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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI‘I

CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY, Plaintiffs-Appellees, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; CHEVRON CORP; CHEVRON USA INC.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; 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-Appellants	**CASE NO. CAAP-22-0000429** CIVIL NO. 1CCV-20-0000380 (JPC) **PLAINTIFFS-APPELLEES’ ANSWERING BRIEF; CERTIFICATE OF SERVICE**

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PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The City and County of Honolulu and the Honolulu Board of Water Supply ("Plaintiffs") seek to hold some of the world's largest oil-and-gas companies ("Defendants") liable under Hawai‘i common law for misleading consumers and the public for decades about the climate change impacts of fossil fuels. In a pair of well-reasoned orders, the Circuit Court (Crabtree, J.) correctly denied Defendants' motions to dismiss for lack of personal jurisdiction and for failure to state a claim. Cir. Ct. Dkt. 622 ("12(b)(2) Order"); Cir. Ct. Dkt. 618 ("12(b)(6) Order"). This Court should affirm. Defendants' conduct in Hawai‘i amply supports the exercise of personal jurisdiction, and Defendants have failed to identify any conflict between state and federal law that could trigger preemption of Plaintiffs' climate deception claims.

The Circuit Court correctly held that this case satisfies each of the three elements necessary to exercise personal jurisdiction over Defendants. As Defendants concede, they each "purposefully availed themselves" of the rights and privileges of extensively conducting business in Hawai‘i over many years. 12(b)(2) Order at 3. The allegations in Plaintiffs' First Amended Complaint are sufficiently "related to" Defendants' fossil-fuel marketing and sales in Hawai‘i for jurisdiction to attach, because there is a "connection between the forum and the specific claims at issue." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1031 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 137 S. Ct. 1773, 1781 (2017)). Indeed, there is "little daylight between the forum and the underlying controversy" because the Complaint alleges Defendants' long-running and deceptive "marketing campaign was worldwide, including in Hawai‘i," their "tortious marketing and failure to warn helped drive fossil fuel demand worldwide, *including in Hawai‘i*," and their "tortious marketing activity caused impacts in the forum state" that injured Plaintiffs. 12(b)(2) Order at 3–4. Exercising jurisdiction is also constitutionally reasonable in light of all applicable fairness factors courts consider, including Plaintiffs' "strong interest in litigating in Hawai‘i," Defendants' pervasive participation in Hawaii's fossil fuel markets, the location of potential evidence and witnesses, and the substantial resources at Defendants' disposal. *Id.* at 5–6.

Unable to prevail under the existing test for specific jurisdiction, Defendants attempt to interpose two additional requirements. First, they insist that for a plaintiff's claims to "arise out of or relate to" a defendant's forum contacts, the "alleged injuries must be *caused by the use and malfunction* of the defendant's products within the forum State." Dkt. 50 ("Br."), at 9. That cannot

be the case here, they say, "because Hawai'i accounts for only a de minimis amount of emissions" globally, so burning fossil fuels in Hawai'i could not alone have caused Plaintiffs' injuries. *Id.* at 5. But the United States Supreme Court unequivocally rejected exactly the same "causation-only approach" to the case-relatedness element in its recent *Ford* opinion. A "causation-only approach finds no support in th[e] Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities," and the Court has "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." *Ford*, 141 S. Ct. at 1026.

Second, Defendants ask to add a new "clear notice" requirement, such that no state court can ever exercise jurisdiction over a defendant unless the defendant's actions in the forum "place it on 'clear notice' that it is susceptible to a lawsuit in that State for the claims asserted by a plaintiff." Br. 13. That is not the law. Providing defendants with "clear notice" that they will be subject to a state's legal and regulatory authority is *the result of* and one *purpose behind* the three-element due process test for specific jurisdiction, not a separate element the plaintiff has a prima facie burden to prove. *See, e.g.*, *Ford*, 141 S. Ct. at 1025. "[I]t cannot be a great surprise" to Defendants in any event that they are being sued in Hawai'i for local manifestations of climatic harms they *knew* would result from their pervasive campaigns to conceal and misrepresent their products' climate impacts. 12(b)(2) Order at 5. The Hawai'i courts have jurisdiction over this case, and the Circuit Court was correct to deny Defendants' motion to dismiss under Rule 12(b)(2).

The two federal preemption defenses that Defendants raised in their motion to dismiss under Rule 12(b)(6) are equally meritless. As an initial matter, both rest on caricatures of the Complaint. Defendants insist that this lawsuit seeks to "curb[] energy production and the use of fossil fuels," "regulate" interstate pollution, and hold Defendants liable for damages caused by all greenhouse gases released anywhere "since the Industrial Revolution." Br. 1, 16, 33–34. The Circuit Court rightly rejected those mischaracterizations of Plaintiffs' claims—just as the District of Hawai'i and the Ninth Circuit did when they remanded this lawsuit back to state court,[1] and just

[1] After Plaintiffs filed their Complaint in the Circuit Court of the First Circuit, Defendants removed the case to federal court. The district court promptly granted Plaintiffs' motion to remand, and the Ninth Circuit affirmed the remand order on appeal. *See City & Cnty. of Honolulu v. Sunoco LP*, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021) ("*Honolulu I*"), *aff'd*, 39 F.4th 1101 (9th Cir. 2022) ("*Honolulu II*").

as courts from around the country have done in similar climate deception cases.[2] Plaintiffs "do not ask for damages for *all* effects of climate change; rather, they seek damages only for the effects of climate change allegedly *caused* by Defendants' breach of Hawai'i law regarding failure to disclose, failures to warn, and deceptive promotion." 12(b)(6) Order at 4. As pleaded and argued by Plaintiffs, then, this lawsuit cannot incentivize—much less compel—Defendants to reduce fossil fuel production because Defendants' liability is triggered by their failure to warn and deceptive marketing, not by their lawful production and sale of fossil fuels. *See, e.g.*, *Baltimore*, 31 F.4th at 233–34 (the "source of tort liability" is the fossil fuel companies' "concealment and misrepresentation of the[ir] products' known dangers," together with "the simultaneous promotion of [those products'] unrestrained use").[3] In fact, so long as Defendants start warning of their products' climate impacts and stop spreading climate disinformation, they can sell as much fossil fuel as they wish without fear of incurring further liability. *See id.*

Once the Court disregards Defendants' reimagining of the Complaint, their two preemption defenses fizzle. In their leading theory of preemption, Defendants argue that the federal common law of interstate pollution "necessarily and exclusively governs" Plaintiffs' state law claims. Br. 19. Every court to address that argument in a climate deception case has rejected it, including three federal appellate courts.[4] This Court should do the same for three reasons. *First*, Plaintiffs' claims

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[2] *See also Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022) ("*Baltimore*") ("Defendants' argument continues to rest on a fundamental confusion of Baltimore's claims"); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *13 (D. Conn. June 2, 2021) (rejecting ExxonMobil's "characterization of Connecticut's claims as targeting pollution"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("[T]he State's action here is far more modest than the caricature Defendants present."); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 969 (D. Colo. 2019) ("Defendants mischaracterize Plaintiffs' claims."), *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (criticizing "ExxonMobil's caricature of the complaint").

[3] *See also Honolulu II*, 39 F.4th at 1113 ("This case is about whether oil and gas companies misled the public about dangers from fossil fuels."); *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44, 54 (1st Cir. 2022) ("*Rhode Island*") (climate deception claims "seek to hold [fossil fuel companies] liable for the climate change-related harms they caused by deliberately misrepresenting the dangers they knew would arise from their deceptive hyping of fossil fuels"); *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1264 (10th Cir. 2022) ("*Boulder*") (climate deception claims "are premised" on the fossil fuel companies "knowingly producing" fossil fuels and "misrepresenting the dangers").

[4] *See Baltimore*, 31 F.4th at 199; *Rhode Island*, 35 F.4th at 53; *Boulder*, 25 F.4th at 1258.

for failure to warn and deceptive promotion fall far outside the federal common law of interstate pollution, which the Supreme Court has only ever applied in cases where a sovereign State sought to regulate the amount of pollution discharged by entities located in other states. *Second*, Defendants waived any argument for "*expand[ing]* federal common law to a new sphere," Br. 31, and in any event, they cannot satisfy the strict preconditions for creating a new body of federal common law that would encompass Plaintiffs' deception-based claims. *Finally*, Defendants concede that the Clean Air Act ("CAA") displaced the federal common law that, in their view, preempts Plaintiffs' state law claims. *See* Br. 33 n.3. And it would contradict Supreme Court precedent, separation-of-power principles, and basic logic to preempt Plaintiffs' claims based on a body of judge-made law that "*no longer exists*." *Boulder*, 25 F.4th at 1260.

In the alternative, Defendants argue that the CAA preempts this lawsuit. But that obstacle preemption defense fares no better because the CAA does not regulate the conduct that triggers Defendants' liability under Plaintiffs' Complaint: their failure to warn and deceptive promotion of fossil fuels. Far from helping Defendants, moreover, the Supreme Court's decision in *Ouellette* confirms that the CAA cannot preempt Plaintiffs' claims because those claims do not create any "standards of [pollution] control." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

This Court should therefore affirm the Circuit Court's orders denying Defendants' motions to dismiss under Rule 12(b)(2) and Rule 12(b)(6).

STATEMENT OF THE CASE

I. Complaint

Plaintiffs' theory of liability is straightforward. *See* Cir. Ct. Dkt. 45 ("Compl."). For decades, Defendants knowingly concealed and misrepresented the climate impacts of their fossil fuel products, using sophisticated disinformation campaigns to cast doubt on the science, causes, and effects of global warming. *E.g.*, Compl. ¶¶ 1–2, 7–8, 86–87. That deception inflated global consumption of fossil fuels, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous conditions in Hawai‘i. *E.g.*, *id.* ¶¶ 9–10, 124–26. In this way, Defendants' failure to warn and tortious promotion were substantial factors in bringing about Plaintiffs' climate-related harms, which include damage to property and infrastructure from rising seas, stronger storm surges, more frequent heat waves, and deadlier wildfires. *See id.* ¶¶ 148–54; *see also Estate of Frey v. Mastroianni*, 146 Hawai‘i 540, 550, 463 P.3d 1197, 1207 (2020) (substantial factor test for causation).

