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IN THE
SUPREME COURT OF MARYLAND

No. 11
September Term, 2025
SCM-REG-0011-2025

Mayor & City Council of Baltimore v. B.P. P.L.C., et al.,

v.

B.P. P.L.C., et al., City of Annapolis.

Appeal from the Circuit Court for Baltimore City
Honorable Videtta Brown, Judge

City Of Annapolis County,

v.

B.P. P.L.C. et al.

Appeal from the Circuit Court for Anne Arundel County
Honorable Steven Platt, Senior Judge

AMICI CURIAE BRIEF BY PROFESSOR RICHARD A. EPSTEIN, PROFESSOR JOHN YOO, AND MOUNTAIN STATES LEGAL FOUNDATION

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IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

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Mountain States Legal Foundation is a non-profit public interest law firm based in Colorado. Since its creation in 1977, MSLF has fought to protect property rights and economic liberty and against efforts to expand the "administrative state." Consistent with that, MSLF has recently argued against small groups of "local" actors setting nationwide "climate policy," including in cases like this one. *See Diamond Alternative Energy, LLC v. EPA*, 24-7 (U.S. Aug. 7, 2024), Br. of Amici Curiae Tex. Royalty Council & Am. Royalty Council in Supp. of Pet. for Cert.[2]; *see also In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. Sept. 18, 2024), Amici Curiae Br. of Prof. R. Epstein, Prof. J. Yoo, and MSLF in Supp. of Defs./Pet'rs.

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[1] No person, other than the proposed amici curiae made a monetary or other contribution to the preparation or submission of this brief.

[2] https://www.supremecourt.gov/DocketPDF/24/24-7/321866/20240807142720039_24-7%20Amicus%20Brief.pdf (last visited July 8, 2025).

SUMMARY OF THE ARGUMENT

If the climate is changing, then ***the Nation*** should decide how to address it. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) ("[T]he question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no.") (*New York*). The plaintiffs/appellants see things differently, but for the reasons discussed below, they are wrong.

No matter how they try to mask their aims, the plaintiffs/appellants want to misuse the settled laws of *nuisance* and *misrepresentation* against the defendants in these cases to set nationwide climate policy, all in violation of federal law and sound tort principles. And until rebuffed by the two Maryland trial courts giving rise to this appeal, the plaintiffs/appellants plowed forward despite U.S. Supreme Court precedent to the contrary. But while local governments continue to willfully ignore the U.S. Supreme Court and, by extension, the Constitution, the law in this area is clear: Congress displaced local attempts to address nationwide climate issues in the Clean Air Act (CAA). *See American Electric Power v. Connecticut*, 564 U.S. 410, 422–23 (2011) (*AEP*). As the Nation decides how to address changes in the global climate, its choices—including deciding as a Nation ***not*** to act—will have nationwide effects. This Court should reaffirm the lower court decisions (at E.1–34, E.1374–1391) that prevent these plaintiffs/appellants *in one state* from trying to set climate policy for the Country, using only a set of boilerplate allegations. Regardless of one's political views about it, regulating the global climate is improper for local tort law.

At bottom, the plaintiffs/appellants say that the defendants "knew" that their fossil fuels were altering the climate, only to conceal the truth from consumers in Maryland and elsewhere, and they further claim that the defendants' conduct led to an increase in greenhouse gases, which in turn raised temperatures throughout the Nation. Nonetheless, the trial courts properly refused to let the cases go to trial on such unprecedented misrepresentation and nuisance theories.

This Court should affirm the trial courts for at least two reasons. *First*, the trial courts rightly recognized that federal law preempts all state law, Maryland's common law included, on the claims that the defendants' air pollution contributed to climate change. The trial courts held, consistent with *AEP*, 564 U.S. at 422–23, that the Clean Air Act preempts judge-made federal common law causes of action for that sort of alleged injury. E.18–19; E.1384–86. *Second*, the trial courts rightly rejected the unprecedented and unmoored tort theories of nuisance and misrepresentation (or "failure to warn," "trespass" etc.—the gravamen of each claim in each case sounds in misunderstood theories of nuisance and fraud) that do not meet the basic requirement that the defendants must have made a *material* misstatement or omission on which the plaintiffs ***actually*** and justifiably relied to their detriment and somehow invaded their properties too. *See* E.13–14; E.1383 (folding misrepresentation claims into the preemption analysis). In each case, the widespread production of information about global warming means that no one—in law—could hold the defendants responsible when none of the defendants' marketing materials were directed to Maryland consumers (let alone read by them) or made any claims about global warming.

