Nos. 23-947 & 23-952

IN THE

Supreme Court of the United States

SUNOCO LP ET AL.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, ET AL.

(Caption continues on inside cover)

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

MARK M. MURAKAMI
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street,
Ste. 1600
Honolulu, HI 96813

WILLIAM M. JAY
Counsel of Record
ANDREW KIM
JULIA C. STAMPER
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
wjay@goodwinlaw.com
(202) 346-4000

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SHELL PLC (F/K/A ROYAL DUTCH SHELL PLC),
SHELL USA, INC. (F/K/A SHELL OIL COMPANY),
AND SHELL OIL PRODUCTS COMPANY LLC,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU, ET AL.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://www.whitehouse.senate.gov/news/release/new-bipartisan-bicameral-proposal-targets-industrial-emissions-for-reduction

[1] Amicus curiae timely provided notice of intent to file this brief to all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

(reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, The Chamber's Climate Position: 'Inaction is Not an Option' (Oct. 27, 2021), https://www.uschamber.com/climate-change/the-chambers-climate-position-inaction-is-not-an-option. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state law.

Under this Court's precedent, cases involving "uniquely federal interests," for which a uniform federal policy is necessary, must be decided under federal law. In the limited range of circumstances in which such uniquely federal interests arise, the relevant legal questions often intersect with the interests of many of the Chamber's members, who rely on the predictability and uniformity of federal policy. This case presents an example of a court veering from this Court's precedent, rejecting the Second Circuit's correct approach, and allowing claims about *global* emissions—for which no State can claim a superior tie or interest—to be decided by a single state's law. Claims of this kind, for which a uniform federal standard is necessary, should not be decided by a patchwork of state laws applied in piecemeal fashion.

SUMMARY OF ARGUMENT

I. Climate change is a global phenomenon. The emissions that cause climate change cross state and national borders. As a result, claims about those

emissions necessarily concern the interests of more than one State or foreign sovereign.

In our federal system, such cross-border claims implicate "uniquely federal interests" that trigger the application of federal law, to the exclusion of state law. State laws may be competent to address environmental issues within a State's borders, but they are not equipped to deliver cross-border solutions for emissions emanating from elsewhere. And applying the law of a particular State to a cross-border claim risks intruding on the sovereign prerogatives of other States and nations, which may have a different perspective on how to resolve a cross-border problem.

Here, the Hawaii Supreme Court purported to recognize the exclusive competence of federal law on matters of cross-border emissions, but did so only in principle, not in practice. It concluded that federal law had no bearing on Honolulu's claims because they were claims about how petitioners marketed their products, even though Honolulu had alleged that its harms resulted from emissions that should be attributed to petitioners. The court also determined that, because the Clean Air Act (CAA) displaced the federal common law of interstate emissions, Honolulu could pursue its claims of transboundary pollution under Hawaii law. But the court's holding cannot be squared with the rule that federal common law provides a cause of action where *no* state law can apply. That federal common law is displaced by a federal statute does not suddenly make a single State's law competent to resolve a cross-border claim in an area of uniquely federal interest.

II. The Hawaii Supreme Court relied on similar misguided grounds in declining to give preemptive effect to the Clean Air Act. Even assuming that the

viability of a state-law claim about cross-border emissions depends *only* on the preemptive scope of the Act (which it does not), the Act leaves no room for state-law claims about emissions that are sourced from outside of that state.

ARGUMENT

I. Under our federal structure, emissions that cross state lines are governed by federal law, not state law.

Because emissions cross state and national borders, the laws of a single state cannot resolve an emissions dispute like this one. Such a nationally and internationally significant dispute is necessarily governed by federal law. Unlike previous petitions this Court has considered, the question here is not whether that body of federal law supports *removal jurisdiction* in federal court. Rather, the question is whether state courts may lay down substantive state-specific rules that purport to govern this interstate and international dispute, or whether federal law alone controls.

For over a century, courts have used federal common law to resolve disputes regarding pollutants that cross state lines. *E.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906). While federal common law is limited in scope, common-law claims arising from a transboundary dispute that implicates the interests of more than one State or other sovereign must, by necessity, be decided by federal law, because a single state's law cannot adequately reconcile competing sovereign interests in resolving the claim. Indeed, this Court has identified claims regarding the air and water in their "ambient or interstate aspects" as entailing the sort of dispute that is fit for the application of federal

law. *Illinois v. City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103, 105 n.6 (1972).

The Hawaii Supreme Court acknowledged that Honolulu's claims concern the international phenomenon of global climate change, and the impact that cross-border emissions have on Honolulu's lands and residents. *See* Sunoco Pet. App. 9a. In the court's words, what causes "adverse impacts on the earth" is "[t]he accumulation of green-house gases in the atmosphere," for which the "combustion of fossil fuels" is a "chief cause." Sunoco Pet. App. 7a. This "global warming" is what allegedly caused "adverse effects on Plaintiffs." Sunoco Pet. 9a; *see also* Shell Pet. App. 138a (alleging that "Defendants' conduct caused a substantial portion of global atmospheric greenhouse gas concentrations, and the attendant … disruptions to the environment—and consequent injuries to Plaintiffs—associated therewith"). The court also recognized in the abstract that "federal law governs disputes involving 'air and water in their ambient or interstate aspects.'" Sunoco Pet. App. 40-41a (quoting *Milwaukee I*, 406 U.S. at 103, 105 n.6).

