Nos. 23-947, 23-952

In the
Supreme Court of the United States

SUNOCO LP, ET AL.,
Petitioners,
v.
CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.,
Respondents.

SHELL PLC, FKA ROYAL DUTCH SHELL PLC, ET AL.,
Petitioners,
v.
CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF RICHARD A. EPSTEIN AND JOHN YOO AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. All counsel were provided timely notice in accordance with Supreme Court Rule 37.2.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Hawaii Supreme Court held that the Respondents—the City and County of Honolulu and its Water Department—could proceed to trial on an unprecedented public nuisance theory. Respondents asserted that Petitioners knew that oil and gasoline products were dangerous, but that Petitioners nonetheless "knowingly concealed and misrepresented" the climate effects of their products and engaged in "disinformation campaigns" to raise doubts about global warming. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1181 (Haw. 2023). The court below allowed Respondents to further claim that Petitioners' conduct thereby led to an increase in fuel consumption and greenhouse gas emissions, and thus "caused property and infrastructure damage in Honolulu." *Id.*

This Court should grant the petition for a writ of certiorari for two related reasons. First, this case raises a disputed question of federal constitutional law over which the court below has split with the U.S. Courts of Appeals for the Second Circuit. These courts have divided over whether states and cities can use tort law to sue energy companies for harms allegedly caused by global warming. The Hawaiian Supreme Court allowed Hawaiian law to apply notwithstanding *American Electric Power v. Connecticut*, 564 U.S. 410, 422 (2011), which held that the Clean Air Act pre-empts judge-made federal common law causes of action. The petition for a writ of certiorari is particularly worthy not only because of the importance of the underlying constitutional questions

but also because of the effect of the Hawaii decision on the national energy industry, one of the nation's largest economic sectors whose rapid decline would spread hardship throughout the nation.

The second reason to grant the petition for a writ of certiorari reinforces the first. The court below adopts an unprecedented theory of misrepresentation, concealment, and nondisclosure that alleges that Petitioners have misled the public on matters on which the public is already fully informed. If this Court does not exercise review, other states could concoct similarly unlimited theories of tort liability that will further interfere with the nation's ability to pursue coherent policies on energy and climate change.

Certiorari is urgent because the decision of this Court in *AEP* left open the question presented here. *AEP* observed that the lower court opinion it reviewed "did not reach the state-law claims because it held that federal common law governed." *AEP*, 564 U.S. at 429. "In light of our holding that the Clean Air Act displaces federal common law," this Court concluded, "the availability *vel non* of a state lawsuit depends, inter alia, on the preemptive effect of the federal Act." *Id.* *AEP* then remanded the case for further consideration of the issue. This Court must now resolve the split between the court below and a U.S. court of appeal that has developed over the question it left open.

ARGUMENT

I. The Decision below creates a split between a U.S. Court of Appeals and a State Supreme Court.

This Court must act now because the decision of the Supreme Court of Hawaii conflicts with the U.S. Court of Appeals for the Second Circuit in *City of New York v. Chevron Corporation*, 993 F.3d 81 (2d Cir. 2021). *City of New York* held that federal law preempts state tort law that regulates air emissions caused by the use of oil and gas for energy production. In contrast, the Supreme Court of Hawaii declined to find that preemption under federal law (including the Clean Air Act) prohibits state tort lawsuits against multinational oil companies for failing to warn consumers about the perils of global greenhouse gas emissions. As the decision below acknowledges, the Second Circuit found such a claim to be pre-empted by both federal common law and the Clean Air Act. *Id.* at 86.

Hawaii's decision also deepens an earlier split between the U.S. Court of Appeals for the Second and Fourth Circuits. Indeed, the Hawaii Supreme Court several times quotes from, and directly relies upon, the Fourth Circuit's opinion in *Mayor & City Council of Baltimore v. BP PLC.*, 31 F.4th 178 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 1795 (2023). *See, e.g.*, *City & Cnty. of Honolulu*, 537 P.3d at 1200 (following the Fourth Circuit). This Court declined to exercise jurisdiction over the Fourth Circuit decision, and similar cases, *see, e.g., City & Cnty. Of Honolulu v. Sunoco,* 39 F.4th 1101, 1113 (9th Cir. 2022)*, cert. denied,* 143 S. Ct. 1795 (2023). The issue now arrives

at this Court in the proper posture for resolution on the merits.