ARGUMENT

I. The trial courts correctly found preemption under the CAA and federal law.

The trial courts chiefly found that federal law (including the CAA) preempts state tort lawsuits against multinational oil companies for supposedly not warning consumers about the perils of greenhouse gas emissions. E.18–19; E.1384–86. Other courts—including the U.S. Supreme Court—have already found such claims to be preempted by both federal common law and the CAA. *Id.*; *AEP*, 564 U.S. at 422–23; *New York*, 993 F.3d at 91. Accordingly, the trial courts followed that precedent and rejected the counter-intuitive logic of courts like the Hawaii Supreme Court in *City and County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023), which wrongly decided federal law did not preempt state tort law. *See* E.7; E.1375–76

This Court should affirm the trial courts and reject all precedents to the contrary. The U.S. Supreme Court has recognized that the sale and consumption of fossil fuels in any single state does not generate a sufficiently large temperature change to produce a rise in sea levels anywhere, let alone in any given jurisdiction. "Greenhouse gases once emitted 'become well mixed in the atmosphere.'" *AEP*, 564 U.S. at 422 (quoting Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009)). This reason alone is sufficient for the Court to hold that the trial courts correctly refused to apply state torts of nuisance, failure to warn, trespass etc.—in novel forms—against the defendants for their production and sale of fuels. The erroneous general approach to tort liability, which lazily rests on an assumption that worldwide greenhouse gas emissions raise worldwide temperatures, and thus purportedly cause weather changes that allegedly harm Maryland, doesn't warrant further consideration, much less discovery and full-blown trials.

In rejecting a lawsuit brought by New York City and several states against major emitters of carbon dioxide, the U.S. Supreme Court said that "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422. The Court went on to reject the plaintiffs' claims. *Id.* at 424. The claims in these cases parallel those rejected by the U.S. Supreme Court.

The trial courts correctly ruled on preemption. *See* E.7–19; E.1383–86. Federal law preempts Maryland tort claims based on a two-step analysis: federal common law preempted state-level common law claims, and then the CAA displaced that federal common law and stepped into its shoes—also preempting local tort claims.

Put another way, as the Second Circuit did, *AEP* does not let local tort laws snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative

one." *New York*, 993 F.3d at 98. Rather, the CAA made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99, and it left to the states ***only*** the power to regulate internal emissions sources, *id*. at 100.

This Court should agree with the Second Circuit that states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *New York*, 993 F.3d at 85. Revisiting the two-step: while *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a *general* federal common law, it also affirmed the existence of a *specialized* federal common law where national concerns are paramount. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92 (1938), decided on the same day as *Erie*, the Court held that interstate water disputes are "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. This holding is logical because, in the absence of a federal common-law rule, the states in a dispute would presumably give priority to their own laws. Justice William O. Douglas expressed the same view in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (applying federal common law to deal with commercial paper to avoid "making identical transactions subject to the vagaries of the laws of the several states."). And as Judge Henry Friendly observed, "'[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (quoting Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421–22 (1964)).

Almost a century of U.S. Supreme Court precedent, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognizes that federal common law must have a preemptive role here. As the U.S. Supreme Court saw, interstate pollution presents an "overriding . . . need for

a uniform rule of decision" because states have conflicting self-interests, energy production and pollution are nationwide in scope, and the basic interests of federalism are involved. *Id*. at 105 n.6. The federal common law as it existed before the CAA would have preempted the state tort claims in this case.

This Court should further follow Supreme Court precedent that the CAA displaces or preempts any claims for trans-boundary pollution provided by either federal common law or state law: "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *AEP*, 564 U.S. at 424. *AEP* did not hold that the CAA revived the state causes of action that earlier federal law had preempted. *AEP*'s conclusion that the CAA preempts judge-made federal causes of action applies with even greater force to judge-made, state-made causes of action. In 2011, the Supreme Court wrote: "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation displaces federal common law." *AEP*, 564 U.S. at 426. Today, it is uncertain whether the major questions doctrine allows the EPA to make that decision with such broad authority as that suggested in 2011. *See W. Virginia v. EPA*, 597 U.S. 697, 723–24 (2022) (EPA still needs "clear congressional authorization" for the regulatory power it claims). But either way, only Congress can overturn the preemptive effect of federal law, the states cannot do so via tort law.

