Nos. 23-947 & 23-952

Supreme Court of the United States

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

SHELL PLC, ET AL.,
Petitioners,
v.
CITY & COUNTY OF HONOLULU, ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF OF ALABAMA AND 19 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

This suit is an affront to the equal sovereignty of *Amici* States and a dire threat to their policy choices. Respondents Honolulu and the Honolulu Board of Water Supply assert the power to enact disastrous global energy policy via state tort law. Among their demands is that major energy companies stop "promoting the sale and use" of their fuel products. Compl. ¶158. Any sale anywhere is deemed trespassing, *id.* ¶201, which Honolulu seeks "to punish … and deter," *id.* ¶206. *Amici* States do not share such aims, which would imperil access to affordable energy and inculpate every State and every person on the planet. If that is what Hawaii law requires, then Hawaii law should not govern.

The ruling below endangers the rights of States to adopt their own policies with respect to energy production, environmental protection, and potentially any other activity that "exacerbate[s] the impacts of climate change." App.10a.[2] To be sure, *Amici* States recognize that one State's actions may affect others; after all, resources are finite and the natural world is shared. But that reality is all the more reason why state law cannot extend beyond its proper sphere, and cases like this one require federal resolution.

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[1] Per Rule 37, *Amici* provided timely notice to counsel of record.

[2] Citations to "App." refer to the appendix filed in No. 23-952.

SUMMARY OF ARGUMENT

I. The same "demands for applying federal law" to a dispute over interstate waters apply equally to this dispute over interstate air. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972) ("*Milwaukee I*"). A case "requires" federal resolution "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Id.* at 105 n.6. Our constitutional structure and this Court's precedents confirm that both conditions are satisfied here. An action seeking abatement and damages for an alleged "global climate crisis" must be governed by federal law, so Honolulu's state-law claims fail.

II. The time for this Court's intervention is now. The question presented has percolated for years, albeit in a removal posture that complicated review. Such complexity is absent here, and there is now a clear split between courts that will entertain state-law suits over interstate emissions and courts that will not. This case may be a unique opportunity because the Hawaii courts granted a rare interlocutory appeal and stayed most of discovery. The Court should act before state courts issue preliminary relief that could trigger a national emergency or fashion a patchwork of new taxes on the Nation's energy system that would make life harder for every American.

ARGUMENT

I. Federalism and Precedent Foreclose State-Law Claims Based on Interstate Emissions.

By declaring independence, the Colonies laid claim "to all the rights and powers of sovereign states." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237-38 (2019) (citing *McIlvaine v. Coxe's Lessee*, 8 U.S. 209, 212 (1808)). "A sovereign decides by his own will, which is the supreme law within his own boundary." *Rhode Island v. Massachusetts*, 37 U.S. 657, 737 (1838). When sovereign wills conflict, they may settle their differences by treaty or war. For example, if a state creates a "nuisance" "upon a navigable river like the Danube, [it] would amount to a *casus belli* for a state lower down, unless removed." *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906).

But the Colonies joined the Union, and from the origins of our federal system flow several basic tenets of constitutional law. While the Constitution "did not abolish the sovereign powers of the States," it "limits [their] sovereignty in several ways." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018).

Unlike "absolutely independent nations," which may resort to force, no State "can impose its own legislation" or "enforce its own policy upon the other[s]." *Kansas v. Colorado*, 206 U.S. 46, 95, 98 (1907). "[H]appily for our domestic harmony, the power of aggressive operation against each other is taken away." *Burton's Lessee v. Williams*, 16 U.S. 529, 538 (1818). Every State agreed to "stand[] on the same level with all the rest," *id.* at 97, forming "a union of states, equal in power, dignity and authority." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

Relinquishing the powers of diplomacy and war did not render the States defenseless. What would have been political fights among sovereigns became judicial questions with answers in federal law. *Rhode Island*, 37 U.S. at 737-38, 743. By ratifying the Supremacy Clause, the States "surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies." *Id.* at 737; *see Kansas*, 206 U.S. at 95; *Missouri*, 200 U.S. at 518-20; *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *see also*; *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). The Constitution thus provided a structural solution for "bickerings and animosities … that could not be foreseen." The Federalist No. 80. "Whatever practices" that "tend[] to disturb the harmony between the States are proper objects of federal superintendence and control." *Id.*

In areas ripe for interstate conflict, the Court has maintained State equality and harmony by declining to apply any one State's law. *See Kansas*, 206 U.S. at 95; *Missouri*, 200 U.S. at 520; *see also, e.g.*, *New Jersey v. New York*, 283 U.S. 336, 342 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931). Instead, only federal law can govern matters that implicate interstate relations. The doctrine extends even to cases involving private parties. *See, e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *Lessee of Marlatt v. Silk*, 36 U.S. 1, 22–23 (1837).

