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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI‘I

CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY, Plaintiffs, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP	CIVIL NO. 1CCV-20-0000380 (JPC) (Other Non-Vehicle Tort) **PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** Hearing Date: August 27, 2021 Hearing Time: 8:30 AM (HT) The Honorable Jeffrey P. Crabtree Courtroom/Division: First Circuit 6th Division Trial Date: None.

HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. INTRODUCTION

This case is about the deceptive promotion of dangerous products. For decades, Defendants—some of the world's largest oil-and-gas companies—have waged sophisticated disinformation campaigns to discredit the science of global warming, downplay the catastrophic consequences of climate change, and conceal the deadly impacts of their fossil fuel products. By hyperinflating the market for fossil fuels, and by failing to warn about the dangers of using their products as intended, Defendants' deception campaigns were a substantial factor in causing climate change and its local impacts on Honolulu. In the years to come, the City and County of Honolulu and the Honolulu Board of Water Supply ("Plaintiffs") will need to spend billions of dollars to protect themselves, their residents, and their ratepayers from rising sea levels, deadlier storms, and other climate-related harms caused by Defendants' decades of deceit. To ensure that those who profited from the deception bear some of its costs, Plaintiffs filed this case, asserting state common law claims for failure to warn, nuisance, and trespass.

Every aspect of these claims rests firmly on the historic power of state law. Plaintiffs' lawsuit vindicates a core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct that falls squarely within fields of traditional state regulation, including "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963); "advertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). It pursues state tort remedies that are rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it

redresses injuries that fall squarely within the States' purview: "the adverse effects of climate change." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

Defendants move to dismiss this action based on a caricature of the First Amended Complaint ("Complaint"), arguing that Plaintiffs' claims are preempted by federal common law or, alternatively, the Clean Air Act ("CAA"). Both preemption arguments hinge on the faulty assumption that this lawsuit would "regulate" greenhouse gas emissions if Plaintiffs prevailed. *See* Mot. at 11, 22. It would do nothing of the sort. The "threat of ongoing liability" can, in certain circumstances, incentivize a defendant to stop engaging in conduct that "subject[s] [them] to the threat of legal and equitable penalties." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). But here, the conduct that triggers Defendants' liability is their use of deception to promote the unrestrained consumption of fossil fuels—*i.e.*, their "*failure to warn* about the hazards of using their fossil fuel products" and their "*disseminat[ion] [of]* misleading information about the same." *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *3 (D. Haw. Feb. 12, 2021) ("*Honolulu*"). Thus, if Plaintiffs prevailed in this action, Defendants would *not* need to reduce fossil fuel production (or solve climate change) to avoid future liability. They could eliminate the threat of ongoing liability by simply stopping their deception campaigns. This lawsuit therefore does not—and cannot—regulate pollution of any kind. *Cf. City of New York v. Chevron Corp.*, 993 F.3d 81, 93 (2d Cir. 2021) ("*City of New York II*") (holding that lawsuit "regulate[d] cross-border emissions" because defendants needed to stop fossil fuel production to avoid "ongoing liability").

Defendants' preemption arguments continue a long and well-documented pattern of mischaracterizing climate deception lawsuits brought against the fossil fuel industry.[1] The District of Hawai'i (Watson, J.) called out Defendants' mischaracterizations in this very case when it remanded the action to state court. *See Honolulu*, 2021 WL 531237, at *1. In their opposition to remand, as in their motion to dismiss here, "[t]he principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims." *Id.* "[T]he very act that forms the basis of [P]laintiffs' claims is *not* billions of consumers' use of fossil fuels," *id.* at 7 (cleaned up), as Defendants would have this Court believe, *see* Mot. at 1, 2, 9, 20. It is, instead, "Defendants' warnings and information (or lack thereof) about the hazards of using fossil fuels." *Honolulu*, 2021 WL 531237, at *7.

Once the Court discards Defendants' reimagining of the Complaint, it can make quick work of their two preemption defenses. First, Defendants' so-called "three-step approach" to federal common law preemption fails at every step:

1. No body of federal common law displaces Plaintiffs' claims—*i.e.*, "pre-empt[s] and replace[s]" them—because they do not raise a "significant conflict" between a state law and a "uniquely federal interest." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 507

[1] *See, e.g.*, *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *13 (D. Conn. June 2, 2021) ("*Connecticut*") (rejecting ExxonMobil's "characterization of Connecticut's claims as targeting pollution"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("*Minnesota*") ("[T]he State's action here is far more modest than the caricature Defendants present."); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 560 (D. Md. 2019) ("*Baltimore I*") ("This argument rests on a mischaracterization of the City's claims."), *aff'd*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021) ("*Baltimore III*"); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 969 (D. Colo. 2019) ("*Boulder I*") ("Defendants mischaracterize Plaintiffs' claims."), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *vacated and remanded on other grounds*, No. 20-783 (U.S. May 24, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) ("*Massachusetts*") (criticizing "ExxonMobil's caricature of the complaint").

(1988) (cleaned up). Instead, this action for failure to warn and deceptive promotion protects traditional state interests and does not conflict with any federal policy.

2. Plaintiffs' state law claims cannot be preempted and replaced by federal common law that has been displaced by the CAA. Once a federal statute displaces a body of federal common law, that judge-made law disappears entirely, and the question of state law preemption is determined by the preemptive effects of the federal statute. *See Ouellette*, 479 U.S. at 491; *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*").

3. The CAA displaced all federal common law relating to greenhouse gas pollution, not just the part concerning domestic emissions. *See AEP*, 564 U.S. at 425–26. And even if some federal common law of foreign emissions survived the CAA, it would not apply here because the United States has no foreign policy interest in allowing private companies to knowingly mislead consumers about the dangers of their products.

Defendants' preemption theory invites this Court to stretch existing bodies of federal common law beyond all recognition, to elevate judicial lawmaking beyond the powers of Congress, and to disregard clear Supreme Court precedent. The Court should reject that invitation.

Defendants' CAA preemption defense fares no better. Obstacle preemption does not apply because the CAA does not regulate the conduct that triggers Defendants' liability in this lawsuit: their deceptive promotion of fossil fuels. And far from helping Defendants, *Ouellette* merely confirms that Plaintiffs' claims are not preempted by the CAA because they do not impose any "standards of [pollution] control." 479 U.S. at 497.

Equally meritless are Defendants' particularity arguments under Rule 9 of the Hawai'i Rules of Civil Procedure ("HRCP"). The Complaint satisfies Rule 9(b) because it contains detailed allegations of the deception campaigns. And Rule 9(g)'s requirement for *special damages* does not apply to Plaintiffs' request for nuisance abatement, a form of *equitable* relief. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 132 (2017).

Defendants' motion to dismiss for failure to state a claim (Dkt. 347) should be denied.

II. BACKGROUND

For more than half a century, Defendants have known that their oil, gas, and coal products create greenhouse gas pollution that changes the planet's climate. Compl. (Dkt. 45) ¶¶ 1, 7, 49–87. Starting as early as the 1950s, Defendants researched the link between fossil fuel consumption and global warming, amassing a remarkably comprehensive understanding of the adverse climate impacts caused by their fossil fuel products. *Id.* ¶¶ 49–87. Their own scientists predicted that the unabated consumption of fossil fuels would cause "dramatic environmental effects," warning that the world had only a narrow window of time to curb emissions and stave off "catastrophic" climate change. *Id.* ¶¶ 54, 62, 66, 71, 74. Defendants took these warnings seriously: they began evaluating the impacts of climate change on their fossil fuel infrastructure, investing to protect assets from rising seas and deadlier storms, and patenting technologies that would allow them to profit in a warmer world. *See id.* ¶¶ 82, 84, 85, 118–23.

But when world leaders started to treat climate change as a grave threat that required major changes in the use of fossil fuels, Defendants embarked on a decades-long campaign of denial and disinformation about the science and consequences of global warming. *See id.* ¶¶ 88–117. Taking a page out of Big Tobacco's playbook, Defendants worked to create doubt in the minds of consumers and the public about the existence, causes, and adverse effects of global warming—even though, internally, Defendants harbored no such doubts. *Id.* ¶ 112. They bankrolled fringe climate scientists whose views conflicted not only with the overwhelming scientific consensus, but with Defendants' own research and findings. *Id.* ¶ 109. They funded think tanks, front groups, and foundations that peddled in climate change denialism. *Id.* ¶¶ 108, 112, 114. They flooded the nation with newspaper ads, radio commercials, and mailers that discredited the science of climate change and concealed Defendants' central role in the emerging

climate crisis. *Id.* ¶¶ 97–100, 104. And they did all this while simultaneously shoring up their own infrastructure to survive a warming world they knowingly created. *Id*. ¶¶ 118–123.

Then, when public awareness finally started catching up to Defendants' own knowledge of the dangers posed by their fossil fuel products, Defendants pivoted to a new strategy of deception: "greenwashing." *Id.* ¶¶ 137–47. Today, Defendants promote their gasoline products as "green" or "clean," while failing to warn that those very same products drive climate change. *Id.* ¶¶ 137–39. Consumers are therefore left with the false impression that purchasing Defendants' fossil fuel products will help combat climate change when, in fact, the environmental benefits are a mirage. At the same time, Defendants falsely portray themselves as corporate leaders in the fight against climate change, knowing that they can sell more products if they are viewed as environmentally responsible companies. *Id.* ¶¶ 140–41. Defendants trumpet their supposed investments in low-carbon energy sources. *Id.* But they fail to disclose that those investments are a rounding error when compared to their spending on fossil fuels. *Id.* ¶ 142. And they fail to mention their plans to dramatically ramp up fossil fuel production in the future. *Id.* ¶¶ 143–47.