By adopting and applying *AEP*, moreover, this Court would not allow federal regulators to intrude unconstitutionally into internal state affairs. Rather, affirming the trial courts would prevent the extraterritorial application of state law from governing the behavior of the hundreds of millions outside Maryland. Properly concerned with the tension between federal and state authority, the Framers of the Constitution wisely crafted a balanced system that prevents a single

state from regulating a nationwide industry. Applying *AEP*'s rule serves the interests of federalism by keeping orderly relations among the states, while reserving to the federal government control over interstate pollution and nationwide industry.

This Court should also adopt the reasoning of the trial court for Baltimore City that the plaintiffs/appellants would have no cause of action under federal law because of preemption by the federal authority over foreign affairs. *See* E.19. The U.S. Supreme Court has long recognized that the Constitution vests the conduct of foreign relations in the federal government alone. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). It has preempted state laws that might interfere with federal foreign policy, even in the absence of a treaty. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for example, the U.S. Supreme Court preempted a state law that imposed sanctions on Burmese-related goods because it conflicted with federal foreign policy toward Burma.

The U.S. Supreme Court has further held that states cannot use their police powers to regulate areas that are the subject of diplomatic negotiations by the federal government. In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the U.S. Supreme Court held that the federal common law of foreign relations preempted a California law that required insurers to disclose information relating to pre-WWII insurance policies held by Swiss and German companies. The Supreme Court found that the state law conflicted with the President Clinton Administration's diplomatic efforts to achieve a settlement between the German government, the private financial institutions, and Holocaust survivors and their families.

Sufficient national foreign policy interests are present in this case. The executive branch has entered into international agreements designed to regulate greenhouse gas emissions and continues to participate in international negotiations to identify areas for cooperation between

nations. *See, e.g.*, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; Rio Declaration on Environment and Development, Jun. 13, 1992, 31 ILM 874 (1992). Yet the plaintiffs/appellants attempt to impose a damages sanction on the defendants for the very conduct, based on the same theory of harm, that is the focus of these national diplomatic efforts. The potential interference with federal foreign policy further justifies preemption of the claims.

II. The plaintiffs/appellants have not pleaded the elements for a cause of action in public nuisance or misrepresentation under Maryland law.

This Court should reject the plaintiffs'/appellants' effort to claim a public nuisance in the guise of a tort of misrepresentation. The plaintiffs/appellants purport to plead a misrepresentation case, but use the elements of public nuisance, without alleging that the defendants have emitted any dangerous substance. In their opening brief the plaintiffs/appellants say: "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 they knew to be false, directly and through paid surrogates." Appellants' Opening Br. 1. But they do not say when the defendants supposedly did such work, how often these statements supposedly were repeated, to which consumers in Maryland they supposedly were made, or who supposedly read them or relied on them among the driving population in Maryland or elsewhere. Furthermore, the plaintiffs/appellants have already asserted that they do "not seek to impose liability on Defendants for their direct emissions of greenhouse gases and do[] not seek to restrain Defendants from engaging in their business operations." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 195 (4th Cir. 2022) (in other documents as *Baltimore IV*, e.g., at E.3).

It is all in vain. As the trial court judge in Baltimore City, Videtta Brown, said below:

> Baltimore declares that it does not seek to regulate gas emissions, but instead its claims are designed to hold the Defendants accountable for misrepresenting the truth about the use and consequences of fossil fuels and for misleading consumers. This misrepresentation and deceptive campaign of misinformation, according to Baltimore, is what has driven the increased use of Defendants' fossil fuels and thereby, the increase in global emissions.

E.10. But the tactical decision ***not*** to ask for an injunction is idle, for no court could order a shutdown of the fossil fuel industry worldwide. Yet the billions in damages that the plaintiffs/appellants seek could have just that effect. And the damages will do what the plaintiffs/appellants had previously disclaimed. As Judge Brown explained, "Baltimore seeks compensatory and punitive damages, disgorgement of profits, civil penalties under the MCPA, and equitable relief." E.10 (quoting *Baltimore IV*). That effort is doomed, for as Judge Brown clarified: "The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign is simply a way to get in the back door what they cannot get in the front door." E.11.

