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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,

v.

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

Defendants.

Civil No. 1CCV-20-0000380 (JPC)
(Other Non-Vehicle Tort)

**BRIEF OF *AMICUS CURIAE* STATE OF HAWAI‘I; CERTIFICATE OF SERVICE**

Hearing:
Date: August 27, 2021
Time: 8:30 A.M.
Judge: Honorable Jeffrey P. Crabtree

Trial Date: None

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**BRIEF OF *AMICUS CURIAE* STATE OF HAWAI‘I**

## INTERESTS OF AMICUS CURIAE

Plaintiffs City and County of Honolulu and Honolulu Board of Water Supply seek to use Hawaii's common law of nuisance, failure to warn, and trespass to hold Defendants liable for the foreseeable harms caused by the sale and use of Defendants' products. Defendants are some of the world's largest fossil fuel companies, and Plaintiffs allege that they have used deceptive marketing and dissemination of disinformation to promote the sale and use of their products. In turn, the use of those products has played a significant role in the climate change-related impacts that the State of Hawai‘i is experiencing and will continue to experience in the future. These impacts will necessarily require Plaintiffs – and the State – to undertake costly measures to adapt and to protect our shared residents and resources. Defendants have profited immensely from the deceptive marketing and sale of their fossil fuel products, and as such are properly held responsible for foreseeable harms resulting from the use of these products.

The Attorney General of Hawaii's interests in the issues presented in Defendants' motions to dismiss are threefold. First, the Attorney General has an interest in preserving Hawai‘i state courts' jurisdiction to hear claims based on alleged tortious commercial conduct that both occurs within and causes foreseeable harm to the State, even if that conduct is also concurrently causing similar harms on a national or multi-national scale.

Second, the Attorney General has an interest in preserving the capacity of Hawai‘i statutory and common law to remedy harm caused by commercial entities to, and within, the State. That interest extends to – and indeed goes beyond – claims for climate change-related harms alleged to result from the conduct of fossil fuel producers and sellers such as the Defendants in this lawsuit.

Finally, the Attorney General has an interest in ensuring that when litigants in Hawai‘i state courts argue that federal law preempts state law the proper analysis is applied and state laws are not improperly deemed preempted.

The Attorney General therefore files this amicus brief to address two arguments raised by Defendants in their motions to dismiss: that the Circuit Court of the First Circuit lacks specific personal jurisdiction over Defendants regarding Plaintiffs' claims, and that Plaintiffs' state law claims are preempted by federal law. As explained below, neither of these arguments has any merit.

## ARGUMENT

### I. This Court Has Personal Jurisdiction Over Defendants

This Court's exercise of personal jurisdiction over Defendants turns on: (1) whether Defendants' "activities in Hawai‘i fall into a category specified by Hawai‘i's long-arm statute, Hawai‘i Revised Statutes (HRS) § 634-35,"[1] and (2) whether "the application of HRS § 634-35 comports with due process." *Shaw v. N. Am. Title Co.*, 76 Hawai‘i 323, 327, 876 P.2d 1291, 1295 (1994). To defeat a motion to dismiss for lack of personal jurisdiction, a plaintiff "need

[1] HRS § 634-35 provides, in relevant part:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of the acts:
> (1) The transaction of any business within this State;
> (2) The commission of a tortious act within this State;
> (3) The ownership, use, or possession of any real estate situated in this State;
> (4) Contracting to insure any person, property, or risk located within this State at the time of contracting.

make only a *prima facie* showing" of these elements, *id.*, a task Plaintiffs have assuredly accomplished here.

Defendants do not dispute that their activities in Hawai‘i fall into a category enumerated in the State's long-arm statute; the dispute, then, centers on the due process inquiry, although even there, Defendants dispute only a portion of the analysis.[2]

### A. Defendants Are Subject to Specific Jurisdiction in Hawai‘i.

A three-part due process test must be satisfied for the exercise of specific jurisdiction: (1) the defendant purposefully availed itself of the privilege of conducting activities in the forum; (2) the claim "arises out of or relates to the defendant's forum-related activities"; and (3) the exercise of jurisdiction "comport[s] with fair play and substantial justice." *In Interest of Doe*, 83 Hawai‘i 367, 374, 926 P.2d 1290, 1297 (1996). Defendants decline to contest that they have purposefully availed themselves of the privilege of conducting activities in Hawai‘i, *see* Dkt. 347 at PDF 21 n.5, and instead focus their energies on the two remaining prongs of the analysis. None of their arguments as to why those prongs are not satisfied is persuasive.

#### 1. Defendants' Arguments Are Premised on a Mischaracterization of Plaintiffs' Claims.

Instead of squarely addressing the allegations in Plaintiffs' complaint, Defendants largely attack a straw man, contending that jurisdictional deficiencies result because Plaintiffs have filed claims based on global climate change and global greenhouse gas emissions. *See, e.g.*, Dkt. 347 at PDF 14 ("In fact, total energy consumption in Hawai‘i—of which at most a portion can be

[2] In the context of the due process inquiry, courts consider the "two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). This brief focuses on the existence of specific jurisdiction over Defendants.

