MAYOR AND CITY COUNCIL OF BALTIMORE, ***Plaintiff,*** **v.** **PHILIP MORRIS USA INC., et. al,** ***Defendants.***	**IN THE** **CIRCUIT COURT** **FOR** **BALTIMORE CITY** **Case No.: 24-C-22-004904 OT**

CERTAIN DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, Liggett Group LLC, and The George J. Falter Company (collectively, the "Defendants"),[1] by and through counsel, jointly move to dismiss Plaintiffs' Complaint under Maryland 2-322(b)(2) for failure to state a claim. In support of this Joint Motion, the Defendants hereby incorporate by reference the accompanying Memorandum of Law as if fully set forth herein.

REQUEST FOR HEARING

The Defendants respectfully request a hearing on this Joint Motion.

Dated: March 19, 2024

Respectfully submitted,

/s/ George F. Ritchie
George F. Ritchie
(CPF/AIS #9306230292)
GORDON FEINBLATT LLC
1001 Fleet Street, Suite 700
Baltimore, MD 21202

John Parker Sweeney
(CPF #9106040024)
Bradley Arant Boult Cummings LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036

[1] Defendant Altria Group, Inc. is not a party to this motion in light of the joint Stipulation of Dismissal Without Prejudice of Altria Group, Inc., filed on February 5, 2024. Defendant British American Tobacco p.l.c. separately moves to dismiss for lack of personal jurisdiction.

410.576.4131
gritchie@gfrlaw.com

John C. Massaro*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
202.942.5000
John.Massaro@arnoldporter.com

Sean Morris*
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street 44th Floor
Los Angeles, CA 90017
213.243.4000
Sean.Morris@arnoldporter.com

Paul Rodney*
Eliseo R. Puig*
ARNOLD & PORTER KAYE SCHOLER LLP
1144 15th Street, Suite 3100
Denver, CO 80202
303.863.1000
Paul.Rodney@arnoldporter.com
Eliseo.Puig@arnoldporter.com

*denotes national counsel with *pro hac vice* motions pending

Counsel for Defendant Philip Morris USA Inc.

410.458.5653
JSweeney@bradley.com

Noel J. Francisco*
Jeffrey R. Johnson*
Alex Potapov*
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
202.879.3939
njfrancisco@jonesday.com
apotapov@jonesday.com
jeffreyjohnson@jonesday.com

David B. Alden*
JONES DAY
North Point
901 Lakeside Ave.
Cleveland, OH 44114
216.586.7121
dbalden@jonesday.com

* *pro hac vice* application forthcoming

Counsel for Defendants R.J. Reynolds Tobacco Co. and The George J. Falter Co.

/s/ Louis J. Kozlakowski, Jr.
Louis J. Kozlakowski, Jr.
(CPF #7412010185)
Wright, Constable & Skeen, LLP
7 Saint Paul Street, 18th Floor
Baltimore, MD 21202
410.659.1343
mcampsen@wcslaw.com

Kelly Anne Luther (*pro hac vice*)
Kasowitz Benson Torres LLP
1441 Brickell Avenue, Suite 1420
Miami, FL 33131
786.587.1045
kluther@kasowitz.com

Leonard A. Feiwus*
Nancy E. Kaschel*
Julie R. Fischer*

	Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019 LFeiwus@kasowitz.com 212.506.1785 Nkaschel@kasowitz.com 212.506.1779 jfischer@kasowitz.com 212.506.1764 * denotes national counsel who will seek *pro hac vice* admission *Attorneys for Defendant LIGGETT GROUP LLC*

CERTIFICATE OF SERVICE

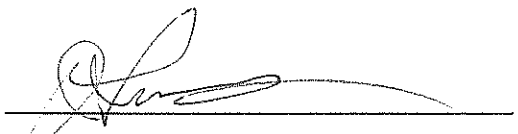
I HEREBY CERTIFY that on this 19th day of March, 2024, a copy of this motion, memorandum in support, and proposed order was served by first class mail, and a courtesy copy via email, to:

Sara Gross, Chief Solicitor
Jane Lewis, Assistant Solicitor
Baltimore City Department of Law
100 N. Holliday Street
Baltimore, MD 21202

Roy L. Mason, Esq.
Zachary Howerton, Esq.
Smouse & Mason, LLC
223 Duke of Gloucester Street
Annapolis, MD 21401

Pro Hac Vice
Marc Grossman, Esq.
Melissa Sims, Esq.
Milberg Coleman Bryson Phillips Grossman, LLP
100 Garden City Plaza, Suite 500
Garden City, NY 11530

Andrew A. Lemmon, Esq.
Milberg Coleman Bryson Phillips Grossman, LLP
P.O. Box 904
Hahnville, LA 70057



John Parker Sweeney (CPF #9106040024)

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.

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

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Mayor Brandon M. Scott, City of Baltimore Files a First of Its Kind Lawsuit Against Tobacco Companies for Cigarette Filter Waste (Nov. 21, 2022) 1

INTRODUCTION

The City of Baltimore seeks to hold Defendants liable because some consumers litter cigarettes. That claim is surprising; no one has ever alleged that cigarette manufacturers and distributors could be liable because some of their customers occasionally fail to properly throw away their cigarette butts. The claim becomes extraordinary once it is extended, as it would be, beyond cigarettes. If the City is right, *every* manufacturer and distributor of littered products—paper receipts, plastic bags, glass bottles, aluminum cans, and many others—would suddenly face civil and even criminal liability because consumers sometimes improperly discard them. That is not simply (as the City admits) a novel theory of liability.[1] It is an untenable one that would yield absurd results.

The City's claims fail for a host of reasons, some of which bar all claims, while others apply to groups of claims or individual ones.

State and Federal Law Preempt All Claims. Regardless how the City characterizes its claims, its requested relief makes clear that it seeks to mandate changes to cigarette design, marketing authorization requirements, and labeling. But Maryland courts have consistently held that the State exclusively occupies the field of regulating the packaging and sale of tobacco products. Further, to the extent permitted by federal law, Maryland has enacted a detailed regulatory scheme that does not permit localities to impose separate rules. *See, e.g.*, Md. Bus. Reg. Tit. 16 (Cigarettes).

Moreover, federal law expressly and impliedly preempts local efforts to impose additional requirements on tobacco product design, authorization, and labeling. The Family Smoking

[1] *See* Mayor Brandon M. Scott, City of Baltimore Files a First of Its Kind Lawsuit Against Tobacco Companies for Cigarette Filter Waste (Nov. 21, 2022), *available at* https://tinyurl.com/5xsk2uj6.

Prevention and Tobacco Control Act of 2009 forbids States and localities from establishing additional requirements relating to tobacco product standards, including provisions relating to their components like filters. Additionally, the Act specifies that cigarettes that were marketed in the United States as of February 15, 2007, can remain on the market unchanged. The Federal Cigarette Labeling and Advertising Act similarly forbids state and local requirements for labeling about smoking and health.

The City's Littering Claims (Counts I-V) Fail Procedurally and Substantively. These Counts seek damages for alleged violations of state and local criminal provisions. But Maryland courts have made clear that a plaintiff may not recover damages in a civil action for alleged violations of criminal statutes. And the City does not allege what the littering laws' plain language requires—that Defendants themselves have disposed of or caused or allowed the improper disposal of cigarettes.

The City's Tort Claims (Counts VI-XI) Collectively Fail. Unable to proceed under the provisions actually addressing littering, the City attempts to raise these same claims via various common law torts. However, Maryland and its municipalities have explicitly released these claims in the Master Settlement Agreement ("MSA"), which released all "monetary Claims ... *in any way* related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business." MSA § II(nn)(2) (emphasis added). That release—given in exchange for, among other things, massive ongoing compensation—unambiguously bars the City's claims for monetary relief.

The City's claims are also untimely. Maryland law required the City to file its action within three years from when the City knew or should have known of the alleged wrong. The City knew

of the conduct it challenges much more than three years ago. *See, e.g.*, Compl. ¶ 37 (alleging cigarette litter as "obvious pollution" issue dating back "more than a century").

Further, the City has failed to plead proximate causation, as the harm at issue arises out of third parties' intentional and unlawful response to the Defendants' lawful design choices for their lawful products.

Each of the City's Tort Claims Fails Substantively. As for trespass, the City cannot plausibly allege that Defendants caused any cigarette filter to enter the City's property, and the City has not alleged an exclusive possessory interest in the supposedly litter-strewn land at issue.

As to design defect and failure to warn, there was no duty to warn *the City* about a product it did not purchase, and no duty to warn *consumers* about an aspect of the product that poses no risk to them. Indeed, the City does not allege that nonbiodegradable cigarette filters cause any physical harm to the user, nor that they are unreasonably dangerous.

Finally, Defendants cannot be liable for an alleged public nuisance that they did not create and in which they did not participate. Nor is merely selling a lawful product a cognizable public nuisance in Maryland. That is particularly so here, as the City has failed to plausibly allege interference with a public right, and the product in question allegedly causes harm only when improperly discarded, even though neither manufacturers nor distributors have control over the product at that point.

Defendants share the City's desire to encourage customers to dispose of their used cigarettes properly; as the City admits, Defendants have long worked toward this end through "anti-littering campaigns." Compl. ¶ 34. But the law does not countenance the City's unprecedented attempt to impose tort and criminal liability on companies because some people

sometimes choose to violate the law and discard their used products improperly. For these reasons, as set forth more fully below, the Complaint should be dismissed.

BACKGROUND

Three of the moving defendants (Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, and Liggett Group LLC) manufacture and advertise filtered cigarettes, and the fourth (The George J. Falter Company) distributes them. *See* Compl. ¶¶ 11-16.[2] The City does not allege that the *proper* disposal of Defendants' cigarettes caused the City or its residents compensable harm. Rather, it claims Defendants are liable for cigarette litter caused by other, unrelated parties—residents of the City, among others—who *improperly* disposed of their cigarette filters within city limits. More specifically, the City targets manufacturers' longstanding use of cellulose acetate in cigarette filters, which the City alleges is not biodegradable. *Id.* ¶¶ 2, 30. And as a result, the City claims, when people litter cigarettes, those filters "permanently litter" the ground and cause a host of harms: an "unsightly nuisance" that "increases crime and reduces commerce," "public health" problems, and environmental damage. *Id.* ¶¶ 2, 24, 30–31, 121; *see also, e.g.*, *id.* ¶¶ 10, 32, 35, 37, 114, 117, 123, 139.

