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| NORTH CAROLINA<br><br>ORANGE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>24CV003385-670 |
| THE TOWN OF CARRBORO, NORTH CAROLINA,<br><br>Plaintiff,<br><br>v.<br><br>DUKE ENERGY CORPORATION,<br><br>Defendant. | **PLAINTIFF TOWN OF CARRBORO'S BRIEF IN RESPONSE TO DEFENDANT DUKE ENERGY CORPORATION'S MOTION TO DISMISS UNDER N.C. RULE 12(b)(6)** |

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## INTRODUCTION

Plaintiff Town of Carrboro ("Carrboro") previously cited *eight* recent, detailed rulings denying motions to dismiss climate deception lawsuits. Brief in Opposition to Duke's Rule 12(b)(1) Motion (ECF No. 18, "Opp. Brief") at 3. Since then, the Colorado Supreme Court has joined this list. *County of Boulder v. Suncor Energy USA, Inc.*, 2025 Colo. LEXIS 326 (May 12, 2025). Nonetheless, while ignoring this overwhelming caselaw, Duke now seeks dismissal under Rule 12(b)(6) by relying on a handful of contrary and distinguishable trial court rulings, most of which are now being reviewed by the Maryland Supreme Court, s*ee infra* at 7. Duke's 12(b)(6) Motion to Dismiss (ECF No. 20, "Mot.") at 9.

Contrary to Duke's arguments, most courts have correctly recognized that tort actions seeking damages for deceptive conduct do not regulate emissions. Opp. Brief at 9-13 (citing cases); *e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1201 (Haw. 2023) ("Numerous courts have rejected similar attempts by oil and gas companies to reframe complaints…."). Carrboro's action only seeks damages for deceptive marketing practices, not an injunction on Duke's emissions or other activities. This case is thus just like in other cases over analogous deceptive

schemes, such as tobacco, opioids, MTBE, and other highly regulated products. Opp. Brief at 12 (citing cases).

Duke nonetheless *insists* this case seeks to regulate. Duke doth protest too much. Without this fringe "regulatory" defense, all of Duke's arguments plainly fail.

Federal law does not bar common law tort damages claims over climate deceptions. As numerous courts—and most recently the Colorado Supreme Court—have explained, there would only be such a bar if the Clean Air Act ("CAA") preempted such claims. *Boulder*, 2025 Colo. LEXIS at *22-33. However, far from preempting such a state action, the U.S. Congress put an express savings clause in the CAA that nothing in the Act "shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from . . . obtaining any judicial remedy or sanction in any State or local court." 42 U.S.C. § 7604(e)(1). Since "modern precedent considers congressional purpose 'the ultimate touchstone' in every preemption analysis," *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 189 (2025) (citations omitted), Duke's preemption argument fails.

Duke's arguments grow weaker from there. Duke claims Carrboro lacks authority to bring this suit because of limitations on how "a municipality may regulate air pollution." Mot. at 14. But this again relies on Duke's "regulation" strawman. Duke revealingly fails to even acknowledge the source of Carrboro's authority: N.C. Gen. Stat. § 160A-11, which provides that municipalities "shall be vested with all the property and rights in property belonging to the corporation," including the right to "sue and be sued." Duke cites no authority for the proposition that a municipality's right to file a common law tort claim over conduct injuring the Town is limited.

Thereafter, Duke posits breezy arguments about Carrboro's individual tort claims. Duke's overarching argument is that Duke cannot be liable because there are "other sources" of emissions.

Mot. at 3. But this ignores the fundamental principle of concurring causation. *Holt v. N.C. Dep't of Trans.*, 245 N.C. App. 167, 177 (2016) ("It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force."). Duke's argument also fails because Duke, a North Carolina company, was a leader in using deceptions to promote fossil fuels and undermine renewable energy—and thereby was a material reason why there are so many "other sources" of emissions. *E.g.*, Compl. ¶¶ 5, 21, 47-59, 61, 111, 265. Duke's direct and material role in causing climate change is clearly elucidated in the Complaint, and it is the jury's job—not the Court on a motion to dismiss—to determine whether the climate crisis and Carrboro's damages were reasonably foreseeable by Duke when it deceived the public about its fossil fuel products. *E.g.*, *Saad v. Town of Surf City*, 2024 N.C. App. LEXIS 1018, *11 (Dec. 17, 2024) ("What is the proximate cause of an injury is ordinarily a question to be determined by the jury").

Duke's statute of limitations argument similarly is meritless. Mot. at 27-28. Among other reasons, Carrboro explicitly alleges a recurring trespass/nuisance. Compl. ¶¶ 203-05. Also, Carrboro alleges Duke's tortious conduct is ongoing. *Id.* ¶¶ 159-76.

## LEGAL STANDARD

Under Rule 12(b)(6), all facts alleged by the nonmovant "are treated as true," *Fox v. Lenoir-Rhyne Univ.*, 909 S.E.2d 750, 757 (2024), and "the Court reviews the allegations of the pleadings at issue in the light most favorable to the nonmoving party." *Extra Care, LLC v. Carolinas All. for Residential Excellence, LLC*, 2024 NCBC LEXIS 84, *6 (N.C. Super. Ct. June 18, 2024). "The complaint must be liberally construed" and should not be dismissed "unless it appears beyond a doubt that the plaintiff could not prove any set of facts … which would entitle him to relief." *Fox v. Johnson*, 243 N.C. App. 274, 286-287 (2015).

"Dismissals in general are viewed as the harshest of remedies in a civil case and should not be imposed lightly." *Page v. Mandel*, 154 N.C. App. 94, 100 (2002). Thus, Duke's Motion must be denied "unless it appears to a certainty that [Carrboro] is entitled to no relief under any state of facts." *Est. of Graham v. Lambert*, 385 N.C. 644, 656 (2024).

## STATEMENT OF THE CASE AND ADDITIONAL STATEMENT OF FACTS

In addition to Carrboro's initial Statement of Facts (ECF No. 18, at 5-10), Carrboro adds the following additional Statement relevant to Duke's Rule 12(b)(6) motion, which argues that Duke had little role in the deception campaigns detailed in the Complaint. Mot. at 6. This action concerns Duke's deception campaigns about its fossil fuel products, which the company engaged in both directly (*e.g.*, Compl. ¶ 70) and through third parties like Edison Electric Institute ("EEI") that Duke paid, directed, exercised control over, and used to spread its misinformation. *Id.* ¶¶ 71-74.