attributed to any individual Defendant—accounts for a tiny fraction of worldwide greenhouse gas emissions. Thus, the purported injuries are 'merely incidental' to Defendants' conduct in Hawai'i, which is insufficient to confer specific personal jurisdiction."); *id.* at PDF 15 ("Plaintiffs' claims implicate *global* conduct"); *id.* at PDF 16 ("Among the links in Plaintiffs' causal chain are the decisions of countless third parties around the world to purchase, sell, refine, transport, and ultimately combust (i.e., use) Defendants' petroleum products."); *id.* at PDF 23 ("Plaintiffs do not and cannot plead that Defendants' contacts with Hawai'i are anything more than 'merely incidental' to claims based on *global* climate change. Plaintiffs' claims depend on a global complex of geophysical cause and effect involving all nations of the planet." (internal quotation marks and citation omitted)); *see also* Dkt. 20 at PDF 4 ("This case is about *global* greenhouse gas emissions"). Contrary to Defendants' contentions, Plaintiffs claims—as plainly laid out in their complaint—are based on Defendants' alleged misrepresentations and concealment regarding the hazards of their fossil fuel products. *See* Dkt. 379 at PDF 10-11 (summarizing allegations of complaint). The federal district court said as much in remanding this case to state court, noting that "[t]he principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims," specifically that "contrary to Defendants' contentions, Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels." *City & Cty. of Honolulu v. Sunoco LP*, No. 20-cv-00163-DKW-RT, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021).[3] So too here.

[3] With respect to Defendants' mischaracterization of Plaintiffs' claims, the federal district court further stated:

> Here, Defendants' assert their theory of the case as: "Plaintiff's alleged harms resulted from decades of greenhouse gas emissions caused by billions of consumers' use of fossil fuels . . . . While that may be a perfectly good theory in the abstract or as part of some other case, here, 'the very act that forms the basis

As a result, instead of properly focusing on Plaintiffs' attempt to "vindicate *local* injuries" caused by Defendants' alleged concealment and misrepresentations, Dkt. 379 at PDF 7 (emphasis added), Defendants incorrectly fixate on "global conduct," apparently hoping to minimize the effect of their contacts with Hawai'i.[4] This effort—along with Defendants' causation theory discussed *infra*—distorts the inquiry, and ultimately fails to demonstrate that this Court lacks personal jurisdiction.

**2. Defendants' Position Conflicts with *Ford Motor*.**

Hand-in-hand with their effort to refashion Plaintiffs' claims to center on global greenhouse gas emissions, Defendants advance a causation-only theory of the "arises out of or relates to" element of the specific jurisdiction inquiry that the U.S. Supreme Court flatly rejected in *Ford Motor*. There, in response to products-liability suits resulting from accidents involving Ford vehicles in Montana and Minnesota, Ford contended that Montana and Minnesota state courts could only exercise personal jurisdiction if a causal link existed between Ford's in-state activity and the plaintiff's claims. *Ford Motor*, 141 S. Ct. at 1019. That, to Ford, meant personal jurisdiction could arise "only if the company had designed, manufactured, or . . . sold in the State the particular vehicle involved in the accident" —not simply because the accidents and alleged malfunctions had occurred in the states at issue. *Id.* at 1023. The Supreme Court

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> of plaintiffs' claims' is *not* 'billions of consumers' use of fossil fuels. . . .' Instead, it is Defendants' warnings and information (or lack thereof) about the hazards of using fossil fuels–something noticeably absent from Defendants' stated theory."

*Id.* at *7 (quotation omitted; cleaned up).

[4] The federal district court noted that Defendants had asked it to find "'irrelevant' Plaintiffs' allegations about 'misrepresentations' and 'concealment,'" but according to the court, there were "many problems with this argument," including that because "each of Plaintiffs' claims concern Defendants' alleged warning and information practices, Defendants essentially ask this Court to find the entire case 'irrelevant,' which would seem an odd request to make at this procedural juncture." *City & Cty. of Honolulu*, 2021 WL 531237, at *8, n.14.

disagreed, noting that "Ford's causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff 's suit and a defendant's activities." *Id.* at 1026 (quotation omitted). According to the Court, "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." *Id.* The suit must "arise out of" *or* "relate to" the defendant's activities in the forum, and while "[t]he first half of that standard asks about causation," the second half, "after the 'or,' contemplates that some relationships will support jurisdiction *without* a causal showing." *Id.* (quotation omitted; emphasis added).

Despite this guidance from the U.S. Supreme Court,[5] Defendants persist in advancing a causation-only theory of personal jurisdiction. They argue, for example, that "[t]he alleged effects of global climate change in Hawai'i . . . cannot be found to 'arise from or relate to' Defendants' contacts with Hawai'i because, as other courts have recognized, the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time mean that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, or group at any particular point in time," and "it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'*caused*' Plaintiffs' alleged global warming related injuries." Dkt. 347 at PDF 24-25 (emphasis added) (internal quotation marks, citations, and brackets omitted). Defendants continue: "Plaintiffs' claims do not 'arise out of or relate to' Defendants' alleged contacts with Hawai'i. . . . To the

[5] As the parties—including Defendants—note, Hawai'i courts look to federal case law for guidance regarding personal jurisdiction. *See* Dkt. 347 at PDF 18 n.4; Dkt. 379 at PDF 13 n.4; *see also Shaw*, 76 Hawai'i at 326, 876 P.2d at 1294.

contrary, Plaintiffs' claimed injuries are 'all *due to* anthropogenic global warming,' . . . *caused by* the 'increase in atmospheric $CO_2$ and other greenhouse gasses . . . ' from the worldwide combustion of oil and gas over the past century." *Id.* at PDF 13 (emphases added). In pursuit of its causation-only theory of personal jurisdiction, Ford argued before the U.S. Supreme Court that "the plaintiffs' claims 'would be precisely the same if Ford had never done anything in Montana and Minnesota.'" *Ford Motor*, 141 S. Ct. at 1029. Defendants offer a near carbon-copy of that argument, contending that "regardless of how much oil and gas Defendants are alleged to have refined or sold in Hawai'i, or how much marketing or advertising purportedly was directed at Hawai'i, Plaintiffs' alleged injuries suffered as a result of global climate change cannot legally, or logically, be said to 'arise out of or relate to' those alleged in-state activities," Dkt. 347 at PDF 13. Defendants so argue despite the Supreme Court's rejection of Ford's reasoning: "Of course, that argument merely restates Ford's demand for an exclusively causal test of connection—which we have already shown is inconsistent with our caselaw." *Ford Motor*, 141 S. Ct. at 1029. Defendants' attempt at a causation-only approach here fares no better.[6]

