No. 23-947

In the
Supreme Court of the United States

SUNOCO LP, ET AL.,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is an entity organized under section 501(c)(6) of the Internal Revenue Code that represents hard-working entrepreneurs and businesses across all sectors of the economy. AmFree's members are vitally interested in U.S energy security and the continued viability of our commercial republic.

AmFree launched the Center for Legal Action ("CLA") to represent these interests in court. CLA is spearheaded by former U.S. Attorney General Bill Barr. Under Attorney General Barr's leadership, the Department of Justice argued that federal law exclusively governs transboundary emissions claims. The Hawaii Supreme Court's contrary view is not just wrong, it gravely threatens the energy security of the United States, and therefore, our national sovereignty.

SUMMARY OF ARGUMENT

This case is about who decides. The Hawaii Supreme Court claims the Clean Air Act empowers every state to govern "the atmosphere around the world." *Massachusetts v. EPA*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting). The Second Circuit's response to this contention was right: "Such

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[1] *Amicus curiae* provided timely notice of intent to file this brief to all parties. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

an outcome is too strange to seriously contemplate." *City of New York v. Chevron Corp.*, 993 F.3d 81, 98–99 (2d Cir. 2021). The Second Circuit's decision directly conflicts with the decision of the Hawaii Supreme Court. S. Ct. R. 10(b); Pet. 12, 17–18. The Hawaii Supreme Court has also "decided an important federal question in a way that conflicts with relevant decisions of this Court," S. Ct. R. 10(c), including *International Paper Company v. Ouellette*, 479 U.S. 481 (1987). The Court should grant certiorari to resolve the conflict and protect its precedent from erosion.

Amicus writes to underscore three key points.

1. Constitutional text, history, and tradition demonstrate that federal law governs claims premised on transboundary emissions. Congress legislates against that legal backdrop. Accordingly, this Court's decision in *Ouellette* makes clear that a clear delegation of authority from Congress is necessary before states may enter the field of transboundary emissions. No such delegation appears in the text of the Clean Air Act, and none may be implied.

The Hawaii Supreme Court reached the wrong answer because it asked the wrong question. The question is not whether federal common law is "dead and alive," Pet. App. 45a, but whether the Clean Air Act, as read by this Court, gives birth to "a hydra in government" by silently delegating power over transboundary emissions to all 50 states. The Federalist No. 80 (Alexander Hamilton). This has never been the law. Indeed, even this Court's most expansive decision regarding state involvement in carbon emissions, *Massachusetts v. EPA*, rejected this proposition, reasoning that states have standing to sue precisely

because they are constitutionally powerless to regulate greenhouse gas emissions beyond their borders without federal assistance. 549 U.S. at 519.

2. The Hawaii Supreme Court tried to distinguish *Ouellette* because the complaint in this case grafts allegations of "deceptive marketing" onto the transboundary emissions claims. Pet. App. 59a. Not content with creating a hydra in government, Hawaii would create a hydra in nuisance law, too, all to evade *Ouellette*. This Court should not buy the plaintiffs' "deceptive marketing" about what this lawsuit is really about. "There is no hiding the obvious": this lawsuit "seeks a global remedy for a global issue." *Minnesota v. Am. Petrol. Inst.*, 63 F.4th 703, 717 (8th Cir. 2023) (Stras, J., concurring).

3. The stakes could hardly be higher. If Hawaii and like-minded states succeed in imposing an unwieldy patchwork of carbon penalties on private energy firms, the United States could soon become dependent on energy companies owned by foreign states to meet its energy needs, since foreign states alone can claim sovereign immunity. 28 U.S.C. § 1604. Many of those companies are controlled by countries hostile to the United States.