As detailed in the Complaint, Defendants' failure to warn and deceptive promotion occurred in Hawai‘i and elsewhere. Each Defendant "has and continues to tortiously distribute, market, advertise, and promote its products in Hawai‘i, with knowledge that those products have caused and will continue to cause climate crisis-related injuries in Hawai‘i, including to [Plaintiffs]." Compl. ¶¶ 20h (Sunoco entities), 21h (Exxon entities), 22h (Shell entities), 23h (Chevron entities), 24h (BHP entities), 25g (BP entities), 26g (Marathon), 27i (ConocoPhillips entities). Each Defendant also "derives or has derived substantial revenue" from supplying, trading, distributing, promoting, marketing, or selling a "substantial portion of [their] fossil fuel products" in Hawai‘i. *See id.* And each Defendant has fuel-related business or assets in Hawai‘i, such as fuel terminals, refineries, and branded gasoline stations. *See id.*

Plaintiffs sued Defendants in the Circuit Court of the First Circuit, pleading state law claims for nuisance, failure to warn, and trespass. Compl. ¶¶ 155–207. The Complaint seeks damages for the harms caused by Defendants' deception campaigns; disgorgement of profits generated by those campaigns; and equitable relief to abate the local hazards created by those campaigns—*e.g.*, infrastructure projects to protect Plaintiffs from sea-level rise. Compl., Prayer for Relief ¶¶ 1–7.

II. Procedural History

More than two years ago, Plaintiffs filed this lawsuit in the Circuit Court. Defendants removed the case to federal court, but the district court promptly granted Plaintiffs' motion to remand. *See Honolulu I*, 2021 WL 531237, at *1. As relevant here, the court rebuffed Defendants' efforts to "misconstrue Plaintiffs' claims," explaining that the suit "target[s] Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels." *Id.* The Ninth Circuit reached the same conclusion when it affirmed the district court's remand order, aptly observing that "[t]his case is about whether oil and gas companies misled the public about dangers from fossil fuels." *Honolulu II*, 39 F.4th at 1113.

Back in state court, Defendants moved to dismiss the Complaint for lack of personal jurisdiction and for failure to state a claim. The Circuit Court denied the motions in two robustly reasoned Orders. As to the Rule 12(b)(2) motion, the Circuit Court held that Plaintiffs' claims satisfied all three prongs of specific jurisdiction. In reaching this conclusion, the court rejected Defendants' attempt to impose an "in-forum, geo-located 'causation' requirement." 12(b)(2) Order at 4. To the contrary, the court held, the recent *Ford* decision "made clear the US Supreme Court has not and does not require a showing that plaintiff's claim occurred due to or because of a

defendant's in-state conduct." *Id.* The court further found that exercising jurisdiction was constitutionally reasonable.

Turning to the Rule 12(b)(6) motion, the Circuit Court rejected Defendants' federal common law theory of preemption for three main reasons. *First*, it held that Plaintiffs' claims for failure to warn and deceptive promotion did not raise a uniquely federal interest and did not significantly conflict with any federal policy. *See* 12(b)(6) Order at 5–7. *Second*, it rejected Defendants' mischaracterization of the lawsuit as "seek[ing] to regulate out-of-state and international fossil fuel emissions." *Id.* at 5. Finally, it concluded that "the Clean Air Act supplants the federal common law invoked by Defendants, meaning that federal common law cannot govern or preempt Plaintiffs' claims." *Id.* at 8. For similar reasons, the Circuit Court rebuffed Defendants' statutory preemption defense under the CAA. That defense, the court explained, "requires a significant and concrete conflict between a federal policy and the operation of state law." *Id.* at 9. And here, no such conflict exists because "there is no federal policy (whether common law or statutory) against timely and accurate disclosure of harms from fossil fuel emissions." *Id.* at 7.

In May 2022, the Circuit Court granted Defendants' motion for leave to file an interlocutory appeal. Dkt. 676. This interlocutory appeal followed.

STANDARD OF REVIEW

Where, as here, the underlying facts are undisputed, this Court reviews *de novo* a trial court's ruling on a motion to dismiss for lack of personal jurisdiction, taking as true the complaint's factual allegations. *Shaw v. N. Am. Title Co.*, 76 Hawai'i 323, 326, 327 & n.2, 876 P.2d 1291, 1294, 1295 & n.2 (1994). It also conducts a *de novo* review of a circuit court's ruling on a motion to dismiss for failure to state a claim, which should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. City & Cnty. of Honolulu*, 144 Hawai'i 466, 474, 445 P.3d 47, 55 (2019).

ARGUMENT

I. The Hawai'i Courts Have Personal Jurisdiction Over Defendants in This Case.

The jurisdictional question before the Court is whether the Circuit Court can assert specific personal jurisdiction over Defendants consistent with the Fourteenth Amendment's due process guarantees. It can, and did. Specific jurisdiction will attach where three elements are present: (1) the defendant has "purposefully avail[ed] himself of the privilege of conducting activities in

the forum, thereby invoking the benefits and protections of its laws," (2) the plaintiff's claim "arises out of or relates to the defendant's forum-related activities," and (3) exercising jurisdiction "comport[s] with fair play and substantial justice, i.e. it [is] reasonable." *In Int. of Doe*, 83 Hawai'i 367, 374, 926 P.2d 1290, 1297 (1996).

Defendants do not contest the circuit court's holding that "[t]he out-of-state Defendants all conducted fossil fuel-related business here and purposefully availed themselves of the forum." 12(b)(2) Order at 3. The questions for consideration in this Court are thus (1) whether Plaintiffs' claims arise out of or relate to Defendants' contacts in Hawai'i, and (2) whether the exercise of jurisdiction is within the constitutional bounds of reasonableness. Both are satisfied here.

A. Plaintiffs' Claims Relate to Defendants' Forum Contacts, and Defendants' Contention That Jurisdiction Can Attach Only if Plaintiffs Suffered Injury From Fossil Fuels Used in Hawai'i Seeks to Impose a Causation Requirement That *Ford* Rejected.

The Circuit Court here correctly applied precedent from the Supreme Courts of Hawai'i and of the United States, and concluded Plaintiffs' claims sufficiently relate to Defendants' in-state conduct. The court held that the "connection" between Defendants' "long-time purposeful availment to market fossil fuels in the forum state, the allegedly tortious marketing and failure to warn in the forum state, and the related impacts in the forum state" leave "little daylight between the forum and the underlying controversy." 12(b)(2) Order at 4, 5. Under governing precedent, "more is not required." *Id.* at 4.

Each of Defendants' arguments for reversal flows from a single, fatally flawed premise: they say, in various formulations, that they can only be subject to personal jurisdiction if the climate change injuries Plaintiffs allege were *caused by* Defendants' fossil fuels being burned *in Hawai'i*.[5] Defendants' argument cannot be correct, because the Supreme Court squarely held otherwise in *Ford*: "[W]e 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." 141 S.Ct. at 1026. The Court held instead that the constitutional requirement that a plaintiff's claims "arise out of *or* relate to" the defendant's forum contacts is truly disjunctive.

[5] *See, e.g.*, Br. 13 ("Plaintiffs do not allege—nor could they—that the use or promotion of Defendants' products in Hawai'i caused global climate change and Plaintiffs' alleged injuries."); *id.* 12 ("Plaintiffs have not alleged (and cannot allege) that the use of Defendants' products in the forum caused Plaintiffs to suffer injury in the forum, because total energy consumption in Hawai'i counts for a negligible fraction of worldwide total greenhouse gas emissions.").

"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." *Ford*, 141 S.Ct. at 1026. A plaintiff's claims can "relate to" a defendant's forum contacts when there is "'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id.* at 1025 (quoting *Bristol-Myers*, 137 S.Ct. at 1780). Even if the plaintiff's claims are not causally related to the defendant's in-state conduct, the forum "may yet have jurisdiction, because of another 'activity [or] occurrence' involving the defendant that takes place in the State" related to the plaintiff's claims. *Id.* at 1026. That standard is satisfied here.

Defendants contend that *Ford* means the opposite of what it says. They assert that for jurisdiction to attach in a case against a manufacturer, "the plaintiff's alleged injuries must be *caused by the use and malfunction* of the defendant's products within the forum State." Br. 9. Applied to this case, they say Plaintiffs' claims "cannot arise from or relate to any in-state activities because . . . climate change would occur on the same scale even if Defendants never produced, promoted, or sold fossil fuels in Hawai'i." Br. 5. The Supreme Court rejected that same line of reasoning in *Ford*, almost verbatim. Ford argued there that "the plaintiffs' claims would be precisely the same if Ford had never done anything in Montana and Minnesota," because "the company sold the specific cars involved in these crashes outside th[os]e forum States," and thus the claims could not arise from or relate to Ford's contacts with the two states. 141 S.Ct. at 1029. The Court held that argument "merely restat[ed] Ford's demand for an exclusively causal test of connection," which the Court had "already shown is inconsistent with our caselaw." *Id.* Just as in *Ford*, Defendants' insistence that jurisdiction can only attach if their products "caused an injury to the plaintiff in the forum State from its malfunctioning there" simply describes a causation requirement. Br. 9. The Circuit Court correctly rejected that position, holding that *Ford* "does not establish any in-forum, geo-located 'causation' requirement," or "require that particular or proportional Hawai'i sales and emissions 'cause' harm to Hawai'i." 12(b)(2) Order at 4.

Defendants nevertheless argue that after *Ford*, courts have embraced a place-of-malfunction requirement, which they say is different from the causation requirement the Supreme Court rejected. In support, they principally cite the Rhode Island Supreme Court's decision in *Martins v. Bridgestone Am. Tire Ops., LLC*, 266 A.3d 753 (R.I. 2022), which they say found jurisdiction lacking because "the plaintiff's claims did not arise from the use and malfunction of

the product in Rhode Island." Br. 10. That is not what the court said. In *Martins*, an allegedly defective tire failed on a tow-truck driven by the decedent, leading to a fatal crash. *Id.* at 756. The tires were manufactured and installed in Tennessee, and the assembled truck was delivered directly to the decedent's towing business, a Massachusetts corporation doing business in Massachusetts. *Id.* at 755–56. The decedent later drove the truck from Massachusetts to Connecticut, and struck a tree in Connecticut when the allegedly defective tire failed. *Id.* at 756. The decedent suffered severe burns and was transported to a hospital in Rhode Island, where he died three weeks later. *Id.* Thus, the *only* relevant connections between Rhode Island and the litigation were that "the decedent was a resident of Rhode Island whose death ultimately occurred in Rhode Island." *Id.* at 761.

