No. 23-_____

IN THE
Supreme Court of the United States

SHELL PLC (F/K/A ROYAL DUTCH SHELL PLC), SHELL USA, INC. (F/K/A SHELL OIL COMPANY), AND SHELL OIL PRODUCTS COMPANY LLC,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawai'i

PETITION FOR A WRIT OF CERTIORARI

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February 2024

QUESTIONS PRESENTED

1. Whether claims seeking damages for the effects of interstate and international emissions on the global climate are beyond the limits of state law and thus preempted under the federal Constitution.

2. Whether the Clean Air Act preempts state-law claims predicated on damaging interstate emissions.

PARTIES TO THE PROCEEDINGS

Petitioners Shell plc (f/k/a Royal Dutch Shell plc), Shell USA, Inc. (f/k/a Shell Oil Company), and Shell Oil Products Company LLC were defendants in the state circuit court, appellants in the state intermediate court of appeals, and respondents/appellants in the Supreme Court of Hawai‘i.

Respondents City and County of Honolulu and Honolulu Board of Water Supply were the plaintiffs in the state circuit court, the appellees in the state intermediate court of appeals, and the petitioners/appellees in the Supreme Court of Hawai‘i.

Respondents Sunoco LP, Aloha Petroleum, Ltd., Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Chevron Corporation, Chevron U.S.A., Inc., Woodside Energy Hawaii Inc. (f/k/a BHP Hawaii Inc.), BP p.l.c., BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company were defendants in the state circuit court, appellants in the state intermediate court of appeals, and respondents/appellants in the Supreme Court of Hawai‘i.

BHP Group Limited and BHP Group plc were defendants in the state circuit court. That court dismissed the claims against them, and the state respondents did not appeal.

RULE 29.6 STATEMENT

Shell plc (formerly Royal Dutch Shell plc) has no parent corporation, and no publicly held company owns 10% or more of its stock. Shell USA, Inc. (formerly Shell Oil Company) and Shell Oil Products Company LLC are wholly owned indirect subsidiaries of Shell plc.

RELATED CASES

State – Direct:

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., Civil No. 1CCV-20-00000380, Dkt. 618 (Haw. Cir. Ct., 1st Cir., Mar. 29, 2022) (order denying defendants' joint motion to dismiss for failure to state a claim)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., Civil No. 1CCV-20-00000380, Dkt. 622 (Haw. Cir. Ct., 1st Cir., Mar. 31, 2022) (order denying defendants' joint motion to dismiss for lack of personal jurisdiction)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., SCAP-22-0000429, Dkt. 7 (Haw. Mar. 31, 2023) (order granting application to transfer appeal to Hawai'i Supreme Court)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., SCAP-22-0000429, Dkts. 74 & 76, 537 P.3d 1173 (Haw. Oct. 31, 2023) (affirming circuit court's decisions to deny joint motion to dismiss for failure to state a claim and joint motion to dismiss for lack of personal jurisdiction)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., SCAP-22-0000429, Dkt. 80 (Haw. Dec. 13, 2023) (judgment on appeal)

State – Related:

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., Civil No. 1CCV-20-00000380, Dkt. 637 (Haw. Cir. Ct., 1st Cir., Apr. 7, 2022) (order granting defendants BHP Group Ltd. and BHP Group plc's motion to dismiss for lack of personal jurisdiction)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., Clean Air ActP-22-0000135 (Haw. Ct. App.)

City & Cnty. of Honolulu, et al. v. Sunoco LP, et al., Clean Air ActP-22-0000428 (Haw. Ct. App.)

County of Maui v. Sunoco LP, et al., Civil No. 2CCV-20-0000283 (Haw. Cir. Ct., 2d Cir.)

Federal:

City & Cnty. of Honolulu v. Sunoco LP, et al., No. 1:20-cv-00163-DKW-RT, ECF No. 128, 2021 WL 531237 (D. Haw. Feb. 12, 2021) (granting motion to remand to state circuit court), *aff'd*, 39 F.4th 1101 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023)

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Petitioners Shell plc (f/k/a Royal Dutch Shell plc), Shell USA, Inc. (f/k/a Shell Oil Company), and Shell Oil Products Company LLC petition for a writ of certiorari to review the judgment of the Hawai'i Supreme Court in this case.

OPINIONS BELOW

The opinion of the Hawai'i Supreme Court (App.1a-76a) is reported at 537 P.3d 1173. The orders of the First Circuit Court of Hawai'i (App.77a-83a, 84a-95a) denying motions to dismiss are not reported.

JURISDICTION

The Hawai'i Supreme Court entered judgment on October 31, 2023. On January 16, 2024, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including February 28, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

INTRODUCTION

This lawsuit is among many attempting to hold certain energy companies liable under state laws for global climate change. Plaintiffs seek to impose billions of dollars in damages on petitioners – and other companies that provide energy sources used by many millions of people – for planet-wide changes in the climate. Plaintiffs allege they can recover under

state law for such global climate-change effects as "flooding, erosion, and beach loss; extreme weather, including hurricanes . . . ; ocean warming and acidification . . . ; and the cascading social, economic, and other consequences of those environmental changes." App.104a-105a (¶ 10).

Climate change is, by its nature, a global issue. Because greenhouse gases comingle and become "well mixed in the atmosphere," a molecule of CO_2 emitted "in New Jersey may contribute no more to flooding in New York than emissions in China." *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) ("*AEP*"). Plaintiffs admit that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere." App.229a (¶ 196). Yet they request relief for "disruption of the Earth's energy balance." App.136a (¶ 40). Plaintiffs thus seek to hold petitioners liable "for the effects of emissions made around the globe over the past several hundred years." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021).

In this case, like dozens of others being filed and litigated around the country based on an expanding variety of state laws, plaintiffs would impose state standards of greenhouse gas emissions under the guise of state-law duties for reasonableness, warnings, and misrepresentations. In these nearly identical cases, plaintiffs seek billions of dollars in damages for energy companies' marketing tactics, which they allege contributed to global climate change. The cross-border nature of global climate change, however, implicates uniquely federal interests. Imposing such sweeping liability based on state-law emissions standards interferes with the application of unified federal policies and federal law. Our constitutional

structure does not permit uniquely federal problems like global climate change to be resolved by a patchwork of state laws.

