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Hawai'i State Association of Counties

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

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  
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.

CIVIL NO. 1CCV-20-0000380 (JPC)  
(Other Non-Vehicle Tort)

*AMICUS CURIAE* BRIEF OF HAWAII  
STATE ASSOCIATION OF COUNTIES IN  
SUPPORT OF PLAINTIFFS'  
MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS;  
CERTIFICATE OF SERVICE

***AMICUS CURIAE* BRIEF OF HAWAI‘I STATE ASSOCIATION OF COUNTIES IN  
SUPPORT OF PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANTS’  
MOTION TO DISMISS**

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## **INTERESTS OF AMICUS CURIAE**

The Hawai‘i State Association of Counties (“HSAC”) is a 501(c)(3) nonprofit organization dedicated to coordinating county programs in the best interest of the people of the State of Hawai‘i through cooperation of the legislative bodies of the several counties of the state. Membership includes the mayors of each county and the respective legislative bodies. HSAC is the Hawai‘i chapter of the National Association of Counties. HSAC has a distinct interest in the *City and County of Honolulu of Honolulu, et al. v. Sunoco LP, et al.* litigation because it serves as an affinity group of local county governments and understands the importance of having local courts hold tortfeasors accountable for local injuries they cause in a local jurisdiction. Defendants’ overarching argument for dismissing the First Amended Complaint is that effects of the climate crisis are felt globally, so even though Defendants are largely responsible for manufacturing and selling the product that is one of the largest contributors to the climate crisis, the problem is too widespread for any single jurisdiction to have authority. If this argument is found meritorious, Defendants would be able to evade liability in any jurisdiction as there is no jurisdiction with a wide-enough reach to encompass the entire planet. For this reason, Plaintiffs’ claims are limited to local harms of which there are many that are a result of the crisis.

### **A. The Climate Crisis Is Already Affecting Hawaii and Its Effects Will Continue to Drastically Worsen.**

Hawai‘i stands at the precipice of the climate crisis. As an island state, it faces unique challenges with sea level rise, drought, heat, and extreme weather events such as hurricanes, which are not only growing stronger but also shifting north and increasingly threatening all four HSAC jurisdictions.<sup>1</sup>

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<sup>1</sup> Jun-Eun Chu, et al., *Reduced tropical cyclone densities and ocean effects due to anthropogenic greenhouse warming*, 6(51) SCI. ADVANCES (2020), <https://advances.sciencemag.org/content/6/51/eabd5109>.



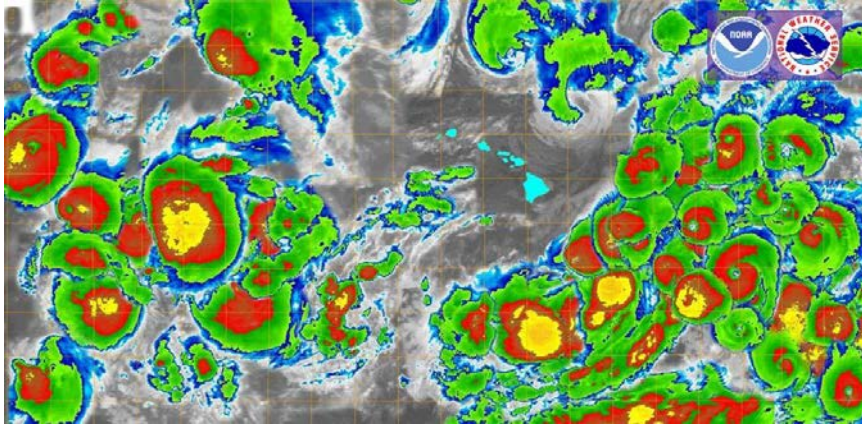
Sea level rise creates conditions for rapid erosion at the Sand Island Wastewater Treatment Plant, meaning overnight exposure of the outfall pipe. *City and County of Honolulu, Office of Climate Change, Sustainability and Resilience.*



Sea level rise is increasing erosion along Hawai'i's coasts, including at Punalu'u Beach Park, pictured above. *City and County of Honolulu, Department of Parks and Recreation.*



King tides are increasing in severity with sea level rise, causing ocean water to flow back through storm drains, flooding streets, such as the flooding pictured above in the Mapunapuna industrial area. Sea Grant University of Hawai'i, *Hawai'i and Pacific Islands King Tides Project*, <https://www.pacioos.hawaii.edu/king-tides/map.html>. Although King Tides are the highest tides of the year – a naturally occurring phenomenon, not a result of climate change – they pose coastal hazards and have more severe effects with sea level rise. *Id.* Moreover, they are windows that show what sea level rise will look like in the near future. *Id.*



