E-FILED
Gregory Hilton, Clerk,
Supreme Court of Maryland
8/4/2025 8:02 PM

IN THE SUPREME COURT OF MARYLAND

No. 11
September Term, 2025

MAYOR & CITY COUNCIL OF BALTIMORE,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

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

CITY OF ANNAPOLIS,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

ANNE ARUNDEL COUNTY,

Appellant,

v.

B.P. P.L.C. *ET AL.*,

Appellees.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants have pleaded recognized Maryland-law claims alleging that Defendants deceived consumers and the public about their fossil-fuel products, causing Appellants to suffer the very climate-related harms Defendants' marketing disavowed. Defendants' preemption arguments all depend on improperly recasting Appellants' deceptive-marketing claims as implicating duties and effects that would arise only if these suits sought to regulate greenhouse gas emissions, which they do not. Defendants' theories also would improperly transform a defunct body of federal common law into a constitutional rule, and would stretch the scope of Clean Air Act preemption far past what settled preemption frameworks permit. This Court should join the Supreme Courts of Colorado and Hawai'i in confirming that claims like Appellants' are not preempted by the Constitution, the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"), federal common law, or federal foreign policy. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023), *cert. denied*, 145 S. Ct. 1111 (Jan. 13, 2025); *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.* ("*Boulder II*"), __ P.3d __, 2025 WL 1363355 (Colo. May 12, 2025).

Defendants also fail in seeking to impose limits on nuisance and trespass claims that are unsupported by, and contrary to, clear Maryland-law precedent. Finally, Defendants do not refute that traditional duty factors establish a fossil-fuel marketer's obligation to warn of its product's known climate dangers.

ARGUMENT

I. Federal Law Does Not Preempt Appellants' Claims.

Fairly viewed, Appellants' claims are not preempted under any of Defendants' theories. These suits cannot regulate out-of-state emissions because Appellants allege Defendants violated Maryland duties not to mislead consumers and the public, and do not seek to impose liability based on anyone's lawful production or consumption of fossil fuels. *See* OB.14–19. For that reason, they would not have been preempted by the now-displaced federal common law of interstate pollution and do not conflict with any uniquely federal interest, OB.24–27, and create neither obstacles to the CAA's pollution control scheme and nor irreconcilable state and federal duties. *See* OB.30–35. And the Constitution does not prohibit states from remedying corporate deception simply because it concerns topics of national or global significance. *See* OB.27–30.

A. Appellants' Complaints Will Not Regulate or Punish Fossil Fuel Production or Consumption.

Defendants' preemption theories all fail for a single reason: they rest on caricatures of the complaints. Defendants insist these lawsuits will "necessarily regulate out-of-state emissions" and "disrupt the careful balance of interests struck" through federal anti-pollution programs. PBA.27–28. Courts around the country have rejected identical mischaracterizations of analogous climate deception suits, including the U.S. Court of Appeals for the Fourth Circuit in Baltimore's case here.

Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 210 (4th Cir. 2022) (claims not "concerned with setting and regulating greenhouse-gas emissions"); OB.14–16 & n.3 (collecting cases). This Court should do the same.

Appellants' complaints do not "subject [Defendants] to ongoing future liability for producing and selling fossil-fuel products." PBA.28. They instead seek to hold Defendants liable for breaching state-law duties to warn and not deceive consumers about their products' climate risks. *See, e.g.*, *Baltimore*, 31 F.4th at 233 ("[T]he Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign."). As a result, this litigation does not and cannot regulate emissions. Regulation is the "act or process of controlling [something] by rule or restriction," *Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 895 (7th Cir. 2017) (citing Black's Law Dictionary), and Appellants do not ask the Court to restrict fossil fuel production or consumption, or seek relief that would enjoin or otherwise restrict anyone's ability to do so. Appellants also do not request "damages for harms attributable to all interstate and international emissions combined," PBA.16, but rather seek relief "only for the effects of climate change allegedly *caused* by Defendants' breach of [state] law regarding failures to disclose, failures to warn, and deceptive promotion." *Honolulu*, 537 P.3d at 1195. "Defendants' liability is causally tethered to their failure to warn and deceptive promotion," so "nothing in

[Appellants'] lawsuit[s] incentivize[]—much less compels—Defendants to curb their fossil fuel production or greenhouse gas emissions." *Id.* at 1201.