These climate deception campaigns had the purpose and effect of inflating and sustaining the market for Defendants' fossil fuel products, and Defendants have profited immensely as a result. *Id.* ¶¶ 2, 9, 124–36, 148–49. But Plaintiffs must now bear the costs of that tortious conduct. By driving up and maintaining profligate consumption of fossil fuels, Defendants' disinformation campaigns significantly increased greenhouse gas pollution, and thereby substantially contributed to climate change and its adverse effects in Hawai‘i. *Id.* Air temperatures in Honolulu are already warming at alarming rates, leading to more heatwaves, less but more intense precipitation, and deadlier wildfires. *See id.* ¶ 150(a). Sea levels are rapidly rising. *Id.* ¶ 150(b). Flooding and storm surges are increasing in frequency and severity. *Id.* "Rain

bombs" and other extreme events are becoming more deadly. *Id.* ¶ 152(a). Honolulu's natural resources are in steep decline, as fauna and flora alike struggle to adapt to unprecedented changes in the local climate. *Id.* ¶ 150(d). And local tourism and fishing industries are suffering as warming and acidification of local waters kill coral reefs and reduce fish catch. *Id.* ¶ 150(b). Now and in the coming years, Plaintiffs will need to spend billions of dollars to protect their residents, ratepayers, and public infrastructure from these and other local harms caused by Defendants' deceptive promotion of fossil fuels. *Id.* ¶ 152.

To vindicate these localized injuries, Plaintiffs sued Defendants in this First Circuit Court, pleading state law claims for nuisance, failure to warn, and trespass. *See id.* ¶¶ 155–206. Plaintiffs principally seek (1) damages for injuries already sustained as a result of Defendants' deception campaigns, and (2) abatement of future harms that will inevitably accrue as a result of those campaigns—*e.g.*, local measures to protect residents and property from an eroding coastline, stronger storm surges, and more heatwaves and extreme weather events. *See id.* ¶ 207.

III. LEGAL STANDARD

In a Rule 12(b)(6) motion to dismiss, a court must take the allegations in the complaint as true, and it may not dismiss a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts . . . that would entitle [it] to relief." *Malabe v. Ass'n of Apartment Owners of Exec. Ctr.*, 147 Hawai‘i 330, 338 (2020). Under Rule 9, fraud must be "stated with particularity," HRCP 9(b), and "items of special damage" must be "specifically stated," HRCP 9(g).

IV. FEDERAL LAW DOES NOT PREEMPT PLAINTIFFS' STATE LAW CLAIMS.

Defendants insist that Plaintiffs' state law claims are preempted by (1) a body of federal common law that has been displaced by the CAA, or alternatively (2) the CAA itself. Both defenses fail because they mischaracterize the Complaint and misconstrue the law.

A. Plaintiffs' Claims Would Not "Regulate" Greenhouse Gas Emissions.

Defendants openly stake their two preemption defenses on the premise that this lawsuit, if successful, would regulate pollution. In their federal common law theory of preemption, Defendants posit that Plaintiffs' "claims are exclusively subject to federal—not state—law because they seek to regulate transboundary and international emissions and pollution." Mot. at 11. In the alternative, Defendants assert that the CAA preempts this action "because [it] functionally would regulate out-of-state sources of greenhouse gas emissions." *Id.* at 22.

That premise is dead wrong. Because Plaintiffs' claims focus entirely on Defendants' failures to warn and campaigns of deception, they do not "regulate[]" pollution under any "common-sense view" of that term. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). Regulation is the "act or process of controlling [something] by rule or restriction." *Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 895 (7th Cir. 2017) (citing BLACK'S LAW DICTIONARY (9th ed. 2009)). A law does not regulate a matter simply because it has "an impact" on the matter; instead, the law "must be specifically directed toward that [matter]." *Pilot Life*, 481 U.S. at 50. Tort law, of course, is directed at the misconduct that it proscribes, and courts have recognized that tort liability can, in a limited sense, "regulat[e]" the behavior that triggers a defendant's "obligation to pay compensation." *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012). According to this line of reasoning, "the threat of ongoing liability" incentivizes a defendant to stop or reduce the conduct that "subject[s] [it] to the threat of legal and equitable penalties." *Ouellette*, 479 U.S. at 495. And if the incentives are strong enough, tort liability can effectively "compel" a defendant to alter its behavior. *Id.*

Nothing in this lawsuit, however, compels or otherwise incentivizes Defendants to curb their production of fossil fuels, limit emissions, or solve climate change. As in other climate

deception cases, Plaintiffs' claims "target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels." *Honolulu,* 2021 WL 531237, at *1; *see also Baltimore III,* 141 S. Ct. at 1535–36 ("[The plaintiff] sued various energy companies for promoting fossil fuels while allegedly concealing their environmental impacts.").[2] Here, the specific conduct that triggers Defendants' liability is their use of deception to promote the unrestrained consumption of their fossil fuel products—*i.e.*, their "*failure to warn* about the hazards of using their fossil fuel products" and their "*disseminat[ion] [of]* misleading information about the same." *Honolulu,* 2021 WL 531237, at *3. Defendants can therefore "avoid the threat of ongoing liability," *Ouellette*, 479 U.S. at 495, by simply stopping their deception campaigns and providing adequate warnings concerning the use of their products. Indeed, under the Complaint, Defendants can continue to sell as many fossil fuel products as they wish without fear of incurring future liability, so long as they do not use deception to do so. As pleaded, then, this lawsuit does not—and cannot possibly—regulate pollution of any kind.

City of New York II reinforces this conclusion. In that case, the plaintiff brought state law claims for nuisance and trespass against several oil-and-gas companies, "seeking to recover damages for the harms caused by global greenhouse gas emissions." 993 F.3d at 91. Unlike here, the plaintiff—the City of New York—specifically defined the conduct giving rise to liability as "lawful commercial activity," namely: the defendants' lawful "production, promotion, and sale of fossil fuels." *Id.* at 993 F.3d at 87–88 (cleaned up). As the Second Circuit observed, the

[2] *See also Baltimore II*, 952 F.3d at 467 (identifying "the source of tort liability" as "the concealment and misrepresentation of [fossil fuel] products' known dangers," together with "the simultaneous promotion of their unrestrained use"); *Minnesota*, 2021 WL 1215656, at *10 ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign."); *Connecticut*, 2021 WL 2389739, at *13 ("Connecticut's claims seek redress for the manner by which ExxonMobil has interacted with consumers in Connecticut, not the impacts of climate change.").

complaint did "not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions." *Id.* at 97. And the plaintiff expressly reaffirmed that point in its opening brief on appeal, declaring that its "particular theory of the claims . . . assumes that [the] [d]efendants' business activities have substantial social utility and does not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation." Br. for Appellant at 19, Dkt. 89, *City of New York II*, Case No. 18-2188 (Nov. 8, 2018).

Based on those representations, the court held that "the [plaintiff's] claims, if successful, would operate as a *de facto* regulation on [greenhouse gas] emissions." *City of New York II*, 993 F.3d at 96. The panel reasoned that "the goal of [the] lawsuit . . . [was] to effectively impose strict liability for the damages caused by fossil fuel emissions," *id.*, and that the defendants would need to "cease global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability" in the future. *Id.* The plaintiff "admit[ted]," moreover, that the threat of "ongoing liability would no doubt compel the [defendants] to develop new means of pollution control." *Id.* (cleaned up). For those reasons, the court found that the lawsuit "would regulate cross-border emissions." *Id.*

The present case stands in stark contrast and clearly *cannot* regulate any greenhouse gas emissions. It does *not* seek to hold Defendants "strict[ly] liable" for harms caused by "lawful commercial activity." *Id.* at 87, 93 (cleaned up). Rather, Plaintiffs' claims hold Defendants liable for failing to warn and for using *unlawful* deception to promote a dangerous consumer product. As a result, Defendants would *not* need to cease their "global production [of fossil fuels] altogether" to avoid "all liability" under Plaintiffs' Complaint. *Id.* at 93. Indeed, they would not

need to reduce production at all. They could eliminate any "ongoing liability" by simply stopping their climate deception campaigns. *Id.*

Defendants are thus mistaken when they characterize this lawsuit as seeking to solve "the worldwide problem of global warming." Mot. at 18. The only problem that Plaintiffs address is Defendants' tortious use of deception to sell dangerous products. *See Minnesota*, 2021 WL 1215656, at *13 ("[T]he State's action here is far more modest than the caricature Defendants present."). Likewise, Defendants are wrong when they suggest that the Complaint seeks relief for all injuries caused by all greenhouse gas pollution ever emitted since the Industrial Revolution. *See* Mot. at 1, 14–15. Plaintiffs' recovery will be cabined by Hawai'i principles of causation, which require them to prove that the disinformation campaigns were a "substantial factor in bringing about the harm." *Estate of Frey v. Mastroianni*, 146 Hawai'i 540, 550 (2020).

Defendants veer further off course when they speculate that Plaintiffs' nuisance claims will require this Court to "balance . . . the costs and benefits of oil and gas consumption." Mot. at 19. They cite no case law suggesting that the utility of a defendant's conduct is a defense to a nuisance claim under Hawai'i law. *Cf. Fernandez v. People's Ice & Refrigerating Co.*, 5 Hawai'i 532, 534 (1886) ("It can be no defense in this [nuisance] case that ice may be a necessity, or that the price of it may have been reduced by the operation of defendants' factory."); *Haynes v. Haas*, 146 Hawai'i 452, 460 (2020) (restating *Fernandez*'s holding). But even if some balancing were required, the Court would balance the social utility of Defendants' tortious *deception* against its benefits. *See* RESTATEMENT (SECOND) OF TORTS §§ 826–31 (AM. LAW INST. 1979); *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal.4th 893, 938 (1996); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1105 (1997). Nothing requires a factfinder to assess the societal value of fossil fuels *per se*.

The Court can (and should) end its analysis here. Defendants expressly premised their theories of federal common law preemption and CAA preemption on the notion that Plaintiffs' claims will regulate greenhouse gas emissions. *See* Mot. at 11, 22. Because this lawsuit does no such thing, both of Defendants' preemption defenses fail by their own logic. Even if the Court looked past Defendants' own stated rationale for preemption, it would find no basis for doing so. *See infra* Parts IV.B & IV.C.

B. Federal Common Law Does Not Preempt Plaintiffs' State Law Claims.

Defendants stumble at every step of their "three-step approach" to federal common law preemption. Mot. at 3. First, federal common law cannot "preempt[] and replace[]" Plaintiffs' state law claims because they do not raise a uniquely federal interest, much less create a significant conflict between state law and a concrete federal policy. *Boyle*, 487 U.S. at 504. Second, the CAA displaced the body of federal common law relating to greenhouse gas emissions, thereby eliminating its preemptive effects. Third, the Clean Air Act displaced *all* of that federal common law, not just the portion concerning domestic emissions.

