No.

In the Supreme Court of the United States

SUNOCO LP, ET AL., PETITIONERS

v.

CITY AND COUNTY OF HONOLULU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Sunoco LP; Aloha Petroleum, Ltd.; Aloha Petroleum LLC; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Chevron Corporation; Chevron U.S.A. Inc.; Woodside Energy Hawaii Inc.; BP p.l.c.; BP America Inc.; Marathon Petroleum Corp.; ConocoPhillips; ConocoPhillips Company; Phillips 66; and Phillips 66 Company.

Petitioner Sunoco LP is a publicly traded master limited partnership. Sunoco LP and its general partner, Sunoco GP LLC, are subsidiaries of Energy Transfer Operating, L.P., and Energy Transfer LP, which are publicly traded limited partnerships. No other publicly held corporation owns 10% or more of Sunoco LP's stock, and no publicly held company owns 10% or more of Energy Transfer Operating L.P.'s or Energy Transfer LP's stock.

Petitioner Aloha Petroleum, Ltd., and petitioner Aloha Petroleum LLC are wholly owned subsidiaries of Sunoco LP.

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ExxonMobil Oil Corporation is a wholly owned indirect subsidiary of Exxon Mobil Corporation.

Petitioner Chevron Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Chevron U.S.A. Inc. is an indirect subsidiary of Chevron Corporation.

Petitioner Woodside Energy Hawaii Inc. is a wholly owned indirect subsidiary of Woodside Energy Group Ltd., a publicly traded company. No publicly held company owns 10% or more of Woodside Energy Group Ltd.'s stock.

Petitioner BP p.l.c. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner BP America Inc. is a wholly owned indirect subsidiary of BP p.l.c.

Petitioner Marathon Petroleum Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ConocoPhillips has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips.

Petitioner Phillips 66 has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Phillips 66 Company is wholly owned by Phillips 66.

Respondents are the City and County of Honolulu; the Honolulu Board of Water Supply; Shell plc; Shell USA, Inc.; Shell Oil Products Company LLC; BHP Group Limited; and BHP Group plc.[*]

[*] Pursuant to Rule 12.6, petitioners have notified the Clerk that they believe that BHP Group Limited and BHP Group plc have no interest in the outcome of the petition. Petitioners have served a copy of that notice on all parties to the proceedings below.

RELATED PROCEEDINGS

United States District Court (D. Haw.):

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, Civ. No. 20-163 (Feb. 12, 2021)

United States Court of Appeals (9th Cir.):

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, No. 21-15313 (July 7, 2022)

United States Supreme Court:

Sunoco LP, et al. v. *City & County of Honolulu, et al.*, No. 22-523 (Apr. 24, 2023)

Hawaii Circuit Court (1st Cir.):

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, No. 1CCV-20-380 (Mar. 29, 2022) (order denying motion to dismiss for failure to state a claim)

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, No. 1CCV-20-380 (Mar. 31, 2022) (order denying motion to dismiss for lack of personal jurisdiction)

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, No. 1CCV-20-380 (June 3, 2022) (order granting leave to file an interlocutory appeal)

Hawaii Intermediate Court of Appeals:

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, CAAP-22-429 (Mar. 3, 2023) (order granting application to transfer case to the Hawaii Supreme Court)

Hawaii Supreme Court:

City & County of Honolulu, et al. v. *Sunoco LP, et al.*, No. SCAP-22-429 (Oct. 31, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Page

Cases—continued:

Constitution, statutes, and regulations:

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PETITION FOR A WRIT OF CERTIORARI

Sunoco LP; Aloha Petroleum, Ltd.; Aloha Petroleum LLC; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Chevron Corporation; Chevron U.S.A. Inc.; Woodside Energy Hawaii Inc.; BP p.l.c.; BP America Inc.; Marathon Petroleum Corp.; ConocoPhillips; ConocoPhillips Company; Phillips 66; and Phillips 66 Company respectfully petition for a writ of certiorari to review the judgment of the Hawaii Supreme Court in this case.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court (App., *infra*, 1a-72a) is reported at 537 P.3d 1173. The opinion of the trial court (App., *infra*, 73a-84a) is unreported.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on October 31, 2023. On January 16, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari until February 28, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

CONSTITUTIONAL PROVISION INVOLVED

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

STATEMENT

Rarely does a case of such extraordinary importance to one of the Nation's most vital industries come before this Court. Energy companies that produce, sell, and market fossil fuels are facing numerous lawsuits in state courts across the Nation seeking billions of dollars in damages for injuries allegedly caused by global climate change. Having litigated the question whether those cases were removable to federal court—including before this Court in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 593 U.S. 230 (2021)—the question now is whether the plaintiffs' claims can legitimately proceed on the merits.

This case presents the Court with its only foreseeable opportunity in the near future to decide a dispositive question that is arising in every climate-change case: whether federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate. After the decision below, there is now a clear conflict on that question.

Petitioners are energy companies that produce or sell fossil fuels; the plaintiff respondents are the municipal government of Honolulu, Hawaii, and the local water utility board. Like many other state and local governments in similar cases across the country, respondents filed this action against petitioners in local state court, asserting claims purportedly arising under state law to recover for harms that respondents allege they have sustained (and will sustain) because of the physical effects of global climate change.

After unsuccessfully seeking to remove the case to federal court, petitioners moved to dismiss the complaint on the ground, *inter alia*, that federal law precludes the invocation of state law in this context. The trial court denied petitioners' motion.

The Hawaii Supreme Court affirmed. The court acknowledged this Court's precedents holding that interstate emissions constitute an inherently federal area exclusively governed by federal law, including federal common law in the absence of applicable statutory law. But the court then concluded that, because Congress had displaced any remedy previously available under federal common law by enacting the Clean Air Act, state law was presumptively competent to regulate in this inherently federal area. In so holding, the Hawaii Supreme Court expressly declined to follow the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021),

which held that federal law precluded materially identical state-law claims that sought damages from many of the same fossil-fuel producers sued here for the alleged effects of climate change. The Hawaii Supreme Court further held that, despite the complaint's focus on the physical effects of climate change, interstate and international emissions were not the source of respondents' injuries; petitioners' marketing and public statements were.

The Hawaii Supreme Court's decision was incorrect, and it provides this Court with the ideal opportunity to address whether the state-law claims asserted in this nationwide litigation are even allowable before the energy industry is threatened with potentially enormous judgments. Contrary to the Hawaii Supreme Court's decision, state law can only provide redress for harms caused by in-state sources of emissions. And as one prominent judge has put it, "there is no hiding the obvious" that climate-change claims like respondents' present "a clash over worldwide greenhouse gas emissions and slowing global climate change." *Minnesota* v. *American Petroleum Institute*, 63 F.4th 703, 717 (8th Cir. 2023) (Stras, J., concurring) (citation omitted), cert. denied, No. 23-168, 2024 WL 72389 (Jan. 8, 2024).

Without this Court's intervention, years might pass before another opportunity to address this pressing question comes along. The Court should grant review and clarify whether state law is competent to impose the costs of global climate change on a subset of the world's energy producers chosen by respondents.

A. Background

1. As this Court has long explained, there are certain narrowly defined areas in which "our federal system does not permit the controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*,

451 U.S. 630, 640-641 (1981). Among those areas are ones where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Ibid.* (citation omitted). In those areas, "the Constitution implicitly forbids" States from "apply[ing] their own law," and disputes in those inherently federal areas must "turn on federal rules of law." *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1498 (2019). Put another way, "the basic scheme of the Constitution" "demands" a federal rule of decision in such inherently federal areas. *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011).

When Congress has not created a rule of decision for a particular question arising in an inherently federal area, federal courts have the power to prescribe a rule as a matter of federal common law. See, *e.g.*, *Texas Industries*, 451 U.S. at 640-641. Those court-created rules are subject to displacement by statute, however, because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *American Electric Power*, 564 U.S. at 423-424.

2. One established category of inherently federal claims is redress for injuries allegedly caused by interstate pollution. For over a century, "a mostly unbroken string of cases has applied federal law to disputes involving" such claims. *City of New York*, 993 F.3d at 91 (collecting cases). As this Court has stated, federal law must govern such claims because they "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972).

In the absence of any applicable federal statute, courts previously applied federal common law to claims seeking redress for interstate air and water pollution. See, *e.g.*,

Milwaukee I, 406 U.S. at 103; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). But Congress later enacted comprehensive legislation governing interstate air and water pollution—namely, the Clean Air Act and Clean Water Act.

This Court addressed the effect of the Clean Water Act on the preexisting federal common law in *City of Milwaukee* v. *Illinois* (*Milwaukee II*), 451 U.S. 304 (1981). There, the Court held that the Clean Water Act precluded federal-common-law claims seeking to abate a nuisance created by water pollution commencing in another State. *Id.* at 317. Then, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court addressed the role of state law in the wake of that statutory displacement. The Court held that, in light of the Clean Water Act's "pervasive regulation" and "the fact that the control of interstate pollution is primarily a matter of federal law," the only permissible state-law actions seeking redress for interstate water pollution are "those specifically preserved by the Act." *Id.* at 492 (citation omitted). The Court then held that the Clean Water Act preserved only suits under the law of the State in which the source of pollution at issue was located. See *id.* at 487-498.

In *American Electric Power*, *supra*, the Court addressed the effect of the Clean Air Act on the federal common law governing air pollution. The Court held that the Act displaced nuisance claims under federal common law seeking the abatement of greenhouse-gas emissions from another State. See 564 U.S. at 424. Because the Clean Air Act "'speaks directly' to emissions of carbon dioxide from the defendants' plants," the Court saw "no room for a parallel track" under federal common law. *Id.* at 424-425. The Court left open the question whether "the law of each State where the defendants operate powerplants" could be applied. *Id.* at 429.

3. Another established category of inherently federal claims are those that threaten to "impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968). As the Court has explained, numerous constitutional and statutory provisions "reflect[] a concern for uniformity" and "a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Accordingly, "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted).

B. Facts And Procedural History

1. Since 2017, state and local governments have filed lawsuits in state courts across the country against private energy companies, alleging that the companies' worldwide extraction, production, promotion, marketing, and sale of fossil fuels has contributed to global climate change and thereby caused injury. Dozens of actions have been brought under this theory, including in San Francisco, New York City, Baltimore, and Boulder.[1] Additional suits continue to be filed.

The litigation in these cases initially focused on the question of jurisdiction. The defendants removed the lawsuits to federal court, and the actions were largely remanded to state court. The defendants appealed. The

[1] See, *e.g.*, *City & County of San Francisco* v. *BP p.l.c.*, No. CGC-17-561370 (Cal. Super. Ct.); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 18-4219 (Balt. Cir. Ct.); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 2018-CV-30349 (Colo. Dist. Ct.); *City of New York* v. *Exxon Mobil Corp.*, No. 451071/2021 (N.Y. Sup. Ct.).

cases eventually reached this Court on the question of appellate jurisdiction; the Court agreed with the defendants' position and remanded the cases to allow the courts of appeals to address the defendants' other grounds for removal. See *BP*, 593 U.S. at 238-239, 246-247.

At roughly the same time, the Second Circuit issued its decision in *City of New York*, *supra*. While the claims in that case were substantively similar to those in other climate-change-related cases, there was no question of jurisdiction in the case, because the plaintiff filed directly in federal court based on diversity jurisdiction. See 993 F.3d at 81, 94. The Second Circuit thus addressed the merits of the plaintiff's climate-change claims, unanimously holding that federal law precludes state-law claims seeking redress for injuries allegedly caused by global climate change. The court concluded that the claims had to be brought under federal common law, but that the Clean Air Act had displaced any such claims with respect to emissions in the United States, and that "foreign policy concerns foreclose[d]" a "cause of action targeting emissions emanating from beyond our national borders." *Id.* at 101. The court rejected the notion that the displacement of federal common law allowed state-law claims to proceed, except to the extent that a plaintiff is seeking relief for injuries caused by in-state emissions. See *id.* at 99-100. But the plaintiff in *City of New York* was "not seek[ing] to take advantage of this slim reservoir of state common law." *Id.* at 100. The plaintiff did not seek this Court's review.

In the wake of this Court's decision in *BP*, the courts of appeals in the removal cases rejected the defendants' jurisdictional arguments. The defendants sought review from this Court; the Court called for the views of the Solicitor General in one case but then denied certiorari, with Justice Kavanaugh noting his dissent. See, *e.g.*, *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners*

of Boulder County, 143 S. Ct. 78 (2022), cert. denied, 143 S. Ct. 1795 (2023). The cases are now largely proceeding in state courts across the country.

2. Petitioners in this case are 15 energy companies that extract, produce, distribute, or sell fossil fuels around the world. The plaintiff respondents are the City and County of Honolulu and the Honolulu Board of Water Supply.

On March 9, 2020, the City and County of Honolulu filed a complaint against petitioners in Hawaii state court, alleging that petitioners have contributed to global climate change, which in turn has caused a variety of harms in Honolulu. The Honolulu Board of Water Supply later joined the case as a plaintiff.

Respondents allege that increased greenhouse-gas emissions around the globe have contributed to a wide range of climate-change-related effects. In particular, respondents cite "sea level rise and attendant flooding, erosion, and beach loss"; "increased frequency and intensity of extreme weather events"; "ocean warming and acidification that will injure or kill coral reefs"; "habitat loss of endemic species"; "diminished availability of freshwater resources"; and "cascading social, economic, and other consequences." Am. Compl. 89, Cir. Ct. Dkt. 45 (Mar. 22, 2021). Respondents allege that those effects have resulted in property damage; "increased planning and preparation costs for community adaptation and resiliency"; and "decreased tax revenue" because of declines in tourism. *Id.* at 90.

Respondents contend that "pollution from [petitioners'] fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution," which is the "main driver" of global climate change. Am. Compl. 2. At the same time, respondents concede that "it is not possible to determine the source of

any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *Id.* at 107.

Respondents assert state-law claims for public nuisance, private nuisance, strict liability, failure to warn, negligent failure to warn, and trespass. Each claim is premised on the same basic theory of liability: namely, that petitioners knew that their fossil-fuel products would cause an increase in greenhouse-gas emissions, yet failed to warn of that risk and instead engaged in advertising and other speech to persuade governments and consumers not to take steps designed to reduce or regulate fossil-fuel consumption, thereby causing increased emissions and climate change.

3. Petitioners removed this action to federal court. The district court granted Honolulu's motion to remand; the Ninth Circuit affirmed; and this Court denied certiorari. 39 F.4th 1101 (2022), cert. denied, 143 S. Ct. 1795 (2023).

4. On remand in state court, petitioners moved to dismiss the complaint on two grounds. First, a group of petitioners not resident in Hawaii argued that the court lacked personal jurisdiction. Second, all of the petitioners argued that federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate greenhouse-gas emissions on the global climate. The trial court denied both motions but granted petitioners' motion for leave to file an interlocutory appeal. In authorizing the appeal, the trial court noted that this case is "unprecedented" and that "[t]he complexity, scope, time, and cost of discovery and motion practice, let alone trial, will be enormous." App., *infra*, 73a-84a, 86a-90a.

5. After briefing was complete in the Hawaii Intermediate Court of Appeals, respondents moved to have the case transferred to the Hawaii Supreme Court. See Haw. Rev. Stat. § 602-58(a). The Hawaii Supreme Court accepted the transfer and then affirmed. App., *infra*, 1a-72a, 85a.

a. The Hawaii Supreme Court first addressed the issue of personal jurisdiction. App., *infra*, 19a-36a. Taking the allegations in the complaint as true, the court held that the state long-arm statute authorized the exercise of jurisdiction over the nonresident defendants and that the exercise of jurisdiction satisfied due process. *Ibid.* In so holding, the court rejected petitioners' argument that a sufficient connection between the claims and the forum did not exist because the use of petitioners' products in Hawaii could not have injured respondents, as Hawaii accounts for only 0.06% of the world's carbon-dioxide emissions per year. *Id.* at 23a-24a.

b. The Hawaii Supreme Court then addressed petitioners' argument that federal law precludes state-law claims seeking redress for injuries allegedly caused by greenhouse-gas emissions. See App., *infra*, 37a-53a. Although petitioners had framed their arguments in terms of whether interstate pollution is an inherently federal issue constitutionally committed to the federal government, the court reframed the argument as whether federal common law preempted respondents' state-law claims. See *id.* at 37a-38a.

The court then concluded that federal common law did not preempt respondents' claims because any remedy available under federal common law had been displaced by the Clean Air Act. According to the court, because the federal common law governing interstate-pollution suits "no longer exists," the fact that it once governed could "play[] no part in th[e] court's preemption analysis."

App., *infra*, 46a, 47a (citation omitted). "The correct preemption analysis," in the court's view, "requires an examination *only* of the [Clean Air Act's] preemptive effect." *Id.* at 48a. The court reasoned that petitioners' contrary argument was incorrect in part because it would leave respondents with "*no* viable cause of action under state or federal law." *Id.* at 45a.

The Hawaii Supreme Court expressly declined to follow the Second Circuit's decision in *City of New York*. App., *infra*, 48a. The court asserted that the Second Circuit had improperly treated "displaced federal common law" as preempting state law, and it faulted the Second Circuit for failing to explain why federal law necessarily governed suits seeking redress for interstate pollution. *Id.* at 49a. The court also declined to follow the Seventh Circuit's decision in *Illinois* v. *City of Milwaukee* (*Milwaukee III*), 731 F.2d 403, 411 (1984), cert. denied, 469 U.S. 1196 (1985), which reached a similar conclusion as *City of New York* in the context of the Clean Water Act. App., *infra*, 42a-43a n.9. The court faulted the Seventh Circuit for failing to apply the presumption against preemption and instead holding that state law could govern only as expressly permitted by Congress. *Ibid.*

Separately, the court concluded that, even if federal common law had not been displaced, it would not govern respondents' claims. App., *infra*, 49a-52a. The court recognized that federal common law governs claims where "the source of the injury * * * is pollution traveling from one state to another," but it asserted that the source of respondents' alleged injury was petitioners' "tortious marketing conduct," not "pollution traveling from one state to another." App., *infra*, 50a, 51a. The court did not attempt to reconcile that characterization with its earlier recognition that respondents' theory of liability depends

upon petitioners' conduct allegedly "dr[iving] consumption [of fossil fuels], and thus greenhouse gas pollution, and thus climate change," resulting in alleged physical and economic effects in Honolulu. *Id.* at 18a (citation omitted).

c. Finally, the court concluded that the Clean Air Act did not alone preempt respondents' claims. App., *infra*, 53a-66a. The court began its analysis with the presumption against preemption and proceeded to analyze whether respondents' state-law claims were subject to traditional preemption. *Id.* at 55a-56a. The court concluded that no form of traditional preemption applied, because respondents were only seeking to regulate petitioners' marketing, and "the source of [respondents'] alleged injury is not emissions." *Id.* at 63a. In so holding, the court concluded that this Court's decision in *Ouellette* was inapplicable because respondents' theories of tort liability involved additional elements beyond the release of emissions. *Id.* at 61a-63a.

d. Justice Eddins wrote a separate concurring opinion concerning personal jurisdiction. App., *infra*, 66a-72a. He stated that "the principles that govern personal jurisdiction arose after 1868" but that today "[a] justice's personal values and ideas about the very old days suddenly control the lives of present and future generations." *Id.* at 66a; see *id.* at 66a-67a (citing *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215 (2022); *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1 (2022); and *West Virginia* v. *EPA*, 597 U.S. 697 (2022)). He questioned whether this Court's modern personal-jurisdiction precedents would remain intact, stating that "[s]ome justices feel precedent is advisory." *Id.* at 67a, 68a.

REASONS FOR GRANTING THE PETITION

This case presents a case-dispositive and recurring question of extraordinary importance to the energy industry, which is facing dozens of lawsuits seeking billions of dollars in damages for the alleged effects of global climate change. That question is whether federal law precludes the application of state law to claims seeking redress for injuries allegedly caused by interstate and international greenhouse-gas emissions. By allowing respondents' state-law claims to proceed, the Hawaii Supreme Court's decision squarely conflicts with the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), and is in serious tension with the decisions of two other federal courts of appeals. The Hawaii Supreme Court's decision is also inconsistent with this Court's precedents: regulation of interstate pollution is an inherently federal area necessarily governed by federal law, and Congress has not permitted—and indeed has preempted—resort to state law except for claims seeking redress for harms caused by in-state emissions.