The Court's immediate review is needed to stop this grave threat to U.S energy security. The Court should not be "willing to stand on the dock and wave goodbye as [Hawaii] embarks on this multiyear voyage of discovery." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

ARGUMENT

I. The Clean Air Act Does Not Authorize Honolulu's Suit.

According to the Supreme Court of Hawaii, the Clean Air Act, as interpreted in *Massachusetts v. EPA*, silently empowered all fifty states to seek damages for alleged harm resulting from the use of fossil fuels around the world. Pet. App. 47a–51a. *Massachusetts* accomplished no such delegation of power. Indeed, this Court's reasoning rested in part on the notion that "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives," including the power to control emissions beyond its borders. *Massachusetts*, 549 U.S. at 519. The Clean Air Act does not expand those sovereign prerogatives.

A. Federal Law Governs Transboundary Emissions Claims.

The U.S. Constitution extinguishes diplomatic relations among the states and forbids them from engaging in war, unless in imminent danger of invasion. *See* U.S. Const. art. I, § 10; *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 245 (2019). In doing so, the Constitution replaces war and peace with law and courts. Conflicts among states are no longer "decide[d] by the sic volo, sic jubeo, of political power," but by the "judgment" of courts "bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." *Rhode Island v. Massachusetts*, 37 U.S. 657, 737 (1838).

But the Constitution says precious little about how judges ought to decide the interstate and international disputes that would inevitably arise among

states and their citizens. The Constitution, to use a felicitous phrase, doesn't "partake of the prolixity of a legal code." *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819). Instead, the Constitution establishes national institutions designed to give national, impartial answers to those disputes. That includes Congress and a Supreme Court, vested with original jurisdiction to decide cases "in which a State shall be [a] Party." U.S. Const. art. III, § 2.

For most of our history, interstate disputes proceeded without Congress. Congress did not create a *Code Napoléon* because it didn't have to. In our system, unwritten law supplies the background rules of decision "until those rules should be changed *by the competent authority*." *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (Marshall, Circuit Justice, C.C.D. Va. 1811) (emphasis added). The question in this case is, who is the competent authority? "Who decides?" *NFIB v. OSHA*, 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring).

Not Hawaii. Hawaii stands "on an equal footing with the other States," so it is not a competent authority over interstate or international emissions questions. Hawaii Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. The "Constitution implicitly forbids that exercise of power because the 'interstate … nature of the controversy makes it inappropriate for state law to control.'" *Hyatt*, 587 U.S. at 246 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

Instead, interstate emissions are a federal domain. The default authority, until Congress acts, is this Court. As this Court put it over a century ago:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever … the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law.

Kansas v. Colorado, 206 U.S. 46, 97–98 (1907).

"For over a century," interstate common law developed by this Court governed air pollutants blown to another state by the prevailing winds. *City of New York*, 993 F.3d at 91. As Justice Holmes observed in *Georgia v. Tennessee Copper Company*, when states surrendered their prerogatives of war and peace to the national government, they "made the forcible abatement of outside nuisances impossible to each." 206 U.S. 230, 237 (1907). "[T]he alternative to force is a suit in this court." *Id.*

Congress is the only competent authority to change these rules. Congress may enact a "policy of excluding from interstate commerce all goods … which do not conform" to federal emissions standards.

United States v. Darby, 312 U.S. 100, 121 (1941); *see, e.g.*, 42 U.S.C. § 7522. The U.S. Constitution also allows states to enter interstate compacts to resolve interstate disputes, subject to Congress's approval. U.S. Const. art. I, § 10, cl. 3. The Compact Clause thus confirms that Congress, not a state, is the competent authority to change background rules of interstate common law. *See, e.g.*, 42 U.S.C. § 7402 (encouraging interstate air pollution compacts). Interpreting interstate compacts, moreover, "is the function and duty of the Supreme Court of the Nation." *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 28 (1951).

When it comes to transnational emissions, states have even less power, as does this Court. States must enlist the political branches to assist them in diplomatic negotiations, for example, by setting up an international arbitral tribunal or an international commission, which decides questions according to principles of international law, not state law. *See, e.g.*, *Trail Smelter Arb. (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1938); *Ontario v. EPA*, 912 F.2d 1525, 1529 (D.C. Cir. 1990).