By upholding plaintiffs' claims against preemption defenses, the state supreme court endorsed a position contrary to federal court judgments that, in the same posture, have dismissed such claims on the pleadings. It also contravened decades of this Court's precedents interpreting federal statutes governing transboundary pollution. The state supreme court got off track by accepting plaintiffs' contrived narrative that, because state law could address failures to warn or allegedly deceptive advertising, state law also could provide a remedy for the global effects of emissions caused by global consumption of hydrocarbons. Because the duties, causes, and remedies of plaintiffs' suit indirectly regulate out-of-state activities, they necessarily raise questions answerable only by federal law. The Hawai‘i Supreme Court erred in failing to recognize that conflict.

Lawsuits like this one seeking to regulate global emissions are beyond the limits of state law. The Constitution and federal law prohibit the application of state law. Without action by this Court, the Nation will be in the untenable position of having innumerable competing and frequently conflicting sources of law governing this important issue. The petition should be granted.

STATEMENT

Over the past seven years, States and municipalities across the country have brought more than two dozen nearly identical cases against energy companies for their alleged participation in causing global climate change. Respondents City and County of Honolulu and Honolulu Board of Water Supply filed

this lawsuit seeking to hold petitioners liable, under state law, for harms they claim are attributable to global climate change. App.101a (¶ 2). This case and others like it seek to impose massive damages and abatement remedies for global emissions.

1. Previous cases also sought to force energy companies to remedy the effects of global greenhouse gas emissions under similar theories. In *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), for example, an Alaskan city and native Alaskan tribe alleged that energy companies were "substantial contributors to global warming" and had "conspir[ed] to mislead the public about the science of global warming." *Id.* at 854. The plaintiffs contended that the defendants "act[ed] in concert to create, contribute to, and maintain global warming" and were "responsible for [the city's] injuries" from "melting [of] arctic sea ice." *Id.*

The City of New York similarly sued energy companies under state law for the "production, promotion, and sale of fossil fuels," alleging that the defendants had "known for decades that their fossil fuel products pose a severe risk to the planet's climate" yet "downplayed the risks and continued to sell massive quantities of fossil fuels." *City of New York*, 993 F.3d at 86-88. The City alleged that the defendants "orchestrated a campaign of deception and denial regarding climate change." Am. Compl. ¶ 6, *City of New York*, No. 18-CV-00182, Dkt. 80 (S.D.N.Y. Mar. 16, 2018) ("*City of New York* Am. Compl."). And it "requested compensatory damages for the past and future costs of climate-proofing its infrastructure and property." 993 F.3d at 88.

Federal courts dismissed such claims on the pleadings. *See Kivalina*, 696 F.3d at 857 (affirming dismis-

sal of "federal common law public nuisance damage action" as "extinguished" by the Clean Air Act); *City of New York*, 993 F.3d at 94 (affirming dismissal of state-law nuisance and trespass claims on "preemption defense").

2. Plaintiffs brought this case in Hawai'i circuit court asserting state-law claims for public and private nuisance; strict liability and negligent failure to warn; and trespass. App.216a-231a (¶¶ 155-207). Plaintiffs allege that the "production and use of [the energy companies'] fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate" and that "global warming" is "overwhelmingly caused by anthropogenic greenhouse gas emissions." App.100a, 134a (¶¶ 1, 35). Indeed, plaintiffs allege that all of their injuries are "caused by anthropogenic greenhouse gas emissions," App.134a (¶ 35), and that these greenhouse gas emissions are "[t]he mechanism" of those alleged injuries, *id.* They seek compensatory damages, abatement of the alleged nuisance, disgorgement of profits, punitive damages, and attorneys' fees and costs. App.232a.

Plaintiffs allege that "sea level rise" and "more extreme and volatile weather" are "the consequences of Defendants' campaign of deception." App.101a (¶¶ 2-3). Plaintiffs' central theory is that defendants (including petitioners) misrepresented the dangers of global climate effects from the lawful use of their energy products. They allege that such failures to warn or deceptive statements caused increased consumption and greenhouse gas emissions that caused global climate change, for which they seek remedies from such effects as sea-level rise.

The energy companies removed this case to federal court, contending, among other things, that the case was governed by federal law and removable under the federal-officer statute. The district court remanded the case. 2021 WL 531237 (D. Haw. Feb. 12, 2021). After this Court's decision in another climate-change case, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the Ninth Circuit considered all of defendants' removal arguments not foreclosed by prior Ninth Circuit precedent, *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022). The court of appeals affirmed remand, explaining that the removal "question before us has nothing to do with the merits of th[e] claims." *Id.* at 1106. This Court declined review. 143 S. Ct. 1795 (2023).

On remand, petitioners moved to dismiss the amended complaint. They and other defendants argued, among other things, that the complaint failed to state a claim because federal law, including the Clean Air Act, necessarily governs and preempts the claims. App.11a. The trial court denied the motion to dismiss, reasoning that the claims were based on "alleged deceptive promotion" of fossil-fuel products. App.89a. Despite "struggl[ing]" with the preemption issue, the trial court held there was no "conflict" between federal law and the state-law claims. App.92a-93a.

Defendants filed a timely interlocutory appeal to the Hawai'i Intermediate Court of Appeals. The Hawai'i Supreme Court subsequently accepted a transfer of the appeal and affirmed.

