P.3d at 1207 (emphasis added). Nothing prevents Defendants from "adhering to the CAA and separately issuing warnings and refraining from deceptive conduct." *Id.*

Unlike in *Ouellette*, where applying affected-state nuisance law to sources in another state would have imposed pollution-control requirements inconsistent with

the CWA's complex permitting system, *see* 479 U.S. at 491–97, liability here would not conflict with any aspect of the CAA. *See Honolulu*, 537 P.3d at 1206 ("the rationale motivating the *Ouellette* court … does not apply"); *Boulder*, 2024 WL 3204275, at *27 (same); *In re MTBE Prods. Liab. Litig.* (*MTBE II*), 725 F.3d 65, 103–04 (2d Cir. 2013) (rejecting CAA preemption of state-law claims for pollution from federally-approved gasoline additive in part because defendant "engaged in additional tortious conduct"). The circuit court did not identify any statutory provision, regulation, program, or permit that actually conflicts with the City's claims, and there is none. There is thus no preemption.

II. The City Pleads Actionable Claims Under Maryland Law.

The Complaint states claims for nuisance, trespass, and failure to warn based on the widespread harms caused by Defendants' deceptive promotion of fossil fuels. Each of the City's claims asserts a "well recognized" tort cause of action "tethered to existing well-known elements," which the alleged facts more than satisfy. *Honolulu*, 537 P.3d at 1195; *see also Boulder*, 2024 WL 3204275, at *35–38.

A. The City Sufficiently Pleads Nuisance Claims.

1. Maryland Law Recognizes Product-Based Nuisance Claims.

Courts have long affirmed the viability of nuisance claims against manufacturers for nuisances created by their tortious promotion and sale of products they knew to be dangerous, like the City alleges here. Maryland law is not to the

contrary, and the City's Complaint satisfies Maryland's time-honored tests for public and private nuisance.

Maryland follows the Restatement (Second) of Torts ("Restatement"). *See Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984); *Gallagher v. H.V. Pierhomes, LLC*, 182 Md. App. 94, 114 (2008). Under the Restatement, nuisance liability runs to anyone who participates in creating or maintaining a nuisance. Restatement § 834; *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."). A private nuisance is anything that interferes with the "private use and enjoyment of land." *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 80 (1994) (quoting Restatement § 821D). A public nuisance is anything that unreasonably interferes with "a right common to the general public," including public health, safety, peace, or comfort. *Tadjer*, 300 Md. at 552 (quoting Restatement § 821B).

The City's allegations amply state claims for public and private nuisance. Defendants' deceptive promotion inflated fossil-fuel consumption, increased greenhouse gas emissions, accelerated global warming, and thereby created hazardous conditions in the City—including sea-level rise, flooding, storm surges, and heat waves. E.44-46, E.77-87, E.138-46, ¶¶ 8-10, 14-17, 59-90, 194-217. Those conditions have endangered human life; impaired public infrastructure and

jeopardized waterways; threatened public safety; and destroyed City-owned land, facilities, and public spaces. E.44, E.46, E.83-85, E.138-46, ¶¶ 8, 15-17, 77-82, 193-217. Defendants have thus created and contributed to quintessential public and private nuisances through their decades-long deception.

The court below invented a new exception to nuisance liability, unsupported by Maryland law, that manufacturers cannot create actionable nuisances by deceptively promoting dangerous products. E.23. Nuisance liability in Maryland, however, attaches to "*every person* who does or directs the doing of an act that will of necessity constitute or create a nuisance." *Maenner v. Carroll*, 46 Md. 193, 215 (1877) (emphasis added); *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 394 (1946) (same); *State v. Exxon Mobil Corp.* (*Exxon*), 406 F.Supp.3d 420, 468 (D. Md. 2019) (Hollander, J.) (same). Liability likewise attaches to "all acts that are a cause of [the] harm." Restatement § 834 & cmt. b; *accord Exxon*, 406 F.Supp.3d at 468. Manufacturers are not insulated from legal fault, because nuisance liability is defined by "reference to the interests invaded" (*i.e.*, public rights or private property interests), "not to any particular kind of act" causing the invasion. E.347, Prosser, *Handbook of Law of Torts* 573 (4th ed. 1971); *see Tadjer*, 300 Md. at 551 (citing Prosser on nuisance).