**3. Plaintiffs' Claims Relate to Defendants' Forum-Related Activities.**

As the U.S. Supreme Court explained in *Ford Motor*, the "arises out of or relates to" prong of the specific jurisdiction inquiry—instead of requiring causation—calls for "an

[6] To the extent Defendants dispute that their conduct caused Plaintiffs' injuries, that is a merits-based argument they are free to raise at the appropriate time. That time is not now. *See Shaw*, 76 Hawai'i at 329 & n.3, 876 P.2d 1297 & n.3 (noting that whether the plaintiff "has sufficient evidence to support his claim for damages should be determined on summary judgment or at trial" and that any determinations regarding liability are "premature at the motion to dismiss stage of the proceedings"); *cf. City & Cty. of Honolulu*, 2021 WL 531237, at *8 ("Defendants' argument is simply an attempt to argue the *merits* of Plaintiffs' claims. That is, however, not the purpose of this instant endeavor.").

'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place' there." *Ford Motor*, 141 S. Ct. at 1031 (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017)). This is to ensure that "the relationship among the defendant, the forum, and the litigation—is close enough to support specific jurisdiction." *Ford Motor*, 141 S. Ct. at 1032 (internal quotation marks and bracketed material omitted).

Here, there is a clear "affiliation between the forum and the underlying controversy" and a clear "relationship among the defendant[s], the forum, and the litigation": Plaintiffs allege that Defendants market and sell their products in Hawai'i, those very same products are the subject of Plaintiffs' claims regarding Defendants' misrepresentations and concealment of harms from Plaintiffs and Hawai'i residents, and the resulting injuries have been sustained in Hawai'i. That is sufficient for the exercise of specific jurisdiction in Hawai'i. *See Ford Motor*, 141 S. Ct. at 1028 ("Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

Defendants' argument for a contrary result based on *Shaw* is meritless. According to Defendants, because Plaintiffs' injuries are allegedly "merely incidental" to Defendants' conduct, personal jurisdiction cannot be exercised in this case under *Shaw*. *See, e.g.*, Dkt. 347 at PDF 14. This argument misconstrues *Shaw*. *Shaw*'s "merely incidental" language was in service of determining whether the defendant there transacted any business in Hawai'i so as to satisfy Hawaii's long-arm statute. *See supra* p.2 at n.1. The defendant in *Shaw* asserted that "it

did not transact business in Hawai‘i" such that it did not fall into the long-arm statute's category for "[t]he transaction of any business within this State." *Shaw*, 76 Hawai‘i at 327, 876 P.2d at 1295 (quoting HRS § 634-35). The *Shaw* Court concluded that the defendant's activities were based on a California contract the plaintiff was not a party to, and that the plaintiff's receipt of telephone calls and signature of documents in Hawai‘i were "merely incidental to the escrow transaction conducted in California," and therefore failed to demonstrate that the defendant transacted business in Hawai‘i for the purposes of the State's long-arm statute. *Id.*

Here, Defendants do not contest that they transact business in Hawai‘i, and they challenge neither the satisfaction of Hawaii's long-arm statute, nor that they purposefully availed themselves of the privilege of conducting business in Hawai‘i. *See* Dkt. 347 at PDF 20-21 (noting their challenge to the "second and third requirements for specific jurisdiction—the claims asserted in the Complaint do not arise from or relate to Defendants' alleged contacts with Hawai‘i, and exercising personal jurisdiction in this case would be constitutionally unreasonable"). Defendants' attempt to transform the *Shaw* Court's "merely incidental" language—used to identify whether the defendant there had transacted any business in Hawai‘i under the State's long-arm statute—into a pronouncement relevant to their challenge to *other* aspects of the personal jurisdiction analysis necessarily fails, especially given Defendants' undisputed contacts with Hawai‘i.

**4. Defendants' "Clear Notice" Argument is Meritless.**

In Defendants' telling, *Ford Motor* added an element to the personal jurisdiction inquiry: whether the defendant had "clear notice" that it may be subject to jurisdiction in the forum. *See* Dkt. 347 at PDF 27. That is incorrect. "Clear notice" is not an independent requirement for personal jurisdiction; the Supreme Court in *Ford Motor* instead discussed "clear notice" in the

context of the existing personal jurisdiction analysis. *See Ford Motor*, 141 S. Ct. at 1025 (citing to an earlier decision referring to "clear notice" and explaining that "our doctrine . . . provides defendants with 'fair warning'—knowledge that a particular activity may subject it to the jurisdiction of a foreign sovereign" (internal quotation marks and brackets omitted)). The *Ford Motor* Court's only other references to "clear notice" confirm this interpretation: First, the Court noted that there is "clear notice" when there is purposeful availment in connection with a company's products. *See id.* at 1027 ("[A] company . . . 'purposefully availing itself' of the Oklahoma auto market 'has clear notice' of its exposure in that State to suits arising from local accidents involving its cars." (quotation omitted)). Second, the Court similarly stated that "[a]n automaker regularly marketing a vehicle in a State . . . has 'clear notice' that it will be subject to jurisdiction in the State's courts when the product malfunctions there (regardless where it was first sold)." *Id*. at 1030 (citation omitted). Far from establishing "clear notice" as a new, standalone element of personal jurisdiction, the *Ford Motor* Court squarely positioned "clear notice" as flowing from satisfaction of the existing personal jurisdiction analysis.

