No. 23-947

In the Supreme Court of the United States

SUNOCO LP, ET AL., PETITIONERS

v.

CITY AND COUNTY OF HONOLULU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Respondents' suit is one of dozens across the Nation seeking to hold multinational energy companies liable for climate change. The Hawaii Supreme Court held that respondents' state-law claims could proceed despite seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions—a field traditionally governed by federal law. The question presented implicates vital federal interests in the regulation of greenhouse-gas emissions, the preservation of the American energy industry, the resolution of interstate conflict, and delicate questions of international diplomacy.

The consistent position of the United States, as expressed to this Court and lower courts in previous cases, has been that federal law precludes the application of state law to transboundary pollution claims. In its brief here, the government does not walk back that position; in

fact, it admits that petitioners "may ultimately prevail." Br. 12.

But rather than taking a definitive position on the question, the outgoing Administration attempts to throw a wrench in the works, raising a series of purported obstacles to review. Tellingly, the government sees obstacles even where respondents do not. But none is valid. As to jurisdiction: the decision below finally resolved the question presented, and its reversal would terminate further litigation. As to preservation: petitioners' constitutional claims were directly presented to the Hawaii Supreme Court. And as to the conflict: the allegations of deceptive marketing here do not eliminate the conflict between the decision below and the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021).

Despite the government's best efforts, the case for this Court's review is compelling. There are now dozens of similar cases pending in state courts nationwide. The arguments on both sides of the question presented have been fully ventilated in the lower courts, and there is a clear conflict on that question. The question is of substantial importance to one of the country's most critical industries, and it raises profound questions of constitutional structure.

Additional years of complex and costly litigation may ensue before another case presenting this question works its way through a state appellate system to this Court—particularly if (as the government erroneously suggests) the case must first proceed to final judgment. The Court should decide now whether state-law climate claims may go forward, instead of allowing uncertainty about the viability of these claims to linger. The petition for a writ of certiorari should be granted.

A. The Court Has Jurisdiction Under 28 U.S.C. 1257(a)

As previously explained, this Court has jurisdiction under 28 U.S.C. 1257(a). See Pet. 2; Reply Br. 3-4. The question presented has been finally decided by the Hawaii Supreme Court; this Court's review of the question would be prevented if petitioners prevail on the merits on non-federal grounds; reversal of the decision below would terminate the litigation; and declining review now would seriously erode significant federal policies. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

Although the government expands on respondents' cursory jurisdictional arguments, its arguments equally lack merit.

1. The government first contends (Br. 8-9) that jurisdiction is lacking because petitioners raised additional federal defenses in their answer below. But this Court has not treated the possibility of additional federal defenses as a jurisdictional bar. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-57 (1989); *id.* at 69 (O'Connor, J., concurring in part and dissenting in part). Rather, the Court requires that the petitioner "might prevail on the merits on nonfederal grounds," such that future review of the federal issue by the Court would be "render[ed] unnecessary." *Cox*, 420 U.S. at 482. That condition is satisfied here.

2. The government next contends that reversal would not prevent future litigation, because "respondents would not be precluded from pursuing claims involving *in-state* deceptive practices or *in-state* pollution." Br. 9. But respondents do not advance that argument here: they have never asserted that petitioners' in-state conduct alone caused their alleged injuries, see Haw. Cir. Ct. Dkt. 45, at 1-4, and they admitted below that reversal would likely terminate this litigation, see Haw. Cir. Ct. Dkt. 649, at 5. Reversal would thus preclude respondents' sole theory of

liability and end the case. Cf. *Wilson* v. *Hawaii*, No. 23-7517, slip op. 6-7 (Dec. 9, 2024) (Thomas, J., respecting the denial of certiorari).

