No. 23-947

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

REPLY BRIEF FOR THE PETITIONERS

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The Hawaii Supreme Court held that state law can impose liability for injuries allegedly caused by the effect of interstate and international greenhouse-gas emissions on the global climate. The Second Circuit, considering materially identical claims, rejected such a breathtaking, extraterritorial application of state law. Other courts, too, have declined to apply state law extraterritorially to regulate transboundary pollution. The question whether the unique phenomenon of global climate change licenses States to ignore the structure of our constitutional system and extend state law beyond their borders is at the heart of the climate-change litigation currently ongoing nationwide. This Court's intervention is urgently needed.

After a passing attempt to contest the Court's jurisdiction, respondents build their brief in opposition around one argument: that this case is about deceptive market-

ing, not the release of greenhouse-gas emissions. That argument neither eliminates the conflict nor is correct on the merits. As to the conflict: the Second Circuit considered and rejected the same theory of liability for deceptive marketing as alleged here. And in rejecting that theory, the Second Circuit declined to hold—as the Hawaii Supreme Court held here—that state law could apply merely because the claims focus on an earlier point in the causal chain than the injury-causing emissions.

As to the merits: respondents' theory of causation is that, absent the allegedly deceptive marketing, greenhouse-gas emissions would have been lower, thereby alleviating the alleged climate-change injuries. Respondents are thus seeking to impose liability for transboundary emissions under state tort law. But both the Constitution and the Clean Air Act prohibit the extraterritorial application of state law to out-of-state and international emissions.

At a time when the Court is working to fill out its calendar for next Term, this is exactly the sort of case the Court should be hearing. It presents a fundamental and substantial question concerning the interplay between federal and state law. And as the avalanche of amicus briefs indicates, that question is of exceptional importance, and it arises in the context of litigation that presents a critical threat to one of the Nation's most vital industries. This is the perfect time to resolve the question presented, because the arguments on both sides have been fully ventilated in the lower courts. Further delay would simply enable the proliferation of litigation in handpicked state courts when these cases should be dismissed at the outset. The case for certiorari here is compelling, and the petition should be granted.

A. The Court Has Jurisdiction Under 28 U.S.C. 1257(a)

Respondents challenge this Court's jurisdiction (Br. in Opp. 7-11), but their arguments are insubstantial. As petitioners have noted (Pet. 2), this Court has jurisdiction under Section 1257(a). The Hawaii Supreme Court finally decided the question of federal preclusion; reversal of that decision would terminate this litigation; and declining review now would erode significant federal policies. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975). The Court has routinely granted certiorari in a similar posture in cases presenting questions of federal preemption. See, *e.g.*, *Coventry Health Care of Missouri, Inc.* v. *Nevils*, 581 U.S. 87, 92-94 (2017); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 259 (2013).

Respondents contend that reversal would not terminate the litigation, because it would "remain open on remand" whether their claims could go forward "based on source-state law." Br. in Opp. 8. That is false. Respondents' entire theory of causation and injury depends on the cumulative impact of greenhouse-gas emissions released from every jurisdiction on the planet—which they concede cannot be traced to any particular source. See Am. Compl. 107. And respondents have always purported to proceed only "under Hawai'i common law." See, *e.g.*, No. 22-523 Br. in Opp. at 1. Accordingly, as the trial court determined, reversal would "likely speedily terminate the case," Pet. App. 87a, because it would preclude respondents' sole theory of liability.

Respondents contend (Br. in Opp. 9) that denying review would not erode federal policy. That is also incorrect. This case implicates vital federal interests in the regulation of fossil fuels and greenhouse-gas emissions. See Pet. 31-33; Myers & Mullen Br. 11-22; Chamber Br. 19-22; API Br. 18-24; AmFree Br. 18-21. In addition, 20 States are vehemently protesting the projection of Hawaii law

beyond its borders as a serious affront to their constitutional sovereignty. See States Br. 3-15. Jurisdiction is plainly present under Section 1257(a).

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

The decision below conflicts with *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), and other decisions holding that state law cannot govern claims alleging injury from pollution emanating from a different State. See Pet. 14-21. Respondents' efforts to deny the conflict are unpersuasive.

1. Respondents admit that the Hawaii Supreme Court "expressly disagree[d]" with the Second Circuit's reasoning in *City of New York* that state tort law cannot govern claims alleging injury caused by global greenhouse-gas emissions. Br. in Opp. 13. Respondents argue only that the claims in *City of New York* were an attempt to regulate emissions, whereas the claims here, focused on deceptive marketing, purportedly are not. See *id.* at 12-13. That argument fails for two reasons.