3. The Hawai'i Supreme Court concluded that plaintiffs' state-law claims were not preempted by federal law. App.69a. The court reasoned that a federal statute (the Clean Air Act) displaced federal

common law governing interstate emissions, and thus "Plaintiffs could [seek to] recover under Hawai'i tort law." *Id.* The court further held that, even if the federal common law of transboundary emissions still exists, the claims asserted below were not preempted because the "claims do not seek to regulate emissions." App.39a. The court believed that "[t]he source of Plaintiffs' injury is not pollution, nor emissions. Instead, the source of [the] alleged injury is Defendants' alleged failure to warn and deceptive promotion." App.54a. The court also held that the Clean Air Act did not preempt the state-law claims, again concluding that the claims "do not seek to regulate emissions." App.61a-62a. The state supreme court did not reconcile those holdings with plaintiffs' request for damages for the effects of greenhouse gas emissions on the global climate. On the contrary, the court acknowledged that plaintiffs' "theory of liability" – that the alleged "deceptive commercial activities . . . increased greenhouse gas emissions" that injured plaintiffs – "is central to the . . . preemption issues on appeal." App.11a.

The Hawai'i court recognized that *City of New York* rejected state-law claims in the same procedural posture as this case. But the state court expressly declined to follow the Second Circuit, concluding that its opinion rested on "flawed reasoning." App.42a. Instead, the court relied on *Baltimore*, where the Fourth Circuit recognized it was "only concerned with removal jurisdiction and complete preemption's application" and therefore did "not . . . delve into [preemption] defenses at [d]efendants' disposal." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 198 n.2 (4th Cir. 2022).

The state supreme court based its holding largely on its view that this lawsuit "do[es] not seek to regulate emissions." App.39a. But Associate Justice McKenna stated (less than a week before the court on which she sits issued its opinion), that "climate change" is "the most important issue" facing courts and that "[t]ort litigation is a method of regulatory control."[1]

In his concurring opinion, Associate Justice Eddins wrote directly to this Court: "Whose history are we talking about anyway? The powerful. The few white men who made laws and shaped lives during the mostly racist and misogynistic very old days. Originalism revives their value judgments. To constrain the value judgments of contemporary judges! . . . In Hawai'i, the Aloha Spirit inspires constitutional interpretation. . . . The United States Supreme Court could use a little Aloha." App.74a-76a.

REASONS FOR GRANTING THE PETITION

The decision below misunderstands core constitutional and federalism questions on which acknowledged conflicts exist. The court's holding that plaintiffs' state-law claims are not preempted by federal law directly conflicts with the Second Circuit's decision in a nearly identical case. That judgment in *City of New York* followed and synthesized a string of cases applying federal law to disputes over transboundary emissions, including how state liability would interfere with federal authority over foreign affairs. The decision below also conflicts with a line

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[1] Chad Blair, *Two Hawaii Supreme Court Justices Are Speaking Out*, Honolulu Civil Beat, Nov. 7, 2023; State Constitutional Law: The Critical Course Missing from Most Law School Curricula, 12th Annual Stevens Lecture, Featuring Justice Sabrina McKenna, Oct. 26, 2023 (video at 29:57).

of decisions holding that the Clean Air Act preempts state-law claims seeking to regulate out-of-state emissions. On both questions, this Court's decisions in analogous cases expose the state court's error. And the decision below raises a question of exceptional national importance: whether the States united under the federal Constitution, with foreign and national policies directed at regulating greenhouse gas emissions, can apply their own laws to impose liability for those same emissions. In this context, the stakes could not be higher for all concerned: who decides how to address the effects of global climate change lies at the heart of lawsuits like this one. The petition should be granted.

I. THE STATE SUPREME COURT JUDGMENT THAT FEDERAL LAW DOES NOT PREEMPT STATE-LAW CLAIMS SEEKING DAMAGES FOR THE EFFECTS OF GLOBAL CLIMATE CHANGE CONFLICTS WITH OTHER COURT DECISIONS

A. A Long Line Of Cases Holds That Only Federal Law Applies To Suits Involving Interstate And Foreign Emissions

1. In *City of New York*, the Second Circuit held that federal law preempted a lawsuit against energy companies seeking damages and equitable relief under theories of public nuisance, private nuisance, and trespass "stemming from the [companies'] production, promotion, and sale of fossil fuels." 993 F.3d at 88. Like in this case, the plaintiff alleged that the defendants "orchestrated a campaign of deception and denial regarding climate change." *City of New York* Am. Compl. ¶ 6. The goal of these "sophisticated advertising campaigns," the city alleged, was "to promote pervasive fossil fuel use . . . and to portray

fossil fuels as environmentally responsible." *Id.* The plaintiff alleged that this "marketing" and "promotion" of fossil fuels "caused, created, assisted in the creation of, maintained, and/or contributed to" the alleged public nuisance. *Id.* ¶ 133.

The Second Circuit saw through the plaintiff's attempt to avoid discussing "emissions" and instead focus on "earlier moment[s]" in its causal chain leading to the alleged injuries, including the "promotion[] and sale of fossil fuels." 993 F.3d at 91, 97. It concluded that this attempt to plead around Supreme Court precedent was "merely artful pleading and d[id] not change the substance of [the] claims." *Id.* at 97. The court recognized that "[i]t [wa]s precisely *because* fossil fuels emit greenhouse gases – which collectively 'exacerbate global warming' – that the "plaintiff] [wa]s seeking damages." *Id.* at 91, 97. "Consequently, though the City's lawsuit would regulate cross-border emissions in an indirect and roundabout manner, it would regulate them nonetheless." *Id.* at 93.

The Second Circuit explained that "[t]he question before us is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions"; it "h[e]ld that the answer is 'no.'" *Id.* at 85. The court concluded that the city's "sprawling" claims, which – like plaintiffs' claims here – sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" – were "simply beyond the limits of state law." *Id.* at 92. In fact, the court found that the claims presented "the quintessential example" of when state laws must yield to a unified federal rule. *Id.*

2. The Second Circuit reasoned that, "[f]or over a century, a mostly unbroken string of [Supreme Court] cases has applied federal law to disputes involving interstate air . . . pollution." *City of New York*, 993 F.3d at 91 (collecting cases). The court recognized that allowing the plaintiff's climate-change-based claims to proceed would defy the Framers' careful allocation of power between the States and the federal government, and among the States themselves. *Id.* at 92. The court explained that "'basic interests of federalism'" preempted the lawsuit. *Id.* at 91-92 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*")).