In these cases, state and local governments are attempting to assert control over the Nation's energy policies by holding energy companies liable for worldwide conduct in ways that starkly conflict with the policies and priorities of the federal government. That flouts this Court's precedents and basic principles of federalism, and the Court should put a stop to it. The petition should be granted.

A. The Decision Below Creates A Conflict On The Question Presented

As the Hawaii Supreme Court recognized, its decision squarely conflicts with the Second Circuit's decision in *City of New York*, which held that federal law precluded materially identical state-law claims. The decision below

is also inconsistent with decisions of the Fourth and Seventh Circuits.

1. In *City of New York*, a municipal government sued a group of energy companies in federal court, alleging that the defendants (including several of the petitioners here) were liable for injuries allegedly caused by the contribution of interstate and international greenhouse-gas emissions to global climate change. As here, the plaintiff asserted claims for public nuisance, private nuisance, and trespass, and sought relief in the form of abatement and damages. See 993 F.3d at 88. And as here, the complaint in *City of New York* alleged that the defendants had "known for decades that their fossil fuel products pose a severe risk to the planet's climate" but had "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes" to the climate. *Id.* at 86-87.

The question before the Second Circuit was "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." 993 F.3d at 85. The Second Circuit unanimously held that "the answer is 'no.'" *Id.* at 85, 92.

The Second Circuit began its analysis by noting that, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." 993 F.3d at 91. As the court explained, that is because "such quarrels often implicate two federal interests that are incompatible with the application of state law": the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Ibid.* (alterations omitted) (quoting *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972)).

In the Second Circuit's view, claims seeking to hold defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" are far too "sprawling" for state law to govern. 993 F.3d at 92. The court reasoned that application of state law to the plaintiff's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93.

The Second Circuit rejected the plaintiff's argument that displacement by the Clean Air Act of any remedy under federal common law allows state law to govern. See 993 F.3d at 98. "[That] position is difficult to square with the fact that federal common law governed this issue in the first place," the court reasoned, because "where 'federal common law exists, it is because state law cannot be used.'" *Ibid.* (quoting *City of Milwaukee* v. *Illinois* (*Milwaukee II*), 451 U.S. 304, 313 n.7 (1981)). "[S]tate law does not suddenly become presumptively competent," the court continued, "to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Ibid.* Such an outcome, the Second Circuit concluded, is "too strange to seriously contemplate." *Id.* at 98-99.

The Second Circuit understood Congress to have the power to "grant [S]tates the authority to operate in an area of national concern," but "resorting to state law on a question previously governed by federal common law is permissible only to the extent authorized by federal statute." 993 F.3d at 99 (internal quotation marks, alterations, and citations omitted). The court concluded that the

Clean Air Act "does not authorize the type of state-law claims" the plaintiff was pursuing. *Ibid.* In the Second Circuit's view, the Act permitted only actions brought under "the law of the [pollution's] *source* state," and the plaintiff was not proceeding under that "slim reservoir of state common law." *Id.* at 100.

The Second Circuit further explained that the Clean Air Act did not displace federal common law with respect to claims for harms caused by international emissions, because the Act "does not regulate foreign emissions." 993 F.3d at 95 n.7, 101. But the court concluded that "condoning an extraterritorial nuisance action" for global climate change "would not only risk jeopardizing our [N]ation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *Id.* at 103.

2. The decision below conflicts with *City of New York*. Both cases involved nuisance and trespass claims asserted under state law and premised on the contribution of defendants' conduct to interstate and international greenhouse-gas emissions.

Like the Second Circuit, the Hawaii Supreme Court recognized that the Clean Air Act displaced any "federal common law action for interstate pollution suits." App., *infra*, 44a. But the Hawaii Supreme Court proceeded to hold that, after statutory displacement, state law was presumptively competent to govern such actions concerning interstate and international pollution unless the Clean Air Act demonstrated Congress's "clear and manifest purposes" to "supersede[]" state law. *Id.* at 55a; see *id.* at 45a-49a. By contrast, the Second Circuit reached the opposite conclusion, holding that state law was presumptively incompetent to govern materially identical claims unless Congress specifically preserved the applicable

state-law claims in question. Notably, the Hawaii Supreme Court acknowledged that the Second Circuit had reached a contrary result on similar claims, but it expressly declined to follow the Second Circuit's decision. *Id.* at 48a-49a.

The Hawaii Supreme Court also failed to distinguish between the interstate and international aspects of respondents' claims, holding that the Clean Air Act displaced federal common law with respect to both aspects. See App., *infra*, 39a-44a. By contrast, the Second Circuit squarely held that "the Clean Air Act cannot displace * * * federal common law claims to the extent that they seek recovery for harms caused by foreign emissions," and it concluded instead that "foreign policy concerns foreclose" such claims. 993 F.3d at 101.

In further conflict with the Second Circuit's decision, the Hawaii Supreme Court held that respondents' materially identical claims did not arise in an inherently federal area. See App., *infra*, 49a-52a. In the Hawaii Supreme Court's view, the inherently federal area of interstate pollution covers only claims where "the source of the injury * * * is pollution traveling from one state to another," not "failure to warn and deceptive promotion." *Id.* at 50a, 52a. But the complaint in *City of New York* likewise alleged that the defendants' promotion and marketing of their products caused injury by increasing greenhouse-gas emissions. See 993 F.3d at 86-87. The Second Circuit nevertheless concluded that the plaintiff was seeking relief "precisely *because* fossil fuels emit greenhouse gases" and thereby exacerbate climate change, and it thus declined to allow the plaintiff to "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Id.* at 91.

3. The decision below is also inconsistent with the decisions of two other federal courts of appeals that have

held that the law of one State cannot govern claims seeking redress for injuries allegedly caused by interstate pollution emanating from another State.

a. In *Illinois* v. *City of Milwaukee* (*Milwaukee III*), 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985), the State of Illinois filed nuisance claims under federal and state common law against a municipality for allegedly polluting Lake Michigan. While the action was pending, Congress enacted comprehensive amendments to the Clean Water Act, and this Court held that those amendments had displaced the remedy previously available under federal common law. See *Milwaukee II*, 451 U.S. at 317-319.

On remand from this Court, the Seventh Circuit faced the question whether Illinois's state-law claims could proceed in light of the displacement of federal common law. See 731 F.2d at 406. The Seventh Circuit held that they could not. As the Seventh Circuit explained, under this Court's precedents, "the basic interests of federalism and the federal interest in a uniform rule of decision in interstate pollution disputes required the application of federal law." *Id.* at 407. Although Congress had displaced the cause of action previously available under federal common law, the court reasoned that the displacement "did nothing to undermine" the "reasons why the [S]tate claiming injury cannot apply its own state law to out-of-state discharges." *Id.* at 410. The court thus held that "federal law must govern * * * except to the extent that the [Clean Water Act] authorizes resort to state law." *Id.* at 411. Because Congress had not preserved state-law claims related to out-of-state sources, the Seventh Circuit determined that federal law precluded Illinois's claims. See *id.* at 413.

b. The Fourth Circuit reached a similar result in *North Carolina ex rel. Cooper* v. *Tennessee Valley Authority*, 615 F.3d 291 (2010). There, the State of North Carolina sued the Tennessee Valley Authority (TVA) over emissions from TVA plants in Alabama and Tennessee. See *id.* at 296. The district court found that the emissions created a public nuisance under North Carolina law and entered an injunction in the State's favor. See *ibid.*

The Fourth Circuit reversed. It reasoned that the "comprehensive" system of federal statutes and regulations governing air pollution left little room for nuisance actions under state law, and it concluded that North Carolina was improperly seeking to "appl[y] home state law extraterritorially." 615 F.3d at 296, 298. Applying this Court's decision in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Fourth Circuit concluded that the claims could proceed only under the law of the States in which the TVA plants were located. See 615 F.3d at 308-309; see also *Merrick* v. *Diageo Americas Supply, Inc.*, 805 F.3d 685, 692 (6th Cir. 2015) (agreeing that *Ouellette*'s interpretation of the Clean Water Act's saving clauses applies to the Clean Air Act's saving clauses); *Bell* v. *Cheswick Generating Station*, 734 F.3d 188, 196-197 (3d Cir. 2013) (same), cert. denied, 572 U.S. 1149 (2014); *Freeman* v. *Grain Processing Corp.*, 848 N.W.2d 58, 80 (Iowa) (same), cert. denied, 574 U.S. 1026 (2014); *Brown-Forman Corp.* v. *Miller*, 528 S.W.3d 886, 892-893 (Ky. 2017) (same).

c. Although *Milwaukee III* and *Cooper* did not involve claims seeking redress for injuries allegedly caused by interstate greenhouse-gas emissions, both cases reflect the broader principle that state law can govern claims seeking redress for interstate pollution only to the extent permitted by federal statute.

The Hawaii Supreme Court's decision is inconsistent with that principle. The Hawaii Supreme Court concluded that, after the statutory displacement of any remedy under federal common law, state law *presumptively* governs any lawsuit seeking redress for interstate emissions. Indeed, the court specifically rejected the Seventh Circuit's decision in *Milwaukee III* on the ground that it "ignores the presumption that state laws and claims are not preempted absent 'a clear and manifest purpose of Congress' to do so." App., *infra*, 42a n.9 (citation omitted).

As a result, not only does the Hawaii Supreme Court's decision squarely conflict, on materially identical claims, with the decision in *City of New York*; it also cannot be reconciled with the decisions in *Milwaukee III* and *Cooper*. In light of that disagreement, further review is plainly warranted.

B. The Decision Below Is Incorrect Under This Court's Precedents

Respondents seek to impose damages on petitioners for injuries allegedly caused by the effect of interstate and international greenhouse-gas emissions on global climate change. Those claims fall squarely within the inherently federal areas of interstate pollution and foreign affairs and cannot proceed under state law. The Hawaii Supreme Court's contrary holding was incorrect and conflicts with this Court's precedents.

1. Although state law is presumptively competent to govern a wide variety of issues in our federal system, there are certain narrowly defined areas in which "our federal system does not permit the controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). In such "inher-

ently federal areas," "no presumption against pre-emption obtains." *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001).

For over a century, this Court has held that interstate pollution is one of the few inherently federal areas necessarily governed by federal law. For example, in *Ouellette*, the Court stated that "the regulation of interstate water pollution is a matter of federal, not state, law." 479 U.S. at 488 (citation omitted); see *id.* at 492. And in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), the Court reiterated that "air and water in their ambient or interstate aspects" are "meet for federal law governance." *Id.* at 421, 422; see *City of New York*, 993 F.3d at 91 (compiling additional cases).

That rule emanates from "the Constitution's structure and the principles of sovereignty and comity it embraces." *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 376 (2023) (internal quotation marks and citation omitted). Under Article IV, Section 3, each State is "equal to each other in power, dignity, and authority." *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911). And each State's "equal dignity and sovereignty" implies "certain constitutional limitations on the sovereignty of all of its sister States." *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1497 (2019) (internal quotation marks, alterations, and citation omitted).

One such limitation is that "[n]o State can legislate except with reference to its own jurisdiction," *Bonaparte* v. *Appeal Tax Court*, 104 U.S. 592, 594 (1882), which is "coextensive with its territory," *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336, 387 (1818). The equality of the States also "implicitly forbids" States from applying their own laws to resolve "disputes implicating their conflicting rights." *Hyatt*, 139 S. Ct. at 1498 (alteration and citations omitted).

Allowing the law of one State to govern disputes regarding pollution emanating from another State would violate the "cardinal" principle that "[e]ach [S]tate stands on the same level with all the rest," by permitting one State to impose its law on other States and their citizens. *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). Federal law must govern such controversies because they "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. And because "borrowing the law of a particular State would be inappropriate" to resolve such interstate disputes, federal law must govern. *American Electric Power*, 564 U.S. at 422.

2. In the absence of federal legislation governing issues of interstate pollution, this Court held that rules developed by the federal courts—federal common law—would govern lawsuits seeking redress for injuries allegedly caused by interstate pollution. See, *e.g.*, *American Electric Power*, 564 U.S. at 420-423; *Milwaukee I*, 406 U.S. at 103. But in the wake of the enactment of the Clean Air Act and Clean Water Act, this Court held that Congress has displaced any previously available causes of action under federal common law. See *American Electric Power*, 564 U.S. at 424; *Milwaukee II*, 451 U.S. at 313-314.

This Court's decision in *Ouellette* explains the limited role of state law after the displacement of federal common law by a comprehensive statutory scheme in an inherently federal area of regulation. There, the Court held that, in light of the "pervasive regulation" of the Clean Water Act and "the fact that the control of interstate pollution is primarily a matter of federal law," the only permissible state-law actions seeking redress for interstate water pollution are "those specifically preserved by the Act." 479 U.S. at 492 (citation omitted). The Court proceeded to conclude that the Clean Water Act preempts claims under any

State's law other than the law of the State in which the source of the pollution was located. See *id.* at 487-498.

As the Court explained, the imposition of liability by a downstream State would cause an upstream source of pollution to "change its methods of doing business and controlling pollution to avoid the threat of ongoing liability," regardless of whether that source complied with federal law or the law of the source State. *Ouellette*, 479 U.S. at 495. Such claims would thus "circumvent" and "disrupt" the careful "balance of interests" struck by the Clean Water Act—bypassing the "delineation of authority" adopted by Congress, through which the roles of "both the source and affected States" are "carefully define[d]." *Id.* at 494-495, 497. The Court reasoned that "[i]t would be extraordinary for Congress, after devising an elaborate * * * system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497. The Court thus interpreted the Clean Water Act's saving clauses to permit state-law actions only under the law of the State in which the source of pollution is located. See *id.* at 495-497.

3. The foregoing precedents lead to a straightforward result here: federal law, including our constitutional structure and the Clean Air Act, precludes respondents' state-law claims seeking redress for interstate emissions.

Respondents' theory of liability is that petitioners' fossil-fuel products are "hazardous" because they "cause or exacerbate global warming and related consequences," and that petitioners acted wrongfully by promoting those products and allegedly taking actions to "conceal[] the[ir] hazards" and prevent "the[ir] regulation." Am. Compl. 101-102. Respondents are seeking relief in the form of damages and equitable remedies for physical harms allegedly caused by global climate change, including "sea level rise, drought, extreme precipitation events, extreme heat

events, and ocean acidification." *Id.* at 102; see *id.* at 105, 106, 108-109, 111, 113, 114-115. The "gravamen" of respondents' complaint, see *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 635 (2012) (citation omitted), is thus that petitioners' conduct increased the worldwide use of fossil fuels, resulting in increased global greenhouse-gas emissions, which contributed to global climate change and resulted in localized physical effects in Hawaii.

Those claims fall squarely under the principle that federal law governs claims seeking redress for interstate air and water pollution. Respondents allege that their injuries are caused by the interstate and international emissions of greenhouse gases over many decades. Respondents' requested relief—including damages, see, *e.g.*, *Kurns*, 565 U.S. at 637—is designed not only to remedy injuries allegedly caused by those emissions but to regulate worldwide activities producing those emissions. Respondents are simply attempting to recover by moving up one step in the causal chain and suing the fuel producers rather than the emitters themselves (which include the vast majority of the world's population).

As the Second Circuit recognized, an attempt to repackage these claims in terms of alleged misrepresentations is merely "[a]rtful pleading." *City of New York*, 993 F.3d at 91. Respondents are still alleging injury caused by interstate and international emissions, and the only way petitioners could have avoided liability would have been to take actions designed to reduce those emissions. Respondents thus cannot escape the conclusion that their claims fall within the inherently federal area of interstate air pollution.

To be sure, if respondents attempted to proceed under federal common law, the Clean Air Act would foreclose relief with respect to interstate emissions. See App., *infra*,

39a-44a. But the congressional displacement of federal common law does not open the door to state-law claims unless the Clean Air Act permits them.

The Clean Air Act does not permit state-law claims based on emissions emanating from another State. Instead, it provides the Environmental Protection Agency with authority to regulate greenhouse-gas emissions from stationary sources, see *American Electric Power*, 564 U.S. at 424-425; see also 42 U.S.C. 7411(b), (d), and to set greenhouse-gas emissions standards for cars, trains, airplanes, motorcycles, and other engines and equipment. See 42 U.S.C. 7521(a)(1)-(2), 7521(a)(3)(E), 7547(a)(1), (5), 7571(a)(2)(A). EPA has relied on its statutory authority to regulate a range of sources of greenhouse-gas emissions, including by setting standards for trucks and passenger vehicles, see 40 C.F.R. 86.1818-12, 86.1819-14, and by limiting emissions of methane from crude-oil and natural-gas operations—including from facilities operated by some petitioners. See 87 Fed. Reg. 74,702 (Dec. 6, 2022).

Although the Clean Air Act has two saving clauses, see 42 U.S.C. 7416, 7604(e), they are materially identical to the Clean Water Act's saving clauses and thus permit actions under state law only to the extent that the plaintiff is proceeding under the law of the State in which the source of the pollution is located. See 33 U.S.C. 1365(e), 1370; *City of New York*, 993 F.3d at 99-100; *Merrick*, 805 F.3d at 692; *Bell*, 734 F.3d at 196-197; *Cooper*, 615 F.3d at 308-309; cf. *Ouellette*, 479 U.S. at 487-498. Of course, that is impossible here, where the alleged mechanism of respondents' injuries is the combined effect of all greenhouse-gas emissions worldwide. Federal law thus precludes respondents' state-law claims. Indeed, in light of the breadth of the Clean Air Act's governance of greenhouse-gas emissions, respondents' state-law claims would

be foreclosed even if a presumption against preemption applied. Contra App., *infra*, 53a-66a.

4. Respondents' claims based on international emissions cannot proceed under Hawaii law either. As the Court has explained, there is "no question" that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted). After all, it was a "concern for uniformity in this country's dealings with foreign nations" that "animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Ibid.* (citation omitted). The Constitution thus bestows broad power on the federal political branches to regulate foreign affairs, and it prohibits States from engaging in certain foreign-affairs-related conduct. See U.S. Const. Art. I, §§ 8, 10; U.S. Const. Art. II, §§ 2-3. In turn, state laws "must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968).

Because respondents seek relief for climate-change-related harms, international emissions—which represent the overwhelming majority of total anthropogenic emissions—are the primary causal mechanism underlying their alleged injuries. "Greenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *American Electric Power*, 564 U.S. at 422 (internal quotation marks and citation omitted).

Foreign-policy principles preclude the application of Hawaii law to regulate international emissions. As the Second Circuit explained in *City of New York*, holding petitioners liable for such emissions would "affect the price and production of fossil fuels abroad"; "bypass the various

diplomatic channels that the United States uses to address this issue"; and "sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." 993 F.3d at 103. Accordingly, respondents can no more seek relief under Hawaii law for injuries allegedly caused by international emissions than for those allegedly caused by interstate emissions.

5. The Hawaii Supreme Court's contrary decision fundamentally misunderstands the ability of state law to operate in inherently federal areas and the nature of respondents' theory of liability.

The central premise of the decision below is that, when Congress enacts a statute that displaces federal common law, state law presumptively governs the issues previously governed by federal common law. But that logic ignores the reason why federal common law governed in the first place. In cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," only federal law can apply, because "our federal system does not permit the controversy to be resolved under state law" at all. *Texas Industries*, 451 U.S. at 641. In other words, where federal common law applies, it is precisely because "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

As the Seventh Circuit recognized in *Milwaukee III*, the displacement of federal common law by federal statutory law does "nothing to undermine" the "reasons why the [S]tate claiming injury cannot apply its own state law to out-of-state discharges." 731 F.2d at 410. State law could not govern interstate and international emissions before Congress acted, and the application of state law to such claims remains inconsistent with our constitutional structure after statutory displacement, even if federal law provides no remedy for the particular claim alleged. Were

it otherwise, Congress's decision to address an inherently federal issue directly by statute, so as to displace *federal* common-law remedies, would result in *state* common-law remedies suddenly becoming available. As the Second Circuit put it, that result is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98-99.

