DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 6TH Street, Boulder, Colorado 80302	
Plaintiffs: BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, et al., v. **Defendants:** SUNCOR ENERGY (U.S.A.), INC., et al.	**▲COURT USE ONLY▲** Case Number: 2018CV30349 Division: 2
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MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)	

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Pursuant to Colorado Rule of Civil Procedure 12(b)(5), Defendants Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc., and Exxon Mobil Corporation (collectively, "Defendants") move to dismiss Plaintiffs' Amended Complaint.[1] Exxon Mobil Corporation ("ExxonMobil") certifies that its counsel has conferred in good faith with opposing counsel regarding the relief requested in this motion, which is opposed.

I. Introduction

Plaintiffs are three local government entities in Colorado seeking to hold a few select energy companies with international operations liable for the local impacts of global climate change. Relying principally on nuisance, trespass, and consumer fraud theories, Plaintiffs allege they have been harmed by decades of worldwide fossil fuel production and global greenhouse gas ("GHG") emissions of countless individuals and entities around the world—including Plaintiffs themselves. Plaintiffs' claims are not limited to harms allegedly caused by fossil fuels extracted, marketed, sold, or used in Colorado. Instead, Plaintiffs attempt to use this state's tort law to control the worldwide activity of companies that play a crucial role in virtually every sector of the global economy. Defendants and their subsidiaries supply fuels that enable production and innovation, literally keep the lights and heat on, power nearly every form of transportation, and form the basic materials from which innumerable consumer and technological devices are fashioned.

Plaintiffs' claims raise federal statutory, regulatory, and constitutional concerns; threaten to upset bedrock federal-state divisions of responsibility; and have profound implications for the global economy, international relations, and America's national security. For these reasons and

[1] By filing this motion, Defendants do not waive their personal jurisdiction defenses, which are being asserted by separate motions. *See* Col. R. Civ. P. 12(b).

more, two federal courts considering claims based on the same facts and theories asserted here recently held that these claims are not justiciable, and dismissed the complaints for failure to state a claim. *See City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017, 1024-25 (N.D. Cal. 2018), *appeal pending*; *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018), *appeal pending*.

As the courts in *Oakland* and *New York* recognized, federal law governs the climate change tort claims asserted here irrespective of how they are characterized by Plaintiffs. The Complaint's conflict with federal law and policy is clear. For nearly 50 years, the federal government has aimed to achieve energy independence by decreasing the nation's reliance on oil imports, including by opening federal lands and coastal areas to promote fossil fuel extraction, establishing strategic petroleum reserves, and contracting with energy companies to develop those resources.[2] During this time, the U.S. also has enacted environmental statutes and regulations designed to strike a balance between protecting the environment and ensuring economic and national security. U.S. foreign policy has pursued these dual goals in part by negotiating with other countries to craft workable international frameworks to respond to climate change while evaluating how such regulation could affect the economy, national security, and foreign relations. Plaintiffs, however, take issue with these efforts and seek to override and upend the federal government's longstanding, carefully calibrated energy and environmental policies.

At bottom, this case is about global emissions and global fossil fuel production and use, not a local tort. Plaintiffs ask this Court to disregard well-established boundaries of tort law, hold select Defendants liable for the actions of billions of third parties, and adjudicate whether

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[2] *See* Megan Slack, *Everything You Need to Know: President Obama's Blueprint for American-Made Energy*, White House Blog (Jan. 26, 2012 2:54 PM), https://bit.ly/2E1dLc4.

Plaintiffs' alleged harms outweigh the massive and undeniable social utility of fossil fuels—not just in Colorado, but around the world. Because Plaintiffs' claims are displaced by the numerous existing federal laws that thoroughly address these issues, they should be dismissed.

Plaintiffs' claims also should be dismissed because they violate any number of well-established federal doctrines, including preemption, the federal foreign affairs power, separation of powers, the Commerce Clause, due process, and free speech. Even if Plaintiffs' claims could be properly adjudicated under state tort law, the Complaint still fails to state any plausible claims. Among other defects, Plaintiffs cannot establish that their purported injuries would not have occurred absent Defendants' conduct, or were proximately caused by it; it is evident from the face of the Complaint that their claims are time-barred under applicable statutes of limitations; and Plaintiffs have failed to plead their fraud-based claims with the requisite particularity. For all these reasons, the Complaint should be dismissed in its entirety and with prejudice.

II. Factual Background

A. Climate Change Is A Global Issue That The Federal Government Is Addressing

Climate change is an important global issue that impacts every nation. *See* Amended Complaint ("AC" or "Complaint") ¶ 85 (GHG emissions "contribute to changes in the planet's climate"); *id*. ¶ 134 (fossil fuels impact "global average temperatures"). As an issue of planetary significance, climate change is "the subject of international agreements" and "active discussions" about whether and how it should be addressed "through a coordinated framework." *Oakland*, 325 F. Supp. 3d at 1026. For example, international discussions beginning over 30 years ago led to the adoption of the United Nations Framework Convention on Climate Change ("UNFCCC") in 1992, and the establishment of the Intergovernmental Panel on Climate Change ("IPCC"). AC

¶ 132. *See* UNFCCC, *Status of Ratification of the Convention*, http://bit.ly/1ujgxQ3. Noting that climate change was "a common concern of humankind," the UNFCCC "[a]cknowledg[ed] that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." UNFCCC Recitals, http://bit.ly/1BQK8Wg. The United States Senate ratified the Convention in 1992.

The United States also has acted at the national level to address climate change while balancing key economic and social interests. In 1978, Congress established a "national climate program" to improve the country's understanding of climate change through enhanced research, information collection and dissemination, and international cooperation. *See* National Climate Program Act, 15 U.S.C. §§ 2901 *et seq.* In the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of climate change and directed the Secretary of State to coordinate U.S. negotiations on this issue. *See id.* § 2901(5); *see also id.* § 2952(a). The Clean Air Act ("CAA")—the primary federal statute governing emission standards—established a comprehensive scheme to promote and balance multiple objectives, deploying resources to "protect and enhance the quality of the Nation's air resources" and "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Congress authorized the Environmental Protection Agency ("EPA") to regulate air pollutants like GHG emissions, and the EPA has exercised this authority on its own and with other agencies. *Id.* § 7601. Other laws, like the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, sought further reductions of GHG emissions. *See id.* § 13389(c)(1); *id.* §§ 17001 *et seq.*

Reflecting the complex tradeoffs inherent in national energy policy, the federal political branches have sought to balance environmental regulations with economic and social interests.