Defendants speculate that a "damages" award against them might impact their production of fossil fuels, PBA.28, but "[a] suit does not 'regulate' a matter simply because it might have 'an impact' on that matter." *Honolulu*, 537 P.3d at 1202 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987)); *see also Boulder II*, 2025 WL 1363355, at *10 ¶ 59. And preemption analysis turns on "an examination of the elements of the common-law duty at issue," not "speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question . . . best left to the manufacturer's accountants)." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005). The state-law duties at issue are Defendants' duties to warn and not deceive consumers about their products' risks, and no federal policy endorses or immunizes consumer deception to preempt those duties. To the contrary, Congress has, consistent with the states' traditional police authority, preserved their ability to combat deceptive marketing. *See, e.g.*, 15 U.S.C. § 45(a) (FTC Act savings clause). Defendants can comply with their duties under Maryland law while still "adhering to the CAA" and any other federal emissions regulations. *Honolulu*, 537 P.3d at 1207.

The nature of the duties here also distinguishes this suit from *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). PBA.14–15. The claims there were

preempted because they "effectively impose[d] strict liability" for climate-related injuries. *City of New York*, 993 F.3d at 93; *see* OB.14–18. New York City sought compensation for Defendants' "lawful and profitable commercial activities," irrespective of whether those activities "were unreasonable or violated any obligation other than the obligation to pay compensation," with the express goal of "reallocat[ing] the costs imposed by lawful economic activity without . . . imposing a standard of conduct." Brief for Appellant at 12, 19, *City of New York*, 993 F.3d 81 (No. 18-2188), 2018 WL 5905772. Appellants, by contrast, allege Defendants are liable only to the extent of their *unlawful* breaches of state-law duties. These claims will not directly or indirectly "regulate cross-border emissions" because Defendants will not need to "cease global [fossil-fuel] production," or even reduce it, to "avoid [ongoing and future] liability." *City of New York*, 993 F.3d at 93. The United States was correct when it recommended the Supreme Court deny petitions for certiorari in *Honolulu*: "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." U.S. Amicus Brief at 20–21, *Sunoco LP v. City & County of Honolulu*, Nos. 23-947, 23-952, 2024 WL 5095299 (U.S. Dec. 10, 2024).

In short, Defendants cannot turn Appellants' complaints into something they are not. This Court must instead credit Appellants' theory of the case at the pleading

stage, drawing all inferences in Appellants' favor. *See, e.g.*, *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 489–95 (2011) (negligence claim not "an attempt to assert 'Dram Shop' liability" where "gravamen" of case was a "failure to protect patrons from a dangerous condition," not "furnishing of alcohol"); OB.17–18. And in determining the viability of any claim, it must focus on "the breach of the duty which is owed," as that breach "constitutes the cause of action." *Philadelphia, B. & W.R. Co. v. Allen*, 102 Md. 110, 62 A. 245, 246 (1905); *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 50, 67 (1998) (tort claims not preempted by overlapping statutory remedies where "theory of the case" was "totally dependent upon the common law tort"). Viewing the complaints in the correct light, the Court should reject all Defendants' preemption arguments.

B. The Federal Constitution Does Not Preempt Appellants' Claims.

1. Defunct Federal Common Law Does Not Linger as an Atextual Constitutional Rule.

The courts below relied on federal common law to preempt Appellants' claims. *See* E.12 ("Baltimore's claims cannot survive because they are preempted by federal common law (and the CAA)."); E.1375 (similar). Defendants now abandon federal common law, *see* PBA.21, and take the astoundingly broad position that the Constitution directly preempts state laws "involving transboundary emissions." PBA.9. That theory merely disguises and repackages a body of federal common law that no longer exists—none of the cases Defendants cite purport to

constitutionalize any rule about air or water pollution, and courts do not issue constitutional rulings *sub silentio*. Each addresses the federal common law of interstate pollution, which never would have encompassed Appellants' claims and was displaced by federal statute. OB.28–29 & n.5.

Defendants' arguments confirm that their constitutional theory just dresses federal common law in constitutional garb. According to Defendants, "the structure of the U.S. Constitution bar[s] state law from operating in areas of uniquely federal interests," and "interstate pollution is one such area." PBA.8. But a "uniquely federal interest" is just one requirement for creating "federal common law," not a standalone constitutional preemption test, which Defendants' citations confirm. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Identifying a uniquely federal interest is not even "a sufficient[] condition for the displacement of state law" by federal common law, which can "occur only where," unlike here, "a significant conflict exists between an identifiable federal policy or interest and the operation of state law." *Boyle*, 487 U.S. at 507 (cleaned up); OB.24–27.