This infographic from the U.S. National Weather Service shows all of the hurricanes and tropical storms in the Northern Central Pacific Basin from 2015. Kevin Kodama, *Mosaic of infrared satellite images from the NOAA GOES and the JMA MTSAT geostationary during 2015 hurricane season*, U.S. National Weather Service and Central Pacific Hurricane Center (November 13, 2015),

<https://www.facebook.com/US.NationalWeatherService.Honolulu.gov/photos/a.120037254732828.19697.113020565434497/904018966334649/?type=3&theater>.

While hurricanes grab headlines, increased heat across HSAC member counties poses a significant threat to lives and economic sustainability. Rising temperatures and increased numbers of excessively hot days as a result of the climate crisis will have an outsized impact on the counties. One emerging heat challenge is a push for additional air conditioning in island homes, adding a prospective burden to the electricity grid.<sup>2</sup> The counties – responsible for health, safety, and the provision of public services that rely directly on electricity – are now evaluating the need for, and potential development of, cooling centers, recently used in the Pacific Northwest during the “heat dome” episode, which were necessary to prevent lower income populations from suffering and even dying in extreme heat. This is not a prediction for the distant future: In 2014, extreme heat in Honolulu increased air conditioning usage and stressed the grid to the point that the local energy utility had to issue emergency public service

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<sup>2</sup> Christina Jedra, *Why the Growing Demand For AC Threatens Hawaii’s Renewable Energy Goals*, CIVIL BEAT (Sept. 20, 2019), <https://www.civilbeat.org/2019/09/as-ac-replaces-trade-winds-hawaiis-demand-for-electricity-imperils-renewable-goals/>.



announcements to curtail air conditioning use.<sup>3</sup> In 2015, Honolulu then set or tied eleven days of record heat during an El Niño year.<sup>4</sup> With increasing surface air temperatures predicted at 1.8°F to 7.2°F by the end of the century, the counties will have to fund and design better electricity and cooling systems to protect their citizens from dangerously high temperatures.<sup>5</sup>

The excessive heat is largely a result of increasing frequency of intense El Niño events. The counties are experiencing less rainfall on average, becoming more prone to drought. Paradoxically, extreme La Niña events are also projected to increase, mostly in years following El Niño events. This means counties will swing back and forth between opposite weather

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<sup>3</sup> *Hawaiian Electric asks Oahu customers to conserve power tonight*, HAWAII NEWS NOW (Sept. 17, 2014), <http://www.hawaiinewsnow.com/story/26551141/hawaiian-electric-asks-oahu-customers-to-conserve-power-tonight>.

Hawaiian Electric is asking Oahu customers to conserve electricity in the evenings this week, especially between 5 p.m. and 9 p.m., as the hot, muggy weather is driving up air conditioning use and demand for electricity more than normal. In addition, the entire power plant, operated by Kalaeloa Partners, an independent power producer, is out of service due to unexpected repairs. The light winds also mean there is little power being provided by the island's wind farms.

*Id.*

<sup>4</sup> KK Rebecca Lai, *New York Times Weather Chart*, N.Y. Times (Feb. 19, 2016), [https://www.nytimes.com/interactive/2016/02/19/us/2015-year-in-weather-temperature-precipitation.html#honolulu\\_hi](https://www.nytimes.com/interactive/2016/02/19/us/2015-year-in-weather-temperature-precipitation.html#honolulu_hi). Temperatures have increased even more dangerously since 2015, with 2019 now holding the record for the hottest recorded year on O‘ahu. 2019 deemed the hottest year ever on record for O‘ahu, KITV (Feb. 19, 2020), <https://www.kitv.com/story/41733909/2019-deemed-the-hottest-year-ever-on-record-for-oahu>.

<sup>5</sup> See Zhang, C., et al., *Dynamical downscaling of the climate for the Hawaiian Islands. Part II: Projection for the late twenty-first century*, 29 J. CLIMATE 8333 (2016).

extremes. After the record heat days in 2015, subsequent years saw extreme flooding in every county.



A City and County of Honolulu truck got stranded trying to assist stranded citizens after parts of Liliha flooded in September 2015. Craig Gima, *Showers drench Oahu; State remains under flood watch*, STAR ADVERTISER (Sept. 3, 2015), <https://www.staradvertiser.com/2015/09/03/hawaii-news/showers-drench-oahu-state-remains-under-flood-watch-2/>.