The Complaint alleges that Duke "has understood the dangers of climate change for decades," including as early as 1968 when "high-ranking Duke officials learned about the risk that burning fossil fuels poses to the Earth's climate." *Id.* ¶¶ 3-4 . For example, Duke contributed *directly* to a report from the EPRI, an entity chaired by Shearon Harris—who from the late 1960s was CEO of Carolina Power & Light, a Duke predecessor, *id.* ¶ 49—extensively discussing the dangers of burning fossil fuels. *Id.* ¶¶ 50-53.[1]

The Complaint alleges that, despite this internal knowledge, Duke "actively participated in a far-reaching, decades-long campaign to deceive the public and decision-makers about these dangers." *Id.* ¶ 3. For example, Duke participated directly in the work of the GCC, *id.* ¶ 81, to put

[1] Duke is liable for the actions and omissions of its predecessor companies. *State ex rel. Stein v. E.I. du Pont de Nemours & Co.*, 382 N.C. 549, 559-60 (2022).

out statements in the 1990s like: "there is no convincing evidence that future increases in greenhouse gas concentrations will produce significant climate effects." *Id.* ¶ 86; *id.* ¶ 104 (detailing Duke predecessor Cinergy's report discussing a "debate" over the risks of climate change). Duke also deceptively promoted "carbon capture and storage" and "clean coal." *Id.* ¶¶ 112-128.

The Complaint alleges that Duke also paid for and controlled EEI's relevant activities. *Id.* ¶ 6. Beginning as early as the late 1960s, Shearon Harris was on EEI's Board (including serving as Chairman). *Id.* ¶ 49; *see also id.* ¶ 76 (another Duke CEO also chaired EEI). Accordingly, the Complaint also alleges Duke's liability for other groups acting on Duke's behalf. *See, e.g., id.* ¶ 90-96 (newspaper ad campaign with slogans like "[t]he most serious problem with catastrophic global warming is – it may not be true"); *id.* ¶¶ 97-101 (use of climate skeptic "scientists" to spread climate deception). In short, Duke intentionally used these organizations to perpetuate its climate deceptions. *Id.* ¶ 72.

## ARGUMENT

### I. A Common Law Tort Action for Monetary Damages Cannot Constitute Regulation.

Duke's arguments all depend upon its effort to recharacterize this action as seeking to regulate emissions. *E.g.*, Mot. at 10-11. A common law tort action is not regulation. Opp. Brief at 9-13 (citing cases). Carrboro's Complaint states, "This civil action does not seek any limitations on Duke's emissions or operations." Compl. ¶ 11. The Court should accept Carrboro's averment at face value. *Ferguson Enters., LLC v. Wilkie*, 2024 NCBC LEXIS 24, *4 (N.C. Super. Ct. Feb. 24, 2024) ("plaintiff is the master of its complaint").

As already detailed, many courts have rejected this effort to recast common law tort claims for damages as seeking "regulation." Opp. Brief at 10-11 (collecting cases). Two separate state

supreme courts have rejected this argument. *Honolulu*, 537 P.3d at 1202-03 (explaining that a "suit does not regulate a matter simply because it might have an impact on the matter"); *Boulder*, 2025 Colo. LEXIS at *21. The Fourth Circuit has likewise rejected these same "regulatory" arguments. *Mayor & City Council of Baltimore v. BP P.L.C.* ("*Baltimore I*"), 31 F.4th 178, 233-34 (4th Cir. 2022) (tort claims do not regulate emissions because the "source of tort liability" is not merely "climate change and its attendant harms" but instead the energy companies' "concealment and misrepresentation of the products' known dangers"). This Court should reject it also.

## II. No Federal Law Bars This Action.

Duke's argument that the "federal constitutional system" and the CAA bar this suit, Mot. at 7-11, merely invokes "some brooding federal interest" that is plainly insufficient to federalize climate deception claims. *See, e.g., Boulder*, 2025 Colo. LEXIS at *25.

### A. There Is No Federal Constitutional Bar to This Action.

Duke's threshold argument about the "basic scheme" of the U.S. Constitution fails because it does not cite any actual constitutional language. *E.g.*, *Minnesota v. American Petroleum Institute*, No. 62-CV-20-3837, at 27 (Minn. Dist. Ct. Feb. 14, 2025) (rejecting defendants' argument that "the structure of the Constitution" compels dismissal, where defendants "do not cite a specific provision of the Constitution").[2] It also fails for at least four additional reasons.

1. Duke's liability "is causally tethered to" its deception campaigns, not emissions. *E.g., Honolulu*, 537 P.3d at 1201; *id.* at 1187 (references to emissions "only serve to tell a broader story about how" defendants' "concealment and representations of" their products drove climate change); *accord Boulder*, 2025 Colo. LEXIS 326. Because the "plaintiff is the master of [its] claim," *Baltimore I*, 31 F.4th at 198, numerous federal trial and appellate courts (rejecting removal

[2] Opinion appears as Exhibit B to ECF No. 18.

jurisdiction) and now two state supreme courts (denying dismissal motions) have uniformly *refused* to rewrite climate deception lawsuits into claims over emissions, as Duke attempts. Then, addressing the claims actually presented, these appellate courts—including the Colorado Supreme Court just last month—have uniformly concluded that claims for climate change harm premised on an energy company's deceptive conduct do not implicate federal interests. *E.g., Boulder*, 2025 Colo. LEXIS at *13-16; *Honolulu*, 537 P.3d at 1196; *accord, e.g., Baltimore I*, 31 F.4th 178; *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (rejecting defendants' "caricature of the complaint").[3]

Duke urges the Court to instead rely on a handful of trial court decisions. Mot. at 9 (citing, *e.g., Baltimore v. BP (Baltimore II)*, 2024 WL 3678699 (2024)). These cases misconstrued plaintiffs' complaints and governing law. *See, e.g.*, *Minnesota*, No. 62-CV-20-3837 at 27 (explaining that *Baltimore II* "was wrongly decided, because [it] did not draw inferences in favor of the plaintiff, including those that relate to its theory of liability"). Moreover, the Maryland Supreme Court has now granted discretionary review over *Baltimore II* and Duke's other Maryland precedents (*Annapolis* and *Anne Arundel County*)—suggesting yet another supreme court will soon likely reject Duke's argument. *See* Md. Supreme Court, Case No. 11, September Term, 2025 (**Attachment A**) (granting review).