Defendants turn federal-common-law inside out, and insist that "[t]he reason federal courts ever had power to make federal common law" concerning interstate pollution is that the Constitution creates "a vacuum that only federal law can fill." PBA.21–22. That thesis cannot be squared with Supreme Court precedent, which

has "always recognized that federal common law is subject to the paramount authority of Congress," *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quotations omitted), not a proxy for substantive constitutional rules Congress is powerless to undo. Because Congress displaced federal common law concerning interstate pollution, the CAA "governs the extent to which state law is preempted," and preemption is assessed "entirely as a matter of *statutory* interpretation." *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144, 152–53 (D.C. Cir. 2023); OB.20–22.[1] Displaced federal common law, like a repealed statute, does "not leave behind a pre-emptive grin without a statutory cat." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988).

The analysis is no different for international air pollution, despite Defendants' argument that the CAA "do[es] not concern foreign emissions." PBA.26. As the United States reiterates here, the CAA "expressly addresses '[i]nternational air pollution'" through a "reciprocal protection[]" framework. U.S. Br. at 10, *id.* at 5–6; OB.23–24. Because the test for displacement "is simply whether the statute speaks

[1] Defendants' flatly misread *Ouellette* and *AEP* in asserting that they suggest anything other than a standard statutory preemption inquiry after displacement. PBA.22–23; *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491, 494 (1987) (analyzing whether Clean Water Act preempted the entire "field of [water] pollution regulation" (it did not) or whether state-law claim was "an obstacle to the full implementation" of the Act (it was)); *Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 429 (2011) (noting that state-law claims depended "on the preemptive effect of the federal [CAA]" and declining to address viability of "claim under state nuisance law" because "none of the parties ha[d] briefed preemption").

directly to the question at issue," *AEP*, 564 U.S. at 424 (cleaned up), any federal common law of "foreign emissions" has been displaced.

Without federal common law, Defendants' constitutional defense stands on thin air. Defendants suggest that some combination of "the Due Process, Supremacy, Interstate and Foreign Commerce, and Full Faith and Credit Clauses" preempt Appellants' claims, PBA.19, but do not explain how and do not invoke any of the U.S. Supreme Court's well-worn tests for implementing each of these constitutional provisions, thus conceding none apply.[2] They also make no reference to any constitutional text, even though "[c]onstitutional analysis must begin with the language of the instrument." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (quotations omitted).

None of the handful of constitutional cases Defendants cite involve interstate pollution, and none support Defendants' novel preemption theory. The Court held in *BMW of North America, Inc. v. Gore* that Alabama could not impose punitive damages "for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*," but did not question that state law may reach out-of-state

[2] "Dormant Commerce Clause and anticommandeering-doctrine jurisprudence," PBA.20, are similarly far afield. Neither doctrine undercuts Supreme Court precedent that preempting state law requires specific constitutional or statutory text, *Puerto Rico*, 485 U.S. at 503; OB.13. And contrary to Defendants' assertions, both doctrines are tethered to specific constitutional provisions—the Commerce Clause and the Tenth Amendment. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023); *Haaland v. Brackeen*, 599 U.S. 255, 281 (2023).

conduct when "supported by the State's interest in protecting its own consumers and its own economy." 517 U.S. 559, 572–73 (1996) (emphasis added). The Court held in *Franchise Tax Board of California v. Hyatt* that the constitution "implicit[ly]" grants states sovereign immunity in each other's courts, but only after an exhaustive discussion of historical sources including the Declaration of Independence, Blackstone's Commentaries, the Federalist, nineteenth-century treatises, eighteenth-century state and federal jurisprudence, and the 1787 Constitutional Convention Debates. 587 U.S. 230, 236–48 (2019). Defendants offer no remotely similar historical analysis here. In *Kansas v. Colorado*, the Court resolved a conflict between states over their respective rights in the Arkansas River, an issue long understood to arise under federal common law. *See* 206 U.S. 46, 95–97 (1907). Finally, *Coyle v. Smith*, 221 U.S. 559, 565 (1911), held that the *federal* government could not condition Oklahoma's admission into the union on a promise to locate its capital in a particular city. None of these decisions support Defendants.

Defendants are left arguing that their constitutional "vacuum" exists even "absent a specific constitutional provision on point." PBA.19. But "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico*, 485 U.S. at 503; *accord Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead op. of Gorsuch, J.) (same). Defendants' sleight of hand only "demonstrates the runaway tendencies of 'federal common law' untethered to a

genuinely identifiable (as opposed to judicially constructed) federal policy," and must be rejected. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 89 (1994).