The Court had these principles in mind when it decided *Milwaukee I*. In an original nuisance suit, Illinois alleged that Milwaukee was polluting Lake Michigan, an interstate body of water. The Court in-

voked the logic of federalism: While Illinois could not force Milwaukee to abate its activity, neither could Illinois be required "to submit to whatever might be done." 406 U.S. at 104. Thus, the "nature of the problem" created an impasse that only neutral federal law could resolve. *Id.* at 103 n.5. Congress would legislate, or federal courts would apply common law. Either way, state law cannot govern a controversy that "touches basic interests of federalism" or that needs "a uniform rule." *Id.* at 105 n.6. "Certainly," the pollution of Lake Michigan was such a controversy. *Id.*

Like *Milwaukee I*, this case must be decided by federal law. Plaintiffs seek to enact a global climate policy—one that would interfere with the sovereign power of every other State to regulate energy within its borders. *Cf. Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 718 (8th Cir. 2023) (Stras, J., concurring) ("This is, in effect, an interstate dispute."). By ruling that state law can resolve an interstate dispute, the court below contravened basic federalism principles that this Court has applied time and again.

A. Federalism permits States to regulate emissions within their borders but not beyond them.

1. It is axiomatic that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). At the heart of State sovereignty is the police power to "to promote the general welfare, or to guard the public health, the public morals, or the public safety." *Lochner v. New York*, 198 U.S. 45, 67 (1905) (Harlan, J., dissenting). A State sovereign has "real and substantial interests" in the natural environ-

ment, *New Jersey*, 283 U.S. at 342, including "all the earth and air within its domain," *Tenn. Copper Co.*, 206 U.S. at 237. "By the law of nature these things are common to mankind." *Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 718 (Cal. 1983) (quoting the Justinian Code).

Through regulation, litigation, and other means, States have long exercised their powers to reduce pollution. *See, e.g.*, *Nw. Laundry v. City of Des Moines*, 239 U.S. 486, 490-92 (1916) (expressing "no doubt" that "emission of smoke [was] within the regulatory power of the state"); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (1970). As a general matter, law "designed to free from pollution the very air that people breathe clearly falls within … the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

States have retained certain powers to regulate emissions notwithstanding federal intervention. The Clean Air Act recognizes "the primary responsibility" of States to prevent and control "air pollution … at its source." 42 U.S.C. §7401(a)(3). The statutory scheme exemplifies cooperative federalism, permitting States to implement their own regulations consistent with a federal baseline. *See, e.g.*, *id.* §7410(a)(1) (providing that States adopt plans to enforce federal standards "within such State").

As a result, our federal system allows States to pursue divergent policies with respect to energy production and environmental protection. *Compare, e.g.*, Utah Code Ann. §78B-4-515 (West) (limiting liability for "greenhouse gas emissions"); Tex. Water Code Ann. §7.257 (West) (providing affirmative defenses to torts allegedly "arising from greenhouse gas emis-

sions") *with* Cal. Gov't Code §7513.75(a)(3) (West) (noting "the state's broad[] efforts to decarbonize"); Cal. Pub. Res. Code §25000.5(a) (West) (declaring "overdependence on … petroleum based fuels" to be "a threat"). Such variety reflects the genius of American federalism, which allows "different communities" to live by "different local standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Within its own domain, a State may "serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. The theory behind this suit, however, would trample over every State's sovereignty to regulate energy and other activity within its borders, posing enormous "risk to the rest of the country." *Id.* As the court below tells it, the suit "does not seek to regulate emissions" at all. App.3a. Rather, "the source of [the] alleged injury is … marketing conduct, not pollution." *Id.* at 53a. Thus, "nothing in this lawsuit incentivizes – much less compels" emissions reduction. *Id.* The energy companies "can sell as much fossil fuel as they wish," according to the court. *Id.* at 15a.

