IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff

v. **Civil Action No. 24-C-22-004904**
OT

PHILIP MORRIS USA, INC., *et al.*,

Defendants.

CERTAIN DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

The City of Baltimore seeks to hold Defendants liable for damages and even criminal penalties because some consumers, in violation of state and local law, throw cigarette butts on the ground rather than into trash cans. But under one of the most fundamental principles of our law—and one embodied in each of the various theories of liability the City advances—a defendant cannot be held liable for a plaintiff's alleged injuries unless it *caused* those injuries. The City's Complaint—premised, again, on the notion that Defendants are responsible because *others*, *sometimes*, *choose* to litter—cannot satisfy that basic requirement. Indeed, if it could, then the manufacturers, distributors, and retailers of any sometimes-littered product—paper bags, plastic bottles, fast-food containers, and on and on—would be liable. Remarkably, the City does not appear to even disagree—indeed, the parade of horribles is now all too real. *See* Rushaad Hayward, Baltimore sues Pepsi, Coca-Cola and others for alleged role in pollution crisis, WMAR2 NEWS BALTIMORE (Jun. 20, 2024, 12:06 PM), https://tinyurl.com/23z3br5r; Compl., *Mayor and City Council of Baltimore v. PepsiCo Inc.* (case number pending). This cross-cutting issue defeats all of the City's causes of action.

Of course, the City's Complaint flunks other legal requirements as well. Its attempt to recover criminal penalties through civil litigation (Counts I–V) violates Maryland and Baltimore City law. And its common law causes of action (Counts VI–XI) have myriad shortcomings wholly apart from causation. It cannot show exclusive possession for trespass (Count VI); cannot show physical harm to the ultimate user, an unreasonably dangerous product, or a duty to the City for design defect (Counts VII and VIII); cannot allege a duty to the City for failure to warn (Counts X and XI); and cannot allege invasion of a public right for public nuisance (Count IX).

Even if the City could overcome these obstacles, more remain: the Master Settlement Agreement released the City's claims, those claims are preempted by state and federal law, and

they are untimely in any event. Nothing in the City's Opposition suggests otherwise. Instead, it rewrites the City's Complaint, ignores settled authority, and blinds itself to the consequences of the City's breathtaking position. This case must be dismissed.

ARGUMENT

I. DEFENDANTS DID NOT CAUSE THE CITY'S ALLEGED INJURIES

For each of its claims, the City must allege (under one rubric or another) that Defendants caused the City's alleged injuries. But the City's basic theory—that Defendants caused littering by selling a product that could be littered by others—does not meet those tests.

A. The City Cannot Satisfy the Causal Language of the Littering Laws (Counts I–V)

The City cannot meet the textual causation requirements found in the state and local littering laws cited in Counts I through V. Through various formulations, the state law and city ordinances in question impose criminal liability on Defendants, but only if they "dispose[d]," "dump[ed]," or "litter[ed]" used cigarette filters; "cause[d] the … disposal" of used filters; "allow[ed] the disposal" of used filters; or "permit[ted] [used filters] to discharge or flow onto any public or private property" or to "accumulat[e]" on Defendants' own property. Md. Code, Criminal Law § 10-110; Baltimore City Health Code §§ 7-606, 7-607, 7-608, 7-609, 7-702. The City does not allege that Defendants themselves discarded used cigarette filters improperly, so the question is whether they unambiguously "caused," "allowed," or "permitted" smokers to do so by selling cigarettes with non-biodegradable filters—after all, the rule of lenity "requires that [ambiguous penal] statutes be strictly construed against the State." *Gardner v. State*, 344 Md. 642, 651 (1997). But both the laws' plain text and case law confirm that parties do not "cause," "allow," or "permit" littering simply by selling a product that *others* discard unlawfully, let alone that they unambiguously do so. Mot. 17–20.

The City insists that Defendants "caused the disposal of litter on [City] property" because they "knew that smokers litter cigarette filters on the ground," which purportedly falls "squarely within the laws' plain language." Opp. 21–22. But "the laws' plain language" disagrees. To repeat Defendants' unanswered examples, no one says alcohol manufacturers "cause" (or "allow" or "permit") drunk driving by making a product that they know some consumers will misuse, and judges do not "cause" prison violence by sentencing defendants to prison, even if that is an unfortunately foreseeable outcome in some cases. Instead, to "cause" or "allow" or "permit" something to come to pass through another, one must direct (or have power to direct) that outcome. *See, e.g.*, *Shirks Motor Exp. v. Oxenham*, 204 Md. 626, 632 (1954) ("The element of control … tend[s] to show affirmatively that the cause was one within the power of the defendant to prevent."). But the City's own Complaint admits that Defendants tried to *stop* littering, *see* Compl. ¶ 34; it does not suggest that Defendants somehow had and exercised the ability to *cause* third parties to do it.

The City claims that the basic causation limits Defendants invoke are "additional requirements concerning how one causes littering through others" that sweep beyond any "language … in the statutory provisions." Opp. 22. Not true. This is just what it *means* to "cause" or "allow" or "permit" something, as Defendants' (again unaddressed) citations demonstrate. *See* "Allow," Black's Law Dictionary (11th ed. 2019) (discussing a woman who "allows the neighbor's children to play on *her* lawn" (emphasis added)); "Permit," *id.* ("To consent to formally; to allow (something) to happen."); Mot. 19. That is why, in *Parklawn, Inc. v. Nee*—a civil case—the Court explained that a landlord—who has much greater control over a tenant than Defendants here have over their ultimate customers—does not simply by virtue of ownership "permit[]" the creation of a nuisance by her tenant in any "sense as to render [the landlord] liable." 243 Md. 249, 252 (1966)

(quoting *Maenner v. Carrol*, 46 Md. 193, 216 (1877)). Otherwise, every manufacturer, distributor, and retailer whose products wind up on City property would be criminally liable because other people illegally discarded them. After all, the City's own data show that, while the number of cigarette butts retrieved by Mr. Trash Wheel has declined precipitously since 2014, the number of (much larger) plastic bottles gathered has remained largely constant. *See* Trash Wheel Collection Data, https://tinyurl.com/2k7cwbpm (attached as Exhibit A); Compl. ¶ 5; Opp. 2 (citing Mr. Trash Wheel).

Perhaps recognizing the staggering scope of its general position, the City pivots to a new and wholly speculative one: Defendants "caused" littering because they knew that smokers "are under the impression that the paper wrappers and filters [in cigarettes] will decompose in the environment" and yet continued to produce non-biodegradable filters anyway. Opp. 22. But biodegradability is entirely beside the point under the relevant statute and ordinances. Someone who throws a stack of newspapers onto the streets of Baltimore has littered just as much as someone who tosses out plastic bottles, regardless of which dissolves better. Yet no one thinks that newsprint manufacturers and newspaper publishers, distributors, or retailers "cause" littering by selling a product that people believe—rightly or wrongly—won't cause much lasting harm if improperly discarded. That intuition makes sense. No matter how much a product may seem like it could be littered without serious consequence, it is still both littering and *the litterer's choice* whether to litter, not the manufacturer's or distributor's choice. For that reason, the City has not plausibly alleged that Defendants "caused" littering in violation of state and local law, even if Defendants allegedly knew that some consumers believe that cigarette filters will deteriorate in the environment.

Finally, to the extent that there is any doubt on these questions, the rule of lenity resolves it in Defendants' favor. All of the littering laws in Counts I through V are enforced through criminal penalties. And basic principles of criminal law sharply limit the extent to which one party may be held liable for acts committed by another. For example, "the acts of one co-conspirator [may] be regarded as acts of the other co-conspirators" only if they in fact conspired and the acts in question were "in furtherance of the conspiracy." *Windesheim v. Larocca*, 443 Md. 312, 349 (2015). And someone may be held liable for another's misdemeanor only if he or she "'encourage[d], incite[d], approve[d] of, or in some manner afford[ed] aid or consent to the act,'" such as by "pointing out potential victims." *Connally v. State*, 2017 WL 5565286, at *2, *8 (Md. Ct. Spec. App. Nov. 20, 2017) (quoting *Roddy v. Finnegan*, 43 Md. 490, 504 (1876)). "[T]ort standards of foreseeability have no place in criminal complicity law," *Sheppard v. State*, 312 Md. 118, 123 n.3 (1988), *abrogated in part on other grounds by State v. Hawkins*, 326 Md. 270 (1992), and the City's attempt to hold Defendants liable because others sometimes litter must thus be rejected. Defendants' interpretation is compelled by the rule of lenity. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (lenity applies even in civil cases where the statute "has both criminal and noncriminal applications"); *Gardner*, 344 Md. at 652 (looking to federal precedent when applying the rule of lenity).[1]

[1] The City's ordinance-based claims suffer other flaws as well. For instance, Subtitle 6 of the Health Code expressly excludes "litter" (as defined in Subtitle 7) from the scope of its prohibitions, while § 7-702 of Subtitle 7 *only* prohibits "littering." *See* Baltimore City Health Code §§ 7-601, 7-702. For that reason, the City can pursue Counts II through IV (for violations of Subtitle 6) or Count V (for violations of Subtitle 7), but not both.