3. The government further contends (Br. 9-10) that denying review would not erode federal policy. As the government sees it, this Court's jurisdiction is proper only when "continuation of the litigation" would undermine "identifiable federal statutory or constitutional policies." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). But jurisdiction also exists where the "unreviewed decision" itself "might seriously erode federal policy." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179 (1988). And however the standard is formulated, it is plainly met here: the threat of untold liability hanging over one of this Nation's most critical industries implicates identifiable federal policies, see, *e.g.*, API Br. 18-24, and hampers the United States' international diplomacy, see pp. 10-11, *infra*. The proper allocation of authority between the federal and state governments over the regulation of greenhouse-gas emissions "should not remain in doubt." *Fort Wayne Books*, 489 U.S. at 56.

As petitioners have noted (Reply Br. 3), this Court has routinely granted review over interlocutory state-court decisions on questions of federal preemption. See, *e.g.*, *Coventry Health Care of Missouri, Inc.* v. *Nevils*, 581 U.S. 87 (2017); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251 (2013). The government speculates that jurisdiction in those cases was proper only because they concerned the scope of an *express* preemption provision. But that is a distinction without a difference. There is ample evidence of the federal interests at stake here, see Reply Br. 3, and this Court has reviewed interlocutory state-court decisions on questions of federal preemption in the absence, as well as presence, of express preemption pro-

visions. See, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988).

4. There is nothing to the government's suggestion (Br. 11-13)—conspicuously not made by respondents—that petitioners' constitutional argument was not properly presented. Petitioners' brief to the Hawaii Supreme Court unambiguously stated that "our federal constitutional structure does not allow varying state laws to govern claims arising out of interstate pollution." Br. 26. That is exactly petitioners' argument here. And although the relevant question is whether the argument was adequately presented to the court immediately below, the same argument was presented to the trial court as well. See Mot. to Dismiss, Haw. Cir. Ct. Dkt. 348, at 11-12; Mot. to Dismiss Hearing Tr. 99, 101, 104.

5. Perhaps recognizing that its jurisdictional argument is a loser, the government ultimately retreats to the position that this Court should decline certiorari whenever a jurisdictional question would "complicate" review. See Br. 11. Perhaps so if the jurisdictional inquiry would depend on yet-to-be-developed facts. Cf. Br. in Opp. at 18, *Gordon College* v. *DeWeese-Boyd*, 142 S. Ct. 952 (2022) (No. 21-145). But there is no such complication here. It would destroy the *Cox* doctrine if the Court denied review whenever a respondent could simply raise a *colorable* but meritless objection to jurisdiction. Here, there is no need even to add an additional question concerning jurisdiction; this Court plainly has it.

B. The Decision Below Creates A Conflict On The Question Presented

Like respondents, the government does not dispute that the Hawaii Supreme Court expressly rejected the Second Circuit's reasoning in *City of New York* that state tort law cannot govern claims alleging injury caused by

global greenhouse-gas emissions. See Br. 21. The government contends only that the Second Circuit reached its conflicting conclusion "because it understood [the plaintiff's] claims to regulate cross-border emissions." *Ibid.* (citation omitted). That argument is invalid.

1. As petitioners have explained (Reply Br. 4-5), it is incorrect that the claims in *City of New York* targeted only "fossil-fuel products themselves," U.S. Br. 20, and not the marketing of those products. As the government acknowledges (*ibid.*), the claims in *City of New York* targeted defendants' actions in "producing, marketing, and selling fossil fuels." J.A. at 51, *City of New York*, *supra* (No. 18-2188). The City of New York alleged that the defendants had "orchestrated a campaign of deception and denial" while "knowing of the harm that was substantially certain to result." *Id.* at 47, 51. Both this case and *City of New York* involved the same allegedly wrongful conduct, yet they reached conflicting conclusions about the viability of state-law claims.