It is, after all, a longstanding principle that "[t]he Courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. 66, 123 (1825). Public nuisance is a public wrong with roots in the "criminal law." Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. Tort L. 1, 5 (2011). It was used to punish "broad-ranging offenses" against public health and morals, including "bullfights." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301–02 (4th Cir. 2010) (Wilkinson, J.). Under international rules of conflicts of law, public nuisance claims may have been penal laws barred from extraterritorial operation,

particularly the claims for punitive damages pressed by Honolulu. *See Huntington v. Attrill*, 146 U.S. 657, 673 (1892) (discussing the meaning of penal laws).

In any event, there was little need to confirm that the federal law of transboundary emissions was exclusive. Throughout this period, territorial rules of personal jurisdiction prevented states from seeking recourse through their courts against out-of-state persons. Before *International Shoe Company v. Washington*, 326 U.S. 310 (1945), jurisdiction was based on a territorial theory of presence or consent. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 138 (2023). A copper company located in Tennessee was not personally subject to a suit in Georgia court under Georgia law, even if its copper and emissions ended up in Georgia through the stream of commerce and the prevailing winds. To secure a binding judgment against a Tennessee copper company in an impartial forum, Georgia had to submit to this Court, which would then apply a general law of nuisance, not Georgia law. *Tenn. Copper*, 206 U.S. at 237.

International Shoe and the related "development of 'long-arm jurisdiction' means, in most instances, that no necessity impels [this Court] to perform such a role." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971); *see also City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 312 n.5 (1981) (rejecting a personal jurisdiction defense under *International Shoe*). Under *International Shoe*'s malleable standards, state courts can claim broad power over out-of-state persons—so broad, that "one of the world's most geographically isolated land masses," accounting for 0.06% of global carbon emissions, can become a focal point for torts allegedly committed by multinational

energy companies everywhere and affecting everyone. Pet. App. 23a, 67a.

It doesn't take an expert in game theory to grasp how this threatens a "race to the courthouse"—and to the bottom. Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1259 (2017); Michael S. Greve, *The Upside-Down Constitution* 234, 304 (2012). *International Shoe*, combined with other legal developments in horizontal federalism, *see, e.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), threatened to leave no impartial court and body of law to resolve transboundary emissions claims. Why would a state negotiate in Congress when its courts can simply impose liability on out-of-state defendants or order them to cease doing business?

Federal courts have rejected this race to the bottom. As the Tenth Circuit explained in a pathbreaking decision, history and precedent confirm that:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain.

Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971).

In *Milwaukee I*, this Court embraced *Pankey*, confirming that disputes that "deal with air and water in their ambient or interstate aspects" are governed by federal common law. *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 99–100, 103 (1972). The Court identified an "overriding federal interest" in applying federal law to "the pollution of a body of

water such as Lake Michigan bounded, as it is, by four States." *Id.* at 105 n.6.

Logically, "[i]f federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7. "[T]he implicit corollary of this ruling," therefore, "was that state common law was preempted." *Ouellette*, 479 U.S. at 488; *see Illinois v. Milwaukee* (*Milwaukee III*), 731 F.2d 403, 414 (1984) (so concluding on remand). *Milwaukee I*, therefore, confirmed what history and tradition already showed: the law of transboundary emissions is a federal domain, not a state domain. *City of New York*, 993 F.3d at 91–92.

B. Congress Must Speak Clearly to Delegate Authority Over Transboundary Emissions to the States.

The question in this case is whether Congress subsequently changed that status quo and delegated authority to the states. Changing the federal baseline of exclusive federal power over transboundary emissions requires a clear statement from Congress. As *Ouellette* put it, Congress must "specifically" authorize state transboundary emissions lawsuits to proceed. 479 U.S. at 492.