Insofar as the City seems to claim that cigarette butts are not "litter" under § 7-701(3) but rather "waste" covered by Subtitle 6—because they are supposedly "toxic, noxious, or otherwise a threat to the public health or safety"—that only highlights how ridiculous the City's position is. Under § 7-617(a), "any vehicle used for or in connection with disposing waste … in violation of this subtitle is subject to seizure and forfeiture," so the City could take the cars of anyone who tosses a cigarette butt out the window. Similarly, § 7-608 generally prohibits dumping waste materials "except for litter, as defined in Subtitle 7" "into any public trash receptacle," so the City may also criminally prosecute those who throw cigarette butts into trashcans.

B. The City Cannot Satisfy the Causal Elements of Its Regular Tort Claims (Counts VI, VII, VIII, X, and XI)

The City has also failed to plead proximate causation, an essential element of its tort claims (Counts VI, VII, VIII, X, and XI). Courts have consistently held that manufacturers cannot be liable for harm third parties cause by illegally misusing products. The injuries that the City claims are just that: the result of littering by third parties, not Defendants. *See* Compl. ¶¶ 1–6; Mot. 27–29 (citing cases).

Against this, the City first protests that it seeks damages, not a change in Defendants' behavior. Opp. 31. The causal inquiry is the same whether the endgame is damages or something else; the City must prove Defendants *caused* the injury for which it seeks damages. And the City's assertion is, in any event, false. The Complaint seeks an injunction to "abate[]" the harm, Compl. ¶ 171(e), punitive damages to "deter Defendants from ever committing the same or similar acts in Baltimore City," *id.* ¶ 171(d), and compensatory damages on a theory that would, if successful, radically change the economics of the cigarette business and necessitate a change in manufacturing and sales practices, *id.* ¶ 171(a).[2]

The City next argues that littering by third parties is foreseeable, and foreseeability establishes proximate causation. Opp. 32–33. But that is simply not true where a third party's intentional misconduct is the immediate cause of injury. That's what the court held in *Modisette v. Apple Inc*, 30 Cal. App. 5th 136 (2018). The *driver's* "willing[]" decision to use FaceTime proximately caused the crash in question; *Apple's* failure to lock drivers out of FaceTime was just a but-for cause, and not sufficient for liability, even though everyone knows it is "foreseeable" that

[2] Federal law preempts the City from directly or indirectly mandating those changes. *See infra* at 32–36.

some drivers will look at their iPhones while driving. *Id.* at 154.[3] So too in *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009). Pfizer's sale of cold medication that contained pseudoephedrine "create[d] a condition that ma[de] the eventual harm possible," but the criminal enterprise responsible for manufacturing methamphetamine, not Pfizer, was still the proximate cause of the meth epidemic. *Id.* at 668–69 (quoting *Young v. Bryco Arms*, 821 N.E.2d 1078, 1091 (Ill. 2004)). As Justice Scalia memorably put it, "'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith" for the resulting invasion. *Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment).

Remarkably, the City argues that foreseeability was lacking in these cases. Opp. 35. Not true. Indeed, in *Modisette*, Apple had *sought a patent* to disable its phones from performing certain functions while users were driving because it recognized the (obvious) risks. *See* 30 Cal. App. 5th at 140–41. In *Ashley County*, the plaintiffs alleged—and the Eighth Circuit accepted as true—that the defendants knew that their products "were being purchased and used illegally to make methamphetamine." 552 F.3d at 669. The court even accepted an allegation that the defendants "marketed the products to the methamphetamine cooks by placing the word 'pseudoephedrine' prominently on the packaging." *Id.* at 671 n.5. There was still no proximate cause.[4]

[3] For reasons related to its holding on causation—namely, that "[i]t was [the careless driver's] conduct of utilizing FaceTime while driving at highway speed that directly placed the Modisettes in danger"—*Modisette* also holds that "Apple owed no duty of care to the Modisettes to design the iPhone 6 Plus with lockout technology." 30 Cal. App. 5th at 147, 152. The same is true here. The reasons proximate causation is lacking are also reasons why Defendants owed Baltimore no duty. *See infra* at 20–21.

[4] The City also says that *Modisette* implies causation is for the trier of fact and should not be resolved on a motion to dismiss. Opp. 34 n.11. Again, not true. The case was decided on California's equivalent of a motion to dismiss, and the court explained that "the scope of Apple's liability is [a] question of law." *Modisette*, 30 Cal. App. 5th at 155. Maryland law is no different. "It is elementary tort law that a motion to dismiss a negligence claim should be granted if the plaintiff cannot establish that the injury alleged was proximately caused by the negligent act." *Keller-Bee v. State*, 448 Md. 300, 310 (2016).

Unable to distinguish Defendants' authorities, the City would have this Court rely instead on *Moran v. Faberge, Inc.*, 273 Md. 538 (1975), which is irrelevant. Opp. 35–36. The question in *Moran* was whether a manufacturer of a perfume highly combustible at room temperature was obliged to warn of the risk of a dangerous conflagration if the perfume was exposed to fire. *See id.* at 541–42. As the City says, the Court thought it enough that the generic risk of conflagration was foreseeable; it did not matter that the specific causal chain that led to the injury in that case (an attempt to scent a lit candle by dousing it with perfume) was difficult to anticipate. *See id.* at 551–52; Opp. 35. But *Moran* did not involve any intentional third-party misconduct; the young woman who poured perfume on the candle was perhaps negligent, but she did not commit an intentional tort, let alone a crime. *See* 273 Md. at 554. *Modisette* and *Ashley County*, not *Moran*, govern that scenario, and they make clear that Defendants are not liable for the actions of those third parties who litter here.

The City tries to avoid this break in the causal chain by asserting that the question of whether one cause supersedes another also hinges on foreseeability. Opp. 33. Again, this is wrong. The Maryland Supreme Court has adopted what it calls an "'enhanced risk' theory" for determining whether "third party criminal activity [is] the superseding cause of the injury." *Scott v. Watson*, 278 Md. 160, 172 (1976). A breach of duty by a defendant in the face of third-party misconduct can result in liability "*only* if the breach enhanced the likelihood of the particular criminal activity which occurred." *Id*. at 173 (emphasis added). For example, a landlord who has failed to provide adequate lighting and locks in a vestibule may be liable following a criminal assault there because those conspicuous deficiencies enhance the risk that a criminal assailant will act. *See id.* at 172–73.

The "enhanced risk" doctrine has nothing to do with this case. As the City insists, littering is an intentional criminal act; the litterer chooses to litter. But Defendants' alleged breach—manufacturing and selling cigarettes containing allegedly nonbiodegradable and even toxic filters, Compl. ¶¶ 107, 123, 148, 162—does not "enhance" the risk that smokers will litter; a smoker is just as likely to litter whether the cigarette in her hand contains a biodegradable filter, a nonbiodegradable one, or no filter at all.

To be sure, the City at times makes the implausible suggestion that cigarette butts are littered in part because the paper-like appearance of cigarette filters hides "their true plastic nature" and misleads smokers into thinking their butts will quickly decompose. Opp. 21–22. But when it comes to proximate causation, the City makes its stand entirely on foreseeability; it does not propose that the appearance of filters "enhances" the risk of littering in a way that keeps third-party smokers who choose to litter from breaking the causal chain. *See id.* 34.

This is unsurprising. The Complaint itself alleges, again and again, that the defect here is that filters are nonbiodegradable; it mentions their paper-like appearance just once, in connection with the duty to warn. *See* Compl. ¶ 33. There are reasons for the Complaint's reticence. For one, it is wildly speculative—indeed, counterintuitive, given the ubiquitousness of plastic waste—to think that a substantial number of Baltimoreans are willing to break the law when it comes to littering apparently biodegradable objects, but scrupulously obey City ordinances when it comes to more durable refuse. Moreover, if the City's theory were that Defendants violated tort duties by failing to make the "true plastic nature" of their filters more apparent, the available relief would be limited to the costs associated with the (surely small) fraction of cigarette butts that were littered by these semi-conscientious smokers who would have taken greater care in disposing of something that looked like plastic.