The City claims that this course of conduct gave rise to its eleven purported causes of action: violations of Maryland's Illegal Dumping and Litter Control Law (Count I); violations of the Baltimore City Code's anti-littering provisions (Counts II through V); Continuing Trespass (Count VI); Strict Liability for Design Defect (Count VII); Negligent Design Defect (Count VIII); Public Nuisance (Count IX); Strict Liability for Failure to Warn (Count X); and Negligent Failure to Warn (Count XI). *Id.* ¶¶ 50–170. At heart, these theories all boil down to two basic claims. First, cigarette manufacturers have violated the law by producing cigarettes with filters that do not

[2] Defendant Altria Group, Inc. is not a party to this motion in light of the joint Stipulation of Dismissal Without Prejudice of Altria Group, Inc., filed on February 5, 2024.

biodegrade quickly and completely. *See, e.g.*, *id.* ¶¶ 105–06. Second, cigarette manufacturers and distributors had a duty to warn consumers about health and environmental risks associated with improperly discarded cigarette butts and failed to do so. *See, e.g.*, *id.* ¶¶ 146–48 (cigarettes "lacked adequate warnings and/or instructions concerning the dangers and hazards as a result of the non-biodegradable cigarette filters," including the alleged environmental harms connected to improper disposal); *id.* ¶¶ 34, 56, 65, 73, 81, 89, 136(a), 145–70 (additional "omission[]"-based allegations stemming from Defendants' packaging and "marketing"). *But see id.* ¶¶ 33–34 (conceding that Defendants for years have sponsored "anti-littering campaigns" but alleging that Defendants failed to adequately "educate the public about the danger discarded cigarette filters pose to the environment").

As a remedy, the City seeks "criminal penalties," "punitive damages," "[c]ompensatory damages," and "abatement" costs. *Id.* ¶ 171(a)–(d). The City also seeks injunctive and equitable relief, including "the immediate and complete abatement" of the "nuisance" purportedly caused by the manufacture and distribution of filtered cigarettes. *Id.*, Prayer for Relief. Specifically, the City seeks "an order that provides for the immediate abatement of the public nuisance Defendants have created [and] enjoins Defendants from creating future nuisances." *Id.* ¶ 143. That is, because the City claims Defendants' cigarettes are defective in both their design and labeling, and because it alleges that "the unabated manufacture, promotion, sale, and distribution of [Defendants'] filtered cigarettes would result in material dangers" to the City "and its citizens and natural resources," *id.* ¶ 123, it effectively asks the Court to end the sale of filtered cigarettes in Baltimore.

LEGAL STANDARD

"Under Maryland Rule 2-322(b)(2), the court may dismiss a complaint if it fails 'to state a claim upon which relief can be granted.'" *Aleti v. Metro. Balt., LLC*, 479 Md. 696, 717 (2022); *see* Md. R. Civ. P. Cir. Ct. 2-322. Such a motion must be granted "where the factual allegations

in a complaint, if proven, would not provide a legally sufficient basis for the cause of action asserted in the complaint." *Aleti*, 479 Md. at 717. In determining whether the plaintiff has thus stated a claim, the court "assume[s] the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." *Id.* (quoting *Barclay v. Castruccio*, 469 Md. 368, 373–74 (2020)). But "[m]ere conclusory charges that are not factual allegations need not be considered." *MCB Woodberry, LLC v. Council of Owners of Millrace Condominium, Inc.*, 253 Md. App. 279, 296 (2021). And "speculation" is not enough to survive; the plaintiff must provide a plausible "nexus between the facts [alleged] and the [legal] conclusion" to be inferred. *McMahon v. Piazze*, 162 Md. App. 588, 597 (2005).

ARGUMENT

I. THE CITY'S CLAIMS ARE PREEMPTED BY STATE AND FEDERAL LAW

The City's claims are preempted by both Maryland and federal law. Regardless how the City characterizes its claims, it seeks to dictate cigarette design and labeling, and punish Defendants for the sale of products that both the state and federal government have concluded may be sold in their current form without interference from local government. Because the City cannot do indirectly what it cannot do directly, its claims are preempted and must be dismissed.

A. State Law Preempts the City's Claims

The Maryland Supreme Court[3] has held that "state law occupies the field of regulating the packaging and sale of tobacco products," and "thus impliedly preempts" local laws purporting to do the same. *Altadis U.S.A., Inc. v. Prince George's Cnty.*, 431 Md. 307, 308 (2013). *Altadis* reasoned that the General Assembly had enacted "a detailed licensing scheme" for manufacturers,

[3] For simplicity's sake, we refer to the "Maryland Supreme Court" or the "Supreme Court of Maryland" even as to decisions that Court issued prior to the constitutional amendment renaming it.

wholesalers, and retailers of tobacco products, thus preempting two municipal ordinances that "regulat[ed] the packaging, sale or distribution of cigars" by "prohibit[ing] the purchase, sale, distribution, or gift . . . of individual or 'unpackaged' cigars." *Id.* at 309, 316. *Altadis* thus confirmed the principle set forth in *Allied Vending, Inc. v. City of Bowie*, which recognized that "[f]or many years the General Assembly has exercised *exclusive* control over the sale of cigarettes." 332 Md. 279, 301 (1993) (emphasis added).

For the same reasons, state law preempts the City's claims here. The State has enacted a detailed regulatory scheme governing cigarette manufacturers, wholesalers, and retailers, including regulations related to the sale of cigarettes and the materials and components used in them. *See generally* Md. Bus. Reg. Tit. 16 (Cigarettes); *see* Md. Bus. Reg. § 16-602 (requiring testing of cigarettes for Fire Safety Performance Standards). That regulatory scheme leaves no room for local efforts to regulate cigarettes, whether it be directly through ordinances or indirectly through a lawsuit that seeks to accomplish the same thing. Just as state law displaces local regulation of cigarette vending machines and the number of cigars in a package, so too must it displace the City's efforts to permit the sale of cigarettes in Baltimore only if they reflect a design of the City's choosing. And that is what the City straightforwardly seeks here. *E.g.*, Compl. ¶¶ 30–35 (faulting Defendants for not "remov[ing] or redesign[ing] their cigarette filters" with "biodegradable" ones); *id.* ¶¶ 98–129 (asserting Defendants' cigarettes are defectively designed because they do not use "biodegradable cigarette filters").

Allowing each jurisdiction in Maryland to enact its own ordinances on these subjects—or, as here, to effectively do the same through civil suits—would "invite" precisely the kind of "chaos and confusion" that the Maryland Supreme Court warned against in *Allied Vending* and *Altadis*. *See Allied Vending*, 332 Md. at 301; *Altadis*, 431 Md. at 308. Because Maryland—to the extent

permitted by federal law—can and does regulate cigarettes, its regulations "occup[y] the field" here, preempting the City's claims to the extent the City seeks to hold Defendants liable for the kind of filter their products feature. *Altadis*, 431 Md. at 308.

B. Federal Law Preempts the City's Claims

Federal law also preempts the City's claims. Congress made clear in the Family Smoking Prevention and Tobacco Control Act of 2009 ("TCA") and the Federal Cigarette Labeling and Advertising Act ("Labeling Act") that authority to regulate cigarettes through tobacco product standards, premarket authorization, and labeling requirements is reserved exclusively to the federal government. In enacting the TCA, Congress recognized that consistent, uniform federal regulation in these core areas is far superior to a patchwork of inconsistent state and local regulations. Thus, one express purpose of the TCA was to "authorize the Food and Drug Administration to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products." TCA § 3(3), Pub. L. No. 111-31 (June 22, 2009). The Labeling Act, for its part, was enacted to establish mandatory and exclusive federal standards for cigarette labeling and advertising, with the twin goals of informing the public and protecting commerce and the national economy "to the maximum extent consistent with this declared policy." 15 U.S.C. § 1331 *et seq.* The express preemption provisions in these statutes preempt the City's claims.

1. The TCA Preempts the City's Efforts to Regulate the Design and Premarket Requirements for Cigarettes

The TCA includes a broad express preemption provision:

> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

Id. § 387p(a)(2)(A). The City's claims violate this provision in two ways.

First, the City effectively asks this Court to impose a tobacco product standard for cigarettes that is different from or in addition to the standards set forth in the TCA and FDA regulations. The TCA describes tobacco product standards as including "provisions respecting the … components … of the tobacco product," *id.* § 387g(a)(4)(B)(i), and a cigarette's "component parts" "includ[e] the … filter," *id.* § 387g(a)(1)(A); *see* FDA, Cigarettes, https://www.fda.gov/tobacco-products/products-ingredients-components/cigarettes ("The basic components of most cigarettes are tobacco, chemical additives, a filter, and paper wrapping."). The City's claims would impose new requirements for the "components … of the tobacco product" by mandating that cigarettes be manufactured with biodegradable filters.[4] *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 555, 556 (9th Cir. 2022) (holding that "tobacco product standards" preempted by the TCA include regulation of how a "product must be produced" and recognizing that the TCA reserves to the federal government the authority to "set the standards regarding *how a product would be manufactured and marketed*" (emphasis added)).

Second, the City's claims would require certain cigarettes that Congress determined can be legally marketed to undergo premarket review despite the TCA. In the TCA, Congress specified that cigarettes that were marketed in the United States as of February 15, 2007, could remain on the market unchanged, without further FDA authorization. *See* 21 U.S.C. §§ 387e(j), 387j(a). Congress also specified that *new* cigarettes could be sold only if FDA issues a marketing authorization that confirms they are "substantially equivalent" to those preexisting cigarettes, or if the new cigarettes reflect only such "minor modifications" to their design that they qualify for a

[4] These requirements also pertain to the use and disposal of the tobacco product and thus may constitute an environmental impact product standard.

substantial equivalence exemption. *See id.* Otherwise, no new cigarette product may be marketed without FDA first determining, based on a review of the product and "the labeling proposed," among other considerations, that selling it would be "appropriate for the protection of the public health." *Id.* § 387j(b)(1), (c)(4).

As FDA applies the TCA, *any* change that a manufacturer makes to a cigarette—no matter how minor—renders the product "new," necessitating FDA approval. If Defendants changed their cigarette filters to satisfy the new mandates the City seeks in this lawsuit—specifically noting the redesign of cigarettes—they could not be marketed without FDA authorization. Additionally, as FDA must assess the environmental impacts of "disposal from use of FDA-regulated articles" like cigarettes, changes that affect cigarette design would require a new environmental assessment as part of the application. *See, e.g.*, 42 U.S.C. § 4331; *see* 21 C.F.R. § 25.40(a); National Environmental Policy Act; Environmental Assessments for Tobacco Products; Categorical Exclusions, 80 Fed. Reg. 57531, 57534 (Sept. 24, 2015) (codified at 21 C.F.R. § 25.35) ("FDA also reviewed the effect on the environment due to … disposal of tobacco products (including cigarette butts) currently on the market… FDA has carefully considered the information available in order to conclude that these tobacco product actions qualify for categorical exclusion under NEPA.").