The court concluded that "our constitutional architecture" forecloses applying state law in certain areas that are inherently interstate. *Id.* at 90. In cases involving "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Indeed, "a few areas [of law], involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted).

The Second Circuit explained that the "overriding" federal "need for a uniform rule of decision" exists even after the Clean Air Act displaced federal common-law claims for domestic greenhouse gas emissions. *City of New York*, 993 F.3d at 91-92. The court noted that "state law does not suddenly become

presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one" under the Clean Air Act. *Id.* at 98. The Seventh Circuit reached the same conclusion in the Clean Water Act context, explaining that "[t]he claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards" such that "federal law must govern" unless "Congress[] *authorizes* resort to state law." *Illinois v. City of Milwaukee*, 731 F.2d 403, 410-11 (7th Cir. 1984) ("*Milwaukee III*") (emphasis added). In other words, regardless of whether the federal government acts through statute to regulate interstate pollution or allows federal common law to apply, the constitutional architecture prevents state law from applying to interstate emissions.

3. The Second Circuit also concluded that the Constitution's assignment of power over foreign affairs to the federal government bars claims based on foreign emissions. The court explained that, because "the Clean Air Act does not regulate foreign emissions," "claims concerning those emissions still require" variegated state law to yield to a federal rule of decision. *City of New York*, 993 F.3d at 95 n.7.

In affirming the companies' "preemption defense," the court explained that "[t]o permit this suit to proceed under state law would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93-94 (citing *AEP*, 564 U.S. at

427). Because "states will invariably differ in their assessment of the proper balance between these national and international objectives, there is a real risk that subjecting the [energy companies'] global operations to a welter of different states' laws could undermine important federal policy choices." *Id.* The court concluded that "[t]o hold the [energy company defendants] accountable for purely foreign activity (especially the Foreign [companies, including a petitioner here]) would . . . bypass the various diplomatic channels that the United States uses to address this issue." *Id.* at 103.

B. The State Supreme Court Expressly Broke With *City of New York* And *Milwaukee III*

The Hawai'i Supreme Court expressly rejected *City of New York* and instead concluded the Second Circuit's decision was "flawed." App.42a. Both cases alleged public nuisance, private nuisance, and trespass claims under state law. And both courts recognized that the cases were premised on the defendants' promotional activities that induced greenhouse gas emissions allegedly causing injury. The state court explained that "Plaintiffs summarized their theory of liability" as "deceptive commercial activities . . . increased greenhouse gas emissions, which exacerbated climate change." App11a. As the City of New York argued, "[t]he primary fault the City allege[d] is that Defendants contributed to serious environmental harm" through "production and marketing activities." Appellant Br. 16, *City of New York v. Chevron Corp.*, No. 18-2188, Dkt. 89 (2d Cir. Nov. 8, 2018). The Second Circuit similarly recognized that "[i]t is precisely *because* fossil fuels emit greenhouse gases – which collectively 'exacerbate global warming' – that the City is seeking damages." 993 F.3d at 91. Yet

the two courts reached opposite results with reasoning that conflicted in multiple ways.

The Hawai'i Supreme Court held "Plaintiffs could [seek to] recover under Hawai'i tort law," App.69a, while the Second Circuit "h[e]ld that the answer is 'no,'" 993 F.3d at 85. The Second Circuit held that "federal common law preempts state law," *id.* at 95, whereas the state supreme court held that "federal common law does not preempt state law," App.4a. The Second Circuit held that state law is not "competent to address issues that demand a unified federal standard" like transboundary pollution, 993 F.3d at 98, whereas the state supreme court "decline[d] to unduly limit Hawai'i's ability to use its police powers," App.69a.

The state supreme court concluded that *City of New York* "goes against [the energy companies] in part by holding that the very federal common law they rely on is no longer good law." App.46a. But the decision below ignored the Second Circuit's holding that, because "the Clean Air Act does not regulate foreign emissions," "claims concerning those emissions still require us to apply federal common law" and that the city's claims were "simply beyond the limits of state law" and thus preempted. 993 F.3d at 92, 95 n.7. The state supreme court did not address at all the "foreign policy concerns" that the Second Circuit determined "foreclose" claims "targeting emissions emanating from beyond our national borders." *Id.* at 101. Instead, the court below concluded that its "preemption analysis requires analyzing the preemptive effect of *only* the [Clean Air Act]." App.39a. By contrast, the Second Circuit declined to apply only "a traditional statutory preemption analysis" and found "a federal rule of decision is necessary"

under "our constitutional architecture." 993 F.3d at 90, 98.

The state court also opined that "state law that was previously preempted by federal common law does have new life when the federal common law is displaced" by federal statute. App.44a n.9. In so holding, the court expressly disagreed with "the Seventh Circuit's approach" in *Milwaukee III*, 731 F.2d at 411, which it said "ignores the presumption" against preemption in certain contexts. App.44a n.9. But that conclusion likewise conflicts with the Second Circuit's reasoning that any such presumption against preemption does not apply in the context of transboundary pollution: "where a federal statute displaces federal common law, it does so not in a field in which the states have traditionally occupied, but one in which the states have traditionally *not* occupied." 993 F.3d at 98 (cleaned up; citations omitted).

The state supreme court determined that the claims did not "regulate" emissions, but "challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." App.3a. It reached that conclusion because plaintiffs "d[id] not ask th[e] court to limit, cap, or enjoin the production and sale of fossil fuels." App.40a. "But this ignores economic reality," as the Second Circuit explained in addressing nearly identical state-law claims challenging promotion of fossil fuels and seeking recovery "for the effects of emissions." 993 F.3d at 92. Rather, "regulation can be effectively exerted through an award of damages," and "though the City's lawsuit would regulate cross-border emissions in an indirect and roundabout manner, it would regulate them nonetheless." *Id.* at 92-93.