2. This Court Should Not Address the United States' New and Meritless Arguments.

The United States raises new constitutional issues as amicus, asserting that Appellants' claims will "regulate extraterritorially" and are therefore preempted by the Due Process and Commerce Clauses. *See* U.S. Br. at 18–20. But Defendants did not mention those Clauses below and cite them now only as passing support for their proposed constitutional interstate pollution rule, not for a sweeping, standalone bar on extraterritorial regulation. *See* PBA.19–20. The issue is thus not properly before the Court because it was not raised or ruled on below, and "an *amicus* ordinarily cannot raise an issue which is not raised by the parties." *R.A. Ponte Architects, Ltd. v. Invs'. Alert, Inc.*, 382 Md. 689, 694 n.3 (2004); *see also* Md. R. 8-131(a). If this Court does reach the merits, it should reject the United States' position because it rests on the same false premise as Defendants': Appellants' claims do not "regulate" fossil fuel production or air pollution, in Maryland or anywhere.

Regardless, the United States is incorrect. Starting with the Due Process Clause, the law has long recognized that "a person acting outside the state may be held responsible to the law of the state for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258–59 (1933); Restatement (Third) of Foreign Relations § 402 & cmt. k (1987) (States may apply their law to foreign conduct that "has or is

intended to have substantial effect within [the forum]"). Applying a state's laws satisfies due process where the state has "a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citation omitted). Where, as here, "the plaintiff claims to have suffered injury" in a state and "at least some of the conduct alleged to be tortious occurred in" the state, "[s]uch contacts are manifest" and the application of state law is "constitutionally permissible." *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 495 (2003) (citations omitted). Unlike a suit involving activities "wholly beyond state lines," U.S. Br. at 19, Appellants allege here that Defendants misled consumers and the public in Maryland (and elsewhere), which exacerbated severe harms in Maryland that Defendants foresaw.[3]

[3] The due process cases the United States cites hold only that a state cannot apply its laws to contracts with no connection whatsoever to the state. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 403, 407–08 (1930) ("nothing in any way relating to the policy sued on" was "done or required to be done in Texas"); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (a state cannot "destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made" (citations omitted)); *id.* at 150 ("[a state] may not, on grounds of policy, ignore a right which has lawfully vested elsewhere" where "the interest of the forum has but slight connection with the substance of the contract obligations"); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001) (insurance transactions "that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany").

As to the dormant Commerce Clause, the United States contends that "[w]hen one state's law 'directly regulates transactions which take place wholly outside the [s]tate,' it's barred." U.S. Br. at 21 (quoting *Ass'n for Accessible Meds. v. Ellison*, 140 F.4th 957, 960–61 (8th Cir. 2025)). That is incorrect on its own terms, as the Supreme Court has recognized Commerce Clause violations only in "law[s] that directly regulat[e] out-of-state transactions *by those with no connection to the State*." *Pork Producers*, 598 U.S. at 376 n.1 (emphasis modified); *see also Ass'n for Accessible Meds*, 140 F.4th at 961 (statutes that "ha[ve] the *specific* extraterritorial effect of *controlling the price* of wholly out-of-state transactions" violate the Commerce Clause (emphasis added)). In any event, Defendants concede that Appellants' claims will not "directly regulate" fossil-fuel use or air pollution, asserting only that they will "regulate cross-border emissions in an indirect and roundabout manner." PBA.29 (quoting *City of New York*, 993 F.3d at 93). Even if that were so, the Supreme Court has squarely rejected an "almost *per se*" rule against state laws that might "have the 'practical effect' of 'controlling' extraterritorial commerce," which "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." *Pork Producers*, 598 U.S. at 375.

The United States separately asserts that principles of equal sovereignty and comity bar this suit as impermissibly extraterritorial because it involves misconduct

in many jurisdictions. U.S. Br. at 22–23. But the United States disregards an entire field of law—choice-of-law rules—that exists to mediate among potentially conflicting laws in cases involving geographically expansive misconduct. "[A]pplication of [Maryland's] choice-of-law rules" is the vehicle to address the United States' concerns, not "outright preclusion" of Appellants' claims. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 483 n.26 (1985); *see* Amicus Br. of Foreign Relations and Civil Lit. Scholars ("Scholars Br.") at 10–15. In Maryland, tort claims are typically governed by the law of the state where injury occurred, with limited exceptions Defendants have not raised. *Lab'y Corp. of Am. v. Hood*, 395 Md. 608, 615–25 (2006). Replacing choice-of-law rules with a bright-line constitutional test would flout the Supreme Court's longstanding avoidance of "constitutionalizing choice-of-law rules." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–28 (1988).