The Hawaii Supreme Court concluded that this Court's instructions for the remand in *American Electric Power* supported its analysis. See App, *infra*, 46a-47a. Quite the contrary. After holding that the Clean Air Act displaced any federal-common-law claim seeking abatement of defendants' greenhouse-gas emissions, the Court remanded for the lower courts to consider the plaintiffs' parallel state-law claims. *American Electric Power*, 564 U.S. at 429. In so doing, the Court directed that, "[i]n light of [its] holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Ibid.* The Court cited *Ouellette* for the proposition that "the Clean Water Act does not preclude aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Ibid.* (citation omitted).

Those instructions support petitioners' position, not respondents'. As already explained, see pp. 23-24, the Court held in *Ouellette* that, because of the comprehensive nature of the Clean Water Act and the fact that "control of interstate pollution is primarily a matter of federal law," "the only state suits that remain available are those specifically preserved by the Act": namely, suits under the law of the source State. 479 U.S. at 492. In *American Electric Power*, the Court was thus directing the lower courts to apply the same analysis as in *Ouellette*—the same analysis petitioners are advancing here.

The Hawaii Supreme Court separately concluded that respondents' claims did not fall within the inherently federal area of interstate pollution, because "the source of the injury" alleged by respondents is not "pollution traveling from one state to another" but instead "failure to warn and deceptive promotion." App., *infra*, 50a, 52a. That is a false dichotomy. While respondents' theory of tort liability may invoke failure to warn and deceptive promotion, the source of injury is most certainly interstate and international emissions.

The complaint is candid on this point: respondents repeatedly allege that defendants' conduct led to increased greenhouse-gas emissions worldwide, which caused or exacerbated global climate change and thereby caused localized harms in Hawaii. See Am. Compl. 105, 106, 108-109, 111, 113, 114-115. Respondents nowhere alleged harm from petitioners' alleged deceptive conduct other than through the mechanisms of increased emissions and global climate change. When faced with the same argument, the Second Circuit rightly held that a plaintiff cannot "have it both ways" by "disavowing any intent to address emissions" when convenient while simultaneously "identifying such emissions as the singular source of the [alleged] harm." *City of New York*, 993 F.3d at 91. The Hawaii Supreme Court also improperly failed to address the international aspects of respondents' claims at all. The Hawaii Supreme Court erred by holding that respondents' claims, seeking redress for interstate and international greenhouse-gas emissions, could proceed under Hawaii law.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

The question presented in this case is recurring and has enormous legal and practical importance. And this

case, which cleanly presents the question, may be the Court's only opportunity to decide it for years to come.

1. The stakes in this case could not be higher. Over two dozen cases have been filed by various States and municipalities across the country seeking to impose untold damages on energy companies for the physical and economic effects of climate change. New cases continue to be filed. See, *e.g.*, *Makah Indian Tribe* v. *Exxon Mobil Corp.*, No. 23-2-25216-1 SEA (Wash. Super. Ct. filed Dec. 20, 2023); *Shoalwater Bay Indian Tribe* v. *Exxon Mobil Corp.*, No. 23-2-25215-2 SEA (Wash. Super. Ct. filed Dec. 20, 2023); *California* v. *Exxon Mobil Corp.*, No. CGC-23609134 (Cal. Super. Ct. filed Sept. 15, 2023); *County of Multnomah* v. *Exxon Mobil Corp.*, No. 23CV25164 (Or. Cir. Ct. filed June 22, 2023).

Those cases present a serious threat to one of the Nation's most vital industries. As the federal government previously stated in a similar climate-change case, "federal law and policy has long declared that fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." U.S. En Banc Br. at 10, *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020) (No. 18-16663) (internal quotation marks and citation omitted). The current administration has similarly made clear that the Nation's approach to fossil-fuel emissions is "vital in our discussions of national security, migration, international health efforts, and in our economic diplomacy and trade talks." Press Statement, Antony J. Blinken, U.S. Secretary of State, *The United States Officially Rejoins the Paris Agreement* (Feb. 19, 2021). Indeed, in an amicus brief to this Court, two former chairmen of the Joint Chiefs of Staff recently explained how the federal

government had "actively encouraged domestic exploration and production of oil and gas" as products "critical to national security, economic stability[,] and the military preparedness of the United States." Myers & Mullen Br. at 3, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 593 U.S. 230 (2021) (No. 19-1189).

The approach adopted by the Hawaii Supreme Court not only contravenes this Court's precedents but would also permit suits alleging injuries pertaining to global climate change to proceed under the laws of all 50 States—a blueprint for chaos. As the federal government explained in its brief in *American Electric Power*, "virtually every person, organization, company, or government across the globe * * * emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries," giving rise to claims from "almost unimaginably broad categories of both potential plaintiffs and potential defendants." TVA Br. at 11, 15 (No. 10-174). Out-of-state actors (including the nonresident energy companies here) would quickly find themselves subject to a "variety" of "vague" and "indeterminate" state-law standards, and States would be empowered to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-496. That could lead to "widely divergent results"—and potentially massive liability—if a patchwork of 50 different legal regimes applied. TVA Br. at 37, *American Electric Power*, *supra*. And that is especially true to the extent that a state court attempts to exercise jurisdiction expansively over any energy company that does business in the State.

2. This case is a suitable vehicle for reviewing the question presented. The question was fully briefed in, and passed on by, the Hawaii Supreme Court. And respondents' claims are representative of the claims being brought in parallel suits across the country, meaning that

resolution of the question presented here will have immediate impact elsewhere.

The time for review is now. Litigation on the merits in these cases is beginning in earnest, with discovery and pretrial proceedings underway in state courts. A decision from this Court now would provide clarity on whether claims seeking relief for global climate change can proceed before state courts and parties spend significant effort and countless sums in litigation costs and before the energy industry is threatened with damages awards that could run into the billions of dollars. Absent the Court's review here, it could be years before the Court can decide this issue, after which point—if petitioners' arguments are ultimately upheld—state courts will have wasted years on complex litigation that should have been dismissed at the outset. The Court should grant certiorari here and resolve whether the state-law claims pressed in the climate-change cases are viable and may proceed on the merits in state courts across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

APPENDIX A

SUPREME COURT OF HAWAI'I

No. SCAP-22-429

CITY AND COUNTY OF HONOLULU;
HONOLULU BOARD OF WATER SUPPLY,
PLAINTIFFS-APPELLEES

v.

SUNOCO LP, ET AL.,
DEFENDANTS-APPELLANT

BHP GROUP LIMITED; BHP GROUP PLC,
DEFENDANTS-APPELLEES

Filed: October 31, 2023

BEFORE: RECKTENWALD, C.J., MCKENNA and EDDINS, J.J., Circuit Judge JOHNSON and Circuit Judge TONAKI, assigned by reason of vacancies.

OPINION

RECKTENWALD, Chief Judge.

I. INTRODUCTION

The City and County of Honolulu and the Honolulu Board of Water Supply (collectively, Plaintiffs) brought

suit against a number of oil and gas producers[1] (collectively, Defendants) alleging five counts: public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. Defendants appeal the circuit court's denial of their motions to dismiss for both lack of jurisdiction and failure to state a claim. We conclude that the circuit court properly denied both motions, and accordingly, this lawsuit can proceed.

Plaintiffs argue this is a traditional tort case alleging that Defendants engaged in a deceptive promotion campaign and misled the public about the dangers of using their oil and gas products. Plaintiffs claim their theory of liability is simple: Defendants knew of the dangers of using their fossil fuel products, "knowingly concealed and misrepresented the climate impacts of their fossil fuel products," and engaged in "sophisticated disinformation campaigns to cast doubt on the science, causes, and effects of global warming," causing increased fossil fuel consumption and greenhouse gas emissions, which then caused property and infrastructure damage in Honolulu. Simply put, Plaintiffs say the issue is whether Defendants misled the public about fossil fuels' dangers and environmental impact.

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[1] Defendants are: Sunoco LP, Aloha Petroleum, Ltd., Aloha Petroleum LLC, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Shell plc (f/k/a Royal Dutch Shell plc), Shell U.S.A. Inc. (f/k/a Shell Oil Company), Shell Oil Products Company LLC, Chevron Corporation, Chevron U.S.A. Inc., Woodside Energy Hawaii Inc. (f/k/a BHP Hawaii Inc.), BP plc, BP America Inc., Marathon Petroleum Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company. The circuit court dismissed BHP Group Limited and BHP Group plc—that dismissal was not appealed and is not before this court.

Defendants disagree. They say this is another in a long line of lawsuits seeking to regulate interstate and international greenhouse gas emissions, all of which have been rejected. Greenhouse gas emissions and global warming are caused by "billions of daily choices, over more than a century, by governments, companies, and individuals," and Plaintiffs "seek to recover from a handful of Defendants for the cumulative effect of worldwide emissions leading to global climate change and Plaintiffs' alleged injuries." They argue: (1) the circuit court lacked specific jurisdiction over the Defendants; (2) Plaintiffs' claims are preempted by federal common law, which in turn, was displaced by the Clean Air Act (CAA); and (3) alternatively, Plaintiffs' claims are preempted by the CAA.

We agree with Plaintiffs. This suit does not seek to regulate emissions and does not seek damages for interstate emissions. Rather, Plaintiffs' complaint "clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 233 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023) (characterizing a complaint brought against many of the same Defendants in this case alleging broadly the same counts, theory of liability, and injuries). This case concerns torts committed in Hawai‘i that caused alleged injuries in Hawai‘i.

Thus, Defendants' arguments on appeal fail. First, Defendants are subject to specific jurisdiction in Hawai‘i because: (1) Plaintiffs' allegations that Defendants misled consumers about fossil fuels products' dangers "arise out of" and "relate to" Defendants' contacts with Hawai‘i, i.e., Defendants' sale and marketing of those fossil fuel products in Hawai‘i, *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021); (2) it is

reasonable for Hawai‘i courts to exercise specific jurisdiction over Defendants, and doing so does not conflict with interstate federalism principles because Hawai‘i has a "significant interest[] . . . [in] 'providing [its] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" *see id.* at 1030 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)); and (3) the Supreme Court has never imposed a "clear notice" requirement, *see id.* at 1025.

Second, the CAA displaced federal common law governing interstate pollution damages suits; after displacement, federal common law does not preempt state law. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-24 (2011) ("*AEP*"); *Bd. Of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1260 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023) ("[T]he federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA."). We must only consider whether the CAA preempts state law. *AEP*, 564 U.S. at 429 ("[T]he availability *vel non* of a state lawsuit depends inter alia on the preemptive effect of the [CAA].").

Third, the CAA does not preempt Plaintiffs' claims. The CAA does not occupy the entire field of emissions regulation. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015) (determining that there is "no evidence that Congress intended that all emissions regulation occur through the [CAA's] framework"). There is no "actual conflict" between Plaintiffs' state tort law claims and the CAA's overriding federal purpose or objective. *See In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.* (*MTBE*), 725 F.3d 65, 101 (2d Cir. 2013) (concluding that CAA did not preempt state tort law

claims relating to a gasoline additive where it was possible to comply with both state and federal law).

Therefore, we affirm the circuit court's orders denying Defendants' motion to dismiss for lack of jurisdiction and motion to dismiss for failure to state a claim.

II. BACKGROUND

A. Circuit Court Proceedings

1. Original complaint, removal, and remand

In March 2020, Plaintiffs filed their original complaint in the Circuit Court for the First Circuit alleging that for decades, Defendants knew their fossil fuel products caused greenhouse gas emissions and global warming, but they failed to warn consumers of the threat, and actively worked to discredit scientific evidence that supported the existence of global warming. In April 2020, Defendants removed the case to federal court. Defendants argued that removal jurisdiction was appropriate because federal common law governed, and the CAA and other federal statutes preempted Plaintiffs' claims.[2]

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[2] Defendants asserted eight grounds for federal jurisdiction: (1) the Outer Continental Shelf Lands Act (OCSLA) because "[a] significant portion of oil and gas exploration and production" occurs on the shelf; (2) the federal officer removal statute, *see* 28 U.S.C. § 1442(a)(1), because oil and gas production "took place under the direction of a federal officer to support critical national security, military, and other core federal government operations;" (3) federal enclave jurisdiction because some oil production occurred on federal enclaves like the Outer Continental Shelf; (4) federal common law, which defendants argue governs Plaintiffs' claims; (5) federal question jurisdiction because Plaintiffs' claims "necessarily raise[] federal questions under the [CAA], EPA and other federal regulations and international treaties on climate change to which the United States is a party;" (6) federal preemption by the CAA and other related statutes; (7) bankruptcy jurisdiction; and (8) admiralty jurisdiction.

On Plaintiffs' motion, the federal district court remanded the case to state circuit court. The federal court explained that the Ninth Circuit, in *City of Oakland v. BP PLC*, 969 F.3d 895, 906-08 (9th Cir. 2020), recently rejected Defendants' federal-common-law, federal-preemption, and federal-question-jurisdiction arguments. *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *2 n.8 (D. Haw. Feb. 12, 2021). The court explained that the "principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims." *Id.* at *1. "More specifically, contrary to Defendants' contentions, Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels." *Id.* Further, Plaintiffs' nuisance claims arise "not through [Defendants'] 'fossil fuel production activities,' . . . but through their alleged *failure to warn* about the hazards of using their fossil fuel products and *disseminating* misleading information about the same." *Id.* at *3.

On appeal, the Ninth Circuit affirmed the district court's order remanding the case to state circuit court. *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1113 (9th Cir. 2022). Defendants filed an application for writ of certiorari to the U.S. Supreme Court, which was denied. *Sunoco LP v. City & Cnty. of Honolulu*, 143 S. Ct. 1795 (2023) (denying application for certiorari).

2. First Amended Complaint

In its First Amended Complaint (Complaint), Plaintiffs added the Board of Water Supply (BWS) as a plaintiff and amended certain allegations to incorporate damages specific to BWS. Plaintiffs also added an allegation that

the wrongful conduct giving rise to the second cause of action (private nuisance) was committed with actual malice, permitting punitive damages.

First, Plaintiffs allege that human activity is causing the atmosphere and oceans to warm, sea levels to rise, snow cover to diminish, oceans to acidify, and hydrologic systems to change. Greenhouse gas emissions, which are largely a byproduct of combustion of fossil fuels, are the chief cause of this warming. The accumulation of greenhouse gases in the atmosphere has adverse impacts on the earth, including: warming of the average surface temperature, resulting in increasingly frequent heatwaves; sea level rise; flooding of land and infrastructure; changes to the global climate, including longer periods of drought; ocean acidification; increased frequency of extreme weather; changes to ecosystems; and impacts on human health associated with extreme weather, decreased air quality, and vector-borne illnesses.

Next, Plaintiffs allege that Defendants knew about the dangers associated with their products because they, or their predecessors in interest, were members of the American Petroleum Institute (API). Beginning in the 1950s, scientists warned the API that fossil fuels were causing atmospheric carbon dioxide levels to increase. In 1965, President Lyndon B. Johnson's Scientific Advisory Committee warned of global warming and the catastrophic impacts that could result. The API President related these findings to industry leaders at the association's annual meeting that year. Plaintiffs allege that by 1965, industry leaders were aware of the global warming phenomenon caused by their products. Defendants continued to gather information on the climate change impacts of their products throughout the 1960s, 1970s, and 1980s.

During the 1980s, many of the defendants in the present case formed their own research units focused on climate modeling. API provided a forum where Defendants shared research efforts and corroborated each other's findings. Plaintiffs allege that by 1988, Defendants "had amassed a compelling body of knowledge about the role of anthropogenic greenhouse gases, and specifically those emitted from the normal use of Defendants' fossil fuel products, in causing global warming and its cascading impacts[.]"

Plaintiffs allege that around 1990, public discussion shifted from gathering information on climate change to international efforts to curb emissions. At this point, Defendants—rather than collaborating with the international community to help curb emissions—"embarked on a decades-long campaign designed to maximize continued dependence on their products and undermine national and international efforts to rein in greenhouse gas emissions." Defendants began a public relations campaign to cast doubt on the science connecting global climate change to their products. Defendants promoted their products through misleading advertisements and funding "climate change denialist organizations."

According to Plaintiffs, Defendants' efforts to cast doubt on climate science continued throughout the 1990s and 2000s. Defendants "bankroll[ed]" scientists with "fringe opinions" in order to create a false sense of disagreement in the scientific community. Defendants' own scientists, experts, and managers had previously acknowledged climate change's effects. At the same time, Defendants worked to change public opinion over climate change's existence and avoid regulation. Defendants funded dozens of think tanks, front groups, and dark

money foundations pushing climate change denial, with ExxonMobil alone spending almost $31 million.

Plaintiffs allege that, while Defendants publicly cast doubt on climate change, they simultaneously invested in operational changes to prepare for its adverse consequences. For example, Defendants allegedly raised offshore oil platforms to protect against rising sea levels, reinforced them against storms, and developed new technologies for extracting oil in places previously blocked by polar sea ice.

Defendants now claim they are investing in renewable energy, but Plaintiffs claim these statements are a pretense. Defendants' advertisements and promotional materials do not disclose the risks of their products, and they continue to ramp up fossil fuel production, including new fossil fuel development.

Plaintiffs allege that they have sustained damages caused by Defendants' failure to warn and deceptive promotion of dangerous products. Defendants' conduct "is a substantial factor in causing global warming," which has had adverse effects on Plaintiffs. These effects include sea level rise (causing flooding, erosion, and beach loss); more extreme weather events; ocean warming (causing destruction of coral reefs); loss of endemic species; and diminished availability of fresh water. Because of Defendants' conduct, Plaintiffs suffered damage to their facilities and property, incurred increased planning and preparation costs to adapt communities to global warming's effects, collected less tax revenue due to impacts on tourism, and suffered the cost of public health impacts such as an increase in heat-related illnesses. Plaintiffs have already suffered damage to beach parks, roads, and drain way infrastructure from flooding and sea level rise.

Plaintiffs bring five counts under state law: public nuisance, private nuisance, strict-liability failure to warn, negligent failure to warn, and trespass. All counts rely on the same theory of liability: Defendants knew about the dangers of using their fossil fuel products, failed to warn consumers about those known dangers, and engaged in a sophisticated disinformation campaign to increase fossil fuel consumption, all of which exacerbated the impacts of climate change in Honolulu.

3. Defendants' joint motions to dismiss

Defendants filed two motions to dismiss, the first for lack of jurisdiction and the second for failure to state a claim. In their first motion to dismiss, Defendants argued the circuit court did not have specific jurisdiction because

> "(1) the Complaint avers, as it must, that Plaintiffs' alleged injuries arise out of and relate to *worldwide* conduct by countless actors, not Defendants' alleged contacts with Hawai'i; (2) Defendants did not have 'clear notice' that as a result of their activities in Hawai'i they could be sued here for activity occurring around the world; and (3) exercising jurisdiction would be constitutionally unreasonable."

In their second motion to dismiss, Defendants argued: (1) Plaintiffs' claims are interstate pollution claims, which must be brought under federal common law, not state common law, and that the CAA preempts interstate pollution federal common law claims; or alternatively, (2) Plaintiffs' state common law claims are preempted by the CAA. Plaintiffs opposed.

At the motion hearing, Plaintiffs summarized their theory of liability, which is central to the jurisdictional and preemption issues on appeal. Plaintiffs explained that de-

fendants "concealed and misrepresented the climate impacts of their products, using sophisticated disinformation campaigns to discredit the science of global warming." Defendants also allegedly misled "consumers and the rest of the world about the dangers of using their products as intended in a profligate manner." Thus, "these deceptive commercial activities . . . inflated the overall consumption of fossil fuels, which increased greenhouse gas emissions, which exacerbated climate change, which created the hazardous environmental conditions" that have allegedly injured Plaintiffs.

4. The circuit denied Defendants' motions to dismiss

The circuit court subsequently denied both motions.[3]

The circuit court denied Defendants' motion to dismiss for lack of jurisdiction, concluding that it had specific jurisdiction because Plaintiffs' claims arose out of and related to Defendants' sales and marketing contacts in Hawai'i. *See, e.g., Ford Motor*, 141 S. Ct. at 1025. The circuit court also determined it would be reasonable to exercise specific jurisdiction over Defendants. *See Hawaii Forest & Trial Ltd. v. Davey*, 556 F. Supp. 2d 1162, 1168-72 (D. Haw. 2008).