Contrary to the government's contention (Br. 21), the Second Circuit's subsequent decision in *Connecticut* v. *Exxon Mobil Corp.*, 83 F.4th 122 (2023), does not suggest otherwise. There, the question was whether federal law was a "necessary element" of a statutory consumer-deception claim *for purposes of establishing federal subject-matter jurisdiction*. *Id.* at 140. The court reasoned that federal law was "irrelevant" for that purpose, but explained that it may "give rise to an affirmative federal preemption defense." *Id.* at 140 n.6. *Connecticut* thus sheds no light on whether such claims can go forward on the merits under state law.

And even if *City of New York* had not involved a claim for deceptive marketing, the conflict would remain because the theory of harm was the same as respondents'. See Reply Br. 5; U.S. Br. at 11, 26, *City of New York*,

supra; *Mayor & City Council of Baltimore* v. *BP P.L.C.*, No. 24-C-18-4219, 2024 WL 3678699, at *6-*7 (Md. Cir. Ct. July 10, 2024). Neither case targets defendants for their own emissions; instead, the theory in each case is that defendants engaged in conduct that caused other people to use fossil-fuel products and thus release greenhouse gases. The Second Circuit reasoned that the City could not, through "artful pleading," "disavow[] any intent to address emissions" while "identifying such emissions as the singular source of [its] harm." 993 F.3d at 91. The Hawaii Supreme Court reached the opposite result, yet acknowledged that respondents' "theory of liability" is that petitioners' global conduct "caus[ed] increased fossil fuel consumption and greenhouse gas emissions" that produced respondents' "damage." Pet. App. 2a. The government's attempt to downplay the conflict merely underscores it.

2. The government similarly seeks to distinguish *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291 (4th Cir. 2010), and *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir. 1984), on the ground that those cases involved suits brought for redress of direct emissions, rather than alleged deception that causes direct emissions. See Br. 21-22. But the key point is that both cases rejected attempts to use state law to redress injuries allegedly caused by pollution from other States. See Reply Br. 6. The resulting conflict with the decision below as to the viability of state-law claims for transboundary emissions warrants this Court's review.

C. The Decision Below Is Incorrect Under This Court's Precedents

1. The government concedes that petitioners "may ultimately prevail" on the argument that the Constitution precludes respondents' state-law claims seeking redress

for interstate and international greenhouse-gas emissions. U.S. Br. 12. That is unsurprising in light of the government's consistent position on the question. The government has told this Court that nearly identical claims were "inherently federal in nature." Oral Arg. Tr. at 31, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). And it similarly argued to the Ninth Circuit that such claims were "irreconcilable with the constitutional commitment of such matters to the national government and the relative rights and obligations of the national government and States under the structure of the Constitution." U.S. Rehearing Br. at 12, *City of Oakland* v. *B.P. p.l.c.*, 969 F.3d 895 (9th Cir. 2020) (No. 18-16663).

The government now seeks to head off this Court's endorsement of that view by rewriting the question presented and attacking a strawman. Remember that the question presented here is whether *federal law* precludes respondents' state-law claims. See Pet. i. Throughout this litigation, petitioners have argued that the Constitution and the Clean Air Act are the sources of that preclusion. See p. 5, *supra*. Yet the government avoids reiterating its consistent agreement with petitioners' constitutional-structure argument by reframing the question presented as whether "federal *common* law" governs respondents' claims. Br. i (emphasis added). Its arguments concerning the scope and displacement of federal common law (Br. 14-17) are not directly responsive to the actual question presented.

2. This Court's decisions support the conclusion that federal law precludes respondents' claims, and the government mischaracterizes those decisions in several respects.

As to *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011): the government is correct that the Court

remanded with instructions to assess the availability of the remaining state-law claims in light of "the preemptive effect of the federal [Clean Air] Act." Br. 15 (quoting 564 U.S. at 429). The government fails to mention, however, that the Court immediately cited *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), for the proposition that "the Clean Water Act does not preclude aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state." 564 U.S. at 429 (internal quotation marks and citation omitted). Respondents' claims, by contrast, are not limited to source-state emissions.