1. No federal common law "governs" Plaintiffs' state law claims for failure to warn and deceptive promotion.

"There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, courts "do not possess a general power to develop and apply [federal] rules of decision." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("*Milwaukee II*"). Instead, it is primarily for Congress to decide whether to "displace state law" by enacting "a federal rule." *Id.* at 312–13. That conclusion flows from the U.S. Constitution itself: federal common law "plays a necessarily modest role" in a system that "vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

By constitutional design, then, "[t]he cases in which federal courts may engage in common lawmaking are few and far between." *Id.* at 716. In the absence of congressional authorization for courts to create federal common law (*e.g.*, ERISA), the Supreme Court has recognized federal common law in only a "few," "restricted" enclaves. *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994). "[S]trict conditions must be satisfied," moreover, before "judges may claim a new area for [federal] common lawmaking," *Rodriguez*, 140 S. Ct. at 717. At a minimum, the party invoking federal common law must identify a "uniquely federal interest[]" in determining an issue raised in the case. *Id.* It must then demonstrate "a significant conflict" between that uniquely federal interest and "the use of state law." *O'Melveny*, 512 U.S. at 87; *see also Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 692 (2006) ("*Empire II*") ("telescop[ing] the appropriate inquiry" on whether federal common law preempts state law); *City of New York II*, 993 F.3d at 90 (noting that there must be a "conflict between state law and federal interests . . . before federal common law may spring into action" (cleaned up)).

Even where those conditions are met, federal common law may "displace" state law—*i.e.*, "pre-empt[] and replace[]" it—only to the extent "necessary" to protect the uniquely federal interests at stake in the case. *Boyle*, 487 U.S. at 504; *see also Rodriguez*, 140 S. Ct. at 717. Courts must always assure themselves that their judge-made rule of decision is neither "too broad" nor "too narrow." *Boyle*, 487 U.S. at 501. Thus, federal common lawmaking proceeds on an issue-by-issue basis, and courts must conduct this inquiry with the utmost "care," as it goes to the very "heart of our separation of powers." *Rodriguez*, 140 S. Ct. at 718; *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (finding that federal common law "depend[s] upon a variety of considerations always relevant to the nature of the specific governmental

interests and to the effects upon them of applying state law"); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 34 (1956) (holding that state law governed the good faith defense in a dispute over U.S. bonds, but federal common law governed whether the bonds were overdue.).

Defendants cannot carry their "heavy burden" here. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1997). Indeed, they fail to meet either of the two basic requirements for federal common lawmaking.

a. There is no "uniquely federal interest" in holding Defendants liable for their deception campaigns.

Defendants contend that federal common law governs "the question" of liability. Mot. at 11. But the federal government does not have a unique interest in determining whether private companies should be held liable for engaging in a decades-long marketing campaign to deceive the public and consumers about the dangerous climate impacts of their fossil fuel products.

To the contrary, this lawsuit falls squarely within the core interests and historic powers of the States to protect the health, safety, and welfare of their citizens. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."). States have a "substantial" "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield*, 507 U.S. at 769. They have traditionally occupied and regulated the fields of consumer protection, *Fla. Lime*, 373 U.S. at 150; "advertising," *Lorillard*, 533 U.S. at 541–42; and "unfair business practices," *ARC*, 490 U.S. at 101. And their "historic [police] powers" include not only "[i]mposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn," *MTBE*, 725 F.3d at 96, but also "regulat[ing] and abat[ing] nuisances," *Nw. Fertilizing Co. v. Vill. of Hyde Park*, 97 U.S. 659, 667 (1878). As a result, every aspect of Plaintiffs' case is rooted in traditional spheres of state regulation—from the interests

that it seeks to protect, to the misconduct that it targets, to the types of common law claims that it pleads, to the abatement remedy that it requests.

Ignoring all this, Defendants insist that this lawsuit raises federal interests relating to (1) interstate pollution, and (2) interstate and foreign relations. But none of their purported interests justifies creating a new body of federal common law that would encompass Plaintiffs' claims for failure to warn and deceptive promotion.

Interstate Pollution: The Supreme Court once recognized a federal common law of interstate air and water pollution. *See Ouellette*, 479 U.S. at 487 & n.7, 488. As explained below, however, Congress displaced that body of judge-made law, making it—and its preemptive effects on state law—disappear. *See infra* Part IV.B.2; *see also AEP*, 564 U.S. at 424 (finding that CAA "displace[d] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants"); *Ouellette*, 479 U.S. at 488–89 (finding that Clean Water Act displaced federal common law of interstate water pollution); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (finding that CAA "displace[d] federal common law public nuisance actions seeking damages [for greenhouse gas emissions], as well as those actions seeking injunctive relief").

In any event, Plaintiffs' claims here bear no resemblance to those formerly governed by the federal common law of interstate pollution. Contrary to Defendants' suggestion, that body of judge-made law does not extend to every cause of action that touches upon "interstate pollution," "global warming," or "national energy and environmental policy." Mot. at 11–13. Instead, the federal common law of interstate pollution applies to one and only one category of claims: those that have the purpose and effect of regulating the discharge of pollution from out-of-state sources. *See, e.g.*, *AEP*, 564 U.S. at 421 ("Decisions of this Court . . . have approved federal

common-law suits brought by one State to abate pollution emanating from another State."); *City of New York II*, 993 F.3d at 93 ("[T]he City's lawsuit would regulate cross-border emissions.").[3] As explained above, however, Plaintiffs' lawsuit does not and cannot stop, limit, or otherwise regulate pollution of any kind. *See supra* Part IV.A. It therefore falls outside the boundaries that once defined the now-defunct federal common law of interstate air pollution.

Undeterred, Defendants try to weave a new body of federal common law out of Plaintiffs' alleged injuries. *See* Mot. at 13–14. But this effort fails because it too mischaracterizes the lawsuit. Greenhouse gas emissions are *not* the "singular source of Plaintiffs' alleged injuries." *Id.* at 14. Instead, their injuries stem from Defendants' failure to warn and deceptive promotion, the conduct that triggers liability in this case. *See supra* Part IV.A. At any rate, "[i]t is well settled that the states have a legitimate interest in combatting the adverse effects of climate change." *O'Keeffe*, 903 F.3d at 913 (citing *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007)). To the extent, then, that the federal government has an interest in the localized impacts of climate change, that interest is not uniquely federal, but rather shared with the States. *See id.*; *cf. Huron*

[3] *See also Ouellette*, 479 U.S. at 484 (seeking "injunctive relief that would require [defendant] to restructure part of its water treatment system"); *Milwaukee II*, 451 U.S. at 311 (seeking an order requiring "petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") (same); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (seeking to "permanently enjoin[]" defendant from "discharging . . . sewage" into a New York harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (seeking "to enjoin defendant copper companies from discharging noxious gas"); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (seeking "to restrain the discharge of . . . sewage"); *see also North Dakota v. Minnesota*, 263 U.S. 365, 371–72 (1923) (seeking "an order enjoining the continued use of [certain] ditches" that flooded farming areas in neighboring state); *Texas v. Pankey*, 441 F.2d 236, 237 (10th Cir. 1971) (seeking to "have the defendants enjoined from using Toxaphene, a chlorinated camphene pesticide, as spray upon their lands"); *Illinois. v. City of Milwaukee*, 731 F.2d 403, 404 (7th Cir. 1984) ("*Milwaukee III*") (seeking "[i]njunctive relief, including changes in the operation of defendant's sewage system").

Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). Plaintiffs' injuries therefore provide no basis for expanding the federal common law of interstate pollution to include state law claims for failure to warn and deceptive promotion.

None of Defendants' "climate change" cases, Mot. at 6, call for a contrary conclusion. *City of New York II* found that the plaintiff's claims were preempted and replaced by federal common law because they "would regulate cross-border emissions," not because of any uniquely federal interest in addressing climate change injuries. 993 F.3d at 92–93; *see also City of New York I*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018). The district court in *Oakland* relied on similar reasoning in its now vacated decisions: It read the complaint in that case as seeking to solve the "fundamental global issue" of climate change, *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018) ("*Oakland I*"), and to hold the defendants liable for their "lawful and everyday sales of fossil fuels," *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018) ("*Oakland II*").[4] Here, by contrast, Plaintiffs' claims cannot regulate cross-border emissions; the only problem that this lawsuit seeks to address is the use of deception to promote fossil fuel products; and Defendants' liability is triggered by their unlawful activities, not their lawful ones. *See* Part IV.A.

Neither *Kivalina* nor *General Motors* helps Defendants. Indeed, neither even addressed whether federal common law preempted and replaced the plaintiffs' state law claims. In *Kivalina*, the plaintiff pleaded nuisance claims under both state and federal common law, and the

[4] In vacating *Oakland I* and *II*, the Ninth Circuit doubted whether any federal common law of greenhouse gas emissions continued to exist following its displacement by the CAA. *See City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland III*"), *cert. denied*, No. 20-1089, 2021 WL 2405350 (U.S. June 14, 2021). Ultimately, though, the panel did not need to answer that question to reverse the district court's threshold ruling that federal common law created federal subject matter jurisdiction over the plaintiffs' state law claims. *See id.* at 906, 908.

Ninth Circuit simply affirmed dismissal of the federal common law claim as displaced by the CAA. *See* 696 F.3d at 858.[5] The panel did not address the plaintiff's state law claim, which the district court had dismissed without prejudice to refile in state court and which the plaintiff had not appealed. *See id.* (Pro, J., concurring). *General Motors* likewise involved claims pleaded under both federal and state common law. *See People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007). The district court dismissed the former under the political question doctrine, an inquiry that bears no resemblance to federal common lawmaking. *See id.*; *but see Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321–32 (2d Cir. 2009) (rejecting political question defense in a public nuisance suit to curtail greenhouse gas emissions), *rev'd on other grounds sub nom. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). And as in *Kivalina*, the court in *General Motors* did not reach the merits of the plaintiff's state common law claim, but instead dismissed it without prejudice after declining to exercise supplemental jurisdiction. *See* 2007 WL 2726871 at *16.