Hawaii's decision and the Second Circuit decision present a clear conflict over the preemptive effect of federal law. The court below upheld the application of the state torts of public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass against the Petitioners in their sale of fuel products in the state. The Second Circuit rejected, but the Fourth Circuit allowed, identical claims – which the court below recognized in siding with the Fourth Circuit. The Hawaii Supreme Court concluded: "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.'" *City & Cnty. of Honolulu*, 537 P.3d at 1181 (quoting *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)).

Respondents' theory of tort liability rests on the view that worldwide greenhouse gas emissions raise worldwide temperatures, which then purportedly cause, among other things, the seas to rise to levels that allegedly harm Honolulu. As this Court has recognized in the past, the sale and consumption of fossil fuels in any single state do not generate a sufficiently large temperature change to produce a rise in sea levels in any given jurisdiction. "Greenhouse gases once emitted 'become well mixed in the atmosphere,'" *AEP,* 564 U.S. at 422 (quoting Endangerment and Cause or Contribute Findings for

Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009)). In rejecting a lawsuit brought by the City of New York and other states against major emitters of carbon dioxide, this Court stated that "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China," *id.* (citations omitted). Hawaii's claim parallels the one rejected by the Second Circuit in *City of New York*.

The court below erred in rejecting the Second Circuit's approach. It concluded instead that federal law does not preempt Respondents' state tort law claim because the Clean Air Act ("CAA") had "displaced" federal common law. *City & Cnty. of Honolulu*, 537 P.3d at 1195. While pre-CAA federal common law had allowed states to sue each other to abate air and water pollution, *AEP* held that the CAA displaced that law because it already "provides a means to seek limits on emissions of carbon dioxide from domestic power plants." 564 U.S. at 425. Unfortunately, the Hawaii Supreme Court misread *AEP* to mean that the CAA's displacement of a judicially recognized federal common law cause of action also allows states to manufacture their own novel common law actions. *City & Cnty. of Honolulu,* 537 P.3d at 1195-1201.

This case requires this Court's review because the split arises over conflicting readings of *AEP*. The Supreme Court of Hawaii, like the Fourth Circuit, relied upon *AEP* for the proposition 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.'" *City & Cnty. of Honolulu,* 537 P.3d at 1199 (quoting *AEP*, 564 U.S. at 423 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). The Second Circuit read *AEP* for the directly opposite proposition. It found that the CAA did not authorize state law to snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. Rather, as the Second Circuit observed, *AEP* recognized that the CAA made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99 (citing *AEP*, 564 U.S. at 428), and that it reserved to the states only the power to regulate internal emissions sources, not those from other states, *id.* at 100 (citing *AEP*, 564 U.S. at 422). (The emission sources at issue in this case are not internal). The Second Circuit further found that the CAA would not have revived state tort law actions against foreign nations under international law. *Id.* at 101-03 (citing *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018)).

This Court has the opportunity here to make clear that, as the Second Circuit correctly held, states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 85. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a general federal common law, but also affirmed the existence of a specialized federal common law where national concerns are paramount. *Hinderlider v. La Plata River & Cherry Creek Ditch*

Co., 304 U.S. 92 (1938), decided on the same day as *Erie*, held: "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. This holding is logical as a matter of law and prudent as a matter of fact because, in the absence of a federal common-law rule, the states in a dispute would presumably give priority to their own laws. Justice William O. Douglas expressed the same view in *Clearfield Trust Co. v. United* States, 318 U.S. 363, 367 (1943) (applying federal common law to deal with commercial paper to avoid "making identical transactions subject to the vagaries of the laws of the several states.") As Judge Henry Friendly observed, "'[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (quoting Henry Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-22 (1964)).

Indeed, almost a century of this Court's precedents, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognize that the federal common law must govern here. As this Court observed, interstate pollution presents an "overriding . . . need for a uniform rule of decision" because states have conflicting self-interests, energy production and pollution are nationwide in scope, and the basic interests of federalism are involved. *Id.* at 105 n.6. The federal common law as it existed before the CAA would have pre-empted the state tort claims in this case and those in *Mayor & City Council of Baltimore*

v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023).