Similarly, Duke relies on the Trump Administration's meritless lawsuits to enjoin new climate deception cases, Mot. at 11 n.5, while ignoring the federal development actually relevant

[3] Duke's argument that state common law cannot apply to Carrboro's climate deception claims cannot be squared with numerous federal appeals rulings that these types of claims belong in state court. *E.g., Baltimore I*, 31 F.4th at 233-34; *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122 (2d Cir. 2023); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Minnesota v. American Petrol. Inst.*, 63 F.4th 703 (8th Cir. 2023); *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144 (D.C. Cir. 2023).

here: namely, the U.S. Supreme Court's recent denial of two separate *certiorari* petitions pressing Duke's arguments. *Sunoco LP v. Honolulu*, 145 S. Ct. 1111 (2025); *Alabama v. California*, 145 S. Ct. 757 (2025).

2. Duke also misstates the holding of *Am. Elec. Power v. Connecticut* ("*AEP*"), 564 U.S. 410 (2011). Mot. at 9. *AEP* does *not* stand for the proposition that state common law claims are prohibited, but rather found only that the CAA displaced any prior *federal* common law. [4]

*AEP* specifically stated that the viability of *state law* claims turns on whether the CAA itself preempts them, and left this issue "open for consideration on remand." 564 U.S. at 451 ("the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the" CAA). Every recent appellate court has agreed that the CAA does not preempt climate deception claims. *See*, *infra* Sec. II.B.

3. As discussed, *supra* at 5-6, Duke's argument (Mot. at 9) that even a damages award would "effectively regulate" Duke's subsidiaries' emissions is unpersuasive. A judgment does not "regulate" a matter just because it may have an impact on it. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987); *Virginia Uranium v. Warren*, 587 U.S. 761, 772-73 (2019); *Boulder*, 2025 Colo. LEXIS at *29-30. The Hawaii Supreme Court aptly summarized the flawed logic and dangerous implications of this argument:

> A broad doctrine that damages awards in tort cases impermissibly regulate conduct and are thereby preempted would intrude on the historic powers of state courts. Such a broad "damages = regulation = preemption" doctrine could preempt many cases common in state court, including much class action litigation, products liability

[4] Duke does not raise federal common law, presumably because after *AEP* there is no federal common law on emissions. *Honolulu*, 537 P.3d at 1181 ("The CAA displaced federal common law [and] after displacement, federal common law does not preempt state law."); *Boulder*, 2025 Colo. LEXIS 326 at *15-16.

> litigation, claims against pharmaceutical companies, and consumer protection litigation.

*Honolulu*, 537 P.3d at 1185 (citations omitted).

4. Even as to emissions, Duke's argument about the authority of a North Carolina court misses the mark. Mot. at 8. A state court resolves damages claims arising from interstate pollution by applying the law of the state where the pollution originated. *E.g.*, *N. Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 306 (4th Cir. 2010) ("the law of the states where emissions sources are located" applies (*citing International Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (finding that when "a court considers a state-law claim concerning interstate water pollution . . . subject to the [Clean Water Act], the court must apply the law of the State in which the point source is located.")). Thus, if Duke's emissions were relevant here, the Court would apply North Carolina law to Duke's substantial North Carolina emissions, and source state law to emissions originating out-of-state. *TVA*, 615 F.3d at 306.[5]

Technically, it is not necessary for the Court to consider Duke's emissions as a source of liability, since Carrboro's allegations principally turn on Duke's deception campaigns. However, the fact that there is nothing inherently federal even about damages claims over emissions further demonstrates that Duke's "federal scheme" argument is fundamentally flawed, as many courts have ruled, and that Duke's emissions may serve as a source of liability (independent of its deceptions).

[5] While Duke stresses its out-of-state operations, Mot. at 7, it ignores that the Complaint focuses on Duke's North Carolina activities. Compl. ¶¶ 19-26.

### B. The CAA Does Not Preempt This Action.

Duke's CAA preemption argument also fails. Mot. at 10-11. Preemption analysis typically considers whether the federal statute either expressly or implicitly preempts, the latter applying only where the federal statute either occupies the field, or the state law would conflict with the statute or federal objectives. *DTH Media Corp. v. Folt*, 374 N.C. 292, 306 (2020). Duke ignores these preemption tests, presumably because it fails all of them.

Duke cites no express preemption provision and does not argue the CAA somehow occupies the field.[6] And because the CAA does not cover deceptive marketing, Carrboro's claims do not conflict with any federal objectives. *See Honolulu*, 537 P.3d at 1195 (because "tortious marketing and failure to warn claims" do not "seek to regulate emissions," federal goals are not implicated); *Boulder*, 2025 Colo. LEXIS 326 at *20 ("Defendants have not identified any way in which state tort liability would frustrate the CAA's purposes, and we perceive none.").

Duke's refrain of "de facto regulation," Mot. at 10, also has no force, as we have explained. *Supra* at 5-6. Moreover, Duke ignores the fact that the CAA *expressly preserves* state law claims, stating:

> **Nonrestriction of other rights.** Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute *or common law* to seek enforcement of any emission standard or limitation *or to seek any other relief* [or] be construed to prohibit, exclude, or restrict any State, *local*, or interstate authority from . . . *obtaining any judicial remedy* or sanction *in any State or local court*….

[6] By contrast, *Kurns v. R.R. Friction Prods*., 565 U.S. 625, 637 (2012), on which Duke relies, ECF No. 21, Duke 12(b)(1) Reply at 4, involved a statute that occupied the entire field at issue. *See Boulder*, 2025 Colo. LEXIS 326 at *29-30 (explaining this distinction).

42 U.S.C. § 7604(e) (italicized emphasis added). Given that "[t]he presence of [such] a savings clause counsels against a finding that Congress intended to sweep aside all state claims," *Pinney v. Nokia, Inc.*, 402 F.3d 430, 450 (4th Cir. 2005), courts have frequently resolved state law tort claims over activities also addressed by the CAA. *See, e.g,*, *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig* ("*MBTE*"), 725 F.3d 65, 101 (2d Cir. 2013); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013). Accordingly, most courts have rejected CAA preemption defenses to climate deception claims, including the Hawaii and Colorado Supreme Courts. *Honolulu*, 537 P.3d at 1202-07; *Boulder*, 2025 Colo. LEXIS 326 at *16-33.