The judgment below thus directly conflicts with decisions by the Second and Seventh Circuits in multiple respects.

C. The State Court's Decision Erred Because The Constitution Preempts These Claims

The Hawai'i judgment erred for at least three reasons. First, the federal constitutional system prohibits States (and municipalities) from using their law to resolve claims involving transboundary pollution. Second, the Constitution preempts state-law claims like those asserted here that trench on the federal government's assigned power over foreign affairs. And, third, plaintiffs' effort to impose massive liability indirectly regulates emissions and thus is preempted.

1. As this Court has explained, the "basic interests of federalism" embodied in the Constitution and the "overriding federal interest in the need for a uniform rule of decision" "demand[]" that federal law govern disputes like this one involving "air and water in their ambient or interstate aspects." *Milwaukee I*, 406 U.S. at 103, 105 n.6. Thus, "the basic scheme of the Constitution . . . demands" that "federal common law" govern these types of interstate and international disputes because "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 421, 422.

When the States "by their union made the forcible abatement of outside nuisances impossible to each," they agreed that such disputes would be governed by federal law. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). "The States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because

the 'interstate nature of the controversy makes it inappropriate for state law to control'" and instead requires those disputes to "turn on federal 'rules of law.'" *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (cleaned up; citation omitted); *see also Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (explaining that when "a State enters the Union" it "surrenders certain sovereign prerogatives" to the federal government); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (noting the "cardinal rule" that "[e]ach state . . . can impose its own legislation on no one of the others").

The result of this constitutional bargain is that, in cases involving alleged interstate nuisances and related interstate or international disputes, "[t]he rule of decision [must] be[] federal." *Milwaukee I*, 406 U.S. at 108 n.10. "[S]tate law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*").

In *Milwaukee I*, this Court explained that "[f]ederal common law," and "not the varying common law of the individual States," is "necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." 406 U.S. at 107 n.9. In *International Paper Co. v. Ouellette*, this Court reaffirmed that "interstate water pollution is a matter of federal, not state, law." 479 U.S. 481, 488 (1987). More recently, it reinforced that conclusion in *AEP* with respect to similar nuisance claims alleging injury from global climate change allegedly caused by the defendants' fossil-fuel-based energy production. *See* 564 U.S. at 418. This Court confirmed that federal law "undoubtedly" governs claims involving "air and water in their

ambient or interstate aspects." *Id.* at 421. The "subject is meet for federal law governance," and "borrowing the law of a particular State would be inappropriate." *Id.* at 422.

The decision below contravenes these authorities by holding that a lawsuit premising liability on "increased greenhouse gas emissions, which exacerbated climate change," "can proceed" under state law. App.2a, 11a.

2. Our constitutional structure also does not permit the States or their municipalities to act in ways that "impair the effective exercise of the Nation's foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 440 (1968). As this Court repeatedly has recognized, "[v]arious constitutional and statutory provisions . . . reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). This power is "broad" and "undoubted." *Arizona v. United States*, 567 U.S. 387, 394 (2012). "There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25).

In adopting the Constitution, the Framers recognized the need for the federal government's plenary power in foreign affairs. *See* The Federalist No. 42, at 264 (Madison) (Clinton Rossiter ed., 1961) ("If we

are to be one nation in any respect, it clearly ought to be in respect to other nations."); *id.*, No. 80, at 476 (Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART."); *id.*, No. 44, at 281 (Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"). Article I, Section 10 prohibits States from performing certain foreign affairs functions, like entering into treaties. *See* U.S. Const. art. I, § 10. Article I, Section 8 and Article II broadly authorize the federal political branches to regulate foreign affairs.[2] As a result, States cannot "intru[de] . . . into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) ("That the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution was pointed out by authors of the Federalist in 1787, and has since been given continuous recognition by this Court.") (footnote omitted)).

Because the claims here encroach on U.S. foreign policy – *i.e.*, challenging the reasonableness of foreign-policy decisions that address energy policy and global greenhouse gas emissions – they are preempted by the Constitution's structure. *See Garamendi*, 539 U.S. at 413-20 (collecting cases holding

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[2] U.S. Const. art. I, § 8, cl. 3 (Congress authorized to "regulate Commerce with foreign Nations"); *id.*, cl. 4 (to "establish an uniform Rule of Naturalization"); *id.*, cl. 10 (to "define and punish . . . Offences against the Law of Nations"); *id.*, cl. 11 (to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.*, cl. 14 (to "make Rules for the Government and Regulation of the land and naval Forces"); *id.*, cl. 18 (Necessary and Proper Clause); *id.*, art. II, § 2, cl. 2 (President authorized to make treaties with advice and consent of two-thirds of Senators present).

state laws preempted because of their intrusion into the federal government's power over foreign relations). As the Second Circuit recognized,

> [t]o hold the [energy companies] accountable for purely foreign activity (especially the Foreign [companies]) would require them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad. It would also bypass the various diplomatic channels that the United States uses to address this issue, such as the U.N. Framework and the Paris Agreement. Such an outcome would obviously sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches.

City of New York, 993 F.3d at 103.

Because plaintiffs' claims (and the many others like them) necessarily involve ambient, global transmissions, federal law must govern. Plaintiffs allege that all of their injuries are "caused by anthropogenic greenhouse gas emissions." App.134a (¶ 35). As this Court has recognized, "[g]reenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422 (cleaned up). The claims thus also are preempted because they are based on undifferentiated greenhouse gas emissions and seek to impose liability for foreign emissions emanating from every country in the world, "all without asking what the laws of those other . . . countries[] require." *City of New York*, 993 F.3d at 92. Plaintiffs' claims hinge on global emissions and necessarily implicate issues involving "our relationships with other members of

the international community [that] must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425-26.

3. The state court incorrectly held that plaintiffs' claims do not seek to regulate emissions and are therefore not preempted by federal law. "The proper inquiry," to determine whether a state-law claim is preempted by federal law, "calls for an examination of the elements of the common-law duty at issue." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). If compliance with the elements of a state-law claim creates a conflict with federal law, the state-law claim is preempted under the Supremacy Clause and that state law is "without effect." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *see* U.S. Const. art. VI, cl. 2.