Finally, even crediting the City's speculations, Defendants did not take any affirmative step to *enhance* risk, like refusing to maintain standard lighting and locks in a shared common area. Instead, they simply declined to make cigarette filters more "plastic" by altering the long-accepted design of a cigarette as a roll of tobacco wrapped in paper. *Cf.* 26 U.S.C. § 5702(b)(1) (defining a cigarette in part as "any roll of tobacco wrapped in paper or in any substance not containing tobacco"). Importantly, the City never alleges that Defendants *chose* their traditional method of filter construction to trick people into thinking they dissolve quickly. *See* Compl. ¶ 33.

C. The City Cannot Satisfy the Causal Element of Trespass (Count VI)

In addition to ordinary proximate cause, the City's Trespass claim (Count VI) requires the defendant, by its own "physical act or force," to "enter[] or caus[e] something to enter" the plaintiff's land. Mot. 30 (quoting *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013), and *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 401 (2021)). In trespassing, the defendant must determine "where and how" to make the unauthorized entry. Mot. 31 (quoting *CDS Family Trust v. Martin*, 2020 WL 7319269, at *6 (D. Md. Dec. 10, 2020)). The City's Trespass claim fails these requirements.

The City asserts—without authority (or really even argument)—that Defendants "caused something harmful or noxious to enter onto its land" by manufacturing and distributing cigarettes with the knowledge that some of them would end up as litter in diverse parts of Baltimore and by creating the misleading appearance that cigarette butts are just paper and cotton. Opp. 38. This does not come close to establishing that Defendants determined "where and how" to litter cigarette butts on the City's land and then provided the "physical act or force" to make it happen. Third parties—smokers—did those things. To attribute smokers' conduct to Defendants would require something like an agency relationship, and that is undeniably lacking here.

The City relies instead on *Mayor of Baltimore v. Monsanto Co.*, 2020 WL 1529014 (D. Md. Mar. 31, 2020), which allowed a trespass claim based on Monsanto's sale of PCBs to proceed past a motion to dismiss. Opp. 38–39. But in that case, the City sought to hold Monsanto liable for the dissemination of chemicals into the environment "[t]hrough abrasion and leaching" from Monsanto's own products, like industrial equipment and "caulks, paints, and sealants." 2020 WL 1529014, at *2. No intentional misconduct by third parties—indeed, no third-party conduct at all—necessarily intervened between Monsanto's manufacturing and the alleged trespass, other than consumers' use of Monsanto's products as intended. *Monsanto* is thus light years away from this case.[5]

D. The City Cannot Satisfy Causal Elements of Its Public Nuisance Claim Because It Cannot Allege the Requisite Control or Contribution by Defendants

Like the trespass claim, the City's nuisance claim (Count IX) fails for its own causation-related reasons. As a preliminary matter, courts have long refused to treat the downstream harms traceable to lawful products (let alone to the misuse of lawful products) as a public nuisance. This is the position of the Supreme Courts of Illinois (guns), Oklahoma (prescription opioids), and Rhode Island (lead paint), of the U.S. Court of Appeals for the Eighth Circuit (asbestos), and of the framers of the Third Restatement of Torts. All agree that holding product manufacturers and distributors liable on a public-nuisance theory would open up the prospect of limitless liability—as the City's novel lawsuit itself demonstrates. Mot. 39–43.

The City does not address a single one of the authorities cited in Defendants' motion. Nor does it cite any contrary authority. Instead, the City simply makes the unsupported assertion that

[5] *Monsanto* is also wrong. The district court rejected Monsanto's argument that it did not control PCBs when they entered the City's property because the City was "proceeding in its *parens patriae* capacity." 2020 WL 1529014, at *12. But the district court ignored the relevant question: what the *defendants* in that case did to cause a trespass. The nature of the City's claim was beside the point.

Defendants have misled smokers into thinking the environmental costs of throwing a cigarette butt to the ground are low and that this somehow constitutes "unreasonable interference" with a public right. Opp. 52. That is deficient, and the City's nuisance claim must be dismissed.

Even if there could be liability for the misuse of a legal product, the claim still fails because the City does not allege that Defendants controlled the instrumentality of the nuisance at the time it allegedly became a nuisance. Just as a landlord "is not liable for [a] nuisance caused solely by [its] lessee" because it "does not have the ability to do anything to abate the nuisance," *Parklawn, Inc. v. Nee*, 243 Md. 249, 253 (1966), Defendants are not liable for any nuisance caused by littering because they don't have the ability to stop smokers from improperly disposing of cigarette butts. *See* Mot. 43–44.

The City first insists that control is irrelevant, asserting that "a defendant … may be held liable even though he (or it) no longer has control over the nuisance-causing instrumentality" if it "created or substantially participated in the creation of the nuisance." Opp. 53 (quoting *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 468 (D. Md. 2019)). The City's own quote shows that it is missing Defendants' point. To be sure, if a defendant *creates* a nuisance, it cannot absolve itself from liability by handing off control to someone else. That is why, for example, an independent contractor may be held liable if its finished "work is inherently dangerous and constitutes a public nuisance," even though it does not actually own the property in question and so cannot remove or alter it. *E. Coast Freight Lines v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 187 Md. 385, 397 (1946).

That does not mean, however, that one whose product, when used properly, does not create a nuisance can be held liable after *someone else*'s actions have allegedly made its product a nuisance. Courts have long rejected that expansive theory of liability. *See, e.g.*, *Tioga Pub. Sch.*

Dist. No. 15 of Williams Cnty. v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993) (no nuisance liability for selling products like asbestos that "later" are "alleged to constitute a nuisance"); *Cofield v. Lead Indus. Ass'n, Inc.*, 2000 WL 34292681, at *7 (D. Md. Aug. 17, 2000) (rejecting nuisance claims against trade associations and corporations that processed, marketed, and promoted lead paint for lack of control). But that is exactly the kind of theory that the City relies upon here. It does not suggest that cigarette filters cause environmental harms when at Defendants' factories or on Defendants' trucks, or even when used and discarded as intended. Instead, it asserts that they *become* a nuisance when smokers choose to break the law and litter them. Because Defendants lack control over cigarettes at that key moment, they cannot be held liable.

Exxon is not to the contrary. There, the State alleged that the defendants "deceptively promoted MTBE" despite knowing that it was "inevitable" that MTBE would leak given its delivery and storage processes. 406 F. Supp. 3d at 462, 469. That is a far cry from the City's allegations here. It points to no statement in which Defendants somehow "deceptively promoted" non-biodegradable cigarette filters as being biodegradable. Moreover, the improper disposal of those filters is not "inevitable," but turns on the independent decisions of City residents to violate the littering laws. And to the extent that *Exxon* suggests otherwise, it misread Maryland law and should not be followed.

Alternatively, the City asserts it has "satisf[ied]" any control requirement because it alleges Defendants sold filters they knew were "hazardous," "knew would be littered," and yet "concealed those hazards." Opp. 54. The City has not actually pleaded any facts suggesting that Defendants "concealed" environmental hazards; it has alleged only that Defendants knew that cigarettes "appear" to be biodegradable yet failed to disabuse consumers of that notion. Compl. ¶ 33. This is not enough. The plaintiffs in *Cofield* alleged that the defendants "marketed and advertised paint

containing lead pigment for use in locations and environments routinely occupied by children," and the court still dismissed the nuisance claims for lack of control. 2000 WL 34292681, at *1. This Court should do the same on the City's weaker allegations.

Finally, the City admits that it must at least allege that Defendants substantially "contributed" to the creation of the nuisance. Opp. 50. It cannot meet even that standard. Defendants manufactured and distributed cigarettes. But that is not a nuisance. Again, even on the City's theory, cigarettes coming off the assembly line or delivery truck do not impact the environment. If there was a nuisance, it came about when smokers littered, and Defendants had no part in that. *See* Mot. 38–39.

The City argues that *Exxon Mobil* and *Monsanto* support its basic refrain: Defendants contributed substantially to the nuisance by selling cigarettes they "knew to be hazardous" and concealing those hazards. Opp. 50. But those cases, again, are distinguishable. It is one thing to suggest that a manufacturer is liable when its inherently hazardous chemical inevitably ends up in the environment "through abrasion and leaching"; in such circumstances, the manufacturer might arguably be said to be the author of the nuisance. *Monsanto*, 2020 WL 1529014, at *2; *see Exxon Mobil*, 406 F. Supp. 3d at 469 (finding potential liability where manufacturer "intentionally and deceptively promoted" the chemical while knowing it "would be placed into leaking gasoline storage and delivery systems"). Here, the smokers and their decision to litter stand between Defendants and whatever injury was visited upon the City. They are the true creators of that injury.