For example, the U.S. Senate unanimously adopted a resolution urging the President not to sign the Kyoto Protocol if it would seriously harm the U.S. economy or did not sufficiently regulate other countries' emissions. *See* S. Res. 98, 105th Cong. (1997). Congress then enacted a series of laws effectively barring the EPA from implementing the Protocol absent Senate ratification.[3]

B. Plaintiffs Seek To Hold Four Energy Companies Solely Liable For Global Climate Change

Plaintiffs allege that "[s]ince the 1960s, unchecked production, promotion, refining, marketing, and sale of fossil fuels" has "led to unchecked fossil fuel use," which has "caused an unprecedented rapid rise in the concentration of [GHGs] in the atmosphere." AC ¶ 7. Plaintiffs allege this increase in GHGs has "trigger[ed] changes to the climate," *id*., including rising "global average temperatures," *id.* ¶ 134. Plaintiffs acknowledge that ExxonMobil has "[h]istorically" supplied only "10 percent of global oil demand," *id.* ¶ 81, and that, in 2016, the "Suncor Defendants" were only "one of the world's largest oil producers," and this production was "almost entirely" from Canada, *id.* ¶ 397.

Plaintiffs allege a litany of climate change impacts experienced across the nation and in Colorado, including "increases in extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered streamflows, bark beetle outbreaks, ecosystem damage, forest die-off, reduced snowpack, and drought." *Id*. ¶¶ 139-140. Plaintiffs claim that Defendants must "share" Plaintiffs' past and *future* projected expenditures in an attempt to mitigate these alleged harms because they allegedly

[3] *See* Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998).

"caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change, while concealing and/or misrepresenting the dangers associated with fossil fuels' intended use." *Id.* ¶ 5. Plaintiffs do not allege that Defendants' activities violated any of the federal or state laws regulating fossil fuels, but instead that Defendants' lawful activities violated state tort law.

III. Legal Standard

To survive a Rule 12(b)(5) motion, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[4] *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). After stripping away "legal conclusions" and "conclusory statements," the Court, relying on its "judicial experience and common sense," *id*. at 678-79, must dismiss the complaint if the remaining allegations fail to "raise a right to relief above the speculative level," *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

IV. Argument

"No plaintiff has ever succeeded in bringing a nuisance claim based on global warming." *Oakland*, 325 F. Supp. 3d at 1023. For good reason. In *Oakland*, the court properly dismissed nearly identical claims because, as here, the plaintiffs' claims "would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming." *Id.* at 1022. Weeks later, another court reached the same conclusion in *New York*, acknowledging that "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable

[4] Colorado courts apply the same standard as federal courts in deciding a motion to dismiss for failure to state a claim. *See Warne* v. *Hall*, 373 P.3d 588, 595 (Colo. 2016).

amount of greenhouse gas emission under the" CAA, such that the statute "displaces the City's claims." 325 F. Supp. 3d at 473. The court cautioned against judicial intervention because the "claims implicate countless foreign governments and their laws and policies," and are "the subject of international agreements." *Id.* at 475. The same is true here.

A. Plaintiffs' Claims Are Based on Federal Common Law and Should Be Dismissed

1. Plaintiffs' claims are governed by federal common law

Federal common law applies where the subject matter of plaintiffs' claims implicates "uniquely federal interests." *Tex. Indus., Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981). Thus, federal common law applies exclusively where the subject matter is by nature "within national legislative power," *Am. Elec. Power Co.* v. *Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011); there is a "demonstrated need for a federal rule of decision," *id.* at 422; or "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641. Applying state law to such suits undermines federal interests and precludes a uniform standard of decision. *See, e.g.*, *New York*, 325 F. Supp. 3d at 472-73.

The Supreme Court has long held that federal common law applies to cases "deal[ing] with air and water in their ambient or interstate aspects." *Illinois* v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103 (1972); *see Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987); *see also AEP*, 564 U.S. at 421 ("Environmental protection is undoubtedly an area within national legislative power."). In *AEP*, plaintiffs brought claims against several electric utilities, claiming that their GHG emissions contributed to global climate change and created a "substantial and unreasonable interference with public rights," in violation of federal and state tort law. 564 U.S. at 418. The Supreme Court held that plaintiffs' claims were governed by federal common law, but were

displaced by the CAA, and, therefore, failed to state a claim. In *Native Village of Kivalina* v. *Exxon Mobil Corp.*, a municipality asserted a public nuisance claim against multiple oil, energy, and utility companies for alleged damage to public property due to the "emissions of large quantities" of GHGs. 696 F.3d 859, 853-54 (9th Cir. 2012). Citing *AEP*, the Ninth Circuit held that the claims were governed by federal common law given their interstate and transnational character. *Id.*

Like *AEP* and *Kivalina*, this action is a classic "transboundary pollution suit[]." *Kivalina*, 696 F.3d at 855. Plaintiffs' claims focus on the role of fossil fuels in "caus[ing] an unprecedented rise in the concentration of [GHGs] in the atmosphere" thereby "triggering changes to the climate." AC ¶ 7. As such, they implicate uniquely federal interests. *AEP*, 564 U.S. at 421-22. For example, assessing Plaintiffs' public nuisance claims requires weighing the gravity of any alleged harm caused by Defendants' production of fossil fuel products against its utility. *See generally* Restatement (Second) of Torts ("Restatement") §§ 821B, 826-32 (1979). This balancing requires a determination of "what amount of carbon-dioxide emissions is unreasonable" given what is "practical, feasible, and economically viable." *AEP*, 564 U.S. at 428; *see New York*, 325 F. Supp. 3d at 473; *California* v. *Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007). This analysis necessarily implicates the federal government's interest in setting national and international energy, environmental, and security policies. *See AEP*, 564 U.S. at 427.

Applying federal common law to Plaintiffs' claims also is necessary to ensure "a uniform standard of decision" on these global issues. *New York*, 325 F. Supp. 3d at 472; *California* v. *BP p.l.c.*, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *appeal pending* (9th Cir.); *see also Milwaukee I*, 406 U.S. at 105 n.6. "If ever a problem cried out for a uniform and comprehensive

solution, it is the geophysical problem of global warming." *California*, 2018 WL 1064293, at *3. Applying state tort law risks creating an unworkable "patchwork of fifty different answers to the same fundamental global issue." *Id.* Out-of-state actors (such as Suncor Energy Inc. and Exxon Mobil Corporation) would become subject "to a variety of . . . vague and indeterminate" state tort standards, and states would be empowered to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette,* 479 U.S. at 495-96.

For these reasons, Plaintiffs' claims are governed by federal common law.