Unsurprisingly, various courts have found product-based nuisance claims viable under Maryland law. *See Exxon*, 406 F.Supp.3d at 467–69 ("manufacture,

marketing, and supply" of a gasoline additive with "extensive knowledge of [its] environmental hazards"); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *9–10 (D. Md. 2020) (nonprecedential) ("manufactur[ing], distribut[ing], market[ing], and promot[ing] PCBs" while withholding "extensive knowledge about [their] harmful effects"); *In re Kia Hyundai Vehicle Theft Litig.*, 2023 WL 8126870, at *1, *7–8 (C.D. Cal. Nov. 17, 2023) (nonprecedential) ("knowingly s[elling]" "[v]ehicles without anti-theft measures"). Like other activities, producing, promoting, and selling harmful products can create conditions that unduly interfere with public rights or private property.

Maryland is not alone in recognizing nuisance claims based on analogous facts. Courts nationwide have overwhelmingly concluded that manufacturers can create actionable nuisances through deceptive promotion of dangerous products, including lead paint, firearms, asbestos, cigarettes, and chemicals. *See, e.g.*, *In re: Opioid Litig.*, 2022 WL 18028767, at *1 (W. Va. Cir. Ct. June 9, 2022) (nonprecedential) ("[A]t least 22 states have found public nuisance claims based on the marketing of prescription opioids to be viable." (quotation omitted)).[5] Fossil-fuel

[5] *See also, e.g.*, *MTBE II*, 725 F.3d at 121–23 (gasoline additives); *Delaware v. Monsanto Co.*, 299 A.3d 372, 376, 386–87 (Del. 2023) (PCB products); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141–1144 (Ohio 2002) (firearms); *People v. ConAgra Grocery Prods. Co.* (*ConAgra*), 227 Cal.Rptr.3d 499, 534–43 (Ct. App. 2017) (lead paint); *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

products are no different, as *Boulder* confirms. There, the trial court rightly refused to "categorically foreclose[] nuisance liability for promoting or selling lawful products." 2024 WL 3204275, at *36. Instead, the court applied the Restatement's test and found it satisfied by allegations that the defendants' deceptive promotion created hazardous climate impacts in the plaintiffs' communities. *Id.* at *35–37. That analysis and conclusion apply with full force here.

2. The Circuit Court Misinterpreted Nuisance Law.

The circuit court erred in holding the City had not stated claims for public or private nuisance. First, nuisance claims need not "relate to a defendant's use of land." E.23. Maryland courts have endorsed a broad view of nuisance,[6] as does the Restatement. Restatement § 821B cmt. b (nuisance law embraces a "diversified

796175, at *1, *18–19 (Mass. Super. Ct. Feb. 7, 2007) (nonprecedential) (cigarettes); *In re JUUL Labs, Inc.*, 497 F.Supp.3d 552, 645–51 (N.D. Cal. 2020) (e-cigarettes).

There are a few exceptions. *E.g.*, *Hunter v. Johnson & Johnson*, 499 P.3d 719, 724–31 (Okla. 2021); *Rhode Island v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 457–58 (R.I. 2008). Such cases are distinguishable because they either turned on state-specific nuisance statutes; involved nuisances arising from unforeseeable or criminal misuse of products by third parties; or did not involve allegations that a manufacturer promoted dangerous products while affirmatively misrepresenting their risks.

[6] *See, e.g.*, *Tadjer*, 300 Md. at 551–52 ("practice of medicine by one not qualified," "public profanity," "eavesdropping on a jury" (quotation omitted)); *400 E. Baltimore St., Inc. v. State*, 49 Md. App. 147, 154 (1981) ("publication and exhibition of lewd and obscene words and writings"); *Raynor v. Dept. of Health*, 110 Md. App. 165, 193 (1996) (keeping of biting ferret); *Collins v. Tri-State Zoological Park of W. Maryland, Inc.*, 514 F.Supp.3d 773, 780–81 (D. Md. 2021) ("mistreatment of animals").

group" of misconduct, including "shooting of fireworks" and "indecent exhibitions"). That view accords with the prevailing judicial consensus today, which has overwhelmingly declined to limit nuisance liability to the use of land.[7]

Second, there is nothing novel about nuisance claims arising from dangerous products. *Cf.* E.23. To the contrary, "historical examples abound of products that were held to create a public nuisance." *Delaware v. Monsanto*, 299 A.3d at 383 & n.70. "[A]s early as the 1660s," treatises defined "common nuisances" to include "sell[ing] products unfit for human consumption." Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 738 (2023). Before 1900, it was settled that defendants could create nuisances by promoting dangerous products or engaging in commercially harmful speech. E.339-43, H.G. Wood, *The Law of Nuisances* 72–73, 75, 143, 147 (1875) (collecting nuisance cases involving sale of "meat, food, or drink"; sale of "obscene pictures, prints, books[,] or devices"; publication of "false reports"; and "posting placards" that interfered with plaintiff's business); *see Becker v. State*, 363 Md. 77, 89 (2001) (citing Wood for nuisance principles).