The circuit court also denied Defendants' joint motion to dismiss for failure to state a claim. The court explained that the standard for the review of a motion to dismiss "is generally limited to the allegations in the complaint, which must be deemed true for purposes of the motion," *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai'i 251, 266, 151 P.3d 732, 747 (2007), but courts are "not required to accept conclusory allegations," *Civ.*

[3] The Honorable Jeffrey P. Crabtree presided.

Beat L. Ctr. for the Pub. Int., Inc. v. City & Cnty. of Honolulu, 144 Hawai'i 466, 474, 445 P.3d 47, 55 (2019). And "the issue is not solely whether the allegations as currently pled are adequate." Rather, "[a] complaint should not be dismissed for failure to state a claim 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 under any set of facts *or any alternative theory*." (Citations omitted).

The circuit court first concluded that *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), cited by Defendants, "has limited application to this case, because the claims in the instant case are both different from and were not squarely addressed in [that] opinion." The circuit court then determined that federal common law did not govern Plaintiffs' state law claims. The circuit court also determined that Plaintiffs' claims were not preempted by the CAA.

The circuit court also rejected Defendants' argument that a large damages award in this case could act as a de facto emissions regulation because an unfavorable judgment would "not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation." The circuit court concluded:

> A broad doctrine that damages awards in tort cases impermissibly regulate conduct and are thereby preempted would intrude on the historic powers of state courts. Such a broad "damages = regulation = preemption" doctrine could preempt many cases common in state court, including much class action litiga-

> tion, products liability litigation, claims against pharmaceutical companies, and consumer protection litigation.

Last, the circuit court concluded that it was appropriate for state common law to govern Plaintiffs' claims:

> Defendants argue (and the *City of New York* opinion expresses) that climate change cases are based on "artful pleading." Respectfully, we often see "artful pleading" in the trial courts, where new conduct and new harms often arise:
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> > The argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law. Assuming that it is true, that fact is unpersuasive unless the litigation largely will be spurious and harassing. Undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy.
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> *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 377 (1968) (opinion by Levinson, J.)[.] Here, the causes of action may seem new, but in fact are common. They just seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such new circumstances.

The circuit court then granted Defendants leave to file an interlocutory appeal.

B. Appellate Proceedings

Defendants timely filed their joint notice of interlocutory appeal from the circuit court's Order Denying Defendants' Joint Motion to Dismiss for Failure to State a Claim and its Order Denying Defendants' Joint Motion to Dismiss for Lack of Personal Jurisdiction. This court subsequently granted Plaintiffs' application for transfer from the Intermediate Court of Appeals.

On appeal, Defendants frame this case as one where Plaintiffs "seek[] to hold Defendants liable under Hawai'i tort law for harms allegedly attributable to global climate change." This case should be dismissed because "these emissions flow from billions of daily choices, over more than a century, by governments, companies, and individuals about what types of fuels to use, and how to use them." Plaintiffs "seek to recover from a handful of Defendants for the cumulative effect of worldwide emissions leading to global climate change and Plaintiffs' alleged injuries."

Plaintiffs dispute Defendants' characterization of the Complaint. Plaintiffs argue that the Complaint does "not ask for damages for *all* effects of climate change; rather, [it] seek[s] 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." Plaintiffs contend their Complaint is "straightforward": "Defendants knowingly concealed and misrepresented the climate impacts of their fossil fuel products" and that "deception inflated global consumption of fossil fuels, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous conditions in Hawai'i." Despite Defendants' contention that this suit seeks to regulate fossil fuel production, "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."

Defendants raise three points of error: (1) the circuit court lacked specific jurisdiction over the Defendants; (2) Plaintiffs' claims are preempted by federal common law, which in turn, was displaced by the CAA; and (3) alternatively, Plaintiffs' claims are preempted by the CAA.

First, Defendants argue that specific jurisdiction does not attach because: (1) Plaintiffs cannot show that their claims "arise out of or relate to," *Ford Motor*, 141 S. Ct. at 1025, Defendants' contacts with Hawai'i because Plaintiffs' alleged injuries did not "occur in-state as a result of the use of the product in-state;" (2) Defendants' in-state conduct "did not reasonably place them on clear notice" they would be subject to specific jurisdiction in Hawai'i as required by the federal Due Process Clause; and (3) the exercise of "personal jurisdiction here would conflict with federalism principles" limiting state jurisdiction in areas of national interest.

Plaintiffs dispute Defendants' arguments, contending: (1) the U.S. Supreme Court explained in *Ford Motor* that it had "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," *id.* at 1026; (2) Defendants had fair warning they could be haled into Hawai'i courts, and *Ford Motor* did not create a "clear notice" requirement, *id.* at 1027; and (3) Plaintiffs' suit does not interfere with national energy policy because Defendants can continue to produce as much oil as they want as long as they stop their tortious marketing conduct.

Second, Defendants argue that Plaintiffs' state law claims are governed by federal common law "because they seek redress for harms allegedly caused by interstate and international emissions." Relying on *City of New York*, Defendants say that federal common law preempts Plaintiffs' state common law tort claims, and in turn, the CAA preempts the federal common law. *See City of New York*, 993 F.3d at 93-96. Defendants contend that "[o]nce this court correctly concludes that Plaintiffs' claims are necessarily governed by federal law, it follows that Plaintiffs also have no remedy under federal law."

Plaintiffs counter that the CAA displaced federal common law governing interstate pollution, and that law "no longer exists." *Boulder*, 25 F.4th at 1260; *see also AEP*, 564 U.S. at 423. Plaintiffs claim that "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 AEP*, 564 U.S. at 429 ("[T]he availability . . . of a state lawsuit depends . . . on the preemptive effect of the [CAA]."). According to Plaintiffs, the proper preemption analysis requires examining only whether the CAA preempts their state law claims. The court need not consider first whether displaced federal common law preempts Plaintiffs' state claims, and second whether displaced federal common law is preempted by the CAA.

Third and finally, Defendants alternatively argue that the CAA preempts Plaintiffs' claims. Defendants say Plaintiffs seek damages for injuries allegedly caused by out-of-state sources' emissions. Relying on *N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303, 306 (4th Cir. 2010), Defendants contend that the "CAA preempts state-law claims concerning out-of-state emissions." Plaintiffs counter that the "CAA does not concern

itself in any way with the acts that trigger liability under [its] Complaint, namely: the use of deception to promote the consumption of fossil fuel products." They say the CAA regulates "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), not the traditional state tort claims for failure to warn and deceptive promotion.

III. STANDARD OF REVIEW

A. Motion To Dismiss

> A trial court's ruling on a motion to dismiss is reviewed de novo. The court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if 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.

Delapinia v. Nationstar Mortg. LLC, 150 Hawai'i 91, 97-98, 497 P.3d 106, 112-13 (2021) (quoting *Goran Pleho, LLC v. Lacy*, 144 Hawai'i 224, 236, 439 P.3d 176, 188 (2019)).

B. Jurisdiction

"A trial court's determination to exercise personal jurisdiction is a question of law reviewable *de novo* when the underlying facts are undisputed." *Shaw v. N. Am. Title Co.*, 76 Hawai'i 323, 326, 876 P.2d 1291, 1294 (1994) (citing *Bourassa v. Desrochers*, 938 F.2d 1056, 1057 (9th Cir. 1991)). Plaintiffs "need make only a *prima facie* showing that: (1) [defendant's] activities in Hawai'i fall into a category specified by Hawai'i's long-arm statute, [Hawai'i Revised Statutes (HRS)] § 634-35; and (2) the application of

HRS § 634-35 comports with due process." *Id.* at 327, 876 P.3d at 1295 (citing *Cowan v. First Ins. Co. of Hawai'i*, 61 Haw. 644, 649, 608 P.2d 394, 399 (1980)). When the circuit court relies on pleadings and affidavits, without conducting an "'full-blown evidentiary hearing,'" the plaintiff's "'allegations are presumed true and all factual disputes are decided in [plaintiff's] favor.'" *Id.* (citations omitted).

C. Preemption

Questions of federal preemption "are questions of law reviewable de novo under the right/wrong standard." *Rodrigues v. United Pub. Workers, AFSCME Loc. 646, AFL-CIO*, 135 Hawai'i 316, 320, 349 P.3d 1171, 1175 (2015).

IV. DISCUSSION

We affirm the circuit court's orders denying Defendant's motions to dismiss. Similar to *Baltimore*, Plaintiffs' Complaint "clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." 31 F.4th at 233. While Plaintiffs' Complaint does reference global emissions repeatedly, "these references only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil-fuel products contribute to greenhouse gas pollution." *Id.* Plaintiffs do "not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* at 233-34.

As the circuit court explained:

> The court recognizes that nuisance, trespass, and failure to warn vary somewhat in terms of their specific elements. All of these claims, however, share the same basic structure of requiring that a defendant engage in tortious conduct that causes injury to a plaintiff. Moreover, as the court understands it, Plaintiffs are relying on the same basic theory of liability to prove each of their claims, namely: that Defendants' failures to disclose and deceptive promotion increased fossil fuel consumption, which—in turn—exacerbated the local impacts of climate change in Hawai‘i.

Because this is a traditional tort case alleging Defendants misled consumers and should have warned them about the dangers of using their products, Defendants' arguments fail. Defendants' contacts with Hawai‘i (selling oil and gas here) arise from and relate to Plaintiffs' claims (deceptive promotion and failure to warn about the dangers of using the oil and gas sold here). Defendants are alleged to have engaged in tortious acts in Hawai‘i and have extensive contacts in Hawai‘i, and it is therefore reasonable for Defendants to be haled into court here. Further, neither displaced federal common law nor the CAA preempts Plaintiffs' state-law tort claims.

A. Defendants Are Subject To Specific Jurisdiction In Hawai‘i

Specific jurisdiction attaches where (1) Defendants' activity falls under the State's long-arm statute, and (2) the exercise of jurisdiction comports with due process. *See Shaw*, 76 Hawai‘i at 327, 876 P.2d at 1295. As we recently explained, "the two-step inquiry may in fact be redundant" because Hawai‘i's long-arm statute "was adopted to expand the jurisdiction of the State's courts to the extent

permitted by the due process clause of the Fourteenth Amendment." *Yamashita v. LG Chem, Ltd.*, 152 Hawai'i 19, 21-22, 518 P.3d 1169, 1171-72 (2022), *opinion after certified question answered*, 62 F.4th 496 (9th Cir. 2023) (quoting *Cowan*, 61 Haw. at 649, 608 P.2d at 399). But while "this collapsed inquiry yields the same practical result as the two-step test" and is "not improper," "there is value in remembering that personal jurisdiction rests on both negative federal limits and positive state assertions of jurisdiction." *Id.* at 22, 518 P.3d at 1172. Accordingly, we engage in the two-step test outlined in *Yamashita*.

First, Defendants' activity in Hawai'i falls under the long-arm statute. Plaintiffs' Complaint alleges that Defendants conducted fossil fuel business in Hawai'i, committed torts in Hawai'i, and caused injury in Hawai'i. *See* HRS § 634-35(a)(1)-(2) (2016)[4] (persons subject to Hawai'i's personal jurisdiction when transact business or commit tort within state). Further, Defendants did not dispute below and do not dispute on appeal that their in-state activity falls under the long-arm statute.

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[4] HRS § 634-35, Hawai'i's long-arm statute, provides:

Acts submitting to jurisdiction. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, the person's personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of the acts:

(1) The transaction of any business within this State;

(2) The commission of a tortious act within this State;

(3) The ownership, use, or possession of any real estate situated in this State;

(4) Contracting to insure any person, property, or risk located within this State at the time of contracting.

Second, exercising specific jurisdiction over Defendants comports with due process. Specific jurisdiction comports with due process where: (1) defendants "purposefully avail[ed] [themselves] of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws"; (2) plaintiffs' claim "arises out of or relates to the defendant[s'] forum-related activities"; and (3) exercising specific jurisdiction "comport[s] with fair play and substantial justice, i.e. it must be reasonable." *Int. of Doe*, 83 Hawai'i 367, 374, 926 P.2d 1290, 1297 (1996). This three-part test is "commonly referred to as the minimum contacts test." *Greys Ave. Partners, LLC v. Theyers*, 431 F. Supp. 3d 1121, 1128 (D. Haw. 2020). "The minimum contacts test 'ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts[.]'" *Freestream Aircraft (Bermuda) Ltd. v. Aero L. Grp.*, 905 F.3d 597, 603 (9th Cir. 2018) (quoting *Burger King*, 471 U.S. at 475).

Defendants do not contest the first prong of the minimum contacts test—that they "purposefully avail[ed]" themselves of the forum. *See id.* Therefore, at issue is whether Plaintiffs' claims "arise out of or relate to" Defendants' Hawai'i contacts and whether the exercise of specific jurisdiction is reasonable. *Ford Motor*, 141 S. Ct. at 1025. Defendants further argue that, under *Ford Motor*, they did not have "clear notice" they could be subject to specific jurisdiction in Hawai'i. *Id.* at 1030 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

As set forth below, Defendants are subject to specific jurisdiction in Hawai'i because: (1) Plaintiffs' allegations that Defendants misled consumers about the dangers of using their products "arise out of" and "relate to" Defendants' contacts with Hawai'i, here Defendants' sale and

promotion of oil and gas in Hawai‘i, *id.* at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1786 (2017)); (2) it is reasonable for Hawai‘i courts to exercise specific jurisdiction over Defendants and doing so does not conflict with interstate federalism principles because Hawai‘i has a "significant interest[] [in] 'providing [its] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" *see id.* at 1030 (quoting *Burger King*, 471 U.S. at 473); and (3) the U.S. Supreme Court has never imposed a "clear notice" requirement, despite having the opportunity to do so, *see id.* at 1025.

Courts typically analyze jurisdictional contacts on a claim-by-claim basis. *See*, *e.g.*, *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274-75 (5th Cir. 2006). But courts "need not assess contacts on a claim-by-claim basis if all claims arise from the same forum contacts." *See*, *e.g.*, *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150-51 (Tex. 2013). Plaintiffs bring five claims: public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. Plaintiffs' claims all arise from the same alleged forum contacts for all Defendants—here, Defendants' products were transported, traded, distributed, promoted, marketed, refined, manufactured, sold, and/or consumed in Hawai‘i. Plaintiffs' claims also all arise from the same alleged acts—here, Defendants' deceptive promotion of and failure to warn about the dangers of using oil and gas. Accordingly, we examine all claims against all Defendants together. *See id.*

1. Plaintiffs' claims "arise out of relate to" Defendants' in-state conduct

Quoting *Ford Motor*, Defendants argue that when personal jurisdiction is based on "'advertising, selling, and servicing,'" the alleged injuries must be "*caused by the*

use and malfunction of the defendant's products within the forum State" for specific jurisdiction to attach. 141 S. Ct. at 1022. In short, Defendants say "the injury must occur in-state as a result of the use of the product in-state" for specific jurisdiction to attach. In this case, Defendants contend that Hawai'i is a small state, with only 0.02% of the world's population, that accounts for only 0.06% of the world's carbon dioxide emissions per year. Quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, Defendants argue that "'the undifferentiated nature of greenhouse gas emissions from all global sources and their world-wide accumulation over long periods of time' mean that 'there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time.'"[5] 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009)

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[5] In *Kivalina I*, the Village of Kivalina brought a federal common law nuisance claim for damages against 24 oil, energy, and utility companies. 663 F. Supp. 2d at 868. Defendants' *Kivalina I* quotations are taken from the court's Article III standing analysis, not from an analysis of whether the court had specific jurisdiction under the minimum contacts test. *See id.* at 881. The court concluded that because Kivalina sought damages for greenhouse gas emissions, which come from "global sources and their worldwide accumulation", the "multitude of alternative culprits" meant Kivalina could not establish its injury was fairly traceable to Defendants. *Id.* at 880-81 (quotation marks omitted). Accordingly, the court dismissed the case for lack of standing. *Id.* at 882. *Kivalina I* involved different claims than those before us in this case, and was disposed of on standing, not minimum contacts grounds—it is inapposite with respect to Defendants' jurisdictional arguments. *See id.* at 868, 882.

But *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina II*") is relevant to Defendants' federal common law arguments. There, the Ninth Circuit affirmed the trial court's dismissal for lack of jurisdiction in *Kivalina I*, but not because Kivalina lacked standing. *Id.* at 856-58. Instead, the Ninth Circuit determined that "*AEP* extinguished Kivalina's federal common law

("*Kivalina I*"), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Given the "undifferentiated nature of greenhouse gas emissions," Defendants argue the circuit court erred in asserting specific jurisdiction.

We agree with Plaintiffs that "Defendants' arguments for reversal flow[] 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*."[6] Indeed, the U.S. Supreme Court rejected an argument similar to Defendants' causation argument in *Ford Motor*, holding that the "causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities." 141 S. Ct. at 1026.

In *Ford Motor*, the U.S. Supreme Court consolidated two cases with the same underlying facts: in both, there was a car accident *in the forum state* involving an allegedly malfunctioning Ford vehicle designed, manufactured, and sold *outside of the forum state*. *Id.* at 1023. Ford moved to dismiss both cases, arguing that "the state court . . . had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims." *Id.* Ford argued that a "causal link" was required: it was only subject to specific jurisdiction in the forum state "if the company had designed, manufactured, or—most likely—sold

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public nuisance damage action, along with the federal common law public nuisance abatement actions." 696 F.3d at 858. Accordingly, Kivalina could not bring its federal common law nuisance claim, and dismissal was proper. *Id.*

[6] Defendants' causation arguments are better saved for the merits stage of this litigation where Plaintiffs must prove causation with respect to all of its tort claims. Of course, we express no opinion as to the validity of those arguments.

in the State the particular vehicle involved in the accident." *Id.*

The Supreme Court held that for specific jurisdiction to attach, a defendant "must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" *Id.* at 1024 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* at 1025 (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)). The contacts "must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Id.* (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

Accordingly, for specific jurisdiction to attach, a plaintiff's claims "'must arise out of or relate to defendant's contacts' with the forum." *Id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1786). "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." *Id.* at 1026. *Ford Motor* thus requires only "a 'connection' between a plaintiff's suit and a defendant's activities" for specific jurisdiction to attach. *Id.* at 1026 (quoting *Bristol-Myers*, 137 S. Ct. at 1776). "Or put just a bit differently, there must be 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 1779) (quotation marks omitted).

Similar to Defendants' arguments here, the *Ford Motor* defendants contended that the link between their fo-

rum contacts and plaintiffs' claims "must be causal in nature: Jurisdiction attaches 'only if the defendant's forum conduct *gave rise* to the plaintiff's claims.'" *Id.* at 1026. But the Supreme Court made clear that it 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." *Id.*

The Court relied on *World-Wide Volkswagen*, 444 U.S. at 295, which "held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma." *Ford Motor*, 141 S. Ct. at 1027. The *World-Wide Volkswagen* court "contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction)." *Id.* "[I]f Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York." *Id.* And while "technically 'dicta,'" the Audi/Volkswagen scenario from *World-Wide Volkswagen* has become the "paradigm case of specific jurisdiction" and has been "reaffirmed" in other cases. *Id.* at 1027-28. This paradigm case appeared again in *Daimler*, where the court again "did not limit jurisdiction to where the car was designed, manufactured, or first sold." *Id.* at 1028.