2. Plaintiffs' claims are displaced by federal law

Applying federal common law, Plaintiffs' claims must be dismissed because they are displaced by federal legislation. *See New York*, 325 F. Supp. 3d at 472-75. The test for whether congressional legislation displaces federal common law is "simply whether [a federal] statute speaks directly to the question at issue," in which case "federal common law does not provide a remedy." *AEP*, 564 U.S. at 424; *City of Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304, 314 (1981); *see also United States* v. *Sims*, 511 F. App'x 429, 431 (6th Cir. 2013). Here, regardless of how Plaintiffs frame their claims, Congress already has spoken to all of the underlying issues.

(a) Congress has "spoken directly" to fossil fuel emissions

Plaintiffs seek to hold Defendants liable for their role in increasing the concentration of GHGs in the atmosphere. AC ¶ 7. As the Supreme Court has recognized, Congress already has "spoken directly" to this issue because GHG emissions constitute "air pollution subject to regulation under the" CAA. *AEP*, 564 U.S. at 424; *see* 42 U.S.C. §§ 7401 *et seq*. Thus, the CAA, and the EPA's implementing regulations, "displace any federal common-law right" to impose liability based on these emissions. *AEP*, 564 U.S. at 424; *see also Kivalina*, 696 F.3d at 857.

Attempting to evade this clear precedent, Plaintiffs claim that they do not seek to "enforce emissions controls of any kind." AC ¶ 542; *see also id.* ¶ 6. But Plaintiffs' isolated disclaimers are belied by the substance of the Complaint, which makes clear that their claims target the alleged role of Defendants' "unchecked fossil fuel activities" in contributing to GHG emissions, *id.* ¶ 7 (alleging that fossil fuel use "has caused an unprecedented rapid rise in the concentration of [GHGs] in the atmosphere . . . triggering changes to the climate"); ¶ 7 ("Changes to the climate were caused, and continue to be exacerbated, by unchecked fossil fuel activities."); *see also id.* ¶¶ 16, 323, 330, 346, 363, 376, 379. Indeed, the Complaint uses the term "emissions" more than 80 times. Thus, as in *AEP*, *Kivalina*, *Oakland*, and *New York*, Plaintiffs' claims are displaced by existing federal laws regulating GHG emissions.

Plaintiffs also cannot circumvent federal regulation of emissions by asserting a derivative theory seeking to hold Defendants liable for the emissions of others. As the court held in *Oakland*, "[i]f an oil producer cannot be sued under the federal common law of nuisance for [its] own emissions, *a fortiori* [it] cannot be sued for someone else's." 325 F. Supp. 3d at 1024; *see also New York*, 325 F. Supp. 3d at 474-75 (finding that claims alleging climate-change related injuries against fossil-fuel producers were predicated on emissions and were displaced by federal law).

(b) Congress has "spoken directly" to fossil fuel production

Even framed as challenging Defendants' role in fossil fuel *production* rather than emissions, Plaintiffs' claims are still displaced because Congress also has spoken directly to that issue through numerous statutes, including the Energy Policy Act of 2005, the Energy Policy Act of 1992, the Federal Land Policy and Management Act of 1976, the Coastal Zone Management Act of 1972, and the Mining and Minerals Policy Act of 1970, which address, and promote, fossil

fuel production and development. *See* 16 U.S.C. § 1451(j); 30 U.S.C. § 21a; 42 U.S.C. §§ 13401, 15927; 43 U.S.C. § 1701(a)(12).

For example, the Energy Policy Act of 1992 provides that "[i]t is the goal of the United States in carrying out energy supply and energy conservation research and development . . . to strengthen national energy security by reducing dependence on imported oil." 42 U.S.C. § 13401. The statute directs the Secretary of Energy "to increase the recoverability of domestic oil resources," *id.* § 13411(a), and to investigate "oil shale extraction and conversion" in order "to produce domestic supplies of liquid fuels from oil shale," *id.* § 13412. The 2005 Act declared it "the policy of the United States that . . . oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports," *id.* § 15927(b), and offered financial incentives to fossil fuel producers to increase domestic fossil fuel production. Even the tax code encourages the extraction and refining activities of fossil fuel companies in order to promote production. *See* I.R.C. §§ 263(c), 613A(c)(1), 617.

Because this legislation directly addresses, and conclusively rejects, the proposition that Defendants' fossil fuel production is "unreasonable" or tortious because of the potential threat of climate change, Plaintiffs' claims challenging these activities are displaced. *See Oakland*, 325 F. Supp. 3d at 1025 ("[N]ot long ago, the problem wasn't too much oil, but too little, and our national policy emphasized the urgency of reducing dependence on foreign oil.").[5]

[5] As discussed *supra* 10, Plaintiffs' disclaimer that they do not seek to "enjoin any oil and gas operations or sales" is not supported by the Complaint. The substantial monetary relief they seek further demonstrates their aim to deter fossil fuel production. *See* AC ¶ 531-39; *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay

(c) Congress has "spoken directly" to fossil fuel promotion

To the extent they can be characterized as challenging Defendants' *promotion of* fossil fuels, Plaintiffs' claims are still displaced because Congress has spoken to this issue as well. For example, in the Federal Trade Commission Act, enacted more than a century ago, Congress outlawed "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The Act expressly covers "misrepresent[ations] . . . that a product, package, or service offers a general environmental benefit." 16 C.F.R. § 260.4(a). Enacted more recently, the Energy Policy Act of 2005 makes it "unlawful for any entity . . . to use or employ, in connection with the purchase or sale of natural gas . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 717c-1. The Energy Independence and Security Act of 2007 forbids the "use or employ" of "any manipulative or deceptive device or contrivance," including any untrue statements or intentional omissions of material fact "in connection with the . . . sale of crude oil, gasoline, or petroleum distillates at wholesale." 42 U.S.C. § 17301; *see* 16 C.F.R. § 317.3. These Congressional actions displace Plaintiffs' state law claims that Defendants promoted fossil fuels in a manner that misrepresented their impact on climate change.

3. Plaintiffs cannot plead viable claims under federal common law

Even if Congress had not displaced Plaintiffs' claims, dismissal still would be required because the Complaint fails to state a plausible claim under federal common law. Federal common law has never been extended to impose tort liability under the expansive theory of derivative liability that Plaintiffs assert here. *See AEP*, 564 U.S. at 422. Moreover, as the Supreme Court

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compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

recently explained, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, courts must refrain from creating the remedy in order to respect the role of Congress." *Jesner* v. *Arab Bank*, 138 S. Ct. 1386, 1402 (2018); *see also Oakland*, 325 F. Supp. 3d at 1025 (judicial caution appropriate where "modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity"). Here, there are multiple reasons why Plaintiffs' claims are inconsistent with Congressional judgment regarding the role of the judiciary.