Regardless of its positioning, however, Defendants certainly had "clear notice" under *Ford Motor*. Defendants do not contest that they purposefully availed themselves of the privilege of conducting activities in Hawai'i, and do not contest that they regularly marketed their products in Hawai'i. *Ford Motor* notes that "when a corporation 'has continuously and deliberately exploited [a State's] market, it must reasonably anticipate being haled into [that State's] court[s]' to defend actions 'based on' products causing injury there." *Id.* at 1027 (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 (1984)). Defendants can hardly be surprised that after marketing and selling their products in Hawai'i, they may be subject to suit in Hawai'i for doing so deceptively.

### 5. The State Has a Strong Interest in Addressing This Dispute.

Hawai‘i courts are best positioned to address Defendants' alleged harms to Hawai‘i residents. By conducting business here, Defendants have "'enjoy[ed] the benefits and protection of [Hawaii's] laws'—the enforcement of contracts, the defense of property, the resulting formation of effective markets[,]" and "[a]ll that assistance to [Defendants'] in-state business creates reciprocal obligations"—here, that Defendants not market their products to Hawaii's citizens deceptively. *Ford Motor*, 141 S. Ct. at 1029-30 (quoting *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945)). A Hawai‘i court's "enforcement of that commitment, enmeshed as it is with [Defendants'] government-protected in-state business, can hardly be said to be undue." *Id.* at 1030 (internal quotation marks and citation omitted).

Defendants cannot escape being held to account for their conduct in Hawai‘i simply because they may have undertaken the same conduct and caused the same harms elsewhere. No defendant should be rewarded for the multiplication of its wrongful conduct. A contrary principle would severely limit the ability of the courts of any state to address the local effects of conduct by national and multinational companies. This is no small matter—the State of Hawai‘i, for example, has recently pursued relief against various defendants for deceptive labeling of blood-thinning medication, *see State of Hawai‘i v. Bristol-Myers Squibb Co., et al.*, 1CCV-14-0708-03, Dkt. 1373 (Findings of Fact, Conclusions of Law, Decision and Order), the deceptive marketing of prescription opioids, *State of Hawai‘i v. Purdue Pharma L.P., et al.*, 1CCV-19-1-0862-06, and for the deceptive marketing of electronic cigarettes, *see State of Hawai‘i v. JUUL Labs, Inc., et al.*, 1CCV-20-0000933, Dkt. 129 (First Amended Complaint). Efforts like these to

address the local effects of harms occurring nationwide—or even worldwide—vindicate important state interests, and this suit is no different.

## II. Plaintiff's State Tort Low Claims are Not "Barred by Federal Law"

### A. Defendants Again Misconstrue Plaintiffs' Claims.

The fundamental flaw underpinning Defendants' preemption arguments is that they mischaracterize Plaintiffs' claims as "targeting interstate and international emissions," Dkt. 347 at PDF 50, and as "seek[ing] to regulate transboundary and international emissions and pollution." *Id.* Just as with their personal jurisdiction arguments, these erroneous characterizations form the backbone of Defendants' preemption arguments. But Plaintiffs' claims do nothing of the sort. Rather, Plaintiffs' claims – while they indeed *involve* the problems of global greenhouse gas (GHG) emissions and climate change – are based on Defendants' failures to warn about the harms they knew their products would cause, and their deceptive conduct in selling and marketing those products. As stated by another federal court in Minnesota – addressing very similar claims and very similar misleading characterizations by Defendants,

> while the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial, the State here does not bring claims capable of addressing the panoply of social, environmental, and economic harms posed by climate change. The State's Complaint, far more simply, seeks to address one particular feature of the broader problem—Defendants' alleged misinformation campaign.

*Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *8 (D. Minn. Mar. 31, 2021).

Likewise, Plaintiffs are not asking this Court to "address[] the panoply of social, environmental, and economic harms posed by climate change[,]" *id.*, nor are they asking this Court to regulate Defendants' emissions in any way. Rather, they ask this Court "to address one particular feature of the broader problem—Defendants' alleged misinformation campaign." *Id.*

Whatever law and legal principles would apply in a suit seeking to hold an entity liable for its transboundary emissions of GHGs, those principles simply do not apply here. Rather, the actual nature of Plaintiffs' claims place them firmly within a regulatory area traditionally occupied by the states pursuant to their police powers. Plaintiffs' claims are therefore fully capable of being resolved by this Court, pursuant to Hawai'i law. And as explained below, they are not preempted by federal law.

**B. Plaintiffs' Claims Raise Matters Traditionally Covered by State Law.**

While it is important that this Court disregard Defendants' misdirection, no matter how Plaintiffs' claims are framed, they fall squarely into a field of traditional state regulation. Consumer protection laws, laws regulating products that cause environmental harm, and even laws specifically aimed at protecting residents from the effects of climate change have all been recognized as being subject to the states' broad authority to protect residents' health, safety, morals, or general welfare, also known as the police power. As such, this Court must begin with a strong presumption *against* preemption. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[I]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Cleaned up)).

First, as explained *supra* Plaintiffs' complaint seeks to protect consumers from false and misleading advertising, disinformation, and the deceptive promotion of dangerous products. Protection of consumers from deceptive commercial conduct is plainly an area in which states are traditionally authorized to regulate pursuant to their broad sovereign police powers. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (noting that states have

"traditional power to enforce . . . regulations designed for the protection of consumers."); *Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) ("[C]onsumer protection laws such as . . . false advertising law . . . are within the states' historic police powers and therefore are subject to the presumption against preemption." (Quotation omitted)); *Durnford v. MusclePharm Corp.*, 907 F.3d 595, 601 (9th Cir. 2018) ("[A] presumption against preemption applies . . . in an area of traditional state police power. Consumer protection falls well within that category." (Citation omitted)).