Turning back to the facts in *Ford Motor*, the Court explained that "[b]y every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail—Ford urges [people in the forum states] to buy its

vehicles." *Id.* Ford dealers regularly maintained and repaired Ford cars, and Ford distributed replacement parts throughout both states. *Id.* Ford "systematically served a market in [the forum states] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." *Id.* Accordingly, "there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

The same is true here. Defendants do not contest that they purposefully availed themselves of the rights and privileges of conducting extensive business in Hawai'i. Indeed, the Complaint alleges that each Defendant conducted substantial business in Hawai'i. Each defendant is alleged to have transported, traded, distributed, promoted, marketed, refined, manufactured, sold, and/or consumed oil and gas in Hawai'i. Plaintiffs also allege that Defendants failed to warn consumers in Hawai'i about the dangers of using the oil and gas Defendants sold in the state and that Defendants engaged in a deceptive marketing campaign to conceal, deny, and discredit efforts to make those dangers known to the public. Plaintiffs further allege that Defendants' tortious failure to warn and deceptive promotion caused extensive injuries in Hawai'i, including:

> injury or destruction of City—or [Honolulu Board of Water Supply]—owned or operated facilities and property deemed critical for operations, utility services, and risk management, as well as other assets that are essential to community health, safety, and well-being; increased planning and preparation costs for community adaptation and resiliency to global

warming's effects; decreased tax revenue due to impacts on the local tourism—and ocean-based economy; increased costs associated with public health impacts; and others.

Just as in *Ford Motor*, "there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *See id.* (quoting *Helicopteros*, 466 U.S. at 414). Defendants sold and marketed oil and gas in Hawai'i, availed themselves of Hawai'i markets and laws, and the at-issue litigation alleges tortious acts and damages in Hawai'i that "arise out of" or "relate to" Defendants Hawai'i contacts, i.e., oil and gas business conducted in the state. *See id.* at 1026. Indeed, the connection between Defendants, Hawai'i, and this litigation is more closely intertwined than that of Ford Motor. *See id.* at 1028. Unlike in *Ford Motor*, here, the alleged injury-causing products (oil and gas) were marketed and sold in the forum state. *See id.* Therefore, Defendants are subject to specific jurisdiction because there is a clear and unambiguous "affiliation between the forum and the underlying controversy." *See id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1779) (quotation marks omitted).

Defendants rely on *Martins v. Bridgestone Am. Tire Ops., LLC*, 266 A.3d 753, 759, 761 (R.I. 2022). *Martins* is inapposite. In *Martins*, a Rhode Island resident drove a truck from Massachusetts to Connecticut, and struck a tree in Connecticut when an allegedly defective tire made in and installed in Tennessee failed. *Id.* at 756. The Rhode Island resident was severely injured and was taken to and later died in Rhode Island. *Id.* The only connection between Rhode Island (the forum state) and the litigation was that the decedent was a Rhode Island resident who

passed away in Rhode Island. *Id.* at 761. The Rhode Island Supreme Court *did not* endorse the causation test put forth by Defendants here—the court instead determined that the plaintiffs' claims did not arise out of or relate to the tire companies' Rhode Island contacts. *Id.*

The Supreme Court has "endorse[d] an 'effects' test of jurisdiction in situations involving tortious acts." *Shaw*, 76 Hawai'i at 330, 876 P.2d at 1298 (quoting *Calder v. Jones*, 465 U.S. 783, 789 (1984)). "Under this theory, 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.* The effects test inquiry "focuses on conduct that takes place *outside* the forum state and that has effects inside the forum state." *Freestream Aircraft*, 905 F.3d at 604. Generally, "[t]he commission of an intentional tort in a state is a purposeful act that will satisfy the first two requirements [of the minimum contacts test]." *Id.* at 603 (quoting *Paccar Int'l, Inc. v. Com. Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1064 (9th Cir. 1985)). Therefore, where a nonresident defendant is alleged to have committed a tort directed at the forum state, the effects test is an alternate due process theory capable of establishing that: (1) the defendant purposefully availed themselves of the forum; and (2) the plaintiff's claim arises out of or relates to the defendant's forum contacts. *Id.* at 1062.

Plaintiffs argues that "the effects test . . . is satisfied here" because "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." Defendants counter that Plaintiffs failed to identify in their Complaint "a single deceptive message that Defendants

allegedly made in or directed at Hawai‘i," which "defeats personal jurisdiction under the effects test."

The circuit court did not engage in an "effects" test analysis, and the parties' briefs almost exclusively address the traditional "minimum contacts" test. Because Defendants are subject to specific jurisdiction under the minimum contacts test, *see infra* Section IV(A)(1), it is not necessary to engage in an effects test analysis as to the first two prongs of the due process inquiry. *See Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357 (11th Cir. 2013) (determining that because the plaintiff had met the "purposeful availment" prong of the "minimum contacts" test, the court "need not analyze the 'effects test' here").

Relatedly, Defendants argue that, under *Shaw*, Plaintiffs' claims "bear at most an 'incidental' . . . relationship to Defendants' in-state activities and thus lack the requisite close connection found in *Ford Motor* that permitted exercise of specific jurisdiction." In *Shaw*, the court held that for the purposes of the long-arm statute's "transacting business" subsection, *see* HRS § 634-35(a)(1), the alleged Hawai‘i business conduct (the signing of escrow documents) was "merely incidental" to business at the crux of the case (the escrow transaction, which happened in California). *Shaw*, 76 Hawai‘i at 328, 876 P.2d at 1296. Thus, the plaintiff failed to sufficiently allege, for the purposes of the long-arm statute, that the defendant "transact[ed] business" in Hawai‘i. *Id.*

The Court in *Shaw* held that the plaintiff sufficiently alleged under another subsection of the long-arm statute that the defendant committed a "tortious act" in Hawai‘i, *see* HRS § 634-35(a)(2), and that due process was satisfied under the "effects" test. *Shaw*, 76 Hawai‘i at 329-330, 332,

876 P.2d at 1297-98, 1300. Notably, *Shaw's* "merely incidental" holding did not affect the court's due process analysis—the defendant was still subject to specific jurisdiction. *See Shaw*, 76 Hawai'i at 328, 876 P.2d at 1296. Here, Defendants' in-state conduct is anything but "merely incidental" to Plaintiffs' claims. *See id.*

2. Exercising specific jurisdiction is reasonable and does not "conflict with federalism principles"

The exercise of specific jurisdiction must "comport with fair play and substantial justice, i.e. it must be reasonable." *Doe*, 83 Hawai'i at 374, 926 P.2d at 1297. In *Doe*, this court adopted the Ninth Circuit's seven-factor test for determining whether the exercise of jurisdiction is reasonable, which is as follows:

> (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.

Id. (*citing Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 127 (9th Cir. 1995)).

"None of the factors is solely dispositive; all seven are weighed in the factual circumstances in which they arise." *Id.* (citation omitted). And, as here, "where a defendant who purposefully has directed [their] activities at forum residents seeks to defeat jurisdiction, [*they*] *must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable*."

Burger King, 471 U.S. at 477 (emphasis added). Therefore, "we begin with a presumption of reasonableness." *Caruth*, 59 F.3d at 128.

Defendants do not engage with the *Doe* factors, but appear to argue that factors three and four weigh against determining that the exercise of jurisdiction over Defendants is "reasonable." *Doe*, 83 Hawai'i at 374, 926 P.2d at 1297. Defendants say that "exercising personal jurisdiction here would be '[un]reasonable, in the context of our federal system of government.'" Quoting *Ford Motor*, 141 S. Ct. at 1024) (brackets in original). According to Defendants, permitting specific jurisdiction in this context would subject companies to climate change suits in every court in the country. And if Plaintiffs' theory were adopted abroad, "American companies could be sued on climate change-related claims in courts around the world." According to Defendants, "[d]ue process does not countenance that result." We review each of the *Doe* factors in turn, and conclude that they weigh in favor of exercising specific jurisdiction over Defendants because doing so is "reasonable." *Id.* Defendants have not "present[ed] a compelling case" that the exercise of specific jurisdiction here would be unreasonable. *See Burger King*, 471 U.S. at 477.

The first factor examines "the extent of the defendants' purposeful interjection into the forum state's affairs." *Doe*, 83 Hawai'i at 374, 926 P.2d at 1297. Defendants are alleged to have engaged in repeated, purposeful business in Hawai'i. Their products were transported, traded, distributed, promoted, marketed, refined, manufactured, sold, and/or consumed in Hawai'i.

The second factor examines "the burden on the defendant of defending in the forum." *Doe*, 83 Hawai'i at 374, 926 P.2d at 1297. Defendants are multi-national oil and

gas corporations with billions in annual revenues. The burden on Defendants in defending a suit in a state where Defendants conduct extensive oil and gas business is slight.

The third factor examines "the extent of any conflict with the sovereignty of the defendants' [home] state." *Id.* Defendants' primary argument is that Plaintiffs' "claims [] implicate the interests of numerous other States and nations, many of which do not share the 'substantive social policies' Plaintiffs seek to advance—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." But this lawsuit does not seek to regulate emissions or curb energy production—it seeks to hold Defendants accountable for allegedly (1) failing to warn about the dangers of their fossil fuel products and (2) deceptively promoting those products. Holding Defendants accountable for their Hawai'i torts implicates the sovereignty of no state other than Hawai'i. And, even if this case did involve "substantive social policies" not advanced by other states, "the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules." *Burger King*, 471 U.S. at 477.

Relying on *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. at 1780, Defendants further contend that "asserting personal jurisdiction over these out-of-state Defendants for global climate change would impermissibly interfere with the power of Defendants' home States (or nations) over their own corporate citizens and could punish commercial conduct that occurred beyond the forum State's borders." However, Defendants' reliance on *Bristol-Myers* is misplaced.

The U.S. Supreme Court in *Bristol-Myers* addressed whether a claim arises out of or relates to a defendant's contacts—the second prong of the minimum contacts test. *Id.* at 1781. The Court *did not* hold that specific jurisdiction was lacking because doing so would be unreasonable. *See id.* Instead, the Court determined that specific jurisdiction was improper because there was no "connection between the forum and the specific claims at issue." *See id.*

The fourth factor examines "the forum state's interest in adjudicating the dispute." *Doe*, 83 Hawai'i at 374, 926 P.2d at 1297. Defendants argue that "Hawai'i's interests in this suit . . . are no greater than other States,'" and later state that Hawai'i's interest is "slight." However, we agree with Plaintiffs that Hawai'i "has a strong interest in remedying local harms related to corporate misconduct."

The fifth factor examines the "concerns of judicial efficiency." *Id.* Because this factor is not relevant here, and Defendants make no arguments to the contrary, we do not address it.

The sixth factor examines "the significance of the forum to the plaintiff's interest in relief." *Id.* Again, Plaintiffs seeks monetary damages for injuries allegedly suffered in Hawai'i as a result of Defendants' alleged tortious conduct in Hawai'i.

The seventh factor examines the "existence of alternate fora." *Id.* Defendants have not shown that there is an alternate forum that is better situated than Hawai'i to decide this dispute.

In sum, the *Doe* factors weigh heavily in favor of determining it is reasonable to exercise specific jurisdiction over Defendants. *See id.* Further, given that Defendants

purposefully availed themselves of Hawai‘i markets, Defendants have failed to overcome the presumption that the exercise of specific jurisdiction is reasonable. *See Burger King*, 471 U.S. at 477, *Caruth*, 59 F.3d at 128.

3. The Due Process Clause does not require that Defendants have "clear notice" they could be subject to specific jurisdiction in Hawai‘i

The exercise of specific jurisdiction is governed by the three-part minimum contacts test: jurisdiction is proper where: (1) the defendant purposefully avails itself of the forum; (2) the defendant's contacts "arise out of or relate to" the plaintiff's claim; and (3) the exercise of specific jurisdiction is reasonable. *Doe*, 83 Hawai‘i at 374, 926 P.2d at 1297. Where the minimum contacts test is met, the exercise of specific jurisdiction comports with due process. *Id.*

Defendants argue that in addition to the minimum contacts test, the Fourteenth Amendment's "Due Process Clause requires a defendant's activities in the forum to *place it on 'clear notice'* that it is susceptible to a lawsuit in that State for the claims asserted by a plaintiff," *Ford Motor*, 141 S. Ct. at 1025, 1030. (Emphasis added.) This is wrong. The minimum contacts test "*provides defendants with 'fair warning'*" or, as the Supreme Court explained, "knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Id.* at 1025 (emphasis added) (quoting *Burger King*, 471 U.S. at 472) (brackets in original). "[F]air warning" is not an additional requirement for the exercise of specific jurisdiction. Rather, "fair warning" is what due process "provides." If the minimum contacts test is met, a defendant has fair warning; and if it has fair warning, then due process is satisfied.

The U.S. Supreme Court has *not* held that "clear notice" is a separate requirement (on top of the minimum contacts test) necessary for the exercise of specific jurisdiction. In *Ford Motor*, the Court used the phrase "clear notice" three times, once in a parenthetical and twice when summarizing the holdings in *World-Wide Volkswagen*. *Id.* at 1025, 1027, 1030. At no point did the Court in *Ford Motor* hold that "clear notice" was required for the exercise of specific jurisdiction. *Id.* Rather, the Supreme Court used the phrase "clear notice" in Ford Motor and other cases like *World-Wide Volkswagen* to describe situations where a defendant's contacts were so pervasive that the defendant had *more than* "fair warning" they could be subject to specific jurisdiction in a forum. *Id.* at 1025, 1030; *see also World-Wide Volkswagen*, 444 U.S. at 297.

In sum, if a defendant has purposefully availed themselves of a forum, the claim arises from or relates to those contacts with the forum, and the exercise of jurisdiction is reasonable, the defendant has "fair warning" they could be subject to specific jurisdiction in that forum. *See id.* at 1025. The minimum contacts test (and the "fair warning" it provides) allows a defendant to "'structure [its] primary conduct' to lessen or avoid exposure to a given State's courts." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297 (brackets in original)). Here, the exercise of specific jurisdiction comports with due process because: (1) Defendants purposefully availed themselves of the benefits and protections of Hawai'i laws; (2) Plaintiffs' claims "arise out of or relate to" Defendants' Hawai'i contacts; and (3) the exercise of specific jurisdiction is reasonable. Defendants had—at a minimum—"fair warning" they could be subject to suit in Hawai'i. *See id.*

B. Federal Common Law Does Not Preempt Plaintiffs' Claims

Defendants next argue that "[f]ederal law exclusively governs claims seeking relief for injuries allegedly caused by interstate and international emissions." They say that the "basic scheme of the [federal] Constitution . . . demands that federal common law," *AEP*, 564 U.S. at 421 (quotation marks omitted), govern any dispute involving "air and water in their ambient or interstate aspects," *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). Defendants' argument ignores well-settled law that "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA." *Boulder*, 25 F.4th at 1260; *see also AEP*, 564 U.S. at 421.

And despite its displacement, Defendants also argue that federal common law plays a role in our preemption analysis. They say that we should first look to whether displaced federal common law preempts Plaintiffs' claims, and then to whether the CAA displaced federal common law. We disagree. "When a federal statute displaces federal common law, the federal common law ceases to exist." *Baltimore*, 31 F.4th at 205. And as the Supreme Court explained in *AEP*, once federal common law is displaced, "the availability *vel non* of a state lawsuit depends *inter alia* on the preemptive effect of the federal Act," not displaced federal common law. 564 U.S. at 429. Accordingly, our preemption analysis requires analyzing the preemptive effect of *only* the CAA—and, it has none in this context. *See supra* Section IV(C).

Defendants' federal common law preemption arguments also fail because Plaintiffs' claims do not seek to

regulate emissions. The federal common law cited by Defendants formerly governed transboundary pollution abatement and damages suits, not the tortious marketing and failure to warn claims brought by Plaintiffs. We agree with the circuit court:

> Plaintiffs' framing of their claims in this case is more accurate. The tort causes of action are well recognized. They are tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs. As this court understands it, 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 failures to disclose, failures to warn, and deceptive promotion (without deciding the issue, presumably by applying Hawai'i's substantial factor test, *see*, *e.g.*, *Estate of Frey v. Mastroianni*, 146 Hawai'i 540, 550 (2020)). Plaintiffs do not ask this court to limit, cap, or enjoin the production and sale of fossil fuels. Defendants' liability in this case, if any, results from alleged tortious conduct, and not from lawful conduct in producing and selling fossil fuels.

Simply put, Plaintiffs' claims do not seek to regulate emissions. Instead, Plaintiffs' Complaint "clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Baltimore*, 31 F.4th at 233. Plaintiffs' references to emissions in its Complaint "only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil-fuel products contribute to greenhouse gas pollution." *Id.*

1. The federal common law governing interstate pollution abatement and damages suits displaced by the CAA

Because the CAA displaced federal common law, we cannot accept Defendants' argument that the federal common law governs here. First, "*AEP* extinguished [] federal common law public nuisance damage action[s], along with the federal common law public nuisance abatement actions." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) ("*Kivalina II*"). Federal appellate courts have recently reaffirmed that the federal common law once governing interstate pollution damages and abatement suits was displaced.[7] In *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022), *cert. denied sub nom. Shell Oil Prod. Co. v. Rhode Island*, 143 S. Ct. 1796 (2023), the First Circuit held that "[t]he Clean Water Act and the [CAA] . . . have statutorily displaced any federal common law that previously existed," and as such, the court could not "rule that any federal common law controls Rhode Island's claims." *Id.* at 55 (quotation marks omitted).

In *Baltimore*, the Fourth Circuit held that federal common law did not control the city of "Baltimore's state-law claims because federal common law in this area cease[d] to exist due to statutory displacement, Baltimore [did] not invoke[] the federal statute displacing federal

[7] These courts did so in the context of removal jurisdiction. All held that federal common law did not govern the plaintiffs' claims, and as such, federal courts did not have jurisdiction over the at-issue state law claims. But, regardless of context, all three cases directly addressed whether federal common law governs state common law claims based on failure to warn and deceptive promotion theories. And all three courts determined that federal common law had been displaced.

common law, and . . . the CAA does not completely preempt Baltimore's claims." 31 F.4th at 204. And in *Boulder*, the Tenth Circuit held that "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA." 25 F.4th at 1260. Indeed, Defendants even concede that "[t]he Supreme Court, the Ninth Circuit, and the Second Circuit have all held that a tort-law claim for greenhouse gas emissions *arising under federal common law* fails as a matter of law under [Federal Rules of Civil Procedure Rule] 12(b)(6) because Congress displaced such claims when it established a comprehensive regulatory scheme for emissions via the CAA." (Emphasis added.)

Nonetheless, Defendants cite to three cases (*Milwaukee I*, *Oakland I*, and *City of New York*) that they argue support the proposition that federal common law governs Plaintiffs' claims. These cases have either been overturned (*Milwaukee I* and *Oakland I*) or rely on flawed reasoning (*City of New York*).

In *Milwaukee I*, the state of Illinois brought an original action against the state of Wisconsin in the Supreme Court for Wisconsin's "pollution . . . of Lake Michigan, a body of interstate water."[8] *Milwaukee I*, 406 U.S. at 93. Illinois alleged Wisconsin discharged "200 million gallons of raw or inadequately treated sewage and other waste materials" daily into Lake Michigan. *Id.* The Supreme Court explained that "where there is an overriding federal interest in the need for a uniform rule of decision or where

[8] The Court ultimately determined that "original jurisdiction [was] not mandatory," declined to exercise original jurisdiction, and remitted the case to the "appropriate district court whose powers are adequate to resolve the issues." *Milwaukee I*, 406 U.S. at 98, 108.

the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* at 105 n.6. The Court concluded that "[c]ertainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan," and that federal law governs disputes involving "air and water in their ambient or interstate aspects." *Id.* at 103, 105 n.6.

Accordingly, the Court held that the "question of apportionment of interstate waters is a question of 'federal common law' upon which state statutes or decisions are not conclusive." *Id.* at 105. Notably, the Court acknowledged that the federal common law it created might one day be superseded by statute, explaining: "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Id.* at 107.

After the Court remitted *Milwaukee I* to the district court to determine the outcome of the case under federal common law, Congress "enacted the Federal Water Pollution Control Amendments of 1972 [(1972 FWPCA)]." *City of Milwaukee v. Illinois*, 451 U.S. 304, 307 (1981) ("*Milwaukee II*"). On appeal in *Milwaukee II*, the Court held that in enacting the 1972 FWPCA, which governed sewage discharges into interstate bodies of water, Congress displaced the federal common law created in *Milwaukee I*. The Court concluded:

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.
>
> [. . .]

> The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when [*Milwaukee I*] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.

Milwaukee II, 451 U.S. at 317, 319.

Accordingly, the Court determined that "no federal common-law remedy was available," thus overruling *Milwaukee I*. *Id.* at 332. That holding was reaffirmed in *AEP* when the Supreme Court determined that the federal common law claims permitted by *Milwaukee I* were displaced by the CAA.[9] *AEP*, 546 U.S. at 424.