In 2018, Kaua‘i’s Nā Pali Coast received 50 inches of rain in less than 24 hours – a national record.<sup>6</sup> The rain gauges in Hanalei broke after the first 28 inches. *Id.*



Flooding on Kauai after receiving fifty inches of rain in less than twenty-four hours. *Id.*

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<sup>6</sup> Heidi Chang, *A Hawaiian island got about 50 inches of rain in 24 hours. Scientists warn it's a sign of the future* (Apr. 28, 2018), <https://www.latimes.com/nation/la-na-hawaii-storm-kauai-20180428-story.html>.

Later in 2018, Hurricane Lane brought torrential rains to the County of Hawai‘i, which received approximately 52 inches of rain between August 22-26, 2018, making it the wettest tropical cyclone ever recorded in Hawai‘i.<sup>7</sup>



Flooding in Hilo on August 23, 2018. Daniel Manzo, et al., *Monster Hurricane Lane pummeling Hawaii with torrential rains, winds* (Aug. 24, 2018), <https://abcnews.go.com/US/category-hurricane-145-mph-winds-nearing-hawaii/story?id=57350920>.

Earlier this year in March, flooding in East Maui destroyed homes, washed out roads, made bridges impassable, and caused Kaupakalua Dam to overflow.<sup>8</sup>

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<sup>7</sup> Susannah Cullinane, *Hurricane Lane dumped 52 inches of rain on Hawaii and there might be more on the way* (Aug. 28, 2018), <https://www.cnn.com/2018/08/28/us/hawaii-tropical-storm-lane-flooding-wxc/index.html>.

<sup>8</sup> Ben Gutierrez, *Homes flooded, roadways damaged on Maui as torrential rains batter state* (Mar. 9, 2021), <https://www.hawaiinewsnow.com/2021/03/08/flash-flood-watch-issued-big-island-maui-county/>.



Flooding on Hana Highway. *Id.*

The County of Maui Department of Public Works has estimated the necessary repairs will cost \$9 million.<sup>9</sup>

During the same storm, the City and County of Honolulu also experienced extreme flooding on the North Shore in Hale‘iwa, where residents had to evacuate.<sup>10</sup> The Waiāhole Stream had flow rates of almost 9,000 cubic feet per second, which broke the previous record of 432 cubic feet per second in 2012. *Id.* The normal flow rate for the Waiāhole Stream is 90 cubic feet per second – one percent of the record-breaking rate in March. *Id.*

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<sup>9</sup> Kehaulani Cerizo, *\$9 million needed for county flood repairs* (Apr. 20, 2021), <https://www.mauinews.com/news/local-news/2021/04/9-million-needed-for-county-flood-repairs/>.

<sup>10</sup> Matthew Cappucci, *Severe flash flooding triggers state of emergency in Hawaii* (Mar. 10, 2021), <https://www.washingtonpost.com/weather/2021/03/10/hawaii-flash-flooding-emergency/>.



Flooding in Hau'ula, O'ahu during the March 2021 storm. *Id.*

**B. Local Adjudication Is the Only Recourse the Counties of Hawai‘i Have Left to Seek Redress from Local Climate Crisis Effects.**

The extreme weather events in Hawai‘i over the last decade offer a glimpse into the stark reality faced by future generations who will suffer even more severe effects of the climate crisis. The crisis being inherited by Hawai‘i’s children, including today’s youth and those yet unborn, is unparalleled. The brunt of protecting Hawai‘i’s people falls largely on the counties, as the counties have jurisdiction and govern local affairs, such as repairs to county highways after flooding. The saying “all disasters are local” has never rung truer than in the climate crisis era, when local governments will be increasingly left to protect their citizens while multiple, cascading disasters occur sometimes simultaneously across the state.

If Defendants' Motion to Dismiss is granted, the City and County of Honolulu will lose its chance to seek legal redress under Hawai'i law, for the Defendants' failures to warn, wrongful promotion, and related campaign of deception.

Defendants wish to make local adjudication impossible before the Court reaches the merits of Plaintiffs' claims precisely because the extent of the damage done by Defendants' wrongful conduct is so reprehensible, it is unlikely a local jury would find allow Defendants' to escape liability. And without the ability to adjudicate claims in its own jurisdiction, the counties of Hawai'i would also lose their only avenue to restorative justice, cost recovery, and the possibility of helping protect their people's safety and the infrastructure they rely on.