The lower court's depiction defies "common sense," *City of New York v. Chevron Corp.*, 993 F.3d 81, 93 (2021), and cannot be squared with the complaint. Right up front, Honolulu alleges that the source of its "injuries" is a "climate crisis" caused by "use of [] fossil fuel products." Compl. ¶¶9, 11. Honolulu thus demands that the defendants "bear the costs" "of dealing with global warming." *Id.* ¶15.

Among the acts alleged to cause harm are "promoting the sale and use of fossil fuel products,"

Compl. ¶158, and "placing [] fossil fuel products into the stream of commerce," *id.* ¶161. Honolulu says the companies should have instead invented "better technologies" and "transition[ed] to a lower carbon economy." *Id.* ¶161. The complaint alleges trespass for "distributing, analyzing, merchandising, advertising, promoting, marketing, and/or selling fossil fuel products." *Id.* ¶201. Each cause of action demands punishment "for the good of society and [to] deter Defendants from ever committing … similar acts." *E.g.*, *id.* ¶163.

The case is about more than "torts committed in Hawai'i." App.3a. If the allegations are true, Honolulu's injuries stem from "global warming," global emissions, and the global use of energy and fuel products. Compl. ¶¶148-54. As Honolulu admits, "it is not possible to determine the source of any particular individual molecule of CO_2." Compl. ¶171. Thus, the only way for energy companies to avoid potential liability is to cease the production and sale of their products *everywhere*. And any "[e]quitable relief, including abatement," *id.* §VII, would need to reach conduct *everywhere* to redress the alleged injuries.

But reducing the sale and use of traditional energy *everywhere* is not among a State's constitutional powers. *Contra* App.44a. Hawaii is entitled to regulate only "persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880); *see also Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881). There is no historical analogue to this suit, which is plainly unlike any "well recognized" tort. App.39a.

Honolulu cannot mask its attempt at extraterritorial policymaking with talk of "tortious marketing."

App.39a. The threat of damages in tort can be "a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). To be sure, not every suit against the energy industry is an attempt to regulate interstate emissions. But this case is. The trial court admitted as much when it counted the State "interest in combatting … climate change" as a reason against preemption. App.89a-90a. If this litigation promotes that interest, then of course "a damages award in this case would [] regulate emissions." *Id.* at 91a. *See also New York*, 993 F.3d at 93 (discussing "basic economics").

If the effect of Honolulu's action would be "to impose its own policy choice on neighboring States," then the suit is forbidden by "principles of state sovereignty and comity." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). Those principles would be "meaningless" if a State could avoid them by doing indirectly what it could not do directly. *See Kurns v. RR. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012).

The lower court's assurance that Honolulu seeks only damages caused by tortious conduct, App.39a, just begs the question—how much lawful conduct in other States can Hawaii deem tortious? According to the complaint, the allegedly tortious conduct occurred almost entirely outside of Hawaii. Some of it predates Hawaii statehood. *See* Compl. ¶¶49-50. On its face, this suit, which is "broadly the same" as many others, App.3a, has everything to do with a national environmental agenda and very little to do with Hawaii. Such action is well beyond the proper sphere of States. *See Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989); *Lane County v. Oregon*, 74 U.S. 71, 76 (1868); *New York*, 993 F.3d at 92.

B. Claims based on interstate emissions are interstate controversies that demand a uniform federal rule of decision.

1. For two centuries, this Court has protected States by applying federal rules of decision to interstate controversies. It follows from the equality of States that when their sovereign wills collide, neither State's law supersedes. *See supra* pp. 3-5. In such cases, the Court "recognize[s] the equal rights of both" by applying higher order principles—"what may … be called interstate common law." *Kansas*, 205 U.S. at 98; *accord Am. Petroleum Inst.*, 63 F.4th at 718 (Stras, J., concurring) ("The rule of decision … has *always* been … what we now know as the federal common law.").

While "general common law" is no more, "specialized federal common law" remains. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). Often, the rules of specialized common law "are, in substance, just the old general-law doctrines in disguise." Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527, 558 (2019). This Court has repeatedly identified interstate common law as an example of the "special" kind that survived *Erie*. *See, e.g.*, *AEP*, 564 U.S. at 421; *Milwaukee I*, 406 U.S. at 105-06; *Hinderlider*, 304 U.S. at 110.

A dispute over the boundary between two States may be the paradigm case for applying interstate common law. But other cases "implicating the conflicting rights of States" also involve "especial federal concerns to which federal common law applies." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981).