First, respondents' description of *City of New York* is simply incorrect: the plaintiff there presented the same theory of deceptive marketing as respondents do here. The plaintiff asserted that the defendants "ha[d] known for decades that their fossil fuel products pose a severe risk to the planet's climate" yet "downplayed the risks and continued to sell massive quantities of fossil fuels." 993 F.3d at 86-87. The complaint alleged that the defendants had "orchestrated a campaign of deception and denial regarding climate change," the goal of which was to "portray fossil fuels as environmentally responsible." J.A. at 48 (No. 18-2188). That alleged "sophisticated advertising campaign[]" served as part of the basis for the plaintiff's theory of liability, which was that the defendants' actions

in "producing, marketing, and selling fossil fuels[,] * * * while knowing of the harm that was substantially certain to result[,] constitute[d] an unlawful public and private nuisance and an illegal trespass." *Id.* at 47, 51; see *id.* at 87-106 (allegations about the defendants' deceptive statements and knowledge). On appeal, the plaintiff identified, as the "primary fault" it was alleging, that the defendants "contributed to serious environmental harm that they knew their highly profitable production and marketing activities would cause." Br. at 16. *City of New York* thus involved the same allegedly wrongful conduct at issue here.

Second, even if the allegedly wrongful conduct differed, it would not eliminate the conflict, because the theory of harm is identical. In both cases, the plaintiffs sought damages on the ground that the defendants' actions allegedly resulted in increased emissions and thereby injured the plaintiffs. In *City of New York*, the plaintiff "disavow[ed] any intent to address emissions" in its complaint, but it "identif[ied] such emissions as the singular source of [its] harm"; the Second Circuit held that the suit thus could not proceed under state law. 993 F.3d at 91. Respondents likewise acknowledge that their alleged injury results from "increased fossil fuel consumption and greenhouse gas emissions," Pet. App. 2a, yet the Hawaii Supreme Court allowed the suit to proceed under state law. The decision below thus conflicts with *City of New York* even under respondents' characterization of the allegedly wrongful conduct.

The two decisions conflict further with respect to international emissions. The Second Circuit held that the Clean Air Act did not displace federal common law with respect to those emissions, yet the Hawaii Supreme Court drew no distinction between interstate and international emissions in its displacement analysis. Compare *City of*

New York, 993 F.3d at 100-101, with Pet. App. 39a-45a. Respondents entirely ignore that additional conflict.

2. Respondents attempt to distinguish *North Carolina ex rel. Cooper* v. *Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), and *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), on the similar ground that the claims alleged in those cases sought to impose liability for the defendants' release of "pollutants from a point source" rather than for "failure to warn and deceptive promotion." Br. in Opp. 14. But just as here, both cases involved claims under the law of one State seeking redress for injuries allegedly caused by emissions from a different State. The Fourth and Seventh Circuits held that state law could not govern such claims. The Hawaii Supreme Court reached the opposite conclusion and expressly rejected the Seventh Circuit's decision. The resulting conflict warrants this Court's review.

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

Tellingly, respondents primarily focus not on the certworthiness of this case, but on the merits. See Br. in Opp. 16-29. While it is ultimately a matter for another day, respondents' merits arguments are unpersuasive.

1. Respondents do not dispute that, for over a century, this Court has held that interstate pollution is one of the few inherently federal areas necessarily governed by federal law. See Pet. 22. Instead, respondents contend that, after the Clean Air Act's enactment, the viability of state law depends solely on the Act and not on "a defunct body of judge-made federal law." Br. in Opp. 17.

That fundamentally mischaracterizes petitioners' argument. Displaced federal common law is not what precludes respondents' claims. The reason why federal common law ever existed in this area is because the structure

of the Constitution precludes the extraterritorial application of state law here. See Pet. 21-23, 28-29. It is thus the Constitution, not displaced federal common law, that is doing the relevant work. See *Franchise Tax Board* v. *Hyatt*, 587 U.S. 230, 246 (2019); *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122, 154 (2023) (Alito, J., concurring).

Respondents contend that "federal common law existed in areas of environmental protection" to "fill in statutory interstices," not because of any "constitutional rules." Br. in Opp. 21 (internal quotation marks and citations omitted). But long before the enactment of federal environmental statutes, this Court applied federal common law to claims seeking redress for interstate pollution. See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

Turning to the case law, respondents argue (Br. in Opp. 18) that *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), and *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), undermine petitioners' position. That is exactly backwards. In *Ouellette*, 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 Act "precludes a court from applying the law of an affected State against an out-of-state source" of pollution. 479 U.S. at 492, 494 (citation omitted). That is petitioners' position here with respect to the Clean Air Act. See Pet. 23-24, 26-27. As for *American Electric Power*, in remanding the case for consideration of the remaining state-law claims, 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." 564 U.S. at 429 (internal quotation marks

and citation omitted). That is also consistent with petitioners' position. See Pet. 29.

2. In a now-familiar argument, respondents contend that this case "falls outside" the inherently federal area of interstate emissions because it concerns only deceptive marketing. Br. in Opp. 19. But that theory is merely the most recent one that plaintiffs in these cases are attempting to use to recover for injuries allegedly caused by interstate and international greenhouse-gas emissions. See NAM Br. 6-15. Regardless of the tort theory being invoked, the "gravamen" of these cases has always been injury allegedly caused by interstate and international emissions. See *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 635 (2012) (citation omitted); API Br. 7-10. Respondents allege injury in the form of physical harms allegedly caused by global climate change. See Pet. 24-25. And to demonstrate causation, they must show that, absent the allegedly deceptive marketing, fewer fossil fuels would have been used, which would have resulted in decreased greenhouse-gas emissions, which would have alleviated the alleged injuries.