This outcome should be the same in North Carolina, where the Supreme Court is especially skeptical of preemption—particularly in cases involving "historic police powers." *DTH Media Corp.*, 374 N.C. at 306 (preemption "diminishes the sovereignty accorded to states"). Since this case plainly involves local powers, Duke's preemption argument has especially little force, and must be rejected. *Asheville Jet, Inc. v. City of Asheville*, 202 N.C. App. 1 (2010) (rejecting preemption for tort claims as an area of "traditional state" authority); *Baltimore I*, 31 F.4th at 224-25.[7]

In short, as the Colorado Supreme Court recently reiterated, there is no preemption "*in vacuo*, without a constitutional text or a federal statute to assert it," and thus "some brooding federal interest [can] never be enough to win preemption of a state law." *Boulder*, 2025 Colo. LEXIS 326 at *25 (citations omitted). Accordingly, the Court must reject Duke's claim that the "basic scheme of the [federal] constitution" or CAA bar this case.

[7] Duke's reliance (Mot. at 9-10) on *New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021) is also misplaced. As the Fourth Circuit explained in *Baltimore I*, the Court in *Chevron* "essentially evade[d] the careful analysis that the Supreme Court requires" in resolving preemption claims. 31 F.4th at 203. The decision has been repeatedly criticized by courts throughout the country. *E.g.*, *Honolulu*, 537 P.3d at 1200; *Boulder*, 2025 Colo. LEXIS 326 at *27-28.

## III. Carrboro Has the Authority to Bring This Action.

### A. Chapter 160A Expressly Empowers Carrboro to File This Action.

Duke's argument that Carrboro lacks the power to bring this action, Mot. at 11-14, is as flawed here as it was in Duke's Rule 12(b)(1) Motion. *See* Opp. Brief at 16. Duke continues to ignore Chapter 160A's express provision that municipalities "shall be vested with all of the property and rights in property belonging to the corporation," including the right to "sue and be sued." N.C. Gen. Stat. § 160A-11. Because the Legislature also expressly provided that these powers "shall be broadly construed . . . to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect," N.C. Gen. Stat. § 160A-4, Duke's argument lacks merit. Chapter 160A imposes no limitations related to common law tort claims, such as civil actions for damages to property caused by conduct originating beyond the municipality's borders, N.C. Gen. Stat. §§ 160A-1 *et seq.*, and Duke cites neither a statute nor caselaw indicating such a limit.

Duke also misstates Chapter 160A, claiming that "[w]hen a municipality uses its police power to address nuisances, it ***must*** do so through ordinances." Mot. at 13 (emphasis added). That is not what the cited provision says. Rather than a limitation, the provision grants additional power, providing that in addition to the power to address a nuisance through litigation, "[a] city ***may*** by ordinance … define and abate nuisances." *Id.* § 160A-174(a) (emphasis added). Courts "must not read into a statute language that simply is not there." *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 189 (2021).

### B. Duke's Argument About Extraterritorial Conduct Misinterprets the Complaint and Lacks Any Support within Chapter 160A or Caselaw.

Duke claims that "Carrboro lacks extraterritorial authority to regulate Duke Energy's alleged misstatements or emissions." Mot. at 12. Duke's argument can be dismissed out-of-hand

because Carrboro's common law claims for monetary damages do not constitute regulation. *Supra* at 5-6. Moreover, there is no statute or caselaw limiting a municipality's authority to file tort actions for damages to the municipality's property even where some of the defendant's conduct occurred elsewhere.[8]

Carrboro's *injuries* are also hardly extraterritorial, for Carrboro's roadways, stormwater control measures, and buildings are all being damaged *within Carrboro*. Compl. ¶¶ 192-205. For example, the Complaint alleges that Duke's actions cause flood waters to "enter or intrude on" Carrboro's property. *E.g.*, *id.* ¶¶ 234-35. Since a cause of action is completed only at the time of injury, the fact that Carrboro's injuries are suffered within its borders also defeats Duke's extraterritoriality argument. *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 180 N.C. App. 257, 262 (2006) ("the injury" is the moment at which "the cause of action is complete").

Carrboro also alleges that Duke's deception campaigns both originated in North Carolina, Compl. ¶¶ 19, 22, and reached Carrboro, *id.* ¶ 175. Thus, Duke is unambiguously mistaken when it states that Carrboro does not allege where Duke's conduct took place. Mot. at 13. Carrboro alleges that Duke's "misrepresentations mislead customers into transacting business with Duke and thereby unknowingly supporting its fossil fuel business model." Compl. ¶ 175. Carrboro is just such a Duke customer. *Id.* ¶ 250.[9]

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[8] Duke's references to statutory limits on city ordinances obviously have no bearing on this action. Mot. at 12-13.

[9] Finding a municipality cannot recover property damages when some of the alleged conduct occurs beyond its borders would yield "absurd results": an architect who developed negligent designs at his out-of-town office would be immune from suit over a defectively designed municipal building; a negligent driver would be immune from damage to a municipal vehicle operated beyond town borders. *See also* Opp. Brief, Exhibits F & G (providing two municipality tort actions); *see also S&M Brands Inc. v. Stein*, 2020 NCBC LEXIS 41, *68 (N.C. Super. Ct. Mar. 24, 2020) ("[C]ourts tend to adopt an interpretation that avoids absurd results").

## IV. Carrboro Alleges Cognizable Common Law Tort Claims.

Carrboro's Complaint details how Duke engaged in deception campaigns designed to preserve its status as one of the world's largest energy companies, Compl. ¶¶ 21, 61, 111, 265, which "materially delayed the transition away from fossil energy sources and thereby significantly worsened the climate emergency." *Id.* ¶ 5. As a result, Carrboro has suffered substantial damages to its property. *Id.* ¶¶ 192-205. Carrboro clearly alleges sufficient facts supporting each of Carrboro's common law claims, particularly given that "common law generally adapts to changing scientific and factual circumstances." *AEP*, 564 U.S. at 423.