The court in *Martins* discussed *Ford* and its predecessor cases at length, and emphasized that "it was key in *Ford* that the injury also occurred in the forum state." *Id.* Jurisdiction was ultimately lacking in *Martins* because "the injury allegedly caused by the tire"—the injury to the decedent's person—"occurred in *Connecticut*," even though that injury ultimately led to the Rhode Island resident's death in Rhode Island. *Id.* at 760. Critically, the Rhode Island Supreme Court did *not* hold that jurisdiction would be proper in Rhode Island only if "use and malfunction" of the tire occurred in Rhode Island. Br. 10. *Martins* at most stands for the proposition that the place of injury is a relevant consideration in determining whether a claim relates to a defendant's forum contacts, which was true even before *Ford*. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 n.5 (2011) ("When a defendant's act outside the forum *causes injury in the forum* . . . a plaintiff's residence in the forum may strengthen the case for the exercise of specific jurisdiction." (emphasis modified)). There is no "place of malfunction" test, because such a test "merely restates [a] demand for an exclusively causal test of connection—which [the Supreme Court] ha[s] already shown is inconsistent with [its] case law." *Ford*, 141 S.Ct. at 1029.[6]

[6] Appellants' other cases are the same. *See* Br. 10 & n.2. None of them read *Ford* for the proposition that malfunction in the forum is indispensable. Like *Martins*, they note that the place of the alleged injury is an important relevant factor. *See LNS Enterprises LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 864 (9th Cir. 2022) (defendant aircraft manufacturer "did not itself manufacture, design, or service the plaintiffs' aircraft in Arizona (or anywhere)," and the record lacked "any indication" that the defendant "service[d] the same type of [personal] aircraft at issue" in Arizona"); *Wallace v. Yamaha Motors Corp, U.S.A.*, No. 19-2459, 2022 WL 61430 at *4 (4th Cir. Jan. 6, 2022) (unpublished) (motorcycle company defendant's contacts with South Carolina did not relate to the plaintiff's claims where "[t]he motorcycle from the accident was designed elsewhere, manufactured elsewhere, distributed elsewhere, and sold elsewhere," and "[t]he

Here, Defendants acted tortiously *in Hawai'i*, and Plaintiffs suffered the injuries alleged in the Complaint *in Hawai'i*. Indeed, the Complaint expressly and repeatedly alleges that Defendants failed to warn of the climate-related effects of the use of their fossil fuel products in connection with their extensive commercial transactions to consumers and others, *e.g.*, Compl. ¶¶ 8, 12, 88–89, 135(a), 137–38, and that Defendants wrongfully promoted their products in this State through use of a long-standing campaign of deception and disinformation, *e.g.*, *id.* ¶¶ 20h, 21h, 22h, 23h, 24h, 25g, 26g, 27i, 107–17, 180.[7] That Defendants allegedly also acted tortiously outside Hawai'i does not diminish the relationship between Defendants' in-state conduct and Plaintiffs' claim, especially where conduct in and outside the state both contributed to Plaintiffs' in-state injuries. *Cf. Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 780 (1984) (jurisdiction proper in New Hampshire in libel action even though it was "undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire").

Finally, Defendants seek to camouflage their causation test in the Hawai'i Supreme Court's language from *Shaw* that forum conduct "merely incidental" to the plaintiff's claims will not support jurisdiction. *See Shaw*, 76 Haw. at 328, 876 P.2d at 1296. But *Shaw* does not establish a causation threshold for specific jurisdiction in the state, and is otherwise inapposite for several reasons. In *Shaw*, the plaintiff alleged that a California title company mishandled his escrow account, severely damaging his credit rating. *Id.* at 326. The court considered whether the California defendant was subject to jurisdiction under the Hawai'i long-arm statute, HRS § 634-35. It first asked whether the defendant was "transacting business" in Hawai'i within the meaning of HRS § 634-35(a)(1) that would subject it to suit. The court found that while some relevant conduct occurred in the state, such as the plaintiff "receiving facsimile transmissions and telephone

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accident that resulted in [the plaintiff's] injuries took place elsewhere"); *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 17 (Tex. 2021) (jurisdiction in Texas was proper over home insulation manufacturer "[i]n light of the alleged injury in Texas giving rise to the lawsuit and evidence of additional conduct evincing an intent to serve the Texas market" for product that caused injury).

[7] Defendants assert in passing that the Complaint does not expressly identify "a single deceptive message that Defendants allegedly made in or directed at Hawai'i." Br. 12. But Defendants did not introduce declarations or other evidence below challenging the facts alleged in the Complaint. On a motion to dismiss, "uncontroverted allegations in the complaint must be taken as true," *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004), and here that includes plaintiffs' allegations that Defendants disseminated allegedly deceptive advertisements and other materials in Hawai'i.

calls as well as receiving and signing checks in Hawai‘i" from the defendant, "th[o]se dealings, based on a California contract, were merely incidental to the escrow transaction conducted in California," so the plaintiff "ha[d] not demonstrated [the defendant] was 'transacting business' in Hawai‘i." *Id.* at 328. The "merely incidental" language thus pertains to the "transacting business" prong of the long-arm statute, and has nothing to do with any purported constitutional requirement that plaintiffs prove injury causation in order to obtain personal jurisdiction. In any event, the court in *Shaw* separately held that the long arm statute was satisfied, because the plaintiff "sufficiently alleged a *prima facie* case that [the defendant] committed a 'tortious act within this state' for purposes of HRS § 634–35(a)(2)." *Id.* at 329.

The court went on to hold that constitutional due process was satisfied based on the so-called "'effects' test of jurisdiction," under which a state's "asserting jurisdiction against nonresident defendants who commit torts directed at a forum state with the intention of causing in-state 'effects' satisfies due process." *Id* at 330 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). The Circuit Court here did not apply the "effects test" and hewed instead to the recent directions in *Ford* to determine whether the claims arose out of or in relation to Defendants' forum conduct.[8] *See* 12(b)(2) Order at 3–4. *Shaw* says nothing relevant to this appeal.

B. Defendants Had Fair Warning They Could be Subject to Suit in Hawai‘i Courts, and *Ford* Does Not Impose a "Clear Notice" Requirement.

Defendants misstate *Ford* and misconstrue the Complaint when they argue they lacked "clear notice" they could be subject to liability in Hawai‘i for their climate deception campaigns. Neither *Ford* nor any other case creates a separate "clear notice" requirement for personal

[8] As Plaintiffs explained below, moreover, the effects test applied in *Shaw* is satisfied here. The court found jurisdiction proper there because the defendant "targeted" the plaintiff in Hawai‘i "when it allegedly committed fraud and misrepresentation by agreeing to forward his creditors' checks to him," and arguably "when it reissued checks directly to [the plaintiff's] creditors (against [the plaintiff's] specific instructions)." *Shaw*, 76 Hawai‘i at 332. Here, the Complaint alleges that the targets of Defendants' deceptive marketing and failure to warn included audiences and consumers in Hawai‘i, and those misrepresentations and omissions, directed at least in part to Hawai‘i, contributed to Plaintiff's injuries. That is sufficient to confer jurisdiction under *Shaw*. *See also Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (jurisdiction in Arizona proper where defendant's "communications were directed to Arizona," and defendant allegedly "knew the injury and harm stemming from his communications would occur in Arizona").

jurisdiction. Defendants cannot plausibly argue they lacked fair warning that based on their longstanding and extensive fossil fuel marketing and sales in Hawai‘i, "the State may hold the compan[ies] to account for related misconduct." *Ford*, 141 S.Ct. at 1025.

The Supreme Court in *Ford* stated that in the interest of "treating defendants fairly," specific jurisdiction rules arise from "an idea of reciprocity between a defendant and a State: When (but only when) a company 'exercises the privilege of conducting activities within a state'—thus 'enjoy[ing] the benefits and protection of [its] laws,'" the state may assert specific jurisdiction over claims alleging "related misconduct." 141 S.Ct. at 1025 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). The Court summarized that "our doctrine similarly provides defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.'" *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The Court used the phrase "clear notice" three times, in each instance quoting dicta from *World-Wide Volkswagen Corp. v. Woodson*: "When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there." 444 U.S. 286, 297 (1980) (cleaned up). *See Ford*, 141 S.Ct. at 1025, 1027, 1030. The Court never described "clear notice" as a separate requirement, in either *World-Wide Volkswagen* or in *Ford*. The Court in *Ford* instead held on the facts before it that "as *World-Wide Volkswagen* described, . . . [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. The "clear notice" afforded to Ford *surpassed* the constitutional minimum of due process because "conducting so much business in Montana and Minnesota . . . create[d] reciprocal obligations" that "cannot be thought surprising." *Id.* at 1029–30.

Defendants here are national and international fossil fuel companies that have "long had a heavy presence," *id.* at 1032 (Alito, J., concurring), in Hawaii's fossil fuel market, in some cases stretching back nearly a century. As in *Ford*, Defendants have benefited from the "'protection of [Hawaii's] laws'—the enforcement of contracts, the defense of property, the resulting formation of effective markets." *Id*. at 1029 (cleaned up). The Complaint alleges that Defendants failed to warn and deceptively marketed and promoted the sale and use of their oil-and-gas products, in Hawai‘i and elsewhere, to obscure the climatic harms Defendants knew their products would cause. Defendants argue that the Circuit Court below did not address this issue, *see* Br. 13, but it did so directly. The court correctly held that "it cannot be a great surprise to be haled into" court

in Hawai‘i, where Defendants "have significant contacts with Hawai‘i, and purposefully availed themselves of the benefits and obligations of operating in the forum state for decades"; "those purposeful contacts are related to the claims made"; and "the tortious acts allegedly culminated in harms in the forum." 12(b)(2) Order at 5.

Defendants' additional contention that they had no "ability to take steps to avoid being subject to jurisdiction" in Hawai‘i, *see* Br. 14, is not credible and relies on a misstatement of Plaintiffs' claims. Neither Plaintiffs nor the Circuit Court have claimed that jurisdiction attaches because of "a complex worldwide phenomenon affected by the cumulative effects of global greenhouse gas emissions by countless individuals and entities." *Id.* The Circuit Court held that because Defendants "have significant contacts with Hawai‘i, and purposefully availed themselves of the benefits and obligations of operating in the forum state for decades," and because related "tortious acts" that *they* engaged in both in Hawai‘i and elsewhere "allegedly culminated in harms in the forum," "it cannot be a great surprise" that they could be subject to jurisdiction here. 12(b)(2) Order at 5. Defendants could structure their conduct to avoid jurisdiction in Hawai‘i simply by not engaging in tortious conduct in Hawai‘i that leads, in combination with their same tortious conduct elsewhere, to injuries in Hawai‘i.