Cases involving interstate emissions—*i.e.*, the pollution of air and water in one State from sources in another State—are interstate controversies that implicate the conflicting rights of States. Accordingly, the federal judiciary has understood for well "over a century" the need for federal resolution of these disputes. *New York*, 993 F.3d at 91 (collecting cases). Where no federal statute governs, this Court has identified and applied federal common law.

For example, in *Missouri v. Illinois*, Missouri sued to enjoin the dumping of sewage into an Illinois river, which, the State alleged, ultimately deposited downstream into Missouri riverbeds and poisoned Missouri water. 200 U.S. at 517. Applying principles "known to the older common law," the Court found that Missouri's claim failed for want of injury and causation. *Id*. at 522.

Interstate air pollution is no different. When Georgia sought to enjoin a Tennessee company from "discharging noxious gas" over state lines, Georgia law did not govern. *Tenn. Copper Co.*, 206 U.S. at 236. Rather, the Court identified common-law principles. As to the remedy, the Court thought a State could be "entitled to specific relief" rather than "give up quasi-sovereign rights for pay." *Id*. at 237-38. And the Court rejected a laches defense. *Id.* at 239. Its analysis did not depend on state law but a federal equity jurisprudence for interstate emissions cases.

More recently in *Milwaukee I*, the Court recognized a general rule: a State's claims to protect its "ecological rights" against "improper impairment … from sources outside the State[]" have their "basis and standard in federal common law." 406 U.S. at 100. The dispositive fact was not that Lake Michigan

is a body of water but that it is "bounded … by four States," one of which was polluting. *Id.* at 104 n.6. When "deal[ing] with air and water in their … interstate aspects," the "basic interests of federalism" demand the application of a neutral law: federal law. *Id.* at 103 n.5, 104 n.6; *see also Iowa v. Illinois*, 147 U.S. 1, 7-8, 13 (1893) (rejecting the views of dueling state courts in favor of "equality" in river rights); *Connecticut*, 282 U.S. at 669-70 (rejecting "municipal law"); *Virginia v. Tennessee*, 148 U.S. 503, 523-24 (1893) (applying public law, international law, and moral law).

Having alleged liability for interstate emissions, Honolulu's suit is an interstate controversy under this Court's binding precedent. Though Respondents will undoubtedly characterize their case as a matter of local tort law, the ramifications for other States if the suit "succeeds" are clear: The traditional energy companies would be forced to pay damages, disgorge profits, and pay punitive penalties amounting to a *de facto* carbon tax. Worse, they could face unspecified equitable relief to abate "the impacts of climate change." App.10a.

Honolulu's aims conflict with many policies adopted by *Amici* States. Alabama, for example, highly values the production and use of traditional energy. It is Alabama's policy "that the extraction of coal provides a major present and future source of energy and is an essential and necessary activity which contributes to the economic and material well-being of the state." *Id.* §9-1-6(a); *see also id.* §9-17-1, *et seq.* (governing the development of oil and gas).

While Alabama has also enacted laws to protect air quality, prevent water pollution, and conserve

wildlife, *see, e.g.*, Ala. Code §§6-5-127, 9-2-2, 22-23-47, 22-28-3, its views on how to achieve those ends diverge sharply from those of Honolulu. This Court should reaffirm that cases about interstate emissions are interstate conflicts in which no State is "bound to yield its own views." *Kansas*, 206 U.S. at 97.

2. Separately, this Court has identified the need for uniformity as a structural reason to apply federal law. Specialized federal common law "remain[s] unimpaired for dealing … with essentially federal matters," *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947), *i.e.*, those implicating "uniquely federal interests … committed by the Constitution and laws of the United States to federal control." *Boyle v. United States*, 487 U.S. 500, 504 (1998) (cleaned up). Uniquely federal interests exist where the application of state law "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states." *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943).

The problem of interstate emissions requires a uniform federal solution. Only federal law, "not the varying common law of individual states," can serve as a "basis for dealing in uniform standard with the environmental rights of [each] State." *Milwaukee I*, 406 U.S. at 108 n.9. The Court's view in *Milwaukee I* applies *a fortiori* to claims premised on *global* emissions, which implicate *every* State, not just those with claims to a specific river or lake.