Thus, the City would force the same cigarettes that were on the market as of February 15, 2007,[5] into the premarket review process, even though Congress expressly allowed them to remain on the market without further authorization. *See* 21 U.S.C. § 387j(a)(1)(A) (requiring FDA

[5] FDA has alternatively referred to these products as "grandfathered tobacco product[s]" or "pre-existing tobacco product[s]." *See* FDA, Pre-Existing Tobacco Products, https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/pre-existing-tobacco products.

authorization only for "new tobacco products," defined as products "not commercially marketed in the United States as of February 15, 2007"). The relief the City seeks would eliminate the possibility of any filtered cigarette maintaining its legally marketed status. That means the City's action, if successful, would require an entirely new premarket authorization regime—due only to one city's claims—for existing, lawful products that were otherwise unchanged. The City also would create a new authorization process for cigarettes that have already obtained marketing orders from FDA, which necessarily means the law would override FDA's conclusion that the products may be marketed.

It makes no difference that the City has brought a claim for damages rather than passing an ordinance prohibiting non-biodegradable filters. As the Supreme Court has explained, "[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. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (holding that plaintiff's common-law claims of negligence, strict liability, and implied warranty against manufacturer were preempted by FDCA); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). This rule reflects the recognition that "'regulation can be effectively exerted through an award of damages,' and 'the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* (cleaned up) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). Allowing state or local governments to impose massive tort liability on tobacco manufacturers for failing to comply with their preferred cigarette composition would thus "make a mockery of the [TCA's] preemption provision." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012).

Finally, the provisions in the TCA that contemplate ongoing regulation of tobacco products do not salvage the City's attempts to regulate cigarette filters. The TCA, for its part, preserved

local governments' ability to adopt laws prohibiting or limiting the sale, possession, or access to tobacco products by minors. 21 U.S.C. § 387p(a)(1). And it spares from preemption "requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age." *Id.* § 387p(a)(2)(B). In other words, the TCA does not preempt state laws regulating conditions on the sale and use of cigarettes—such as age-verification requirements for sales, restrictions on free samples, or restrictions on harmful uses of tobacco products. The TCA also preserves state product liability claims, allowing plaintiffs to litigate numerous personal injury claims under various state laws. *Id.* § 387p(b). But claims like the City's here, which seek to impose a new rule for how to manufacture cigarettes, fall squarely within the TCA's express preemption of different or additional requirements related to tobacco product standards.

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

Federal law preempts the City's failure to warn claims because the content of cigarette warning labels falls within the exclusive authority of the federal government. The TCA expressly preempts any local "requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product . . . labeling." *Id.* § 387p(a)(2)(A). On that basis alone the City's claim fails.

The Labeling Act also, and independently, preempts the City's failure to warn claims. The Act specifies the words, size, typeface, and color of warnings that must be affixed to cigarette packaging. 15 U.S.C. § 1333. And it provides that, except as required by FDA, "no statement relating to smoking and health, other than the [warning] statement required by section 1333 of this title, shall be required on any cigarette package." *Id.* § 1334(a). Moreover, "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with

the provisions of this chapter." *Id.* § 1334(b); *see, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530–31 (1992) (The Labeling Act preempts claims "based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions."). Through these provisions, Congress achieved its goals of "establish[ing] a comprehensive Federal program to deal with cigarette labeling and advertising," thereby "protect[ing]" "commerce and the national economy" from "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331(2). The TCA also supplements the Labeling Act's preemption provision to bar States and localities from imposing "bans or restrictions" on the "content" of "the advertising or promotion of any cigarettes." *Id.* § 1334(c).

The City's claims wrongly seek to impose "requirements" on Defendants with respect to "smoking and health" labeling or warnings given in the context of their "advertising or promotion" of cigarettes. The City insists Defendants were "required" by state tort law "to issue adequate warnings to Baltimore City, the public, consumers, and public officials of the reasonably foreseeable or knowable" risks allegedly posed by cigarette filters. Compl. ¶¶ 147, 160. The City alleges that "hazardous" non-biodegradable cigarette filters are a danger to "public health," *id.* ¶¶ 121, 136, threatening "[t]he health and safety of Baltimore's environment," *id.* ¶ 134, through "contaminated soil and groundwater, hampered plant growth, polluted waterways, deteriorated critical aquatic habitats," and poisoned fish and animals, *id.* ¶ 139. By demanding that Defendants "warn customers, retailers, regulators, public officials, or Baltimore City of the permanent litter risk posed by their filtered cigarettes," *id.* ¶ 137, the City thus threatens to bring about exactly the kind of label-related chaos that the Labeling Act exists to prevent.

3. Federal Law Also Impliedly Preempts the City's Claims

In addition to running afoul of the TCA's and Labeling Act's express preemption clauses, the City's claims also are subject to implied preemption. Local laws are impliedly preempted when they stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California v. FERC*, 495 U.S. 490, 506 (2005) (citations and internal quotations omitted). The City's lawsuit does precisely that: A local law that mandates the use of certain product ingredients and prohibits others, despite FDA's express approval, clearly stands as an obstacle to federal law.

The City's claims interfere with FDA's regulation of cigarettes in a host of ways: They impose a product standard that mandates the use of certain materials in the production process; they disrupt the premarket review process, forcing many cigarettes off the market or else requiring them to undergo a premarket review they would otherwise avoid; and they seek to impose labeling requirements different from and in additional to federal law, such as additional warning statements. Establishing new state-specific requirements for materials, ingredients, and labels interferes with FDA's regulation of the properties of cigarettes (including its assessment of environmental impacts) and opens the door to many other localities imposing additional, and potentially incompatible, requirements. Further, forcing cigarettes into the premarket review process interferes with Congress's plan for tobacco product marketing authorizations. Congress decided to allow cigarettes on the market as of February 15, 2007, to remain on the market without further authorization; the City's claims present an unavoidable obstacle to that intent by compelling cigarettes to give up that status. Similarly, FDA has already issued marketing authorizations for thousands of cigarettes through the substantial equivalence and premarket tobacco approval pathways; the City seeks to upend all of those decisions, forcing many of those products back into the premarket review process despite FDA's specific determinations. And that is just the result

from *one city's* lawsuit; imagine the chaos that would ensue if every municipality could impose its own environmental policies on cigarettes.[6] The City's claims stand as an obstacle to federal law and are preempted.

II. THE CITY'S LITTERING CLAIMS FAIL

A. The City Cannot Seek Criminal Remedies Through This Civil Litigation

In Counts I through V, the City seeks to recover from Defendants under various anti-littering provisions found in Maryland's Criminal Law and in the City's Health Code, and specifically requests "[c]riminal penalties, including ... fines." *See* Compl. ¶¶ 50–90, 171(c). These claims must be dismissed: It is well-established that a plaintiff cannot recover criminal penalties for alleged violations of criminal statutes through civil litigation. *See, e.g.*, *Tribble v. Reedy*, 888 F.2d 1387 (Table), 1989 WL 126783, at *1 (4th Cir. Oct. 20, 1989) (per curiam) (absent "clear [legislative] intent to provide a civil remedy, a plaintiff cannot recover civil damages for an alleged violation of a criminal statute"); *see also Phair v. Zambrana*, No. CCB-14-2618, 2016 WL 3125081, at *3 (D. Md. June 3, 2016) (dismissing claims brought under criminal code because "criminal statutes do not give rise to civil liability"); *McMillan v. Templin*, No. CV JKB-22-1675, 2023 WL 3996477, at *7 (D. Md. June 14, 2023) (similar).

Count I alleges a claim under Maryland's Illegal Dumping and Litter Control Law, which is located in Title 10 of Maryland's Criminal Law. After criminalizing littering, *see* § 10-110(c), the statute establishes "penalties" for violations of the law: Low-level violators are "guilty of a misdemeanor and on conviction" may be sentenced to "imprisonment not exceeding 30 days," "a fine not exceeding $1,500," or "both"; intermediate violators face up to a year in prison and a $12,500 fine "on conviction" for this "misdemeanor"; and serious violators face up to "5 years" in

[6] Further, Congress expressly found that FDA is the only federal agency that "possesses the scientific expertise needed to implement effectively all provisions of the [TCA]." *Id.* § 2(45).

prison and a $30,000 fine "on conviction." § 10-110(f)(2)(i)–(iii); *see also* Compl. ¶ 54 (quoting same). Section 10-110(g) provides that the statute "shall" be "enforce[d]" by "[a] law enforcement unit, officer, or official of the State or a political subdivision of the State, or an enforcement unit, officer, or official of a commission of the State, or a political subdivision of the State," but nowhere provides a civil remedy. Indeed, insofar as the statute speaks to "municipal corporation[s]," it makes clear they are limited to "prohibit[ing] littering" legislatively through their own ordinances and to "classify[ing] littering as a municipal infraction under Title 6 of the Local Government Article."[7]

The City's attempt to recover criminal penalties under its own Health Code fares no better. In Counts II and IV (which allege violations of §§ 7-607, 7-608, and 7-609), the City relies upon Health Code § 7-632(a). Compl. ¶¶ 64, 80. That provision authorizes "a fine of not more than $1,000" and "imprisonment for not more than 90 days." But those punishments are available only "*on conviction*" for the "*misdemeanor*" of "violat[ing] any provision" of Subtitle 7 of the Health Code. § 7-632(a) (emphasis added). The availability of these remedies makes clear that the City's Health Code is criminal in nature and therefore does not provide a civil cause of action. *See Miller v. Maloney Concrete Co.*, 63 Md. App. 38, 48 (1985) (laws are criminal in nature when they "carr[y] criminal penalties").

Count V suffers from a similar flaw. There, the City relies upon § 7-706 as the penalty provision relevant to violations of § 7-702 of the Health Code. *See* Compl. ¶ 88. But like § 7-632,

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[7] The City also points to § 10-110(f)(3), which states that "[i]n addition to the penalties" discussed above, "a court may order the violator" to "remove or render harmless the litter," "pay damages" for property harmed by the litter, or "reimburse the State, county, municipal corporation, or bi-county unit for its costs incurred in removing the litter." Compl. ¶ 55. But § 10-110(f)(3) provides remedies that the court may impose *in addition* to the criminal penalties set out in the other two subsections of § 10-110(f); it does not suggest that the City may seek those remedies as a standalone matter through a civil case.

§ 7-706 conditions its "fine of $500 for each offense" "*on conviction*" of the person thereby found "guilty of a misdemeanor." § 7-706(a) (emphasis added). Again, that liability entails "conviction" means the City cannot bring a civil claim under this provision. *Miller*, 63 Md. App. at 48.