The Court should disregard Defendants' inapposite cases and instead follow the district court's lead in *Minnesota*, a state law action seeking to hold fossil fuel companies liable for their climate deception campaigns. *See* 2021 WL 1215656, at *2. There, as here, the defendants argued that "the [plaintiff's] claims are premised upon interstate pollution because the [plaintiff's] alleged injuries stem from climate change impacts, which are caused by global emissions and are inherently transboundary in nature." *Id.* at *4. But the court declined to

[5] The nuisance claim in *Kivalina* sought to hold the defendants liable for their direct "emissions of carbon dioxide and other greenhouse gases." 696 F.3d at 854. In addition, the plaintiffs brought conspiracy and concert-of-action claims that were "dependent" on their federal common law claim for nuisance. *Id.* at 854, 858. The Ninth Circuit never decided whether the CAA also displaced those dependent claims, because the plaintiffs "concede[d]" that the claims necessarily "f[ell] with the[ir] substantive claim" for federal common law nuisance. *Id.* at 858.

"weave a new claim for interstate pollution out of the threads of the [c]omplaint's statement of injuries." *Id.* at *5. And it refused to apply the federal common law of interstate pollution in a lawsuit that alleged "no causes of action related to pollution regulations or disputes between states over emissions standards." *Id.* at *4. This Court should reach the same conclusion here.[6]

Interstate and Foreign Relations: Defendants also suggest that federal common law preempts and replaces Plaintiffs' state law claims because some of the alleged misconduct occurred outside of Hawai‘i. *See* Mot. at 14–16. However, a lawsuit does not raise a uniquely federal interest simply because it concerns activities that stretch across state and national borders.

Courts have long recognized that a defendant may be liable under state law for out-of-state conduct that causes in-state injuries, subject only to limited constitutional constraints not at issue here. *See, e.g.*, *Young v. Masci*, 289 U.S. 253, 258–59 (1933) ("A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument."). Without the power to hold tortfeasors liable for out-of-state conduct, States could not adequately "protect [the] interests of [their] own people," especially in a globalized economy where harmful business transactions often span multiple states, if not multiple countries. *Watson v. Emps. Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954). Our system of federalism therefore recognizes that a defendant who causes harm in multiple states may be subject to liability under each of those states' laws. *See Allstate Ins. Co. v. Hague*,

[6] In passing, Defendants cryptically suggest that federal common law might govern Plaintiffs' claims because "the instrumentality of the alleged harm is the navigable waters of the United States." Mot. at 15. The Court should disregard this conclusory statement as Defendants have "fail[ed] to present any argument on this point*." Singleton v. Liquor Comm'n, Cty. of Hawai‘i*, 111 Hawai‘i 234, 246 n.29 (2006). In any event, the federal common law of navigable waters does not apply here because this "action does not purport to regulate, apportion, or mediate other states' or agencies' relationships to navigable waters." *Minnesota*, 2021 WL 1215656, at *5.

449 U.S. 302, 307 (1981) (plurality) ("[A] set of facts giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction."); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) ("[T]he legislative jurisdictions of the States overlap.").

Indeed, "[t]he cases are many in which a person acting outside the State may be held responsible according to the law of the state for injurious consequences within it." *Masci*, 289 U.S. at 258–59 (citing cases for "nuisance" and "negligent manufacture"). The same is true for misconduct occurring outside of the United States. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 & cmt. k (1987) (individual States may generally apply their law to foreign conduct that "has or is intended to have substantial effect within [the forum State]").[7]

In contrast, courts have narrowly cabined the federal common law of interstate and foreign relations to a handful of cases, chiefly:

- Litigation between sovereign States, *see New Jersey*, 283 U.S. at 342 ("Different considerations come in when we are dealing with independent sovereigns.");

- Controversies over the boundaries between States or the apportionment of interstate waters among States, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110–11 (1938);

- Lawsuits that name foreign governments as defendants or that "direct[ly] focus" on the "actions of foreign governments," *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1377 (11th Cir. 1998) (collecting cases); and

- Claims that would require a court to invalidate an official act of a foreign sovereign, *see Sabbatino*, 376 U.S. at 421–27; *Patrickson v. Dole Food Co.*, 251 F.3d 795, 800 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003).

[7] *See, e.g.*, *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107–08, 1113 (9th Cir. 2013) (stating that California antitrust law governed claims that targeted "a global conspiracy to fix the prices of LCD panels," even though the plaintiffs did not purchase any of those products in California and even though only "part" of the "alleged conspiracy took place [there]"); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 156, 158 (2d Cir. 2012) (finding that New York law governed liability of a bank that was allegedly negligent in financing a terrorist attack that injured the plaintiffs in Israel).

Those cases stand miles apart from the present action, which seeks to hold private companies liable for tortious conduct that has traditionally been regulated by the States: the deceptive promotion of dangerous products. Thus, Defendants are mistaken when they suggest that federal common law applies just because Plaintiffs' claims involve some out-of-state conduct. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) ("[A] dispute . . . cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.").

b. There is no "significant conflict" between state law and a concrete federal policy.

Defendants fail to identify a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87. This "conflict [is] a precondition for recognition of a federal rule of decision," *id.*, and Defendants bear a "heavy burden" in proving its existence, *Atchison*, 159 F.3d at 362. The federal policy must be "specific," "concrete," and "genuinely identifiable" from statutes or other existing sources of federal law. *O'Melveny*, 512 U.S. at 88–89. It cannot be "judicially constructed," *id.* at 89, or "highly abstract," *Miree v. DeKalb Cty.*, 433 U.S. 25, 32 (1977). Moreover, the conflict between that federal policy and state law must be "significant" and not "speculative." *Miree*, 433 U.S. at 31, 32 (cleaned up). And it must be "specifically shown," not "generally alleged." *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 127 (2d Cir. 1999) (quotations omitted).

Defendants do not identify *any* federal policy against holding private companies liable for harms caused by deceptive commercial activity. Nor could they, because the federal policies in this area expressly preserve and promote the use of state law to protect consumers and the public from dangerous products. The Federal Trade Commission Act, for example, preserves state law actions for unfair or deceptive trade practices. *See* 15 U.S.C. § 57b(e); *Good v. Altria Grp., Inc.*,

501 F.3d 29, 52–53 (1st Cir. 2007), *aff'd and remanded*, 555 U.S. 70 (2008). The Consumer Product Safety Act also preserves state products liability claims. *See* 15 U.S.C. § 2072; *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063, 1068 (9th Cir. 2000). And Congress added analogous savings clauses to various other federal consumer protection statutes, such as the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 379r(f), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5551(a). Viewed as a whole, then, the federal landscape positively encourages the sort of state law claims asserted by Plaintiffs here.

Defendants speculate that the operation of Hawai'i state law in this case "risk[s] upsetting the careful balance that has been struck [by the federal government] between the prevention of global warming, . . . energy production, economic growth, foreign policy, and national security." Mot. at 15. But to carry their burden, Defendants must do more than list abstract policy *issues*. They must define *what* the federal government's policy position is on those issues, and state how immunizing corporate deception from liability conflicts with that position. Defendants never explain how the application of state law requiring truthful behavior in the marketplace would conflict with the federal government's plans for tackling climate change, energy production, national security, *etc.*—much less *significantly* conflict with the "balance . . . struck" between those various priorities. *Id.* And as precedent makes clear, the Court cannot create federal common law based on its own estimation of what the proper balance should be. *See O'Melveny*, 512 U.S. at 89. The Court should therefore decline Defendants' invitation to make federal law.

Two cases cement this conclusion. First, in *O'Melveny*, the defendant urged the Supreme Court to apply federal common law to claims brought by the Federal Deposit Insurance Corporation, arguing that the application of California law "might deplete" a federal "deposit insurance fund." 512 U.S. at 88 (cleaned up). But because Congress had not "set[] forth any

anticipated level for the fund," the Justices found no "specific, concrete federal policy or interest" against depleting the fund, and so no conflict with California law. *Id.* The same is true here: Hawai‘i law cannot "upset[]" any federal "balance" that has been struck between mitigating climate change and pursuing other policy goals because Congress has not specified what that balance should be. Mot. at 15.

In re Agent Orange Product Liability Litigation makes this point even clearer. 635 F.2d 987 (2d Cir. 1980). In that case, veterans brought a products liability action against manufacturers of toxic herbicides that were used during the Vietnam War. *See id.* at 988. Like Defendants here, the manufacturers insisted that federal common law governed because the veterans' state law claims would have "a direct and lasting impact" on two unquestionably important federal interests: (1) the military's "interest in the welfare of its veterans," and (2) the U.S. government's "interest in the suppliers of its materiel." *Id.* at 994. But because Congress had "not determined what the federal policy [was] with respect to the reconciliation of these two competing interests," the federal government's "interest in the outcome of the litigation"—"*i.e.*, in how the parties' welfares should be balanced"—was also "undetermined." *Id.* at 994–95. Accordingly, the Second Circuit refused to apply federal common law, observing that "it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the [defendant] contractors." *Id.* at 994. That logic compels the same result here.

Nor can Defendants avoid this outcome by invoking *City of New York II*. In that case, the panel found that the plaintiff's claims "risk[ed] upsetting" federal policy choices because, in its view, those claims would effectively regulate cross-border emissions. *See* 993 F.3d at 93 (ruling that plaintiff's state law claims would "subject[] the [defendants'] global operations to a welter

of different states' laws"). As explained above, however, Plaintiffs' claims here would do no such thing because the conduct that triggers liability is Defendants' deception, not their emissions. Defendants make no effort, moreover, to "specifically show[]" how a lawsuit that targets their deception "run[s] counter" to any federal interest in global warming, energy production, economic growth, foreign policy, national security, or anything else. *Woodward*, 164 F.3d at 127 (cleaned up). Accordingly, their purported conflicts rest on nothing more than "speculations" and "general[] allegat[ions]," neither of which can support the creation of federal common law. *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 141 (2d Cir. 2005) ("*Empire I*"), *aff'd*, *Empire II*, 547 U.S. 677; *cf. Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law.").