The climate crisis poses an immense threat to all of the people of Hawai'i; however, this question of jurisdiction has even larger implications. If Defendants are allowed to escape this Court's jurisdiction, other large corporations will have a green light to deceptively market other dangerous products in Hawai'i's counties so long as their misconduct is equally broad in scope. Counties must have the ability to bring cases against out-of-state corporations whose products and deceptive marketing campaigns are targeted at local county residents and harm county interests. This truth is illustrated by issues such as current litigation against tobacco and pharmaceutical companies nationwide, and litigation in the County of Kaua'i over water supply contamination from toxic pesticides.

Mitigating the damages from harmful products within the counties is both costly and time consuming. In the case of water contamination and climate impacts, the dangerous products can literally harm and kill generations of residents and tax county financial resources for decades or more. HSAC has a distinct interest in Plaintiffs being able to bring their claims in state court

because Defendants are not the only large out-of-state corporations causing harm in Hawai‘i through their deceptively marketed, dangerous products.

## **ARGUMENT**

### **I. SPECIFIC JURISDICTION IS PROPER IN HAWAI‘I BECAUSE THIS CASE RELATES TO DEFENDANTS’ HAWAI‘I ACTIVITIES, AND THE FORUM STATE’S INTEREST IS STRONG.**

The crux of Defendants’ personal jurisdiction argument is that because the climate crisis is also a global phenomenon with additional causes and effects that extend beyond Hawai‘i’s borders, it is inappropriate for Hawai‘i courts to adjudicate Defendants’ culpability for tortious conduct within the state. If accepted by courts, the argument would exempt Defendants from being held accountable anywhere but in their corporate home states in which they are subject to general jurisdiction. That outcome may indeed be Defendants’ end game, but it is neither what the law of personal jurisdiction, the principle of fairness, nor the rule of law requires.

A forum may exercise specific jurisdiction when (1) the nonresident defendant “purposefully avails himself of the privilege of conducting activities within the forum”; (2) the claim “arises out of or relates to the defendant’s forum-related activities”; and (3) the exercise of jurisdiction would be “reasonable.” *In Interest of Doe*, 926 P.2d 1290, 1297 (Haw. 1996). Here, Defendants do not dispute that they purposefully availed themselves of the privilege of acting within Hawai‘i,<sup>11</sup> but they do contend that the present suit is not related to their Hawai‘i activities and that the exercise of jurisdiction would be unreasonable. With respect to both the second and third prongs, Defendants emphasize the global dimensions of the climate crisis to suggest that Hawai‘i’s connection to this lawsuit is tenuous.

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<sup>11</sup> The BHP Group defendants are the only exception, as they have argued that they do not do business in Hawai‘i. Nevertheless, BHP Group’s subsidiary is incorporated in the state, and BHP Group or its subsidiaries have sold fuel to Hawai‘i in the past.

These arguments are a red herring. Although the climate crisis is a global phenomenon, its causes originate – and its impact is felt – at a local level. This lawsuit seeks to hold Defendants accountable for local actions and local harms. It is immaterial that such harms may also be suffered in other jurisdictions. The Supreme Court has confirmed that the relatedness prong does not impose a causal link requirement. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1026 (2021) (rejecting a defendant corporation’s attempt to escape personal jurisdiction):

Ford agrees that it has “purposefully avail[ed] itself of the privilege of conducting activities” in both places. *Hanson*, 357 U.S., at 253, 78 S.Ct. 1228; see *supra*, at 1024-1025. Ford’s claim is instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford’s view, the needed link must be causal in nature: Jurisdiction attaches “only if the defendant’s forum conduct *gave rise* to the plaintiff’s claims.”

...  
But 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. *Bristol-Myers*, 582 U. S., at \_\_\_, 137 S.Ct., at 1776. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant’s in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit “arise out of *or relate to* the defendant’s contacts with the forum.” *Id.*, at \_\_\_, 137 S.Ct., at 1780 (quoting *Daimler*, 571 U.S., at 127, 134 S.Ct. 746; emphasis added; alterations omitted); see *supra*, at 1025. The first half of that standard asks about causation; but the back half, after the “or,” contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase “relate to” incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff’s claim came about because of the defendant’s in-state conduct.

Here, Plaintiffs’ uncontroverted allegations show that Defendants have engaged in substantial operations in Hawai‘i related to the sale, promotion, production, and development of fossil fuel products. Defendants’ contacts with Hawai‘i are directly related to Plaintiffs’ claims that Defendants deceived the public and failed to warn about the harms associated with the



unabated use of their products. Moreover, the exercise of jurisdiction in this forum is reasonable because Hawai‘i has a compelling interest in adjudicating the in-state wrongdoing and harms that Plaintiffs have alleged. Indeed, Hawai‘i is not merely a *reasonable* forum: It is the most appropriate one for the particular claims at issue.