The Second Circuit properly found that the CAA displaced any cause of action for trans-boundary pollution provided by the federal common law. It relied upon this Court's statement in *AEP*: "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *AEP*, 564 U.S. at 424. This Court has issued no ruling on whether the CAA revived state causes of action. The Second Circuit answered that remaining question by holding that the CAA also preempted state tort law over interstate air pollution. "For many of the same reasons that federal common law preempts state law, the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." *City of New York,* 993 F.3d at 95. It made no difference, the Second Circuit held, whether the state styled its tort action against the emissions from fossil fuels or against misrepresentations in the sale of fossil fuels. In both cases, the state sought improperly to hold defendants liable for the release of greenhouse gases and their harmful effects on the environment. *Id*. at 97.

AEP's conclusion that the CAA preempts judge-made federal causes of action for interstate air pollution applies with even greater force to state law causes of action. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants; the delegation displaces federal common law." *AEP*,

564 U.S. at 426. The lower federal courts are part of a unified judicial system headed by this Court, which can correct deviations from established tort doctrine under a well-established body of federal law. By contrast, the state courts are autonomous and can develop tort law subject only to a weak set of constitutional constraints. State tort law can create higher levels of undesirable variation, as shown by the unprecedented tort theory adopted by the Hawaii Supreme Court. This variation produces the fractured interpretation and application of federal law that only this Court's review can remedy.

Adoption of the rule of *AEP*, moreover, would not represent an unconstitutional intrusion of federal authority into internal state affairs. Following the Second Circuit's approach instead would prevent the extraterritorial application of state law from governing the behavior of the hundreds of millions who live outside Hawaii. Because the Framers were properly concerned with the limits on federal authority, they wisely crafted a balanced system that prevents a single state from regulating a nationwide industry by the back door. Allowing Hawaii to continue down this path could dislocate the affairs of the hundreds of millions of Americans who live outside the State of Hawaii. Following the Second Circuit's approach serves the interests of federalism by maintaining orderly relations among the states while reserving to the federal government control over interstate pollution and nationwide industry.

II. This case presents a constitutional question of national importance.

As this Court recognized in *AEP*, greenhouse gases and their impact on temperatures are not localized. Emissions rapidly intermix with other gases in the atmosphere, which then exert a cumulative effect on the environment. Necessarily and immediately, greenhouse gas emissions have profound national effects, which therefore require coordinated national solutions. Hawaii's case is one of multiple lawsuits brought against energy companies for their alleged role in climate change. While defendants in these cases have sought the Court's review of issues relating to removal to federal court, this petition for a writ of certiorari marks the first time the question on the merits has reached this Court. This Court now has the opportunity to review whether states may regulate the energy industry for emissions that have national and even global effects.

Given the national importance of the energy industry, no further delay is prudent. In 2021, the energy industry employed 7.8 million Americans; in 2022 employment rose to 8.1 million. United States Energy and Employment Report 2023: https://www.energy.gov/media/299601. Americans last year spent $1.3 trillion on energy, which amounts to 5.7 percent of the Gross Domestic Product. U.S. Energy Information Administration (EIA) (2023), State Energy Data System (SEDS) 1960-2021: Prices and Expenditures. There are more than 11,000 utility-scale power plants located in every state that deliver electricity to the nation's power grid.

https://www.epa.gov/power-sector/electric-power-sector-basics#:~:text=Across%20the%20United%20States%2C%20over,how%20EPA's%20programs%20reduce%20emissions.

Controlling energy has long constituted an important national security goal that not only supports economic independence and stability but also U.S. diplomacy and military capabilities. If this Court were to allow these tort cases to proceed, states and localities could handicap an interstate industry critical to the nation's economy and security. This Court should not let this issue be decided by defaulting to the states but instead should reject Respondent's effort to regulate phenomenon with nationwide, indeed global effects.