2. Displaced federal common law cannot preempt state law.

Defendants' federal common law theory of preemption fails for another, independent reason: it would require this Court to hold that state law can be "preempt[ed] and replac[ed]" by a body of federal common law that *no longer exists*. *Boyle*, 487 U.S. at 504; *see also AEP*, 564 U.S. at 429. Defendants concede that the CAA displaced the same federal common law that, in their view, preempts Plaintiffs' state law claims. *See* Mot. at 16–17. Nonetheless, they insist that this dead body of judge-made law reaches out from beyond the grave and replaces Hawai‘i law. That remarkable proposition cannot be reconciled with Supreme Court precedent or with basic separation-of-powers principles.

a. Federal common law disappears entirely once displaced by Congress.

Federal common law exists only "*in [the] absence* of an applicable Act of Congress." *Milwaukee II*, 451 U.S. at 314 (emphasis added); *see also id.* at 319 n.14. That is because

"[w]hether latent federal power should be exercised" to preempt state law "is primarily a decision for Congress, not the federal courts." *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997) (cleaned up). Thus, when Congress enacts a statute that "speaks directly to a question" previously governed by federal common law, it "displace[s]" that judge-made law, making it "disappear[]." *AEP*, 564 U.S. at 423–24 (cleaned up). And once federal common law disappears, the question of state law preemption is answered solely by reference to federal statutes, not the ghost of some judge-made federal law. *Id.* at 429 (holding that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act"); *see Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981) ("[After displacement], the task of the federal courts is to interpret and apply statutory law, not create common law.").

Ouellette and *AEP* make this point crystal clear. In *Ouellette*, the Supreme Court considered a preemption challenge to state law claims formerly governed by the federal common law of interstate water pollution. 479 U.S. at 484, 487. Because the Clean Water Act had displaced that body of judge-made law, the Justices framed the relevant inquiry as whether the Act preempted the plaintiffs' state law claims—a question they answered by conducting a traditional statutory preemption analysis of the Clean Water Act. *See id.* at 491–500. Twenty years later, the Supreme Court gave the same instructions in *AEP* when discussing the displacement of federal common law relating to greenhouse gas emissions—the same body of judge-made law that Defendants invoke here. 564 U.S. at 429. After holding that the CAA displaced the plaintiffs' federal common law claims for public nuisance, the Court unanimously remanded their state law claims for further consideration by the lower courts, noting that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [CAA]." *Id.*; *accord Kivalina*, 696 F.3d at 858.

Defendants therefore depart from well-settled precedent when they assert, in a conclusory footnote, that the displacement of federal common law leaves the common law's preemptive force intact. Mot. at 19 n.5. If that were so, the Supreme Court in *Ouellette* would not have analyzed "whether the [Clean Water] Act pre-empts Vermont common law." 479 U.S. at 491. Instead, it would have dismissed the plaintiffs' state law claims simply because those claims were governed by a body of federal common law that Congress later displaced, as Defendants ask the Court to do here. Similarly, the Supreme Court in *AEP* would not have concluded that "the availability *vel non* of a state lawsuit" for the abatement of interstate air pollution depended "on the preemptive effect on the federal [CAA]." 564 U.S. at 429. On Defendants' view, it should have dismissed the plaintiffs' state law claims, having already concluded that their federal common law claims were displaced by the CAA.

b. Defendants' theory violates important separation-of-powers principles.

In arguing that state law can be preempted and replaced by *congressionally displaced* federal common law, Defendants not only deviate from Supreme Court precedent, but also disregard core separation-of-powers principles.

The Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Milwaukee II*, 451 U.S. at 313. More than that, it has stressed that "the decision whether to displace state law . . . is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Id.*; *see also AEP*, 564 U.S. at 423–24 ("[I]t is primarily [for] the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest."). Even in areas "where the federal judiciary's lawmaking power [is] at its strongest, it is [the courts'] duty to respect the will of Congress." *Nw. Airlines*, 451 U.S. at 96.

Defendants' preemption defense flips these well-settled principles on their head, insulating federal common law from the legislative authority of Congress. In their view, even after "congressional legislation excludes a declaration of federal common law," *AEP*, 564 U.S. at 424, that (displaced) declaration retains the power to preempt and replace state law. But not even validly enacted federal statutes have that kind of irreversible preemptive force. *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988) ("[R]epeal of EPAA regulation did not leave behind a pre-emptive grin without a statutory cat."). And it would be illogical to conclude that the weakest form of federal lawmaking (judge-made federal common law) has the strongest preemptive effects on state law.

Worse still, Defendants' theory subverts the express will of Congress. By enacting the CAA's broad savings clauses, Congress decided to *preserve* state law claims. *See* 42 U.S.C. §§ 7416, 7604(e). Defendants' analysis disregards that decision entirely, however. Indeed, it never even considers what Congress expressed in the CAA about the "availability *vel non*" of state law, despite *AEP*'s clear instruction to do so. 564 U.S. at 429.[8]

Instead, Defendants contend that Congress is powerless to reverse a judicial finding that federal common law preempts and replaces state law. *See* Mot. at 19 n.5. But as the Supreme Court has explained, Congress always has "paramount authority" over the decision to preempt

[8] Defendants cannot paper over these flaws by equating Congress's decision to displace federal common law with a decision to preempt state law. Those two decisions raise different considerations: the former, separation-of-powers concerns; the latter, federalism concerns. *See Milwaukee II*, 451 U.S. at 317 n.9; *id.* at 333 n.2 (Blackmun, J., dissenting); *AEP*, 564 U.S. at 423. It is precisely because of those differences that the Supreme Court has created a more demanding standard for the preemption of state law than for the displacement of federal common law. *See AEP*, 564 U.S.at 423–24. Whereas state law preemption requires "clear and manifest congressional purpose," displacement of federal common law merely requires Congress to "speak[] directly" to the problem addressed by a body of federal common law. *Id.* (cleaned up). Defendants mistakenly conflate those two tests, positing that whenever Congress displaces a field of federal common law, it automatically preempts state law in that field.

state law through the enactment of federal law. *City of Milwaukee II*, 451 U.S. at 313. Nothing about federal common law diminishes that authority. *See id.* ("Nothing in th[e] [federal common law] process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between Congress and the federal judiciary are inapplicable."). As a result, judges must stop "rely[ing] on federal common law . . . when Congress has addressed the problem." *Id.* at 315. That is not "an outcome . . . too strange to seriously contemplate." Mot. at 19 n.5. It is, in fact, the only outcome compatible with the Supreme Court's avowed "commitment to the separation of powers." *Milwaukee II*, 451 U.S. at 315.[9]

3. The federal common law of foreign emissions does not exist and is not applicable in any event.

Defendants stray even further from precedent and the Complaint in the final step of their federal common law theory of preemption. First, they posit that the CAA displaced federal common law as it related to domestic greenhouse gas emissions, but not foreign emissions. *See* Mot. at 21. Under the correct test for displacement, however, that statute displaced *all* federal common law relating to greenhouse gas pollution. Defendants then urge that the federal common law of foreign emissions bars Plaintiffs' claims because of "foreign policy concerns." *Id.* But the

[9] Not even *City of New York II* accepted Defendants' theory that a declaration of federal common law preempts and replaces state law for all time, regardless of subsequent congressional action. *See* 993 F.3d at 99. Instead, the panel erroneously held that displaced federal common law continues to extinguish state law claims until Congress expressly "authorize[s] [those claims] by federal statute." *Id.* (cleaned up). That holding cannot be reconciled with *Milwaukee II*, which prohibits courts from "rely[ing] on federal common law" once "Congress has addressed the problem." 451 U.S. at 315. It is incompatible with *AEP*, which teaches that "the need for [federal common law] . . . disappears" after congressional displacement. 564 U.S. at 423. And it cannot be harmonized with *Ouellette*, which conducted a standard statutory preemption analysis that started with the presumption against preempting state law, ended with an obstacle preemption inquiry, and made no mention of federal common law between the two. 479 U.S. at 491–97.

United States has no foreign policy interest in immunizing private companies for their deceptive promotion of dangerous products. And all of Defendants' contrary arguments mischaracterize the Complaint as seeking to regulate pollution, when it plainly does not. *See supra* Part IV.A. Accordingly, any federal common law of foreign emissions that may have once existed cannot preempt this climate deception case.

a. The CAA displaced any federal common law of foreign emissions that may have once existed.

Defendants claim that the CAA did not displace the federal common law of foreign emissions because Congress did not give a "clear indication" that the statute applied to conduct occurring outside of the United States. Mot. at 21 (quoting *City of New York II*, 993 F.3d at 100). But that is not the test for determining whether a statute displaces judge-made federal law. Indeed, *AEP* expressly rejected the notion that "clear" congressional intent is a precondition for "displacement of federal common law." 564 U.S. at 423. Instead, the Supreme Court opted for a much less demanding standard: displacement occurs whenever Congress "speaks directly" to the problem addressed by a body of federal common law. *Id.* at 424 (cleaned up).

In Section 115 of the CAA, Congress spoke directly to the problem of "[i]nternational air pollution." 42 U.S.C. § 7415. Under that statutory provision, the EPA can require states to reduce emissions that threaten the health or welfare of foreign countries, so long as those other countries supply the United States with reciprocal protections against transboundary pollution originating from *their* foreign territories. *See id.* Section 115 thus creates a mechanism whereby the United States and foreign countries can curb cross-border emissions. *See* M. Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 359, 363–68 (2016). And that mechanism, in turn, must displace any

federal common law of foreign emissions because it "addresses the [same] problem" purportedly "governed" by that judge-made law. *See Milwaukee II*, 451 U.S. at 315 n.8.[10]

This conclusion is only solidified by the CAA's "comprehensive scheme" for regulating greenhouse gas emissions. Mot. at 22. Where, as here, a regulatory scheme is "comprehensive and detailed," "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," not federal common law. *O'Melveny*, 512 U.S. at 85. Accordingly, the CAA displaced *all* of the federal common law that, in Defendants' view, could formerly have preempted Plaintiffs' state law claims. And because displaced federal common law cannot override state law, Defendants' preemption defense must fail. *See supra* Part IV.B.2.

b. Defendants' "foreign policy concerns" misconstrue the Complaint.