The logic of the ruling below would mean that the conduct of energy companies could be subjected to every State's regulatory and enforcement regime simultaneously—resulting in unpredictable and irreconcilable duties. *See Wisc. Dept. of Ind. v. Gould*

Inc., 475 U.S. 282, 286 (1986) ("Conflict is imminent whenever two separate remedies … bear on the same activity." (cleaned up)). The alternative to federal law is a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010); *see also New York*, 993 F.3d at 91. If every State can regulate the same conduct, energy companies will face tremendous "vagueness" and "uncertainty," and States will risk "chaotic confrontation" with each other. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987).

Unfortunately, such chaos is already unfolding. Dozens of States and localities have brought enforcement actions like this one under the aegis of their own state laws.[3] The resulting lack of uniformi-

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[3] *See, e.g.*, *Bucks County v. BP P.L.C. et al.*, No. 2024-01836 (Pa. Ct. Com. Pl. filed Mar. 25, 2024); *Anne Arundel County v. BP P.L.C.*, 94 F.4th 343 (4th Cir. 2024); *City of Chicago v. BP P.L.C.*, No. 2024CH01024 (Ill. Cir. Ct. filed Feb. 20, 2024); *Metro v. Exxon Mobil Corp.*, No. 23-cv-51752 (D. Or. filed Jan. 3, 2024); *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 114 (D.C. Cir. 2023); *California ex rel. Bonta v. Exxon Mobil Corp.*, No. CGC23609134 (S.F. Super. Ct. filed Sept. 15, 2023); *City of Charleston v. Brabham Oil Co.*, No. 23-1802 (4th Cir.); *County of Multnomah v. Exxon Mobil Corp.,* No. 23-CV25164 (Or. Cir. Ct. filed June 22, 2023); *Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122 (2d Cir. 2023); *Minnesota*, 63 F.4th 703; *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022) (consolidated with *Delaware ex rel. Jennings v. B.P. America, Inc.*, No. 22-1096 (3rd Cir. 2022)); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022) (consolidated with *County of Maui v. Chevron U.S.A. Inc.*, 39 F.4th 1101 (9th Cir. 2022)); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022);

ty will continue to breed confusion while threatening ruinous liability for traditional energy companies. As proceedings progress around the country, it becomes more and more likely that one state court, interpreting one State's law, could "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *North Carolina*, 615 F.3d at 296; *see also AEP*, 564 U.S. at 427 ("[O]ur Nation's energy needs and the possibility of economic disruption must weigh in the balance."). Disaster may be avoided by this Court's instruction to apply only federal law to cases premised on interstate emissions.

C. Displacement of federal common law does not render state law competent to govern interstate emissions.

To the extent that *Milwaukee I* rejected state law as a decisional rule for interstate conflicts over air and water, the case remains precedential. Yet the court below and others around the country have resisted *Milwaukee I*'s application to cases like this one, reasoning that the federal common law governing interstate emissions "*no longer exists*" after the Clean Air Act and Clean Water Act. App.38a (quoting *Boulder*, 25 F.4th at 1260); s*ee also, e.g.*, *Rhode*

Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022); *New Jersey v. Exxon Mobil*, No. 22-cv-06733 (D.N.J. 2022); *Municipalities of Puerto Rico v. Exxon Mobil*, No. 3:22-cv-01550 (D.P.R. 2022); *City of Oakland v. BP P.L.C.,* 969 F.3d 895 (9th Cir. 2020); *Vermont v. Exxon Mobil*, No. 2:21-cv-00260 (D. Vt. 2021); *City of New York*, 993 F.3d 81; *King County v. BP P.L.C.*, No. C18-758-RSL (W.D. Wash. 2018).

Island, 35 F.4th at 55; *Baltimore*, 31 F.4th at 206. On this view, displacement of federal common law allows "state law … [to] snap back into action unless specifically preempted by statute." *City of New York*, 993 F.3d at 98. The "snap back" approach is misguided for several reasons.

First, the court below misapprehended the function of federal common law, which "exists … because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). In the "enclaves" of federal common law, States are not "free to develop their own doctrines." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). After displacement, "the need" for federal common law "disappears," App.48a, but *only because* a different federal rule governs. Whatever form federal law takes, it remains equally "inappropriate for state law to control." *Texas Indus.*, 451 U.S. at 641. As the Second Circuit explained, "state law does not suddenly become competent to address issues that demand a unified federal standard simply because Congress … displace[d] a federal court-made standard with a legislative one." *New York*, 993 F.3d at 98.