**A. Plaintiffs’ Injuries and Claims Are Related to Defendants’ Hawai‘i Activities, and It Is Irrelevant that Additional Causes Outside the Forum May Also Play a Role.**

Defendants contend that because the harms of the climate crisis are related to global atmospheric dynamics, Plaintiffs’ claims for climate-related injuries cannot be said to arise out of or relate to Hawai‘i-based conduct. Defs.’ Joint Mem. Supp. to Dismiss Lack Pers Jurisdiction 12-13, Jun. 2, 2021, Dkt. 347. This argument rests on a mischaracterization of Plaintiffs’ claims and the governing case law.

Plaintiffs’ First Amended Complaint alleges extensive and systematic forum contacts by Defendants and traces how those activities contributed to the climate-related harms on which Plaintiffs’ legal claims are premised. In particular, Defendants failed to warn Hawai‘i consumers and deceptively marketed their products in Hawai‘i, and this contributed to the expected injuries that range from severe flooding and coastal erosion to public health and safety hazards in Hawai‘i. First Am. Compl. ¶¶ 4-5. The relief Plaintiffs seek is based on those Hawai‘i-specific injuries. Moreover, there is a direct link between Defendants’ business activities in Hawai‘i — specifically, their sale, promotion, and production of fossil fuels — and Plaintiffs’ claims that Defendants’ misled and failed to warn about the harms associated with their products. Seen from the proper vantage point, there can be little doubt that there is a sufficient connection between this lawsuit and Defendants’ forum activities to satisfy the relatedness prong.

Defendants avoid that conclusion only by mischaracterizing the governing law. They contend that their Hawai‘i activities are not the *sole* cause of, or even a meaningful factor in, the alleged climate harms because those harms depend on global greenhouse gas emissions. But the U.S. Supreme Court recently confirmed that the relatedness test does not equate to causation. *See Ford Motor Co.*, 141 S. Ct. at 1026. In that case, it was sufficient that the defendant corporation engaged in the types of activities (marketing and selling) that would be expected to lead to the types of harms (purchasing a defective vehicle) that occurred, and that the injuries underlying the suit did occur in the forum. *See id.* at 1028. It did not matter that the defendant sold the specific cars involved in the injuries outside the forum, thereby breaking a causal chain. *See id.* at 1029. Likewise, here, Defendants were engaged in the types of forum activities that could and did lead to Plaintiffs’ injuries in Hawai‘i. That other events outside the forum may also have contributed to the eventual harms is not controlling; specific jurisdiction requires a “*connection*.”

Defendants fare no better by trying to downplay the extent of that connection. In the cases they cite on that issue – unlike in this case – the defendants’ contacts were either minimal to begin with or otherwise tangential to the alleged injuries. *See, e.g., Norris v. Six Flags Theme Parks, Inc.*, 74 P.3d 26, 32 (Haw. 2003) (noting that the only Hawai‘i contacts by defendant, a California theme park, involved advertising in a national publication and on its website that plaintiff accessed from Hawai‘i); *Moki Mac River Expeditions v. Drugg*, 221 S.W. 3d 569, 587-88 (Tex. 2007) (finding no substantial connection between defendant’s Texas solicitations and the operative facts that led to plaintiff’s death on a hiking trail in Arizona).

In this case, Defendants’ contacts are systematic and – rather than merely providing a jurisdictional hook – equate to the very facts supporting Plaintiffs’ claim for relief. The only basis for minimizing the connection is that the sheer scope of the climate crisis makes any

individual factor seem small in context. But that disproportionality as a quantitative matter does not negate the undeniable qualitative relationship. Defendants are arguing – with no cited authority – that if wrongful conduct causes great enough harms, courts no longer have jurisdiction over the conduct.

Finally, it bears emphasizing that the logical consequence of Defendants’ reasoning is that no state would be able to exercise specific jurisdiction over a lawsuit alleging climate-based injuries. In the cases they cite in which forum contacts were deemed too incidental to support jurisdiction, there was an obvious alternative that could be described as the focal point of the alleged facts. *See, e.g., Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 340 (2d Cir. 2016) (“In this case, the United States is not the nucleus of the harm—Israel is.”). The causes and effects of the climate crisis have no such focal point. But Defendants’ contributing wrongful conduct has targeted focal points, such as in Hawai‘i and its counties in this case. That distinction underscores why Defendants’ theory is so misguided. The global dimensions of the climate crisis do not justify entirely removing the inherent authority every local jurisdiction has to oversee the assignment of culpability. They simply require that each jurisdiction exercise its authority responsibly on the conduct and harms within the jurisdiction.