### A. Proximate Cause Is a Jury Question.

A fundamental flaw with Duke's proximate cause argument[10] is that it never explains how the issue can be taken from the jury. "Questions of proximate cause and foreseeability are *questions of fact to be decided by the jury*. Thus, since proximate cause is a factual question, not a legal one, it is *typically not appropriate to discuss in a motion to dismiss*." *Demarco v. Charlotte-Mecklenburg Hosp. Auth.*, 268 N.C. App. 334, 335 (2019) (emphasis added).

And while Duke claims Carrboro alleges causation in "conclusory fashion," Mot. at 15, Carrboro details Duke's series of protracted deception campaigns (Compl. ¶¶ 67-136) designed to preserve its status as one of the world's largest energy companies. *Id.* ¶¶ 21. "Had substantial efforts to reduce greenhouse gas emissions began decades ago—when Duke already understood the dangers of climate change—then these harms would have been avoided or at least materially

[10] Duke erroneously claims proximate cause is required for nuisance and trespass. Mot. at 14-15. The N.C. Pattern Jury Instructions do not require proof of proximate cause for these claims. N.C. P.J.I. §§ 805.00 & 805.20. While Duke cites *Braswell v. Colonial Pipeline*, 395 F. Supp. 3d 641, 652 (M.D.N.C. 2019), the court there was merely stating that the contaminants must have entered the plaintiffs' property—*i.e.*, but-for or actual causation. No North Carolina precedent requires a foreseeability (*i.e.*, proximate cause) analysis for trespass or nuisance.

mitigated." *Id.* ¶ 147; *see, e.g., MBTE*, 725 F.3d at 143 (upholding jury's finding that deceptions about fossil fuel product harms led to decisions that ultimately caused plaintiffs' injuries).

Because Duke's conduct materially worsened climate change, Carrboro suffered substantial damages to its property from increasingly profound rain events, flooding, *etc.* Compl. ¶¶ 192-202, 205. Numerous courts have concluded that similar allegations are sufficient at the pleading stage and are ultimately jury issues unsuitable for resolution on a motion to dismiss. *E.g.*, *County of Boulder v. Suncor Energy (U.S.A.), Inc.*, No. 2018-CV-30349 at 68-69 (Colo. Dist. Ct. June 21, 2024)[11] ("In short, they allege that the Energy Companies foresaw the climate crisis and yet promoted their product and misrepresented the dangers. These allegations are sufficient to plausibly plead proximate causation."); *City & Cnty. of Honolulu v. Sunoco LP* ("*Sunoco*"), No. 1CCV-20-0000380, at 3 (Cir. Ct. Haw. Mar. 29, 2022) (rejecting energy companies' causation defense);[12] *Minnesota*, No. 62-CV-20-3837 at 44 ("These allegations are sufficient to plead causation.").

From there, Duke gives its "closing argument"—appropriate for a jury perhaps, but not for a motion to dismiss—about the number of purported steps in the causal chain. Mot. at 16. However, proximate cause does not require that Duke foresee Carrboro's precise injuries, only that Duke reasonably could foresee that its conduct would lead to *some* injury. *Sutton v. Duke*, 277 N.C. 94, 107 (1970) ("[A] defendant is liable for the consequences of his negligence if he might have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected."). However many steps in the causal chain, proximate cause is satisfied where there is a "natural and continuous sequence" of causes that "produce[] the

[11] Opinion appears as Exhibit D to ECF No. 18.
[12] Opinion appears as Exhibit E to ECF No. 18.

plaintiff's injuries." *Adams v. Mills*, 312 N.C. 181, 192-93 (1984). Here, there is a direct and predictable progression from Duke's deceptions about the climate crisis—which delayed the transition to renewable energy and exacerbated climate change—to Carrboro's injuries.

"The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Acosta v. Byrum*, 180 N.C. App. 562, 568-69 (2006). The Complaint specifically alleges that Duke knew or should have known its deceptive conduct would exacerbate climate change and injure Carrboro. *E.g.*, Compl. ¶ 218. Where a defendant has actual knowledge of the risks of its conduct, the plaintiff has typically satisfied the foreseeability component of proximate cause. *Bolkhir v. North Carolina State University*, 321 N.C. 706 (1988). Accordingly, the issue of proximate cause is for the jury. *Saad v. Town of Surf City*, 910 S.E.2d 851, 857 (N.C. Ct. App. 2024) ("rarely the case" that a motion to dismiss should be granted on the issue of proximate cause).

**1. Duke's Motion Ignores the Fundamental Principle of Concurring Causation.**

Duke's bid for dismissal because the Complaint does not allege Carrboro's "injuries occurred *solely* as a result of Duke Energy's alleged misleading statements," Mot. at 16 (emphasis added), is unavailing. It is well-settled that "there may be more than one proximate cause of an injury." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234 (1984). "The mere fact that another person or agency concurs or co-operates in producing the injury or contributes thereto in some degree, whether large or small, is not of controlling importance." *Hall v. Coble Dairies, Inc.*, 234 N.C. 206, 211-12 (1951); *Holt*, 245 N.C. App. at 177 ("immaterial" how many new events are introduced after the original cause).

The existence of other fossil fuel users cannot insulate Duke from liability, because Carrboro alleged that Duke played a material rule in causing the public's continued reliance upon

fossil fuels. *E.g.*, Compl. ¶¶ 147, 150 & 175; *Hall*, 234 N.C. at 211-12 (additional causes do not cut off liability unless they "turn[] aside the natural sequence of events and produce[] a result which would not otherwise have followed, and which could not have been reasonably anticipated"). Here, the existence of other fossil fuel users is the foreseeable *and intended* result of Duke's deceptions. *E.g.*, Compl. ¶¶ 21, 61, 111, 175, 218. Therefore, the existence of other fossil fuel users is the "very risk created" by Duke and cannot insulate Duke from liability. *Adams*, 312 N.C. at 195.

**2. Carrboro's Complaint Alleges that Duke Harbored Superior Knowledge.**

Finally, Duke alleges that Carrboro seeks to "have it both ways" by simultaneously alleging that the public was duped by Duke's misrepresentations but also that the public was aware of the climate crisis. Duke's argument rests entirely upon a misreading of Carrboro's Complaint: namely, Duke cites to Complaint paragraphs 49, 51, and 53 for the proposition that "the public and governments the world-over have known for at least two decades of the causes and dangers of anthropogenic climate change." Mot. at 18. However, each of the paragraphs cited by Duke pertain to the knowledge of *climate scientists or energy insiders* decades ago and not the general public. For example, Complaint paragraph 51 describes the 1971 knowledge of Dr. Chauncey Starr, who was the president of the Electric Power Research Institute. Duke has simply misstated the allegations of Carrboro's Complaint.