Judge Brown's point here is obviously correct, and this Court should uphold the trial court on the point. The Court cannot allow the plaintiffs/appellants to manipulate the tort law of Maryland in this manner to get from these defendants the same damages as if they were the actual polluters—all while denying that this has anything to do with any actual pollution. At multiple points, the plaintiffs/appellants desperately try to shoehorn the supposed misrepresentations into a common law cause of action by insisting that the defendants had somehow participated in the creation of the nuisances by others. But in American tort law, no court has ever found that bare misrepresentations to the public at large make up either a nuisance or trespass. The cases relied upon by the plaintiffs/appellants are examples instead of naked misrepresentation or

disinformation. Words and omissions—the basis of the tort of misrepresentation—cannot form a nuisance, public or private.

Even if this Court were to entertain such sleight of hand in pleading, it must find that the alleged facts cannot support a tort of public nuisance. The standard definition of a public nuisance draws its inspiration from the private law of nuisance. Under § 822 of the Restatement (Second) of Torts, a private nuisance holds an actor "liable in an action for damages for a non-trespassory ***invasion*** of another's interest in the private use and enjoyment of land"; and § 821B(1) defines a public nuisance as "an unreasonable ***interference*** with a right common to the general public." (emphases added).

Throughout the historical evolution of the tort of public nuisance, courts never included issues of misrepresentation, concealment, and nondisclosure. The most common invasions of a public right are blocking rights of ways, *Anonymous, Y.B. Mich.*, 27 Hen. 8, f. 27, pl. 10 (King's Bench 1536), or discharging pollutants (such as 100,000 gallons of oil) into public waters, *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973). The law has always "used the same definition of nuisance to cover both public and private nuisances," with the former used to reach damage to the public at large, instead of damages to neighboring property owners. Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J.L. Econ. & Pol'y 282, 283 (2022).

The plaintiffs/appellants resort to claiming misrepresentation because they utterly fail to satisfy the requirements of a tort of public nuisance. Artfully, they never ***say*** "invasion," but simply aver that the defendants' supposed nuisance "requires only that the Defendants participated in the creation of the nuisance." They cannot allege that these defendants engaged in a "physical invasion" because they cannot reasonably assert that the defendants have released, either singly or

jointly, discharged, or assisted in the release or discharge, of any greenhouse gas, or any other pollutant, into Maryland's land, air, or waters. Instead, they allege that unidentified third-party ***users*** of the defendants' products caused alleged "invasions." These third parties must include the plaintiffs/appellants themselves and the residents of Maryland, all of whom used equipment and machinery that run on fossil fuels. At no point does the complaint aver that any of the defendants' sales of their products were "illegal" or "wrongful."

The proceedings below are replete with references to the misrepresentations and concealment that allegedly are the source of liability. But misrepresentation and concealment cases both start with the proposition that the defendant has material information that is *not* known to the plaintiff, after which the defendant makes a false statement to the plaintiff or omits to state some relevant material fact. The plaintiff, to its detriment, then relies on the false statement or improper omission.

The Restatement explains:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.

See Restatement (Third) of Torts: Liability for Economic Harm § 9. In this case, however, the plaintiffs/appellants fail on each count: to name the full class of proper defendants; to show causation; and to show justifiable reliance. As a result, this Court should reject the statement-based tort claims as a matter of law.

A. The plaintiffs/appellants lack a proper defendant.

The complaints do not identify any false statements made by these multiple defendants to Maryland residents about fossil fuels. They do not explain that any misstatements or omissions, let alone from fifty years ago, reached today's residents of Maryland over the period within which

climate-change related harms allegedly occurred. Nor is this a case of concealment given that the plaintiffs/appellants do not allege that the defendants, or their retailers, had a duty to discuss climate issues in routine sales transactions. The promotion of oil and gas, for example, does not resemble the specific health claims that tobacco companies made about their product. The defendants made their sole claims in a highly competitive market through advertisements about price, mileage, additives, and services—none of which remotely resembles a claim about the impact of fossil fuels on global warming. Further, the plaintiffs/appellants make no claim that the defendants acted in concert.