In the absence of an express civil remedy or cause of action, the City's statutory littering claims amount to an unconstitutional end-run around the unique requirements of criminal procedure. Criminal defendants, including those facing only criminal fines, have a panoply of rights not available to civil defendants, such as a higher burden of proof and a unanimous verdict. *See, e.g.*, Md. Declaration of Rights, art. 21. The City cannot ask the Court to sweep those constitutional rights away and impose criminal penalties in a civil suit.

B. The City's Littering Claims Fail on The Merits

The City's littering claims also fail under the laws' plain language. Count I alleges violations of § 10-110 of the Maryland Criminal Law, which makes it unlawful (with exceptions not relevant here) for a "person" to "dispose or cause or allow the disposal of litter on public or private property." Md. Code Ann., Crim. Law § 10-110(c)(2); *see id.* § 10-110(a)(4) (defining "[l]itter" as "rubbish, waste matter, refuse, garbage, trash, debris, dead animals, or other discarded materials of every kind and description"). The Baltimore City Code provisions at issue in Counts II through V are similarly phrased. Section 7-606 of the Health Code prohibits "person[s]" from "dispos[ing] of any waste or other material"; § 7-607 states that "[n]o person may dispose of or permit to discharge or flow onto any public or private property" any "offensive" substance; § 7-608 prohibits "dump[ing] or dispos[ing]" waste on public property; § 7-609 prohibits the same conduct directed toward private property; and § 7-702 prohibits "litter[ing] on any public or private property" and "permit[ting] the accumulation of litter on any property under [one's] control."

To state a claim against Defendants under these provisions, the City must therefore allege that Defendants "dispose[d]," "dump[ed]," or "litter[ed]" used cigarette filters, that they "cause[d] ... the disposal" of used cigarette filters, or that they "allow[ed] the disposal" of used cigarette filters, "permitted [them] to discharge or flow onto any public or private property," or permitted them to accumulate on their own property.

The Complaint includes no such allegations. The City certainly has not alleged that Defendants *themselves* "dispose[d] ... of litter on public or private property," "dump[ed]" litter there, or themselves "litter[ed]"; rather, the City claims that Defendants "manufacture[], advertise[], and s[ell] cigarettes" that are then "*disposed of by their users*." *E.g.*, Compl. ¶¶ 13, 36 (emphasis added); *see also id.* ¶ 16 (alleging that Defendant The George J. Falter Company "distribute[s]" cigarettes). The City also has not alleged that Defendants allowed cigarette filters to accumulate on their *own* property in Baltimore, either. Nor has the City plausibly alleged that Defendants "cause[d]" littering. Someone "causes" an outcome when he brings it about through others. For example, someone "cause[s] ... the disposal of litter" when he orders an employee to throw it into the Chesapeake, or perhaps when he places it on top of a car knowing that the owner will drive off unaware. The City alleges nothing like this. Far from claiming that Defendants directed or even asked their customers to litter, the City admits that they took part in "*anti*-littering campaigns." *Id.* ¶ 34 (emphasis added).

That leaves "allow[ing] the disposal of litter on public or private property" and "permit[ting]" the "discharge or flow" of waste onto public or private property. However, to "allow" or "permit" something, one must have both the *power* and the *right* to control whether that thing comes to pass. For example, a woman can "allow[] the neighbor's children to play on her lawn" because she could otherwise rightfully insist that they leave, and an appellate court can

"allow[]" a "writ of error" because it has power to grant or deny it. "Allow," Black's Law Dictionary (11th ed. 2019) (providing these examples); *see also, e.g.*, "Permit," *id.* ("To consent to formally; to allow (something) to happen ...."); *Parklawn, Inc. v. Nee*, 243 Md. 249, 252 (1966) (a landlord might "be said, in one sense," to "permit[]" a *tenant* to "create [a] nuisance, but not in such sense as to render him liable") (internal quotation marks and citation omitted). And of course, the "criminal conduct" of third parties usually breaks the causal chain; it does not somehow make the original actor liable. *See Collins v. Li*, 176 Md. App. 502 (2007), *aff'd sub nom. Pittway Corp. v. Collins*, 409 Md. 218 (2009) (discussing manufacturer liability in light of criminal intervening causes). Here, Defendants clearly have neither the power nor the right to control whether third parties in Baltimore break the law by littering, contrary to the City's contention that Defendants "allowed" and "permitted" littering because they "knew" that some users dispose of cigarettes improperly, yet refused to "utilize biodegradable filters or educate the public on the harm of littering those non-biodegradable filters." Compl. ¶ 37.

A company does not "allow" or "permit" objectionable conduct by a third party simply because it is aware that the third party can choose to engage in such conduct using its products; alcohol manufacturers do not "allow" or "permit" drunk driving by selling liquor, and courts do not "allow" or "permit" prison violence by imposing custodial sentences. Similarly, Defendants do not "allow" or "permit" those who purchase their cigarettes to dispose of them improperly, because they have no control over whether customers do so or not. Again, the City effectively admits as much. It does not claim that Defendants failed to assert some power they have to stop their customers from disposing of cigarettes improperly. Rather, it asserts that they did not try hard enough to *persuade* customers not to litter (through "educat[ing] the public") and failed to *mitigate the consequences* of their customers' decisions (by "utiliz[ing] biodegradable filters"). *Id.*

Thus, even if (as the City alleges) Defendants know that some of their customers may dispose of used cigarette filters improperly, that does not mean Defendants "allowed" or "permitted" such conduct, such that *Defendants themselves* are guilty of violating Maryland's and Baltimore's anti-littering laws.

Further, precedent demonstrates that mere knowledge of others' potential misconduct is not enough. For instance, the Maryland Supreme Court rebuffed a city's attempt to use its zoning ordinances to force a property owner to remove the run-down automobiles that trespassing *third persons* had placed on his properties. *Leet v. Montgomery Cnty.*, 264 Md. 606, 610 (1972). Defendants, too, did nothing to cause (or even encourage) littering, but merely made and sold products that—like many other consumer goods—third persons sometimes fail to properly throw away. Again, were it otherwise, the manufacturers, distributors, and retailers of plastic bottles, glass bottles, aluminum cans, juice boxes, plastic straws, paper straws, Styrofoam containers, plastic take-out boxes, paper take-out cartons, newspapers, magazines, receipts, and wrappers would all be liable for trespass, which is both unjust and illogical. For these reasons and others,[8] the City's littering claims fail.

III. THE CITY'S TORT CLAIMS COLLECTIVELY FAIL

Unable to proceed against Defendants under the ordinances actually designed to address littering, the City raises the same basic theory—that Defendants are liable because others throw away Defendants' products improperly—under various common law torts. But for several independent reasons, the City's reliance on the common law also fails.

[8] Reading these laws to cover third parties' disposal of Defendants' products would also violate the rule of lenity and subject Defendants to liability under unconstitutionally vague provisions. *See, e.g.*, *Clark v. State*, 473 Md. 607, 622 (2021) (lenity); *In re Leroy T.*, 285 Md. 508, 511 (1979) (vagueness).

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

The City's tort claims fail because they have been explicitly released by contract. The Master Settlement Agreement (MSA) between Maryland and the manufacturer Defendants released all "monetary Claims ... *in any way* related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business." MSA § II(nn)(2) (emphasis added). That release—given in exchange for, among other things, massive ongoing compensation—unambiguously bars the City's claims for monetary relief.[9]

1. The MSA released claims related to the use of or exposure to tobacco products in exchange for significant ongoing compensation

In 1996, Maryland sued a host of tobacco companies, alleging that they "were engaged in wrongful advertising and marketing of cigarettes." *See State v. Philip Morris*, 179 Md. App. 140, 144–45 (2008); *see* Master Settlement Agreement, https://naagweb.wpenginepowered.com/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf ("MSA"), at D-2 (listing Maryland lawsuit). Other States initiated similar litigation. *See* MSA, Ex. D. The States' litigation "shared a common theme," and included allegations that the tobacco companies had "conspir[ed] to suppress the development and marketing of safer cigarettes." *Star Sci. Inc. v. Beales*, 278 F.3d 339, 344 (4th Cir. 2002). The MSA settled this state litigation with the tobacco manufacturers, including the moving manufacturing defendants, and was signed by 52 States and territories,

[9] The moving manufacturing defendants—Philip Morris, Liggett, and Reynolds—are "Participating Manufacturers" under the MSA. *See* MSA § II(jj) (defining to include tobacco manufacturers that signed the MSA on the execution date); *see id.* § II(hh). As their distributor, The George J. Falter Company is released under MSA § II(oo). British American Tobacco p.l.c., too, is a Released Party under MSA §§ II(d) and (oo).

including Maryland. *See* https://naagweb.wpenginepowered.com/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf; Compl. ¶ 38.[10]

Under the MSA, Maryland and the other settling States secured a broad set of restrictions on the tobacco companies' advertising, marketing, and lobbying activities. *See* MSA § III; Robin Miller, *Validity, Construction, Application and Effect of Master Settlement Agreement*, 25 A.L.R.2d 435, § 2 (2007) (noting that many well-known restrictions on tobacco advertising come from the MSA). They also secured an ongoing stream of revenue—billions of dollars per year—"in perpetuity." *See* MSA § IX; *Star Sci.*, 278 F.3d at 345. The manufacturers' base payment to Maryland is approximately $130 million per year, and as of April 2022, they had paid Maryland nearly $3.35 billion overall. *See* Nat'l Ass'n of Att'ys Gen., *MSA Payment Information, Payments to States Since Inception Through April 20, 2022*, https://naagweb.wpenginepowered.com/wp-content/uploads/2020/09/2022-04-20-Payments_to_States_since_Inception_through_April_20_2022.pdf. Maryland distributes these funds to a variety of recipients, including Maryland's Cigarette Restitution Fund, which in turn distributes funds to Maryland's counties and Baltimore City to support efforts to educate smokers about the risks of smoking and encourage smokers to quit. *See* Md. Health Gen. § 13-1007(b). And, from the entry of the MSA in 1998 to 2022, the rate of adult smoking in Maryland fell by more than half—from 22.4% to 9.6%—which, in turn, surely reduced cigarette litter.[11]

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[10] *See also* MSA, Maryland Signature Page (22), www.marylandattorneygeneral.gov/TobaccoDocuments/MSAwithSigPagesandExhibits.pdf (signature of Maryland Attorney General, Nov. 23, 1998).