Second, and more broadly, the regulation of products and activities that cause environmental harms is also an area traditionally occupied by state law. For example, courts have held that the presumption applies in, among others, cases alleging that the operator of a wood treatment plant released environmental contamination because this is a "subject involving historic state police powers," *Barnes ex rel. Est. of Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008) (citation omitted),[7] and asserting negligence, trespass, nuisance, and failure to warn claims against manufacturers, refiners, and distributors of a gasoline additive whose use caused contamination of groundwater wells. *See In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("Imposing state tort law liability for negligence, trespass, public nuisance, and failure-to-warn—as the jury did here—falls well within the state's historic powers to protect the health, safety, and property rights of its citizens. In this case,

[7] To be clear, as explained *supra*, Plaintiffs here are not seeking to impose liability on Defendants for their roles as emitters or even producers of fossil fuels, but rather as corporate entities that have led misleading and deceptive information campaigns about their products. The State cites these cases to demonstrate that even though this case involves GHGs and climate change, the state laws at issue operate in areas of traditional state regulatory authority.

therefore, the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong.").

Moreover, the states' authority to protect its citizens from environmental harms extends to harms caused by climate change and GHG emissions. "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents[,]" and that they may use their police power "to protect the health of citizens in the state" from the harms of climate-altering air pollution. *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (quotation marks omitted); *See also Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.").

Indeed, Hawai'i has been proactive in enacting laws that seek to address the causes of climate change, and to reduce the state's reliance on fossil fuels. For example, Act 97, Session Laws of Hawai'i 2015, codified at HRS § 269-92, enacted a renewable portfolio standard (RPS) requiring each utility company that sells electricity within the State to establish an RPS reaching various percentages of renewable energy in certain timeframes, culminating in a required RPS of 100% of net electricity sales by December 31, 2045. HRS § 269-92. Other states have enacted similar requirements. Oregon, for example, has required its largest utilities to achieve 50% reliance on renewables by 2040, Or. Rev. Stat. § 469A.052(1)(h), and to cease reliance on coal-generated electricity by 2030, *id.* § 757.518(2). Connecticut has required utilities to reach 40% renewable energy sources by 2030. Conn. Gen. Stat. § 16-245a(25).[8] Yet other states have

[8] For a full list of state renewable portfolio standards, *see State Renewable Portfolio Standards and Goals*, National Conference of State Legislatures,

taken an even more direct approach to reducing emissions, such as California's AB 32 "Global Warming Solutions Act" of 2006, which codified the state's target of reducing statewide GHG emissions to 40% below 1990 levels by 2030. Cal. Health & Safety Code, § 38500 *et seq.*, and New Jersey's "Global Worming Response Act," which, among other things, requires reduction of statewide GHG emissions to "80 percent below the 2006 level by the year 2050." N.J. Stat. Ann. § 26:2C-38.

Hawai'i, like many other states, has also enacted measures to address not just the causes, but the impacts of climate change. For example, Act 117 of 2015 recognized that the State's beaches "are disappearing at an alarming rate" and thus authorized the use of transient accommodation tax revenues for beach conservation and restoration. Act 97, Session Laws of Hawai'i 2015. In 2017, the Legislature also passed Act 32,[9] making Hawai'i the first state to enact legislation committing itself to implementing parts of the United Nations Paris Climate Agreement, from which the United States had recently announced that it would withdraw.[10]

Given the extent of state action in the climate change arena, it is no surprise that state courts have also been active in addressing legal questions that arise under these state laws. The Hawai'i Supreme Court, for example, last year considered a challenge to the Hawai'i Public Utilities Commission's (PUC) approval of a gas utility rate increase on the grounds that the PUC had failed to fulfill its statutory obligation of considering the effects of the State's reliance on

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https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx (last visited July 22, 2021).

[9] Among other things, Act 32 established, and provided funding for, the Hawai'i Climate Change Mitigation and Adaptation Commission. *See* Act 32, §§ 3-8, Session Laws of Hawai'i 2017.

[10] *See Trump Will Withdraw U.S. From Paris Climate Agreement*, The New York Times, https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html (last visited July 22, 2021).

fossil fuels on out-of-state GHG emissions. *Matter of Gas Co., LLC*, 147 Hawai‘i 186, 199, 465 P.3d 633, 646 (2020). The Court held that the PUC had failed in its "affirmative duty to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation, as HRS § 269-6(b) requires, because the PUC could not have explicitly considered the effect of the State's reliance on fossil fuels on the level of greenhouse gas emissions." *Id.* at 202, 465 P.3d at 649 (cleaned up, citations omitted). State courts also routinely interpret and adjudicate the validity of state regulations limiting GHG emissions and reliance on fossil fuels, *see, e.g.*, *New England Power Generators Ass'n, Inc. v. Dep't of Env't Prot.*, 105 N.E.3d 1156, 1167 (Mass. 2018) (upholding regulations limiting GHG emissions by electricity producers promulgated pursuant to state statute); *California Chamber of Com. v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 614 (2017) (upholding a state board's creation of a cap-and-trade emissions reduction system), and address climate change issues arising in challenges to environmental impact statements (EIS) pursuant to state laws, *see, e.g.*, *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 306 P.3d 1031, 1038 (Wash. Ct. App. 2013) (rejecting a challenge under the Washington State Environmental Policy Act that an EIS was invalid because it did not "identify and analyze alternatives and mitigations capable of attaining the greenhouse gas emission limits" set by state statute).