Even if some federal common law of foreign emissions survived the CAA, it would not apply here. In Defendants' view, this body of judge-made law forecloses suit because Plaintiffs' claims would "complicate the nation's foreign policy" on climate change. Mot. at 22. But none of Defendants' "foreign policy concerns" provide a basis for preempting this state law action, *see id.* at 21, because all of their "concerns" stand on a mischaracterization of the Complaint.

The United States has no foreign policy interest in "exonerat[ing] companies for knowingly misleading consumers about the dangers of their products," as several high-level appointees in the Biden administration have explained in amici briefs filed in their individual capacities in other climate deception cases. *E.g.*, Br. of Former U.S. Gov't Offs. as *Amici Curiae*

[10] *City of New York II* all but conceded this point when it described Section 115 as Congress's "carefully balanced scheme of international cooperation on a topic of global concern [*i.e.*, climate change]." 993 F.3d at 103.

at 14, *Oakland III*, No. 18-16663, Dkt. 43 (9th Cir. Mar. 20, 2019) ("*Oakland Amici* Br.").[11] To the contrary, Congress has enacted numerous statutes prohibiting companies from misleading the public about their products.[12] And as a member of the Organisation for Economic Cooperation and Development ("OECD"), the United States adheres to OECD guidelines that urge countries to use their domestic judicial systems to protect their citizens from misleading consumer practices.[13] Thus, far from "jeopardizing our nation's foreign policy goals," Mot. at 22, this lawsuit aligns with America's opposition to corporate amnesty for deceptive conduct.

Nor would Plaintiffs' claims disrupt U.S. climate diplomacy. To date, "international climate negotiations" have not addressed "questions of legal blame with regard to [fossil fuel] corporations," much less "the narrower issue of whether corporations should be shielded from liability [in their domestic courts] for misleading practices." *Oakland Amici* Br. at 9–10.[14] Indeed, corporate liability is not even mentioned in the two agreements at the heart of

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[11] The amici who joined the brief in *Oakland* include: the current Secretary of State (Antony Blinken), Deputy Secretary of State (Wendy Sherman), U.S. Special Envoy for Climate (John Kerry), Director of the Central Intelligence Agency (William J. Burns), Director of National Intelligence (Avril Haines), White House National Climate Advisor (Gina McCarthy), Director of the U.S. Domestic Policy Counsel (Susan Rice), and Senior Advisor to the U.S. Special Envoy for Climate (Susan Biniaz).

[12] *E.g.*, 15 U.S.C. § 45(a) (prohibiting "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"); 15 U.S.C. § 78j(b) (prohibiting the use of "any manipulative or deceptive device or contrivance" in connection with securities); 15 U.S.C. § 717c-1 (prohibiting "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of natural gas").

[13] *See also* OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders 11 (2003) (calling for "[e]ffective mechanisms to stop businesses and individuals engaged in fraudulent and deceptive commercial practices" and "mechanisms that provide redress").

[14] In climate negotiations, the federal government has opposed *intergovernmental* compensation schemes that would render the *United States* liable to other countries for its historical emissions. But Plaintiffs' lawsuit does not implicate—much less undermine—that policy position because it merely seeks to hold *private* companies liable for harms caused to *American* subnational governments by deceptive commercial activity. *See Oakland Amici* Br. 8–9.

international climate diplomacy: the United Nations Framework Convention on Climate Change ("UNFCCC"), S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (1992), and the recent Paris Agreement to the UNFCCC, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016). These two climate accords apply only to countries and regional economic integration organizations like the European Union. They therefore contain financial assistance provisions regarding the transfer of funds between governments. *See* Paris Agreement art. 9; UNFCCC art. 4, ¶ 3. But neither addresses whether private companies should pay subnational governments for injuries caused by deceptive commercial activity. In short, no aspect of U.S. foreign policy or international climate negotiations immunizes from judicial review the sort of corporate deception, misconduct, and concealment alleged here.

Defendants do not contend otherwise. Instead, they try to manufacture foreign policy concerns based on a distortion of the Complaint, claiming that this action "target[s] emissions." Mot. at 21. Because this lawsuit actually "target[s] Defendants['] alleged failure to warn and/or disseminate accurate information about the use of fossil fuels," *Honolulu*, 2021 WL 531237, at *6, Defendants' arguments all miss their mark. First, Defendants contend that Plaintiffs' claims "would require them to internalize the costs of climate change." Mot. at 22. At most, though, this lawsuit will force them to internalize the costs of their failure to warn and deceptive promotion, the specific conduct that triggers liability under the Complaint. *See supra* Part IV.A. Next, Defendants baldly assert that this lawsuit would "affect the price and production of fossil fuels." Mot. at 22. But as courts have recognized in other climate deception cases, that sort of prediction is "highly speculative." *Minnesota*, 2021 WL 1215656, at *10; *see also Boulder I*, 405 F. Supp. 3d at 967. And when it comes to federal common law, "speculations do not suffice." *See Empire*

I, 396 F.3d at 141. Finally, Defendants invoke *City of New York II*. That lawsuit is distinguishable, however, because it "operate[d] as a *de facto* regulation on greenhouse gas emissions," 993 F.3d at 96, whereas the present lawsuit does not.[15] As a result, nothing in Defendants' faulty analysis supports applying federal common law to this case.

C. The Clean Air Act Does Not Preempt Plaintiffs' State Law Claims.

In the alternative, Defendants raise an obstacle preemption defense, arguing that Plaintiffs' claims interfere with the CAA's regulation of air pollution. *See* Mot. at 22–24. But that defense suffers the same fatal flaw as their federal common law theory of preemption: it incorrectly assumes that Plaintiffs' clams "would regulate out-of-state sources of greenhouse gas emissions." *Id.* at 22. Because this lawsuit would do no such thing, *see supra* Part IV.A, it falls outside of the CAA's preemptive scope, and Defendants cannot use *Ouellette* to bridge the gap.

1. Obstacle preemption does not apply.

State law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). To prevail on this defense, a defendant must identify a congressional objective

[15] In *City of New York II*, the court relied on the "presumption against extraterritoriality" to hold that the federal common law of foreign emissions foreclosed liability in that case. *Id.* at 101. That analysis fails here for two reasons. First, again, *this* case cannot regulate international (or any) emissions. *See supra* Part IV.A. Second, *City of New York II* misapplied the presumption against extraterritoriality. That presumption is "a presumption about a statute's meaning": it assumes that the "legislation of Congress . . . is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). "[B]y its terms," then, the presumption against extraterritoriality applies to statutes enacted by Congress, not common law made by judges. *Leibman v. Prupes*, No. 2:14-CV-09003-CAS, 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015); *see also* W. S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1412 (2020) (finding "no cases in which a state court applied a presumption against extraterritoriality to common law claims"). Indeed, that conclusion follows inexorably from the Supreme Court's "two-step framework" for applying the presumption, as both steps require a statute to interpret. *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021).

that is "grounded in the text and structure of the statute at issue." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (cleaned up). A court cannot invalidate state law based on "brooding federal interests," "judicial policy preferences," or "unenacted legislative desires." *Virginia Uranium*, 139 S. Ct. at 1901, 1907 (lead opinion). A defendant must also demonstrate a conflict between the statutory purpose and the operation of state law that is "so direct and positive that the two acts cannot be reconciled or consistently stand together." *MTBE*, 725 F.3d at 102.

This is a "high threshold" to meet. *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). Obstacle preemption cannot rest on the mere "possibility that federal enforcement priorities might be upset" by the operation of state law. *Garcia*, 140 S. Ct. at 807. Nor does it arise simply because federal and state law "overlap" in subject matter, *id.* at 806; or because a state law claim has "incidental effects" on a federal program, *Casumpang v. ILWU, Loc. 142*, 94 Hawai'i 330, 340 (2000); or even because there is some quantum of "tension between [the] federal and state law," *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006) (cleaned up). Rather, "[t]he Supreme Court has found obstacle preemption in only a small number of cases" in which either (1) the state law "directly interfered with the operation of [a] federal program," or (2) "the federal enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020) (collecting cases). As with all preemption defenses, moreover, a court must start from a presumption against preemption. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And that presumption is particularly strong in this case, given that Plaintiffs' claims fall squarely within fields of traditional state authority. *See id.* at 565 n.3.

Defendants cannot carry their "heavy" burden. *MTBE*, 725 F.3d at 101. The CAA does not concern itself in any way with the acts that trigger liability under the Complaint, namely: the use of deception to promote the consumption of fossil fuel products. Indeed, the marketing of fossil fuels is not even a "peripheral concern" of the statute. *DeCanas v. Bica*, 424 U.S. 351, 360–61 (1976) (finding no preemption "where the activity regulated was a merely peripheral concern of the federal regulation" (cleaned up)).

Instead, the CAA's stated purpose is to protect the nation's air resources by preventing pollution. *See* 42 U.S.C. § 7401 (defining the CAA's purpose); *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003) ("The central goal of the [CAA] is to reduce air pollution."). The statute achieves that goal by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014). However, Plaintiffs' claims do not regulate pollution because Defendants do not need to limit or alter their fossil fuel production to avoid future liability. *See supra* Part IV.A. Indeed, even if the federal government ordered Defendants to increase fossil fuel production, Defendants could do so *and still comply* with their state law duties to accurately represent the climate impacts of their products. Plainly, then, this lawsuit has no effect on the CAA's mission or methods of regulating pollution. And that conclusion is only reinforced by the CAA's broad savings clauses, which expressly preserve state law even in the field of pollution regulation. *See* 42 U.S.C. §§ 7416, 7604(e); *see also Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) ("[The CAA] made the States and the Federal Government partners in the struggle against air pollution.").

Courts around the country have rejected analogous preemption defenses in cases where, as here, a defendant's liability did *not* rest "solely" on conduct that was regulated by the CAA.