Sellers, distributors, and consumers handle, use, consume, and promote fossil fuel products in countless goods and services within Maryland without mentioning carbon dioxide or global warming. These unnamed downstream companies are in direct privity with their customers. They are, if anything, better able than the defendants to communicate with their customers. A tort of misrepresentation against them fails as well because those parties did not have any closer relationship to the actual polluters than the refiners sued in this case. Indeed, on the plaintiffs'/appellants' theory, the list of other possible defendants goes far beyond the sellers of fossil fuel products to include the sellers of cars, trucks, and airplanes in Maryland and the many companies that supply natural gas and coal products either directly or through intermediates to Maryland residents. The plaintiffs/appellants surely continue their own intensive use of fossil fuels even after they initiated these cases, and they are armed with full information on whatever they consider to be the scope and importance of global warning. Yet the plaintiffs/appellants did not sue ***themselves***, nor any local restaurants, recreational facilities, nor trains, taxis, buses, airplanes, or other transportation providers. By such tortured logic, however, those businesses' silences are all illicit, and hence actionable, omissions.

Under the standard rules of joint and several liability, the defendants' alleged misrepresentations amount to a tiny fraction of those made by the thousands of firms that deal in some way with fossil fuels but generate no emissions. Under the two prevailing rules for apportioning loss, § 433A of the Restatement (Second) Torts and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f), there must be a reasonable basis for division, here by market share, for any fraction of alleged misrepresentations made. The defendants' supposed contribution would be *de minimis*. On this ground alone, this Court should affirm the trial courts.

B. The plaintiffs/appellants cannot establish either materiality or causation.

In every tort case, the plaintiff must show that the actions attributed to the defendant have caused the specified harm. But here, the complaints do not charge the defendants with discharging carbon dioxide or other greenhouse gases in Maryland or indeed anywhere else. Therefore, the plaintiffs/appellants must prove causation by showing that the alleged misrepresentations satisfy two conditions. *First*, if the requisite misstatements or omissions had not taken place, there would have been a lower level of consumption of fossil fuels. In dealing with this question, what is important is "whether a reasonable man *would* attach importance to the fact misrepresented or omitted in determining his course of action." *TSC Industries, Inc. v. Northway, Inc*., 426 US 438, 445 (1976). It is not enough that such a statement "might" have that effect. *Id.* at 445. Under that standard, the U.S. Supreme Court held that the plaintiffs had to bring their background understandings of the basic transaction to the evaluation of the specifically alleged representations. If the plaintiffs in *TSC* were required to apply basic principles to specific statements made in a proxy statement, how could the plaintiffs/appellants in this case treat the defendants' supposed ***non***-statements about global warming as material, when they and the public at large knew as much or more about global warming as the defendants?

Second, the plaintiffs/appellants fail to show that as to increases in fuel-consumption levels, the alleged local adverse events—sea-level rise, flooding, extreme precipitation and storms, and extreme heat—could not have been reduced, let alone eliminated. In similar cases, other plaintiffs have alleged that defendants' misrepresentations caused increases "in extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered streamflows, bark beetle outbreaks, ecosystem damage, forest die-oft reduced snowpack, and drought." *In re Exxonmobil v. Bd. of Cty. Comm'rs*, 2024SA000206 (Colo. July 16, 2024), App. to Pet. for Order to Show Cause Pursuant to C.A.R. 21, at Ex. 2, pp. 118–19 of 810 (presenting the Amended Complaint and Jury Demand ¶ 140 in the Colorado case).

Yet in Maryland, the plaintiffs/appellants cannot satisfy their pleading burden by simply claiming adverse climate effects from temperature increases. They must allege that increased consumption of fossil fuels attributable to these nonspecific representations were both material and sufficient to produce changes in consumption levels. Then they must allege that these supposed increases would have produced the necessary temperature changes to cause the alleged adverse climate events. The plaintiffs/appellants cannot simply plead that the consequences of all weather-related changes must be laid at the defendants' doorsteps because of their general marketing activities.