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[7] *See, e.g., In re: Opioid Litig.*, 2022 WL 18028767, at *3 & n.5 (collecting cases); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1233 (Ind. 2003) (same); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1111 (Ill. 2004); *supra* 24–25 n.5. Some courts have commented that public nuisance "has historically been linked to the use of land." *E.g.*, *Hunter*, 499 P.3d at 724. But Maryland courts have not so limited nuisance liability, and instead have long recognized nuisances created by other conduct. *Supra* 25 n.6.

Third, product-based nuisance claims do not impermissibly blur "the lines between public nuisance law and product liability." E.23. Where, as here, nuisance "liability is premised on [a defendant's] promotion of [a hazardous product] for [a] use with knowledge of the hazard that such use would create," the nuisance-creating conduct "is distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product." *Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal.Rptr.3d 313, 328 (Ct. App. 2006); *see ConAgra*, 227 Cal.Rptr.3d at 594 (a "public nuisance action is not a disguised products liability action"). Here, the City alleges Defendants took affirmative steps over decades to obfuscate their products' catastrophic dangers. E.110-26, ¶¶ 141-70. In any event, it is not unusual or improper that overlapping conduct may give rise to multiple causes of action. *See, e.g.*, *Exxon*, 406 F.Supp.3d at 458–69 (upholding public nuisance, failure-to-warn, and design-defect claims); *Baltimore v. Monsanto*, 2020 WL 1529014, at *8–11 (same).

Fourth, the circuit court misconstrued relevant case law. The court distinguished *Exxon* and *Baltimore v. Monsanto* on the grounds that they supposedly involved "a tight nexus between the sale of a product and the contamination of local lands and waters." E.22. As those decisions confirm, however, Maryland nuisance law does not demand such a nexus; it requires only that the defendant "substantially participated in the creation of the nuisance." *Baltimore v. Monsanto*, 2020 WL

1529014, at *9 (quoting *Exxon*, 406 F.Supp.3d at 468); *see* Restatement § 834 & cmt. d (similar). The Complaint easily meets this requirement by alleging that Defendants' failure to warn and deceptive promotion "drove [fossil fuel] consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore IV*, 31 F.4th at 234.

Fifth, nuisance liability does not turn on whether fossil fuels are "lawful" or federally regulated. *Compare* E.22, *with Boulder*, 2024 WL 3204275, at *36 (declining to create "exception" for "nuisances involving lawful products"); *supra* 24–25 n.5 (collecting nuisance cases involving regulated products). What matters is that Defendants' deceptive conduct created harmful conditions in Baltimore that significantly impair public rights and private property. *See Tadjer*, 300 Md. at 552.

Finally, although the circuit court declined to resolve whether a defendant must "exercise[] control over the instrumentality that caused the nuisance," E.23, the answer is clearly no. A defendant who "substantially participate[s] in the creation of the nuisance," is liable under Maryland law, even if it "no longer has control over the nuisance-causing instrumentality." *Exxon*, 406 F.Supp.3d at 468;[8] *see also* Restatement § 834 & cmt. e; E.338, Wood, *supra*, at 89 (a defendant need not

[8] *See also Baltimore v. Monsanto*, 2020 WL 1529014, at *9 ("control is not a required element to plead public nuisance under Maryland law"); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 256–57 (D. Md. 2000) (nuisance liability may attach even if the "party no longer has control of the work or product creating the public nuisance").

"commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely"). Numerous courts have rejected analogous attempts to graft a "control" element onto nuisance claims.[9]

Regardless, Defendants' argument is irrelevant because the City does allege, and will prove, that Defendants exercised control over the instrumentality that caused the nuisances. The nuisance-causing instrumentality is Defendants' deceptive business practices, which caused the City's injuries and which Defendants controlled. *Compare* E.89-90, E.147-48, ¶¶ 100-02, 221, *with In re JUUL Labs*, 497 F.Supp.3d at 649 (defining "instrumentality of the nuisance" as defendants' tortious promotion and sale of a dangerous product, rather than the "product itself"); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (N.D. Ohio June 13, 2019) (nonprecedential) (similar); *Cincinnati*, 768 N.E.2d at 1143 (similar); *Rhode Island v. Purdue Pharma L.P.*, 2019 WL 3991963, at *10 (R.I. Super. Ct. Aug. 16, 2019) (similar); *City of Bos. v. Smith & Wesson Corp.*, 2000 WL 1473568, at *14 (Mass. Super. Ct. July 13, 2000) (nonprecedential) (similar). This Court should thus reverse the dismissal of the City's nuisance claims.