As to *Ouellette*: the government is simply wrong that "the Court did not suggest that the prior federal-common-law regime had any bearing on the extent to which state-law claims could go forward." Br. 15. The Court's reasoning was expressly based on "the fact that the control of interstate pollution is primarily a matter of federal law." 479 U.S. at 492. That directly affected the Court's analysis, because, in areas in which "there has been a history of significant federal presence," there is "no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); see *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 347-348 (2001).

And as to *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988): that case stands only for the unremarkable proposition that state law in an area historically governed by the State is not preempted by a repealed federal statute. See *id.* at 499-504. That is distinct from the question here: whether the Constitution continues to preclude state law in an inherently federal area after Congress displaces federal common law without affirmatively authorizing resort to state law in its place.

3. In addition, the Clean Air Act preempts claims for transboundary pollution under a traditional preemption analysis.[*] The government acknowledges that the Act may "limit the scope of respondents' claims or the relief that could be granted," but it ultimately takes the position (without elaboration) that the Act does not "*categorically* preempt respondents' claims." Br. 17-18 (emphasis added). That position, the government acknowledges, is a reversal from its earlier position that analogous suits were preempted by the Clean Air Act. See Br. 18 n.3. The government's only explanation for its about-face is the implausible assertion that it did not previously consider that some of the claims were based, in part, on alleged deception.

4. The government is completely silent on respondents' claims based on international greenhouse-gas emissions. That is also unsurprising. Earlier this year, the government told the International Court of Justice that "climate change has been the subject of continuous international negotiations for more than 30 years," culminating thus far in the Paris Agreement, which "represents a significant diplomatic achievement" through "carefully calibrated provisions." Obligations of States in Respect of Climate Change, Written Statement of the United States ¶¶ 2.29, 2.51 (Mar. 22, 2024) <tinyurl.com/ICJ-US-Climate>. The government took the position that "these ongoing diplomatic efforts" offer "the best means for achieving the international community's shared climate goals." *Id.* ¶ 1.14. But the unilateral imposition of liability by Hawaii, or any other State, for climate-change-related harms caused by international emissions would take a wrecking

[*] Whether the Clean Air Act preempts respondents' state-law claims is within the scope of the single question presented here. See Reply Br. 2.

ball to those efforts. There can be no serious doubt that respondents' claims reach international emissions and thus threaten "serious foreign policy consequences." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

D. The Question Presented Is Important And Warrants The Court's Review In This Case

Like respondents, the government does not question the importance of the question presented. Dozens of States and municipalities are seeking billions of dollars in damages from multinational energy companies for the alleged effects of climate change. Those cases are pending in state courts nationwide, and more continue to be filed. See, *e.g.*, *Puerto Rico* v. *Exxon Mobil Corp.*, No. SJ2024-24CV0652 (P.R. Super. Ct. filed July 15, 2024); *Maine* v. *BP p.l.c.*, No. PORSC-CV-2024-442 (Me. Super. Ct. filed Nov. 26, 2024). In the similar circumstances presented in *American Electric Power*, the government urged interlocutory review because "action by this Court would meaningfully affect an emerging category of litigation over greenhouse-gas emissions that implicate myriad plaintiffs and defendants." TVA Cert. Br. at 9-10 (No. 10-174). The Court granted review there, and it should do so again here.

In light of the enormous legal and practical importance of this case, now is the time to resolve the question presented. Respondents' claims are representative of the claims brought in other similar climate suits; petitioners' federal preclusion defense is cleanly presented; arguments on both sides have been fully ventilated; and the lower courts are in clear conflict. And while there are many cases currently pending in trial courts, it is uncertain when another case will make its way through a state appellate system in order to present this Court with

another opportunity for review. The Court's intervention is urgently needed to dispel the cloud of uncertainty hanging over one of this Nation's most critical industries, to protect important federal interests in national and economic security, and to prevent wasting untold resources in litigating and adjudicating cases that should be dismissed at the outset.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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