C. Exercising Jurisdiction Over Defendants Does Not Offend Federalism Principles Because Hawai‘i Has a Clear, Substantial Interest in The Case.

Defendants next argue that asserting jurisdiction over them would contravene principles of federalism and international comity. They speculate that if they are subject to suit in Hawai‘i, then "*any* energy company that does business in a State . . . could be forced to appear before *any* state court in the United States based on its alleged contribution to global climate change," causing nationwide havoc and possibly leading to international retaliation by court systems abroad. *See* Br. 15–16. Defendants' argument ignores most elements Hawai‘i courts consider in assessing whether jurisdiction is constitutionally reasonable. Asserting jurisdiction is well within the bounds of reasonableness here and easily satisfies the constitutional minimum.

Hawai‘i courts generally consider seven factors in determining the reasonableness of personal jurisdiction:

> (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.

Doe, 83 Hawai'i at 374. Defendants do not directly address these factors, even though the Circuit Court found each of them favored jurisdiction. *See* 12(b)(2) Order at 5–6. Defendants appear instead to argue that the third and fourth factors—their home states' sovereignty and Hawaii's interest in the suit—weigh against jurisdiction. *See* Br. 15–16. Defendants are incorrect.

First, Defendants' argument that exercising jurisdiction "would interfere with the power of Defendants' home States (or nations) over their own corporate citizens" turns on a gross mischaracterization of Plaintiffs' claims. *See id.* 15. The Complaint does not "seek to advance" any "substantive social policies" in other states or nations, "such as curbing energy production and the use of fossil fuels or allocating the downstream costs of consumer use to the energy companies to bear directly." *Id.* 16. Instead, it seeks to protect Plaintiffs from harms caused by Defendants' deceptive commercial activities. As explained below, moreover, this lawsuit cannot interfere with any energy policies because, so long as Defendants stop their deceptive commercial conduct, they can produce as much fossil fuel as they want without fear of incurring any liability under Plaintiffs' Complaint. *See infra* Section II(A)(i) & (iv)(a). Tellingly, Defendants do not identify any specific regulations, statutes, or policies from their home fora that actually conflict with Plaintiffs' deception-based claims.

Second, Hawai'i has a significant interest in adjudicating the suit, and particularly has a strong interest in remedying local harms related to corporate misconduct. As discussed in greater detail below, states have a substantial interest in the reliability of commercial speech, protecting consumers, and protecting their residents from tortious injury. *See infra* Section II(A)(ii). Defendants' bare assertion that "this is not a case where any one State has a more 'significant interest[]' in addressing climate change than any other," Br. 15, would be irrelevant even if it were susceptible to proof, because Plaintiffs only ask the court to "address" local injuries, not climate change writ large. No State has a more significant interest than Hawai'i in addressing climate-related impacts occurring in Hawai'i. Accordingly, the Court should affirm the Circuit Court's ruling that Hawai'i courts have specific jurisdiction over Defendants.

II. The Circuit Court Correctly Rejected Defendants' Preemption Defenses.

Defendants insist that Plaintiffs' state law claims are preempted by either (1) the federal common law of interstate pollution, or (2) the CAA. Both defenses fail because, among other

reasons, this lawsuit does not seek to regulate interstate emissions, and Defendants cannot demonstrate any conflict between Plaintiffs' claims and a concrete federal policy or interest.

A. Federal Common Law Does Not Preempt Plaintiffs' Claims.

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

By constitutional design, then, "[t]he cases in which federal courts may engage in common lawmaking are few and far between." *Id.* at 716. In the absence of congressional authorization, the Supreme Court has created federal common law in only a "few," "restricted" areas where "a federal rule of decision is necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (cleaned up). And judges may not expand the corpus of federal common law in any way unless two preconditions are satisfied. *Rhode Island*, 35 F.4th at 54 (collecting cases). *First*, the party invoking federal common law must identify a "uniquely federal interest[]" in resolving an issue raised by the lawsuit. *Rodriguez*, 140 S. Ct. at 717. *Second*, the party must demonstrate "a significant conflict" between a "federal policy or interest and the use of state law." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994). These demanding requirements "make[] sense because where federal common law exists, it preempts and replaces state law—which raises sensitive issues of separation of powers and federalism." *Rhode Island*, 35 F.4th at 54 (cleaned up) (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), and *Rodriguez*, 140 S. Ct. at 717).

Defendants cannot carry their "heavy burden" here. *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 362 (9th Cir. 1997). As they have done in other climate deception cases, Defendants argue that the federal common law of interstate pollution "necessarily and exclusively governs" Plaintiffs' state law claims for failure to warn and deceptive promotion. Br. 19. Every court to address that argument has rejected it, including three federal appellate courts.

See Baltimore, 31 F.4th at 199; *Rhode Island*, 35 F.4th at 53; *Boulder*, 25 F.4th at 1258.[9] This Court should do the same for three principal reasons. *First*, Plaintiffs' deception-based claims bear no resemblance to the federal common law claims for interstate pollution abatement that existed prior to the CAA. *Second*, Defendants fail to satisfy either of the two preconditions for expanding the federal common law of interstate pollution, as this lawsuit seeks to vindicate historical state interests in protecting consumers and the public from deceptive marketing activity. *Third*, Defendants concede that the CAA displaced the federal common law of interstate emissions, and it would defy logic, precedent, and fundamental separation-of-power principles to preempt Plaintiffs' state law claims based on a body of judge-made law that no longer exists.

i. Plaintiffs' claims fall outside the now-displaced federal common law of interstate pollution.

The Supreme Court once recognized a federal common law of interstate pollution. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). As explained below, however, the CAA and the Clean Water Act displaced that body of federal judge-made law, making it—and its preemptive effects on state law—disappear entirely. *See infra* Section II(A)(iii).

In any event, Plaintiffs' claims are different in kind from those formerly governed by the federal common law of interstate pollution. The Supreme Court has only ever applied that body of judge-made federal law in cases where a sovereign State sought to restrict and regulate the amount of pollution discharged by entities located in other states. *AEP*, 564 U.S. at 421 ("Decisions of this Court . . . have approved federal common-law suits brought by one State to abate pollution emanating from another State.").[10] But here, as in other climate deception lawsuits, Plaintiffs do

[9] Although these decisions concerned federal removal jurisdiction, Defendants concede—as they must—that *Baltimore*, *Rhode Island*, and *Boulder* directly addressed the question of whether federal common law governs state law claims for climate deception. Br. 31 n.4. The Circuit Court also recognized that these three decisions "all support[ed] [its] ruling that federal preemption does not apply." Dkt. 676, at 3.

[10] *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (seeking "to restrain the discharge of . . . sewage"); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (seeking "to enjoin defendant copper companies from discharging noxious gas"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (seeking to "permanently enjoin[]" defendant from "discharging . . . sewage" into a New York harbor); *North Dakota v. Minnesota*, 263 U.S. 365, 371–72 (1923) (seeking "an order enjoining the continued use of [certain] ditches" that flooded farming areas in neighboring state); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New

not seek to abate or otherwise "regulate greenhouse-gas emissions." *Rhode Island*, 35 F.4th at 56 n.8. Instead, as the federal Ninth Circuit observed, this action seeks to hold private fossil fuel companies liable for harms caused by their concealment and misrepresentation of their products' climate impacts. *See Honolulu*, 39 F.4th at 1106 ("The Complaints assert that Defendants' deception caused harms from climate change."). Because Defendants' liability is causally tethered to their failure to warn and deceptive promotion, nothing in this lawsuit incentivizes—much less compels—Defendants to curb their fossil fuel production or greenhouse gas emissions. *See* 12(b)(6) Order at 7–8. Indeed, if Defendants adequately warn of their products' climate impacts and stop spreading climate disinformation, they can produce and sell *as much fossil fuel as they wish* without fear of incurring future liability under the Complaint. *See id.*

This lawsuit thus falls outside the bounds of Supreme Court precedent that once cabined the (now-defunct) federal common law of interstate pollution. *See Rhode Island*, 35 F.4th at 55 (defendants' "old Supreme Court cases . . . do[] not address the type of acts Rhode Island seeks judicial redress for"). On that basis alone, this Court should dispose of Defendants' federal-common-law theory of preemption. In their opening appellate brief, Defendants expressly waive any argument for "*expand[ing]* federal common law to a new sphere." Br. 30–31. That waiver "substantively precludes the creation of [new] federal common law" because Defendants bear the burden of demonstrating a significant conflict between a uniquely federal interest and the operation of state law. *Baltimore*, 31 F.4th at 202; *Rhode Island*, 35 F.4th at 54 (similar).

ii. The Court should not expand the federal common law of interstate pollution to encompass Plaintiffs' claims.

Even if Defendants tried, they could not satisfy the "strict conditions" for expanding federal common law. *Rodriguez*, 140 S. Ct. at 717.

Far from raising a uniquely federal interest, Plaintiffs' claims for failure to warn and deceptive promotion fall squarely in "the realm of products liability," which has been "traditionally governed" by state law. *Baltimore*, 31 F.4th at 208. In fact, every aspect of Plaintiffs' claims rests firmly on the historic power of state law. This lawsuit vindicates a core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769

Jersey and from otherwise polluting its waters and beaches"); *Milwaukee II*, 451 U.S. at 311 (seeking "to eliminate all overflows and to achieve specified effluent limitations on treated sewage"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") (same).

(1993). It targets misconduct that has traditionally been regulated by the States. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (identifying "advertising" as "a field of traditional state regulation" (cleaned up)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (identifying "unfair business practices" as "an area traditionally regulated by the States"); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (underscoring the States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers"). It pursues state tort remedies that are rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re MTBE Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013) ("*MTBE*"). And it redresses injuries that "the states have a legitimate interest in combating," namely: "the adverse effects of climate change." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). To the extent, then, that the federal government has an interest in the resolution of this case, it is shared with the states, rather than uniquely federal. Defendants therefore flunk the first and "most basic" precondition for applying federal common law. *Rodriguez*, 140 S. Ct. at 717.