The United States' foreign-policy-preemption arguments are neither properly before the court nor meritorious. *See* Scholars Br. at 4–15. The United States does not explain how Appellants' claims could amount to a separate Maryland "foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 434, 441 (1968), an argument that the Fourth Circuit already rejected, *Baltimore*, 31 F.4th at 214. Nor can the United States glean "express foreign policy" in conflict with Appellants' claims from the smattering of disconnected federal action and inaction they cite, including laws supporting emissions-reduction efforts, decisions to forgo certain international

agreements, and a tariff exemption for certain imports. *Id.* at 213; U.S. Br. at 25–27. A generalized need for "sensitive diplomacy" on energy and environmental issues, U.S. Br. at 26, falls far short of a clear conflict between Appellants' claims and express foreign policy. *See Baltimore*, 31 F.4th at 213; *accord Honolulu*, 537 P.3d at 1200; *Boulder II*, 2025 WL 1363355, at *11–12, ¶¶60–67.

C. The CAA Does Not Preempt Appellants' Claims.

Defendants' CAA preemption arguments fail because Defendants do not attempt to satisfy any recognized preemption test or connect their argument to any statutory text. They argue any remedies Appellants may seek "would necessarily regulate out-of-state emissions," PBA.27, and posit that Appellants' claims are therefore incompatible with the CAA's gestalt. But "[h]ere, no more than in any statutory interpretation dispute, is it enough for any party or court to rest on a supposition (or wish) that 'it must be in there somewhere.'" *Va. Uranium*, 587 U.S. at 767. As the United States advised the Supreme Court last year—before its present about-face—"the Clean Air Act does not categorically preempt" claims like Appellants' that allege the violation of "a duty to disclose and not be deceptive about the dangers of using fossil-fuel products." *Honolulu*, U.S. Amicus at 16–17.[4]

[4] The United States acknowledges that its position on CAA preemption has changed at least twice while these cases have been pending, and that it recently recommended the Supreme Court deny certiorari in *Honolulu*. *Id.* at 17 n.3.

Defendants' brief still does not identify which preemption test they believe applies, much less explain how that test is satisfied. *See* PBA.27–31; OB.31–35. They have never argued for express or field preemption, and both theories would be meritless regardless. *See* OB.30–31 & n.6. Defendants do not respond to Appellants' authorities refuting conflict preemption, or rebut the Hawai'i and Colorado Supreme Courts' holdings that materially similar claims are not preempted. *Compare* OB.31–33 *with* PBA.27–29. Those courts correctly found no conflict under either "impossibility" or "obstacle" preemption theories, because the claims "do not subject Defendants to any additional emissions regulation," "[t]he CAA does not bar Defendants from warning consumers about the dangers of using their fossil fuel products," and Defendants can "adher[e] to the CAA and separately issu[e] warnings and refrain[] from deceptive conduct." *Honolulu*, 537 P.3d at 1207; *see also Boulder II*, 2025 WL 1363355, at *7 ¶¶42–43. Defendants ignore those holdings, along with conflict preemption principles writ large.

The authorities Defendants do rely on only illustrate the preemptive conflicts lacking here. *Ouellette* held that Vermont-law claims against a New York pollution source were preempted because the Clean Water Act's *permitting system* would be disrupted if permit-holders' emissions were subject to the laws of states with no role in creating or enforcing the permit. 479 U.S. at 491–97; *see* OB.33–35. The CAA cases Defendants cite likewise all involved claims that would have imposed

restrictions on discrete out-of-state pollution sources in conflict with CAA permits issued to those polluters.[5] There is no similar conflict with permitting or emissions controls here.

After its recent flip-flop, the United States manufactures a purported conflict by asserting that Appellants' nuisance claims will require the trier of fact to determine what amount of emissions are "so 'unreasonable' as to create a 'nuisance,'" and thus second-guess EPA's determinations concerning "how much out-of-state air pollution is too much." U.S. Br. at 15–16. Not so. In evaluating whether "the gravity of the harm outweighs the utility of the actor's [nuisance-creating] conduct," the court will not need to determine whether some volume of emissions is *per se* unreasonable, but instead whether the harms caused by Defendants' deception outweigh the utility of that deception. *See* Restatement (Second) of Torts §§ 826 & cmts. a, d; 827 & cmt. a; 828 & cmt. a (1979).