[9] *See, e.g.*, *Boulder*, 2024 WL 3204275, at *37; *Delaware v. Monsanto*, 299 A.3d at 383–84; *In re MTBE* (*MTBE I*), 175 F.Supp.2d 593, 628–29 (S.D.N.Y. 2001); *ConAgra*, 227 Cal.Rptr.3d at 594; *Northridge*, 556 N.W.2d at 282. Although some courts have concluded otherwise, *e.g.*, *Hunter*, 499 P.3d at 728; *Lead Indus.*, *Ass'n*, 951 A.2d at 449, such cases are distinguishable for the reasons described in footnote 5.

B. The City States a Claim for Trespass.

A trespass is actionable under Maryland law "[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; *see* Restatement § 158 (similar); *Bramble v. Thompson*, 264 Md. 518, 522 (1972) (citing the Restatement for guidance on trespass). Here, Defendants' failure to warn and deceptive promotion drove fossil-fuel consumption, which exacerbated climate impacts in Baltimore. E.139-46, E.166-68, ¶¶ 197-217, 282-89. Defendants thereby "caused flood waters, extreme precipitation, saltwater, and other materials" to invade and harm City-owned property, and are thus liable for trespass. E.166, ¶ 284.

Courts in Maryland and elsewhere have affirmed the viability of trespass claims against manufacturers based on their tortious production, promotion, or sale of products. *E.g.*, *Exxon*, 406 F.Supp.3d at 471 (trespass claim stated under Maryland law based on "defendants' manufacture, distribution, or supply of MTBE gasoline that was subsequently released by another entity"); *Baltimore v. Monsanto*, 2020 WL 1529014, at *11–12 (similar for trespass via PCB chemicals).[10] Courts

[10] *See also, e.g.*, *Delaware v. Monsanto*, 299 A.3d at 389 (trespass claim against manufacturer who allegedly caused trespasses through production, promotion, and sale of PCBs); *Oregon v. Monsanto Co.*, 2019 WL 11815008, at *9 (Or. Cir. Ct. Jan. 9, 2019) (nonprecedential) (same); *MTBE II*, 725 F.3d at 120 (same against manufacturer of MTBE-containing gasoline); *New York v. Fermenta ASC Corp.*, 238 A.D.2d 400, 404 (N.Y. App. Div. 1997) (same against manufacturer of herbicides).

have likewise correctly upheld trespass claims alleging climate impacts caused by deceptive promotion of fossil fuels. *E.g.*, *Boulder*, 2024 WL 3204275, at *38.

"[T]he link" here between Defendants' conduct and the alleged trespasses is also not "to[o] attenuated" to support liability. E.32. When a foreign object invades a plaintiff's land, a defendant need only "have some connection with or some control over that object in order for an action in trespass to be successful." *Rockland Bleach & Dye Works Co. v. H. J. Williams Corp.*, 242 Md. 375, 387 (1966); *Exxon*, 406 F.Supp.3d at 471 (same). A sufficient connection exists when a defendant knowingly "caus[es] something to enter the [plaintiff's] land." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013) (quotation omitted); *see* Restatement § 158 cmt. i. The Complaint pleads such a connection: Defendants' failure to warn and deceptive promotion caused climate impacts in Baltimore that invaded and damaged City property, as Defendants accurately predicted. E.83-86, E.90-110, E.139-46, E.166-68, ¶¶ 77-83, 103-40, 197-217, 283-89. Defendants' own scientists alerted them to the catastrophic effects of climate change decades ago, triggering Defendants' deceptive acts designed to protect their profits.