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[9] Defendants also cite to *Illinois v. City of Milwaukee,* 731 F.2d 403, 411 (7th Cir. 1984) ("*Milwaukee III*") for the proposition that the displacement of "one form of federal law (common law) by another (federal statute) does not somehow breathe life into nonexistent state law." On remand from *Milwaukee II*, Illinois argued that "Illinois common law controlled this case until *Milwaukee I* judicially promulgated federal common law, and that since the 1972 FWPCA dissipated federal common law, Illinois law must again control." *Id.* at 406. The Seventh Circuit disagreed, and held that, "[g]iven the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal law created by Congress) authorizes resort to state law." *Id.* at 411. Respectfully, the Seventh Circuit's approach in *Milwaukee III* ignores the presumption that state laws and claims are not preempted absent "a clear and manifest purpose of Congress" to do so. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

Not surprisingly, the Supreme Court implicitly overruled the Seventh Circuit's *Milwaukee III* decision in *AEP* when the Court held that, after federal common is displaced, "the availability *vel non* of a state lawsuit depends *inter alia* on the preemptive effect of the fed-

Defendants also rely on *City of Oakland v. BP PLC*, 325 F. Supp. 3d 1017, 1021-22 (N.D. Cal. 2018) ("*Oakland I*"), *vacated and remanded sub nom. City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020). In *Oakland I*, the cities of Oakland and San Francisco brought suit against five large oil and gas companies[10] in state court alleging one count of nuisance on the same theory that Plaintiffs raises here. *Id.* at 1021-22. The case was removed to federal court, and Oakland and San Francisco then amended their complaint to add a "separate claim for public nuisance under federal common law." *Id.* The district court determined that *AEP* and *Kivalina II* held that the CAA displaced federal common law claims for emissions abatement and damages. *Id.* at 1024. Accordingly, the district court dismissed Oakland and San Francisco's federal common law claim and the state law nuisance claim because "nuisance claims must stand or fall under federal common law." *Id.* at 1028.

On appeal, the Ninth Circuit reversed the federal district court, determining that Oakland and San Francisco only added the federal common law claim "to conform" to an earlier district court ruling. *City of Oakland v. BP PLC*, 969 F.3d 895, 909 (9th Cir. 2020) ("*Oakland II*"). The Ninth Circuit also determined that the state law nuisance claim should not have been dismissed because "it is not

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eral Act." 564 U.S. at 429. Thus, contrary to *Milwaukee III* and Defendants' argument, state law that was previously preempted by federal common law does have new life when the federal common law is displaced. *See id.*

[10] The five defendants in *Oakland I* (Chevron Corporation, Exxon Mobil Corporation, BP p.l.c., Royal Dutch Shell plc, and ConocoPhillips) are also defendants in this case.

clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined [(since *AEP* displaced the old federal common law)] that there is a [new] federal common law of public nuisance relating to interstate pollution." *Id.* at 906. Indeed, in *Kivalina II*, the Ninth Circuit held just that—concluding that federal common law suits (not state common law suits) "aimed at imposing liability on energy producers for 'acting in concert to create, contribute to, and maintain global warming' and 'conspiring to mislead the public about the science of global warming,' [*were*] *displaced by the* [*CCA*]." *Id.* (quoting *Kivalina II*, 696 F.3d at 854) (emphasis added). Therefore, the trial court was incorrect when it determined that displaced federal common law required the dismissal of Oakland and San Francisco's state common law claim because it was preempted. *Id.* Since displaced federal common law did not provide a federal jurisdictional hook, the Ninth Circuit remanded the case to the federal district court to determine whether there was an alternate basis for federal jurisdiction with respect to only the state common law claim. *Id.* at 911.

Further, the Second Circuit in *City of New York* also held that the "[CAA] displace[d] federal common law claims concerned with domestic greenhouse gas emissions." 993 F.3d at 95. Thus, Defendants' best case—*City of New York*—goes against them in part by holding that the very federal common law they rely on is no longer good law. Indeed, *City of New York* is consistent with *AEP*, *Rhode Island*, *Baltimore*, *Boulder*, *Kivalina II*, and *Oakland II* in holding that the federal common law once governing interstate pollution suits was displaced by the CAA. Accordingly, Defendants' argument that federal common law preempts Plaintiffs' claims fails, because Defendants do not point to any case recognizing a federal

common law action for interstate pollution suits that has not been displaced by the CAA.

2. Federal common law does not retain preemptive effect after it is displaced

Defendants acknowledge that the federal common law that once governed interstate pollution damages and abatement suits was displaced by the CAA. Nonetheless, Defendants argue that despite displacement, federal common law still lives. Defendants say that federal common law still lives but only with enough power to preempt state common law claims "*involving* interstate air pollution." According to Defendants, federal common law is both dead and alive—it is dead in that the CAA has displaced it, but alive in that it still operates with enough force to preempt Plaintiffs' state law claims.

Under Defendants' preemption theory, this court should first look to whether the federal common law governing interstate pollution damages and abatement claims preempts Plaintiffs' state common law claims. After determining that federal common law does in fact preempt Plaintiffs' state common law claims, Defendants say this court should then look to whether the CAA displaced federal common law claims (and Defendants say it did). Indeed, were this court to adopt Defendants' two-step approach, Plaintiffs would have *no* viable cause of action under state or federal law. Federal common law would preempt state common law, and in turn, the CAA would displace federal common law. No common law cause of action would be available. Further, no federal statutory cause of action would be available because the CAA does not contain one available to Plaintiffs, *see* 42 U.S.C. § 7401 et seq., and any state statutory cause of action would be preempted by federal common law, which, in turn, would be displaced by the CAA.

We decline to follow Defendants' two-step approach because it engages in backwards reasoning. This court would first need to determine whether the federal common law governing interstate pollution suits is still good law *before* determining whether it can preempt state law claims. And, as we have explained above, the federal common law governing interstate pollution suits was displaced by the CAA and "no longer exists." *Boulder*, 25 F.4th at 1260; *see also Milwaukee II*, 451 U.S. at 314 ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.").

Defendants' approach cannot be reconciled with *AEP*. In *AEP*, two groups of plaintiffs, including eight States, brought suit against the Tennessee Valley Authority and four private companies who were allegedly responsible for 10% of global emissions. 564 U.S. at 418. The plaintiffs brought federal common law and state law nuisance claims, and "sought injunctive relief requiring each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." 564 U.S. at 419 (quotation marks omitted). The Supreme Court held that the CAA displaced *only federal common law* governing interstate emissions. *Id.* at 428-29. Having determined that federal common law was displaced, the Court concluded that "the availability *vel non* of a state lawsuit depends *inter alia* on the preemptive effect of the [CAA]." *Id.* at 429. And since the parties had not briefed whether the CAA preempted "the availability of a claim under state nuisance law," the Court left "the matter open for consideration on remand." *Id.*

In *AEP*, with regard to the plaintiffs' *state* common law nuisance claims, the relevant inquiry was *not:* (1)

whether federal common law preempted the remaining state law claims, and if so, (2) whether the CAA displaced the federal common law. *Id.* Instead, *AEP* made clear that whether the state law nuisance claims were preempted depended *only* on an analysis of the CAA because "'when 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 (quoting *Milwaukee II*, 451 U.S. at 314).[11] The Supreme Court did not analyze the federal common law's preemptive effect because it was displaced by the CAA. *See id.* And if federal common law retained preemptive effect after displacement, the Court would have instructed the trial court on remand to examine whether displaced federal common law preempted the state law claims. *See id.*

Simply put, displaced federal common law plays no part in this court's preemption analysis. Once federal common law is displaced, the federal courts' task is to "interpret and apply *statutory* law[.]" *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981) (emphasis added). Therefore, "[a]s instructed in *AEP* and supported by [*Kivalina II*], we look

[11] There is a "significant distinction between the statutory displacement of federal common law and the ordinary preemption of a state law." *Baltimore*, 31 F.4th at 205. Federal common law is disfavored because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *AEP*, 564 U.S. at 423-24. Thus, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Id.* at 423. Instead, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* at 424. When federal common law is displaced, it "no longer exists." *Boulder*, 25 F.4th at 1260.

to the federal act that displaced the federal common law to determine whether the state claims are preempted." *Boulder*, 25 F.4th at 1261. The correct preemption analysis requires an examination *only* of the CAA's preemptive effect because "*AEP* extinguished [] federal common law public nuisance damage action[s], along with the federal common law public nuisance abatement actions." *Kivalina II*, 696 F.3d at 857; *see also id.* at 866 (Pro, J., concurring) ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.").

Defendants primarily rely on *City of New York* to argue that their two-step preemption analysis is the correct one. In that case, New York City filed a state-law tort suit in federal court "against five oil companies to recover damages caused by those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world." 993 F.3d at 86. At issue was whether New York City's claims were preempted by either federal common law or the CAA. *Id.* at 89. The Second Circuit first looked to whether federal common law governing interstate pollution damages and abatement suits preempted New York City's state law claims, holding that it did. *Id.* at 95 (determining that New York City's "claims must be brought under federal common law"). Next, the court examined whether the federal common law was displaced by the CAA, holding again that it was. *Id.* at 98 (determining that "federal common law claims concerning domestic greenhouse gas emissions are displaced by statute."). Thus, the Second Circuit held that displaced federal common law preempted New York City's state law claims. *Id.* at 95-98.

We agree with the Fourth Circuit's analysis in *Baltimore*, which explained why *City of New York* is not persuasive in that respect:

> [A]fter recognizing federalism and the need for a uniform rule of decision as federal interests, *City of New York* confusingly concludes that federal common law is "most needed in this area" because New York's state-law claims touch upon the federal government's relations with foreign nations. [993 F.3d] at 91-92. But it never details what those foreign relations are and how they conflict with New York's state-law claims. *See id.* at 92. The same is true when *City of New York* declares that state law would "upset[] the careful balance" between global warming's prevention and energy production, economic growth, foreign policy, and national security. *Id.* at 93. Besides referencing statutes acknowledging policy goals, the decision does not mention any obligatory statutes or regulations explaining the specifics of energy production, economic growth, foreign policy, or national security, and how New York law conflicts therewith. *See id.* It also does not detail how those statutory goals conflict with New York law. *See id.* [Critically,] *City of New York* essentially evades the careful analysis that the Supreme Court requires during a significant-conflict analysis.

Id. (emphasis added) (footnote omitted).

3. Even were federal common law to control, it would not govern Plaintiffs' claims

Even if federal common law governing interstate pollution claims had not been displaced, Plaintiffs' claims would not be preempted by it. The claims permitted by

federal common law in this area were brought against polluting entities and sought to enjoin further pollution.[12] *See*, *e.g.*, *Milwaukee I*, 406 U.S. at 93 (requesting court enjoin "pollution by the defendants of Lake Michigan"). Indeed, in *AEP*, the plaintiffs sued the Tennessee Valley Authority and other powerplant owners and sought injunctive relief *to prevent future emissions*. 564 U.S. at 418. As the Supreme Court explained in *AEP*, this "specialized federal common law" governed "suits brought by one State to abate pollution emanating from another State." *Id*. at 421. Thus, the source of the injury in federal common law claims is pollution traveling from one state to another. That is not what Plaintiffs allege here.

Rather, as the Ninth Circuit explained in earlier proceedings in this case, Plaintiffs "allege that oil and gas companies knew about climate change, understood the harms energy exploration and extraction inflicted on the environment, and *concealed those harms from the public." Sunoco LP*, 39 F.4th at 1106 (emphasis added). As Plaintiffs allege, "Defendants' liability is causally tethered to their failure to warn and deceptive promotion," and "nothing in this lawsuit incentivizes—much less compels—Defendants to curb their fossil fuel production or greenhouse gas emissions." Simply put, the source of

[12] Defendants cite to no cases recognizing federal common law claims for interstate pollution damages. But this is neither here nor there. Damages claims are no longer available under federal common law. In *Kivalina II*, Kivalina sought "damages for harm caused by past emissions." 696 F.3d at 857. The Ninth Circuit determined that "displacement of a federal common law right of action means displacement of remedies." *Id*. Therefore, "*AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions." *Id*. We agree. Therefore, even though it appears that no court has recognized a federal common law claim for interstate pollution damages, such claims were displaced by the CAA. *See id*.

Plaintiffs' alleged injury is Defendants' allegedly tortious marketing conduct, not pollution traveling from one state to another.

Numerous courts have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers. The Ninth Circuit did so in this case. *See id.* at 1113. And in other cases alleging similar deceptive promotion and failure to warn torts, the Fourth Circuit, Tenth Circuit, and the Districts of Connecticut, Massachusetts, and Minnesota have also rejected attempts to characterize those claims as being about emissions and pollution. *See Boulder*, 25 F.4th at 1264 (Boulder's claims "are premised on the Energy Companies' activities of 'knowingly producing, promoting, refining, marketing and selling a substantial amount of fossil fuels used at levels sufficient to alter the climate, and misrepresenting the dangers.'"); *Baltimore*, 31 F.4th at 217 ("None of Baltimore's claims concern emission standards, federal regulations about those standards, or pollution permits. Their Complaint is about Defendants' fossil-fuel products and extravagant misinformation campaign that contributed to its injuries."); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *13 (D. Conn. June 2, 2021) ("ExxonMobil's argument on this issue fails because the claims Connecticut has chosen to bring in this case seek redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut—not for harms that might result from the manufacture or use of fossil fuels[.]"); *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."); *Massachusetts v. Exxon Mobil Corp.*, 462 F.

Supp. 3d 31, 44 (D. Mass. 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud.").

The source of Plaintiffs' alleged injury is Defendants' alleged failure to warn and deceptive promotion. *See Sunoco LP*, 39 F.4th at 1113 ("[t]his case is about whether oil and gas companies misled the public about dangers from fossil fuels."). Even were this court to determine that federal common law retains preemptive effect after displacement, the federal common law cited to by Defendants would not preempt Plaintiffs' claims in this case. The source of Plaintiffs' injury is not pollution, nor emissions. Instead, the source of Plaintiffs' alleged injury is Defendants' alleged failure to warn and deceptive promotion. Therefore, even if federal common law had not been displaced, Plaintiffs' claims would not be preempted by it.

4. We decline to expand federal common law, and, in any event, Defendants waived such an argument

In their opening brief, Defendants say they "do not seek to *expand* federal common law to a new sphere" and instead "rely on extensive Supreme Court precedent establishing that federal law *already* governs in this area." Defendants have waived any argument to expand federal common law to cover Plaintiffs' claims here. Second, Defendants fail to point to any case recognizing new federal common law decided after *AEP* and *Kivalina II* displaced the old federal common law that once governed suits for interstate pollution damages or abatement. We reiterate that the sources of Plaintiffs' alleged injury are Defend-

ants' alleged tortious marketing and failure to warn. Defendants also fail to point to any case recognizing federal common law governing tortious marketing suits.

Even if Defendants had argued federal common law should be expanded to cover tortious marketing, that argument would fail because the "cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 140 S. Ct. 713, 716 (2020). We see no "uniquely federal interests" in regulating marketing conduct, an area traditionally governed by state law. *See id.* at 717.

We also decline to create new federal common law governing suits that "*involv*[*e*] . . . interstate air pollution." (Emphasis in original.) Congress has enacted a comprehensive legislative scheme to address interstate air pollution, and "once Congress addresses a subject, even a subject previously governed by federal common law, *the justification for lawmaking by the federal courts is greatly diminished*." *Nw. Airlines*, 451 U.S. at 95 n.34 (emphasis added). "[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *AEP*, 564 U.S. at 423-24. And "[c]ases justifying judicial creation of preemptive federal rules are extremely limited: [w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *In re Nat'l Sec. Agency Telecomms. Recs. Order Litig.*, 483 F. Supp. 2d 934, 940 (N.D. Cal. 2007) (quoting *Atherton*, 519 U.S. at 218) (quotation marks omitted). "Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *Milwaukee II*, 451 U.S. at 315 (internal quotation marks omitted).

C. The CAA Does Not Preempt Plaintiffs' Claims

Having determined that displaced federal common law plays no part in this court's preemption analysis, we now turn to whether the CAA preempts Plaintiffs' state claims. *See Boulder*, 25 F.4th at 1261 ("As instructed in *AEP* and supported by [*Kivalina II*], we look to the federal act that displaced the federal common law to determine whether the state claims are preempted."). Defendants say that federal law must govern all suits that "*involve*[] interstate and international emissions." (Emphasis added). They say that a large damage award in effect could regulate air pollution,[13] and that air pollution is an area governed exclusively by "federal law." But the question before the court is not whether a potential damages award in this case could regulate air pollution. If that were true, then any case with a potentially large damage award must be dismissed because it *might* regulate a field—the mere possibility of regulation, standing alone, is not enough to dismiss Plaintiffs' claims. A suit does not "regulate" a matter simply because it might have "an impact" on that matter. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). Rather, the operative question is whether Plaintiffs' state law claims are preempted by federal law. To prevail, Defendants need to show not only that Plaintiffs'

[13] Defendants cite to *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012), a products liability cases involving a railroad worker exposed to asbestos, to argue that damages awards can effectively act as regulation. This is accurate, but incomplete. The Court did not ask *only* whether such a large damages award could operate as a regulation. The Court further engaged in a preemption analysis, and asked whether such an award was preempted by federal law. *Id.* Based on prior precedent, the Court concluded that Congress had occupied the entire field of locomotive equipment regulation and that the worker's claims were therefore preempted. *Id.*

claims could lead to a large damages award that effectively acts as a regulation, but critically, that such a large damages award is preempted by federal law. Defendants do not do so.

The doctrine of preemption is rooted in the federal Constitution's Supremacy Clause, which provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Courts begin with the presumption that state laws and claims are not preempted. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). This is because the "historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citing *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926) *and Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942)).[14] Therefore, when determining whether a statute is preempted through any preemption doctrine, courts primarily evaluate whether Congress intended to preempt state law. *Id.*

There are two types of preemption: complete and substantive (or ordinary) preemption. *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707 (3d Cir. 2022). Complete

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[14] The Supreme Court has applied this presumption against preemption of historic police powers broadly. *Cipollone v. Liggett Grp., Inc.*, 505 U.S.504, 528-29 (1992) (requiring a showing of congressional intent to supersede state common law duties not to make false statements or conceal facts and holding that Congress expressed no such intent in the Federal Cigarette Labeling and Advertising Act); *CTS Corp v. Waldburger*, 573 U.S. 1, 19 (2014) (quoting *Wos v. E.M.A.*, 568 U.S. 627, 639-40 (2013)) ("[i]n our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit").

preemption applies only in the context of federal removal jurisdiction, which is not at issue here.[15] *Id.* Defendants argue that the CAA substantively preempts Plaintiffs' state tort law claims.

In general, there are three types of substantive preemption:

> (1) *express preemption*, where Congress has expressly preempted local law; (2) *field preemption*, "where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law"; and (3) *conflict preemption*, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

New York SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) (emphases added) (citing *English v. General Elec.* Co., 496 U.S. 72, 78-79 (1990)).

Defendants do not specify which substantive preemption theory they rely on. We address each preemption theory in turn.

First, *express preemption* does not apply. Federal law expressly preempts state law where the federal statute contains an express preemption clause barring state law claims in enumerated areas. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (holding that Congress may "preempt . . . a state law through . . . express language in a

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[15] The Supreme Court has only recognized three federal statutes that completely preempt state laws: "ERISA, the National Bank Act, and the Labor-Management Relations Act." *City of Hoboken*, 45 F.4th at 707 (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6-8, 10-11 (2003)).

statute"). Simply put, the CAA contains no "express language" preempting state common law tort claims. *See id.* Rather, the CAA explicitly preserves "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief[.]" 42 U.S.C. § 7604(e) (2018).

Second, *field preemption* does not apply because the CAA does not completely occupy the field of emissions. Field preemption applies where (1) the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement" the regulation, or (2) the "federal interest is so dominant" in a field "that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230. Field preemption "reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards," so "even complementary state regulation is impermissible" when Congress has occupied an entire field. *Arizona v. United States*, 567 U.S. 387, 401 (2012).