Nor can Defendants establish a conflict with any CAA provisions, because the statute "does not even mention marketing regulations." *Honolulu*, 537 P.3d at 1205. Defendants and the United States cite provisions authorizing EPA to establish point-source emissions standards and implement a regional emissions trading

[5] *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015) (whiskey distillery); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013) (coal power plant); *Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (power plants).

program among states for certain categories of pollutants. *See* PBA.27, 29–30; U.S. Br. at 4, 11; *see E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 503 n.10 (2014) (describing CAA's Good Neighbor Provision). To be sure, EPA regulates emissions, including interstate emissions. That is irrelevant because, again, these suits will not "regulate out-of-state emissions." PBA.27. *See* OB.14–19.[6]

The United States attempts to insert a new preemption issue, contending that the CAA "occupies the field of interstate air pollution." U.S. Br. at 9. Even if that issue were properly before the Court, *see R.A. Ponte Architects*, 382 Md. at 694 n.3, Supreme Court precedent refutes it. Rejecting a field preemption frame in *Ouellette*, the Supreme Court held that the Clean Water Act's "savings clause negates the inference that Congress 'left no room' for state causes of action," and then conducted a conflict preemption analysis. *Ouellette*, 479 U.S. at 492. The United States focuses on the Court's statement that "federal legislation now occupie[s] the field," but that was merely an explanation that the Act "pre-empt[ed] all *federal* common law"; the

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[6] Defendants cite *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012), and *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), for the proposition that a damages award can constitute regulation, but both are inapposite. *Kurns* was a *field* preemption case in which product-defect claims "aimed at the equipment of locomotives" were preempted because the Locomotive Inspection Act occupies the "field of regulating locomotive equipment." 565 U.S. at 634 (citation omitted). *Riegel* involved a provision *expressly* preempting inconsistent state-law "requirements." 552 U.S. at 316. The Court held that "a State's 'requirements' include[] its common-law duties," since a tort judgment "establishes that the defendant has violated a state-law obligation." *Id.* at 324 (citation omitted). Neither case supports Defendants' conflict preemption arguments.

Court explained that its prior decisions "left open the question of whether injured parties still had a cause of action under *state* law," which, again, it resolved through a conflict preemption lens. *Id.* at 489. Finally, even if the CAA did have some field preemptive effect, it would have no bearing here because, in the United States' own words, "while the Clean Air Act regulates pollution, it does not concern itself with the kind of deceptive marketing alleged here." *Honolulu*, U.S. Amicus at 18.

II. Appellants Have Stated Claims Under Maryland Law.

A. Public and Private Nuisance

Appellants have stated public and private nuisance claims. The complaints allege Defendants unreasonably interfered with public rights and with Appellants' use and enjoyment of real property—the undisputed basic liability elements of both causes of action. *See* OB.36–37. There is no separate requirement that nuisance liability must arise from a defendant's "use of land or property," PBA.32, or that the defendant "control[] the instrumentality that caused the nuisance," PBA.39.

1. Maryland Does Not Require Nuisance Claims to Arise From Use of Land.

Defendants are wrong that "nuisance claims in Maryland must be linked to the use of land by the one creating the alleged nuisance." PBA.34. Defendants' logic presumes that releasing obnoxious odors or dumping toxic waste into a river can give rise to public nuisance liability if undertaken at the defendant's home or business, but not on a public sidewalk. That is not the law.

Consistent with long historical tradition, this Court has endorsed a broad public nuisance definition that encompasses activities having nothing to do with real property. Those include "shooting of fireworks in the streets," engaging in "public profanity," and "obstructing" common arteries like "a highway or a navigable stream." *Tadjer v. Montgomery Cnty.*, 300 Md. 539, 551–52 (1984) (quoting W. Prosser, *Handbook of Law of Torts* § 88, at 584 (4th ed. 1971))[7]; *see also 400 Balt. St., Inc. v. State*, 49 Md. App. 147, 154 (1981) ("exhibition of lewd and obscene words and writings"). That view accords with the principle that nuisances are defined by "reference to the interests invaded," "not to any particular kind of act." E.347, Prosser, *Handbook of Law of Torts* § 87, at 573; OB.38–39 & nn.7–8.