Nor is there any requirement that a defendant own, produce, or manufacture the physical thing that enters a plaintiff's land. *See* E.32. Rather, trespass liability can arise from entry by water, snow, mud, or other natural materials. *See, e.g.*, *Kurpiel v. Hicks*, 284 Va. 347, 350, 355–57 (2012) (floodwater); *Shaheen v. G & G*

Corp., 230 Ga. 646, 648 (1973) (rainwater and dirt); *Mapco Express v. Faulk*, 24 P.3d 531, 538, 540, 546 (Alaska 2001) (snowfall); *cf. City of Bristol v. Tilcon Materials, Inc.*, 931 A.2d 237, 259 (Conn. 2007) (groundwater contamination); Restatement § 158 cmt. i & ill. 5 (trespass occurs where one "builds an embankment that during ordinary rainfalls" carries dirt onto another's land). The City's trespass claim is adequately pleaded.

C. The City Sufficiently Pleads Failure-to-Warn Claims.

The Court should also permit the City's failure-to-warn claims to proceed. Defendants owed the City a duty to issue adequate warnings about their fossil-fuel products' climate impacts, and contrary to the circuit court's holding, that duty does not create an indeterminate class of potential plaintiffs.

"Maryland has long recognized a duty on the part of sellers to warn of latent dangers attendant upon a proper use of the products they sell, where injury is foreseeable." *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 287 (2002) (quotation omitted). Manufacturers owe a duty not only to a product's end-users, but also to bystanders "endangered by [the product's] probable use." *Ga. Pac., LLC v. Farrar*, 432 Md. 523, 531 (2013) (quoting Restatement § 388). Defendants breached that longstanding duty by failing to warn about their products' climate impacts, causing foreseeable injuries to bystanders like the City.

That conclusion is reinforced by the "classic factors" Maryland courts use "to determine whether a duty exists." *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 633–34 (2018) (listing factors) (quoting *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016)); *see also Farrar*, 432 Md. at 527. First, the City's climate-related harms were foreseeable to Defendants, who actually foresaw as early as the 1960s the climatic havoc the intended use of their fossil fuels would wreak, particularly in coastal cities like Baltimore. E.90-110, E.155, E.164, ¶¶ 103-40, 239-40, 272-73. Foreseeability is "the principal determinant of duty" here because Defendants knowingly created risks of physical harm, not just "a risk of economic loss," *Hancock v. Mayor & City Council of Baltimore*, 480 Md. 588, 604–05 (2022) (citations omitted), which "weighs heavily in favor of imposing a duty," *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 12 (2015) (quotation omitted).

The remaining factors confirm Defendants owed the City a duty to warn. The City has already suffered numerous climate-related harms. *See May*, 446 Md. at 12 (considering "degree of certainty" plaintiff suffered injury). And Defendants have earned "moral blame" by misleading consumers about their products' risks to maximize profits. *Id.* at 16–17; *see* E.156, E.165, ¶¶ 242, 275 (Defendants embarked on a decades-long deception campaign that "prevent[ed] consumers from recognizing" the risks of their products). This suit also advances "a policy of preventing future harm," *Kiriakos*, 448 Md. at 490, because Defendants' failure to

warn continues unchecked. As for the costs and benefits of an adequate warning, they too support liability. Where "the magnitude of potential harm is great, 'even a relatively remote possibility' of the harm occurring may be sufficient to tip the scales 'in favor of duty,'" and here the harm is both great and certain. *Brady v. Walmart Inc.*, 2024 WL 2273382, at *24 (D. Md. May 20, 2024) (citations omitted). And as the Supreme Court has "long recognized," the cost of product warnings are usually "minimal, amounting only to the expense of adding some more printing to a label." *May*, 446 Md. at 16 (quotation omitted).[11]

Finally, there is a more than sufficient "connection" between Defendants' misconduct and the City's injuries. *Kiriakos*, 448 Md. at 488. A "close connection … is not required" here because Defendants' conduct created "the risk [of] death [and] personal injury." *Id.* Instead, the immense "magnitude of th[at] risk" justifies "the imposition of a duty in favor of a large class of persons." *Id.* (quotation omitted). The City falls squarely within that class because the Complaint pleads "proximate caus[ation]," *id.*, alleging that Defendants' failure to warn and deceptive promotion "drove [fossil-fuel] consumption, and thus greenhouse gas pollution, and thus climate change," *Baltimore IV*, 31 F.4th at 233–34. Those allegations suffice at the

[11] Insurance availability is at best unclear. The Court need not consider this factor at the pleading stage and should allow a record to develop on the issue. *See Kiriakos*, 448 Md. at 492 (declining to address factor without "evidence in the record" concerning insurance availability); *Brady*, 2024 WL 2273382, at *25 (same).

pleading stage, especially because "proximate cause," including "the substantial factor inquiry," "is ordinarily a jury question." *Kiriakos*, 448 Md. at 470–71; *compare Lab'y Corp. of Am. v. Hood*, 395 Md. 608, 627 (2006) ("although the existence of duty is a question of law, the answer to that question … is necessarily fact-based"). In short, every relevant factor points the same way: Defendants owed the City a duty to warn about their products' climate impacts. *Cf. Exxon*, 406 F.Supp.3d at 462–63 (manufacturer owed Maryland duty to warn where its products caused widespread environmental harms); *Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (similar duty owed to Baltimore).