II. THE CITY'S CLAIMS FAIL FOR INDEPENDENT SUBSTANTIVE REASONS

A. The City Cannot Pursue Criminal Remedies in this Civil Case (Counts I–V)

The City cannot seek penalties for alleged violations of § 10-110 of Maryland's Criminal Law (Count I) through this civil action. The City is certainly correct that the statute authorizes "an *enforcement* unit, officer, or official of … a political subdivision of the State" to "*enforce*

compliance with this section." Md. Code, Criminal Law, § 10-110(g) (emphasis added); *see* Opp. 17. But that section authorizes City law enforcement personnel to "enforce" § 10-110: make arrests, issue citations, and the like. It does not suggest that the City Solicitor—let alone retained counsel likely paid on a contingency basis—may recover criminal penalties through civil litigation. *Cf.* Md. Code, Public Safety, § 3-201(d)(1) (defining "Law enforcement agency" as "a governmental police force, sheriff's office, or security force or law enforcement organization of … a municipal corporation that … is authorized to enforce the general criminal laws of the State"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (due process likely forbids even civil penalty actions brought by those who "stand[] to profit economically from vigorous enforcement"). The City also correctly notes that the statute empowers it to "prohibit littering" and "classify littering as a municipal infraction under Title 6 of the Local Government Article." Md. Code, Criminal Law, § 10-110(j); Opp. 17. But Count I seeks to enforce § 10-110 *itself*, not a municipal ordinance authorized by it, and so § 10-110(j)'s grant of lawmaking authority is irrelevant.

Putting this aside, the City's Complaint is an improper vehicle through which to invoke § 10-110's criminal penalties, as Maryland's rules governing criminal procedure make clear. Under those rules, "[a]n offense shall be tried only on a charging document." Rule 4-201(a). The rules then specify what that charging document must look like. "In the circuit court, an offense may be tried (1) on an indictment"; "(2) on an information if the offense" or defendant meet certain criteria; or "(3) on a charging document filed in the District Court for an offense within its jurisdiction if the defendant is entitled to and demands a jury trial or appeals from the judgment of the District Court." Rule 4-201(c). Here, of course, the City has not filed an indictment or an information, nor does it seek to proceed on a "charging document filed in the District Court."

The City now makes the remarkable claim that its Complaint *is* a charging document. *See* Opp. 20. But the Complaint is facially defective toward that end. Among other flaws, it does not describe "with reasonable particularity[] the time and place the offense occurred" under Rule 4-202(a); it does not notify Defendants of their rights as required by that same rule; it is not "signed by the peace officer or judicial officer who issue[d] it," Rule 4-202(b)(1)(A); and it "contain[s] charges against more than one defendant," in violation of Rule 4-203(b). The City cites no provision suggesting that it may disregard these protections when seeking criminal penalties under § 10-110. Indeed, the only provision about charging documents that it *does* cite—Md. Code, Criminal Procedure, § 4-107—has no relevance here. *See* Opp. 20. That section covers "charging document[s] for the violation of an ordinance of a municipal corporation, a county, or a special taxing area," not violations of state law. § 4-107(a). Even then, it requires that the charging document "conform[] to the law governing the framing of charging documents for a violation of an act of the General Assembly." § 4-107(b)(2). For the reasons above, the City's Complaint plainly does not conform to the law governing the framing of charging documents.

The City's attempt to enforce its own criminal ordinances through this civil litigation fares no better. As the City points out, § 7-631 of the Health Code provides that §§ 7-606, 7-607, 7-608, and 7-609 (Counts II through IV) "may be enforced by issuance of: (1) an environmental citation under City Code Article 1, Subtitle 40," by "(2) a civil citation under City Code Article 1, Subtitle 41," or by "any other civil or criminal remedy or enforcement procedure." *See* Opp. 18. Similar enforcement pathways exist under § 7-705 for violations of § 7-702. *See* Opp. 19. But the City has not issued environmental or civil citations to Defendants for their alleged violations, and other pathways must be "*authorized by law*." Health Code §§ 7-631; 7-705 (emphasis added).

The City seeks refuge in the "authorized by law" pathway, first pointing to Baltimore City Code §§ 40-13 and 41-2. Opp. 19. But on the City's own account, those provisions simply "provide that the issuance and enforcement of a civil citation under this subtitle does not preclude pursuit" of other remedies "authorized by law"; they do not themselves create those remedies. The City then points back to § 4-107 of the Code of Criminal Procedure. Far from "align[ing]" with § 4-107's requirements, the Complaint comes nowhere near satisfying them. Opp. 20. As just recounted, it does not "conform[] to the law governing the framing of charging documents for a violation of an act of the General Assembly." § 4-107(b)(2). Indeed, it does not even "conclude[] with the words 'against the peace, government, and dignity of the State'" as demanded by § 4-107(b)(3), notwithstanding the City's bald (and false) assertion that it contains that "traditional proclamation." Opp. 20.

Finally, the City resorts to bromides about this Court's "general jurisdiction," its ability to "handle the complexities of cases that encompass both civil liabilities and criminal penalties," and its power to "sever matters for trial" and "instruct the jury on the respective burdens of proof." *Id.* 19–21. Even assuming this Court has *jurisdiction* over the City's criminal claims, that is beside the point.[6] To protect criminal defendants and their fundamental statutory and constitutional rights, Maryland law specifies in detail how criminal proceedings must begin and how they must be conducted. The City's proposed alternative—that the Court make things up as it goes along, treating an obviously civil complaint as a charging document, relying on supervisory powers to craft hybrid rules, and instructing *the same jury* with different standards of proof—violates

[6] That is not clear. District courts generally have "exclusive original jurisdiction" over cases involving the "[c]ommission of a common-law or statutory misdemeanor regardless of the amount of money or value of the property involved." Md. Code, Courts & Jud. Proceedings, § 4-301(b)(1). While circuit courts have "concurrent" jurisdiction when the penalty in question "may be … a fine of $2,500 or more," *id.* § 4-302(d)(1)(i), Count I's alleged violations of state law are the only ones that trigger that threshold. As explained above, however, the City has no statutory authority to bring those claims through its Complaint here.

Maryland law. That is perhaps why the City cannot cite a single case—not one—where it proceeded in this fashion. Counts I through V must be dismissed.

B. The City's Trespass Claim Fails for Lack of Exclusive Possession (Count VI)

To recover for trespass, the City must exclusively possess the property in question. But the City does not exclusively possess property open to others, so it cannot state claims as to the streets, sidewalks, beaches, parks, lawns, and waterways that are the principal concern of its Complaint. Mot. 32–33.

In response, the City admits it cannot pursue trespass for "certain categories of property [that] are not City property," Opp. 40, so the Complaint's allegations about such property—private lawns and the like—must be ignored. As to the rest, the City claims that trespass requires a mere "possessory interest" and not exclusive possession. This, however, is contrary to Maryland law, as Judge Hollander demonstrates in *Exxon Mobil*, 406 F. Supp. 3d at 469–70 (collecting cases). It is even contrary to the City's own favorite case. *Monsanto*, 2020 WL 1529014, at *11 (citing precedent holding that "the State plausibly alleged a claim for trespass to the extent it is based on properties within its *exclusive* possession" (emphasis added)).

The law is also clear that the City of Baltimore does not exclusively possess most of the property mentioned in its Complaint. Citing *Monsanto*, the City argues otherwise with respect to just one category of property—"its water bodies." Opp. 40. But *Monsanto* (citing *Exxon*, 406 F. Supp. 3d at 470) concedes that no claim can plausibly be alleged "based on properties outside of [the City's] exclusive possession—*i.e.*, *its natural waters* and the properties of its citizens." 2020 WL 1529014, at *11 (emphasis added).[7] Indeed, far from holding that the City may proceed in

[7] In *Monsanto*, Judge Bennett appears to suggest that *Exxon* treats a governmental body as having exclusive possession of property so long as it proceeds in *parens patriae*. *See* 2020 WL 1529014, at *11–12. That is the opposite of what Judge Hollander said: "there is no support … under Maryland law" for the position that "proceeding in *parens patriae* give[s] the State 'exclusive possession' of contaminated properties within its borders." *Exxon*, 406 F. Supp. 3d at 470.

trespass for infringements on its "water bodies," *Monsanto* says only that the City has exclusive possession of its "public water systems, which the City operates and maintains for the public welfare." *Id.* at *12. So while the City might satisfy this element of trespass law with respect to a small sliver of its claims—perhaps harms to its "storm and sewer systems," Compl. ¶ 28—it cannot do so with respect to the vast majority of properties identified in its Complaint.

C. The City's Design Defect Claims Fail (Counts VII and VIII)

The City's design-defect claims fail because the City cannot plausibly allege (1) physical harm to the ultimate user, (2) that cigarettes with nonbiodegradable filters (or filters that appear biodegradable because wrapped in paper) are unreasonably dangerous, or (3) that Defendants owe the City a duty to protect it from the risk that third parties might choose to litter. *See* Mot. 34–35.