**B. Given Hawai‘i’s Compelling Interest in This Litigation, Adjudication in This Forum Would Be Reasonable and Serve the Aims of Interstate Federalism.**

To assess whether the exercise of jurisdiction would be reasonable, courts consider:

(1) the extent of the defendants’ purposeful interjection into the forum state’s affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of any conflict with the sovereignty of the defendants’ state; (4) the forum state’s interest in adjudicating the dispute; (5) concerns of judicial efficiency; (6) the significance of the forum to the plaintiff’s interest in relief; and (7) the existence of alternative fora.

*Interest of Doe*, 926 P.2d at 1297. Plaintiffs’ Opposition shows how all of these factors weigh in favor of finding reasonableness. HSAC will limit its submission to elaborating on the strength of

Hawai‘i’s interest in this dispute and explaining how adjudication here serves the broader “principles of interstate federalism embodied in the Constitution.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

As explained above, this lawsuit is not an attempt to adjudicate responsibility for the climate crisis at the global level. Defendants’ arguments about the burdens of having to defend against allegations of global wrongdoing and harms therefore miss the mark. Likewise, their concerns that Hawai‘i’s exercise of jurisdiction would offend interstate federalism depend on the mistaken premise that this lawsuit seeks to set energy policy for the nation and world. To the contrary, this suit seeks to determine culpability under Hawai‘i law for local conduct and local injuries. For such issues, a Hawai‘i court is not only a reasonable forum; it is the most appropriate one.

A few examples drawn from HSAC member counties’ experiences will illustrate the nature and extent of the local interest. First, each HSAC county faces unique challenges from the inundation of previously dry residential cesspools along Hawai‘i’s coasts. As Hawai‘i’s sea levels rise there is a corresponding increase in the underground water tables along coastal areas. Formerly “dry” cesspool pits serving coastal residential properties are now in some cases permanently inundated, causing the migration of untreated wastewater containing pathogens such as bacteria, protozoa, and viruses into nearshore waters where residents and visitors swim. Similarly, each HSAC county faces the daunting task of moving coastal highways back and away from rising water levels and storm surge. The extreme weather events from increasing El Nio and La Nia events linked to the climate crisis, such as the increase in deadly hurricanes passing dangerously close to the islands, make disasters once regarded as rare as now routine. *See Interests of Amicus Curiae, supra.*

Claims for such injuries belong in Hawai‘i’s courts, which have the expertise and legitimacy to apply Hawai‘i law to the sensitive and complex issues at stake. These are precise harms that are profoundly local and are not shared by other jurisdictions facing their own local climate impacts. The Hawai‘i-specific claims do not belong in a distant forum that happens to have general jurisdiction where they would have to compete for attention with numerous dissimilar claims potentially arising other states. In short, despite its global dimensions and implications, the climate crisis is also a fundamentally local problem that requires local solutions and local adjudication.<sup>12</sup> In that regard, it is worth recalling that although personal jurisdiction operates as a limit on state sovereignty, that limit came as a corollary to the even more fundamental principle that states have exclusive authority to regulate within their own borders. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). Here, accordingly, the value of interstate federalism is not thwarted but in fact fulfilled by Hawai‘i’s exercise of jurisdiction over the properly delineated subset of claims relating to its own territory.

## **II. LIKE TOBACCO LITIGATION DEFENDANTS, DEFENDANTS HERE IMPLAUSIBLY ASSERT THAT FEDERAL REGULATORY FRAMEWORKS PREEMPT STATE NEGLIGENCE AND STRICT LIABILITY LAW.**

Defendants contend that Plaintiffs’ state law claims are preempted by federal law, either the Clean Air Act or in the alternative federal common law. This is incorrect because Plaintiffs’ claims derive from state law and are based on failure to warn, consumer protection, false advertising, and products liability, which are not touched upon by federal law. Plaintiffs have already fully addressed why their claims are not preempted in their Memorandum in Opposition.

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<sup>12</sup> It is also worth noting that although there is no doubt Defendants’ deceptive promotion of dangerous products in Hawai‘i caused greenhouse gas emissions, which caused the climate crisis affecting Hawai‘i, this discussion is limited to whether this Court has jurisdiction to determine the merits of Plaintiffs’ claims – at which point causation will also need to be determined.