The circuit court did not address any of the factors for determining whether a duty exists, and instead found the City's claims would require recognizing "a duty … owed to the world" and create "an indeterminate class" of potential plaintiffs. E.25, E.26. But the Complaint merely asserts a duty running from Defendants to Baltimore City, consistent with the Restatement's "general standard" that a manufacturer owes a duty to protect persons foreseeably injured by its products. *Farrar*, 432 Md. at 530–31; *see also Exxon*, 406 F.Supp.3d at 463 (rejecting analogous "duty to warn the world" argument); *Baltimore v. Monsanto*, 2020 WL 1529014, at *11 (same). In any event, the City belongs to an identifiable group whose injuries were not only foreseeable, but actually foreseen by Defendants decades ago: coastal cities on the U.S. East Coast. E.91-92, E.103-04, ¶¶ 105, 127.

In fact, some Defendants anticipated lawsuits in response to climate impacts along "the eastern coast of the U.S." *See* E.108-09, ¶ 137. Therefore, the City's claims avoid concerns about "indeterminate class[es]." *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 671–72 (2000); *see Kennedy Krieger*, 460 Md. at 642. Whether other potential plaintiffs can invoke this duty will invariably turn on case-specific factors, such as the foreseeability, severity, and certainty of their particular injuries. *See Valentine v. On Target, Inc.*, 353 Md. 544, 556 (1999) (existence of duty turns on "specific facts alleged in this particular case"). This Court need not—and should not—decide whether that duty extends to other hypothetical plaintiffs. *See Farrar*, 432 Md. at 536 n.2.

There is also no requirement that the City's injuries arise from "its own use of or direct exposure to Defendants' products." E.26. Under Maryland law, a plaintiff may bring a products-liability claim for injuries foreseeably caused by a third party's use of a dangerous product. *See, e.g.*, *Ga.-Pac. Corp. v. Pransky*, 369 Md. 360, 363–68 (2002); *ACandS, Inc. v. Godwin*, 340 Md. 334, 348–56 (1995); *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304, 323 (1988), *rev'd on other grounds*, 317 Md. 185 (1989); *Moran v. Faberge, Inc.*, 273 Md. 538, 554 (1975). If anything, "bystanders should be entitled to greater protection than the consumer or user," who can more easily avoid a product's dangers. Products Liability: Design & Manufacturing Defects § 3:17 (2d ed., Sept. 2024 update). Unsurprisingly, courts routinely uphold

failure-to-warn claims for injuries caused by a defendant's failure to warn third-party consumers. *E.g.*, *Exxon*, 406 F.Supp.3d at 463; *Monsanto*, 2020 WL 1529014, at *11; *MTBE I*, 175 F.Supp.2d at 625–26.

Finally, Defendants need not warn "everyone contributing to climate change" to satisfy their duty to the City. E.26. They need only issue "adequate warnings" about the climate impacts of "the products *they* sell," *Utica Mutual*, 145 Md. App. at 288 (emphasis added) (quotation omitted), and the "adequacy of [a] warning[]" is typically "a factual issue for submission to the jury," *Halliday v. Sturm, Roger & Co., Inc.*, 138 Md. App. 136, 159 (2001). Defendants could have—at a minimum—reduced harms to the City by issuing warnings to their own customers about their own products' climate risks. *E.g.*, *Moran*, 273 Md. at 554 (where defendant's cologne could foreseeably ignite near flames and injure bystanders, defendant "should have warned consumers of this latent flammability danger"). They failed to take those most basic steps, and indeed concealed the dangers of their products, breaching their duty to the City.

CONCLUSION

This Court should reverse the circuit court's dismissal of the City's claims for public and private nuisance, trespass, and strict liability and negligent failure to warn, and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 8-504(a)(8), Appellant City requests oral argument.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

I hereby certify that:

1. This brief contains 9,096 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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