First, as discussed *supra* 10-11, Congress has expressly authorized and encouraged the very activities for which Plaintiffs seek to hold Defendants liable. Under established principles, a common law nuisance claim cannot survive if the challenged conduct is "fully authorized by statute, ordinance or regulations." Restatement § 821B cmt. f; *see also AEP*, 582 F.3d at 328. Courts are especially "reluctant" to declare a defendant's activities a public nuisance if those activities have been "considered and specifically authorized by the government," particularly where they "implicate[] the technically complex area of environmental law." *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 309 (4th Cir. 2010).

Second, resolving Plaintiffs' claims will "require a balancing of policy concerns—including the harmful effects of greenhouse gas emissions, our industrialized society's dependence on fossil fuels, and national security." *Oakland*, 325 F. Supp. 3d at 1025. This balancing "demand[s] the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate," all of which are actively engaged on these issues. *Id.* at 1026. Judicial resolution of individual tort suits under the various state common laws and statutes to address an inherently cross-border, global phenomenon would greatly interfere with this balancing.

Third, by seeking to impose liability on Defendants for their worldwide fossil fuel activities, Plaintiffs' claims not only interfere with federal laws, but also with the laws of foreign countries and international agreements. *Id.* (relief sought by Plaintiffs "would effectively allow [them] to govern conduct and control energy policy on foreign soil"); *see also New York*, 325 F. Supp. 3d at 475-76. Relatedly, Plaintiffs' claims are inconsistent with the presumption against extraterritoriality, which "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."). Although typically applied to discern whether federal statutes regulate conduct abroad, the Supreme Court has recognized that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" where, as here, "the question is not what Congress has done but instead what courts may do." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); *see also Oakland*, 325 F. Supp. 3d at 1026.

Finally, compounding the *foreign* policy implications, adjudication of Plaintiffs' nuisance claims would interfere with the energy and environmental policies of other U.S. states and impermissibly impose Plaintiffs' policy preferences on the rest of the country. *See infra* 18-19.

B. Plaintiffs' Claims Are Preempted By Federal Law

Plaintiffs' claims also should be dismissed because they are preempted by federal law. State-law tort claims are preempted when they conflict with federal law, or where Congress has occupied the field through legislation. *See Middleton* v. *Hartman*, 45 P.3d 721, 731 (Colo. 2002). "Conflict" preemption exists when state law "stands as an obstacle to accomplishing the purposes and objectives" of federal law. *In re Drexler & Bruce*, 315 P.3d 179, 182 (Colo. App. 2013). Field

preemption occurs where a federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *In re MacAnally*, 20 P.3d 1197, 1201 (Colo. App. 2007). State law also is preempted if it implicates "uniquely federal interests" committed to federal control. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988). Plaintiffs' claims are preempted under all three theories.

First, as discussed *supra* 9-12, adjudication of Plaintiffs' state-law claims would "interfere with the careful balance struck by Congress" through numerous statutes and regulations related to fossil fuel production and emissions, and environmental protection. *Arizona* v. *United States*, 567 U.S. 387, 406 (2012); *see Fuentes-Espinoza* v. *People*, 408 P.3d 445, 453 (Colo. 2017). The Supreme Court has "admonished against the tolerat[ion] of common-law suits that have the potential to undermine [the federal] regulatory structure." *Cooper*, 615 F.3d at 303. Plaintiffs' implicit solution to the important issue of climate change—an avalanche of litigation based on overlapping application of every state's common law—presents a significant obstacle to federal regulation of air pollution, and Congress's objective of increasing fossil fuel extraction. Plaintiffs' approach would impose standards "whose content must await the uncertain twists and turns of litigation," which "will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *Id.* at 301. It is exceedingly unlikely "that Congress intended to establish such a chaotic regulatory structure." *Id.* at 302. The Supreme Court's holding in *AEP* that plaintiffs' "claim for curtailment of greenhouse gas emissions because of their contribution to global warming" was displaced by the CAA, 564 U.S. at 429, similarly could not have been intended to unleash nuisance suits under state common law in all 50 states targeted at essentially the same conduct.

Second, Congress's delegation to the EPA, through the CAA, of broad authority over "whether and how to regulate carbon-dioxide emissions" reflects a clear occupation of this legislative area, preempting Plaintiffs' state-law tort claims, which effectively seek to regulate the same area. *Id.* at 426. *Finally*, as discussed *supra* 7-9, Plaintiffs' claims implicate a number of "uniquely federal interests," including national energy and security policies, and foreign relations. *See Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1098 (10th Cir. 2015).

C. Plaintiffs' Claims Violate Numerous Other Federal Doctrines

Plaintiffs' claims violate numerous other federal doctrines, including the federal foreign affairs power, separation of powers, the Commerce Clause, due process, and free speech.

1. Plaintiffs' claims impair the federal foreign affairs power

State-law causes of action, whether based on statute or common law, "must give way if they impair the effective exercise of the Nation's foreign policy." *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 (2003); *see In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 119-20 (2d Cir. 2010). By seeking damages for Defendants' lawful worldwide fossil fuel production activities, Plaintiffs' claims would interfere with the federal government's ability to negotiate and implement comprehensive international frameworks related to climate change, and "infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." *New York*, 325 F. Supp. 3d at 476; *see Oakland*, 325 F. Supp. 3d at 1026 (U.S. is "engaged in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework"). By asking this Court to punish Defendants' worldwide conduct, Plaintiffs also threaten to "undercut[] the President's diplomatic discretion and the choice he has made exercising it." *Garamendi,* 539 U.S. at 423-24. For example, in

Garamendi, the Supreme Court invalidated California legislation encouraging Holocaust reparations by European insurance carriers because of the likelihood that it would "conflict with express foreign policy of the National Government." *Id.* at 420; *see also Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S.363, 366-72 (2000). The same rationale warrants dismissal here.

2. Plaintiffs' claims violate the separation of powers

Adjudication of Plaintiffs' claims also would violate principles of separation of powers and federalism. Rendering judgment on the reasonableness or legality of Defendants' extraction and production of fossil fuels is not within "the proper—and properly limited—role of the courts." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006). Climate change-based tort claims cannot be adjudicated without dragging this Court "into precisely the geopolitical debate more properly assigned" to the federal political branches. *Gen. Motors*, 2007 WL 2726871, at *10; *see also New York*, 325 F. Supp. 3d at 475-76. Concerns about such judicial interference are particularly acute in state court proceedings because principles of federalism preclude state courts from "trenching upon the prerogatives of the National Government." *Lenhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Further, state *and* federal courts alike should refrain "from reviewing controversies concerning policy choices and value determinations." *Busse* v. *City of Golden*, 73 P.3d 660, 664 (Colo. 2003) (citing *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Thus, controversies such as the appropriate fossil fuel production and emissions levels are "committed for resolution to the legislative or executive branch." *Moss* v. *Bd. of Cty. Comm'rs*, 411 P.3d 918, 921 (Colo. App. 2015).