All of this is to say that Defendants wrongly assert that "global warming presents a uniquely international problem of national concern that is not well suited to the application of state law," Dkt. 347 at PDF 50 (quoting *City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d. Cir. 2021)). And when viewed in context, Plaintiffs' state tort law claims are entirely unremarkable. They do not seek to impose emissions restrictions on Defendants; instead, they seek to impose liability on Defendants for the alleged harms that Defendants' deceptive conduct

has foreseeably caused. To be sure, GHG emissions and climate change are part of the causal chain that leads from Defendants' challenged conduct to Plaintiffs' alleged harms, and Plaintiffs must eventually establish causation as part of the elements of their tort claims. But that causation is not at issue today, and it does not somehow transform Plaintiffs' tort law claims into ones that are "exclusively subject to federal law." Dkt. 347 at PDF 50.

It is for these reasons that federal common law would not preempt Plaintiffs' claims. As explained *infra* Part II.3, all federal common law related to interstate air pollution has been displaced by the Clean Air Act (CAA), and therefore no longer has any preemptive effect. But even if that were not the case, the federal common law that did exist prior to the CAA would not govern here. The only previously recognized federal common law suits in this field prior to the CAA were those "brought by one State to abate pollution emanating from another State." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*). It is no surprise that the scope of the federal common law claims was so cabined because cases in which "judicial creation of a special federal rule [is] justified . . . are 'few and restricted.'" *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963)). Specifically, such cases are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *Id.* (quoting *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966)). Moreover, "[n]ot only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict." *Id.* at 87-88.

This, however, is not a suit seeking to "abate pollution emanating from another State." *AEP*, 564 U.S. at 421. As Plaintiffs clearly spell out in their Opposition, the claims asserted here do not, and cannot, regulate pollution or emissions of any kind. Dkt. 375 at PDF 22-23. Rather, Plaintiffs seek redress for Defendants' alleged misinformation campaign, and their claims

emanate not from Defendants' emissions of interstate pollution, but from their deceptive marketing conduct within Hawai'i. Because these claims are plainly within the states' traditional regulatory universe, they plainly do not create any "significant conflict" with any federal policy.

### C. In Any Event, the Clean Air Act Displaced Federal Common Law.

Defendants' assertion that Plaintiffs' claims are preempted by federal common law suffers from a second fundamentally flawed premise: that Plaintiffs' claims can be preempted by federal common law that Defendants acknowledge no longer exists. Specifically, Defendants erroneously argue that even though any relevant federal common law has been displaced by the CAA, federal common law still retains preemptive effect over Plaintiffs' claims. Instead, it is precisely because the CAA has displaced the federal common law that this Court's preemption analysis is limited to whether the CAA preempts Plaintiffs' state tort law claims.

Defendants acknowledge that the CAA displaced any federal common law "concerned with domestic greenhouse gas emissions." Dkt. 437 at PDF 55-56. Indeed, this displacement of federal common law is now well established. *AEP*, 564 U.S. at 424 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."). This includes the displacement of any claims, such as federal common law conspiracy claims, that are dependent on those displaced federal common law nuisance claims. *See City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020) ("[W]e have held that federal public-nuisance claims aimed at imposing liability on energy producers for acting in concert to create, contribute to, and maintain global warming and conspiring to mislead the public about the science of global warming, are displaced by the Clean Air Act." (*Citing Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d

849, 854 (9th Cir. 2012)). In short, any *federal* common law that might otherwise have governed Plaintiffs' claims has now been displaced by the CAA.[11]

Where Defendants' analysis goes awry, however, is when they assert that the displaced federal common law may still preempt Plaintiffs' claims even though it no longer exists. *See* Dkt. 347 at PDF 58 n.5 (citing *City of New York,* 993 F.3d at 98). This argument both defies common sense logic and is contrary to U.S. Supreme Court precedent.

In *AEP*, the U.S. Supreme Court considered "whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain federal common-law public nuisance claims against carbon-dioxide emitters." 564 U.S. at 415. *AEP* held, of course, that the CAA displaces those federal common law claims. *Id.* The plaintiffs in *AEP*, though, had also sought relief under *state* law. *Id.* at 429. The court below – the Second Circuit Court of Appeals – had not reached the state law claims because it had (wrongly) concluded that they were preempted by federal common law. *Id.* As the Supreme Court explained, "*if* a case 'should be resolved by reference to federal common law, state common law is pre-empted[,]'" *id.* (quoting *International Paper Co. v. Ouellette,* 479 U.S. 481, 488 (1987)) (emphasis added; cleaned up), but, the Court continued, "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect *of the federal Act*." *Id.* (emphasis added). Stated otherwise, if federal common law is displaced by an Act of Congress, the preemption question then becomes whether the federal *Act* preempts state law, not whether the now defunct federal common law still governs.

[11] To be clear, as noted above, the State agrees with Plaintiffs that given the exact nature of Plaintiffs' claims, even notwithstanding the CAA, federal common law would not have preempted Plaintiffs' claims.

That conclusion is also consistent with the Supreme Court's approach to preemption questions that arise under the Clean Water Act (CWA). In *Ouellette*, plaintiff residents of Vermont sued a New York paper mill operator, claiming that the defendant's discharge (in New York State) of effluent into a lake on the Vermont-New York border "constituted a 'continuing nuisance' under Vermont common law." *Ouellette*, 479 U.S. at 484. Thus, the Court was faced with the question of whether the plaintiffs' state common law claims were preempted by federal law. *Id.* at 483. The Court began by noting that "[u]ntil fairly recently, federal common law governed the use and misuse of interstate water." *Id.* at 487. The Court recognized, however, that in *Milwaukee v. Illinois,* 451 U.S. 304 (1981) (*Milwaukee II*), it had held that the CWA "now occupied the field, pre-empting all *federal* common law." *Ouellette*, 479 U.S. at 489. As a result, the Court then "turn[ed] to the question presented: whether the [Clean Water] Act pre-empts Vermont common law to the extent that law may impose liability on a New York point source." *Id.* at 491. The Court then proceeded to analyze whether Vermont state common law was preempted by the CWA, and for the purposes of that analysis, it did not matter whether the displaced federal common law would have previously preempted the state law claims. *Ouellette*, 479 U.S. at 491-500.[12]