MTBE, 725 F.3d at 96. In *MTBE*, for example, the plaintiff sued petroleum companies for nuisance, trespass, and failure to warn (among other state law claims), alleging that the defendants had contaminated local groundwater supplies by using a gasoline additive called MTBE. *See id.* at 82–83. Although the defendants insisted that they used MTBE only to meet certain "oxygenate" requirements under the CAA, *see id.* at 95, the Second Circuit found no preemption because "the mere use of MTBE would not have caused [the defendants] to incur liability" under the plaintiff's theory of its case, *id.* at 104. Instead, the plaintiff's claims "required the jury to find that [the defendants] engaged in additional tortious conduct," such as failing to warn of MTBE's dangers or "failing to exercise reasonable care when storing gasoline that contained MTBE." *Id.* at 104. As a result, the defendants could not prevail on their preemption defense because they "could have complied with [the CAA]" without violating their state law duties to consumers and the public. *Id.*

Other courts have reached similar conclusions in litigation over so-called "defeat devices" that make vehicles appear more fuel efficient during federal emissions testing than they actually are under normal driving conditions. *See, e.g.*, *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 941 (N.D. Cal. 2018). Because the source of liability in those cases sprang from the car manufacturers' concealment and misrepresentation of their products' environmental benefits, courts rightly concluded that the plaintiffs' claims did not enforce any emissions standards, and therefore could not be preempted by the CAA. *See, e.g.*, *id.* at 1003 ("[T]he gravamen of the complaint is Defendants' deceit; they are not attempting directly to enforce the CAA."); *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 591–92 (E.D. Mich. 2017); *In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189, 2016 WL 10880209, at *5–6 (Va. Cir. Ct. 2016); *cf. State ex rel. Yost v. Volkswagen*

Aktiengesellschaft, No. 2020-0092, 2021 WL 2654338, at *1 (Ohio June 29, 2021). That same logic applies to the claims asserted here, and it demands the same result.[16]

2. *Ouellette* is inapposite.

Defendants cannot salvage their CAA preemption defense based on *Ouellette*. As Defendants themselves acknowledge, *Ouellette* found obstacle preemption because the plaintiffs' state law nuisance claims amounted to a "regulation of out-of-state discharges [of pollution]." Mot. at 23. Far from supporting Defendants' view that Plaintiffs' claims will regulate interstate emissions, *Ouellette* confirms that this lawsuit does not qualify as a *de facto* emissions standard.

In *Ouellette*, Vermont property owners brought nuisance claims under Vermont law against a New York paper company for its "discharge of [pollution]" into Lake Champlain, which borders both states. 479 U.S. at 484. The plaintiffs sought not only damages, but "injunctive relief that would require [the defendant] to restructure part of its water treatment system." *Id.* Applying traditional principles of statutory preemption, the Supreme Court concluded that these state law claims stood "as an obstacle to the full implementation of the [Clean Water Act]" because they would "override" the Act's complex "permit system" for establishing water quality standards and for regulating pollution discharges from point sources. *Id.* at 494–497. This sort of lawsuit, the Supreme Court explained, "would compel [polluters] to adopt different control standards and a different compliance schedule from those approved by the EPA." *Id.* at 495. And that compulsion would essentially allow a state affected by interstate pollution to "set discharge standards" for emitters operating entirely in other states, raising the

[16] Although Defendants reference impossibility preemption in passing, they do not pursue that "demanding defense" here. *Wyeth*, 555 U.S. at 573. And for good reason. Nothing in this lawsuit makes it "impossible for [Defendants] to comply with both federal and state requirements." *Id.*

distinct risk that the pollution standards approved in "any permit issued under the [Clean Water] Act would be rendered meaningless." *Id.* at 495 n.15, 496–97.

Ouellette therefore hurts, rather than helps, Defendants because it dispels any notion that Plaintiffs' claims regulate pollution. Once again, the conduct that triggers liability is Defendants' use of deception to sell a dangerous product, not their "discharge of [pollution]." *Id.* at 484. As a result, this lawsuit cannot "compel" Defendants or anyone else to "adopt different [pollution] control standards." *Id.* at 495. At most, it will encourage Defendants to be more truthful in the promotion of their fossil fuel products. And so, Plaintiffs' claims cannot be preempted on the basis of *Ouellette*, which expressly limited its preemption finding to "only those suits that may require standards of [pollution] control." *Id.* at 497.[17]

V. DEFENDANTS' RULE 9 CHALLENGES FAIL.

Next, Defendants mistakenly contend that the Complaint does not satisfy HRCP 9(b) and 9(g). Plaintiffs plead their claims with sufficient particularity, and Rule 9(g) does not apply to their request for equitable nuisance abatement.

A. The Complaint Satisfies Rule 9(b).

Plaintiffs adequately plead state law claims for nuisance, failure to warn, and trespass under Hawai'i's "liberal notice pleading standard." *Bank of Am., N.A. v. Reyes-Toledo*, 143 Hawai'i 249, 262 (2018). The Complaint satisfies the elements of:

- *Public and private nuisance* by alleging that Defendants' concealment and misrepresentation of their products' climate impacts, together with their promotion of those products' unrestrained use, inflated and sustained the market for fossil fuels,

[17] None of Defendants' cases adopt a broader reading of *Ouellette*. *See Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 692–93 (6th Cir. 2015) (finding no preemption of state law claims); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 195–97, 195 n.6 (3d Cir. 2013) (same); *North Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 296, 301–03 (4th Cir. 2010) (finding preemption of claims that were brought under North Carolina law to enjoin emissions from Alabama and Tennessee).

resulting in local heatwaves, sea-level rise, and other environmental hazards that have substantially interfered with Plaintiffs' use and enjoyment of their own property and of public places, *compare* Compl. ¶¶ 155–73, *with Haynes v. Haas*, 146 Hawai'i 452, 458–59 (2020) (a nuisance includes "anything that works hurt, inconvenience, or damage"); *ConAgra*, 17 Cal. App. 5th at 83–84 (affirmative promotion of a dangerous consumer product gives rise to nuisance liability);

- *Strict and negligent failure to warn* by alleging that Defendants had a duty to warn consumers about the devastating climate-related injuries that they knew or should have known would flow from using their fossil fuel products; that Defendants failed to give adequate warning, and instead waged disinformation campaigns that prevented Plaintiffs and consumers from gaining access to comparable knowledge; and that the intended use of Defendants' fossil fuel products caused the precise harms that Defendants had reasonably foreseen, *compare* Compl. ¶¶ 174–98 *with Ontai v. Straub Clinic & Hosp. Inc.*, 66 Haw. 237, 248 (1983) (noting that "a manufacturer must give appropriate warning of any known dangers which the user of its product would not ordinarily discover"), *and Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 370 (1997);

- *Trespass* by alleging that Plaintiffs "own, lease, occupy, and/or control real property throughout [Honolulu] County"; that Defendants knowingly caused "flood waters, extreme precipitation, saltwater, and other materials to enter Plaintiffs' real property" by using omission, misrepresentation, and deception to promote, inflate, and sustain the consumption of fossil fuels; and that Plaintiffs did not consent to the entry of those foreign objects onto their lands, *compare* Compl. ¶¶ 199–207 *with Spittler v. Charbonneau*, 145 Hawai'i 204, 210 (App. 2019) (trespass occurs when a defendant intentionally causes a foreign object to enter another's land).

Defendants do not contend otherwise. Instead, they seek to dismiss the Complaint under HRCP 9(b) for failing to allege the climate deception campaigns with sufficient particularity. But Plaintiffs easily clear that pleading standard too.

A complaint satisfies Rule 9(b) when it "allege[s] the who, what, when, where, and how of the misconduct charged." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016). Contrary to Defendants' unsupported assertions, *see* Mot. at 27, a plaintiff does not need to identify every alleged misstatement made by every defendant, *see id.* at 1180 ("[FRCP 9(b)] does not require absolute particularity or a recital of the evidence"); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (holding that there is no requirement to "identify false statements made by each and every defendant" (emphasis omitted)). Indeed, a plaintiff need

not even allege "a precise time frame, describe in detail a single specific transaction, or identify the precise method used to carry out the fraud." *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir. 2021) (cleaned up). That is because "[t]he touchstone of Rule 9(b) is notice." *Freedline v. O Organics LLC*, 445 F. Supp. 3d 85, 90 (N.D. Cal. 2020). A pleading is therefore "sufficient under [R]ule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

Here, Defendants have plentiful information about the deception campaigns to "prepare an effective defense." *Larsen v. Pacesetter Sys., Inc.*, 74 Hawai'i 1, 30 (1992). The Complaint:

- Specifies the subject matter of the deception, alleging that Defendants failed to warn about the climate impacts of fossil fuels, and that they made false and misleading statements about the existence, causes, and consequences of global warming, *see, e.g.*, Compl. ¶¶ 93–94;

- Explains why Defendants' statements and omissions about climate change were false or misleading, providing specific examples of how Defendants' public facing communications contradicted their internal ones, *see, e.g., id.* ¶¶ 100–04;

- Identifies the timing of the deception, documenting how Defendants started studying climate change in the 1950s and how they launched their disinformation campaigns at the end of the 1980s, *see id.* ¶¶ 49, 88–94;

- Describes how the deception campaigns operated, explaining that Defendants used front-groups, industry associations, think tanks, and dark money foundations to discredit climate science, cast doubt on the existence and effects of global warming, and downplay their products' role in driving the climate crisis, *see, e.g., id.* ¶¶ 112–15;

- Links each Defendant to the climate deception campaigns, either through their own advertisements or through their participation in the American Petroleum Institute ("API") and other industry groups that coordinated and implemented those campaigns on a daily basis, *see, e.g., id.* ¶¶ 28–29;

- Details each Defendant's role in the deception campaigns, alleging that each failed to warn consumers and the public about the dangers of fossil fuels, and that each participated in the strategy, governance, and operation of trade associations and front groups that disseminated climate disinformation, *see, e.g., id.* ¶¶ 28–29, 94, 108; and

- Supplies numerous, specific examples of false and misleading statements made by Defendants or groups working on behalf of Defendants, *id.* ¶¶ 88–117.