Rightly understood, this supposed causal chain consists of a series of missing links. It ignores the sequence of events that would theoretically—never mind actually—link the defendants' conduct to the possible damages, given that the defendants' fossil fuel *sales* include coal, natural gas, and gasoline. These different energy sources are distributed through different channels. Coal is often sold to industrial users; natural gas is used for heating and industrial

purposes; gasoline is commonly sold at automobile service stations. The plaintiffs/appellants do not identify the different forms of improper communications that accompany each method of distribution, and they cannot show that the supposed forms of misinformation were material and ***the sole sources*** of greenhouse gases information to whatever hypothetical groups of buyers.

Take, for example, the sale of gasoline at service stations. If the defendants had revealed all allegedly true information about global warming, the plaintiffs/appellants do not explain the difference it would have made in the level of purchases by individual drivers, all of whom have been bombarded with claims about the dangers of greenhouse cases for years on end. There is no evidence that any increase on gasoline consumption would have been more than trivial. Consumers *might* believe that reducing their individual gasoline consumption might have only an infinitesimal effect on global warming. They would then have to balance this against the major changes in lifestyle that would occur if they could not drive to work or take their kids to school. Those sacrifices would loom too large for individuals to change major driving habits. Consumers and consumption levels are far more responsive to taxes and regulations that immediately affect prices. Changes in consumer behavior due to federal regulation of fossil fuels swamp any weak voluntary responses to new information about greenhouse gases. The disparate modes of distribution for coal and natural gas are also heavily subject to regulation. It is implausible that any communications by the defendants about their products would influence consumption. Increasing demand for the defendants' products in Maryland and worldwide has a far greater impact on consumption.

To successfully satisfy the causation requirement, the plaintiffs/appellants must also show that other variables *do not* account for the alleged environmental harms. Thus in the Pacific Palisades for decades it has been well understood rainy seasons would produce new green growth that would in a following dry year create kindling for the huge fires that followed—global

temperature changes had nothing to do with those fires. Instead, "two 'extraordinarily' wet winters in 2023 and 2024 were followed by a dry period starting in February 2024 and lasting through now," was well understood when the fires started.[3]

Taking the point further, forest management policies, rather than greenhouse gasses, surely account far more than temperature change for forest beetle infestations and fires. The deadwood that now accumulates on public lands is tinder for massive conflagrations. The extent of chronic mismanagement can vary widely over time, as shown by the sharp rise in fires that began when government strategies shifted from forest management to fire suppression. Similarly the deterioration in road conditions will depend far more on whether cities and counties have properly maintained and salted roads, the change in the number and weight of cars and trucks, and whether any storms or parasites have necessitated repairs.

The theory that global consequences attach to both local sales campaigns and to the alleged nondisclosure of research activities over the last fifty years creates an open ticket to collect tens of billions of dollars, not only in Maryland but also worldwide. But each allegation of an adverse event claimed to arise from misrepresentation during fossil fuel sales is both speculative and unsustainable. The claims of irreversible damage require a detailed and separate account of each element in the chain of causation. So in their allegations, given the more stringent pleading requirements of *Bell Atlantic, Co. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009),[4] the plaintiffs/appellants must clearly explain the direct link between the

[3] Julia Jacobo, *This is the worst fire the Pacific Palisades has ever seen, experts say* (Jan. 10, 2025), https://abcnews.go.com/US/worst-fire-pacific-palisades-experts/story?id=117507457, last visited July 9, 2025.

[4] While this Court has not explicitly adopted and applied *Twombly* and *Iqbal*, the pleading standard in this jurisdiction is the same: "A plaintiff must plead the facts material to the cause of action with sufficient specificity. A court will not accept bald assertions and conclusory statements by the

defendants' statements, which supposedly accompanied the sales of their products, to the asserted physical damages. But they cannot carry their pleading burden if they cannot rule out other well-known causes—poor forest management etc.—that bring about the same alleged harms produced by greenhouse gas emissions.

C. The plaintiffs/appellants cannot establish justifiable reliance.

American law strongly distinguishes between *speaking falsely t*o someone and actively *deceiving* someone. It is not possible to deceive a person who knows the true facts, because that knowledge precludes any justifiable reliance on the defendant's statements or omissions. Here, the plaintiffs/appellants do not identify in their allegations anyone who can show actual reliance on the defendants' supposed misrepresentations. They must point to a misrepresentation or concealment by the defendants that fossil fuels "do no harm to the environment." They offer no explanation why *these* defendants, among thousands of other possible parties—including the plaintiffs/appellants themselves—have a unique duty of disclosure to the public. But even if every statement uttered by the defendants were false, the plaintiffs/appellants could still not justifiably rely on the defendants' supposed statements about climate change. Hundreds, if not thousands, of sources proclaim the threat that greenhouse gases pose to the environment.