Ouellette involved a nuisance claim under Vermont law, seeking compensatory, punitive, and injunctive relief against a New York source that was polluting Lake Champlain. 479 U.S. at 484. By the time of *Ouellette*, *Milwaukee II* had decided the relevant federal common law had been displaced by the Clean Water Act. *Id.* at 489. The question, as here, was whether this opened the field of interstate water pollution to the rule of fifty states.

The answer was no. As this Court recognized, the default rule is that control over interstate pollution is "a matter of federal law." *Ouellette*, 479 U.S. at 492. "[I]f a New York source were liable for violations of Vermont law," this Court recognized, "Vermont and other states could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* at 495. "Nothing in the Act gives each affected State this power to regulate discharges." *Id.* at 497. "It would be extraordinary for Congress," this Court continued, to delegate to the states the power "to undermine" the balance of interests struck by the federal agency in charge. *Id.*

In light of the tradition of exclusive federal law and the federal scheme, the best reading of the Clean Water Act (including its savings clause) was that it authorized suits only under the law of the "source State." *Id.* at 496–500. A suit for compensatory, punitive, or injunctive relief against a New York source thus could not proceed under Vermont law. *See id.* at 498 n.19 (rejecting the U.S. Solicitor General's argument that suits for compensatory relief could proceed under Vermont law).

Although couched as an obstacle preemption case, *Ouellette*'s logic follows from the federalism canon, which "requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (cleaned up); *see Ouellette*, 479 U.S. at 492. "[M]any decades before the [Clean Water Act] was enacted, such pollution was governed exclusively by federal common law, and Congress is presumed to legislate against the background of established law." Thomas W. Merrill,

Preemption in Environmental Law, *in Federal Preemption* 166, 183 (Richard A. Epstein & Michael S. Greve eds. 2007). Therefore, if an issue was beyond the authority of a state before a statute like the Clean Water Act, it remains out of reach after the Act unless Congress clearly says otherwise. The Act did not speak clearly enough to delegate power in this "extraordinary" way to the states. *Ouellette*, 479 U.S. at 497.

In other words, when it comes to the law of interstate pollution, the presumption under the Supremacy Clause is exclusive federal power, not concurrent power. "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. 299, 319 (1851). So it is with the law of transboundary emissions. The Second Circuit therefore was right to hold that "resorting to state law … is permissible only to the extent *authorized* by federal statute." *City of New York*, 993 F.3d at 99 (emphasis added) (cleaned up). And, under *Ouellette*, that authorization must be *clear*.

The Hawaii Supreme Court's reliance on the presumption against preemption is backwards. Pet. App. 55a, 78–79a. The background "balance between federal and state power" is that states have never governed this area, so the presumption is that they still don't.

C. The Clean Air Act Does Not Give States Authority Over Transboundary Emissions.

"To say [the Clean Air Act's] regulatory and permitting regime is comprehensive would be an understatement." *Cooper*, 615 F.3d at 298. In *Massachusetts v. EPA*, this Court held that the term "air pollution agent" in the Clean Air Act unambiguously delegates to EPA authority to control domestic gases that absorb infrared radiation, commonly known as greenhouse gases. 549 U.S. at 528–29. Under this decision, EPA has proceeded to comprehensively regulate greenhouse gas emissions from the oil and gas sectors. 89 Fed. Reg. 16,280 (Mar. 6, 2024). EPA can also regulate the downstream sale of fuels from cradle to grave. 42 U.S.C. § 7545. That includes a fuel program that aims to reduce the "lifecycle greenhouse gas emissions" of transportation fuel. *Id.* § 7545(*o*). EPA may also regulate industrial sources, power plants, and cars, trucks, trains, planes—even lawnmowers. *Id.* §§ 7411, 7521, 7550(2), (10), 7571. EPA is zealously executing this regulatory task—some would argue, too zealously. *See West Virginia v. EPA*, 597 U.S. 697 (2022).