[11] CDC, BRFSS Prevalence & Trends Data, https://www.cdc.gov/brfss/brfssprevalence/index.html (last visited March 14, 2024); CDC, State-Specific Prevalent and Trends in Adult Cigarette Smoking—United States 1998-2007 (Mar. 13, 2009), tbls. 1, 2 (tracing the decline in smoking through 2007), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5809a1.htm.

To induce the tobacco companies to make these extensive concessions, the settling States made a large concession of their own: They agreed to "the release and discharge of all claims by the Settling States." *See* MSA Recitals; *Star Sci.*, 278 F.3d at 360. That release was "much broader in scope than the claims asserted by" the States in their underlying litigation. *Tyler v. Douglas*, 280 F.3d 116, 120 (2d Cir. 2001). In particular, the MSA "*absolutely and unconditionally release[d] and forever discharge[d] 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) (emphasis added).

The States and tobacco companies framed the release provisions expansively. The MSA defined "Releasing Parties" as "persons or entities acting in a *parens patriae*, ... private attorney general, ... or any other capacity ... to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public." *Id.* § II(pp). For past conduct, the MSA released 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, (B) the exposure to, or (C) research, statements, or warnings regarding" tobacco. *Id.* § II(nn)(1) (emphasis added). With respect to claims for "future conduct," it released those "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 Tobacco Products manufactured in the ordinary course of business.*" *Id.* § II(nn)(2) (emphasis added). "Claims" include "all manner of civil (i.e., non-criminal): claims, demands, actions, suits, causes of action, damages (whenever incurred), liabilities of any nature including civil penalties and punitive damages ..., known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable, or statutory." *Id.*

§ II(n).[12] In this way, the MSA "shall be a complete defense to any … civil action or proceeding" seeking "to establish civil liability against any Released Party based, in whole or in part, upon any of the Released Claims." *Id.* § XII(a)(3). Indeed, the only civil claims that survived the MSA were individual claims seeking "solely … private or individual relief for separate and distinct injuries." *Id.* § II(pp).

2. The MSA released the City's claims for monetary relief

The City is bound by the MSA, which defines a "Settling State" to include the "Settling State's subdivisions (political or otherwise, including … municipalities)," such as Baltimore. *See id.* In addition, the release covers not only Maryland and its municipalities, but also "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." *Id.* Even if the City's claims were somehow not released by Maryland as a settling State, they are barred because they seek relief on behalf of and applicable to the general public. *See, e.g.*, Compl. ¶ 171 (seeking compensatory damages for "the loss of [Baltimore City's] environmental health," and punitive damages "for the good of society").

The City's tort claims are also "Released Claims" under the MSA's broad definition. The City's claims are all predicated on its repeated assertion that Defendants' manufacturing and labeling choices predictably "result[ed] in millions of cigarette filters being dropped on Baltimore City property," leading to a host of problems for which the City now seeks financial compensation. *Id.* ¶ 10; *see id.* ¶¶ 30–37c. To the extent the City's claims relate to pre-MSA conduct, those claims are thus "based on" and "aris[e] out of or in [some] way relate[] … to" "the use, sale, distribution,

[12] Although the MSA does not bar the City's claims under Maryland's Criminal Law and the City's Health Code (Counts I though V) because they are criminal in nature, as discussed above, seeking criminal penalties in a civil suit is not permitted.

manufacture, development, advertising, [or] marketing" of tobacco. MSA, § II(nn)(1). To the extent the claims relate to post-MSA conduct, they are likewise "based on" and "aris[e] out of or in [some] way relate[] to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business." *Id.* § II(nn)(2). Accordingly, the City has "absolutely and unconditionally release[d] and forever discharge[d]" Defendants from its tort claims to the extent they seek monetary relief, and they must be dismissed. *See id.* § XII(a).

To plead around the MSA, the City avers that its claims are "not excluded by the Master Settlement Agreement" because the Complaint "does not seek damages for any injuries or losses for humans" and the "MSA does not address environmental effects." Compl. ¶¶ 38–39. But the MSA says nothing to suggest that its release is limited to claims for "losses for humans"; rather, it discharges every claim for monetary relief that is "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 Tobacco Products manufactured in the ordinary course of business." MSA, § II(nn) (emphasis added). As the City cannot dispute, its claims are "related to … the use of or exposure to Tobacco Products," because they each start from the premise that the ordinary use of Defendants' cigarettes (and their allegedly non-biodegradable filters) exposes the City to a raft of allegedly compensable harms. The City's tort claims for monetary relief must therefore be dismissed.

B. The City's Tort Claims Are Barred by the Statute of Limitations

In addition to the MSA's preclusion of the City's claims, they are untimely and should be dismissed. Maryland law requires that any civil action "shall be filed within three years from the date it accrues" unless a different limitation applies, and none does here. Md. Cts. & Jud. Proc.

§ 5-101.[13] In Maryland, "all tort actions" accrue "when [the] claimant knows or should have known of the wrong." *Edwards v. Demedis*, 118 Md. App. 541, 553 (1997). The City knew of the conduct it challenges much more than three years ago; after all, the Complaint paints a picture of cigarette litter as a long-standing "obvious pollution" issue dating back "more than a century." Compl. ¶ 37. The City claims since 2014 to have spent $32 million in collecting and disposing of litter, including 11,935,098 cigarette filters, into landfills. *Id.* ¶ 41. That concession alone is sufficient to show the City was on notice regarding the conduct alleged in the Complaint. But, the Complaint also includes a wide range of allegations showing that it was on notice well before 2019: For example, the Complaint alleges:

- For "more than a century[,]" "cigarettes were disposed of by their users directly onto the ground, pavement, or into waterways." *Id.* ¶ 37.
- "[N]on-biodegradable filters, which [Defendants] began selling in the 1960's, ... accumulate in the soil and waterways of Baltimore City and ... have to be cleaned up and disposed of, at great cost, by the Plaintiff." *Id.*
- In May 2014, 12,478,576 cigarette filters were collected from Baltimore's waterways. *Id.* ¶ 5.
- A nonprofit initiative that collaborates with the government collected 55,000 cigarette filters from the streets and sidewalks of a Baltimore neighborhood within six months in 2016. *Id.* ¶ 5 & n.12.
- Data from 2016 purportedly shows the City and its stakeholders spent over $32 million to collect upwards of 2,600 tons of litter annually, at an estimated cost of $10,571 per ton of litter, a significant amount of which is cigarette filter litter. *Id.* ¶ 5 & n.13.
- "Smokers litter millions of cigarette filters in Baltimore City each year and these filters take decades to degrade." *Id.* ¶ 29.

[13] The limitations period is even shorter for the criminal littering violations the City alleges. A "prosecution or suit for a fine [or] penalty ... shall be instituted within one year after the offense was committed." Md. Cts. & Jud. Proc. § 5-107.

The City's tort claims are thus barred to the extent they are based on acts or omissions from more than three years ago.[14]

The City alleges that "[n]o statute of limitation can be plead against the Plaintiff as all of the Defendants' wrongful conduct and the consequent violations of Baltimore City's ordinances are continuous, wrongful, and ongoing." *Id.* ¶ 18. To be sure, Maryland courts recognize a "continuing harm" or "continuing violation" doctrine, under which an action is timely if one of a series of tortious acts occurred within the limitations period. *Bacon v. Arey*, 23 Md. App. 606, 655 (2012). But a plaintiff may only recover damages incurred "within the 'three year period prior to the filing of the action,'" *Litz v. Md. Dep't of Env't*, 434 Md. 623, 646 (2013). Thus, even if the City prevailed on its allegations of continuous third-party litter, the result is the same, because Defendants cannot be held liable for damages for conduct that happened more than three years ago.

C. The City Has Not Adequately Pled Proximate Causation in Its Tort Claims

Causation is an essential element of all of the City's tort claims, yet the City has failed to plead that necessary element as to the torts that indisputably require proximate causation.[15] For

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[14] The City's allegations sound in permanent nuisance and are subject to a three-year statute of limitations. "[A] temporary [nuisance] can be abated, while a permanent nuisance will be presumed by its character and circumstances to continue indefinitely." *Hoffman v. United Iron & Metal Co.*, 108 Md. App. 117, 143–44 (1996) (quoting *Moy v. Bell*, 46 Md. App. 364, 371 (1980)). Under Maryland law, "damages past, present and future for permanent reduction in the market value of the land can *only* be recovered for a permanent nuisance." *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 677–78 (1979) (emphasis added). The Complaint alleges a permanent nuisance and requests damages available only for permanent nuisance: "filters take decades to degrade," "filters are...impossible to fully clear from the public areas," "Defendants' conduct caused, and continues to cause, *permanent harm* to and seriously damage the property values and utility of Baltimore City property," and the City seeks damages for all "losses past, present, and future." Compl. ¶¶ 24, 29, 94, 171 (emphasis added).

[15] These are continuing trespass (Count VI), design defect (Counts VII and VIII), and failure to warn (Counts X and XI). *See Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 78–79 (1994) (continuing trespass); *Ford Motor Co. v. Gen. Accident Ins. Co.*, 365 Md. 321, 335 (2001) (design defect); *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 227 (1992) (failure to warn).

an act or omission to proximately cause an injury, it "must be 1) a cause in fact, and 2) a legally cognizable cause." *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009). The legal-causation inquiry "requires [consideration of] whether the actual harm to a litigant falls within a general field of danger that the actor should have anticipated or expected." *Id.* at 245. Even where a harm is foreseeable, "the remoteness of the injury from the negligence [and] the extent to which the injury is out of proportion to the negligent party's culpability" may negate legal causation. *Id.* at 246. While the trier of fact ordinarily determines proximate cause, "'it becomes a question of law in cases where reasoning minds cannot differ.'" *Id.* at 253.

"Reasoning minds" cannot differ here. Courts have regularly held—as a matter of law—that plaintiffs may not establish proximate causation where the harm at issue arises out of a third party's intentional and unlawful (but perhaps foreseeable) response to the defendant's lawful design choices for its lawful product. For example, in *Modisette v. Apple Inc.*, the plaintiffs were injured by a driver distracted from the road by his iPhone's FaceTime application. 30 Cal. App. 5th 136, 140 (2018). The plaintiffs claimed that Apple should have designed FaceTime so that it could not be used while driving, but the Court of Appeal upheld the district court's dismissal of that claim. "Although Apple's manufacture of the iPhone 6 Plus without the lockout technology was a necessary antecedent of the [plaintiffs'] injuries ... , those injuries were not a result of Apple's conduct," but rather were "caused" when the driver "crashed ... while he willingly diverted his attention from the highway." *Id.* at 154.

The court in *Ashley County v. Pfizer, Inc.* upheld the same basic principle. *See* 552 F.3d 659 (8th Cir. 2009). A local government sought to hold pharmaceutical companies liable because they manufactured products that contained ephedrine and pseudoephedrine without taking adequate steps to prevent others from converting those products into methamphetamine. *Id.* at 664.