Nor can they satisfy the second "precondition": showing a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87. As the Circuit Court rightly recognized, there is no "federal policy (whether common law or statutory) against timely and accurate disclosure of harms from fossil fuel emissions." 12(b)(6) Order at 7. To the contrary, federal policies in this area expressly preserve and promote the use of state law to protect consumers and the public from dangerous products and deceptive commercial activity.[11] Nor is there any conflict between this lawsuit and any U.S. foreign policies, as several high-level appointees in the Biden administration have explained in *amici* briefs filed in their individual capacities in other climate deception cases. *E.g.*, Br. of Former U.S. Gov't Offs. as *Amici Curiae*, at 14, *City of Oakland et al., v. BP PLC et. al.*, No. 18-6663, Dkt. 43 (9th Cir. Mar. 20, 2019) ("[N]o aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products"). Instead, as a member of the Organisation for Economic Co-operation and Development ("OECD"), the U.S. adheres to OECD guidelines that

[11] *See, e.g.*, 15 U.S.C. § 57b(e) (state law savings clause in Federal Trade Commission Act); 15 U.S.C. § 2072 (savings clause in Consumer Product Safety Act); 21 U.S.C. § 379r(f) (savings clause in Food, Drug, and Cosmetic Act); 12 U.S.C. § 5551(a) (savings clause in the Dodd-Frank Wall Street Reform and Consumer Protection Act).

urge companies to use their domestic judicial systems to protect their citizens from misleading consumer practices. *See id.* at 15.

iii. The federal common law of interstate pollution no longer exists.

Defendants' federal common law theory of preemption fails for another, independent reason: it would require this Court to hold that state law can be preempted by a body of federal common law that "*no longer exists*." *Boulder*, 25 F.4th at 1260. Defendants concede that the CAA displaced the same body of federal common law that, as they see it, preempts Plaintiffs' state law claims. *See* Br. 33 n.3. That concession is fatal because congressionally displaced federal common law cannot "govern" or "control" state law claims. *See Rhode Island*, 35 F.4th at 55; *Boulder*, 25 F.4th at 1261; *Baltimore*, 31 F.4th at 206.

"When a federal statute displaces federal common law, the federal common law ceases to exist." *Baltimore*, 31 F.4th at 205. That is because federal common law is always "subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313. Accordingly, federal common law may be "resorted to *in the absence* of an applicable Act of Congress." *Id.* at 314 (cleaned up). But "[w]hen Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears." *AEP*, 564 U.S. at 423 (cleaned up). And once federal common law disappears, the question of state law preemption is answered solely by reference to federal statutes, not the ghost of some judge-made federal law. *See, e.g.*, *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981) ("[After displacement], the task of the federal courts is to interpret and apply statutory law, not create common law."); *O'Melveny*, 512 U.S. at 85 (courts do not "supplement federal statutory regulation" with federal common law because "matters left unaddressed in such a [regulation] are presumably left to the disposition provided by state law").

Ouellette and *AEP* make this point crystal clear. In *Ouellette*, the Supreme Court considered a preemption challenge to state law claims formerly governed by the federal common law of interstate water pollution. 479 U.S. at 484, 487. Because the Clean Water Act had displaced that body of judge-made law, the Justices framed the relevant inquiry as whether the Act preempted the plaintiffs' state law claims—a question they answered by conducting a traditional statutory preemption analysis of the Act. *See id.* at 491–500. Twenty years later, the Supreme Court gave the same instructions in *AEP* when discussing the displacement of federal common law relating to greenhouse gas emissions—the same body of judge-made law that Defendants invoke here. 564

U.S. at 429. After holding that the CAA displaced the plaintiffs' federal common law claims for public nuisance, the Court unanimously remanded their state law claims for further consideration by the lower courts, noting that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [CAA]." *Id.*

Defendants therefore depart from well-settled precedent when they assert that Congress's displacement of federal common law leaves the judge-made law's preemptive force intact. *See also P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988) ("[R]epeal of EPAA regulation did not leave behind a pre-emptive grin without a statutory cat."). If that were so, the Supreme Court in *Ouellette* would not have analyzed "whether the [Clean Water] Act pre-empts Vermont common law." 479 U.S. at 491. Instead, it would have dismissed the plaintiffs' state law claims simply because those claims were governed by a body of federal common law that Congress later displaced, as Defendants ask the Court to do here. Similarly, the Supreme Court in *AEP* would not have concluded that "the availability *vel non* of a state lawsuit" for the abatement of interstate air pollution depended "on the preemptive effect on the federal [Clean Air] Act." 564 U.S. at 429. On Defendants' view, it should have dismissed the plaintiffs' state law claims, having already concluded that their federal common law claims were displaced by Congress.

In addition to conflicting with *Ouellette* and *AEP*, Defendants' theory violates fundamental separation-of-power principles. Under their theory, Congress is powerless to reverse a judicial declaration that state law claims are governed by federal common law. But the Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313. Indeed, even in areas "where the federal judiciary's lawmaking power [is] at its strongest, it is [the courts'] duty to respect the will of Congress." *Nw. Airlines*, 451 U.S. at 96. For that reason, judges must stop "rely[ing] on federal common law . . . when Congress has addressed the problem." *Milwaukee II*, 451 U.S. at 315. That is the only outcome compatible with the Supreme Court's avowed "commitment to the separation of powers." *Id.*

iv. Defendants' counterarguments are unavailing.

In support of their federal common law theory of preemption, Defendants advance six arguments. All fundamentally misconstrue the Complaint and precedent.

a. <u>The source of tort liability is Defendants' failure to warn and deceptive promotion.</u>

Defendants continue their well-documented pattern of mischaracterizing climate deception lawsuits when they insist that "the source of [Plaintiffs'] alleged injuries" is greenhouse gas

emissions, not Defendants' failure to warn and deceptive promotion. Br. 20; *see supra* n.2 (documenting these mischaracterizations). But as the federal Ninth Circuit aptly explained in this very case, the "Complaint[] assert[s] that Defendants' *deception caused* harms from climate change." *Honolulu II*, 39 F.4th at 1106 (emphasis added). Or as the federal Fourth Circuit put it in a related climate deception case: "it is [the defendants'] concealment and misrepresentation of [fossil fuels'] known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore*, 31 F.4th at 233–34. Accordingly, "the source of tort liability" in this lawsuit, as in other climate deception actions, is Defendants' unlawful failure to warn and deceptive promotion, *not* their lawful production and sale of fossil fuels. *Id.*; *see also supra* n.3.

Nor is there any misalignment between Defendants' tortious conduct and Plaintiffs' requested remedies. Br. 21. As the Circuit Court noted, Plaintiffs seek damages and equitable relief only for "the effects of climate change allegedly *caused* by Defendants' breach of Hawai'i law regarding failures to disclose, failures to warn, and deceptive promotion." 12(b)(6) Order at 4. This lawsuit therefore follows in a long line of cases that request state law remedies for injuries caused by a manufacturer's deceptive promotion of a dangerous product.[12] True, Plaintiffs' claims "may seem new . . . due to the unprecedented allegations involving causes and effects of fossil fuels and climate change." 12(b)(6) Order at 11. But in reality, they "are common," *id.*, resting on "well recognized" causes of action that are "tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs," *id.* at 4.

For preemption purposes, moreover, it does not matter that greenhouse gas emissions are "a link" in the causal chain connecting Defendants' tortious conduct (failure to warn and deceptive promotion) to Plaintiffs' injuries (climate impacts). Br. 20. That is because federal common law preemption—like federal statutory preemption—turns on whether a defendant "could comply with both its [federal law] obligations and [its] state-prescribed dut[ies]." *Boyle*, 487 U.S. at 509; *see*

[12] *See, e.g., ConAgra Grocery Prods.*, 227 Cal. Rptr. 3d 499, 536, 570 (Cal. Ct. App. 2017) (equitable abatement remedy in lawsuit for lead paint contamination caused by manufacturers' deceptive promotion); *In re JUUL Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 577–78 (N.D. Cal. 2020) (seeking nuisance abatement and damages in lawsuit against manufacturers for their deceptive promotion of e-cigarettes); *Rhode Island v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *1, 10 (R.I. Super. Aug. 16, 2019) (seeking damages for public health harms caused by manufacturers and distributors' deceptive promotion of opioids).

also Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 528 (1992) (preemption turns on whether "[the state law] duty is the sort of requirement or prohibition proscribed by [federal law]."). If simultaneous compliance is possible, preemption will not lie. *See Boyle*, 487 U.S. at 509 ("No one suggests that state law would generally be pre-empted [by federal common law] in this context."). Here, as the Circuit Court correctly noted, "Plaintiffs allege that Defendants had a *duty* to disclose and not be deceptive about the dangers of fossil fuel emissions." 12(b)(6) Order at 3. That state law duty does not "require Defendants to do something that federal law forbids." *Id.*[13]

b. Adopting Defendants' theory would require this Court to expand federal common law.

Unable to satisfy the Supreme Court's test for federal common lawmaking, Defendants try to evade it by insisting that their preemption defense does not require this Court to "expand[] federal common law." Br. 30. It is beyond dispute, however, that a judge would need to go beyond the holdings of the United States Supreme Court to conclude that the federal common law of interstate pollution preempts climate deception lawsuits. The "old Supreme Court cases" that Defendants cite do not include cases that "seek to hold [private fossil fuel companies] liable for their tortious conduct that deliberately and unnecessarily deceived consumers about the scientific consensus on climate change and its devastating effects, and about the starring role their products play in causing it." *Rhode Island*, 35 F.4th at 56 & n.8 (cleaned up). They do not include cases brought by a State's "political subdivisions" rather than by the State itself. *AEP*, 564 U.S. at 422; *see also Baltimore*, 31 F.4th at 205. And they do not include cases brought against "product sellers rather than emitters—[that is,] suits in which out-of-state third-party emitters are only steps in the causal chain." *Boulder*, 25 F.4th at 1260 n.5. Plainly, then, accepting Defendants' preemption defense would require this Court to expand the federal common law of interstate pollution beyond the boundaries drawn by Supreme Court precedent.

[13] This lawsuit is wholly distinguishable from *Jackson* and *Irving*. In those cases, the plaintiffs alleged the defendants breached state law duties by complying (or failing to comply) with federal standards. *See Jackson v. Gen. Motors Corp.*, 770 F. Supp. 2d 570, 574 (S.D.N.Y. 2011) ("state common law tort actions [were] premised on failure to meet the federal standards promulgated by the EPA pursuant to the CAA"); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Plaintiff sued Defendants for exercising an option explicitly permitted by Congress"). Here, by contrast, Defendants do not—and cannot—identify any conflict between (1) their duties under Hawai‘i common law to warn and not mislead consumers and the public about the dangers of their products, and (2) any legal obligations that Defendants might have under federal law.