This brief will highlight key flaws in Defendants' contentions by comparing them to the failed arguments used by Big Tobacco defendants in similar lawsuits.

The Defendants attempt to frame this case as an attempt to regulate the global greenhouse gas emissions caused by the consumption of Defendants' products. Defs.' Joint Mem. Supp. of Defs.' Mot. Dismiss Failure State Claim, 11, June 2, 2021, Dkt. 347. They have a distinct interest in painting this narrative because Defendants' strategy is to avoid adjudication in a local forum. This case, as Plaintiffs have made clear in both their First Amended Complaint and Memorandum in Opposition, is about the failure to warn, consumer protection, and false advertising and promotion in this jurisdiction that has contributed to the escalating effects of the climate crisis being felt in Hawai'i.

The tactics used by Defendants are similar to those used by Big Tobacco companies to avoid liability in state courts for dangerous products deceptively marketed to the public and causing economic damages to local governments. Recently, the Eleventh Circuit held that federal labeling laws for tobacco products did not preempt the police powers vested in Florida to impose tort liability on tobacco manufacturers. *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1191 (11th Cir. 2017). The Eleventh Circuit found that federal labeling laws do not create a right to sell cigarettes, and holding otherwise would effectively preclude tobacco companies from ever being held accountable for the manufacture, distribution, and sale of a dangerous product. *Id.*

R.J. Reynolds Tobacco Co. specifically argued that federal labeling laws preempted local state actions; however, the court held that the regulatory scheme sought only to standardize labeling requirements and did not protect manufacturers "from more stringent regulation generally." *Id.* at 1188. R.J. Reynolds Tobacco Co. additionally argued that Congress' inaction toward the sale of cigarettes showed an intent to preempt state law prohibitions. *Id.* at 1190. The

Eleventh Circuit, citing numerous cases, found this argument meritless because inaction by Congress does not indicate such preemptive intent. *Id.* The present action is similar in that Plaintiffs ask this Court to apply state law to determine tort liability for the sale of dangerous petroleum products. The Defendants' arguments that the Clean Air Act preempts state law fail in a similar manner. *See* Defs.' Joint Mem. Supp. of Defs.' Mot. Dismiss Failure State Claim, 11, June 2, 2021, Dkt. 347.

**A. This Case Seeks to Hold Defendants Accountable For Their Failures to Warn and Knowingly Wrongful Promotion of Dangerous Products and Does Not Seek to Regulate Greenhouse Gas Emissions In the Future.**

This is a case about defendants' failures to warn and knowingly wrongful promotion of dangerous products. Defendants attempt to distract the Court by characterizing this action as one seeking the regulation of greenhouse gas emissions in the future. *Id.* But Plaintiffs have brought a case that clearly focuses on Defendants' decades-long campaign of deception and denial. First Am. Comp. ¶¶ 154-204. Here, as in *Graham*, the fact that Congress regulates one aspect of an issue does not indicate an intent to preempt state law regulation of other aspects. *Graham*, 857 F.3d at 1190. Unlike the air travel industry, for example, Congress has never decided to grant fossil fuel companies a shield against liability under state laws protecting consumers. Airline Deregulation Act, 49 U.S.C. § 41713; *see e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The causal effect of Defendants' campaign of deception is the outsized consumption of said dangerous products, and the unduly inflated production of greenhouse gas emissions. *Graham*, 857 F.3d at 2 (noting that the burning of gas contributes to global warming). Without the failure to warn, wrongful promotion, deceptive marketing, and sale of fossil fuel products, Plaintiffs would not have incurred their injuries and mounting economic harms from the climate crisis.

**B. The Clean Air Act's Lack of Procedural Mechanism to Bring Tort Claims Does Not Indicate Congressional Intent to Shield Defendants Against Liability Under State Laws.**

Defendants claim that because the Clean Air Act does not provide a statutory remedy for tort claims, they are impossible to bring. Defs.' Joint Mem. Supp. of Defs.' Mot. Dismiss Failure State Claim, 11, June 2, 2021, Dkt. 347. Analogous to claims by Big Tobacco that inaction by Congress on the sale of cigarettes indicated intent that it was permissible, Defendants try to claim that the lack of procedural mechanism to bring tort cases under the Clean Air Act indicates an intent by Congress to disallow state law tort and products liability actions. *Id.* This fails for the same reason Big Tobacco's arguments failed: Inaction by Congress is not an intent to disallow state tort actions over the failure to warn, deceptive marketing, and sale of a dangerous product. *See e.g., Morales*, 504 U.S. at 374; *cf. Graham*, 857 F.3d at 1189 (citing precedent that inaction by Congress does not indicate intent).