This Court has long recognized that the Constitution vests the conduct of foreign relations in the federal government alone. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). It has pre-empted state laws that might interfere with federal foreign policy, even in the absence of a treaty. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for example, this Court pre-empted a state law that imposed sanctions on Burmese-related goods because it conflicted with federal foreign policy toward Burma. This Court has further held that states cannot use their police powers to regulate areas that are the subject of diplomatic negotiations by the federal government. In *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), this Court held that the federal common law of foreign relations pre-empted a California law that required insurers to disclose information relating to pre-WWII insurance

policies held by Swiss and German companies. The Court found that the state law conflicted with the Clinton administration's diplomatic efforts to achieve a settlement between the German government, the private financial institutions, and Holocaust survivors and their families.

National foreign policy interests, of equal or greater importance, are present in these air pollution cases. The executive branch has entered into international agreements designed to regulate greenhouse gas emissions and continues to participate in international negotiations to identify areas for cooperation between nations. *See, e.g.,* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; Rio Declaration on Environment and Development, Jun. 13, 1992, 31 ILM 874 (1992). Respondents attempt to impose a damages sanction on petitioners for the very conduct, based on the same theory of harm, that is the focus of these national diplomatic efforts. The potential interference with federal foreign policy further demonstrates the national importance here that justifies this Court's review.

III. Respondents distort universal tort doctrine as found in every jurisdiction, state and federal, in the United States.

There are two reasons why this Court should reach the validity of the tort claims addressed below. To be sure, basic federalism principles dictate that every state has the right to determine the content of its own tort law. But that power is subject to constitutional constraints. First, where, as here, the federal common law controls, federal courts must develop the substantive law that governs. The Hawaii Supreme Court's misapplication of tort law is not a matter of state law, but instead represents the erroneous incorporation of a state tort standard into the federal common law of interstate pollution. In fashioning a federal common law rule, courts may consider the incorporation of state law, but the guiding principle is to prevent significant conflict between state and federal policies. In this case, this Court must address the Hawaii Supreme Court's distortion of standard tort law principles as federal common law. Federal courts have so far been unable to address the substance of the federal common law in these cases because the. Courts of Appeals, including the Ninth Circuit in this case, *City & Cnty. Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), *cert. denied* 143 S. Ct. 1799 (2023), have refused to allow removal of these actions from state court.

Second, this Court should grant certiorari to make clear that the Fourteenth Amendment's limits on the exercise of personal jurisdiction bar Hawaii's effort here to regulate extraterritorially. The Respondents did not claim that the case falls within its general

jurisdiction. The Hawaii Supreme Court's assertion of specific personal jurisdiction requires this Court to evaluate the Respondents' substantive causes of action because their unlimited breadth expands the state's power so far as to render Due Process protections meaningless. The Hawaii Supreme Court has wrongly exercised its power over Petitioners by defining a novel cause of action that has no geographic or temporal limits. This allows the court below to impermissibly transform specific jurisdiction into a general jurisdiction that every state could exercise over Petitioners. But no state could claim jurisdiction over a motor collision in another state solely on the ground that some of its citizens hope to do business on some future day with the children of one of the participants. This Court cannot allow speculative connections to justify personal jurisdiction that would allow every state in the nation to claim power over every automobile accident in the world. While not presented by the Petitioners, the question of judging the Hawaii Supreme Court's power to exercise specific jurisdiction under the Fourteenth Amendment requires evaluation of the tort claim.

Here, the Hawaii Supreme Court has adopted a theory of tort liability so broad that it allows any state to exercise personal jurisdiction over any defendant involved in the production or distribution of fossil fuels anywhere in the world. Measured against standard personal jurisdiction cases such as *International Shoe v. Washington*, 326 U.S. 310 (1945), *McGee v International Life Insurance Co.*, 355 U.S. 220 (1957), and *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), Hawaii's assertion of jurisdiction cannot be sustained. This Court recently cited *International Shoe* for the

proposition that "a tribunal's authority depends on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 358 (2021) (quoting *International Shoe v. Washington*, 326 U.S. 310, 316-17 (1945)). Here, there is no discrete transaction, no automobile accident, no credit transaction, no local tax, and no local real estate interest within the state that meets the minimum contacts test. Instead, the Respondents plead vague counts of fraudulent misrepresentation and fraudulent concealment that contain *none* of the recognized elements of these familiar causes of action. Respondents' skeletal pleadings cannot be taken at face value on this jurisdictional point. Once the surplusage is stripped away, all that remains of these claims is a bare assertion that Petitioners sold their products in Hawaii in a lawful and proper matter, which is also true of every local independent distributor and retailer of fuel products in this and every other state.