The City argues that it need not allege a "physical harm" but instead may recover for economic loss under "the public safety exception." Opp. 43. That exception, however, applies only when economic losses are "coupled with a *serious* risk of death or personal injury resulting from a dangerous condition"; in that circumstance, the law will "allow recovery in tort to encourage correction of the dangerous condition." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 534–35 (1995) (emphasis in original). The City does not allege that the littering of cigarette butts poses a serious risk of death or personal injury *to anyone*, let alone to the smokers who purchase Defendants' products and choose to litter. Quite the contrary—it insists its suit "does not address any connection between smoking and illness (or, more pointedly, death)," but rather "concerns purely the impact of cigarettes on the environment and City finances." Opp. 14. While the City tries to have it both ways—frequently alleging that cigarette filters are "toxic" because they trap constituents present in the passing cigarette smoke—it does not ever claim that the minute

quantities of cigarette smoke constituents trapped in filters pose a *serious* risk of death or injury, and therefore cannot avail itself of the public-safety exception.[8]

The City, citing "the responsibility each of us bears to exercise due care to avoid unreasonable risks of harms to others," argues that Defendants owed it a duty to prevent harms caused by third-party littering on its property. Opp. 44 (quoting *Moran*, 273 Md. at 543–44); *see id.* 42–44. That is a fine statement of a very general principle, but it has nothing to do with this case. Governing Maryland law provides that "[w]hen the harm is caused by a third party, rather than the first person": "there is no duty to control a third person's conduct so as to prevent personal harm to another, unless a 'special relationship' exists either between the actor and the third person or between the actor and the person injured." *Warr v. JMGM Grp., LLC*, 433 Md. 170, 183 (quoting *Remsburg v. Montgomery*, 376 Md. 568, 583 (2003)).

By virtue of this rule, a police officer does not owe the public any duty to detain a drunkard found behind the wheel of a parked car, *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 619–20, 630 (1986); an employer does not owe "the general motoring public" any duty to avoid so fatiguing his employees as to render them incapable of driving home safely from the office, *Barclay v. Briscoe*, 427 Md. 270, 292, 306–07 (2012)); and a bar owner does not owe "members of the general public" any civil duty to refrain from serving visibly intoxicated patrons, *Warr*, 433 Md. at 199. That is because "[h]uman beings, drunk or sober, are responsible for their own torts." *Id.* at 190 (quoting *State v. Hatfield*, 197 Md. 249, 254 (1951)). Importantly, this rule applies even when the third party's misconduct is foreseeable. "'[F]oreseeability must not be confused with 'duty.' The

[8] Here again, *Monsanto* is not to the contrary. While probably wrong on this legal point, it involved PCBs, which allegedly cause cancer and a whole host of other serious health problems if leached into the land or water. *See* 2020 WL 1529014, at *7.

fact that a result may be foreseeable does not by itself impose a duty in negligence terms." *Ashburn*, 306 Md. at 628.

Just as in those cases, here the City does not allege, and cannot allege, that Defendants enjoy any "special relationship" with smokers or with the City that would require Defendants to take steps to prevent smokers from littering. *See* RESTATEMENT (SECOND) OF TORTS §§ 315–20 (stating general principle and listing special relationships that can give rise to a duty, such as parent-child and principal-agent). Smokers are responsible for their own torts, whether the cigarette butts they litter have cellulose acetate filters, conspicuously plastic filters, or no filters at all.

D. The City's Failure to Warn Claims Fail (Counts X and XI)

The City's failure-to-warn claims fail because the City has not plausibly alleged that Defendants owe it a duty to warn of the allegedly severe environmental risks that attend foreseeable littering. Maryland's high court has "resisted the establishment of duties of care to indeterminate classes of people." *Gourdine v. Crews*, 405 Md. 722, 749 (2008) (quoting *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 420 (2005)). A duty owed to all those *someone else* might happen to injure—especially when that "injury" comes in the form of litter that happens to end up on a third party's property—is just such a boundless duty. Without some "special relationship" between the defendant and the third party or the injured party, Maryland courts will not recognize such duties. *Id.* at 746 (quoting *Ashburn*, 306 Md. at 628). Defendants have no special relationships with littering smokers or the City, and therefore owe no duty to warn. Mot. 35–37.

The City tries to distinguish *Gourdine* on the ground that it involved a duty that would have been owed to an indeterminate class, while the duty posited here would be owed only to municipalities. *See* Opp. 47–48. This is wrong. The duty the City posits here is just as broad as

the duty discussed in *Gourdine*. There, a pharmaceutical company would have owed a duty to everyone with whom consumers of its product might have come into contact while driving—"[e]ssentially … a duty to the world." 405 Md. at 750. Here, Defendants would owe a duty to everyone upon whose property cigarette butts might be discarded—effectively, the whole world, or at least the whole property-owning world.

Indeed, the Maryland Supreme Court has already rejected similar gambits to limit a duty to an arbitrary class of beneficiaries. In *Doe v. Pharmacia & Upjohn & Co.*, 388 Md. 407 (2005), Pharmacia's laboratory technician became infected with HIV while working there. He infected his wife, who then filed suit and alleged Pharmacia owed her—and other spouses (but only spouses) of employees—a duty. The Court of Appeals rejected this arbitrary distinction because the stated rationale for the duty would apply to *all* sexual partners of employees, not just spouses. *Id.* at 421. There is likewise no reason why the duty the City describes should be owed only to municipalities. (And even if it were, that would be cold comfort; there are thousands upon thousands of municipalities in the United States.)

The City again attempts to rely on *Exxon* and its holding that Exxon was obliged to warn Maryland of the hazards of MTBE, a possibly carcinogenic chemical blended into its gasoline that, as a result of spills and leaks, found its way into "public water systems and private drinking-water wells in Maryland." 406 F. Supp. 3d at 434, 463. To the extent *Exxon* relies on the blunt proposition that the duty extends to "third persons whom the supplier should expect to be endangered" by the product's use, *id.* at 463, it is wrong. *Exxon* quotes *Georgia Pacific, LLC v. Farrar* for that proposition, but *Farrar* offers that language only to *reject* it as not "entirely correct." 432 Md. 523, 531 (2013). As noted, Maryland's approach requires more than foreseeability. In any event, *Exxon* is distinguishable. MTBE—a carcinogen hazardous to human health—"posed

unique, substantial harms to [the State's] resources" by threatening to poison the water supply. 406 F. Supp. 3d at 463. The City here, of course, *disclaims* any attempt to protect City residents against harm. Opp. 14.

E. The City's Public Nuisance Claim Fails (Count IX)

Nothing the City has alleged amounts to "interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1). A public right is one that is genuinely collective; it is not an individual right or even the individual rights of "a large number of persons" added together. *Id.* cmt. g. The economic injuries Baltimore claims plainly do not qualify, since the public has no collective right to a particular fiscal situation. Neither do the claimed injuries to public waterways and the like qualify as a public right, since the City has not alleged littering in waterways deprives members of the community of any right they enjoy in common. *See* Mot. 38–39.

The City does not deny that economic injuries fall short. It does not even deny that it has failed to allege impairment of a right common to all members of the public. Instead, it argues that it is too early in the case to expect such allegations, and that discovery will reveal the extent of the injuries in due course. Opp. 51–52. That is wrong. The "extent" of the injuries is not some incidental fact. An essential element of public nuisance is that a right common to the *whole* public be impaired. If a plaintiff cannot allege that, it cannot state a claim for public nuisance. The City cannot make the required allegation and therefore its claim fails.

III. EVEN IF THE CITY HAD STATED VIABLE SUBSTANTIVE CLAIMS, THEY ARE BARRED BY THE MASTER SETTLEMENT AGREEMENT, PREEMPTED, AND UNTIMELY

A. The City's Claims Are Barred by the Master Settlement Agreement

Through the Master Settlement Agreement ("MSA"), the State of Maryland settled its lawsuit against the major cigarette manufacturers in exchange for, among other things, the

manufacturers' agreement to make annual payments to Maryland in perpetuity and abide by certain marketing and advertising restrictions. *See* Mot. 22. As of April 2024, the manufacturers (including Defendants here) have paid nearly $3.6 billion to the State of Maryland under the MSA.[9]

In return, Maryland agreed to "absolutely and unconditionally release and forever discharge all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have." MSA § XII(a)(1). The City seeks to upend this agreement 25 years later by arguing that (1) it is not a Releasing Party and (2) its claims in this lawsuit are not Released Claims. The City is incorrect on both points.