**C. Defendants Attempt to Credit Themselves For Societal Progress Achieved Through the Use of Fossil Fuels When They Knew Safer Energy Sources Were Available and Actively Promoted Fossil Fuels Despite Knowing of the Dangers of the Climate Crisis.**

Defendants depict themselves as merely serving a legal market to cast doubt on Hawai'i's legitimate interest in protecting its consumers. Big Tobacco attempted to exonerate itself from liability by placing blame on the consumer. Courts have rejected this framing because Big Tobacco knowingly manufactured, distributed, and sold its products to unwitting consumers. Courts have rejected the notion that blame should lie solely with the consumer when corporations selling the products knowingly misled consumers to deepen their pockets. *See Graham*, 857 F.3d at 1186. Defendants try to exculpate themselves by painting a picture of societal progress centered around the consumption of fossil fuels. Defs.' Joint Mem. Supp. of Defs.' Mot. Dismiss Failure State Claim, 2, June 2, 2021, Dkt. 347. The Court should not allow



this red herring argument to distract from the issue at hand. The past availability of energy in the form of fossil fuels makes such use even more insidious. Defendants in fact misled consumers for decades precisely because if consumers were fully aware of the harmful effects of Defendants' products, there likely would have been a much earlier, greater push for safe and renewable energy technology, as evidenced by today's cry for more sustainable energy sources and more ambitious climate action plans. In fact, the City and County of Honolulu passed by popular vote Charter Amendment 7 in 2016, which established the Office of Climate Change.<sup>13</sup> This demonstrates clear concern and population-wide action against the climate crisis on behalf of both the HSAC member county and voters now that information has emerged about the risks of Defendants' products. Defendants should not be able to escape liability by framing the consumers as the guilty parties when they knew continued product use would lead to the very climate crisis Hawai'i now faces.

### **III. CALIFORNIA'S ANTI-SLAPP LAW IS NOT THE CORRECT CHOICE OF LAW, AND DEFENDANTS DO NOT QUALIFY FOR RELIEF UNDER HAWAI'I ANTI-SLAPP LAWS.**

HSAC notes its support for Plaintiffs' contention that Hawai'i and not California law should apply in this case; thus, the Court should deny Chevron's Special Motion to Strike and/or Dismiss the Complaint Pursuant to California's Anti-SLAPP Law. Pfts.' Mem. Opp. to Chevron's Spec. Mot. Strike Dismiss Compl. Purs. Cal. Anti-SLAPP Law, July 19, 2021, Dkt. 377.

Although Defendants have not asserted that Hawai'i Anti-SLAPP Law should apply, HSAC reiterates its agreements with Plaintiffs that Chevron's Special Motion to Dismiss (Dkt.

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<sup>13</sup> Chelsea Davis, *Oahu voters decide whether to create climate change office* (Oct. 28, 2016), <https://www.hawaiinewsnow.com/story/33511779/a-critical-question-facing-honolulu-voters-regarding-climate-change/>.

349) also fails under Hawai‘i law. In *Perry v. Perez-Wendt*, the Hawai‘i Intermediate Court of Appeals (“ICA”) examined Hawai‘i’s anti-SLAPP statute (Haw. Rev. Stat. § 634F). 129 Hawai‘i 95 (Haw. App. 2013). The ICA interpreted narrowly the provision of the statute protecting from liability public participation, which it defines as “oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding.” *Id.* at 1086. The ICA considered that testimony for the purposes of the statute had to be in a formal setting and proceeding, so informal communications to government officials were excluded. Furthermore, the ICA found that a complaint filed with the Office of Disciplinary Counsel did not qualify as public participation because no written or oral testimony was given. *Id.* at 1087.

In this case, Plaintiffs have alleged actions by Defendants well outside the scope of Hawai‘i Revised Statutes § 634F. Acts such as marketing and advertising are neither part of a government proceeding, nor do they constitute testimony.

## **CONCLUSION**

For the foregoing reasons, *amicus curiae* HSAC urges this Court to deny Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint.

DATED: Honolulu, Hawai‘i, August 6, 2021.

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I HEREBY CERTIFY that the foregoing document will be served on the following by electronic means using the Judiciary Electronic Filing System on August 6, 2021.

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