[12] The Court's conclusion in *Ouellette* that the Vermont state law claims were preempted by the CWA is by no means controlling here. In fact, *Ouellette* exemplifies why Plaintiffs' claims are *not* preempted by the CAA. In *Ouellette*, the plaintiffs directly challenged the defendant's "discharge of effluents" and sought "injunctive relief that would require [the defendant] to restructure part of its water treatment system." *Ouellette*, 479 U.S. at 484. Allowing non-source states like Vermont to impose different effluent standards in this way, the Court held, "would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA," which created an obstacle to the CWA's full implementation. *Id.* at 495-97. The Court, though, indicated that the scope of its preemption holding was very narrow, cautioning that "[t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act[,]" and noting that "[t]he [CWA's] saving clause specifically preserves other state actions . . . ." *Id.* at

Supreme Court precedent therefore makes it abundantly clear that given the CAA's displacement of all federal common law related to GHG emissions, the proper analysis is for this Court to consider whether the CAA preempts Plaintiffs' state common law claims, without regard to any now non-existent federal common law. And for the reasons below, it does not.

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

To begin, it is important to make clear that the question of whether the CAA preempts Plaintiffs' state tort law claims in this context is very different from whether the CAA displaced any federal common law that might have covered Plaintiffs' claims.[13] When a court addresses whether a federal statute has displaced *federal* common law – as the Supreme Court did in *AEP* and *Milwaukee II* regarding the CAA and the CWA respectively – "separation of powers concerns create a presumption *in favor of*" displacement. *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (emphasis added). This is because "due regard for the presuppositions of our embracing federal system as a promoter of democracy does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest[.]" *AEP*, 564 U.S. at 423-24 (cleaned up; citations omitted). Thus, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Id.* at 423 (quoting *Milwaukee II,* 451 U.S., at 314).

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497. Here, as explained more below, Plaintiffs do not challenge or seek to abate Defendants' emissions, so *Ouellette's* holding that the CWA preempted Vermont's state law claims is inapposite.

[13] Again, to be very clear, the State does not believe that federal common law ever recognized or governed the type of claim that Plaintiffs make here. The State makes this point, however, to dispel any notion that just because the CAA displaced all federal common law governing interstate GHG emissions, it necessarily also preempts plaintiffs state common law claims.

On the other hand, "[b]ecause the States are independent sovereigns in our federal system," when considering whether *state law* is preempted, this Court must "assum[e] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *CTS Corp. v. Waldburger*, 573 U.S. 1, 18–19 (2014) (internal quotation marks omitted). That "presumption has greatest force when Congress legislates in an area traditionally governed by the States' police powers," *id.*, at 19, and "[i]n our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *Id.* (quoting *Wos v. E.M.A.*, 568 U.S. 627, 639-40 (2013)). Far from meeting their "considerable burden" of establishing Congressional intent to preempt Plaintiffs' state law tort claims, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997), Defendants offer no more than a brief, cursory attempt to explain how the CAA preempts Plaintiffs' tort claims. Dkt. 347 at PDF at 61-62. And once again, Defendants are incorrect.

"'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996)). There are three ways Congress can statutorily preempt state law: "[1] through a statute's express language, . . . [2] if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or [3] if there is an actual conflict between state and federal law." *Id.* at 76–77 (citation omitted). Here, there is plainly no express preemption and Defendants do not argue otherwise. Nor can there be any serious argument that Congress intended to occupy the entire legislative field by "foreclose[ing] any state regulation in the area," *Arizona v. United States*, 567 U.S. 387, 401 (2012), given the CAA's express preservation of the states' authority to "adopt or enforce (1) any standard or limitation respecting emissions of air

pollutants or (2) any requirement respecting control or abatement of air pollution[,]" except that any such requirements may not be "less stringent" than required by the Act. 42 U.S.C. § 7416; *see also Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1254 (9th Cir. 2000) ("The text of the Clean Air Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution.").

That leaves only conflict preemption. Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985) (cleaned up; citation omitted). Defendants argue that the latter applies here, asserting that state "regulation of out-of-state discharges would 'upset[] the balance of public and private interests so carefully addressed by the Act.'" Dkt. 347 at PDF 62 (quoting *Ouellette*, 479 U.S. at 494).

The problem with Defendants' argument is that they again mistakenly rely on their distorted characterization of Plaintiffs' claims. *See* Dkt. 347 at PDF 61-62 (asserting that Plaintiffs' claims are "preempted by the Clean Air Act because they functionally would regulate out-of-state-sources of greenhouse gas emissions."). But conflict preemption "turns on the identification of '*actual conflict*,'" *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (quoting *English v. General Electric Co.*, 496 U.S. 72 (1990) (emphasis added)); the mere "possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption." *Kansas v. Garcia*, 140 S. Ct. 791, 794 (2020). Where, as here, Plaintiffs do not seek any abatement of Defendants' emissions that would involve or otherwise interfere with "[t]he overriding purpose of the Clean Air Act[, which] is to force the states to do their job in

regulating air pollution effectively so as to achieve baseline air quality standards," *Exxon Mobil*, 217 F.3d at 1255, there is no actual conflict, and thus no obstacle preemption.