1. The Attorney General Was Authorized to Bind the City, and Other Political Subdivisions of Maryland, as Releasing Parties

The City contends it is not a Releasing Party as defined in the MSA because the Attorney General of Maryland "had no authority to litigate on behalf of the City" against tobacco companies, and consequently, the City is not bound to the terms of the settlement agreement that resulted from that litigation. Opp. 27–28. The City is wrong.

To be precise, the City asks the wrong question. The relevant question is whether the Attorney General had the power to release the tort claims the City now asserts on behalf of the general public, not whether the Attorney General had the power to sue in the City's name. And the answer is that the Attorney General had the power to bring (and therefore settle) claims that concern *statewide* interests, which subsume the City's interests. *See* Md. Const. Art. V. § 3(a)(3); *State v. Burning Tree Club Inc.*, 301 Md. 9, 34 (1984) ("[The Attorney General's] duties include

[9] *See* Nat'l Ass'n of Att'ys Gen., *MSA Payment Information, Payments to States Since Inception Through April 18, 2024*, available at https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/msa-payment-information/.

prosecuting and defending cases on behalf of the State in order to promote and protect the State's policies, determinations, and rights."); *State of Md., Dep't of Nat. Res. v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066–67 (D. Md. 1972) (even in the absence of specific legislation, Maryland had standing to bring a common law nuisance claim because, in addition to the right to legislate, "the state also has the inherent power to protect the public welfare by bringing common law suits"). The Attorney General exercised that authority when he filed suit against tobacco companies, including Defendants, in 1996. *See, e.g.*, Consent Decree and Final Judgment, *State v. Philip Morris Inc.*, 1998 WL 35254679 (Md. Cir. Ct. Dec. 1, 1998) ("Plaintiff, the State of Maryland, commenced this action on May 1, 1996, by and through its Attorney General, J. Joseph Curran, Jr., pursuant to his common law powers and the provisions of state law."); *Philip Morris Inc. v. Glendening*, 349 Md. 660, 663 (Md. 1998) (Attorney General's lawsuit against tobacco companies was authorized by the Governor of Maryland).

In seeking to recover in tort, the City is asserting the public interest of its residents in being free of the alleged ill effects of littered cigarette butts. *See, e.g.*, Compl. ¶¶ 96, 110, 125, 140, 154, 167 (citing injuries to "the public interest," "public resources," and "public rights"). The Attorney General has the power to vindicate these interests on a statewide basis, including on behalf of the public of Baltimore City as well. As a corollary, the Attorney General had the power to settle the tort claims the City now brings. And he did so—doubly. The Attorney General released certain claims by Maryland's "subdivisions" "including municipalities" and also by "persons or entities acting in … any other capacity … whether or not any of them participate in this settlement … to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public." Mot. 24 (quoting MSA § II(pp)). The City is plainly a municipal subdivision of the State, but in bringing this suit is also an "entity [] seeking relief on behalf of or generally

applicable to the general public." As an official charged with litigating to vindicate the rights of the People of Maryland, the Attorney General was acting well within his authority when he moved to settle claims under these headings—in the process, securing a massive revenue stream that redounds to the City's benefit to the tune of millions of dollars a year. *See, e.g.*, Md. Dep't of Health, *Cigarette Restitution Fund Program—Fiscal Year 2021 Annual Report*.[10]

Applying the same reasoning, the Supreme Court of Michigan rejected a similar challenge to the authority of that state's attorney general to bind Michigan counties to the MSA: "The Attorney General of Michigan possesses the authority to represent the interests of the people of Michigan, and thus the Attorney General has the authority as part of this representation to represent the people of a county who are a part of these same people." *In re Certified Question from U.S. Dist. Ct. for E.D. Mich.*, 638 N.W.2d 409, 414 (Mich. 2002). Aware of this problem, the City tried to distinguish the Michigan case on the ground that the Attorney General of Maryland, unlike the Attorney General of Michigan, "possesses no common law powers." Opp. 27 (citing *Burning Tree Club*, 301 Md. at 33). But what matters is that the Attorney General has the power to sue in the statewide interest. It does not matter whether the source of the power is constitutional, statutory, or common law.

2. The MSA Released the City's Claims for Monetary Relief

The City separately contends that even if it is a Releasing Party, its claims in this lawsuit are not Released Claims. Here, too, the City is wrong.

[10] *See* https://dlslibrary.state.md.us/publications/Exec/MDH/SF7-317%28h%29%282%29_2021.pdf. According to the 2021 CRF Annual Report, local public health distributions in 2021 under the Cancer Prevention, Education, Screening and Treatment program totaled $9,993,472 (with $2,446,000 to Baltimore City). *Id.* at 3–4. Local public health distributions in 2021 under the Tobacco Use Prevention and Cessation Program totaled $3,877,227 (with $280,822 to Baltimore City). *Id.* at 4.

The City concedes that the MSA is subject to "ordinary principles of contract interpretation." Opp. 24. Likewise, "releases are contracts [that] are construed and applied according to the rules of contract law," and "[t]he cardinal rule of contract interpretation is to effectuate the intentions of the parties." *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 495–97 (2005). Giving the MSA its ordinary reading as a contract, the releases it contains are unambiguously broad and cover the tort claims in this case. With respect to past conduct, the MSA released civil claims "directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of [cigarettes], (B) the exposure to [cigarettes], or (C) research, statements, or warnings regarding [cigarettes]." MSA § II(nn)(1). With respect to post-MSA conduct, the MSA released monetary claims "directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to [cigarettes] manufactured in the ordinary course of business." *Id.* § II(nn)(2). This broad language plainly encompasses the City's claims. *See, e.g.*, *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 537 (1994) (referring to an agreement to arbitrate "[a]ny claim or controversy arising out of or relating to this Agreement or the breach thereof" as "a broad arbitration clause"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (noting that the meaning of the phrase "relating to" is "broad" and "expansive").

The City's contrary arguments fail.

First, the City says that these release provisions fail to specifically mention "claims for *environmental* damages that are caused by the *disposal of already used* tobacco products." Opp. 29. This argument, however, ignores the breadth of the MSA's language. The MSA does not release only claims directly for the use of tobacco products—it releases claims that are "based on" and "aris[e] out of or in [some] way relat[e], in whole or in part," to the "use, sale, distribution,

manufacture, development, advertising, [or] marketing" of cigarettes. Any harm caused by littered cigarette butts at the very least "arises out of" or "relates" to the "use, sale, distribution, manufacture, development, advertising, [or] marketing" of cigarettes. MSA § II(nn)(1). Indeed, in its Complaint, the City alleges that the Defendants should be held responsible *precisely because* they "manufactured," "sold," "marketed," and "distributed" cigarettes used by smokers in Baltimore. *See, e.g.*, Compl. ¶¶ 6, 10–15, 30–37. And the City repeatedly claims that its alleged injuries flow from the "use" of filtered cigarettes.[11] Under the text of the MSA, the City's tort claims for monetary relief are plainly within the scope of Released Claims.

Second, the City says future claims cannot be released. Opp. 29–30. But the parties to a settlement "are privileged to make their own agreement and thus designate the extent of the peace being purchased." *Bernstein v. Kapneck*, 290 Md. 452, 459 (1981). And the "peace being purchased" plainly may include the release of future claims or claims not yet accrued. *See Kaye v. Wilson-Gaskins*, 227 Md. App. 660, 685 (2016) (enforcing release of all "claims and demands … which may hereafter arise"); *Bernstein*, 290 Md. at 464 (enforcing release that expressly covered unknown injuries that might develop in the future). The cases cited by the City do not hold otherwise. *See* Opp. 30. *Spangler v. McQuitty* interpreted Maryland's Wrongful Death Statute and held that a decedent's release of one joint tortfeasor in a personal injury action did not preclude the decedent's beneficiaries from pursuing a wrongful death action against other tortfeasors who were not parties to the release. 449 Md. 33, 40 (2016). *In re Collins* considered,

[11] *See, e.g.*, Compl. ¶ 107 ("Throughout the time at issue, filtered cigarettes have not performed as safely as an ordinary consumer would expect them to, and have been unreasonably dangerous for their intended, foreseeable, and ordinary use, because the consequences of their use damages the environment and costs Baltimore City millions of dollars in cleanup costs."); *id.* ¶ 121 ("Defendants knew or should have known of the environmental and public health effects inherently caused by the normal use and operation of their filtered cigarettes …."); *id.* ¶ 122 (Defendants had duty to prevent harm that "resulted from the ordinary and/or foreseeable use of Defendants' products"); *id.* ¶ 147 (Defendants should have warned "of the reasonably foreseeable or knowable severe risks posed by the inevitable use and litter of their filtered cigarettes"); *id.* ¶ 148 (referring to "environmental consequences inherently caused by the normal use and operation of [Defendants'] filtered cigarettes"); *id.* ¶¶ 150, 152, 160, 162, 164–65 (similar).

in the context of the Maryland Workers' Compensation Act, whether employees have the power to release their dependents' future claims for death benefits. 468 Md. 672, 678–80 (2020). These cases address situations in which a party attempts to release a claim in which it has no interest; they are not relevant here.