So understood, respondents' claims are simply an indirect method of regulating interstate and international emissions. See, *e.g.*, *Kurns*, 565 U.S. at 637. The imposition of liability is designed to incentivize petitioners to take actions to reduce the sale of fossil fuels and thereby limit greenhouse-gas emissions.

3. Respondents fault petitioners for failing to provide a sufficiently "searching and rigorous analysis of the Constitution's text and history." Br. in Opp. 22. Setting aside that this case is only at the certiorari stage, petitioners cited both well-established constitutional principles and numerous decisions from this Court in support of their position. See Pet. 21-24. Respondents also argue that claims by "non-sovereign plaintiffs seek[ing] to hold private

companies liable under tort law for in-state injuries" do not implicate issues of state sovereignty. Br. in Opp. 23. At least 20 States beg to differ, arguing that respondents' theory of liability "would trample over every State's sovereignty" by projecting one State's law across the Nation. States Br. 7.

4. Contrary to respondents' contention (Br. in Opp. 24-26), the Clean Air Act also preempts their claims under a traditional preemption analysis. No "presumption against pre-emption obtains" in "inherently federal" areas like transboundary emissions. *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 347-348 (2001). And the Clean Air Act makes the Environmental Protection Agency, not state courts and juries, the Nation's regulator of interstate greenhouse-gas emissions. See Pet. 26. The use of state law indirectly to regulate those emissions would interfere with the Clean Air Act's comprehensive scheme, which assigns responsibility for setting emissions standards to EPA and the source States. See ALF Br. 14-19. Indeed, even if a presumption against preemption applied, respondents' state-law claims could not survive. See *Ouellette*, 479 U.S. at 494. Respondents' rejoinder that they are not seeking to hold petitioners liable for injuries caused by interstate emissions fails for reasons already explained. See p. 8, *supra*.

5. With respect to international greenhouse-gas emissions (the vast majority of those at issue), the extension of state tort law beyond the Nation's borders inherently raises foreign-policy concerns. Contra Br. in Opp. 26-29. After all, the presumption against the extraterritorial application of *federal* law exists to "guard[] against our courts triggering * * * serious foreign policy consequences." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). There is an "even stronger" reason to question the extraterritorial application of *state* law,

"given that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law." *Al Shimari* v. *CACI International, Inc.*, 679 F.3d 205, 231 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) (citations omitted).

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

There is no disputing the importance of the question presented; respondents do not even try. Numerous climate-change cases seeking billions in damages for the alleged localized effects of global climate change are now pending in state courts nationwide. More have been filed even since this petition, see *City of Chicago* v. *BP p.l.c.*, No. 2024CH1024 (Ill. Cir. Ct. filed Feb. 20, 2024); *Bucks County* v. *BP p.l.c.*, No. 2024-1836 (Pa. Ct. Common Pleas filed Mar. 25, 2024), and still more have been promised. These cases represent a critical threat to one of the Nation's most vital industries. See Myers & Mullen Br. 11-22; AmFree Br. 20-21.

The decision below also presents a serious challenge to our constitutional system. The Hawaii Supreme Court held that state law can impose liability for injuries allegedly caused by the effect of interstate and international greenhouse-gas emissions on the global climate. Numerous States have objected to that sweeping, extraterritorial application of state law. See States Br. 3-15. And allowing the States to apply tort law in such an extraterritorial fashion will disrupt efforts to address global climate change at the national and international level. See Chamber Br. 19-22; Epstein & Yoo Br. 11-13.

Given the stakes, the time for review is now. There is a clear conflict on the question presented, and it is uncertain when another case will make its way through a state-

court system (especially in States with multiple layers of appellate review). If petitioners are correct that these "unprecedented" cases should fail at the outset, the "enormous" resources necessary to litigate and adjudicate them would be wasted. Pet. App. 87a. Because the complaint in this case is representative of the complaints filed in other climate-change cases, a decision in petitioners' favor here would affect all of the cases in this nationwide litigation.

Respondents offer only two additional reasons to deny review. In a reprise of their meritless jurisdictional argument, respondents note (Br. in Opp. 29-30) that this case arises in an interlocutory posture. But the Court routinely grants review to decide important questions of federal law in cases that have not been fully resolved below. See, *e.g.*, *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 765 (2018); *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 485-486 (2015); *American Broadcast Companies, Inc.* v. *Aereo, Inc.*, 573 U.S. 431, 438 (2014); *Kiobel*, 569 U.S. at 114.

Respondents also argue (Br. in Opp. 30-33) that further percolation is warranted. But to what end? Both the Second Circuit and the Hawaii Supreme Court issued lengthy precedential opinions addressing the question presented in conflicting ways. And any percolation in the foreseeable future will come not from federal courts but from hand-picked state courts, which have comparatively little experience addressing the interaction of the Constitution, a federal statute, partially displaced federal common law, and state law. It is thus implausible that further percolation would aid the Court, and there are compelling reasons not to delay review of the question presented. The time for that review, we respectfully submit, is now.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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