In light of these and other allegations in Plaintiffs' 115-page Complaint, Defendants plainly have "adequate notice" of the claims charged and sufficient "detail[s] . . . to prepare a responsive pleading." *United Healthcare*, 848 F.3d at 1180. Indeed, courts have found Rule 9(b) satisfied based on far less. *See, e.g.*, *Adams v. Dole Food Co.*, 132 Hawai'i 478, 489–90 (App. 2014).[18]

Defendants' three counterarguments misconstrue Rule 9(b). *First*, they contend that the Complaint is flawed because it impermissibly relies on "group pleadings." Mot. at 27. But "[t]here is no flaw in a pleading where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct*." United States ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 677 (9th Cir. 2018) (cleaned up). And here, Plaintiffs allege that each Defendant "committed the same wrongful acts," *id.*, namely: failing to warn of the dangers posed by their fossil fuel products and disseminating climate disinformation through front groups and trade associations, *see, e.g.*, Compl. ¶¶ 29, 138–39. Collective allegations are therefore entirely proper.[19]

Second, Defendants fault the Complaint for not including specific misrepresentations from each individual Defendant. *See* Mot. at 27. In a multi-defendant case, however, a plaintiff is

[18] This case is nothing like *Aquilina v. Certain Underwriters at Lloyd's Syndicate #2003*, 407 F. Supp. 3d 1051, 1068 (D. Haw. 2019), which involved a complaint that "contain[ed] almost no particulars—including the who, what, when, where, and how—of the alleged 'scheme.'"

[19] This conclusion is reinforced by the structure of the alleged deception campaigns. Generally, collective allegations are permitted when the fraudulent scheme resembles a "wheel conspiracy" with separate agreements between each defendant and a "hub." *Silingo*, 904 F.3d at 678. They are usually not allowed, however, when the fraudulent scheme resembles a "chain conspiracy," with each defendant "responsible for a distinct act within the overall plan." *Id.* As evident from the Complaint, Defendants' climate deception campaigns take the form of a wheel conspiracy, with industry groups acting as coordinating hubs and Defendants operating as the "spokes." *Id.*; *see also* Compl. at ¶ 29(a) ("API coordinates among members of the petroleum industry. . . .").

not required to "identify false statements made by each and every defendant." *Swartz*, 476 F.3d at 764 (emphasis omitted). It need only identify a defendant's role in the alleged fraudulent scheme. *See Silingo*, 904 F.3d at 677. Here, Plaintiffs easily meet that requirement, *see, e.g.*, Compl. ¶ 29(a), which is "relax[ed]" in this case because the precise role that each Defendant played in the deception campaigns is "known only to the [D]efendant," *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) (requiring plaintiffs to "specifically plead" only those facts "to which they can reasonably be expected to have access").

Finally, Defendants urge dismissal on the ground that the Complaint fails to plead reliance with particularity. *See* Mot. at 27. But Plaintiffs do not need to allege reliance *at all* because reliance is not an element of their claims for nuisance, failure to warn, or trespass. As many courts have concluded, Rule 9(b) cannot "add substantive elements . . . to any claim." *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 528 n.8 (S.D.N.Y. 2015); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266 (N.D. Cal. 2000) (same).[20] Instead, it simply demands that a plaintiff plead the existing elements of its claims with a certain level of "factual specificity." *McKesson*, 126 F. Supp. 2d at 1266. For that reason, some courts have required plaintiffs to allege reliance with particularity when reliance is part of their *prima facie* case. *See Xia Bi v. McAuliffe*, 927 F.3d 177, 183 (4th Cir. 2019). But courts have refused to do so when reliance is not an element of any asserted claim. *See Golden v. Home Depot, U.S.A, Inc.*, No. 118CV00033LJOJL, 2018 WL 2441580, at *8 (E.D. Cal. May 31, 2018) ("Justifiable reliance simply is not an element that must be pled in all claims sounding in fraud under Rule 9(b).").[21]

[20] *See also, e.g.*, *In re Mun. Mortg. & Equity, LLC, Sec. & Derivative Litig.*, 876 F. Supp. 2d 616, 652–53 (D. Md. 2012); *Hardy v. Flood*, No. 17-CV-00677-CMA-NRN, 2019 WL 937708, at *4 (D. Colo. Feb. 26, 2019).

[21] *See also, e.g.*, *ASI, Inc. v. Aquawood*, LLC, No. CV 19-763 (JRT/HB), 2020 WL 5913578, at

In any event, the Complaint pleads reliance with sufficient particularity. It alleges that Defendants' deception campaigns caused consumers to purchase more fossil fuels than they would otherwise have consumed. *See, e.g.*, Compl. ¶¶ 9, 45. It identifies the types of misrepresentations that influenced consumers—*e.g.*, Defendants' omissions and misleading statements regarding the science, causes, and impacts of climate change. *See id.* ¶¶ 88–117. It specifies how these misrepresentations were transmitted to consumers—*e.g.*, through newspaper ads, radio commercials, mailers, *etc. See, e.g.*, *id.* ¶ 97. It explains how these misrepresentations influenced Plaintiffs and the public—*e.g.*, by preventing them from making "material, informed decisions about whether and how to address climate change." *Id.* ¶ 135. And it even cites survey evidence showing the "impact" of the deception campaigns on "public opinion." *Id.* ¶ 110. Those details relating to consumer reliance more than satisfy Rule 9(b)'s particularity standard.[22]

B. Rule 9(g) does not apply to Plaintiffs' request for equitable nuisance abatement.

Finally, Defendants mix oil and water when they argue that Rule 9(g)'s requirements for special *damages* apply to Plaintiffs' request for nuisance abatement, a type of *equitable* remedy.

Rule 9(g) demands that "items of special damage . . . be specifically stated" in a complaint. By its terms, then, the Rule applies only to a particular category of legal relief: damages that do not "usually accompany the kind of wrongdoing alleged in the complaint," but

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*9 (D. Minn. Oct. 6, 2020); *Maestas v. Wal-Mart Stores, Inc.*, No. 216CV02597KJMKJN, 2018 WL 1518762, at *3 (E.D. Cal. Mar. 28, 2018); *SEC v. Medical Capital Holdings, Inc.*, No. SACV090818DOC RNBX, 2010 WL 809406, at *3 (C.D. Cal. Feb. 24, 2010); *Webb v. Bank of Am., N.A.*, No. 2:13-CV-02006-MCE-AC, 2013 WL 6839501, at *7 (E.D. Cal. Dec. 23, 2013); *Breeze v. Bayco Prod. Inc.*, 475 F. Supp. 3d 899, 906 (S.D. Ill. 2020); *Asis Internet Servs. v. Subscriberbase Inc.*, No. 09-3503 SC, 2009 WL 4723338, at *3 (N.D. Cal. Dec. 4, 2009); *Katz v. China Century Dragon Media, Inc.*, No. LA CV11-02769 JAK, 2011 WL 6047093, at *3 (C.D. Cal. Nov. 30, 2011).

[22] If the Court disagrees, Plaintiffs request leave to amend to address any infirmities the Court identifies. *See* HRCP 15(a)(2) ("leave shall be freely given when justice so requires").

instead arise out of "peculiar" or "relatively unusual" circumstances. *Ellis v. Crockett*, 51 Hawai'i 45, 50–51 (1969); *see also SCI Mgmt. Corp. v. Sims*, 101 Hawai'i 438, 446 (2003) ("Traditional forms of 'legal' relief include compensatory and punitive damages.").

As numerous courts have recognized, a judicial order requiring abatement of a nuisance is not a form of damages or, indeed, a legal remedy at all. *See, e.g., United States v. Price*, 688 F.2d 204, 212 (3d Cir.1982) ("[A]batement is not, in any sense, a traditional form of damages"); *In re JUUL Labs, Inc., Mktg., Sales Practices, & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 653 (N.D. Cal. 2020) (same). Rather, nuisance abatement is an "equitable remedy" that seeks "to eliminate the hazard that is causing prospective harm to [a] plaintiff." *ConAgra*, 17 Cal. App. 5th at 132 (explaining that an "abatement fund" to remove lead from public buildings is not a "damages award"); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 938–39 (10th Cir. 2001) (characterizing an "escrow fund for the abatement of the nuisance" as "an equitable remedy . . . rather than a legal award of damages"). Indeed, the U.S. Supreme Court has identified "an action to abate a public nuisance" as "a classic example of the kind of suit that relied on the injunctive relief provided by courts in equity." *Tull v. United States*, 481 U.S. 412, 423 (1987); *see also City & Cty. of Honolulu by Inouye v. Cavness*, 45 Hawai'i 232, 243 (1961) ("[T]he power of the City to abate this nuisance and to resort to equity for that purpose is established."); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4686815, at *5 n.9 (N.D. Ohio Sept. 26, 2019) ("[A]ny abatement remedy is a matter of equity for the Court to decide.").

No court has ever read HRCP 9(g) as applying to a prayer for equitable relief, much less one for nuisance abatement. And in the handful of out-of-jurisdiction cases that address the issue, courts have rejected that reading of similarly worded rules. *See, e.g., Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 922 (8th Cir. 2004) (stating that FRCP 9(g) did not cover "equitable"

remedy); *Hirata v. Evergreen State Ltd. P'ship No. 5*, 103 P.3d 812, 816 (Wash. Ct. App. 2004) (stating that CR 9(g) did not apply to "equitable remedy").

But even if HRCP 9(g) did apply to equitable remedies, the Complaint would satisfy it. Despite Defendants' assertions, nuisance abatement will *not* require them to reduce their fossil fuel production. *See* Mot. at 29 n.7. It will simply require them to abate the local environmental hazards in Honolulu that were created by Defendants' tortious conduct, such as by fortifying Plaintiffs' public infrastructure against sea level rise and increased flooding. Because the Complaint amply documents those hazards, *see* Compl. ¶¶ 156–61, Defendants have "notice" of "the nature of [Plaintiffs'] claim" for nuisance abatement, and so HRCP 9(g) is met. *Ellis*, 51 Hawai'i at 51.[23]

VI. CONCLUSION

The Court should deny Defendants' motion to dismiss for failure to state a claim.

Respectfully submitted,
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Dated: July 19, 2021

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[23] If the Court concludes otherwise, Plaintiffs ask for leave to file a more definite statement of the abatement sought.