The CAA simply does not occupy the entire field of emissions regulation, as noted above. *Merrick*, 805 F.3d at 694 (holding that CAA does not bar state common law claims against in-state emitters because "environmental regulation is a field that the states have traditionally occupied"). "There is no evidence that Congress intended that all emissions regulation occur through the [CAA's] framework, such that any state law approach to emissions regulation would stand as an obstacle to Congress's objectives." *Id.* at 695. Indeed, under the CAA, each state retains regulatory power through their State Implementation Plan (SIP), which provides for state-level implementation, maintenance, and enforcement of CAA emissions

standards with federal oversight. 42 U.S.C. § 7410(a)(1) (2018). While the federal government has primary authority over emissions legislation, states are responsible for implementation through their SIP. *See id.* And the CAA's "Retention of State authority" section expressly protects a state's right to adopt or enforce any standard or limitation respecting emissions unless the state policy in question would be less stringent than the CAA. 42 U.S.C. § 7416 (2018).[16] Congress encouraged states to participate through SIPs and provided for state regulation of any emissions standard or limitation as stringent as or more stringent than the CAA. *See* 42 U.S.C. § 7410(a)(1) (2018).

Accordingly, the CAA does not occupy the field of emissions regulation such that state law is preempted—it does not "reflect[] a congressional decision to foreclose any state regulation in the area." *Arizona*, 567 U.S. at 401. And, even if it did, the City's claims do not seek to regulate emissions, and so a claim of field preemption in the field of emissions regulation is inapposite.

Third, *conflict preemption* does not apply. Conflict preemption takes two forms. The first form is *obstacle*

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[16] 42 U.S.C. § 7416 (2018) provides:

> Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

preemption, where state law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Arizona*, 567 U.S. at 399 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The second form is *impossibility preemption*, which is a "demanding defense", *Wyeth*, 555 U.S. at 573, that succeeds where state law claims are shown to directly conflict with federal law or penalize behavior that federal law requires. *AT&T Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227 (1998) (holding that federal statute preempts state law when state law claims directly conflict with federal law); *Geier v. Am. Honda Motor Co.*, 529 U.S. 864, 873 (2000) (holding that federal statute preempts state law where state law penalizes what federal law requires). Neither obstacle preemption nor impossibility preemption applies here.

1. Obstacle preemption does not apply

The CAA does not preempt Plaintiffs' claims through obstacle preemption because their claims arise from Defendants' alleged failure to warn and deceptive marketing conduct, not emissions-producing activities regulated by the CAA. Obstacle preemption applies only where there is an "actual conflict" between state law and a statute's overriding federal purpose and objective. *Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 162 (2d Cir. 2013). "[T]he conflict between state law and federal policy must be a sharp one." *Marsh v. Rosenbloom*, 499 F.3d 165, 178 (2d Cir. 2006) (quotation marks omitted). The operative federal purpose or policy is defined by "examining the federal statute as a whole and identifying its purpose and intended effects," and "[w]hat is a sufficient obstacle is a matter of judgment." *Arizona*, 567 U.S. at 400 (quoting *Crosby*, 530 U.S. at 363).

The U.S. Supreme Court has applied this standard sparingly, finding obstacle preemption in only two scenarios: (1) where a federal legislation involved a uniquely federal area of regulation and state law directly conflicted with the federal program's operation, and (2) where Congress has clearly chosen to preclude state regulation because the federal legislation struck a delicate balance of interests at risk of disturbance by state regulation.[17] *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020). But this is a "high threshold." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).

Here, the CAA's identified purposes are to protect the country's air resources, public health, and welfare; prevent and control air pollution; and support state, local, and regional air pollution prevention and control efforts. *See* 42 U.S.C. § 7401(b) (2018); *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981) ("[The CAA] was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining

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[17] The first category historically includes areas such as foreign affairs powers and regulating maritime vessels. *Crosby*, 530 U.S. at 373-74 (holding that the federal foreign affairs power is a uniquely federal area of regulation); *United States v. Locke*, 529 U.S. 89, 97 (2000) (holding that maritime vessel regulation is a uniquely federal area). The second category historically includes criminal immigration penalties, vehicle safety device implementation, and interstate pollution under the Clean Water Act. *Arizona*, 567 U.S. at 405 (holding that the federal government struck a balance in immigration penalties that would be disturbed by an additional state law criminal penalty); *Geier*, 529 U.S. at 879-81 (holding that the federal government struck a balance in gradual airbag phase-in that would be undermined by a state law immediate implementation requirement); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987) (holding that affected-state claims against out-of-state polluters stand as an obstacle to the balance struck by the Clean Water Act).

and curtailing modern day air pollution."). The CAA achieves these purposes primarily 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).

Plaintiffs' state tort law claims do not seek to regulate emissions, and there is thus no "actual conflict" between Hawai'i tort law and the CAA. *See Mary Jo*, 707 F.3d at 162. These claims potentially regulate marketing conduct while the CAA regulates pollution. We agree with Plaintiffs that 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." The CAA expresses no policy preference and does not even mention marketing regulations.

Defendants argue that the CAA preempts Plaintiffs' claims because Congress preempted affected-state common law claims regarding emissions through the CAA, and Plaintiffs' claims seek to regulate out-of-state emissions. Affected-state claims are state law actions where the injury occurred in a different state from the state where the emission was released; courts have held that the CAA preempts these claims. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987). Source-state claims are state law actions where the injury was suffered in the same state as the emitting conduct; courts have held that the CAA *does not* preempt these claims. *See id.*

Relying on *Ouellette*, Defendants say "[e]very federal court of appeals to consider this issue has recognized that the CAA does not permit States to use their state tort law to address harms caused by emissions occurring in other States." Defendants are correct, but their analysis is incomplete. In *Ouellette*, the Supreme Court examined

whether the Clean Water Act (CWA) preempted "a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury [was] located in New York." *Id.* at 483. The Supreme Court held that affected-state common law claims arising from polluting activity located *outside* the affected-state are preempted by the CWA because "[t]he application of affected-state laws would be incompatible with the [CWA's] delegation of authority and its comprehensive regulation of water pollution." *Id.* at 500. Applying affected-state common law could potentially subject a defendant-polluter to "an indeterminate number of potential regulations" depending on how far the emission traveled.[18] *Id.* at 499; *see also Merrick*, 805 F.3d at 693 (explaining that "claims based on the common law of the source state . . . are not preempted by the [CAA,]" but "claims based on the common law of a non-source state . . . are preempted by the [CAA]").

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[18] Defendants also cite to *N. Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 297 (4th Cir. 2010), arguing that *Ouellette's* rationale in determining the CWA preempted affected state common law claims should be applied to the CAA. In *Cooper*, the Fourth Circuit determined that North Carolina's nuisance action seeking an injunction against fixed powerplants from emitting sulfur dioxides and nitrous oxides was preempted by the CAA because the "EPA has promulgated [National Ambient Air Quality Standards] for a number of emissions, including standards for all the emissions involved in this case." *Id.* at 299. Critically, the CAA, and the agency it empowers (the EPA), had already expressly regulated the very emissions (sulfur dioxides and nitrous oxides) alleged to have caused the nuisance. *Id.* at 299-303. But the *Cooper* court refused to "hold flatly that Congress has entirely preempted the field of emissions regulation." *Id.* at 302. And it acknowledged that the "*Ouellette* Court itself explicitly refrained from categorically preempting every nuisance action brought under source state law." *Id.* at 303.

But the rationale motivating the *Ouellette* court in preempting affected-state common law claims does not apply to Plaintiffs' state tort claims. This is because Plaintiffs' claims require "additional tortious conduct" to succeed. *MTBE*, 725 F.3d at 104. Here, that additional tortious conduct is Defendants' alleged deceptive marketing and failure to warn about the dangers of using their products—the source of Plaintiffs' alleged injury is not emissions but the additional alleged torts.

In this case, as in *MTBE*, Defendants' alleged tortious conduct is *not production of emissions* and therefore, obstacle preemption does not apply. In *MTBE*, the defendant gasoline producer used MTBE, a fuel additive that reduced emissions, to bring its gasoline into compliance with the CAA's minimum oxygen content requirement. *Id.* at 129. The CAA identified a number of substances, including MTBE, that *could* have been added to gasoline to help bring it into compliance with the oxygen content requirement. *Id.* at 81. New York City and its agencies brought ten causes of action, including strict liability failure to warn, negligence, public nuisance, private nuisance, and trespass, arguing that the defendant oil producer's use of MTBE caused detrimental contamination of groundwater. *Id.* at 80-83. The defendant argued that the plaintiff's tort claims "conflict[ed] with and are therefore preempted by . . . the [CAA] Amendments of 1990[.]" *Id.* at 95.

The Second Circuit held that New York City's claims were not preempted under either obstacle or impossibility preemption. *Id.* at 97-103. The court held that where a party participates in a non-polluting emissions-related activity (i.e., choosing gasoline additives), the fact that it complied with relevant CAA provisions did not absolve the party of any state common law or statutory duties to

warn of public hazards or comply with an additional standard of care. *Id.* at 65. In short, the Second Circuit determined that state tort law claims are not preempted by the CAA where the alleged tortious behavior does not produce emissions. *Id.* at 104-05.

Plaintiffs' claims simply do not risk subjecting Defendants to "an indeterminate number of potential regulations" because the claims do not subject Defendants to any additional emissions regulation at all. *See Ouellette*, 479 U.S. at 499. Plaintiffs are correct that *where* the emissions originate is irrelevant because emissions are at most a link in the causal chain connecting Plaintiffs' alleged injuries and Defendants' unrelated liability-incurring behavior. [AB at 33, ICA Dkt. 65:43] Simply put, this means obstacle preemption does not apply.

2. Impossibility preemption does not apply

At its most demanding, the impossibility doctrine historically required it to be a "physical impossibility" to comply with both state and federal requirements for federal law to preempt state law. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 143 (1963).[19] The modern impossibility doctrine is broader and now includes instances where state law penalizes what federal law requires, *Geier*, 529 U.S. at 873, or where state law claims

[19] Under the *Florida Lime & Avocado Growers* standard, some scenarios would yield different results than preemption doctrine's intended effect: "[f]or example, if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior." *Wyeth*, 555 U.S. at 590 (2009) (Thomas, J., concurring). In that scenario, it is not a physical impossibility to comply with both requirements, but modern doctrine would find a sufficient conflict between federal and state law to preempt state law through impossibility preemption.

directly conflict with federal law, *AT&T Co.*, 524 U.S. at 227. But impossibility preemption is still a "demanding defense." *Wyeth*, 555 U.S. at 573. Defendants do not raise impossibility preemption, and it does not apply regardless.

MTBE is instructive again. There, the Second Circuit declined to preempt state tort claims through impossibility preemption where: (1) it was possible to comply with the CAA and avoid tort liability; (2) state and federal law did not directly conflict; and (3) the CAA did not require the alleged conduct. *MBTE*, 725 F.3d at 97. The oil producer defendant could have complied with both state and federal law if it had used other additives (like ethanol) that did not pose the same health risk as MTBE but would bring the fuel into CAA oxygen content compliance without incurring prohibitively high costs. *Id.* at 99-101. Though the CAA identified MTBE as one additive that would sufficiently boost oxygen content, at no point did it require the specific use of MTBE in gasoline—it was one of many options. *Id.* at 98.

The same is true here. The CAA does not bar Defendants from warning consumers about the dangers of using their fossil fuel products. *See id.* Defendants could simply avoid federal and state liability by adhering to the CAA and separately issuing warnings and refraining from deceptive conduct as required by Hawai'i law; it is not a "physical impossibility" to do both concurrently. *See Florida Lime & Avocado Growers*, 373 U.S. at 143; *State ex rel. Shikada v. Bristol-Myers Squibb Co.*, 152 Hawai'i 418, 438, 526 P.3d 395, 415 (2023) (rejecting a pharmaceutical company's argument that "there was no way [it] could have updated [a drug's] label to provide the warning that [state law] require[d] and at the same time comply with federal law" regarding drug labeling).

V. CONCLUSION

For the foregoing reasons, we hold that Defendants are subject to specific jurisdiction in Hawai‘i and that neither federal common law nor the Clean Air Act preempt Plaintiffs' claims. We reiterate that federal common law retains no preemptive effect after it is displaced. Were we to adopt Defendants' argument that displaced federal common law preempts Plaintiffs' state law claims, Plaintiffs could not recover under Hawai‘i tort law, even where the state specifically permits lawsuits to hold companies responsible for allegedly deceptive marketing claims about any product, including oil and gas products. We decline to unduly limit Hawai‘i's ability to use its police powers to protect its citizens from alleged deceptive marketing.

Accordingly, the circuit court's Order Denying Defendants' Motion to Dismiss for Failure to State a Claim, filed March 29, 2022, and Order Denying Defendants' Joint Motion to Dismiss for Lack of Personal Jurisdiction, filed March 31, 2022, are affirmed.

EDDINS, J., concurring.

I agree with the Chief Justice's well-reasoned opinion.

Because the principles that govern personal jurisdiction arose after 1868, I write separately.

Enduring law is imperiled. Emerging law is stunted. A justice's personal values and ideas about the very old days suddenly control the lives of present and future generations. Recently, the Supreme Court erased a constitutional right. It recalled autonomy and empowered states to force birth "for one reason and one reason only: because the composition of this Court has changed." *Dobbs*

v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319-20 (2022) (Kagan, J., dissenting). The day before, the Court cherry-picked history to veto public safety legislation, disturb the tranquility of public places, and increase homicide. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The same week, it promoted a conjured idea hostile to judicial restraint—"major questions." When executive branch policy-making grazes disliked policy preferences, major questions "magically appear as get-out-of-text-free cards." *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

For now, *International Shoe* still fits. Defendants must have minimum contacts with the forum state such that exercising jurisdiction over them does not offend traditional notions of fair play and substantial justice. But the due process clause mentions neither fairness and justice, nor minimum contacts. And those standards clash with how courts determined personal jurisdiction long ago. *See Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (courts lack jurisdiction over defendants who are not physically present in the state or who have not consented to jurisdiction).

So when justices solicit cases to test their way against durable personal jurisdiction principles, a state occupying one of the world's most geographically isolated land masses pays attention. *Ford Motor*'s concurrence announced "*International Shoe*'s increasingly doubtful dichotomy." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J., concurring). It floated reviving the old tag rule to hale corporations into court, asking "future litigants and lower courts" to help determine how the Constitution's original meaning or history jostles personal jurisdiction law. *Id.*

Back in the day, parties played tag inside a state's boundaries. Once tagged, a party could be sued for anything, even things that happened outside the state. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 128 (2023). But if a party couldn't be tagged, they couldn't be personally sued.

Time-travelling to 1868 would unravel Hawai'i's long arm statute. Hawai'i Revised Statutes (HRS) § 634-35 (2016) reaches as far as the federal constitution allows. *Yamashita v. LG Chem, Ltd.*, 152 Hawai'i 19, 21, 518 P.3d 1169, 1171 (2022). A state registration statute preserves jurisdiction over national corporations. *Mallory*, 600 U.S. at 134. But what about other businesses, shell companies, and individuals that do not enter or remain in Hawai'i? *See Shaffer v. Heitner*, 433 U.S. 186, 200 (1977) ("The Pennoyer rules generally favored nonresident defendants by making them harder to sue").

Now, settled law easily unsettles. Some justices feel precedent is advisory. *See Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013); *Dobbs*, 142 S. Ct. at 2265. Who knows what law may vanish? Or what text gets exiled next? *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017) (ghosting the Establishment Clause).

Before the Court's hubristic originalists arrived, everyone got it wrong. Well, mostly everyone. *See Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857) (enslaving human beings and denying citizenship based on race because the Supreme Court must interpret the Constitution "according to its true intent and meaning when it was adopted"). All others, hall-of-fame jurists to 1Ls, held egregiously wrong-headed views. Only public meaning at inception

counts. Traditional methods to interpret the Constitution are unacceptable. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492-93 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation").

A chosen interpretive theory cages the Constitution. Why originalism? To keep value judgments out of judging. To constrain judges.

Not that judges are always restrained. *See, e.g.*, *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013) (dismembering a cornerstone of American civil rights because a few judges made up a textually-unsupported rule that Alabama's equal sovereignty prevents the federal government from enforcing federal law—a law those judges felt worked too well).

Inconvenient originalism nurtures views that the Court operates as a political body. For instance, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), sidestepped text, history, and tradition to invalidate a major law on a question vital to democracy—limitless corporate money influencing elections. Corporations though have never been "members of 'We the People' by whom and for whom our Constitution was established." *Id.* at 466 (opinion of Stevens, J.). In 1791, corporations were rare, highly regulated creations of the states and not mentioned in the Constitution. *Id.* at 426-27. Corporations had *privileges*, not rights. *Id.* at 427. They did not enjoy the same free speech protections as people. *Id.* at 428-29, 466 ("corporations have no consciences, no beliefs, no feelings,

no thoughts, no desires"). And they certainly were not spending silver coins to sway elections.

Whose history are we talking about anyway? The powerful. The few white men who made laws and shaped lives during the mostly racist and misogynistic very old days. Originalism revives their value judgments. To constrain the value judgments of contemporary judges!

What about today's need-to-be-constrained judges? They need to be historians. Figuring out the way things were to govern the way things are. Excavating 18th and 19th century experiences to control 21st century life. How? Relying on partisan amicus briefs, borrowing history books and dictionaries, searching online, using artificial intelligence? As one judge put it: "[T]he standard articulated in *Bruen* expects us to play historian in the name of constitutional adjudication." *United States v. Bullock*, ___ F. Supp. 3d ___, 2023 WL 4232309, at *4-*5 (S.D. Miss. 2023) (Reeves, J.) ("[A]n overwhelming majority of historians reject the Supreme Court's most fundamental Second Amendment holding—its 2008 conclusion that the Amendment protects an individual right to bear arms, rather than a collective, Militia-based right") (both quotes cleaned up).

I fear the Court self-inflicts harm, loses public confidence, and exposes itself to real criticisms about its legitimacy.

Inconvenient originalism may just save *International Shoe*. Playing tag exposes nationwide corporations to easy forum-shopping by plaintiffs. "[C]orporations might lose special protections." *Ford Motor*, 141 S. Ct. at 1039 n.5 (Gorsuch, J., concurring). They might get sued for any claim, in any state, even though they have no connection

to that state. *Mallory*, 600 U.S. at 128. And states may enact the broadest possible jurisdiction consent statutes to compete with each other. *See id.* at 130.

Sharper minds than mine deep dive and debate the tugs between originalism and other interpretative modalities. I'm just a state judge who respects and admires the federal constitution's open-textured, freedom-and-liberty-inspired language.

Sure, a constitutional provision's public meaning at ratification may matter centuries or decades later. *See United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Yogi*, 101 Hawai'i 46, 53, 62 P.3d 189, 196 (2002) ("[i]n construing a constitutional provision, the court can also look to [the] understanding of voters who ratified the constitutional provision"). But to the Hawai'i Supreme Court, it's not decisive, or the *only* way to interpret a constitution.

In Hawai'i, the Aloha Spirit inspires constitutional interpretation. When this court exercises "power on behalf of the people and in fulfillment of [our] responsibilities, obligations, and service to the people" we "may contemplate and reside with the life force and give consideration to the 'Aloha Spirit'" HRS § 5-7.5(b) (2009).

Hawai'i's people define the Aloha Spirit as:

> "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the follow unuhi laulā loa may be used:
>
> "Akahai", meaning kindness to be expressed with tenderness;
>
> "Lōkahi", meaning unity, to be expressed with harmony;

> "'Olu'olu", meaning agreeable, to be expressed with pleasantness;
>
> "Ha'aha'a", meaning humility, to be expressed with modesty;
>
> "Ahonui", meaning patience, to be expressed with perseverance.
>
> These are traits of character that express the charm, warmth and sincerity of Hawai'i's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawai'i. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

HRS § 5-7.5(a).

Ku'ia ka hele a ka na'au ha'aha'a (hesitant walks the humble hearted). Mary Kawena Pukui, *'Ōlelo No'eau: Hawaiian Proverbs & Poetical Sayings* 201 (1983). A humble person walks carefully so they will not hurt others. *Id.*

The United States Supreme Court could use a little Aloha.