Courts applying Maryland law—in line with most, though not all, jurisdictions, *see* OB.40–42, PBA.37–38—have allowed nuisance claims to proceed predicated on deceptive promotion of dangerous products. *State v. Exxon* and *Baltimore v. Monsanto* both involved chemical manufacturers who deceptively marketed products for uses they knew to be hazardous. *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 436 (D. Md. 2019); *Mayor & City Council of Baltimore v. Monsanto Co.*, 2020 WL 1529014, at *2 (D. Md. Mar. 31, 2020). Both courts expressly upheld a "theory of public nuisance liability under Maryland law"

[7] *Tadjer* endorsed this broad definition, and declined to find a private nuisance only because no "land *of the original plaintiff* was invaded" by a defendant's operation of a landfill. 300 Md. at 554 (emphasis added).

"premised on [the defendants'] manufacture, marketing, and supply of" products that create nuisance conditions. *Exxon*, 406 F. Supp. 3d at 469; *Monsanto*, 2020 WL 1529014, at *9–10. Defendants' contention that those products "were directly deposited into and directly entered" the plaintiffs' property, PBA.36, is false. The courts made no distinction between "direct" and "indirect" contamination, and did not require the plaintiffs to identify specific contaminating releases or sources. *See Exxon*, 406 F. Supp. 3d at 458; *Monsanto*, 2020 WL 1529014, at *10.

Defendants' citations are inapposite. PBA.34–35. Many center on conduct with no connection to land that could have occurred anywhere. *E.g.*, *Gorman v. Sabo*, 210 Md. 155, 161–63 (1956) (continuously blaring loud radio into a home); *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 647 (1938) ("playing of jazz or other loud music"); *Raynor v. Dep't of Health*, 110 Md. App. 165, 190, 193 (1996) ("biting ferret"); *Cochrane v. City of Frostburgh*, 81 Md. 54, 31 A. 703, 705 (1895) (livestock "running at large"). At best, they illustrate that nuisance conditions tend to arise at discrete physical locations because they commonly center on interference with the use of public or private property. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003) (rejecting argument "that a public nuisance necessarily involves either an unlawful activity or the use of land" and explaining that cases often "fall[] into one of these two categories" "due to the

happenstance of how the particular public nuisance actions arose and not to any principle of law").

2. Control Over the Instrumentality Is Not an Element of Nuisance.

Maryland law does not require that a nuisance defendant "control the instrumentality" of the nuisance conditions. PBA.39; *see* OB.44–45. *State v. Exxon* and *Baltimore v. Monsanto* correctly concluded that "Maryland courts have never adopted the 'exclusive control' rule for public nuisance," and "[t]o the contrary . . . have found that a defendant who created or substantially participated in the creation of the nuisance may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality." *Exxon*, 406 F. Supp. 3d at 468; *Monsanto*, 2020 WL 1529014, at *9. Defendants acknowledge both courts rejected the argument that "Maryland law requires a defendant to exercise 'exclusive control,'" PBA.36, but offer no response.

Neither of the mid-1940s opinions Defendants rely on "endorse[] a control requirement" for nuisance, either. PBA.39. Each confirms the basic rule that a Defendant must have caused or contributed to the nuisance to be liable. In *East Coast Freight Lines v. Consolidated Gas, Electric, Light & Power Co. of Baltimore*, a gas company was held not liable when a driver struck a pole the gas company maintained on a highway median as a contractor for the City of Baltimore. 187 Md. 385, 401 (1946). The court so held because "the dangerous condition, if there was such a

condition, was not due to the pole" itself, but to Baltimore's failure to provide "proper warning . . . to approaching travelers," *id.*, irrespective of the company's degree of control over the pole. To the contrary, the court clarified that a contractor performing "inherently dangerous" work that "constitutes a public nuisance," can still be liable "even after he has completed his work" and relinquished control of the nuisance instrumentality. *Id.* at 397.

Callahan v. Clemens, 184 Md. 520 (1945), is similar. The plaintiffs there alleged a crumbling "negligently constructed" retaining wall was spreading dirt across the property line, and sued a defendant who "had, at most, only a nominal fee in" an alley above the wall. *Id.* at 523, 527. The court held the defendant not liable because giving "[p]ermission to erect the wall would not itself constitute a tortious act," and because his "highly technical" title did not impose "an obligation to maintain the alley, [or] the wall supporting it." *Id.* at 525–527. Stated differently, Clemens could not be liable because he did not cause or contribute to the alleged nuisance and owed no special duty to abate it—not because he lacked control of the wall. Maryland law does not recognize the barriers Defendants would erect to assigning nuisance liability and neither should this Court.