Tort claims based on climate change also "require a balancing of policy concerns—including the harmful effects of greenhouse gas emissions, our industrialized society's dependence

on fossil fuels, and national security," *Oakland*, 325 F. Supp. 3d at 1025, an assessment for which there are no judicial standards, *see Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874-75 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). This makes them ill-suited for judicial resolution because unlike the legislature, which may weigh competing political interests, courts "must be governed by *standard*, by *rule*." *Veith* v. *Jubelirer*, 541 U.S. 267, 278 (plurality opinion); *see Colo. Med. Soc'y* v. *Hickenlooper*, 353 P.3d 396, 399 (Colo. App. 2012).

There also is no "manageable method of discerning the entities that are creating and contributing" to climate change because there are countless "worldwide sources of atmospheric warming across myriad industries and multiple countries." *Gen. Motors*, 2007 WL 2726871, at *15. Thus, the "allocation of fault—and cost—of global warming is a matter appropriately left for determination by the [federal] executive or legislative branch." *Kivalina*, 663 F. Supp. 2d at 877.

3. Plaintiffs' claims violate the Commerce Clause

The dormant Commerce Clause invalidates state laws that have the "'practical effect' of regulating commerce occurring wholly outside that State's border," or "control[ling] conduct beyond the boundaries of the State." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *accord People* v. *Helms*, 396 P.3d 1133, 1140 (Colo. App. 2016). A "State may not impos[e] economic sanctions on violators of its laws with the intent of changing tortfeasors' lawful conduct in other States." *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 572 (1996). And "state regulation" can be just as "effectively exerted through an award of damages." *Kurns* v. *R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). This is especially so for common-law environmental tort claims, which can force a defendant to "change its methods of doing business and contributing pollution to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. Plaintiffs' claims violate these principles.

By seeking to punish Defendants' worldwide production and sale of fossil fuels, Plaintiffs' claims would have the "practical effect" of controlling Defendants' "conduct beyond the boundaries" of the State of Colorado. *See Healy*, 491 U.S. at 336. As discussed *infra* 24, the "undifferentiated nature" of GHG emissions means that there is "no realistic possibility" of tracing any particular fossil fuel emission to a particular source. *Kivalina*, 663 F. Supp. 2d at 880. Plaintiffs may not use Colorado tort law to "impose [their] own policy choice on neighboring States," let alone every state in the country, *BMW*, 517 U.S. at 571, many of which depend on petroleum resources for energy and economic security, *Healy*, 491 U.S. at 336-37.[6]

4. Plaintiffs' claims violate Due Process

Plaintiffs' claims violate the Due Process Clause in at least two ways. *First*, due process precludes states from "punish[ing] a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421 (2003). States also may not "impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 517 U.S. at 572-73 & n.19. Here, Defendants' "challenged conduct is, as far as the complaint[] allege[s], lawful in every nation." *Oakland*, 325 F. Supp. 3d at 1026. Indeed, ExxonMobil has conducted oil exploration at the direction and supervision of the federal government. Plaintiffs may not seek to punish Defendants for this lawful conduct.

Second, due process prohibits states from imposing disproportionate and *retroactive* liability for lawful conduct. *See E. Enters.* v. *Apfel*, 524 U.S. 498, 549 (1998) (provision of Coal Act imposing liability for miners' medical expenses dating back 35 years violated Takings Clause

[6] Because adjudication of Plaintiffs' claims also would regulate foreign commerce, *see supra* 14, their claims violate the dormant Foreign Commerce Clause as well. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 100 (1984).

because it placed a retroactive burden on defendant); *id.* at 539-50 (Kennedy, J., concurring) (reaching the same result under the Due Process Clause). The relief Plaintiffs seek here is even more extreme than in *Eastern* because Plaintiffs demand not just past expenses, but all alleged "past and future damages" trebled, related to conduct dating back more than 100 years. *See* AC ¶¶ 532-35. Defendants could not have anticipated that this lawful conduct would give rise to such liability. *See id.* ¶¶ 131–34; *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185, 192 (2d Cir. 2014). Due process prohibits such overreach. *See Stop the Beach Renourishment, Inc.* v. *Fla Dep't of Envtl. Prot.*, 560 U.S. 702, 714 (2010) (plurality).

5. Plaintiffs' claims violate the First Amendment

Plaintiffs' claims also should be dismissed because they seek to punish Defendants for protected speech. In particular, in support of their consumer fraud claim, Plaintiffs allege that Exxon Mobil Corporation ran advertisements "claim[ing] that climate science was unsettled," "criticiz[ing] the unrealistic and economically damaging Kyoto process," and "emphasiz[ing] scientific uncertainties about the human role in climate change." AC ¶ 421. However, punishing these alleged advertisements would violate the First Amendment, which protects the essential "free flow of commercial information." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995); *see City of Lakewood* v. *Colfax Unlimited Ass'n, Inc.*, 634 P.2d 52, 63-64 (Colo. 1981). Plaintiffs simply are not permitted to bring claims against Defendants because they may have taken or supported positions on a controversial issue that are contrary to theirs. *See Janus* v. *AFSCME*, 138 S. Ct. 2448, 2476 (2018) ("climate change" is a "controversial subject[]" and "sensitive political topic[]" that is "of profound value and concern to the public").

Plaintiffs' claims also are barred by the Noerr-Pennington doctrine, which immunizes "various forms of administrative and judicial petitioning activity from legal liability in subsequent litigation." *Gen. Steel Domestic Sales, LLC* v. *Bacheller*, 291 P.3d 1, 7 (Colo. 2012); *see Cow Palace, Ltd.* v. *Assoc. Milk Producers, Inc.*, 390 F. Supp. 696, 701 (D. Colo. 1975). For example, Plaintiffs claim that Defendants "promoted fossil fuels as safe, environmentally friendly and necessary," and that industry groups and their members distributed information to "discredit climate science" and "undermine support for the Kyoto Protocol." AC ¶¶ 415, 424. But the industry groups that Plaintiffs allege directed these communications were *lobbying organizations*, including the Global Climate Coalition, American Petroleum Institute ("API"), and Global Climate Sciences Communications Team. *See id.* ¶¶ 422-25; *see also id.* ¶ 427. Plaintiffs also allege that Defendants were involved in attacking the "conclusions and processes" of the IPCC, *id.* ¶ 431, but the IPCC's principal audience was policymakers, *see* IPCC, Climate Change 2007 Synthesis Rept. iii (2008) (cited in AC ¶ 132), so any criticisms would have been directed at the same audience.