The state claims' elements necessarily invoke transnational, cross-boundary emissions. The "reasonableness" element of the state-law duty second-guesses national and international judgments about energy policy. As to causation, the complaint alleges that "greenhouse gas emissions" are "[t]he mechanism" of harm. App.134a (¶¶ 35-36). The alleged injuries stem from a "dramatic increase" in "greenhouse gases." App.102a (¶ 4). Thus, in their own words, the "causes of Plaintiffs' injuries and damages" are "greenhouse gas molecules." App.223a (¶ 171). And as to damages, plaintiffs allege that defendants' conduct "caused a substantial portion of global atmospheric greenhouse gas concentrations . . . and consequent injuries to Plaintiffs." App.138a (¶ 47). Although plaintiffs have focused on the supposed disinformation allegedly spread by defendants, plaintiffs have acknowledged from the start that the only alleged source of harm is more greenhouse

gas emissions. As the Second Circuit recognized, "focus[ing] on [an] 'earlier moment' in the global warming lifecycle" "cannot transform [the complaint] into anything other than a suit over global greenhouse gas emissions." *City of New York*, 993 F.3d at 91, 97.

This Court has held that state common-law damages claims are a form of regulation. "[R]egulation can be effectively exerted through an award of damages," *Kurns v. Railroad Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (cleaned up), and "[s]tate power" can be wielded as much by the "application of a state rule of law in a civil lawsuit as by a statute," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996). Environmental tort claims also force defendants "to change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. Each cause of action asserted below requires injury or harm as an element of the claim, and, in each one, plaintiffs encroach on federal law in seeking to regulate the source of that alleged harm: extraterritorial greenhouse gas emissions.

Moreover, the partial displacement of federal common law does not give rise to a state-law claim because, "where a federal statute displaces federal common law, it does so not in a field in which the states have traditionally occupied, but one in which states have traditionally *not* occupied." *City of New York*, 993 F.3d at 98 (cleaned up). Thus, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* Plaintiffs' lawsuit is barred by federal law

because it "'implicates the conflicting rights of states and our relations with foreign nations.'" *Id.* at 92 (quoting *Texas Indus.*, 451 U.S. at 641) (cleaned up). This "sprawling case is simply beyond the limits of state law." *Id.*

II. THE HAWAI'I SUPREME COURT'S HOLDING THAT THE CLEAN AIR ACT DOES NOT PREEMPT STATE LAW CONFLICTS WITH DECISIONS FROM THIS AND OTHER COURTS

The decision below also conflicts with the judgments of several federal courts holding that the Clean Air Act preempts state-law claims involving interstate emissions. Multiple federal appellate courts have applied this Court's reasoning in *Ouellette* to hold that the Clean Air Act preempts the application of state law to remedy harms arising from out-of-state emissions.

A. A Long Line Of Cases Holds That The Clean Air Act Preempts State-Law Claims Seeking To Regulate Interstate Emissions

Under the Clean Air Act, Congress designated the Environmental Protection Agency ("EPA") as the "primary regulator of [domestic] greenhouse gas emissions." *AEP*, 564 U.S. at 428. Congress thus balanced the costs and benefits associated with the production and use of fossil fuels and greenhouse gas emissions through an "informed assessment of competing interests," including the "environmental benefit potentially achievable" and "our Nation's energy needs and the possibility of economic disruption." *Id.* at 427. In *Ouellette*, this Court held that "[t]he [Clean Water] Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." 479 U.S. at 500. Because the struc-

ture of the Clean Air Act parallels that of the Clean Water Act, courts have held that state-law claims seeking to regulate out-of-state air emissions are preempted.

1. In *City of New York*, the Second Circuit held that "the issues raised in this dispute concerning domestic emissions are squarely addressed by the Clean Air Act." 993 F.3d at 98. That statute "does not authorize the City's state-law claims, meaning that such claims concerning domestic emissions are barred." *Id.* at 100. In concluding that the city's claims were preempted, the Second Circuit explained that the case "hinge[d] on the link between the release of greenhouse gases and the effect those emissions have on the environment generally (and on the City in particular)." *Id.* at 97. The court emphasized that "the City does not seek any damages . . . that do not in turn depend on harms stemming from emissions." *Id.* As a result, the "well-defined and robust statutory and regulatory scheme of environmental law" Congress created in the Clean Air Act "displaced" common-law claims for damages for "domestic greenhouse gas emissions" outside of New York. *Id.* at 95, 97-98.

The Fourth Circuit reached a similar conclusion in *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 306 (4th Cir. 2010) (Wilkinson, J.). There, North Carolina brought a nuisance suit based on emissions from power plants in other States. In finding the claims preempted, the court reasoned that the "comprehensive" statutory scheme did not allow for state-law claims and that the plaintiff was improperly seeking to "appl[y] home state law extraterritorially." *Id.* at 296, 298. To hold otherwise, the Fourth Circuit explained, would "'undermine this carefully

drawn statute.'" *Id.* at 304 (quoting *Ouellette*, 479 U.S. at 494).

Other courts also have held that the Clean Air Act preempts state-law claims brought to curb global warming. In *Comer v. Murphy Oil USA, Inc.*, the plaintiffs brought nuisance, trespass, negligence, and fraudulent misrepresentation and concealment claims against several energy companies because of their alleged contributions to global warming. 839 F. Supp. 2d 849, 852-53 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013). Because "the state law causes of actions asserted by the plaintiffs hinge on a determination that the defendants' emissions are unreasonable," the court held that the "entire lawsuit is displaced by the Clean Air Act." *Id.* at 865.