In arguing otherwise, Defendants misquote Supreme Court cases. Contrary to Defendants' assertions, *Ouellette* did *not* "reaffirm[] that 'interstate water pollution is a matter of federal, not state, law.'" Br. 22. Instead, it "affirmed the view that *the regulation* of interstate water pollution is a matter of federal, not state, law," *Ouellette*, 479 U.S. at 488 (emphasis added)—which is consistent with Plaintiffs' view that the federal common law of interstate pollution only ever governed claims that regulated interstate pollution, *see supra* Section II(A)(i). Likewise, *AEP* did *not* "h[o]ld that federal common law 'undoubtedly' governs claims involving 'air and water in their ambient or interstate aspects.'" Br. 23. Instead, the Supreme Court characterized its prior cases as having "approved federal common-law suits brought by one State to abate pollution emanating from another State." *AEP*, 564 U.S. at 421–22. Finally, *Milwaukee I* did *not* hold that "federal law governs disputes involving 'air and water in their ambient or interstate aspects.'" Br. 22. Instead, it merely approved "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters." *Milwaukee I*, 406 U.S. at 104.

To infer a broad preemption rule from these Supreme Court cases—as Defendants do—would contradict "the most basic" tenet of federal common lawmaking: in the absence of congressional authorization, any expansion of federal common law "must be *necessary* to protect uniquely federal interests." *Rodriguez*, 140 S. Ct. at 717 (emphasis added). Courts must always assure themselves that a federal-common-law rule of decision is neither "too broad" nor "too narrow" vis-à-vis the federal interest that requires protection. *Boyle*, 487 U.S. at 501. And they cannot expand federal common law in any way without first identifying a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87; *see also id.* at 87–88 (explaining that both "the permissibility" and "the scope of judicial displacement of state rules turns upon such a conflict"). By necessity, then, federal common law develops incrementally on a case-by-case basis. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (federal common law "depend[s] upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law").

This Court should not skip over the "threshold questions" of federal common lawmaking, *Rodriguez*, 140 S. Ct. at 718, based on Defendants' untenable reading of Supreme Court precedent. Instead, it should affirm the Circuit Court's conclusion that no body of federal common law preempts Plaintiffs' state law claims because Defendants do not even try to satisfy the "strict conditions" for expanding federal common law. *Id.* at 717.

c. Defendants' climate-related cases are inapposite.

As an initial matter, Defendants incorrectly suggest that the Circuit Court is the only court to have denied motions to dismiss in a climate-related lawsuit. Not so. The Commonwealth of Massachusetts overcame motions to dismiss for lack of personal jurisdiction and for failure to state a claim in its climate deception lawsuit against ExxonMobil. *See Massachusetts v. Exxon Mobil Corp.*, 2021 WL 3493456, at *1 (Mass. Super. June 22, 2021). That litigation has now proceeded to discovery. *See, e.g.*, *Commonwealth v. Exxon Mobil Corp.*, 2022 WL 10393900, at *1 (Mass. Super. Feb. 8, 2022) (allowing depositions to proceed during Exxon's appeal). In any event, none of the climate-related cases cited by Defendants support them here.

Far from helping Defendants, *City of New York v. Chevron Corporation* confirms that federal common law cannot govern Plaintiffs' claims because the claims in this case do not and cannot "regulate cross-border emissions." 993 F.3d 81, 93 (2d Cir. 2021). In *City of New York*, the plaintiff—New York City—sought to hold fossil fuel companies "strict[ly] liab[le]" for climate impacts caused by "lawful commercial activity," namely: their *lawful* production, promotion, and sale of fossil fuels. *Id.* at 87, 93 (cleaned up). As the Second Circuit observed, the complaint did "not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions." *Id.* at 97. And in its opening brief on appeal, the plaintiff reaffirmed that its "particular theory of the claims . . . assumes that [the] [d]efendants' business activities have substantial social utility and does not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation." Br. for Appellant at 19, Dkt. 89, *City of New York*, Case No. 18-2188 (Nov. 8, 2018).

Based on those representations, the Second Circuit held that plaintiff's "claims, if successful, would operate as a *de facto* regulation on [greenhouse gas] emissions." *City of New York*, 993 F.3d at 96. Because the lawsuit sought to impose "strict liability" on the lawful production and sale of fossil fuels, the defendants in *City of New York* would need to "cease global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability" in the future. *Id.* at 93 (cleaned up). And so "a significant damages award would no doubt compel the [defendants] to develop new means of pollution control." *Id.* (cleaned up). Indeed, the plaintiff "even admit[ted] as much." *Id.* Accordingly, the Second Circuit concluded that the lawsuit "would regulate cross-border emissions," and on that basis, it held that federal common law governed. *Id.*

In sharp contrast, Plaintiffs' climate deception claims here cannot regulate pollution of any sort, as explained above. *See supra* Section II(A)(i). This lawsuit does *not* seek to hold Defendants "strict[ly]" liable" for harms caused by "lawful commercial activity." *City of New York*, 993 F.3d at 87, 93 (cleaned up). Rather, Plaintiffs seek to hold Defendants liable for *tortiously* failing to warn and for using *unlawful* deception to promote their products. As a result, Defendants would *not* need to cease their "global production [of fossil fuels] altogether" to avoid "all liability" under Plaintiffs' Complaint. *Id.* at 93. Indeed, they would not need to reduce production at all because they could eliminate any "ongoing liability" by simply stopping their climate deception campaigns. *Id.* Under *City of New York's* own reasoning, then, Plaintiffs' climate deception claims cannot regulate interstate pollution. They are therefore qualitatively different from any claims formerly governed by the federal common law of interstate pollution.[14, 15]

For the same reasons, this Court should disregard Defendants' citations to the district court's *vacated* decisions in *Oakland* and to various *amicus* briefs filed by the United States. In *Oakland*, the district court read the complaint as seeking to solve the "fundamental global issue" of climate change, *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018) ("*Oakland I*"), and to hold the defendants liable for their "lawful and everyday sales of fossil fuels," *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018) ("*Oakland II*").[16] Similarly, the United States viewed the claims alleged in *Oakland* as seeking to regulate the lawful sale and use of fossil fuels, declaring that, "[i]f successful, these claims would,

[14] Defendants argue that *City of New York* implicitly rejected a deception-based theory of liability because the court noted, in the *background section* of its opinion, that the defendants "downplayed the risks" of their fossil fuel products. 993 F.3d at 86–87. But judicial opinions do not resolve "questions which merely lurk in the record." *United States v. Corrales-Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019) (cleaned up). Nor do they offer insight into questions that they do not "squarely address[]." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). Nowhere in *City of New York's* preemption analysis did the panel mention the fossil fuel companies' deceptive conduct. *See* 993 F.3d at 89–103. And so nothing in that opinion supports preempting Plaintiffs' claims here.

[15] *City of New York*'s federal common law analysis is not only inapplicable, but wrong because "[i]t fails to explain a significant conflict between the state-law claims before it and the federal interests at stake." *Baltimore*, 31 F.4th at 203.

[16] In vacating *Oakland I* and *II*, the Ninth Circuit doubted whether any federal common law of greenhouse gas emissions continued to exist after its displacement by the CAA. *See City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). Ultimately, though, the panel did not need to answer that question to reverse the district court's jurisdictional ruling. *See id.* at 906, 908.

in practice, impose a tax on fossil-fuel production and use nationwide and potentially worldwide." U.S. *Amicus Curiae* Br. 10–11, *City of Oakland v. BP p.l.c.*, No. 18-16663, Dkt. 198 (9th Cir. Aug. 3, 2020); *see also* Tr. of Oral Arg. 31:5–13, *Baltimore*, 2021 WL 197342 (U.S. Jan. 19, 2021) (arguing that interstate "emissions just can't be subjected to potentially conflicting regulations"). But again, Plaintiffs' claims here cannot regulate or tax cross-border emissions; the only problem that this lawsuit seeks to address is the use of deception to promote fossil fuel products; and Defendants' liability is triggered by their unlawful activities, not their lawful ones.[17]

As for *Kivalina*, that decision did not even address the question of federal common law preemption. In that case, the plaintiff pleaded nuisance claims under both state and federal common law, and the Ninth Circuit simply affirmed dismissal of the federal common law claim as displaced by the CAA. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012). The panel did not address the plaintiff's state law claim, which the district court had dismissed without prejudice to refile in state court and which the plaintiff had not appealed. *See id.* at 866 (Pro, J., concurring). As Judge Pro observed in his concurrence, moreover, the plaintiff could pursue its state law claims in state court because, "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal [statutory] law." *Id. Kivalina* therefore undercuts Defendants' argument that congressionally displaced *federal* common law retains the power to preempt *state* law.

So does *AEP*, which—as explained above—held that the plaintiffs' *federal*-common-law claims for the abatement of greenhouse gas pollution were displaced by the CAA and that the "availability *vel non*" of the plaintiffs' companion *state* law claims turned on the CAA's preemptive effects. 564 U.S. at 429; *supra* Section II(A)(iii).[18] Defendants are wrong, moreover, when they suggest that the claims pleaded in *AEP* are "similar" to those alleged here. Br. 21–22. In *AEP*, the plaintiffs "sought injunctive relief requiring [major electric power companies] to cap

[17] The U.S. wrote its *amicus* briefs before the First, Fourth, and Tenth Circuits held that federal common law does not govern climate deception cases. In light of that intervening authority, the federal government would likely reassess the positions it took in earlier *amicus* briefs.

[18] In *AEP*, the plaintiffs pleaded their state law claim under the "law of each State where the defendants operate[d] powerplants." 564 U.S. at 429 (citing the complaint). Defendants mistake the Supreme Court's description of those particular claims as a limitation on the types of state law claims that are available after the CAA's displacement of federal common law. *See* Br. 34. *AEP* imposed no such limitation, holding instead that "the availability *vel non* of *a* state lawsuit" depended on the preemptive effect of the CAA. 564 U.S. at 429 (second emphasis added).

[their] carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." *Id.* at 419 (cleaned up). Thus, their federal-common-law claim for nuisance abatement had the purpose and effect of regulating interstate pollution, akin to prior lawsuits where the Supreme Court had applied the federal common law of interstate pollution.[19] By contrast, Plaintiffs' claims for failure to warn and deceptive promotion cannot enjoin, cap, or otherwise regulate greenhouse emissions, for the reasons already discussed. *See supra* Section II(A)(i).