But as the court explained, "the natural and probable consequences of manufacturers selling cold medicine to independent retailers through highly regulated channels" do not—as a matter of law—include "that the cold medicine will create a methamphetamine epidemic resulting in increased government services." *Id.* at 671 (internal quotation marks and citation omitted); *see also, e.g.*, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1031 (W.D. Wash. 2005) (Caterpillar could not be held liable for injuries caused in an overseas military conflict because "[a] manufacturer or distributor of non-defective, legal products cannot be liable in tort for alleged criminal acts committed with those products by third parties").

The City's allegations are no different. It does not claim that the proper and typical disposal of Defendants' cigarettes cause harm. Rather, like the plaintiffs in *Modisette* and *Ashley County*, it alleges that Defendants should have modified their lawful products (by "manufactur[ing] and sell[ing] biodegradable cigarette filters," Compl. ¶ 123(c)) or taken "other precautionary measures" (such as "warn[ings]," *id.* ¶ 137) because many smokers illegally litter their filters, *id.* ¶ 23, and *those littered filters* allegedly cause harm, *see id.* ¶¶ 24–29. But Defendants do not proximately cause cigarette littering by manufacturing and distributing allegedly non-biodegradable filters any more than Pfizer proximately caused the methamphetamine epidemic or Apple proximately caused traffic accidents by selling their own lawful products that, when properly used, lead to no such results. Again, were it otherwise, manufacturers, distributors, and retailers of commonly littered products—including the entire supply chain for all of the items that Mr. Trash Wheel routinely collects, *see* Compl. ¶ 41; https://www.mrtrashwheel.com/—would have to re-design or refrain from selling their products, and would *still* face liability for any damage nonetheless caused by those items. That is not the law, and so the City's continuing-trespass, design-defect, and failure-to-warn claims should be dismissed.

IV. THE CITY HAS FAILED TO PLAUSIBLY PLEAD ITS TORT CLAIMS

The City's tort claims are also each fatally flawed in their own right.

A. The City Has Not Stated a Claim for Continuing Trespass (Count VI)

Notwithstanding the City's claim that Defendants allegedly knew that their cigarettes would be littered, Compl. ¶¶ 92–93, Defendants' manufacture and distribution of cigarettes that others may have chosen to discard is not a trespass. The City does not adequately plead that Defendants caused anyone to throw a cigarette on Plaintiff's property under trespass-specific causation principles. Nor does the City plead sufficient facts to demonstrate that it exclusively possesses the supposedly littered areas.

1. The City does not allege that Defendants caused any cigarette filter to enter its property

Trespass is an unconsented interference "with a plaintiff's interest in the exclusive possession of the land" at issue "by entering or causing something to enter the land." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013); *see* Restatement (Second) of Torts § 158 cmt. c (Am. L. Inst. 1965) defining intrusion as denoting invasion of the possessor's "exclusive possession of his land"). A plaintiff must show the interference took place "through the defendant's physical act or force." *Uthus v. Valley Mill Camp, Inc.*, 472 Md. 378, 401 (2021). While a defendant can trespass without itself entering another's property, for liability to attach, it must have "*cause[d]* a thing or a third person" to enter, Restatement, *supra*, § 158(a) (emphasis added)—such as by "command[ing] or request[ing]" them to do so, *id.* cmt. j.

For example, there was no trespass liability where Exxon supplied a gas station with underground storage tanks, which subsequently contaminated the subsurface of adjacent property. The Maryland Supreme Court concluded that, once Exxon supplied the tanks, the operator of the gas station owned them and thus Exxon had "insufficient control, as a matter of law, to permit a

finding of liability for trespass." *JBG/Twinbrook Metro Ltd. Partnership v. Wheeler*, 346 Md. 601, 626 (1997). In *CDS Family Trust v. Martin*, there was no trespass where the defendants' coal supplier mined on the plaintiff's property to fill the defendants' order. 2020 WL 7319269, at *3, 5 (D. Md. Dec. 10, 2020). Assuming without deciding that a "third party" theory of trespass liability might be viable in the first place, the court held that the defendants' "lack of physical presence on [the] property" defeated the trespass claim unless they "caus[ed], command[ed], or request[ed]" that their supplier mine on the plaintiff's land. *Id.* at *5. Even though the defendants had ordered the coal—and knew that it would hail from the general vicinity of the plaintiff's property—they were not liable for trespass because they were not involved in the supplier's determination of "where and how to mine." *Id.* at *6; *compare Rockland Bleach & Dye Works Co. v. H.J. Williams Corp.*, 242 Md. 375, 386–87 (1966) (contractor liable for trespass where it had dramatically changed grade of property adjacent to plaintiff's, causing mudslide after foreseeably heavy spring rains); *Kopka v. Bell Tel. Co.*, 91 A.2d 232, 233, 235 (Pa. 1952) (phone company liable for trespass where it specifically told contractor to drill on plaintiff's land).

The City does not allege that Defendants "caused" consumers to drop cigarettes on Plaintiff's property, nor that any Defendant ever actually "littered" a cigarette. Compl. ¶ 92. Nor does the City allege that Defendants "commanded or requested" anyone to discard cigarette filters on the City's property. And the City does not claim that Defendants were somehow involved in consumers' determination of "where and how to" dispose of their cigarettes. To the contrary, the City acknowledges that "*[s]mokers* litter millions of cigarette filters in Baltimore City." *Id.* ¶ 29 (emphasis added). These defects defeat the City's claim.

2. The City does not plead exclusive possession of the supposedly littered public lands and waterways

"[A] party cannot recover for trespass to properties that it does not exclusively possess." *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 469 (D. Md. 2019). That is, trespass is trained on remedying harm to an "exclusive possessory interest" in property. *Nissan Motor Corp. in U.S.A. v. Md. Shipbuilding & Drydock Co.*, 544 F. Supp. 1104 (D. Md. 1982) (applying analogous principles under admiralty law and finding no such harm where claim concerned smoke coming from neighboring property); *see Exxon Mobil Corp.*, 433 Md. at 408 (no recovery for contamination of aquifer plaintiffs did not own but from which they drew water).

Here, the City generally alleges the presence of cigarette filters on "Baltimore City lands and waters." Compl. ¶ 92. It identifies littered locations as including "the Plaintiff's streets, sidewalks, beaches, parks, and lawns," or "waterways, and other public areas," and also alleges harm to less-defined "natural resources." *Id.* ¶¶ 3, 24, 28. But the City cannot recover in trespass for the alleged littering of any property that it does not exclusively possess, and it has failed to plead sufficient facts to suggest exclusive possession for all of the properties it identifies. That is obviously true with respect to any *private* property falling within its vague allegations, such as private lawns. *See, e.g., id.* ¶ 10 (alleging "millions of cigarette filters … on the property of Baltimore City's residents and businesses"); *id.* ¶ 113 (alleging "massive littering of public and private property in the City"). But it is also true of many "public" areas, whether or not within city limits. The City cannot have—and does not adequately allege—an exclusive possessory interest in public property that anyone may occupy. *Cf. Grymes v. State*, 202 Md. App. 70, 94 (2011) (tenants of apartment building lacked exclusive possession of common hallways, as front door was unlocked and halls were readily accessible to "anyone who wished to enter").

Nor does the City have an exclusive possessory interest in "natural resources" and public waters. Not even the State of Maryland owns the waters within its boundaries. Of course, it has paramount regulatory authority over "harbors, bays, rivers, and similar waters," but that "power does not constitute a property interest." *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 784, 788 (1993) (holding that the State did not own groundwater for purposes of insurance dispute). Instead, the State "holds" the navigable waterways in its boundaries "as a quasi trustee for the public benefit"—and "does not hold those areas to the exclusion of all others." *Anne Arundel Cnty. v. City of Annapolis*, 352 Md. 117, 133 (1998).

The same norm applies in the context of trespass. Indeed, in a case concerning "the widespread contamination" of Maryland's waters, the District of Maryland held that the State itself did not exclusively own "the State's natural water resources," or any "properties owned by its citizens," and so could not state trespass claims based on their contamination, even though the State normally has authority to defend its citizens' water rights. *State*, 406 F. Supp. 3d at 469. The court found "no support" for the State's contrary position "under Maryland law" of trespass. *Id.* at 470. Here, a municipality cannot have a claim to exclusive possession that the State, which has "paramount rights" over its waters, lacks. *Anne Arundel Cnty.*, 352 Md. at 133. As the City has not "specifically allege[d] trespass only to" its own property, its claim fails. *Mayor & City Council of Balt. v. Monsanto Co.*, No. RDB-19-0483, 2020 WL 1529014, at *12 (D. Md. Mar. 31, 2020); *cf. Windsor Resort Inc. v. Mayor & City Council of Ocean City*, 71 Md. App. 476, 485 (1987) (dismissing city's trespass action where city had no "possessory interest" in property).

B. The City Has Not Stated a Claim for Design Defect (Counts VII and VIII)

The City also alleges that Defendants' cigarettes are defectively designed, rendering Defendants either strictly liable or negligent. It contends that Defendants knew or should have known that cigarettes with non-biodegradable filters are "unreasonably dangerous for their

intended, foreseeable, and ordinary use" because, when littered, they "permanently contaminate the soil and groundwater" and cause associated harms, which consumers do not realize and cannot prevent. Compl. ¶ 106-07, 109; *see also, e.g.*, *id.* ¶¶ 117–23.

Ultimately, the City has not stated a design defect claim, whether sounding in strict liability or negligence. Under either theory, it must plead "the existence of a defect" and a "causal relation between the defect and the injury." *Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693, 706 (2008). Maryland has adopted the Second Restatement's formulation of design defect, *Gourdine v. Crews*, 405 Md. 722, 740 (2008), which provides that the seller of a defective product is liable (1) "for physical harm" (2) "caused to the *ultimate user*" if, among other things, the product is "unreasonably dangerous to the user," Restatement, *supra*, § 402A (emphasis added); *see* Md. Civ. Pattern Jury Instr. 26:11 (same); *id.* 26:14 (design defect exists where "design puts the product in a condition not contemplated by the ultimate user which condition is unreasonably dangerous to the user"). A non-malfunctioning product is unreasonably dangerous to the user if it is more dangerous to the user than an ordinary consumer would expect. *Halliday v. Sturm, Ruger & Co.*, 368 Md. 186, 199, 207 (2002) (no liability where user shot himself with defendant manufacturer's gun, which worked exactly as anyone would expect).