Moreover, Duke's knowledge was superior to the public's. For example, the Complaint notes that Duke's climate science expertise had grown to the point where it knew to almost the month precisely when greenhouse gas concentrations in the atmosphere would reach 400 parts per

million more than twenty-five years later. Compl. ¶¶ 56-59. There is no allegation that the public possessed this level of knowledge.[13]

Further, Duke's argument ignores Carrboro's allegation that Duke manipulated public opinion about the realities of climate change, altering the public's understanding. Compl. ¶¶ 122-28 (discussing an energy insider poll demonstrating that Duke's misrepresentations change the public's opinion about fossil fuels). And once the public began to understand the problem more recently, Duke also led deception campaigns falsely suggesting it was addressing the problem. *Id.* ¶¶ 112-36; 159-176.[14]

**B. Carrboro Adequately Pled a Claim for Private Nuisance.**

Carrboro's private nuisance claim arises from Duke's intentional deceptions, which results in flood waters and other interferences with Carrboro's property. Compl. ¶¶ 223-31. Carrboro is particularly susceptible to climate change-related damages due to its tendency to flood and its location in the Piedmont. *E.g.*, Compl. ¶¶ 18, 40. Similar interferences have long been held to constitute cognizable private nuisances. *E.g.*, *Pendergast v. Aiken*, 293 N.C. 201, 207-16 (1977) (collecting cases about how flooding can constitute a nuisance and determining that the reasonableness of such interferences is typically a jury issue). Further, courts have repeatedly

[13] Duke also confusingly suggests that because internal industry articles sometimes mischaracterized climate change, Duke knew no more than the public at large. Mot. at 17. But this contradicts the overwhelming allegations of Duke's internal knowledge, and in any event, whether the public reviewed any of these articles is a question of fact to be resolved later. *Fox*, 909 S.E.2d at 757.

[14] Duke's reliance on a New York consumer protection suit is also misplaced. Mot. at 18. There, the statutory claim required that the business alone possess the material information. *New York v. Exxon Mobil*, 226 N.Y.S.3d 863, 879 (2025). There is no such requirement here. *Hall*, 234 N.C. at 211-12; *see also Vermont v. Exxon Mobile Corp.*, 2024 Vt. Super. LEXIS 263, *32 (Vt. Super. Ct. Dec. 11, 2024) (rejecting argument that consumer familiarity with climate change made deceptions irrelevant).

denied motions to dismiss private nuisance claims in climate deception suits. *See, e.g.*, *Boulder*, No. 2018-CV-30349 at 70.

Duke once again misconstrues the Complaint in arguing Carrboro fails to allege an interference with any "personal" interest. Mot. at 19. Carrboro alleged injury from damages to its roadways, stormwater control measures, and buildings, all of which Carrboro directly owns, Compl. ¶¶ 14-18, 192-205, not its "stewardship" of shared resources. Mot. at 20. Thus, the case cited by Duke, *Priselac v. Chemours*, No. 7:20-CV-190-D, 2022 WL 909406 (E.D.N.C. Mar. 28, 2022), which concerned a public resource (a river), is inapposite.

**C. Carrboro Adequately Pled a Claim for Public Nuisance.**

Duke also argues that Carrboro did not plead the special injury necessary for a public nuisance claim. Mot. at 21. However, Carrboro alleges just such "special injuries," describing how Carrboro is particularly susceptible to the flooding and other harms in light of its location in the Piedmont. *E.g.* Compl. ¶¶ 18, 40. Carrboro alleges millions of dollars in damages, *id.* ¶¶ 192-205, and also alleges that it was "specially injured … because it … has a duty to repair substantial infrastructure damaged by Defendant's conduct." Carrboro alleges specifically that "it possess substantial property and assets that are especially vulnerable to the impacts of climate change." *Id.* ¶ 216.

Other courts have declined to dismiss public nuisance claims in climate-deception actions based on similar allegations. *Boulder*, No. 2018-CV-30349 at 70; *Sunoco*, No. 1CCV-20-0000380 at 3-5, 10-11.

### D. Carrboro Adequately Pled Claims for Negligence and Gross Negligence.

Concerning Carrboro's negligence claims,[15] Duke principally argues that it did not owe a duty of care to Carrboro. Mot. at 22-24. Duke's position is meritless.

*First*, the touchstone of any duty of care analysis is whether some injury to the plaintiff was foreseeable. *Carsanaro v. Colvin*, 215 N.C. App. 455, 461 (2011). Since "[u]sually the question of foreseeability is one for the jury," *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474 (1951), the issue cannot be resolved on the pleadings.

*Second*, Duke knows its deception campaigns are false. Compl. ¶ 218. This knowledge made it foreseeable that Carrboro would be injured, thus creating a duty of care to Carrboro. *Bolkhir v. N.C. State University*, 321 N.C. 706 (1988) (holding that an injury is typically foreseeable where the defendant has actual knowledge of the risks of its conduct).

*Third*, "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226 (2010). Here, Carrboro alleges Duke actively provided misinformation about fossil fuels and climate change nationwide. Compl. ¶¶ 21, 67-136. Even today, Duke is providing false information about its products on the Internet, including within Carrboro. *Id.* ¶¶ 159-76. The Complaint alleges that Duke's misrepresentations reached Carrboro. *Id.* ¶¶ 165, 175, 250. While engaged in these disinformation campaigns about climate change and fossil fuels, Duke was engaged in "an active course of conduct" and thus had a "duty to exercise ordinary care." *Fussell*, 364 N.C. at 226.

[15] Duke does not raise arguments specific to Carrboro's gross negligence claim. Mot. at 22-25. Nor could it, because Duke's intentional deception campaigns clearly constitute the aggravated conduct that creates a gross negligence claim. Compl. ¶¶ 67 & 257; *see also Yancey v. Lea*, 354 N.C. 48, 52 (2001) ("wanton conduct done with conscious or reckless disregard for the rights and safety of others").