Finally, *General Motors* lends no help to Defendants. In that case, the plaintiffs pleaded claims under both federal and state common law. *People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007). The federal district court dismissed the federal-common-law claim under the political question doctrine, an inquiry that bears no resemblance to federal common lawmaking. *See id.*; *but see Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 321–32 (2d Cir. 2009) (rejecting political question defense in a public nuisance suit to curtail greenhouse gas emissions), *rev'd on other grounds sub nom. AEP*, 564 U.S. 410. And as in *Kivalina* and *AEP*, the court in *General Motors* did not reach the merits of the plaintiff's state common law claim, but instead dismissed it without prejudice after declining to exercise supplemental jurisdiction. *See* 2007 WL 2726871 at *16.

d. Defendants cannot explain how Plaintiffs' claims would regulate out-of-state emissions.

The Circuit Court correctly rejected Defendants' argument that Plaintiffs' claims could regulate emissions. *See* 12(b)(6) Order at 7–8. In response, Defendants repeat their conclusory assertion that "[r]egulation can be effectively exerted through an award of damages." Br. 27. But even if that were true,[20] Defendants make no attempt to show how a damages award *in this particular case* would "force [them] to change their methods of doing business and controlling pollution to avoid the threat of ongoing liability." *Id.* (cleaned up). Nor could they. As explained above, Defendants can avoid the threat of ongoing liability *in this particular lawsuit* by adequately

[19] *AEP* never held that federal common law governed the plaintiffs' claims for pollution abatement. Instead, it declined to answer that "academic question" because the CAA had displaced any federal common law relating to greenhouse gas emissions. *AEP*, 564 U.S. at 423.

[20] *But see Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005) ("The proper [preemption] inquiry calls for an examination of the elements of the common-law duty at issue; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants)" (citation omitted)).

warning of their products' climate impacts and by stopping their climate deception campaigns. *See supra* II(A)(i). They would *not* need to reduce—much less "cease"—"global production" of fossil fuels. *City of New York*, 993 F.3d at 93. Thus, even assuming *arguendo* that this lawsuit might have incidental or secondary effects on greenhouse gas emissions,[21] it cannot "regulate" emissions under any "common-sense view" of that term. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987) (a law does not "regulate" a matter simply because it may have "an impact" on the matter); *Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 895 (7th Cir. 2017) (regulation is the "act or process of controlling [something] by rule or restriction") (citing BLACK'S LAW DICTIONARY).

Perhaps recognizing as much, Defendants now insist on appeal that the Circuit Court erred in "focus[ing] on whether Plaintiffs' claims sought to *regulate* out-of-state emissions." Br. 26. But Defendants expressly argued to the Circuit Court that "Plaintiffs claims are exclusively subject to federal—not state—law because they seek to regulate transboundary and international emissions and pollution." 12(b)(6) Mot. at all, Cir. Ct. Dkt. 347. And the Circuit Court rejected their argument. In any event, the Circuit Court's focus on regulation was entirely proper because the Supreme Court has only ever applied the federal common law of interstate pollution to nuisance claims that would regulate pollution from out-of-state sources. *See supra* Section II(A)(i); *see also Rhode Island*, 35 F.4th at 55& n.8 (the "old Supreme Court cases" on interstate pollution did not apply because climate deception claims did not seek to "regulate greenhouse-gas emissions").

e. Plaintiffs' claims are not covered by any federal common law on interstate relations.

Defendants vaguely argue that federal common law preempts Plaintiffs' claims because some of the alleged misconduct occurred outside of Hawai'i. *See* Br. 24–25, 27. That argument is misguided because a dispute "cannot become 'interstate,' in the sense of requiring the application of federal common law, merely because the conflict is not confined within the boundaries of a single state." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985).

The Supreme Court has long recognized that a defendant may be liable under state law for out-of-state conduct that causes in-state injuries, subject to limited constitutional constraints not at

[21] As the Circuit Court noted, it is premature at the pleading stage to evaluate the potential effects of a damages award in this lawsuit. *See* 12(b)(6) Order at 7; *cf. Rhode Island*, 35 F.4th at 60 (rejecting as "contingent and speculative" the argument that "a large monetary judgement" in a climate deception case would "inevitably deter" fossil fuel production on the outer continental shelf); *Boulder*, 25 F.4th at 1275 (same); *Baltimore*, 31 F.4th at 222 (same).

issue here. *See, e.g.*, *Young v. Masci*, 289 U.S. 253, 258–59 (1933) ("A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (state law may apply to out-of-state conduct if the application is "supported by the State's interest in protecting its own consumers and its own economy"). Indeed, "[t]he cases are many in which a person acting outside the State may be held responsible according to the law of the state for injurious consequences within it." *Masci*, 289 U.S. at 258–59 (citing cases for "nuisance" and "negligent manufacture"). The same is true for misconduct occurring outside of the United States. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 & cmt. k (1987) (state law may apply to foreign conduct that "has or is intended to have substantial effect within [the state]").[22]

By contrast, the Supreme Court has narrowly cabined the federal common law of interstate and foreign relations to a handful of cases that either (1) were brought by a sovereign State, *see New Jersey*, 283 U.S. at 342; or (2) targeted the actions of a foreign government, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). *See also Tex. Indus.*, 451 U.S. at 641 n.13 (identifying cases filed by sovereign States and cases seeking to invalidate the official act of a foreign sovereign as examples of the federal common law of interstate and foreign relations). Those cases stand miles apart from this one, which seeks to hold companies liable for tortious conduct traditionally regulated by the States: the deceptive promotion of dangerous products.

To be sure, the reach of state law is not without limits. Over the years, the Supreme Court has carefully crafted a narrow set of doctrines to identify state law claims that are impermissibly extraterritorial—none of which are raised in Defendants' motions.[23] Not among those doctrines:

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

[23] *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (choice of law); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–20 (2003) (foreign-affairs preemption); *Am. Trucking Associations, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (dormant commerce clause); *BMW*, 517 U.S. at 568 (due-process constraints on punitive damages).

Defendants' untethered theory that federal common law preempts state law claims whenever a judge concludes (based on some undefined metric) that a case is too "sprawling." Br. 24.

f. Declarations of federal common law are not constitutional rules.

Throughout their brief, Defendants try to recast the Supreme Court's declarations of federal common law as constitutional rules. *See, e.g.*, Br. 26 ("As the Supreme Court has repeatedly held, our federal constitutional structure does not allow varying state laws to govern claims arising out of interstate pollution."). Their reason for doing so is transparent: Because the Clean Air Act displaced the federal common law of interstate pollution, Defendants cannot prevail on their theory of preemption *unless* Congress is powerless to reverse a judicial declaration that state law claims are governed by federal common law. And the *only* judicial declaration that Congress *cannot* reverse is one that "interpret[s] and appl[ies] the Constitution"—*i.e.*, "a constitutional rule." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (Congress could supersede *Miranda's* warning requirement unless "the *Miranda* Court [had] announced a constitutional rule").

The problem for Defendants is that federal common law rules are not constitutional rules that stand beyond the reach of the federal Legislature. *See United States v. Lara*, 541 U.S. 193, 207 (2004) (rejecting the argument that "the Constitution forbids Congress to change 'judicially made' federal Indian law"). Instead, the Supreme Court has clearly held that "congressional legislation [can] exclude[] [a] declaration of federal common law." *AEP*, 564 U.S. at 424. Indeed, the Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Milwaukee II*, 451 U.S. at 313. And Congress has undoubtedly exercised that paramount authority to eliminate the federal common law of interstate pollution, including any declarations concerning the preemptive effects of that federal common law. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981) (the Clean Water Act "entirely preempt[s]" the federal common law of interstate water pollution); *AEP*, 564 U.S. at 429 ("the Clean Air Act displaces federal common law" relating to greenhouse gas emissions).

In passing, Defendants cite *McCulloch* to argue that the federal Constitution may prohibit state laws "by implication." Br. 21. As an initial matter, *McCulloch* is wholly inapposite because it addressed the constitutionality of a congressionally incorporated bank and said nothing about federal common law. *See McCulloch v. Maryland*, 17 U.S. 316, 400 (1819). In any event, *McCulloch* confirms that the Supreme Court did not issue any constitutional rulings *sub silentio* in its decisions concerning the federal common law of interstate pollution. When the Supreme

Court interprets the federal Constitution, as it did in *McCulloch*, it does so expressly and openly, examining both the text and history of the relevant constitutional provisions. *See id.* at 407 ("we must never forget that it is a *constitution* we are expounding"); *see also id.* at 403 (discussing the constitutional convention); *id.* at 405–07 (analyzing constitutional text). By contrast, the Supreme Court never referenced—much less analyzed—any constitutional provision in its cases on the federal common law of interstate pollution. And in fact, the Supreme Court made clear in those cases that its power to create the federal common law of interstate pollution derived from Congress's "national legislative power" to regulate in the field of "[e]nvironmental protection," not from any text or clause in the federal Constitution. *AEP*, 564 U.S. at 421; *see also Milwaukee I*, 406 U.S. at 102 (explaining that "the [Federal Water Pollution Control] Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters," and confirming that "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with [that] Act").

Defendants also rely on *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984) ("*Milwaukee III*") and *City of New York* to argue that congressionally displaced federal common law retains its preemptive force. But the Seventh Circuit decided *Milwaukee III* without the benefit of the Supreme Court's decisions in *Ouellette* and *AEP*—both of which clarify that, in areas where Congress has displaced federal common law, courts must resolve questions of state law preemption based on federal statute, not obsolete judge-made law. *See supra* Section II(A)(iii). And in *City of New York*, the Second Circuit relied on *Milwaukee III*, ignoring the Supreme Court's more recent instructions that "the availability *vel non* of a state law suit" relating to greenhouse gas emissions turns on "the preemptive effects of the federal [Clean Air] Act." *AEP*, 564 U.S. at 429.

