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TESTIMONY IN SUPPORT OF SENATE BILL 149

Responding to Emergency Needs From Extreme Weather (RENEW) Act of 2025

Senate Education, Energy, and the Environment Committee
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Submitted by Professor William Piermattei[1]

I am writing in support of Senate Bill 149, the RENEW Act (cross-filed with HB 128) and to address legal concerns related to the legislation. This bill will provide funds for addressing State efforts to adapt and mitigate the effects of climate change through payments from the businesses most responsible for (and who have profited the most from) fossil fuel products that have caused climate change and its attendant damages to Maryland. Given concerns raised to date about the constitutionality of the bill, it is likely that the bill will survive judicial scrutiny under current precedent.

The RENEW Act ("the Act") establishes a climate change adaptation fund and an administrative process to determine: (1) the extent of future climate change damages in Maryland and the cost to address them; (2) "responsible parties," those business entities whose products and processes contributed the most to climate change; (3) allocation of a portion of the costs to each responsible party based on their share of GHG emissions; and (4) determination of qualified expenditures from the fund to address climate change adaptation measures. The Act holds responsible parties strictly liable for cleaning up the damage their businesses and products have caused, similar to the federal "Superfund" law (CERCLA) holding responsible parties strictly liable to pay for clean-up of improperly disposed hazardous chemicals. *See,* 42 U.S.C. §9607. The RENEW Act is similarly structured and an extension of the "polluter pays" principle that undergirds many environmental laws. Both Vermont and New York have recently passed similar laws, both have recently been challenged in court.

Not surprisingly, the American Petroleum Institute, representing many of the responsible parties under the Act, filed objections alleging that the Act *may* be unconstitutional because it: (1) constitutes retroactive law making; (2) violates the dormant commerce clause; (3) imposes arbitrary penalties and fines creating due process and fairness issues; and (4) it is preempted by federal law.

1. Retroactivity

Legislation can impose retroactive liability provided that the legislation has a "legitimate legislative purpose furthered by rational means." *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984). The Superfund law (CERCLA) passed this test, imposing liability for decades-old hazardous waste disposal, legal at the time, because cleaning up hazardous waste is a legitimate government purpose, the amount

[1] This testimony may not represent the position of the University of Maryland Carey School of Law; the University of Maryland, Baltimore; or the University of Maryland System.

assessed was proportional to that purpose, and it was "foreseeable at the time that improper disposal could cause enormous environmental damage." *U.S. v. Monsanto Co.,* 858 F.2d 160, 174 (4th Cir. 1988); *see also, Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976) (retroactive liability in Black Lung Benefits Act satisfied because legislation had legitimate purpose and not enacted in "arbitrary or irrational manner").

Here, there is no question that the state interest is compelling and vital: funding infrastructure needs to deal with climate change. The Act provides an administrative process to determine both climate damages and apportioning liability to those who contributed the most in bringing about those harms. Finally, the responsible parties knew or should have known their products would cause climate change harms. The Act sets the period of liability (approx. 1994-2024) at a time when the U.N. Framework Convention on Climate Change went into effect (1994); i.e., when governments around the world recognized the dangers climate change posed and its link to fossil fuel use. *See, Owens Illinois v. Zenobia*, 325 Md. 420, 437 (1992) (manufacturers held to knowledge of experts in the field).

2. Dormant Commerce Clause

The dormant commerce clause prevents states from excessively burdening interstate commerce or discriminating against out-of-state businesses to benefit in-state businesses. *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970). First, the RENEW Act does not explicitly discriminate against out-of-state interests. The applicability test (1 billion tons of GHG emissions) applies to any entity doing business in Maryland, i.e., Maryland has personal jurisdiction under the Constitution, whether they are a Maryland business or not.

The Supreme Court recently upheld a California law banning the sale of pork raised in an inhumane manner. *Nat. Pork Producers Council v. Ross,* 143 S.Ct. 1142 (2023). The court upheld the law even though virtually all pork sold in California came from out-of-state because: (1) the statute advanced a legitimate state interest; (2) the statute applied to both in-state and out-of-state pork producers even-handedly; and (3) the "extraterritoriality doctrine" (a state cannot regulate conduct outside its borders) is not a basis for striking down a state law. *Id.* Here, the state interest advanced is vital: protecting Maryland's infrastructure. Second, the legislation does not protect or favor Maryland businesses. Finally, as the Supreme Court noted in the *Pork Producers* case, nearly all state laws regulating products sold will have *some* extraterritorial effect and therefore that cannot be a basis for striking down the law. *Id.* at 1154-56 (explaining rejection of extraterritoriality)

3. Arbitrary or excessive "fines" or "penalties" and unfairness

To begin, the RENEW Act fees assessed to "responsible parties" in creating climate change and its harms in Maryland are not "penalties" or "fines" or "punishment" as the

API asserts in its opposition to the Act.[2] Rather, they are compensatory in nature (to compensate for harm inflicted) and not punitive (to penalize or punish for wrongdoing). Put simply, several of API's legal objections rely on this erroneous description of RENEW Act fees as "penalties" or "sanctions" or "punishment." *Compare, BMW v. Gore,* 116 S.Ct. 1589, 1595 (1996) (punitive damages punish unlawful conduct and deter repetition) with Black's Law Dictionary, "compensatory damages compensate the injured party for the injury sustained, and nothing more." Second, there is nothing unfair for a law requiring a handful of companies (that have profited hundreds of billions selling products that will increasingly harm Maryland) to pay for some of the costs to address those harms. Finally, the administrative process to establish liability would be developed in a transparent way and provide the responsible parties legal recourse to challenge those determinations, thereby addressing due process concerns.

4. Preemption

Pursuant to the U.S. Constitution Supremacy Clause, federal law would preempt state law if Congress intended federal law to "occupy the field" (implied preemption) or by expressing this intent in the federal statute. In addition, state law can be preempted if it conflicts with a federal law (e.g., adhering to state law would violate federal law) or is an "obstacle" to implementing federal law. Requiring responsible parties to pay compensation for the damage their products have caused and will cause does not conflict with any federal requirements nor presents an obstacle to federal law implementation. As there is no federal law that expressly prevents states from passing laws such as the RENEW Act, the Clean Air Act (CAA) is the federal law most frequently cited that allegedly preempts states from holding fossil fuel companies responsible for the harms their products caused.

The preemptive effect of the CAA is still unsettled. *See, American Electric Power v. Connecticut,* 564 U.S. 410, 429 (2011) (CAA displaces federal common law, leaves open whether it preempts state law governing GHGs). However, Congress specifically preserved state authority to regulate pollution more stringently than federal standards. *See, e.g.,* 42 U.S.C. §7402(a) (state and local governments encouraged to pass uniform laws); §7604(e) (statute does not prohibit state government from seeking "administrative remedy … in any State or local administrative agency, department or instrumentality."). Such "saving provisions" show Congress intended the state to augment the CAA and counsel against preemption. *Mayor & City Council of Baltimore v. B.P. P.L.C.,* 31 F.4th 178, 216-17 (4th Cir. 2022).

Here, the RENEW Act does not regulate emissions at all, like the CAA. The Act does not impose any requirements on responsible party operations, does not restrict the sale of their products or otherwise "regulate" in any meaningful way nor does it conflict with or impede the CAA or other federal statutes.

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[2] The U.S. Chamber of Commerce and API recently filed a lawsuit challenging Vermont's similar legislation raising similar arguments. *Chamber of Commerce v. Moore, et al.,* (D. Vt. Dec. 30, 2024).