Similar CAA preemption arguments to Defendants' have been rejected in relation to fraud-on-consumer claims against car manufacturers that allegedly made their vehicles seem more fuel efficient than they actually are:

> The question raised by GM's argument is whether Congress intended the CAA (or EPA) to regulate the scope of vehicle manufacturer's disclosure obligations to consumers. GM has provided no legal authority to support the proposition that the CAA and/or the EPA is responsible for determining the extent to which vehicle manufacturers must disclose information about the emissions produced by their cars to consumers. The EPA is tasked with *environmental* protection, not *consumer* protection. Defendants have not provided "any basis to conclude, that a significant federal regulatory goal of the CAA is consumer protection from false advertising claims regarding emissions compliance, vehicle efficiency, or implementation of new emissions technology."

*In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1064 (E.D. Mich. 2018) (emphasis in original); *see also In re Caterpillar, Inc., C13 & C15 Engine Prod. Liab. Litig.*, No. 1:14-CV-3722 JBS-JS, 2015 WL 4591236, at *14 (D.N.J. July 29, 2015) ("Even Caterpillar must concede that federal regulation of motion vehicle emissions does not extend so far as to preclude claims that do not relate to adoption or enforcement of emissions standards. This explains Caterpillar's insistence that all of Plaintiffs' claims are fundamentally about the Engines' ability to comply with the applicable emissions standards. Having largely rejected this characterization of Plaintiffs' claims, the Court also rejects Caterpillar's contention that federal regulation in this area is so extensive that Plaintiffs' claims are impliedly preempted."); *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 992 (N.D. Cal. 2018) ("The Court holds that the affirmative misrepresentation claims are not an attempt to

enforce an emissions control standard, and thus not subject to CAA preemption."); *In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189 (2016) (finding "no . . . basis to conclude[] that a significant federal regulatory goal of the CAA is consumer protection from false advertising claims regarding emissions compliance, vehicle efficiency, or implementation of new emissions technology[,]" and ruling that "[a]s such, Plaintiffs' fraud and VCPA claims are not impliedly preempted because their claims do not interfere with any significant federal regulatory goal within the CAA.").

Similarly, Defendants here have not, and cannot establish that a significant regulatory goal of the CAA is consumer protection from false advertising claims regarding the dangers of using their products.[14] And even if Defendants *choose* to limit their ongoing liability by reducing their fossil fuel production, rather then by stopping their deceptive conduct – aside from being a highly speculative proposition – Plaintiffs' claims would still not "stan[d] as an obstacle to the accomplishment ... of the full purposes and objectives" of the CAA. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 336 (2011).[15] This is plain, given the CAA's express preservation of

[14] This conclusion is bolstered by the Ninth's Circuit's ruling in *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), that there was no basis for federal removal jurisdiction for virtually identical claims pursuant to the "complete preemption" doctrine. Concededly, the standard for "complete preemption" to establish federal question jurisdiction is somewhat more demanding than the one for "regular" preemption that is controlling here; nevertheless, the touchstone for the first prong of the complete preemption analysis is particularly relevant, for our purposes, i.e., whether Congress "intended to displace a state-law cause of action." *Id.* at 906. In holding that the defendants had not met this standard for the CAA, the Ninth Circuit concluded that the many state law savings provisions within the CAA "weigh[ed] against a conclusion that Congress intended to displace state-law causes of action." *Id.* at 907-08.

[15] *Williamson* is instructive. There, the Court considered whether a federal law that required auto manufacturers to "install lap-and-shoulder belts on seats next to a vehicle's doors or frames[,]" but allowed them "a choice about what to install on rear inner seats . . . either (1) simple lap belts or (2) lap-and-shoulder belts," preempted "a state tort suit that, if successful, would deny manufacturers a choice of belts for rear inner seats by imposing tort liability upon those who

the states' authority to "adopt or enforce . . . any standard or limitation respecting emissions of air pollutants or . . . any requirement respecting control or abatement of air pollution," as long as such requirements are not "less stringent" than those required by the Act. 42 U.S.C. § 7416.[16]

In short, allowing Plaintiffs' tort law claims to go forward will not present any obstacle to the accomplishment of the CAA's purposes and objectives. Defendants have not come close to meeting their "considerable burden" of establishing Congressional intent to preempt such claims. As such, this Court should reject Defendants' preemption argument.

**CONCLUSION**

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

DATED: Honolulu, Hawai'i, August 2, 2021.

Respectfully submitted,

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choose to install a simple lap belt." *Williamson*, 562 U.S. at 326. The Court concluded that even though the federal regulation "leaves the manufacturer with a choice," and "the tort suit here would restrict that choice," the tort suit was nevertheless not preempted because allowing that choice was not "a significant regulatory objective." *Id.* at 332. Here, allowing fossil fuel producers like Defendants to deceptively market their products is similarly not a regulatory objective of the CAA, significant or otherwise, and regardless of how Defendants would choose to respond to reduce their future liability, Plaintiffs' tort claims would not present any obstacle to the accomplishment of the CAA's purposes.

[16] For largely the same reasons, Defendants' argument that "Plaintiffs' claims targeting foreign emissions are impermissibly extraterritorial" also fails. Like Plaintiffs, the State is not aware of any "foreign policy interest in exonerating companies for knowingly misleading consumers about the dangers of their products." (Cleaned up). Dkt. 375, at PDF 42.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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|---|---|
| CITY AND COUNTY OF HONOLULU AND HONOLULU BOARD OF WATER SUPPLY,<br><br>Plaintiffs,<br><br>v.<br><br>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 HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLPS; CONOCOPHILLPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,<br><br>Defendants. | Civil No. 1CCV -20-0000380 (JPC)<br>(Other Non-Vehicle Tort)<br><br>**CERTIFICATE OF SERVICE** |

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing document has been served electronically (through the Court's JEFS system), or conventionally via US Mail, upon the following parties:

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