D. Plaintiffs Fail To Allege Viable Claims Under Colorado Law

Even assuming state law governs Plaintiffs' claims, they still should be dismissed.

1. Plaintiffs do not have standing

Standing is a threshold issue that must be resolved before a decision on the merits. *Hickenlooper* v. *Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). To establish standing, a plaintiff must allege an "injury in fact" to a "legally protected interest." *Id.* The alleged injury cannot be "indirect and incidental to the defendant's action" or "overly speculative." *1405 Hotel, LLC* v. *Colo. Econ. Dev. Comm'n*, 370 P.3d 309, 316 (Colo. App. 2015). Plaintiffs' alleged injuries suffer from both of these defects, and should be dismissed. *Id.*

First, Plaintiffs do not and cannot allege that Defendants' fossil fuel activities are directly responsible for their alleged injuries. Instead, Plaintiffs allege that Defendants made it possible for billions of consumers—including Plaintiffs themselves—to consume fossil fuels, which, in turn, caused their alleged injuries. *See* AC ¶¶ 10, 128, 322. However, under Colorado law, a defendant having "merely encourage[d] or permit[ted] a third party to engage in conduct that affects a plaintiff's legally protected interest" does not create an injury in fact. *1405 Hotel*, 370 P.3d at 318; *cf. Cloverleaf Kennel Club, Inc.* v. *Colo. Racing Comm'n*, 620 P.2d 1051, 1053-57 (Colo. 1980); *Wimberly* v. *Ettenberg*, 570 P.2d 535, 537-39 (Colo. 1977).

Second, the Complaint makes repeated references to alleged damages that Plaintiffs claim are "expected," "projected," "anticipated," or "predicted" to materialize at some unspecified point in the future. *See, e.g.*, AC ¶¶ 161-63, 165-66, 172-173, 178-179, 244, 255, 288, 311. Since the nature and extent of these claimed damages "will not be known until a remote time in the future," they cannot support a claim.[7] *Olson* v. *City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002); *see also Anderson* v. *Suthers*, 338 P.3d 384, 388 (Colo. App. 2013).

2. Plaintiffs' claims are time-barred

It is evident from the face of the Complaint that all of Plaintiffs' claims are time-barred because Plaintiffs were on notice of them more than four years before they were filed.[8] Plaintiffs

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[7] For similar reasons, these allegations also cannot state a claim that is ripe for adjudication. *See Dev. Pathways* v. *Ritter*, 178 P.3d 524, 534 (Colo. 2008) ("We must refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur."); *see also Texas* v. *United States*, 523 U.S. 296, 300 (1998).

[8] For applicable statutes of limitations, see Colo. Rev. Stat. § 13-80-102(1) (trespass/nuisance: 2 years); *id.* § 13-80-101(1)(a) (unjust enrichment: 3 years); *id.* § 6-1-115 (CCPA: 3-4 years); *Sterenbuch* v. *Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (civil conspiracy: 2-4 years).

allege that "[b]y the late 1980s, the reality of climate change was increasingly identified in public settings," AC ¶ 417, and a "scientific consensus around the existence and causes of climate change" had emerged by the 1990s, *id.* ¶ 436. The misrepresentations Plaintiffs allege date back to the 1990s, *see id.* ¶ 324, and were made publicly, including through newspaper advertisements, *see id.* ¶¶ 416, 419-21. As sophisticated government entities who "have been national leaders in environmental sustainability and mitigating GHG emissions," *id.* ¶ 197, Plaintiffs were on notice of all of this information, *see Skyland Metro. Dist.* v. *Mountain W. Enter., LLP*, 184 P.3d 106, 127 (Colo. App. 2007); *Hughes* v. *Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000). Plaintiffs' own alleged efforts to combat climate change and its effects over the past two decades further underscore their awareness of the causes and consequences of climate change prior to 2014: Plaintiffs allege local impacts of climate change dating back to the 1990s and early 2000s, *see, e.g.*, AC ¶¶ 259, 268, 314, and efforts that they have undertaken to combat these effects, *see, e.g.*, *id.* ¶¶ 32, 206, 214, 226, 229. Based on these allegations, Plaintiffs were aware of their claims prior to 2014, and their claims are time-barred.

3. Plaintiffs cannot allege causation

All but one of Plaintiffs' claims (unjust enrichment) require them to prove both causation-in-fact and legal causation.[9] *Reigel* v. *SavaSeniorCare LLC*, 292 P.3d 977, 985 (Colo. App. 2011). Plaintiffs cannot satisfy either requirement.

As to causation-in-fact, Plaintiffs do not and cannot allege that their purported injuries would not have occurred "but for" Defendants' activities. *Smith* v. *State Comp. Ins. Fund*, 749

[9] *See Rhino Linings USA, Inc.* v. *Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003) (CCPA); *Pub. Serv. Co. of Colo.* v. *Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (private nuisance); *State, Dep't of Health* v. *Mill*, 887 P.2d 993, 1002 (Colo. 1994) (public nuisance);

P.2d 462, 464 (Colo. App. 1987). Plaintiffs allege that Defendants supply only a fraction of global oil demand. AC ¶¶ 61, 81 n.7, 397. But as other courts have recognized, the "undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time . . . make[s] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time." *Kivalina*, 663 F. Supp. 2d at 880; *see also Amigos Bravos* v. *U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135-36 (D.N.M. 2011). Put differently, "it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related injuries." *Kivalina*, 663 F. Supp. 2d at 881. In light of the substantial fossil fuel activity throughout the world by companies other than Defendants, and the innumerable contributors to GHG emissions and global climate change, including Plaintiffs themselves, AC ¶ 10, Plaintiffs simply cannot allege that the climate change consequences they complain of would not have happened absent Defendants' activities, *see Univ. of Tex. S.W. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346-47 (2013).