In any event, neither *Milwaukee III* nor *City of New York* adopted the theory of preemption advanced by Defendants here—*i.e.*, that a declaration of federal common law preempts state law *forever*, regardless of subsequent congressional action. Instead, both cases treated the prior existence of federal common law as a factor in conducting a statutory preemption analysis. *See Milwaukee III*, 731 F.2d at 411–14 (preemption analysis of Clean Water Act); *City of New York*, 993 F.3d at 99–100 (preemption analysis of CAA).[24] By contrast, Defendants' theory of federal

[24] Defendants have waived any right to argue the preemption theory articulated in *Milwaukee III* and *City of New York*. In any event, those two opinions erred in treating displaced federal common

common law preemption never considers what Congress said in the CAA about the "availability *vel non*" of state law, *AEP* 564 U.S. at 429, even though Congress expressly *preserved* state law claims through the CAA's broad savings clauses, *see* 42 U.S.C. §§ 7416, 7604(e).

B. The Clean Air Act Does Not Preempt Plaintiffs' Claims.

In the alternative, Defendants rely on *Ouellette* to argue that the CAA preempts Plaintiffs' claims. But that obstacle preemption defense[25] suffers the same fatal flaw as their federal common law theory of preemption: it applies only if Plaintiffs' claims "regulate interstate pollution." Br. 33. Because this lawsuit does no such thing, it falls outside of the CAA's preemptive scope.

i. Obstacle preemption does not apply.

To prevail on an obstacle preemption defense, a defendant must meet two requirements. *First*, it must identify a congressional objective that is "grounded in the text and structure of the statute at issue." *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (cleaned up). A court cannot invalidate state law based on "brooding federal interests," "judicial policy preferences," or "unenacted legislative desires." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901, 1907 (2019) (lead opinion). *Second*, a defendant must demonstrate a conflict between the statutory purpose and the operation of state law that is "so direct and positive that the two acts cannot be reconciled or consistently stand together." *MTBE*, 725 F.3d at 102. Obstacle preemption cannot rest on the "possibility that federal enforcement priorities might be upset" by the operation of state law. *Garcia*, 140 S. Ct. at 807. Nor does it arise simply because federal and state law "overlap" in subject matter, *id.* at 806, or because a state law claim has "incidental effects" on a federal program, *Casumpang v. ILWU, Loc. 142*, 94 Hawai'i 330, 340, 13 P.3d 1235, 1245 (2000). Rather, "[t]he Supreme Court has found obstacle preemption in only a small number of cases" in which (1) the state law "directly interfered with the operation of [a] federal program," or (2) "the federal

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law as factor in their statutory preemption analysis. Their analysis cannot be reconciled with *Milwaukee II*, which prohibits courts from "rely[ing] on federal common law" once "Congress has addressed the problem." 451 U.S. at 315. It is incompatible with *AEP*, which teaches that "the need for [federal common law] . . . disappears" after congressional displacement. 564 U.S. at 423. And it cannot be harmonized with *Ouellette*, which conducted a standard statutory preemption analysis of state law claims that were once governed by federal common law. 479 U.S. at 491–97.

[25] In passing, Defendants reference the test for field preemption, which can apply when Congress occupies a field of regulation exclusively. Br. 33. However, Defendants have waived their right to argue field preemption, and in any event, *Ouellette* makes clear that the CAA's saving clause "negates the inference that Congress 'left no room' for state causes of action." 479 U.S. at 492.

enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation." *In re Volkswagen "Clean Diesel" Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020).

Defendants cannot clear this "high threshold." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). The CAA does not concern itself in any way with the acts that trigger liability under Plaintiffs' Complaint, namely: the use of deception to promote the consumption of fossil fuel products. Indeed, the marketing of fossil fuels is not even a "peripheral concern" of the statute. *DeCanas v. Bica*, 424 U.S. 351, 360–61 (1976) (finding no preemption "where the activity regulated was a merely peripheral concern of the federal regulation" (cleaned up)). Instead, the Clean Air Act's stated purpose is to protect the nation's air resources by preventing pollution. *See* 42 U.S.C. § 7401 (defining the CAA's purpose); *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003). The statute achieves that goal by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014); *see also* Br. 33 n.5 (identifying various CAA provisions that establish pollution-control standards and permitting requirements for different point sources of air pollutants).

As explained above, however, Plaintiffs' claims cannot regulate pollution because Defendants do not need to limit their fossil fuel production to avoid future liability. *See supra* Section II(A)(i) & (iv)(c). Indeed, even if the federal government ordered Defendants to increase fossil fuel production, Defendants could do so and still comply with their state law duties to accurately disclose the climate impacts of their products. Plainly, then, this lawsuit has no effect on the CAA's mission or methods of regulating pollution. And that conclusion is only reinforced by the Act's broad savings clauses, which expressly preserve state law even in the field of pollution regulation. *See* 42 U.S.C. §§ 7416, 7604(e).

The federal Ninth Circuit's analysis in *Oxygenated Fuels* is especially instructive. 331 F.3d at 668. There, a fuels association challenged California's ban on the use of MTBE in gasoline, arguing that this state regulation was preempted by the Clean Air Act. *Id.* at 672. The appellate court disagreed because the MTBE ban—which "was enacted for the purpose of protecting groundwater"—did not interfere with the CAA's "central goal of . . . reduc[ing] air pollution." *Id.* at 673. In reaching that conclusion, the court acknowledged the possibility that the MTBE ban "may, to some degree, disrupt the gasoline market and cause higher prices." *Id.* But that potential disruption could not support preemption because nothing in the CAA's text suggested that "a

smoothly functioning market and cheap gasoline" were among "the Clean Air Act's goals." *Id.* The same is true here. Plaintiffs' lawsuit and the CAA "operate in different areas"—the former operates to protect consumers and the public from deceptive marketing, whereas the latter operates to reduce air pollution. *Id.* As with California's MTBE ban, moreover, Plaintiffs' action will not "inhibit federal efforts to fight air pollution" because, once again, this lawsuit cannot regulate air pollution of any sort. And so even if a judgment in this case might have secondary impacts on fossil fuel markets, those incidental effects cannot trigger statutory preemption because there is no evidence that "assuring inexpensive gasoline was a goal of the [Clean Air] Act." *Id.*

The Second Circuit's decision in *MTBE* further rebuts Defendants' preemption defense here. In that case, the plaintiff sued petroleum companies for nuisance, trespass, and failure to warn (among other state law claims), alleging that the defendants caused groundwater contamination by adding MTBE to gasoline, and then failing to warn of the threats posed by the chemical to the nation's drinking water supplies. *See* 725 F.3d at 82–83. Although the defendants insisted that they used MTBE only to meet certain "oxygenate" requirements under the CAA, *see id.* at 95, the Second Circuit found no preemption because "the mere use of MTBE would not have caused [the defendants] to incur liability" under the plaintiff's theory of its case, *id.* at 104. Instead, the plaintiff's claims "required the jury to find that [the defendants] engaged in additional tortious conduct," such as failing to warn of MTBE's dangers or "failing to exercise reasonable care when storing gasoline that contained MTBE." *Id.* at 104. As a result, the defendants could not prevail on their preemption defense because they "could have complied with [the CAA]" without violating their state law duties to consumers and the public. *Id.* That same logic applies to the claims asserted here, and it demands the same result because Defendants could have simultaneously complied with any applicable CAA regulations and their duties under Hawai'i law to warn and not deceive.[26]

ii. *Ouellette* does not support Defendants.

Defendants cannot salvage their preemption defense based on *Ouellette*. In that case, the Supreme Court held that the Clean Water Act "precludes *only* those suits that may require standards of [pollution] control that are incompatible with those established by the procedures set

[26] For similar reasons, courts have rebuffed CAA preemption defenses in litigation over "defeat devices" that misrepresent the fuel efficiency of vehicles. *See, e.g.*, *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 1003 (N.D. Cal. 2018) ("[T]he gravamen of the complaint is Defendants' deceit; they are not attempting directly to enforce the CAA.").

forth in the Act." 479 U.S. at 497 (emphasis added). But this lawsuit cannot create any standard of pollution control, as *Ouellette* itself confirms.

In *Ouellette*, Vermont property owners brought nuisance claims under Vermont law against a New York paper company for its "discharge of [pollution]" into Lake Champlain, which borders both states. 479 U.S. at 484. The plaintiffs sought not only damages, but "injunctive relief that would require [the defendant] to restructure part of its water treatment system." *Id.* Applying traditional principles of statutory preemption, the Supreme Court concluded that these state law claims stood "as an obstacle to the full implementation of the [Clean Water Act]" because they would "override" the Act's complex "permit system" for establishing water quality standards and for regulating pollution discharges from point sources. *Id.* at 494–497. This sort of lawsuit, the Supreme Court explained, "would compel [polluters] to adopt different control standards and a different compliance schedule from those approved by the EPA." *Id.* at 495. And that compulsion would allow a state affected by interstate pollution to "set discharge standards" for emitters operating in other states, raising concerns that the pollution standards approved in "any permit issued under the [Clean Water] Act would be rendered meaningless." *Id.* at 495 n.15, 496–97.

Ouellette therefore dispels any notion that Plaintiffs' claims regulate pollution. Once again, the conduct that triggers liability is Defendants' use of deception to sell a dangerous product, not their "discharge of [pollution]." *Id.* at 484. Accordingly, this lawsuit cannot "compel" Defendants or anyone else to "adopt different [pollution] control standards." *Id.* at 495. At most, it will encourage Defendants to be more truthful in the promotion of their products. And so, Plaintiffs' claims cannot be preempted on the basis of *Ouellette*, which expressly limited its preemption finding to "only those suits that may require standards of [pollution] control." *Id.* at 497.[27]

CONCLUSION

The Circuit Court's Orders should be affirmed.

Respectfully submitted,
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[27] None of Defendants' cited cases adopted a broader reading of *Ouellette* when applying that decision to the CAA. *See Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 692–93 (6th Cir. 2015) (finding no preemption); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 195–97, 195 n.6 (3d Cir. 2013) (same); *North Carolina v. TVA*, 615 F.3d 291, 296, 301–03 (4th Cir. 2010) (finding preemption of claims seeking to enjoin emissions from Alabama and Tennessee).

Dated: January 18, 2023

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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI‘I

CITY AND COUNTY OF HONOLULU and HONOLULU BOARD OF WATER SUPPLY, Plaintiffs-Appellees, vs. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; CHEVRON CORP; CHEVRON USA INC.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; 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-Appellants	**CASE NO. CAAP-22-0000429** CIVIL NO. 1CCV-20-0000380 (JPC) **CERTIFICATE OF SERVICE**

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I HEREBY CERTIFY that on this date a copy of the foregoing document was duly served electronically through JIMS/JEFS and a copy sent via email to counsel for all parties to this appeal

Respectfully submitted,

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