Under *Massachusetts v. EPA*, it's clear what happens next. *Am. Elec. Power Co.* ("*AEP*") *v. Connecticut*, 564 U.S. 410, 430 (2011) (Alito, J., concurring). As this Court has held, the interstate law of transboundary emissions is displaced. *Id.* at 427. Citing *Ouellette*, *AEP* left open "the availability of a claim under state nuisance law" on remand, and in particular "'the law of the *source* State.'" *Id.* at 429. Taking this remand instruction seriously means that state courts must follow *Ouellette*, not cast it aside.

Ouellette controls here as it did in *AEP*. The Clean Air Act's comprehensive scheme sets a complex "balance of interests." *Ouellete*, 479 U.S. at 495. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *AEP*, 564 U.S. at 427. And "[t]he Clean Air Act entrusts such complex balancing to EPA in the first instance." *Id.*[2] The Clean Air Act, in short, demands reasoned decisionmaking, not emotive decisionmaking. *Compare Michigan v. EPA*, 576 U.S. 743, 753 (2015) (holding EPA must generally consider cost), *with* Pet. App. 71a (quoting Haw. Rev. Stat. § 5-7.5(b)) (judges must consider the "Aloha Spirit" and "emote good feelings" in their decisions).

EPA's rules, moreover, operate prospectively, after public notice and comment, in accordance with detailed rulemaking requirements in the Clean Air Act. 42 U.S.C. § 7607(d). They are overseen by an elected President who is accountable to voters across the Nation, *Trump v. Anderson*, 144 S. Ct. 662, 670 (2024) (per curiam), and is better suited at addressing the "questions of national or international policy" raised by climate change, *AEP*, 564 U.S. at 428. After all, "global warming—as its name suggests—is a global problem that the United States cannot confront alone." *City of New York*, 993 F.3d at 88. Hawaii is not just attempting to govern Lake Michigan—it is attempting to govern "the atmosphere around the

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[2] For example, regulating the "offering for sale, or sale of any fuel" requires "a cost benefit analysis." 42 U.S.C. § 7545(c)(2)(B); *see also*, *e.g.*, *id.* §§ 7521(a)(2), 7571(b). When relevant, EPA must also consider "energy requirements." *Id.* § 7411(a)(1).

world." *Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting).

The Clean Air Act (including its savings clauses) is not materially distinguishable from *Ouellette*. Pet. 26. Neither provision delegates federal authority over interstate or international greenhouse gas emissions to the states, so "[n]othing in the Act gives each affected State this power to regulate" global emissions. *Ouellette*, 479 U.S. at 497; *accord City of New York*, 993 F.3d at 99.

II. The "Deceptive Marketing" Label Is Itself Deceptive Marketing.

The Hawaii Supreme Court purported to distinguish *Ouellette* because "[t]he source of [Honolulu's] alleged injury is Defendants' alleged failure to warn and deceptive promotion." Pet. App. 52a. That, as petitioners explain, is a "false dichotomy." Pet. 30.

The Hawaii Supreme Court's recitation of the claim refutes this distinction. According to the court's description, the hybrid tort alleged by Honolulu is that "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" Honolulu. Pet. App. 11a (emphasis added) (cleaned up). No increase in emissions, no increase in climate change, no injury. Indeed, the emissions are necessary *ex hypothesi* to the alleged harm from climate change. Slapping a new moniker on these claims doesn't change that they attempt to regulate and impose liability on transboundary emissions.

The Second Circuit rightly saw through this "[a]rtful pleading." *City of New York*, 993 F.3d at 91. *Ouellette* wouldn't have turned out differently if the Vermont residents had alleged that International Paper engaged in "a public relations campaign" by funding "think tanks" and "advertisements"—in other words, speech—to downplay the risk of its effluents and "avoid regulation." Pet 8a. The effect of the tort suit would be the same. Vermont "and other states could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495.

The Hawaii Supreme Court's nuisance hybrid is a ruse. The court never explained how a jury would decide how a public relations campaign "inflated the overall consumption of fossil fuels." Pet. App. 11a. That's because a jury cannot possibly decide that question—rationally at least.