APPENDIX B

CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

No. 1CCV-20-380 (JPC)

CITY AND COUNTY OF HONOLULU;
HONOLULU BOARD OF WATER SUPPLY,
PLAINTIFFS,

v.

SUNOCO LP, ET AL.,
DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

CRABTREE, Judge.

Defendants' Motion to Dismiss for Failure to State a Claim, filed on June 2, 2021 (Dkt. 347), came for video hearing on August 27, 2021, at 8:30 a.m., before the Honorable Jeffrey P. Crabtree. All parties appeared through counsel. Theodore J. Boutrous argued for Defendants, and Victor M. Sher argued for Plaintiffs.

After considering the written submissions and the arguments of counsel, the files herein, and other good cause appearing therefore, Defendants' Motion to Dismiss for Failure to State a Claim is **DENIED** for the following reasons. (Note: this order is the version submitted by Plaintiffs during the post-hearing Rule 23 process, with several

of the changes requested by Defendants as well as editing by the court.)

1. Legal Standard.

A. This is a Rule 12(b)(6) motion. Such motions are viewed with disfavor and rarely granted in Hawai'i. *Marsland v. Pang*, 5 Haw. App. 463, 474 (1985).

B. Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed true for purposes of the motion. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai'i 251, 266 (2007). However, the court is not required to accept conclusory allegations. *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. City & Cty. of Honolulu*, 144 Hawai'i 466, 474 (2019).

C. On a 12(b)(6) motion, the issue is not solely whether the allegations as currently pled are adequate. A complaint should not be dismissed for failure to state a claim 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 under any set of facts *or any alternative theory*. *In re Estate of Rogers*, 103 Hawai'i 275, 280-281 (2003); *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 406-07 (2006); *Malabe v. AOAO Exec. Ctr.*, 147 Hawai'i 330, 338 (2020).

D. Hawai'i is a notice pleading jurisdiction. Our Hawai'i Supreme Court expressly rejected the federal "plausibility" pleading standard (Twombly/Iqbal) in *Bank of America v. Reyes-Toledo*, 143 Hawai'i 249, 252 (2018).

2. This is an unprecedented case for any court, let alone a state court trial judge. But it is still a tort case. It is based exclusively on state law causes of action.

3. City of New York.

A. Defendants' motion relies heavily on *City of New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021). This court spent extensive time reviewing that decision multiple times, and considered it carefully. This court respectfully concludes that *City of New York* has limited application to this case, because the claims in the instant case are both different from and were not squarely addressed in the *City of New York* opinion.

B. Plaintiffs emphasize repeatedly their state law tort claims include *failures to disclose and deceptive promotion*. State law tort claims traditionally involve four elements: duty, breach, causation, and harm or damages. Plaintiffs allege that Defendants had a *duty* to disclose and not be deceptive about the dangers of fossil fuel emissions, and *breached* those duties. As the court understands it, Plaintiffs claim Defendants thereby *exacerbated the costs* to Plaintiffs adapting to and mitigating impacts from climate change and rising sea levels (*causation*). Finally, Plaintiffs alleged harms include flooding, a rising water table, increased damage to critical infrastructure like highways and utilities, and the costs of prevention, mitigation, repair, and abatement—to the extent *caused* by Defendants' breach of recognized duties. Plaintiffs double-down on this theory of liability by expressly arguing that if Defendants make the disclosures and stop concealing and misrepresenting the harms, *Defendants can*

sell all the fossil fuels they are able to without incurring any additional liability.[1]

C. Defendants frame Plaintiffs' claims very differently, saying Plaintiffs actually seek to regulate global fossil fuel emissions, or alternatively, that the claims amount to *de facto* regulation. This framing also appears in the *City of New York* opinion, which expressly stated that New York City's claims targeted "lawful commercial activity," and Defendants would need to "cease global production" if they wanted to avoid liability. 993 F.3d at 87, 93 (cleaned up). The United States Court of Appeals for the Second Circuit added that the threat of such liability would "compel" Defendants to develop new pollution control measures, and therefore the City of New York's lawsuit would "regulate cross-border emissions." *Id.* at 93 (cleaned up). This conclusion was important to the ultimate holding that the claims in *City of New York* are preempted by federal law (whether federal common law or the Clean Air Act) (discussed further, below).

D. This court concludes that Plaintiffs' framing of their claims in this case is more accurate. The tort causes of action are well recognized. They are tethered to existing well-known elements including duty, breach of duty, causation, and limits on actual damages caused by the alleged wrongs. As this court understands it, Plaintiffs do

[1] The court recognizes that nuisance, trespass, and failure to warn vary somewhat in terms of their specific elements. All of these claims, however, share the same basic structure of requiring that a defendant engage in tortious conduct that causes injury to a plaintiff. Moreover, as the court understands it, Plaintiffs are relying on the same basic theory of liability to prove each of their claims, namely: that Defendants' failures to disclose and deceptive promotion increased fossil fuel consumption, which—in turn—exacerbated the local impacts of climate change in Hawai'i.

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 failures to disclose, failures to warn, and deceptive promotion (without deciding the issue, presumably by applying Hawai'i's substantial factor test, *see, e.g., Estate of Frey v. Mastroianni*, 146 Hawai'i 540, 550 (2020)). Plaintiffs do not ask this court to limit, cap, or enjoin the production and sale of fossil fuels. Defendants' liability in this case, if any, results from alleged tortious conduct, and not from lawful conduct in producing and selling fossil fuels.

E. This court concludes that Plaintiffs' claims as pled here were not squarely addressed in *City of New York* given the way that opinion frames those claims. This is especially true in the opinion's preemption analysis, which did not turn on any allegations that fossil fuel companies concealed or misrepresented the dangers of their products.[2]

4. Preemption.

A. Defendants argue that federal common law "governs" or preempts the claims in this case. The argu-

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[2] The Second Circuit noted generally that fossil fuel companies allegedly "downplayed the risks" of their fossil fuel products (*City of New York*, 993 F.3d at 86-87). But the court's preemption analysis did not analyze a deception claim. Rather, the court's opinion stated that the claims sought "to impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at 93. The deception-based claims asserted by Plaintiffs here were not squarely addressed. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) ("[Q]uestions which merely lurk in the record are not resolved, and no resolution of them may be inferred." (cleaned up)).

ment is that Plaintiffs seek to regulate out-of-state and international fossil fuel emissions, and therefore interfere with the need for a consistent national response to climate change. Defendants argue in the alternative that if Plaintiffs do not seek actual regulation, then Defendants' activity is *de facto* "regulated" by the threat of a damages award. To apply federal common law here, generally this court needs to answer "yes" to at least three questions: 1) is there a unique federal interest? 2) is there a "significant conflict" in this case between a federal policy or interest and applying state law? 3) do Plaintiffs' claims really seek to regulate out-of-state, national, and international greenhouse gas emissions? The court answers "no" to all three of these questions, as discussed below.

B. Unique federal interest. Federal common law does not apply in cases that fail to raise "uniquely federal interests." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). This court concludes there is no unique federal interest in the alleged failure to disclose harms in this case, nor in the alleged deceptive promotion. States have a well-established "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); *see also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (identifying "the protection of consumers" as a traditional state interest); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) (noting that "advertising" is "a field of traditional state regulation" (cleaned up)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (underscoring "the long history of state common-law and statutory remedies against monopolies and unfair business practices"). Moreover, under our state-federal system, states have broad authority to protect residents' health, safety, property, and general welfare, and there is a strong presumption against federal preemption. *Wyeth v. Levine*, 555

U.S. 555, 565 (2009); *see also In re MTBE Products Liability Litigation*, 725 F.3d 65, 96 (2d Cir. 2013) (*MTBE*) (state tort law fell within the state's historic powers to protect health, safety, and property rights, and therefore the presumption against preemption was "particularly strong"). States also have a legitimate interest in combatting the adverse effects of climate change. *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). In other words, any federal interest in the local impacts of climate change is an interest shared with the states—and is not unique to federal law.

C. No "significant conflict." The court also concludes there is no "significant conflict" in this case between a federal policy or interest and the operation of Hawai'i state law—a second "precondition" for applying federal common law. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (quotations omitted). Such a conflict is key to preemption, because federal and state policies and law can co-exist and supplement each other. This court is not aware of any doctrine where federal common law broadly replaces state-law tort claims, *per se*. To the contrary, federal preemption requires a real and significant conflict: e.g., the state-law duty requires Defendants to do something that federal law forbids. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) (finding preemption where "it was impossible for [defendant] to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label"); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528 (1992) ("Our preemption analysis requires us to determine whether [the state-law] duty [at issue] is the sort of requirement or prohibition proscribed by [federal law]."). The federal policy or interest must be concrete and specific, and not judicially constructed, and

not speculative. *See O'Melveny*, 512 U.S. at 88-89; *Miree v. DeKalb Cty.*, 433 U.S. 25, 32-33 (1977). This court concludes there is no federal policy (whether common law or statutory) against timely and accurate disclosure of harms from fossil fuel emissions.

D. No "regulation." Defendants are correct that the claims here involve fossil fuel emissions, and the complexity of global climate change involves matters of federal concern. But at this stage of the litigation, there is no concrete showing that a damages award in this case would somehow regulate emissions. *Black's Law Dictionary* (11th ed. 2019) defines regulation as "*control* over something *by rule or restriction*," (emphasis added) and gives the example of federal regulation over the airline industry. How would a damages award actually "control" Defendants? Under the limits imposed by a Rule 12(b)(6) motion, how does a trial court make a "regulation" finding, and based on what criteria exactly? The court currently sees nothing in the record that tethers the claim of "regulation" (whether it be of emissions, disclosures, or something else) to a possible award of damages. The federal court opinions cited to this court do not clearly require that any potentially large damages award constitutes "regulation" for purposes of preemption. *See generally Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (reaffirming that state-court judicial remedies do not "infring[e] on the policy choices of other States" when they are "supported by the [forum] State's interest in protecting its own consumers and its own economy"). In any event, the damages claims made here focus on failures to disclose, failures to warn, and deceptive marketing. *See, e.g.*, *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021) ("Plaintiffs have chosen to pursue claims that target

Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020) ("[T]he Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *10 (D. Minn. March 31, 2021) ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in [their] alleged misinformation campaign"). Thus, as pleaded and repeatedly argued by Plaintiffs, this case does not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation. The court does not agree that this amounts to control by rule or restriction of Defendants' lawful production and sale of fossil fuels.

E. Common law or statutory preemption? This court struggled with *City of New York*'s apparent reliance on both federal common law and statutory preemption under the Clean Air Act. This issue was discussed in the briefing, including supplemental briefing following the hearing (Dkt. 581 filed 2/9/22; and Dkt. 587 filed 2/17/22). The court agrees with Plaintiffs that the Clean Air Act supplants the federal common law invoked by Defendants, meaning that federal common law cannot govern or preempt Plaintiffs' claims. The Clean Air Act displaced any federal common law relating to greenhouse gas emissions. *See AEP*, 564 U.S. at 423 (holding that the Clean Air Act "displaced" any "federal common-law claim for curtailment of greenhouse gas emissions"). Federal common law "disappears" once displaced by a federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)

(*Milwaukee II*). Alternatively, as discussed above, even if federal common law still exists on these issues, it does not preempt the state law claims in this case. Although the court concludes the Clean Air Act replaces federal common law, this does not help Defendants. As with the test for federal common law, statutory preemption requires a significant and concrete conflict between a federal policy and the operation of state law. As discussed above, the court sees no such conflict here.

F. States' rights. A broad doctrine that damages awards in tort cases impermissibly regulate conduct and are thereby preempted would intrude on the historic powers of state courts. Such a broad "damages = regulation = preemption" doctrine could preempt many cases common in state court, including much class action litigation, products liability litigation, claims against pharmaceutical companies, and consumer protection litigation.

5. Out-of-state and international activities. Out-of-state and international events do not mean preemption is automatically appropriate. Without the power to hold tortfeasors liable under state law for out-of-state conduct that causes in-state injuries, municipalities such as Honolulu could be hard-pressed to seek redress. *See Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("The 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."); *Watson v. Emps. Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954) ("As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its

own people, even though other phases of the same transactions might justify regulatory legislation in other states."). There are limits on state law claims involving out-of-state activity (e.g., choice of law, foreign affairs preemption, due process limits on punitive damages, and due process limits on personal jurisdiction, among others). In fact, Defendants have asked this court to dismiss most of the Defendants for lack of personal jurisdiction/due process concerns. These issues are not part of the instant Rule 12(b)(6) motion, and will be decided by separate order(s). Not among those limitations, however, is a federal common law doctrine that preempts state law claims simply because they involve some out-of-state conduct. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) ("[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.").

6. HRCP 9(b) & 9(g). Defendants also argue dismissal is warranted for alleged shortcomings under HRCP Rules 9(b) and 9(g). The court disagrees. Hawai'i is a notice-pleading jurisdiction and Plaintiffs are not required to cite every bad act in their operative complaint. Defendants clearly have reasonably particular notice of the misconduct alleged and the remedies sought. (See Plaintiffs' opposition to this motion, Dkt. 375, especially pages 38-45.) To the extent more details can be fleshed out, that is for discovery and standard motions practice.

7. The common law adapts. Defendants argue (and the *City of New York* opinion expresses) that climate change cases are based on "artful pleading." Respectfully, we often see "artful pleading" in the trial courts, where new conduct and new harms often arise:

> The argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law. Assuming that it is true, that fact is unpersuasive unless the litigation largely will be spurious and harassing. Undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy.

Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 377 (1968) (opinion by Levinson, J.) Here, the causes of action may seem new, but in fact are common. They just seem new due to the unprecedented allegations involving causes and effects of fossil fuels and climate change. Common law historically tries to adapt to such new circumstances.

Dated: Honolulu, Hawai'i, March 29, 2022.

/s/ Jeffrey Crabtree
JEFFREY P. CRABTREE
JUDGE OF THE ABOVE-
ENTITLED COURT

APPENDIX C

SUPREME COURT OF HAWAI'I

No. SCAP-22-429

CITY AND COUNTY OF HONOLULU;
HONOLULU BOARD OF WATER SUPPLY,
PLAINTIFFS-APPELLEES

v.

SUNOCO LP, ET AL.,
DEFENDANTS-APPELLANT

BHP GROUP LIMITED; BHP GROUP PLC,
DEFENDANTS-APPELLEES

BEFORE: RECKTENWALD, C.J., NAKAYAMA, MCKENNA, WILSON, and EDDINS, J.J.

ORDER GRANTING APPLICATION FOR TRANSFER

Upon consideration of the application for transfer filed on March 3, 2023, and the record,

IT IS HEREBY ORDERED that the application for transfer is granted. This case is transferred to the Supreme Court effective the date of this order.

DATED: Honolulu, Hawai'i, March 31, 2023.

APPENDIX D

CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

No. 1CCV-20-380 (JPC)

CITY AND COUNTY OF HONOLULU;
HONOLULU BOARD OF WATER SUPPLY,
PLAINTIFFS,

v.

SUNOCO LP, ET AL.,
DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL, AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STAY PENDING APPEAL

CRABTREE, Judge.

1. Defendants' motion for leave to file an interlocutory appeal and to stay action pending appeal, filed on April 11, 2022 (Dkt. 639), was heard in person on May 17, 2022. Victor M. Sher argued on behalf of Plaintiffs. Theodore J. Boutrous, Jr. argued on behalf of the Defendants. The court took the motions under advisement, and now issues its ruling.

2. The motion for leave to file an interlocutory appeal is hereby **GRANTED** under Hawai'i Revised Statute ("HRS") § 641-1(b):

A. An interlocutory appeal of a circuit court's order is proper when an appeal is "advisable for the speedy termination of litigation." HRS § 641-1(b). The Hawai'i Supreme Court has explained that, "if the appeal may put an end to the action, obviously the requirement [of speedy termination] is met." *Lui v. City & Cnty. of Honolulu*, 63 Haw. 668, 671 (1981). The court grants Defendants' motion for interlocutory appeal because reversal of the court's orders denying Defendants' motions to dismiss would bring a "speedy termination," in whole or part, to the present litigation.

B. This case is unprecedented. The complexity, scope, time, and cost of discovery and motion practice, let alone trial, will be enormous. The impact on judicial resources will be significant. (As of May 16, 2022, 663 items were listed on the docket of this case, and no Answer has yet been filed.)

C. The 12(b)(6) motion to dismiss for failure to state a claim (Dkt. 347) was directed at all claims. Therefore, this court's denial of the Rule 12(b)(6) motion (Dkt. 618)—if reversed—would likely speedily terminate the case. The potential enormous waste of money, time, and resources would largely be avoided. The court fully appreciates Plaintiffs' argument that every 12(b)(6) denial should not and cannot lead to an interlocutory appeal. *See* Dkt. 649, at 5–6. This court cannot recall a single time it granted an interlocutory appeal on denial of a 12(b)(6) motion. But this case is different because of its sheer size and complexity.

D. This court's denial (Dkt. 622) of the Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction (Dkt. 347)—if reversed—would speedily terminate the case as to most Defendants. The potential enormous waste of money, time, and resources would largely be avoided.

E. This court's denial (Dkt. 585) of Chevron's anti-SLAPP motion to dismiss (Dkt. 349) only applies to Defendant Chevron, so whether it meets the "speedily terminate the action" standard is more doubtful. Standing alone, the court might well deny an interlocutory appeal of its anti-SLAPP order. But since there will already be an interlocutory appeal for the other rulings described above, and since the anti-SLAPP appeal could be dispositive as to Chevron, and again given the potential enormous waste of cost and effort if this court's denial of the motion was wrong, the court allows an interlocutory appeal of its anti-SLAPP order as well.

3. Stay Pending Appeal. At the start of the hearing on May 17, 2022, the court gave an inclination that on the stay issue, if an interlocutory appeal was granted, the stay would likely be granted. The court has now changed its inclination to this extent: rather than an "all or nothing" stay, the court will instead be granting a stay in part, and denying a stay in part. The court's reasoning is as follows:

A. It made sense for this court to decide the interlocutory appeal issue (since this court decided the underlying motions for which leave to appeal was sought). That logic does not apply with equal force on the issue of a stay.

B. Every circuit court judge has inherent powers to issue stays pending interlocutory appeals (*Salera v. Caldwell*, 137 Haw. 409 (2016)). So as soon as this case is reassigned, the new judge will have the inherent power to make decisions regarding a stay. The need for a stay and

the scope of a stay is ordinarily a flexible issue depending on then-present circumstances.

C. This case is in a fluid position to say the least. In addition to the interlocutory appeal this court is granting, there are potentially relevant appeals in seven different federal circuit courts (the First, Second, Third, Fourth, Eighth, Ninth, and Tenth) that could impact this case. Four of those courts issued opinions after this court's rulings. All four opinions support this court's ruling that federal preemption does not apply. There may or may not be *en banc* proceedings in some of those appeals, and the U.S. Supreme Court may or may not grant *cert*. The federal appellate proceedings may impact what the Hawaii appellate court does on the federal preemption issue—either as guiding precedent from the federal circuit courts' decisions or as a controlling decision if the U.S. Supreme Court decides the federal preemption issue.

D. With all this fluidity in mind, and since this court is a co-equal to the Division and judge who will be assigned this case, this court concludes the incoming trial judge should have free rein to decide the stay issues, unhampered by this court's ruling as to a stay—either as law of the case or as a matter of judicial comity. See *Wong v. City and County of Honolulu*, 66 Haw. 389, 394 (1983). Further details regarding the scope and duration of the stay are included in the court's concurrently filed Order Regarding Defendants' Motion to Stay Action Pending Appeal, (Dkt. 684). ~~In the meantime, all non voluntary discovery is hereby stayed absent further court order.~~ /jpc

* * *

For the reasons stated above, Defendants' motion for leave to file an interlocutory appeal is **GRANTED**, and

Defendants' motion to stay pending appeal is **GRANTED IN PART** and **DENIED IN PART**.

Dated: Honolulu, Hawaii, June 3, 2022.

/s/ Jeffrey Crabtree
JEFFREY P. CRABTREE
JUDGE OF THE ABOVE-ENTITLED COURT