*Fourth*, it was clearly foreseeable by Duke that its deception campaigns would result in some type of injury to its customer, Carrboro. *Carsanaro*, 215 N.C. App. at 459 ("It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected."). Duke is headquartered in North Carolina, supplies electricity to Carrboro, Compl. ¶¶ 19 & 250, and would be aware of the susceptibility to climate-related damages of municipalities, like Carrboro, located in the Piedmont. *Id.* ¶¶ 18 & 40. While supplying information about fossil fuels and electricity to its customers, such as Carrboro, Duke was subject to a duty of care. *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667 (1979) ("Liability arises from the negligent breach of a common law duty of care flowing from the parties' working relationship.").

Thereafter, Duke restates its argument that it cannot be liable because third parties also used fossil fuels. Mot. at 23. This argument ignores principles of concurring causation. *E.g.*, *Young v. Baltimore & O. R. Co.*, 266 N.C. 458, 465 (1966) ("The mere fact that another is also negligent and the negligence of the two results in injury to the plaintiff does not relieve either… This Court has said many times: There may be two or more proximate causes of an injury.").

Duke's claim that Carrboro would have Duke be responsible for third-party conduct is also erroneous. Mot. at 24. Carrboro's Complaint is about Duke's own conduct and those of its agents directly under its control. *See supra at* 4-5 (discussing these allegations). Far from seeking to impose vicarious liability, Carrboro alleges that *Duke* launched a conspiracy of populating these groups with Duke's own officers and used these groups to spread misinformation. Compl. ¶¶ 6, 71-73.

Finally, Duke argues Carrboro is contributorily negligent by "continuing to contract with Duke Energy to purchase electricity and natural gas services." Mot. at 24. This argument is flawed for several reasons, including because "issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner." *Page v. Sloan*, 281 N.C. 697, 706 (1972). Moreover, unlike Duke, Carrboro has never engaged in deception campaigns about fossil fuels. The Complaint also describes the substantial work that Carrboro (in contrast to Duke) has dedicated to reducing climate change impacts. Compl. ¶¶ 177-89. Finally, Carrboro's contributory negligence, if any, would "not bar recovery from a defendant who is grossly negligent." *McCauley v. Thomas*, 242 N.C. App. 82, 89 (2015).

**E. Carrboro Adequately Pled a Claim for Trespass.**

Finally, Carrboro asserts a cognizable trespass claim, alleging Duke knew its conduct "would cause or contribute to climate change and to the resulting intrusions on and damage to Plaintiff's property." Compl. ¶ 236. North Carolina recognizes that such intrusions constitute trespass, *e.g.*, *Frisbee v. Town of Marshall*, 122 N.C. 760 (1898) (flooding by water), as have other jurisdictions considering climate deception claims, *e.g. Boulder*, No. 2018-CV-30349 at 75.

Duke's claim that Carrboro fails to identify the "specific municipal property" invaded, Mot. at 25, is unavailing because there is no precedent requiring such particularity. However, Carrboro's Complaint identified several particular damaged parcels, including Carrboro's "47 miles of roads," as well has Carrboro's "eight (8) separate parks," and "substantial stormwater infrastructure." Compl. ¶¶ 14, 16-17, 190-205. These allegations are more than sufficient. *Gallimore v. Sink*, 27 N.C. App. 65, 66-67 (1975) ("Mere vagueness or lack of detail is not ground for a motion to dismiss . . .").

The Court must similarly reject Duke's argument that it cannot be responsible for flood waters, severe rain events, and other such invasions. Mot. at 26. Trespass may exist even where the defendant caused some other object or force to enter the property. *Trespass to Real Property*, N.C. P.J.I. ¶ 805.00 n.7 ("Our appellate courts have repeatedly held defendants liable in trespass for entry through objects, substances, *or forces*." (emphasis added)). Many cases recognize trespass where defendants set into motion the circumstances that result in an unauthorized invasion. *See id.* (collecting cases); *see, e.g.*, *Pegg v. Gray*, 240 N.C. 548 (1954) (foxhounds entered property).

Contrary to Duke's claim, Mot. at 26, North Carolina has also recognized that flooding events, which typically involve a weather event, can constitute a trespass. *E.g.*, *Frisbee*, 122 N.C. 760; *Forrest City Cotton Co.*, 218 N.C. 294. Duke ignores North Carolina's expansive treatment of the types of invasions that can constitute a trespass, including our Supreme Court's statement that the specific type of invasion is "[im]material" to a trespass claim. *Letterman v. English Mica Co.*, 249 N.C. 769, 771 (1959) ("At common law, every man's land was deemed to be enclosed. . . *Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used, and . . . the form of the instrumentality by which the close is broken . . . is [im]material"*) (emphasis added)).[16]

## V. Carrboro's Claims Are Not Barred by the Statute of Limitations.

Duke's brief argument about the statute of limitations is also meritless. Carrboro alleges that because of the deceptive nature of Duke's tortious conduct, Carrboro was not reasonably able

[16] While Duke's cases do not actually support its further proposition that "future trespass claims sound in nuisance," Mot. at 26, the argument is nonetheless irrelevant because Carrboro alleged both past and future trespasses. Compl. ¶ 234. Further, Duke's precedent for a trespass claim with "too many steps" (Mot. at 27) is similarly inapposite, as the cited case instead turned upon the plaintiff's failure to allege certain material facts.

to discover it until within three (3) years of the filing of this civil action. Compl. ¶ 177; *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4194296, at *13 (N.D. Ohio Sept. 4, 2019) (denying motion to dismiss on statute of limitations because, in part, of a "decades-long" misleading opioids marketing campaign). Since no limitations bar is "disclosed in the complaint," this is yet another "question of fact to be answered by a jury." *United Therapeutics Corp. v. Roscigno*, 2025 NCBC LEXIS 61, *20-21 (N.C. Super. Ct. May 27, 2025).

Carrboro further alleges Duke's tortious conduct continues to the present day. Compl. ¶ 159-76; *see id.* ¶ 175 (stating that Duke's ongoing tortious conduct is causing continued reliance upon fossil fuels). This also defeats Duke's argument, since "[t]he continuing wrong doctrine is an exception to the general rule that a cause of action accrues as soon as the plaintiff has the right to sue." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 86 (2011).