3. If the City Is Permitted to Recover, the State Will Pay the Price

It is important to note that if the City were correct that it is not a "Releasing Party" under the MSA, and assuming Defendants are right that this case involves Released Claims, the bottom line would be that any sums the City recovers end up being deducted from the MSA payments to which the State is otherwise entitled. The MSA provides for cases in which "any person or entity enumerated in subsection II(pp), *without regard to the power of the Attorney General to release claims of such person or entity* … attempts to maintain a Released Claim against a Released Party." MSA § XII(b) (emphasis added).[12] If a release is denied because of "lack of authority to release such a claim," the Released Parties can claim an offset:

> Judgments (other than a default judgment) against a Released Party in such an action shall, upon payment of such judgment, give rise to an immediate and continuing offset against the full amount of such [Released Party's] share … of the applicable Settling State's Allocated Payment, until such time as the judgment is fully credited on a dollar for dollar basis.

Id. § XII(b)(2)(B); *see also id.* § XII(b)(2)(A) (setoff applicable in event of settlement or stipulated judgment). The City is unquestionably a "person or entity enumerated in subsection II(pp)"—it is a political subdivision in the form of a municipality. As a result, any recovery by the City with respect to the Released Claims would come out of the State of Maryland's pocket.[13]

[12] Defendants gave the Attorney General notice of the City's claims, as the MSA requires. *See* MSA § XII(b).

[13] The City's argument may require intervention by the State of Maryland as an interested party to this litigation.

B. Maryland Law Preempts the City's Claims

As the Maryland Supreme Court has recognized, "state law occupies the field of regulating the packaging and sale of tobacco products." *Altadis U.S.A., Inc. v. Prince George's Cnty.*, 431 Md. 307, 308 (2013). It follows that the City's claims here—which (at least) will prohibit the sale of traditional filtered cigarettes, and in fact seek to regulate cigarette manufacturing, *see infra* at 32–36—are also preempted. *See* Mot. 6–8.

The City first claims that its "lawsuit in no sense intrudes" on that field because Defendants remain "free to sell whatever cigarettes they wish," so long as they pay the City massive damages. Opp. 8. Elsewhere, however, the City appears to *concede* that its claims should be construed as requirements relating to the sale, distribution, or advertising and promotion of cigarettes, and so they fall squarely within the field of preempted municipal activity even as the City defines it. *See id.* 12 (addressing federal preemption). That makes sense. The City would impose vast liability for the sale of traditional filtered cigarette products indefinitely into in the future. *See, e.g.*, Compl. ¶¶ 56, 65, 73, 81, 89, 99, 114. If allowed, that result would ensure that no manufacturer would continue to sell those products, and would instead either make cigarettes more to the City's liking or stop selling them altogether. *See, e.g.*, *id.* ¶¶ 56, 65, 73, 81, 89, 99, 114. That is (at least) a preempted sales restriction.

The City also contends that there is no preemption here because Defendants have "pointed to *no* action by the Legislature in the field of environmental damage caused by tobacco products." Opp. 9. The Maryland Supreme Court has made clear, however, that field preemption does not turn on the existence of legislation covering the exact topic in question. For example, in *Allied Vending v. City of Bowie*, the General Assembly had "not addressed" "the particular aspect of the field sought to be regulated" by the cities' location-based ordinances, yet they were preempted. 332 Md. 279, 303 (1993). Instead, what matters is whether the General Assembly has asserted

itself throughout the general area. On that front, Maryland courts have already confirmed that "[f]or many years the General Assembly has exercised exclusive control over the sale of cigarettes," *id.* at 301, and that "state law occupies the field of regulating the packaging and sale of tobacco products," *Altadis*, 431 Md. at 308. That conclusion, too, makes sense; the State's detailed regulatory framework includes laws governing the sale, distribution, marketing, and taxation of cigarettes. *See, e.g.*, Md. Bus. Reg. §§ 16-201 through 16-309 (cigarette business and retail licensing); *id.* § 16-3a-01 *et seq.* (cigarette vending machines); *id.* § 16-401 through 16-508 (cigarette manufacturer Master Settlement Agreement requirements);[14] *id.* § 16-602 *et seq.* (fire sale cigarette requirements); Md. Tax. Code. § 12-101 *et seq.* (cigarette excise taxes). It would be absurd to think that this legislative activity occupies the field relating to the sale and distribution of cigarettes in Maryland—as *Allied Vending* and *Altadis* recognized—and yet conclude that the City of Baltimore is free to prohibit the manufacture and sale of traditional filtered cigarettes.

The City's cited cases are readily distinguishable. *Fogle v. H & G Restaurant*, 337 Md. 441, 463–64 (1995)—the one case that addresses cigarettes—considered local regulations pertaining to smoking at work, not the sale, distribution, or manufacture of cigarettes. It is one thing to say that Maryland municipalities may independently regulate whether and when employees can smoke on the job. It is quite another to say they may dictate the composition of cigarettes or prohibit the sale of traditional filtered ones, activity that would produce precisely the "chaos and confusion" against which the Maryland Supreme Court has warned. *Allied Vending*, 332 Md. at 300. With *Fogle* dispatched, all the other cases the City relies on pertain to completely

[14] Despite the City's disparagement of the MSA, Opp. 23–24, as a result of that agreement, Maryland has received payments of nearly $3.6 billion through April 2024. *See supra* at 24.

different regulatory frameworks that in no way show that the state does not occupy the field of tobacco product regulation. *See* Opp. 10. State law therefore impliedly preempts the City's claims.

C. Federal Law Preempts the City's Claims

1. The TCA Preempts the City's Claims

The TCA prohibits the City from "establish[ing] or continu[ing] in effect … any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards [or] premarket review." 21 U.S.C. § 387p(a)(2)(A). A "tobacco product standard" is defined to include "provisions respecting the … components of the tobacco product," *id*. § 387g(a)(4)(B)(1), and a cigarette's "components" are defined to "includ[e] the … filter," *id.* § 387g(a)(1)(A). It necessarily follows that the City's lawsuit—which seeks to change the filters used in cigarettes—is a preempted tobacco product standard. Mot. 8–12.

The City contends that even if its lawsuit would ban the sale of traditional cigarettes, sales bans do not qualify as "'tobacco product standard[s]' within the meaning of § 387p(a)(2)(A)." Opp. 12. If that were correct, it would confirm beyond doubt that the City's claims are preempted by state law. *See supra* at 30–32. But the City is wrong, because its lawsuit would not just ban the sale of such cigarettes as currently constructed. Instead, the City's Complaint makes plain that it seeks to force Defendants to change the design and manufacturing of cigarettes. For example, for its illegal dumping claim (Count I), the City would impose liability for "each . . . future statute violation until the violations cease," Compl. ¶ 56; for its municipal waste disposal claim (Count II), it would impose liability for conduct it alleges "will continue into the indeterminable future" and thus for "each … future statute violation until the violations cease," *id.* ¶ 65; for its design defect claim (Count VII), it alleges that cigarettes are "unsafe for the environment as designed" and seeks punitive damages to "deter each Defendant from ever committing the same or similar

acts," *id.* ¶¶ 99, 114. Indeed, the City itself admits that the only way to avoid this indefinite future liability is to change cigarette designs by switching to "unfiltered cigarettes," *id.* ¶ 139.e, or cigarettes with "biodegradable filters," *id.* ¶¶ 139.h, 142. That is a "tobacco product standard," not just a sales ban. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) (a ban on the sale of meat produced in certain ways was a preempted "operations" requirement because "[t]he idea—and the inevitable effect—of the provision [was] to make sure that slaughterhouses remove nonambulatory pigs from the production process").

The City's cited cases prove that such requirements are prohibited, notwithstanding the TCA's preservation and saving clauses. In *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, the Second Circuit held that even nominal sales bans fall within the preemption provision if they "infringe on the FDA's authority to determine *what chemicals and processes may be used in making tobacco products*." 708 F.3d 428, 434 (2d Cir. 2013) (emphasis added). That court made clear that a law that regulates manufacturing (as the City's claims would do here) would fall under the TCA's preemption clause. The Second Circuit explained:

> The line between regulating the sale of a finished product and establishing product standards will not always be easy to draw. Any finished product can be described in terms of its components or method of manufacture. "Flavored tobacco products" are no exception, and can arguably be described either [1] as a category of finished product or [2] as products that are manufactured with ingredients that impart a flavor.