Global energy use continues to grow today, and fossil fuels with it. Humans use 574 exajoules of energy a year—and four-fifths comes from fossil fuels. Liberty Energy, *Bettering Human Lives* 41 (2024), https://perma.cc/M2TD-756F. Fossil fuels, predominantly oil and natural gas, have provided 76% of the added energy since 2010—well after the public relations campaign alleged in the complaint. *Id.* at 42. The solar panels, wind turbines, and batteries touted by many politicians remain a trivial share of primary world energy—and require copious amounts of fossil fuel inputs to make and maintain. *See, e.g.*, Thomas A. Troszak, *Why Do We Burn Coal and Trees To Make Solar Panels?* (rev. 2019), https://perma.cc/WA2Y-

DTGU ("Every step in the production of solar photovoltaic (PV) power systems requires a perpetual input of fossil fuels.").

Humans don't use fossil fuels because of a "public relations campaign." They use fossil fuels because they are necessary to the technologies that underlay global human prosperity—from synthetic fertilizer, to cement, to plastics, to internal-combustion engines, to steel. *See* Williams Nordhaus, *The Climate Casino* 20 (2013) ("Why in the world do we use this vast quantity of fossil fuels? We use it to drive, to fly, to heat our houses and schools, to run our computers, and for everything we do."). Hawaii is the most petroleum-dependent state in the Nation not because fossil fuels are popular, but because oil's energy density and convenient transport make it an ideal source of energy for the isolated islands. Under any counterfactual scenario in which political leaders don't launch a globally coordinated assault on the standard of living or impose permanent emergency lockdowns, fossil fuels would have increased in past decades, regardless of any "public relations campaign."

Given all this, how is a jury supposed to isolate the effect of a "public relations campaign" on the additional use of fossil fuels, the effect of those additional fossil fuels on the climate, and the consequent effect of that in Honolulu or some other place? The questions at issue in *Ouellette* pale in comparison to the inquiry envisioned by Hawaii's Supreme Court on remand.

More than that, the question cannot be answered through any evidence that follows basic rules of scientific integrity. Any counterfactual scenario would be unfalsifiable, and so unscientific. *Daubert v.*

Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993). Allegations that cannot be proven through falsifiable evidence are not elements of a legal tort. They are instead an attempt to plead indirectly what Honolulu knows it cannot plead directly. In short, artful pleading.

The Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). It should not do so here.

III. This Case Is Extraordinarily Important to the Nation's Energy Security.

The Second Circuit correctly noted the very significant "energy production, economic growth, foreign policy, and national security" consequences of these cases around the country. *City of New York*, 993 F.3d at 93.

There is a pattern to these cases. All involve suits against private energy companies—typically, big-pocketed ones, unless a small local company is needed to destroy complete diversity and avoid federal court. None involve energy companies owned by foreign states, which account for the "majority of the world's oil and gas, pumping out an estimated 85 million barrels of oil equivalent per day." Patrick R. P. Heller & David Mihalyi, Nat'l Res. Governance Inst., *Massive and Misunderstood: Data Driven Insights into National Oil Companies* 6 (Apr. 2019). Such companies control "up to 90 percent of global reserves." *Id.* And their market influence is growing as private oil companies cut back under pressure from "ESG" investors and governments. Clifford Krauss, *As Western Oil*

Giants Cut Production, State-Owned Companies Step Up, N.Y. Times (Nov. 4, 2021).

Energy companies owned by foreign states, therefore, account for an enormous quantity of greenhouse gases resulting from the eventual burning of their products downstream. The eventual consumption of oil and gas extracted by Saudi Aramco produces an estimated 1.6 billion metric tons of greenhouse gases, more than Chevron, BP, and Shell combined. David Fickling & Elaine He, *The Biggest Polluters Are Hiding in Plain Sight*, Bloomberg (Sept. 30, 2020). According to the data and liability theory used by the city and state plaintiffs in these cases, Saudi Aramco's marketing of fuels has contributed to an estimated 4.38% of global carbon emitted since 1965, more than any private energy firm. *See* Climate Accountability Inst., Press Release, *Carbon Majors: Update of Top Twenty Companies 1965–2017* (Oct. 9, 2019), https://perma.cc/95YV-RY97. Several other firms owned by foreign states make the top twenty list. *Id.* These companies are therefore a big part of the alleged problem.