And in *Delaware ex rel. Jennings v. BP America Inc.*, Delaware sued several energy companies (including some involved as defendants in this lawsuit) for, among other things, failure to warn. 2024 WL 98888, at *1 (Del. Super. Ct. Jan. 9, 2024). Delaware alleged that the companies "knew or should have known that the unrestricted production and use of fossil fuel products creates greenhouse gas pollution that causes damage to the planet, the State of Delaware, and its residents." *Id.* Delaware further alleged that the companies "concealed and misrepresented their products' known dangers while promoting their use, which drove consumption leading to creating more greenhouse gas pollution and causing the climate crisis." *Id.* The court held that "the [Clean Air Act] preempts state law to the extent a state attempts to regulate air pollution originating in other states." *Id.* at *10. The court reasoned that a suit "seeking damages for injuries resulting from out-of-state or global greenhouse emissions and

interstate pollution" is "beyond the limits of [state] common law." *Id.* at *9.

2. Although the Clean Air Act contains savings clauses, courts have continued to find claims for out-of-state emissions preempted under the statute. For example, one provision states, in relevant part, "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e). Every court to weigh in on this issue has held that the savings clause applies *only* to the regulation of *intrastate* emissions.

In *Merrick v. Diageo Americas Supply, Inc.*, for example, homeowners in Kentucky sued in-state distillers for state-law negligence, nuisance, and trespass based on emissions from the distilleries that damaged the plaintiffs' properties. 805 F.3d 685, 688-89 (6th Cir. 2015). The Sixth Circuit held that the Clean Air Act "does not preempt state source common law." *Id.* at 694. The court recognized, however, that "claims based on the common law of a non-source state . . . are preempted by the Clean Air Act." *Id.* at 693 (applying *Ouellette* and *Cooper*).

The Third Circuit has held the same. In *Bell v. Cheswick Generating Station*, the plaintiffs, a class of residents who lived within one mile of a power station, alleged state-law nuisance, negligence, and trespass claims. 734 F.3d 188, 189-90 (3d Cir. 2013). The court applied *Ouellette* to hold that "the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located." *Id.* at 196-97.

State high courts agree with those holdings. *See Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014); *Brown-Forman Corp. v. Miller*, 528 S.W.3d 886 (Ky. 2017).

B. The Hawai‘i Judgment Conflicts With Decisions From This Court And Multiple Appellate Courts

1. The state supreme court's judgment conflicts with the above decisions. The court below held that the Clean Air Act did *not* preempt plaintiffs' state-law claims because the Clean Air Act does not occupy the field of "emissions." App.61a. The court reasoned that, because the claims alleged here (e.g., deceptive marketing and failure to warn of the dangers of fossil-fuel use) do not "regulate" emissions, the Clean Air Act does not preempt those claims. App.66a-67a. That holding conflicts with *City of New York* and other judgments that state law cannot regulate out-of-state emissions. As the Second Circuit recognized, "while the Clean Air Act might not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions, neither does the City's complaint"; claims that identify no harms "other than those caused by emissions" are barred. *City of New York*, 993 F.3d at 97 & n.8; *see also id.* at 93.

The state supreme court believed that "the rationale motivating the *Ouellette* court in preempting affected-state common law claims does not apply to Plaintiffs' state tort claims." App.66a. The court concluded that the "claims require additional tortious conduct to succeed," that is, "Defendants' alleged deceptive marketing and failure to warn about the dangers of using their products." *Id.* But the state supreme court also acknowledged plaintiffs' "theory

of liability" is that defendants' conduct "increased greenhouse gas emissions." App.11a. The state judgment thus conflicted with the Second Circuit's recognition that "the City does not seek any damages . . . that do not in turn depend on harms stemming from emissions." *City of New York*, 993 F.3d at 97.

Moreover, the state supreme court allowed plaintiffs' claims to proceed under Hawai'i law despite plaintiffs contending that defendants' "deception inflated *global* consumption of fossil fuels, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous conditions in Hawai'i." App.15a (emphasis added). Other courts, by contrast, have held that the Clean Air Act preempts claims seeking to "appl[y] home state law extraterritorially." *Cooper*, 615 F.3d at 296.

2. The Hawai'i decision also misunderstood the Clean Air Act's savings clause as supporting its holding that the Clean Air Act does not preempt the asserted state-law claims. The court noted that "the [Clean Air Act]'s 'Retention of State authority' section expressly protects a state's right to adopt or enforce any standard or limitation respecting emissions unless the state policy in question would be less stringent than the [Clean Air Act]." App.61a. The Hawai'i court acknowledged that plaintiffs alleged defendants "inflated global consumption of fossil fuels, which increased greenhouse gas emissions." App.15a. The court's errant reasoning nonetheless viewed the savings clause as authorizing state law to apply, even as it paid lip service to the principle that the Clean Air Act preempts the application of one State's law to sources in another State, but "*does not* preempt" "[s]ource-state claims." App.65a.

The state court's interpretation of the Clean Air Act's savings clause would permit state tort claims for interstate and global emissions that cause harm in a State, regardless of the source of those emissions. App.60a-61a. But as the Fourth Circuit recognized in *Cooper*, "[w]e . . . cannot allow non-source states to ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended." 615 F.3d at 304.

C. The State Court Erred Because The Clean Air Act Preempts These Claims

The state supreme court concluded that plaintiffs' claims are not preempted by the Clean Air Act because they did not seek to "regulate" interstate emissions. App.57a. That holding cannot be squared with the complaint's reliance on increased greenhouse gas emissions as supporting the causation and damages elements of plaintiffs' claims. Plaintiffs seek to impose liability on petitioners for having allowed – through alleged deception or otherwise – some amount of emissions to enter the atmosphere that Hawai'i law deems illegal. But Congress and the EPA already have determined what amount of emissions is permissible. The Clean Air Act gives States a role to play in a cooperative federal statutory scheme by regulating in-state sources of emissions. But one State cannot dictate to other States the appropriate amount of emissions or determine under state law that statements about emissions in other States or countries are "unreasonable." The States as represented in Congress already reached a federal statutory bargain. The Clean Air Act thus preempts plaintiffs' claims.