The Court addressed the same issue in *Standard Oil*, a damages action arising from the collision of a truck with a U.S. Army soldier. 332 U.S. at 302. The Court answered the choice-of-law question first: The truck owner's liability could not "be determined by state law" because the matter "vitally affect[ed] [federal] interests, powers, and relations … as to require uniform national disposition rather than diversified state rulings." *Id.* at 305, 307. "The only question," then, was "which organ of the Government is to make the determination that liability exists." *Id.* at 316. Finding that decision best left "for the Congress,

not for the courts," *id.* at 317, the Court effectively barred a remedy. It did not then *revisit* its choice-of-law holding in the absence of federal common law.

Similarly, a claim traditionally governed by federal common law remains so, notwithstanding whether that "claim may fail at a later stage." *Oneida Indian Nation of N.Y. v. Oneida County*, 414 U.S. 661, 675 (1974); *cf. Ouellette*, 479 U.S. at 499-500. Any "displacement of a federal common law right of action" is a "displacement of remedies." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012). Whether the *remedy* is still "good law," App.48a, has no bearing on centuries of doctrine that forbids the application of state law. On the lower court's view, if Honolulu's suit would not succeed under federal common law, then every interstate pollution case before the Clean Air Act is irrelevant. *That* is "backwards reasoning." *Id.*

Second, state law would be especially inappropriate to replace federal common law fashioned out of constitutional necessity. Here, interstate common law developed because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why … federal law must govern" even after any displacement. *Illinois v. City of Milwaukee*, 731 F.2d 403, 410-11 (7th Cir. 1984) ("*Milwaukee III*"). In an area ripe for interstate conflict, applying one State's law would derogate the sovereignty of another; it would treat the States unequally. *Kansas*, 206 U.S. at 95. If this case is an interstate conflict, then it would be a constitutional wrong to apply Hawaii law.

Likewise, if "uniquely federal" interests demand "uniform federal standards," state law can never be conclusive. *Milwaukee III*, 731 F.2d at 410. The interests identified in *Milwaukee* apply even more strongly here. As the Court explained in *AEP*, "district judges issuing ad hoc, case-by-case injunctions" are not well "suited to serve as primary regulator of greenhouse gas emissions." 564 U.S. at 428. If that was one of the reasons for displacement, it would make no sense for state law to "snap back" and recreate the problem that *better* federal law was needed to solve.

Third, the court below misread *AEP*. True, the Court left open the possibility of certain state-law claims, 564 U.S. at 429, but not Honolulu's claims. The Court remarked in *dicta* that after the Clean Water Act, plaintiffs could still bring a "nuisance claim pursuant to the law of the *source* State." *Id.* (quoting *Ouelette*, 479 U.S. at 489) (emphasis in original). That fact does not help Honolulu, which brings its claims under Hawaii law, not the law of the source States. *See Ouelette*, 479 U.S. at 495. The type of claim *AEP* left open (intrastate) was never governed by federal common law in the first place. The type of claim here (interstate) was historically governed by federal common law, precluding state law.

In fact, *AEP* reaffirmed that "suits brought by one State to abate pollution emanating from another State" are "meet for federal law governance." 564 U.S. at 421-22. In such suits, "borrowing the law of a particular State would be inappropriate." *Id.* (citing cases pre- and post-*Erie*). Claiming *AEP* for itself, the court below largely ignored these lines, App.48a, as well as this Court's doubt that "a State may sue to abate any and all manner of [interstate] pollution."

AEP, 564 U.S. at 421-22. If federal law might not provide a cause of action for unbounded claims of global warming, *id.* at 422-23, the *AEP* Court surely did not invite state law to fill the void.

II. This Case Is an Ideal Vehicle to Address an Issue of Great Constitutional and Economic Significance.

1. This case may be a rare opportunity for the Court to intervene before *Amici* States, their citizens, and our Nation's energy sector suffer tremendous damage. The trial court granted an interlocutory appeal from the denial of a motion to dismiss for failure to state a claim. Although the court could not "recall a single time" it had granted such an appeal, "this case is different." Sunoco.App.87a. "This case is unprecedented" because 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." *Id.* Erroneously proceeding beyond the motion-to-dismiss stage would be an "enormous waste of money, time, and resources." *Id.*

The trial court was right, and this Court's calculus should account for the "enormous" costs of continued litigation here and in dozens of courts around the country. *See supra* n.3. In this case, the parties were spared the potential waste by a stay pending appeal. But other proceedings may not be stayed; other courts may not grant an interlocutory appeal on these issues at all. Consequently, the Court may not have another chance to review before litigation costs skyrocket. Worse, the Court may not have another chance to review before a state court imposes devastating preliminary relief. The plaintiffs here are demanding "abatement of the nuisances."