They are not, however, part of the Hawaii Supreme Court's litigation-driven solution. The reason is obvious. Apart from personal jurisdiction and service hurdles, companies owned by foreign sovereigns could remove the cases to federal court. 28 U.S.C. § 1441(d). They are also presumably immune from suits for damages. *Id.* § 1604.

If successful, the suits brought by Honolulu and like-minded states and localities would therefore create a perverse two-tiered system of justice. By imposing market-share liability on this select group of com-

panies, the lawsuits would establish a *de facto* taxation system, "but taxation in a form that is very difficult to defend." George L. Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, 18 S. Ct. Econ. Rev. 109, 113 (2010).

The tax will be imposed through *ad hoc* public nuisance litigation that "violates the most elemental aspect of the rule of law: that legal duties must be sufficiently predictable to guide those to whom they apply." Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. F. 985, 987–88 (2023). And it will be imposed selectively, creating a patchwork of judge-made carbon taxes for an assortment of private companies, many of them domestic, and no carbon taxes for energy companies owned by foreign sovereigns, many of them hostile to the United States.

The result would be disastrous. Demand for oil and gas will not go away. Oil and gas account for over two-thirds of primary energy consumption in the United States. Energy Info. Admin., *U.S. Energy Facts Explained*, https://perma.cc/LHD7-47YV (last updated Aug. 16, 2023). Despite political platitudes, this will not change soon, nor will this litigation change consumer demand.

But our sources of supply could change if these lawsuits move forward. By artificially biasing the market against private firms, and toward unaccountable companies owned by foreign states, the suits brought by Honolulu and states and localities across the country could make the U.S. captive to foreign countries, many of them hostile to U.S. interests, threatening our national security. The Organization

of Petroleum Exporting Countries, and Russia, would again be able to leverage market power to sway foreign policy decisions around the world. And the U.S military, which "consumed nearly 78 million barrels of fuel to power ships, aircraft, combat vehicles, and contingency bases" in fiscal year 2021, would lack a robust and vibrant private industry to supply the refined products it needs to protect the Nation. Dep't of Defense, *Fiscal Year 2023 Energy and Fuel Budget Justification Report* 2 (Aug. 2022). The grave energy security and foreign policy implications of these suits alone warrant this Court's immediate review.

* * *

It all started with this Court's decision in *Massachusetts v. EPA*. There, the Court said the quasi-sovereign interests of states affected by domestic greenhouse gases would be protected through the "scientific judgment" of EPA. 549 U.S. at 534. *Massachusetts* assumed that states needed to enlist EPA to regulate greenhouse gas emissions because control over interstate emissions disputes is "lodged in the Federal Government." *Id.* at 519.

Fast forward nearly two decades, and the Hawaii Supreme Court has understood *Massachusetts* to unleash a regulatory regime under which state courts and juries impose energy policy on their neighbors, and the planet. According to the Hawaii Supreme Court, *Massachusetts* paradoxically means that power is no longer exclusively "lodged in the Federal Government." But how can that be reconciled with the Court's standing analysis? Or "has this monumental decision been quietly interred?" *United States v. Texas*, 599 U.S. 670, 724 (2023) (Alito, J., dissenting).

The Hawaii Supreme Court's understanding of *Massachusetts*'s regime is untenable.

What started with a decision of this Court, must end with a decision of this Court. This Court should not sit idly by while its handiwork is commandeered to wreak havoc on the Nation's energy sector. *Util. Air Regul. Grp.*, 573 U.S. at 328.

CONCLUSION

The petition for certiorari should be granted.

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