The opinion does not analyze whether Hawaii has pleaded the standard elements of nondisclosure and misinformation theories of liability found everywhere in the United States. In fact, it pleaded *none* of these elements. As stated in the Restatement (Second) of Torts:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to

> act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused by his justifiable reliance on the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (1977).

Misrepresentation and concealment cases both start with the proposition that the defendant possesses material information that is *not* known to the plaintiff, after which the defendant makes a false statement or, alternatively, omits to mention some key fact of relevance to the plaintiff. The plaintiff, to its detriment, then relies on the false statement or improper omission, which in this case allegedly includes a wide array of permanent damages to Hawaii's environment.

But the complaint only denounces a supposed campaign of misinformation without specifying any of its components. There is no allegation that fossil fuel consumed in Hawaii was marketed using any identifiable public statements that the production and use of fossil fuels carries no or little danger to the environment. Rather, Petitioners claimed without contradiction that their fossil fuels could improve gas mileage, reduce engine wear, or even reduce the emission of harmful substances like nitrous acid and sulfur dioxide. These statements cannot be treated as a form of misinformation if they are all true. Indeed, each of these true statements helps to improve the operation of a competitive market, which only produces positive externalities, not Respondents' unspecified negative externalities. Hawaii has an active Office of Consumer Protection, yet the Hawaii Supreme Court has not produced a single instance in

which either that agency or the Federal Trade Commission raised the issue of greenhouse gases with any of the Petitioners as a matter of public concern. DEP'T OF COM. & CONSUMER AFFS., OFF. OF CONSUMER PROT. (2013), https://cca.hawaii.gov/blog/office-of-consumer-protection/.

Sellers, distributors, and commercial consumers within Hawaii commonly handle, use, consume, and promote fossil fuel products in countless goods and services without disclosing anything about carbon dioxide or global warming. Yet Respondents did not sue any of these local restaurants, recreational facilities, transportation providers, or factories. The same applies to the Hawaiian retailers who have a closer connection to the public than Petitioners. By the Respondents' logic, however, the silence of these businesses should be regarded as an illicit, and hence actionable, form of omission.

Respondents' complaint is similarly deficient in establishing the element of reliance, which is critical to any claim of fraudulent statements or omissions. The minimum condition to prove a fraud case is asymmetric information between the two parties. The defendants must know something that the plaintiffs do not. A leading illustration of a fraudulent statement that caused justified reliance by the plaintiffs is the English case, *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889). There the fatal misrepresentation was that defendants had "the right to use steam or mechanical motive power instead of horses" to run their trams along the public way, even though they had secured such authorization for only part of that way. *Id.* at 347. The concealment of that

vital information hurt the plaintiffs' investment prospects. The plaintiffs, who had no independent source of information, relied on the defendants.

Section 9 of the Third Restatement of Torts also sharply limits a plaintiff's right to recover for any trivial misstatements by requiring that all misrepresentations be material:

> **§9. fraud** ***Comment d. Materiality:*** Liability for fraud attaches only to misrepresentations that are material. A misrepresentation is material if a reasonable person would give weight to it in deciding whether to enter into the relevant transaction, or if the defendant knew that the plaintiff would give it weight (whether reasonably or not). The question, in effect, is whether the defendant knew or should have known that the misrepresentation would matter to the plaintiff . . .

RESTATEMENT (THIRD) OF TORTS § 9 (2020).

This understanding is incorporated, for example, into Rule 14a-9, promulgated under section 14(a) of the Securities Exchange Act of 1934, which provides that no proxy solicitation shall be made "which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9(a). Thus, *TSC Industries, Inc. v. Northway, Inc,* 426 U.S. 438 (1976), stands for the proposition that sophisticated parties to financial transactions must make reasonable inquiries on their own, based on the information that

they already have acquired either from the defendant or from independent sources. These parties should rely, when appropriate, on informed intermediaries to get accurate information about a proposed transaction. There is a duty of inquiry on the recipient of information from standard sources, which the Respondents here and the public had in abundance.