2. The question presented has percolated, and a clear split of authority has emerged. Because this case arose in state court, the Court may resolve the split without reaching any more complicated questions concerning removal jurisdiction.

In the Second Circuit, a "nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions" may not proceed under state law. *New York*, 993 F.3d at 91. That court did not credit New York's narrative that its suit concerned only "production, promotion, and sale," rather than the regulation of emissions. *Id.* The court held that New York's claims "must be brought under federal common law," but the Clean Air Act "barred" them by displacing the common-law remedy. *Id.* at 95, 100. Nor did the Act "[r]esuscitate" state-law claims that were verboten under federal common law. *Id.* at 98.

The Seventh Circuit decided decades ago that "the state claiming injury cannot apply its own state law to out-of-state discharges." *Milwaukee III*, 731 F.2d at 410. Illinois had squarely argued that if federal common law were "dissipated" by statute, "Illinois law must again control." *Id.* at 406. Citing "the logic of *Milwaukee I*," the court rejected the notion that state law could ever apply to interstate pollution. *Id.* at 411. Whether common law or statute, "federal law must govern." *Id.*

The Hawaii Supreme Court expressly departed from both decisions. On its view, "neither federal common law nor the Clean Air Act preempt[s]" the state-law claims here. App.69a. First, the court gave no weight to the reasons of constitutional structure that motivated interstate common law. *Id.* at 50a

("displaced federal common law plays no part"). Second, the court held that federal common law never governed this type of suit because Honolulu's "injury is not pollution, nor emissions," but "marketing conduct." *Id.* at 52a-54a. For similar reasons, the court found no preemption by the Clean Air Act on the ground that this suit is not about emissions. *See, e.g.*, *id.* at 61a, 64a, 66a-67a.

Other courts have adopted reasoning like that of the Hawaii Supreme Court, but this is the first petition in years to raise the issues outside of the context of removal. Whether the federal common law precludes the application of state law is a simpler question than whether it does so in a way that supports removal. If this Court grants review, it would be "free to consider the [] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *New York*, 993 F.3d at 94 (collecting cases acknowledging the distinction). Again, this clean vehicle is available only because the Hawaii courts granted a rare interlocutory appeal from the denial of a motion to dismiss.

3. The grave threat these suits pose to equal sovereignty and our Nation's energy infrastructure are reason enough for this Court to grant review. But the theory used against energy companies can be expanded to allow targeting of *any* cross-border activity that purportedly "exacerbate[s] the impacts of climate change." App.10.

Indeed, just a few weeks ago, the State of New York sued "the world's largest producer of beef products, for misleading the public about its environmen-

tal impact."[4] The beef producer's stated commitment to reach "Net Zero by 2040" is allegedly misleading because the company "plans to grow global demand for its product," rather than "reduce production of and demand for" it. Compl. ¶¶143-44, *New York v. JBS USA Food Co.*, No. 450682/2024 (N.Y. Sup. Ct. filed Feb. 28, 2024). The company's emissions "of greenhouse gases to the atmosphere" and "supply chain practices" purportedly "contribut[e] to climate change harms." *Id.* ¶11.

New York's complaint alleges that "the world's top five meat and dairy corporations combined are responsible for more annual greenhouse gas emissions than ExxonMobil, Shell, or BP, individually." *Id.* ¶88. Surely in some State's view, those companies too (and countless others) have "exacerbated the impacts of climate change." App.10a. But the States, upon entering the Union, gave up the right to use their laws to wage this sort of interstate conflict. The Court should grant review here before any further damage is done to our national economy and our federal scheme.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[4] Office of the N.Y. Att'y Gen., *Attorney General James Sues World's Largest Beef Producer for Misrepresenting Environmental Impact of Their Products*, Feb. 28, 2024, ag.ny.gov/press-release/2024/attorney-general-james-sues-worlds-largest-beef-producer-misrepresenting.

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