State law is preempted where it "stands as an obstacle to the accomplishment and execution of the

full purposes and objectives of Congress." *Ouellette*, 479 U.S. at 492. Like the Clean Water Act, the Clean Air Act "represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate . . . system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497.

Nor does any presumption against preemption apply here. As this Court has recognized, in "inherently federal" areas, "no presumption against pre-emption" applies. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001). Indeed, in these areas, "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). Especially in the realm of international relations, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Hines*, 312 U.S. at 68; *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").

Although this Court reserved the narrow question whether to allow state-law claims brought under "the law of each State where the defendants operate powerplants," *AEP*, 564 U.S. at 429, that potential exception merely proves the rule – one State cannot apply its law to claims based on emissions from another State or country. The Clean Air Act's narrow exception for States to regulate *intrastate* emissions

does not save plaintiffs' claims arising from *interstate* and *global* emissions from preemption under the Clean Air Act. Plaintiffs seek to use Hawai'i common law to "regulate the conduct of out-of-state sources," which federal law prohibits. *Ouellette*, 479 U.S. at 495; *accord City of New York*, 993 F.3d at 95. As this Court has recognized, damages awarded by a state court against an out-of-state emitter would cause the source of the pollution "to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. In these cases, "[t]he inevitable result" is that the States "could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* Because the complaint seeks recovery of damages that plaintiffs assert are due to global climate change from worldwide emissions, App.204a-216a, 218a-223a, 226a, 229a-231a (¶¶ 149-150, 152, 156, 160-161, 167-169, 183-184, 195-196, 203), the claims are preempted.

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW

Dozens of climate change-related lawsuits filed in state courts are currently pending across the country. Energy companies have been haled into courts in many States and face potentially massive liability under the laws of more than a dozen States based on similar theories of liability. Despite global climate change being a matter of worldwide concern, individual States are seeking to address the problem by indirectly regulating emissions through their own common law. The consequences of allowing any one of these lawsuits to proceed under state common law are tremendous. Jury verdicts in cases like this

could threaten the energy industry. The questions presented here, which have substantial legal and practical importance, implicate the principle that only federal law governs disputes in which remedies are sought for transboundary emissions.

As this Court has recognized, allowing the States to apply their own common-law rules to seek remedies for transboundary emissions would mean "more conflicting disputes, increasing assertions and proliferating contentions" about these disputes. *Milwaukee I*, 406 U.S. at 107 n.9. Without a federal standard, these companies will remain subject to more than 50 sets of "vague and indeterminate" state-law theories. *Milwaukee II*, 451 U.S. at 317. The resulting fragmented, piecemeal approach to judicial decision-making interferes with an appropriate, coordinated, and effective federal approach to combatting global climate change. The Solicitor General has stated that "virtually every person . . . across the globe . . . emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries." Tennessee Valley Auth. Br. 11, *American Elec. Power Co. v. Connecticut*, No. 10-174 (U.S. Jan. 31, 2011). If allowed, the fragmented approach sanctioned by the state supreme court will "implicate many competing interests of almost unimaginably broad categories of both potential plaintiffs and potential defendants." *Id.* at 15-16. At its core, this case illustrates that problem.

Substantial disagreement in approach marks this issue. The Second Circuit recognized that the numerous *amicus* briefs from the federal government, the District of Columbia, and 23 States on both sides of the dispute highlight that this is an interstate controversy for which the law of one State cannot apply. *See City of New York*, 993 F.3d at 84.

Even the United States has taken contrary positions on this issue. The Solicitor General has argued that "cross-boundary tort claims associated with air and water pollution involve a subject that 'is meet for federal law governance'" because claims "that seek to apply the law of an affected State to conduct in *another* State" necessarily "arise under 'federal, not state, law.'" U.S. *Amicus* Br. 26-27, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020) (citations omitted). At oral argument in *Baltimore*, the United States confirmed that the plaintiff's claims are "inherently federal in nature." Oral Arg. Tr. 31:2-4, *Baltimore*, 2021 WL 197342 (U.S. Jan. 19, 2021). Although the plaintiff "tried to plead around" contrary precedent, "its case still depends on alleged injuries to the [plaintiff] caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city." *Id.* at 31:4-12. Similarly, and as the United States explained to the Ninth Circuit, "[a]s a matter of constitutional structure, any claims asserted in this area are inherently federal," so "state law could never validly apply in the first place." U.S. *Amicus* Br. 5, *City of Oakland v. BP p.l.c.*, No. 18-16663, Dkt. 198 (9th Cir. Aug. 3, 2020).

But the United States also has taken the position that these claims do not arise under federal law. *See* U.S. *Amicus* Br. 7, *Suncor Energy (U.S.A.) Inc. v. Board of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550 (U.S. Mar. 16, 2023) ("After the change in Administration . . . , the United States has reexamined its position and has concluded that state-law claims like those pleaded here should not be recharacterized as claims arising under federal common law.").

The varying decisions and positions by the federal government confirm the problem is one only this Court can resolve. Instead of one federal rule, under the logic of the decision below, at least 50 different sets of state law govern global climate change. Thus, courts inevitably will reach different results and impose different remedial measures on the company defendants – be they inconsistent injunctions or huge damages awards. This fragmented approach to disputes about interstate and global emissions will continue to make it "increasingly difficult for anyone to determine what standards govern." *Cooper*, 615 F.3d at 298. "This problem is only exacerbated [where, as here] state nuisance law is the mechanism [to be] used, because 'nuisance standards often are vague and indeterminate.'" *Id.* at 301 (quoting *Ouellette*, 479 U.S. at 496).

The concurring justice below issued a challenge to this Court and used his concurrence to express his frustration with this Court's rulings. Another justice explained that she believes tort suits are a way for States to assert regulatory control on the issue of climate change. *See supra* note 1. Those statements highlight the need for a federal standard for cross-border, transient emissions cases. Without such a standard, state courts are free to use these cases to express discontent with this Court and policies the Constitution has delegated to the federal government.

CONCLUSION

The petition for a writ of certiorari should be granted.

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