Id. at 434–35 (emphasis added). There the Second Circuit upheld New York City's law, which allowed sales of flavored tobacco products in "tobacco bars" but not elsewhere, only because it fell within the first category: "Whether a product is governed by [New York City's law] depends on its characteristics as an end product, and not on whether it was manufactured in a particular way or with particular ingredients." *Id.* at 435. Here, in contrast, the City's claims expressly turn on how the product is manufactured and therefore fall within the Second Circuit's second,

preempted category. As a result, Baltimore's claims fall under the TCA's preemption clause, even if that clause is limited to "manufacturing restrictions."

Accordingly, because the City's claims would plainly dictate the composition of cigarettes, they are preempted. *See, e.g.*, *id.* at 434–35 (requirements that cigarettes be "manufactured in a particular way or with particular ingredients" are preempted); *CA Smoke & Vape Ass'n, Inc. v. Cnty. of Los Angeles*, 2020 WL 4390384, at *5 (C.D. Cal. June 9, 2020) (requirements that "direct manufacturers as to which ingredients they may or may not include"); *Indeps. Gas & Serv. Stations Ass'ns v. City of Chicago*, 112 F. Supp. 3d 749, 754 (N.D. Ill. 2015) (requirements that "function[] as a command to tobacco manufacturers to structure their operations in accordance with locally prescribed standards"). In other words, unlike laws that banned flavored tobacco product sales, the City's claims do not constitute "a sales ban directed at what end products are available to consumers," but rather are an impermissible "directive to manufacturers about what materials are permitted to make tobacco products." *Neighborhood Market Ass'n v. Cty. of San Diego*, 529 F. Supp. 3d 1123, 1133 (S.D. Cal. 2021).

The City additionally asserts that, in fact, its claims "do not seek to challenge, modify, or object to tobacco product standards regarding labeling, design, or marketing," but rather "challenge the product itself—namely the cigarette filters." Opp. 13 (quoting *Mayor & City Council of Baltimore v. Philip Morris USA, Inc.*, 2024 WL 229586, at *8 (D. Md. Jan. 19, 2024)).[15] But far from *helping* the City, that argument only confirms that its claims are preempted. Surely a lawsuit "challeng[ing] the product itself—namely the cigarette filters," seeks to impose a tobacco product standard that is prohibited by the TCA's preemption clause. Insofar as the City (and the

[15] In a footnote, the City argues Defendants may not challenge this dictum about the nature of the City's claims found in the federal district court decision remanding this case. Opp. 14 n.7. But a district court's "jurisdictional findings regarding complete preemption have no preclusive effect," and "any issues that the district court decided incident to remand may be relitigated in state court." *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993).

district court) mean to suggest that the City's claims cannot qualify as product standards because they seek to impose requirements via torts and code violations, they are mistaken. A lawsuit like this one constitutes a prescriptive local requirement no less than a city ordinance or other local law. *See*, *e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("[a]bsent other indication, reference to a State's 'requirements' [in a preemption provision] includes its common-law duties," such as those imposed by tort law); *see also* Mot. 11.

2. The TCA and the Labeling Act Preempt the City's Labeling Claims

Federal law also expressly preempts the City's failure to warn claims (Counts X and XI).

First, the TCA prohibits a local government from imposing any requirement that is different from, or in addition to, the requirements of the TCA with respect to tobacco product labeling. 21 U.S.C. § 387p(a)(2)(A); s*ee* Mot. 12. The City's only response is that the argument fails for the same reason the other arguments under the TCA fail. As just shown, those arguments do not fail. Indeed, were it otherwise, every city in the country could impose a different labeling requirement, which would lead to the very chaos the TCA is meant to avoid.

Second, the Labeling Act independently preempts the City's failure to warn claims. The City is prohibited from requiring a "statement relating to smoking and health … on any cigarette package," 15 U.S.C. § 1334(a), and from imposing such requirements in advertising and promotion of cigarettes, *id.* § 1334(b); *see* Mot. 12. The City contends that these provisions are limited to warnings pertaining to human "illness," Opp. 14, but the Labeling Act refers more broadly to "health." The Complaint alleges that the City seeks to protect "the *health and well-being* of Baltimore City's environment," and that the failure to warn claims address, among other things, soil and groundwater contamination, which have a potential impact on human health. Compl. ¶¶ 8, 148, 162 (emphasis added). And the City seeks damages regarding "loss of its environmental health." *Id.* ¶ 171.a.

Contrary to the City's argument, neither *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), nor *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), allow the City to enforce additional warning requirements. *Lorillard* addressed local laws regarding the "location and size of advertisements" rather than their content, and *Cipollone* held that the Labeling Act preempted the plaintiff's claims that cigarette "advertising or promotions should have included additional, or more clearly stated, warnings." *Lorillard*, 533 U.S. at 552; *Cipollone*, 505 U.S. at 517. The City notes that *Cipollone* allowed fraud claims to proceed, but the City does not plead a claim for fraud. Opp. 15. The Labeling Act preempts the City's claims.

3. Federal Law Impliedly Preempts the City's Claims

The City's claims also fail because they interfere with FDA's regulation of cigarettes in a number of ways, including by requiring design changes to cigarettes (on pain of never-ending liability) and by forcing cigarettes into a premarket review process from which Congress excepted them. *See* Mot. 14–15.

The City's two attempted answers to this argument fail. First, the City says its suit "does not seek to have a regulatory effect on cigarette manufacturers in a way that might countermand federal regulation." Opp. 15–16. But this relies on the fiction that Defendants could continue doing what they are doing even if the City's argument prevails. This ignores the economics of the business and overlooks that the City seeks equitable relief. *See supra* at 6. Second, the City says, without any elaboration, that implied preemption is at odds with express language in the TCA and Labeling Act. Opp. 16. But the TCA does not permit localities to impose product standards, and the only role of the Labeling Act in this case is to bar the failure to warn claims. *See supra* at 35–36

D. The City's Claims Are Barred by the Applicable Statutes of Limitations

Even if the City's claims survived all the hurdles discussed above, they are separately barred by the applicable statutes of limitations, the longest of which is three years. *See* Mot. 25–26 & n.13. By its own admissions, the City knew of the challenged conduct well before 2019, three years before the filing of the Complaint. *See* Compl. ¶¶ 5, 37, 41.

Start with the criminal claims under the Maryland Illegal Dumping and Litter Control Law and the Baltimore City Code, which are barred after one year. *See* Md. Cts. & Jud. Proc. § 5-107. The City ignores this issue entirely and offers an argument only as to its *tort* claims. *See* Opp. 31. Accordingly, the Court should bar Plaintiff's request for penalties and fines. *See, e.g.*, *Att'y Gen. of Md. v. Dickson*, 717 F. Supp. 1090, 1103–04 (D. Md. 1989) (finding governmental plaintiff in action for civil fines was not entitled to immunity from statute of limitations).

As to its other claims, the City conclusorily asserts that they are not time-barred because its suit exercises a "strictly governmental function"—"address[ing] the litter problem"—and so it is immune from limitations periods. Opp. 31. Maryland courts have held, however, that municipalities are *not* immune with respect to their "duty to maintain streets and highways in a reasonably safe condition," *Tadjer v. Montgomery Cnty.*, 300 Md. 539, 548 (1984) (citing *Godwin v. County Comm'rs*, 256 Md. 326, 335 (1970)), because trash removal has long been viewed as a partially proprietary rather than strictly governmental function. In *Consolidated Apartment House Co. v. City of Baltimore*, for instance, the Supreme Court held that the City could be sued for its failure to remove ashes and household refuse from residences because "the removal of [trash] … bears a close relation to the obligation of the city to keep its streets and alleys clean and free from obstructions and safe for travel." 131 Md. 523, 536 (1917). In performing those services, the City acts in its "private or corporate capacity," not "as a public agency of the state." *Id.* (internal quotation marks and citation omitted). The City's attempt to "address the litter problem"—that is,

"keep its streets and alleys clean"—through this lawsuit is no different, so it is not immune from § 5-107's three-year window.

The Court should dismiss the City's criminal claims as time-barred because they are based on conduct the City knew occurred more than one year before the suit was filed and the City's civil claims because they are based on conduct the City knew took place more than three years before suit was filed.

CONCLUSION

For the foregoing reasons, the City's Complaint should be dismissed.

Dated: June 24, 2024

Respectfully submitted,

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I HEREBY CERTIFY that on this 24th day of June, 2024, a copy of the forgoing Motion was served on counsel of record through filing and service by Maryland Electronic Courts ("MDEC") and a courtesy copy was transmitted via electronic mail:

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