Here, the City fails to plausibly allege either (1) physical harm to the ultimate user, or (2) that the products are unreasonably dangerous. It nowhere alleges that the non-biodegradable nature of cigarette filters makes them "dangerous *to the user*" at all, let alone more dangerous to the user than he or she would expect. Restatement, *supra*, § 402A. The City expressly disclaims seeking damages "for any injuries or losses for humans," Compl. ¶ 38, as opposed to its own alleged *economic* losses from cleaning up litter, which are not recoverable under a product liability claim, *see e.g.*, *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 250 (1994)

("Historically, a purchaser suffering only economic loss has ordinarily been unable to bring a tort action for negligence or in strict liability."). And the City is not a "user" of Defendants' cigarettes. These deficiencies make the City's design defect claim, whether for strict liability or negligence, fail as a matter of law.

For the same reason, the City cannot show, as it must to pursue a design defect claim, that Defendants owed any duty to the City. In products liability cases, as in all others, a plaintiff must plead facts supporting a duty to the plaintiff and breach of that duty. *Gourdine*, 405 Md. at 738. It is unclear how Defendants could owe *the City* any duty to redesign a lawful product that persons *other than the City* purchased—persons who, according to the City's own allegations, were themselves unharmed by the cigarette filters—and that only caused alleged harm to the City because persons *other than Defendants* chose to litter. If Defendants owed the City a duty in such circumstances, then every manufacturer would have to redesign its products (and every distributor would have to avoid selling certain products) so as to prevent harm to third parties stemming from mishandling: Car manufacturers would have to eliminate features (like Bluetooth connectivity or smartphone-connected displays) that could aid and abet distracted driving, toymakers would have to deploy solar power rather than batteries to avoid potential pollution, and straw manufacturers would have to switch to paper from plastic for the same reason. That has never been the law anywhere. *See infra*. It certainly isn't the law in Maryland, where courts have "resisted the establishment of duties of care" "to the world, an indeterminate class of people." *Gourdine*, 405 Md. at 750. The City's extraordinary design defect claims must be dismissed.

C. The City Has Not Stated a Claim for Failure to Warn (Counts X and XI)

The City further alleges that Defendants' cigarettes are defective because they do not warn that their filters are not biodegradable. Because Defendants allegedly had and breached a duty to warn the City, as well as the public and consumers, "of the reasonably foreseeable or knowable

severe risks posed by the inevitable use and litter of their filtered cigarettes," Compl. ¶ 147; *see id.* ¶¶ 150, 160, 164 (similar), the City claims they are either strictly liable (Count X) or liable in negligence (Count XI).[16]

A "failure to warn" claim requires the plaintiff to show that the seller knew (or should have known) of the danger a product posed to the user but failed to adequately warn the user of that risk. *See* Restatement, *supra*, § 402A cmt. j; *Owens-Ill., Inc. v. Zenobia*, 325 Md. 420, 436 (1992) (noting that Maryland has adopted the Restatement's rule). In light of this knowledge requirement, "negligence concepts and those of strict liability have 'morphed together' ... in failure to warn cases," but an underlying duty to warn owed to the plaintiff is "an essential element" under either theory. *Gourdine*, 405 Md. at 743.

The City fails to establish the keystone element that it was owed a tort duty, as already discussed in the context of its negligent design defect claim, because the City does not allege that a non-biodegradable filter endangers or has actually harmed any *cigarette user*. There is thus no duty to warn anyone, and certainly not the City, which is not such a user. And while there are contexts in which a seller can have a duty to warn someone other than the product's user, the Maryland Supreme Court has refused to recognize a duty to warn in a case similar to this one. In *Gourdine*, a consumer of the defendant manufacturer's medications suffered side effects while driving, causing an accident that killed another motorist. The decedent's widow argued that the manufacturer was both strictly liable and negligent for failing to warn the consumer about side effects, as it was foreseeable that, without such warning, the consumer would harm third persons while driving. Based on that asserted foreseeability, the plaintiff argued that the manufacturer in

[16] To the extent the City also asserts that Defendants "intentionally concealed" the "dangers to the environment of filtered cigarettes," Compl. ¶¶ 149, 151, it fails to provide any well-pleaded allegations of fact to ground that accusation, either as to concealment, intent, or knowledge.

fact owed a duty to the *decedent* to warn the *consumer*. The court rejected that argument, noting "the general rule that there is no duty to control a third person's conduct so as to prevent personal harm to another," and reasoning that there was no "close and direct connection" between the manufacturer's failure to warn and the plaintiff's injury—or even the manufacturer and the plaintiff—as there must be for a duty to the plaintiff to exist. *Id.* at 746–47 (internal quotation marks omitted).

So too here. The City does not allege any relationship with Defendants; it simply asserts that, because littering and its environmental effects are allegedly foreseeable, Defendants had a duty to the City to warn third persons about those effects. But the mere *foreseeability* of injury to the plaintiff in the absence of a warning to the consumer did not thread the needle in *Gourdine* and cannot do so here. Recognizing a duty under these circumstances, as there, "would expand traditional tort concepts beyond manageable bounds, because such duty could apply to all individuals who could have been affected by [the consumer] after [use of the product]." *Id.* at 750; *see also Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 540 (2013) ("We have made clear that the fact that an individual ... is foreseeably within a zone of danger ... is not the sole criterion in determining a duty to warn, even in a product liability case."). Even if it is foreseeable that many cigarette users will litter, manufacturers and distributors cannot be liable to every property owner in the world who finds a cigarette butt on its property.

That is especially so because littering is a *criminal offense*. Defendants (like everyone else) "may reasonably proceed upon the assumption that others will obey the criminal law." *Valentine v. On Target, Inc.*, 353 Md. 544, 552 (1999) (gun dealer owed no duty to shooting victim to protect against its wares' theft and criminal use). As the Complaint makes clear, Baltimore has let its citizens know that littering is illegal, and fines them for doing so. *See* Compl. ¶ 43 (noting how

the City has "post[ed] signs indicating fines for littering, increas[ed] ... public awareness through billboards and radio/television broadcasting, and [devoted] law enforcement time, energy, and manpower to fine for littering"). If that "litter deterrence" hasn't actually deterred enough consumers from littering, Defendants telling them about the risk of "contaminated soil and groundwater," *id.* ¶ 139(a), will not do the trick. The City's contrary position turns on the limitless notion that manufacturers and distributors have a duty to warn consumers not to break the law.

D. The City Has Not Stated a Claim for Public Nuisance (Count IX)

Finally, the City's attempt to repackage its fundamental theory as a nuisance claim similarly fails. The City has not plausibly alleged multiple elements of that tort of last resort.

1. The City has not adequately alleged that Defendants created or contributed to the alleged public nuisance

To be liable for public nuisance, Defendants must have either created the nuisance, actively participated in it, or undertaken "some positive act evidencing its adoption." *Gorman v. Sabo*, 210 Md. 155, 161 (1956); *see* Restatement, *supra*, § 834 cmt. d (one of several participants in activity must contribute "substantial[ly] ... to be a legal cause of harm"). The City does not claim that filtered cigarettes are a public nuisance in themselves, but only when consumers choose to discard them improperly. *See, e.g.*, Compl. ¶ 139. Thus, merely manufacturing and distributing filtered cigarettes, as yet *not* littered, does not create a nuisance. And the City pleads no allegations of fact suggesting that Defendants' actions constitute "active[]" participation or "positive ... adoption." *Gorman*, 210 Md. at 161. As such, Defendants as a matter of law cannot be liable for the nuisance the City alleges.

2. The City's public nuisance claim does not implicate any public right

Maryland has adopted the Restatement (Second)'s definition of public nuisance as an unreasonable interference with a right common to the general public." Restatement, *supra*,

§ 821B(1); *see Tadjer v. Montgomery Cnty.*, 300 Md. 539, 552 (1984). "A public right is one common to all members of the general public"; it is "collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." Restatement, *supra*, cmt. g. For example, polluting a stream does not inherently implicate a public right—it only does so if it "prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives *all* members of the community" of fishing access. *Id.* (emphasis added).

Here, the City fails to allege a public right. It certainly cannot do so with its vague allegations that litter has decreased "real property values owned by Baltimore City" and resulted in the "diversion of tax dollars." Compl. ¶¶ 138–39. That property is "public," not private, and that the City's budget serves the community, does not mean that Baltimore residents have a *public right* to a city hall with a particular dollar value, or to a municipal budget of a particular size. The City comes closer when it alleges that improperly discarded cigarette filters have "contaminated soil and groundwater, ... deteriorated critical aquatic habitats, and poisoned ... fish." *Id.* ¶ 139. But it does not come close enough. Without asserting the *extent* of these supposed occurrences, or how they affect the *community's* interests, the City has not pleaded the existence of a public right. Without a public right, the City's nuisance claim fails.

3. The lawful sale of lawful products is not a nuisance, especially when those products' intended uses cause no harm

Because no public right is implicated, Defendants' conduct obviously cannot *unreasonably* interfere with one, as required. Indeed, Defendants' conduct has not interfered with any public right at all, let alone unreasonably so. Conduct may, for example, "*significant[ly]* interfer[e] with the public health, the public safety, the public peace, the public comfort or the public convenience," when it is "proscribed by a statute, ordinance, or administrative regulation," or when it "is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or

has reason to know, has a significant effect upon the public right." Restatement, *supra*, § 821B(2) (emphasis added).

In applying these (and equivalent) provisions, courts have long refused to hold manufacturers and distributors liable in public nuisance for downstream harms traceable to their lawful products. In *State ex rel. Hunter v. Johnson & Johnson*, for instance, the Oklahoma Supreme Court recently held that its analogous nuisance statute "does not apply to ... [the] manufacturing, marketing, and selling [of] prescription opioids." 499 P.3d 719, 731 (Okla. 2021). As the court explained, applying nuisance law (rather than products liability law) to these product-based claims would conflict with nuisance jurisprudence in three respects. First, it would conflict with the established rule that public nuisance claims must concern the violation of a public right, not a private one; "[p]roducts generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right." *Id.* at 726–27 (quoting Donald Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 817 (2003)). Second, a manufacturer lacks "control of its product once it is sold," meaning that it lacks power to prevent the product's misuse or to "remove or abate" any resulting nuisance. *Id.* at 727. Finally, allowing nuisance claims in such circumstances would subject manufacturers to "perpetual[] liab[ility]" across a range of industries—"will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution"? *Id.* at 729, 731. Such wide-ranging liability should come—if at all—from legislative activity, not the "expansion of public nuisance law" beyond its "traditional limits." *Id.* at 731.