Carrboro also alleges damages due to recurring trespasses and nuisances. Compl. ¶¶ 203-05. Since a new three-year statute of limitations applies to each invasion or interference, the limitations period is not relevant here. *E.g.*, *Shadow Group v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 201 (2003) ("causes of action exist for all consequential and successive damages for a recurring injury resulting from a condition wrongfully created and maintained, such as a recurrent nuisance or trespass").

Thus, as with so many of Duke's arguments, courts in many other climate deception actions have rejected statute of limitations defenses. *E.g.*, *Minnesota*, No. 62-CV-20-3837, at 34-43; *Vermont*, 2024 Vt. Super. LEXIS 263 at *17-21.

## CONCLUSION

For the foregoing reasons, Duke's Motion to Dismiss Under Rule 12(b)(6) should be denied.

This the 23rd day of June, 2025.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Rule 7.8 of the North Carolina Business Court Rules in that it (excluding the caption, any index, table of contents, table of authorities, signature blocks, and required certifications) contains no more than 7,500 words, as determined by the word count feature of Microsoft Word.

This the 23rd day of June, 2025.

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## CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document was served electronically via both email and the North Carolina Business Court's e-filing system on all counsel of record, including the following:

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| NORTH CAROLINA<br><br>ORANGE COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>24CV003385-670 |
| THE TOWN OF CARRBORO, NORTH CAROLINA,<br><br>Plaintiff,<br><br>v.<br><br>DUKE ENERGY CORPORATION,<br><br>Defendant. | **INDEX OF EXHIBITS TO PLAINTIFF TOWN OF CARRBORO'S BRIEF IN OPPOSITION TO DEFENDANT DUKE ENERGY CORPORATION'S MOTION TO DISMISS UNDER N.C. RULE 12(b)(6)** |

Pursuant to N.C. Business Court Rule 7.5, Plaintiff the Town of Carrboro uploads the following Exhibit, which is a copy of a decision cited in Carrboro's said Brief but is not included in sources such as LexisNexis:

| | |
|---|---|
| **ATTACHMENT A** | Discretionary Review Granted for *Mayor and City Council of Baltimore v. B.P. P.L.C., et al.*; *Anne Arundel County v. B.P. P.L.C., et al.*; *City of Annapolis v. B.P. P.L.C.*, *et al.*, Case No. 11, September Term, 2025. |

**ATTACHMENT A**

Discretionary Review Granted for *Mayor and City Council of Baltimore v. B.P. P.L.C., et al.*; *Anne Arundel County v. B.P. P.L.C., et al.*; *City of Annapolis v. B.P. P.L.C., et al.*, Case No. 11, September Term, 2025.

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Supreme Court of Maryland

ROBERT C. MURPHY COURTS OF APPEAL BUILDING

# Petitions for Writ of Certiorari - April, 2025

## PETITIONS FOR WRIT OF CERTIORARI

## September Term, 2024

# Granted April 24, 2025

**Mayor and City Council of Baltimore v. B.P. P.L.C., et al.; Anne Arundel County v. B.P. P.L.C., et al.; City of Annapolis v. B.P. P.L.C., et al.** – Case No. 11, September Term, 2025

Issues – Torts – *From the petition for writ of certiorari*: 1) Do the U.S. Constitution and federal law preempt and preclude state law claims seeking redress for injuries allegedly caused by the effects of out-of-state and international greenhouse gas emissions on the global climate? 2) Does Maryland law preclude nuisance claims based on injuries allegedly caused by the worldwide production, promotion, and sale of a lawful consumer product? 3) Does Maryland law preclude failure-to-warn claims premised on a duty to warn every person in the world whose use of a product may have contributed to a global phenomenon with effects that allegedly harmed the plaintiff? 4) Does Maryland law preclude trespass claims based on harms allegedly caused by global climate changes arising from the use of a product by billions of third parties around the world outside of producer's control? *From the cross-petition for writ of certiorari*: 1) Do appellants/cross-appellees' complaints state claims for public and private nuisance? 2) Do appellants/cross-appellees' complaints state claims for strict liability and negligent failure to warn? 3) Do appellants/cross-appellees' complaints state claims for trespass.

**Comptroller of Maryland v. The Potomac Edison Company** – Case No. 12, September Term, 2025

Issues – Tax General – 1) Did ACM erroneously interpret § 11-201(b) of the Tax-General Article, which exempts "tangible personal property … used directly and predominantly in a production activity" from sales-and-use tax, to apply to the equipment that Respondent uses not to produce electricity but to transmit and deliver it from out-of-state generators to its Maryland consumers? 2) In applying ACM's erroneous interpretation of § 11-201(b) of the Tax-General Article, did the Tax Court err in concluding that much of Respondent's transmission and delivery equipment was used "directly and predominantly" – that is more than 50 percent – in a production activity, when Respondent's expert testified that the equipment is used both to deliver and process electricity simultaneously and concurrently and that neither delivery nor processing predominates? 3) Did ACM err in concluding that § 13-508(a) of the Tax-General Article, which governs the time within which a taxpayer may

seek a refund of tax paid pursuant to an assessment by the Comptroller, supersedes the generally-applicable four-year limitations period in § 13-1104(g) and allows Respondent the refund of previously-paid sales-and-use-tax that was not paid pursuant to an assessment by the Comptroller? 4) Did ACM err by compelling the State to pay interest on Respondent's refund claim when the evidence showed that Respondent paid the tax because of an "accounting system irregularity", a mistake not attributable to the State?

## Denied/Dismissed April 25, 2025

The order denying or dismissing the below petitions can be found here.

Ali v. Clarke – Pet. No. 468
Bhairava, Shiva v. State – Pet. No. 485
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Pirzchalski v. Solomon – Pet. No. 466
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Stevens, Calvin M. v. State – Pet. No. 467
Tapia, Jose Miguel v. State – Pet. No. 437
Turner v. Silva – Pet. No. 453
Twigg v. Twigg – Pet. No. 480
Ucheomumu v. Peter – Pet. No. 483
Watson v. LVNV Funding – Pet. No. 448
Zang v. Peroutka – Pet. No. 469

* September Term 2025

## Denied/Dismissed April 28, 2025

Gaynor v. Extended Stay America - Pet. No. 416
Smith-Scott v. BMG Laurel - Pet. No. 445

Directions to the Court

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