Respondents fail to satisfy any of these requirements for a claim of misstatement or concealment. First, they do not identify any excessive overpromotion or deliberate omissions that could form the basis of liability. Respondents' general allegations are so broad that they could apply to different sellers, saying different things, at different times, to different buyers. Pleading with particularity is necessary here to give fair notice to each Petitioner to allow it to prepare its individual defense.

Second, Respondents fail to identify the information that Petitioners must disclose. Respondents' complaint assumes that the Petitioners are in possession of information on global warming of which the plaintiffs are ignorant. But nothing could be further from the truth. Information about climate change is a matter of public knowledge and can be obtained from many different sources, each with its own distinctive perspective. No defendant, and certainly none of the Petitioners in this case, could deceive the Respondents given the substantial knowledge available to state government entities. As for the public, it is composed of highly heterogenous groups of people who can acquire their information on global warming and fossil fuels from many different sources. Members of the public might have taken

anything that the Petitioners might have said about global warming with a grain of salt or discounted it in favor of other positions.

Respondents also face insuperable obstacles on the question of causation. First, Respondents do not rule out independent causes of global warming that are widely understood in the scholarly literature. Methane, for example, is often regarded as a cause of climate change. *Global Climate Change: Evidence*, NASA GLOBAL CLIMATE CHANGE AND GLOBAL WARMING: VITAL SIGNS OF THE PLANET (2022), https://climate.nasa.gov/vital-signs/methane/. The sale or use of fossil fuels only takes place after its production. Furthermore, environmental disasters can have a variety of causes unrelated to fossil fuels. To give but one Hawaiian example, multiple accounts of the 2023 Maui fires stress a variety of natural and human causes without mentioning carbon dioxide or fossil fuels.[2] Elsewhere, Maui officials have claimed that "the 'intentional and malicious' mismanagement of power lines by Hawaiian Electric," caused the fire, which attributes the fire's cause to gross human error rather than to any (nonexistent) marketing campaign to induce the public to continue to use fossil fuels.[3]

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[2] See, e.g., Clair Rush et al., *Maui's fire became deadly fast. Climate change, flash drought, invasive grass and more fueled it*, ASSOCIATED PRESS (Aug. 10, 2023), https://apnews.com/article/hawaii-wildfires-climate-change-92c0930be7c28ec9ac71392a83c87582.

[3] See Adeel Hassan & Anna Betts, *Maui Wildfires Latest: Lahaina Reopens to Residents*, THE NEW YORK TIMES (Sept. 29, 2023), https://www.nytimes.com/article/maui-wildfires-hawaii.html#:~:tex

Respondents cannot tease out the supposed effects of fossil fuels from all other possible causes for the environmental harms that they have allegedly suffered.

In *AEP*, this Court held that the CAA's comprehensive scheme pre-empted any public nuisance tort for the release of carbon dioxide into the air. The decision itself only preempted suits under federal common law; it did not preclude any state public nuisance action so long as the sources and targets of pollution were all located within the same state. Nonetheless, the same fatal flaws with a judge-made federal common law cause of action applies as well to any analogous state law action. In both settings, the private law action could work at cross-purposes with the general regulatory federal scheme. In the aftermath of *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), where this Court instructed the EPA to develop a plan to control carbon dioxide emissions, *AEP* found emissions subject to direct regulation by the Clean Air Act, not a patchwork of state private tort actions.

Respondents cannot rely on the causation theory used in ordinary pollution cases that they explicitly disclaimed in their pleadings. The theory of causation necessarily varies with changes in the underlying cause of action. In this context, the correct definition of causation does not ask how much global warming is caused by pollution. It only asks the far more limited question of how much, if any, the public would have

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t=Maui%20County%20officials%20have%20claimed,had%20allowed%20flames%20to%20spark.

altered its fossil fuel consumption if it had received material information that Petitioners allegedly withheld. The answer here is de minimis at most. The public already held this information; its members would not have changed their behavior based on the information that they already knew. In a world saturated with constant discussion of global warming, marketing that relied on no false statements about fossil fuels cannot amount to misinformation and concealment that caused a change in public behavior. This weakness in causation makes it all the more imperative for this Court to recognize that federal common law preempts these state tort claims.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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