Johnson & Johnson did not break new ground. Indeed, across a range of industries, courts have refused to use nuisance law to regulate harms arising from the foreseeable use of products. In *Tioga Public School District Number 15 v. U.S. Gypsum Co.*, for example, the Eighth Circuit overturned a jury verdict holding an asbestos manufacturer liable for the costs of remediating asbestos contamination in public schools, reasoning that "rewrit[ing]" state nuisance law to cover such claims would transform nuisance into a "monster that would devour in one gulp the entire law of tort." 984 F.2d 915, 921 (8th Cir. 1993). In *Rhode Island v. Lead Industries Ass'n*, the Rhode Island Supreme Court reversed a jury verdict on a public nuisance claim against a lead paint manufacturer. 951 A.2d 428 (R.I. 2008). It explained that the right "not to be poisoned by lead paint" was a private, not public, right; that the manufacturer lacked the requisite control "at the time [the lead pigment] caused injury"; and that, if allowed, nuisance liability in such contexts would subject the "manufacturers, distributors, and retailers" of *any* lawful product that is foreseeably "misused"—such as "cell phone[]" companies—to liability. *Id.* at 454–55 (internal quotation marks and citation omitted).

This principle is especially significant where the foreseeable *mis*use of a product is concerned. In *City of Chicago v. Beretta U.S.A. Corp.*, the Supreme Court of Illinois refused to "extend public nuisance liability" to cover gun manufacturers supposedly responsible for illegal gun violence. 821 N.E.2d 1099, 1118 (Ill. 2004). "[A]llowing a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce" would usurp the legislature's role and subject "a wide and varied array of other commercial and manufacturing enterprises and activities" to "potentially limitless liability." *Id.* at 1119 (internal quotation marks and citation omitted); *see also, e.g.*, *Camden Cnty. Bd. of Chosen Freeholders v. Beretta*, 273 F.3d 536 (3d Cir. 2001) (per curiam) (same). Likewise, in *Modisette*, the California

Court of Appeal rebuffed a public nuisance claim alleging that Apple could be held responsible for harms caused by distracted drivers because it failed to install "lockout" technology in its iPhone 6. The "burden to Apple and corresponding consequences to the community that would flow" from such liability was simply too great, especially in light of the "tenuous connection" between the plaintiffs' injuries and "Apple's design." 30 Cal. App. 5th at 142; *see also, e.g.*, *Ashley Cnty.*, 552 F.3d at 689 (affirming dismissal of nuisance claims against ephedrine and pseudoephedrine manufacturers based on the wrongful conversion of those chemicals into methamphetamine); *Hinds Inv., L.P. v. Angioli*, 445 F. App'x 917, 919–20 (9th Cir. 2011) (affirming dismissal of nuisance claim against dry cleaning equipment manufacturers based on the wrongful disposal of dry cleaning chemicals).

To be sure, a handful of courts have taken a different approach to these questions. But the correct result—as explained by the authors of the Third Restatement in addressing a topic left open by the (binding) Second Restatement—is clear:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue.

Restatement (Third) of Torts: Liab. for Econ. Harm § 8 cmt. g (Am. L. Inst. 2020).

If these manufacturers and distributors cannot be held liable in public nuisance, then Defendants—whose products cause *none* of the challenged harms when properly disposed, and who *never* instructed or encouraged their customers to litter—can't be held liable either. Otherwise, public nuisance truly has become the "monster" that "devour[s] … the entire law of

tort," *Tioga*, 984 F.2d at 921, taking "a wide and varied array of ... commercial and manufacturing enterprises" down with it, *Beretta*, 821 N.E.2d at 1119.

4. The City has not alleged that Defendants control the instrumentalities that cause the alleged nuisance at the relevant time

The City's claim also fails because the City does not, as it cannot, allege that Defendants controlled the cigarette butts at the relevant time—namely, when they were improperly disposed and contributed to the alleged nuisance. Such control is an essential element of a nuisance claim in Maryland. In *Parklawn, Inc. v. Nee*, for example, a cemetery sued a nearby property owner for nuisance resulting from the tenant's use of the landlord's property. 243 Md. 249. The Maryland Supreme Court affirmed the grant of summary judgment to the landlord. As it explained, a landlord "is not liable for the nuisance caused solely by the lessee" because "ordinarily such an owner does not have the ability to do anything to abate the nuisance during [the] tenant's term"—that is, the landlord lacks *control* over the property when the tenant causes the nuisance. *Id.* at 253. In *East Coast Freight Lines v. Consolidated Gas, Electric Light & Power Co. of Baltimore*, the Supreme Court similarly rejected a nuisance claim against a power company based on the siting of a power pole. 187 Md. 385 (1946). The City, not the power company, controlled the pole's placement, as well as the presence or absence "of warning signs or lights" needed to prevent otherwise foreseeable accidents, and so the power company could not be held responsible. *Id.* at 401.

The District of Maryland applied these precedents to nuisance claims analogous to the City's here in *Cofield v. Lead Industry Association, Inc.*, No. 99-3277, 2000 WL 34292681 (D. Md. Aug. 17, 2000). There, homeowners sued lead-paint manufacturers, alleging that their products created a nuisance. The district court dismissed the case. A plaintiff needs to "plead and prove that the defendant has control over the alleged nuisance," yet it was "indisputable" that the

manufacturers "lack[ed] control over the lead containing products that [were] alleged to constitute [the] nuisance." *Id.* at *7. In so holding, *Cofield* followed (and anticipated) a long line of cases rejecting nuisance claims because the defendant lacked control over the instrumentality of the alleged nuisance at the time it became hazardous. *See, e.g.*, *Johnson & Johnson*, 499 P.3d at 727–29 (opioid manufacturer "could not control," among other things, "how individual patients used its product"); *see also Lead Indus. Ass'n*, 951 A.2d at 449 (lead-paint manufacturer lacked control "*at the time the damage occurs*") (emphasis in original); *Camden Cnty.*, 273 F.3d at 541 (gun manufacturer had "limited ability ... to exercise control beyond its sphere of immediate activity"); *Tioga*, 984 F.2d at 920 (asbestos manufacturer "lacked control of the product after the sale"); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (PCB manufacturer did not "retain[] the right to control the PCBs beyond the point of sale").[17]

The City's claims fail under this principle. One last time, it is undisputed that Defendants' cigarettes do not cause any of the harms alleged in this litigation when properly thrown away. But the City admits that *customers*, not Defendants, control cigarettes at that (doubly) dispositive moment. *E.g.*, Compl. ¶ 6 (referring to "*customers'* cigarette filter disposal conduct" (emphasis added)); *id.* ¶ 10 (filters are "discarded by Defendants' customers"); *id.* ¶ 34 (similar). As such, its nuisance claim must be dismissed.

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[17] Some federal district judges have rejected the "exclusive control" requirement, permitting liability where a defendant "created or substantially participated in the creation of a nuisance," but Defendants cannot be liable even under that standard. *Exxon Mobil Corp.*, 406 F. Supp. 3d at 468. In *Exxon Mobil*, the nuisance claim survived because the defendants allegedly "intentionally and deceptively promoted MBTE" and "knew or reasonably should have known that it would be placed into leaking gasoline storage and delivery systems." *Id.* at 469. But Plaintiff here does not allege that Defendants encouraged unlawful conduct or deceived anyone about cigarettes' biodegradability, nor that they "intentionally withheld" information. *Monsanto*, 2020 WL 1529014, at *10. Further, the City does not allege that Defendants' products cause environmental harms "even when used as intended." *Id.* at *11.

CONCLUSION

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

Dated: March 19, 2024

Respectfully submitted,

John Parker Sweeney
(CPF #9106040024)
Bradley Arant Boult Cummings LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036
410.458.5653
JSweeney@bradley.com

Noel J. Francisco*
Jeffrey R. Johnson*
Alex Potapov*
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
202.879.3939
njfrancisco@jonesday.com
apotapov@jonesday.com
jeffreyjohnson@jonesday.com

David B. Alden*
JONES DAY
North Point
901 Lakeside Ave.
Cleveland, OH 44114
216.586.7121
dbalden@jonesday.com

* *pro hac vice* application forthcoming

Counsel for Defendants R.J. Reynolds Tobacco Co. and The George J. Falter Co.

/s/ George F. Ritchie

George F. Ritchie
(CPF/AIS #9306230292)
GORDON FEINBLATT LLC
1001 Fleet Street, Suite 700
Baltimore, MD 21202
410.576.4131
gritchie@gfrlaw.com

John C. Massaro*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
202.942.5000
John.Massaro@arnoldporter.com

Sean Morris*
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street 44th Floor
Los Angeles, CA 90017
213.243.4000
Sean.Morris@arnoldporter.com

Paul Rodney*
Eliseo R. Puig*
ARNOLD & PORTER KAYE SCHOLER LLP
1144 15th Street, Suite 3100
Denver, CO 80202
303.863.1000
Paul.Rodney@arnoldporter.com
Eliseo.Puig@arnoldporter.com

*denotes national counsel with *pro hac vice* motions pending

Counsel for Defendant Philip Morris USA Inc.

/s/ Louis J. Kozlakowski, Jr.
Louis J. Kozlakowski, Jr.
(CPF #7412010185)
Wright, Constable & Skeen, LLP
7 Saint Paul Street, 18th Floor
Baltimore, MD 21202
410.659.1343
mcampsen@wcslaw.com

Kelly Anne Luther (*pro hac vice*)
Kasowitz Benson Torres LLP
1441 Brickell Avenue, Suite 1420

Miami, FL 33131
786.587.1045
kluther@kasowitz.com

Leonard A. Feiwus*
Nancy E. Kaschel*
Julie R. Fischer*
Kasowitz Benson Torres LLP
1633 Broadway
New York, NY 10019
LFeiwus@kasowitz.com
212.506.1785
Nkaschel@kasowitz.com
212.506.1779
jfischer@kasowitz.com
212.506.1764

* denotes national counsel who will seek *pro hac vice* admission

Attorneys for Defendant LIGGETT GROUP LLC

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. PHILIP MORRIS USA INC., et. al, *Defendants*.	IN THE CIRCUIT COURT FOR BALTIMORE CITY: Case No.: 24-C-22-004904 OT

ORDER

UPON CONSIDERATION of Certain Defendants' Joint Motion to Dismiss for Failure to State a Claim, any Opposition, any Reply thereto, and for good cause having been shown, it is on this _____ day of _____, 2024, by the Circuit Court of Baltimore City, Maryland, hereby

ORDERED that Certain Defendants' Joint Motion to Dismiss for Failure to State a Claim is GRANTED; and further

ORDERED that Plaintiff's Complaint is DISMISSED in its entirety.

Dated: _____, 2024

_____

Judge, Circuit Court for Baltimore City, Maryland