As to legal causation, Plaintiffs cannot allege that their damages were a "reasonably foreseeable" consequence of Defendants' conduct. *Boulders at Escalante LLC* v. *Otten Johnson Robinson Neff & Ragonetti PC*, 412 P.3d 751, 762 (Colo. App. 2015). Plaintiffs not only seek to

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Jet Courier Serv., Inc. v. *Mulei*, 771 P.2d 486, 502 (Colo. 1989) (civil conspiracy); *Sanderson* v. *Health Mesa Homeowners Ass'n*, 183 P.3d 679, 683 (Colo. App. 2008) (trespass). Plaintiffs' unprecedented unjust enrichment claim relies upon the theory that Defendants must bear the purported "costs of the impacts of climate change" in Boulder and San Miguel Counties, AC ¶ 486, and fails for the same reasons as their other claims. There also is no allegation that any purchaser or user of Defendants' fossil fuels did not receive "a valuable product for which they bargained and which they intend to keep." *Van Zanen* v. *Qwest Wireless, LLC*, 550 F. Supp. 2d 1261, 1266-67 (D. Colo. 2007), *aff'd*, 522 F.3d 1127 (10th Cir. 2008). Indeed, it is the very receipt and use of these products that Plaintiffs claim caused GHG emissions.

hold Defendants liable for lawful conduct dating back to the mid-nineteenth century, *see* AC ¶¶ 131, 133, but their alleged injuries have arisen because of the fossil fuel activities of essentially everyone on the planet, and countless other causes. Billions around the world, including Plaintiffs themselves, combusted fossil fuels for transportation, electricity, or heat, and the GHGs emitted mixed with the aggregated emissions of other users around the world for many decades to increase the concentration of GHGs in the atmosphere. Thus, Plaintiffs' claims are "dependent on a series of events far removed both in space and time from the Defendants'" alleged misconduct, *Kivalina*, 663 F. Supp. 2d at 881, and the causal chain is far "too attenuated" for Defendants to be deemed legally responsible for Plaintiffs' widely varied alleged injuries, *see Boulders at Escalante*, 412 P.3d at 766; *cf. Comer* v. *Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 868 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

4. Plaintiffs fail to state a nuisance claim

In order to establish that Defendants' conduct constituted a nuisance, whether public or private, Plaintiffs will be required to demonstrate that Defendants' conduct was unreasonable, i.e., that its harm outweighs its social utility. *See Saint John's Church in Wilderness* v. *Scott*, 194 P.3d 475, 479 (Colo. App. 2008); Restatement § 821 & cmt. e.; *id.* §§ 826-32. Here, any allegation that Defendants' conduct was unreasonable is facially implausible. *See Warne*, 373 P.3d at 591. Federal and state governments and courts have recognized the pivotal role that fossil fuel production and use has played in human societal innovation. *See, e.g.*, *Oakland*, 325 F. Supp. 3d at 1023 ("[O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible."); Oral Arg. Tr. 68:8-10, *California* v. *BP p.l.c.*, Civ. No. 17-6011, ECF No. 260

("The Court: We won the Second World War with fossil fuels. If we didn't have fossil fuels, we would have lost that war and every other war."). Plaintiffs also have benefited, and continue to benefit, from fossil fuel consumption like all consumers.[10]

A defendant's conduct also cannot constitute a public nuisance where, as here, it has been sanctioned by statute. Restatement § 821B cmt. f; *see Ft. Lyon Canal Co.* v. *Bennett*, 156 P. 604, 609 (Colo. 1916). As with federal law, *see supra* 9-10, 13, Colorado lawmakers have authorized and encouraged the very activities upon which Plaintiffs base their claims, *see, e.g.*, Colo. Rev. Stat. §§ 8-20-204, 232.5, 233 (authorizing the sale of fossil fuels meeting ASTM specifications, in gallon equivalents, and invoice requirements); 22-32-112 (authorizing municipal school districts to lease property for fossil fuel development and receive royalties); 39-26-715 (exempting electricity, coal, and gas used for residential and industrial purposes from fuel tax).[11]

In evaluating nuisance claims, courts also have required that the defendant have "control over the instrumentality causing the alleged nuisance at the time the damage occurs."[12] *State* v. *Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 449 (R.I. 2008); *see Tioga Pub. Sch. Dist. No. 115* v. *U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). Here, Plaintiffs allege that "[f]ossil fuel

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[10] Boulder residents also have determined that it is reasonable to balance the harm of fossil fuel emissions against the necessity of ensuring reliable, cost effective energy. In November 2011, voters enacted an initiative amending the City's charter to establish a municipal utility on the condition that it would not result in rate increases or decreased reliability, thus prohibiting the City from establishing a more environmentally friendly utility regardless of costs. *See* Boulder Charter & Rev. Code Art. XIII, § 178(a).

[11] *See also, e.g.*, Colo. Rev. Stat. §§ 8-20-101, *et seq.*; *id.* §§ 24-65.5-1, 24-65.5-1, 34-32-110, 34-33-107, 34-33-109, 34-33-110, 34-33-117, 34-33-121, 34-60-104, 34-60-105, 34-60-106, 34-60-116, 34-64-103, 36-1-115, 39-27-102, 39-27-103, 39-29-105, 39-29-106, 39-29-107.

[12] Colorado courts have not addressed this issue.

combustion is responsible for the majority of emissions that have caused [GHG] concentrations to reach hazardous and unprecedented levels." AC ¶ 128. Thus, Plaintiffs concede that it is the "use[]" of fossil fuels *by third parties* "at levels sufficient to alter the climate" that "caused, created, contributed to and/or exacerbated dangerous alterations in the climate." *Id.* ¶ 445.

5. Plaintiffs fail to state a trespass claim

The Complaint fails to plead several elements required for a trespass claim. *See Hoery* v. *United States*, 64 P.3d 214, 217 (Colo. 2003). *First*, to be liable for trespass, a defendant must have "inten[ded] to do the act that itself constitutes, or inevitably causes, the [alleged] intrusion." *Antlovich* v. *Brown Grp. Retail, Inc.*, 183 P.3d 582, 603 (Colo. App. 2007). The act must have been done with "knowledge that it w[ould] to a substantial certainty result in the entry of the foreign matter," *Hoery*, 64 P.3d at 218, or "in the usual course of events, w[ould] damage property of another," *Burt* v. *Beautiful Savior Lutheran Church*, 809 P.2d 1064, 1067 (Colo. App. 1990). Here, Plaintiffs cannot plausibly allege that by producing and selling fossil fuels worldwide, Defendants intended to cause "flood waters, fire, hail, rain, snow, wind and invasive species" to enter San Miguel or Boulder County. AC ¶ 474. Even assuming Defendants were aware that the combustion of fossil fuels contributes to climate change, AC ¶¶ 321-62, Plaintiffs' allegations are a far stretch from the facts in which Colorado courts have found this standard to be met, *see, e.g.*, *Cobai* v. *Young*, 679 P.2d 121, 123-24 (Colo. App. 1984) (snow sliding from a roof into plaintiff's house); *Docheff* v. *Broomfield*, 623 P.2d 69, 71 (Colo. App. 1980) (discharge of drain water onto adjoining property); *Miller* v. *Carnation*, 564 P.2d 127, 129 (Colo. App. 1977) (failure to remove chicken manure resulting in pests intruding on plaintiff's property). Their unprecedented and "breathtaking" theory of trespass liability would reach fossil fuel sales "anywhere in the world,

including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming." *Oakland*, 325 F. Supp. 3d at 1022.