The plaintiffs/appellants cannot claim that these defendants withheld critical information about the effects of greenhouse gases. Intensive public knowledge and discussion of these issues already exists. Thus the United Nations' Intergovernmental Panel on Climate Change issued a 2021 report in a press release that had these emphatic words: "Climate change is widespread, rapid,

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pleader." *Baltimore Cnty. v. Baltimore Cnty. Deputy Sheriffs*, No. 1498, 2016 WL 687503, at *5, *5 n.3 (Md. Ct. Spec. App. Feb. 18, 2016) (citations omitted); *Adamson v. Corr. Med. Servs.*, 359 Md. 238, 246, 753 A.2d 501 (2000).

and intensifying, and some trends are now irreversible, at least during the present time frame."[5] In the same press release, UN Secretary-General António Guterres declared that the IPCC's Working Group's report was nothing less than "a code red for humanity." "The alarm bells are deafening, and the evidence is irrefutable." Guterres continues to call publicly for a fossil fuel ban to avoid "an escalating crisis." Websites such as Carbon Monitor[6] give exhaustive updates on all issues carbon. Just recently James Gustave Speth published his recent book, *They Knew*.[7] Mr. Speth has been actively involved in climate work since his days as a high-level official in the President Carter Administration. And who is "they"? It is ***not*** these defendants. No, as the subtitle says it is "The US Federal Government's Fifty-Year Role in Causing the Climate Crisis."

One can agree or disagree with any of these studies, but what the plaintiffs/appellants cannot show or even allege is that in this world teeming with information, the defendants' silence has led to changes in fossil fuel consumption, let alone to changes in temperature. Every court should take judicial notice that public statements from a multitude of public and private sources make it impossible to conceive of these defendants playing a decisive role in the public creation and transmission of carbon-related information. The plaintiffs/appellants cannot sufficiently allege that the defendants by some devious schemes supposedly were able to keep the public in the dark.

The law of fraud rests on the rule that a defendant cannot keep secret *private* information in its commercial dealings with others. The ***minimum condition*** to prove a fraud case is asymmetric information between the two parties. The defendants must know something that the plaintiffs do not. A leading illustration is the English case, *Derry v. Peek*, L. R. 14 App. Cas. 337

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[5] United Nations, *IPCC report: 'Code red' for human driven global heating, warns UN chief* (Aug. 9, 2021), https://news.un.org/en/story/2021/08/1097362, last visited July 9, 2025.

[6] https://carbonmonitor.org/, last visited July 9, 2025.

[7] https://mitpress.mit.edu/9780262545099/they-knew/, last visited July 9, 2025.

(1889). There, the fatal misrepresentation was that defendants had "the right to use steam or mechanical motive power instead of horses" to run their trams along the public way, even though they had secured such authorization for only part of that way. *Id.* at 347. The concealment of that vital information hurt the plaintiffs' investment prospects. The plaintiffs, who had no independent source of information, relied on the defendants.

This case raises the opposite prospect. It bears similarity to the situation condemned nearly 100 years ago by Justice Benjamin Cardozo, in a case involving financial fraud undetected by accountants, against imposing "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

Here, the plaintiffs/appellants have filed generic allegations that anyone could repeat virtually verbatim, with a few name changes, against a broad universe of defendants. Every producer, user, and consumer of fossil fuels, and every entity in the supply chain in between, could become the next defendant in a suit for contributing to energy use, which allegedly increases greenhouses gases, allegedly raises global temperatures, and then allegedly causes climate change, which in turn maybe harms Maryland—along with every other state in the Union. Hundreds of cities and counties could bring copycat complaints that could plunge these defendants, or any of a thousand other firms, into the same morass. This Court should affirm the decisions below—whether on the preemption issue or these tort-focused deficiencies—and reject limitless theories of tort liability.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial courts.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains **6,093** 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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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served on this 15th day of July 2025 to all counsel of record associated with this case via the MDEC system.

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