B. Trespass

Appellants' trespass claims are adequately stated. Defendants argue that they lacked control over floodwaters and other invading substances, but they misunderstand the level of connection or control the law requires. *See* PBA.41–43.

The Second Restatement is clear that a defendant who "plac[es] a thing either on or beneath the surface of [another's] land," can be liable for trespass whether or not he "directly and immediately [placed the substance] upon the other's land." Restatement (Second) of Torts § 158, cmt. i (1965). "It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Id.* This Court in *Rockland Bleach & Dye Works Co. v. H. J. Williams Corp.*, 242 Md. 375, 386–87 (1966), thus rejected the contention that "the critical question" is whether a defendant "controlled the act which directly caused the invasion." It sufficed that the defendant had "plac[ed] the fill material" that was later "carried by the foreseeable seasonal rains" onto the plaintiff's property. *Id.* at 387. Defendants point out that the defendant there had "significant amounts of control over the adjoining land" where the mudslide occurred, *see id.* at 387, but ignore the Court's explicit rejection of "the proposition . . . that exclusive control over the adjacent land *or over the invading force* is an essential element" of trespass, *id.* at 386–87 (emphasis added).

State v. Exxon and *Baltimore v. Monsanto* confirm the viability of Appellants' trespass claims. In both, defendants asserted they "lacked the requisite control over" chemicals they manufactured "at the time the alleged trespasses occurred," but both courts declined to dismiss. *Exxon*, 406 F. Supp. 3d at 471; *Monsanto*, 2020 WL 1529014, at *11–12. "[V]iewing the allegations in the light most favorable to the State," the court in *Exxon* "[could] not say" the defendants lacked a sufficient connection to their chemicals to sever trespass liability. 406 F. Supp. 3d at 471; *see also Monsanto*, 2020 WL 1529014, at *12. The same result follows here. Appellants allege extensively that the exact trespass injuries they face were foreseeable and actually foreseen by Defendants. Those allegations suffice to show that Defendants knew "to a substantial certainty" their conduct would result in trespass. Restatement (Second) of Torts § 158, cmt. i.

C. Failure to Warn

Defendants' attacks on Appellants' failure to warn claims also fail, because the "classic factors" Maryland courts consider "to determine whether a duty exists" support recognizing a duty here. OB.50–52; *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 633–34, 650–57 (2018) (quoting *Kiriakos v. Phillips*, 448 Md. 440, 486 (2016)). Defendants accurately foresaw the effects their products would cause, the threatened harms are severe, the likelihood of future harm is exceedingly high, and Defendants not only failed to issue any warnings but affirmatively misled

consumers and the public. *See* OB.50–52. Defendants fail to dispute, and thus concede, that multiple factors weigh heavily in favor of a duty to provide warnings with their own products sufficient to protect bystanders like Appellants.

Defendants contend that a duty can only arise from "a close or direct effect of the tortfeasor's conduct on the injured party." PBA.46 (quoting *Gourdine v. Crews*, 405 Md. 722, 746 (2008)). But as this Court advised in *Kiriakos*, the closeness-of-connection factor asks "whether, across the universe of cases of the type presented, there would ordinarily be so little connection between breach of the duty contended for, and the allegedly resulting harm, that a court would simply foreclose liability by holding that there is no duty." 448 Md. at 488 (citations omitted). Moreover, courts "relax[]" the degree of connection required "[a]s the magnitude of the risk increases," and the climate-related harms of Defendants' products are grave. *Id.* (quoting *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 537 (1986)). Appellants allege Defendants accurately predicted decades ago that their products would cause severe widespread harm to large classes of persons, including in particular cities on the United States' east coast. *See* OB.50–51. The allegations here satisfy this factor, which this Court likens to a "proximate cause element." *Kiriakos*, 448 Md. at 488. The Court need not recognize a duty to warn the world to find a duty here.

CONCLUSION

The Court should reverse the decisions below and remand for further proceedings.

Respectfully submitted,

[SIGNATURE PAGES FOLLOW]

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

I HEREBY CERTIFY that:

1. This petition contains 6,475 words, excluding the parts exempted from the word count by Rule 8-503.
2. This petition complies with the requirements stated in Rule 8-112.

/s/ Martin Quiñones
Martin Quiñones (pro hac vice)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2025, a copy of the foregoing document was filed and served electronically via the Court's MDEC system, on all counsel of record.

/s/ Martin Quiñones
Martin Quiñones (pro hac vice)