Second, Plaintiffs cannot allege that any purported "intrusion" was nonconsensual. *See Jones* v. *Lehmkuhl*, 2013 WL 6728951, at *23 (D. Colo. Dec. 20, 2013); *Wal-Mart Stores, Inc.* v. *UFCW Int'l Union*, 382 P.3d 1249, 1258 (Colo. App. 2016). Although Plaintiffs allege that they "did not give Defendants permission" for the alleged "invasions," AC ¶ 477, they acknowledge that they too are responsible for fossil fuel emissions, *see, e.g.*, *id.* ¶¶ 10, 202, 208, 215, even though the consequences of these emissions have been known for decades, *id.* ¶¶ 417, 436. Thus, they have impliedly consented to the very conduct they now target. *See* 7 S. Speiser, et al., The American Law of Torts § 23.35 (2019); *Corder* v. *Folds*, 292 P.3d 1177, 1180 (Colo. App. 2012).

Finally, an action for trespass will not lie if the alleged entry is authorized "by legislative enactment." Restatement § 211. As discussed *supra* 9-10, 13, 26-27, Defendants' fossil fuel activities have been fully authorized, and encouraged, by federal and state law.

6. Plaintiffs' Consumer Protection Act claim fails

Plaintiffs' claim that Defendants engaged in "deceptive practices" in violation of the Colorado Consumer Protection Act ("CCPA") by falsely representing, or omitting, material information regarding climate change fails. As an initial matter, because Plaintiffs' CCPA claim sounds in fraud, Plaintiffs must allege with particularity "the statements [they] claim[] were false or misleading, give particulars as to the respect in which [they] contend[] the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *State Farm Mut. Auto. Ins. Co.* v. *Parrish*, 899 P.2d 285, 289 (Colo. App. 1994); *see Abercrombie* v. *Aetna Health, Inc.*, 176 F. Supp. 3d 1202, 1215 n.15 (D. Colo. 2016), *aff'd*, 704

F. App'x 728 (10th Cir. 2017). Each of the misrepresentations alleged in the Complaint, *see* AC ¶¶ 407-35, lacks at least one of the required particularities. The purportedly fraudulent statements identified in the Complaint suffer from several additional defects.

First, Plaintiffs fail to allege that the purported misstatements were directed at consumers to promote consumption, as required under Section 6-1-105(1)(e), rather than at policy makers to influence energy policy. *See, e.g.*, AC ¶¶ 409 (statements "opposing efforts to cut fossil fuel use"), 422-25 (statements to lobbying organizations); *see Rhino Linings*, 62 P.3d at 146-47; *Martinez* v. *Lewis*, 969 P.2d 213, 221 (Colo. 1998). *Second*, alleged misstatements related to climate change generally, rather than the "characteristics" or "benefits" of Defendants' goods, cannot support liability under Section 6-1-105(1)(e). *See, e.g.*, AC ¶ 419 ("Exxon and its predecessors ran multiple advertisements downplaying the risks of climate change and emphasizing uncertainty."); *cf. Warner* v. *Ford Motor Co.*, 2008 WL 4452338, at *10 (D. Colo. Sept. 30, 2008) (statements not actionable "because they are representations about Ford's safety research and not representations about Ford's products"). *Third*, Plaintiffs fail to adequately allege that statements made by third parties, such as API, are attributable to Defendants. *See, e.g.*, AC ¶¶ 416, 424, 430; *infra* 30. *Finally*, the statements alleged in the Complaint constitute protected commercial speech under Colorado and First Amendment jurisprudence.[13] *See Protect Our Mountain Env't, Inc.* v. *Dist. Court in & for the Cty. of Jefferson*, 677 P.2d 1361, 1364-66 (Colo. 1984); *supra* 20-21.

[13] For the same reasons, Plaintiffs also have failed to state a claim under Section 6-1-105(1)(u), which requires a showing that defendant failed to disclose "material information concerning goods, services, or property to consumers," with the intent to induce consumers into transactions. *See Valley Fresh Produce, Inc.* v. *W. Skyways, Inc.*, 2019 WL 4695668, at *8 (D. Colo. Sept. 25, 2019). Plaintiffs also fail to allege that the purported omissions would have factored into consumers' decisionmaking about fossil fuel consumption. *See id.*

7. Plaintiffs have failed to allege civil conspiracy

Plaintiffs' civil conspiracy claim fails for at least three reasons. *First*, Plaintiffs have no conspiracy claim because the "acts alleged to constitute the underlying wrong provide no cause of action." *Double Oak Constr., LLC* v. *Cornerstone Dev. Int'l, LLC*, 97 P.3d 140, 146 (Colo. App. 2003). *Second*, Colorado courts "require greater detail in pleading conspiracy claims," *Wilson* v. *City of Lafayette*, 2008 WL 4197742, at *10 (D. Colo. Sept. 10, 2008), including how the alleged agreement came about or the basic terms of the agreement itself—the time, place, or person(s) involved in the alleged conspiracies, *Twombly*, 550 U.S. at 557; *see Nelson* v. *Elway*, 908 P.2d 102, 106 (Colo. 1995). Where a conspiracy is based on fraud, the alleged "fraudulent acts must be pled under the standard of Rule 9(b)." *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 387 F. Supp. 2d 1130, 1153 (D. Colo. 2005). Here, however, the Complaint contains only conclusory allegations that Defendants "acted together with, and through" industry groups and associations "in a concerted and coordinated effort to mislead" the public about climate change, AC ¶ 412, but lacks any particularized facts supporting the bare allegations that Defendants "conspired" with these groups to mislead the public about climate change, *see id.* ¶¶ 335, 430, 504, 514; *Alley* v. *Aurora Loan Servs. LLC*, 2011 WL 3799035, at *8 (D. Colo. July 21, 2011). *Finally*, a conspiracy requires "an unlawful act or unlawful means[;] [a] party may not be held liable for doing in a proper manner that which it had a lawful right to do." *Nelson*, 908 P.2d at 106. Because Plaintiffs fail to allege an "unlawful act or unlawful means," they cannot support a conspiracy claim. *See supra* 9-10, 13, 26-27.

V. Conclusion

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: December 9, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2019, a true and correct copy of the foregoing **MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO COLO. R. CIV. P. 12(b)(5)** was electronically filed with the Court through CCES and served on all counsel of record via the manner indicated below:

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