But in analyzing the viability of Honolulu's state-law claims, the state supreme court refused to put two and two together. Despite observing that Honolulu is harmed by emissions, the court indulged the fiction that Honolulu's claims were really about "the promotion and sale of fossil-fuel products," with the emissions themselves somehow providing only background and context. *See* Sunoco Pet. App. 38a (concluding that "references to emissions … only serve to tell a broader story"). And although the court superficially accepted that there is an "overriding federal interest" in matters of "air and water in their ambient or interstate aspects," Sunoco Pet. App. 40a-

41a (citation omitted), the court nevertheless failed to treat federal law as "overriding" at all. Rather, the court held that state law had a role to play because the Clean Air Act displaced the federal common law governing interstate emissions claims and did not otherwise preempt state law.

The Hawaii Supreme Court failed to give effect to a fundamental principle of federalism: that federal law must control when a claim implicates conduct that crosses state lines and implicates the competing interests of multiple state sovereigns. Whether the governing law is federal common law, or a federal statute displacing it, there is no room for a state like Hawaii to apply its laws to claims involving emissions that are generated outside of Hawaii's borders.

A. No state law can adequately resolve a claim of *interstate* emissions, so federal law must apply.

1. "There is no federal *general* common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), but federal courts may "fashion federal law" in limited areas "where federal rights are concerned." *Milwaukee I*, 406 U.S. at 103 (citation omitted). *Erie* does not undermine this principle. Indeed, on "the same day *Erie* was decided, the Supreme Court released an opinion in which Justice Brandeis, the author of *Erie*, relied upon federal common law to resolve a case." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 927 n.8 (5th Cir. 1997) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

Courts typically apply federal common law in cases presenting one (or more) of three characteristics. First,

federal common law applies in cases where "common lawmaking must be 'necessary to protect uniquely federal interests.'" *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). Second, federal common law is used in "those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 173-74 (1942). Finally, federal common law applies "[w]hen Congress has not spoken to a particular issue," *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 313 (1981), but federal policy calls for a "uniform standard." *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted).

Several types of cross-border disputes—particularly those that implicate the interests of more than one State or sovereign—present "uniquely federal interests" that require the application of federal law because state law cannot govern. Courts have applied federal law in cases involving interstate water disputes,[2] tribal land rights,[3] interstate air carrier liability,[4] interstate disputes over intangible property,[5] and foreign rela-

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[2] *Hinderlider*, 304 U.S. at 110; *Kansas v. Colorado*, 206 U.S. 46, 95 (1907).

[3] *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 235-36 (1985).

[4] *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007).

[5] *Delaware v. Pennsylvania*, 598 U.S. 115, 128-29 (2023) (discussing federal common law rules for escheatment of money orders).

tions.[6] In such cases, federal law is necessary because "local law will not be sufficiently sensitive to federal concerns, it is not likely to be uniform across state lines, and it will develop at various rates of speed in different states." Wright & Miller, 19 Fed. Prac. & Proc. Juris. § 4514 (4th ed. 2022). Moreover, the structure of the Constitution does not allow States to engage in such cross-border regulation. *Tex. Indus.*, 451 U.S. at 641 ("In these instances, our federal system does not permit the controversy to be resolved under state law….").

Cases about global emissions, like this one, squarely give rise to considerations that "do[] not permit the controversy to be resolved under state law," *id.*, and require any action to proceed only under federal law. Allowing states to apply their own varying common-law rules to environmental concerns crossing state lines would mean "more conflicting disputes, increasing assertions and proliferating contentions" about the standards for adjudging claims of "improper impairment." *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)). Thus, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103; *accord Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011). "Environmental protection" is, after all, "an area 'within national legislative power,'" and thus, it is appropriate for federal courts to "fill in 'statutory interstices,' and, if

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[6] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1233 (11th Cir. 2004).

necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (citation omitted).

Because claims regarding transboundary emissions implicate "uniquely federal interests," the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640-41 & n.13 (citation omitted); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012).

2. Climate change is an international and interstate phenomenon. In order for climate change to occur, as alleged by Honolulu here, myriad events caused by myriad actors must occur all around the world. *City of N.Y. v. BP p.l.c.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018) (climate-change claims "are ultimately based on the 'transboundary' emission of greenhouse gases"), *aff'd sub nom. City of N.Y. v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Indeed, much of what is alleged to have caused harm to Honolulu are events by "sources outside of [Hawaii's] domain." *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted). Applying Hawaii law, then, to a case about "outside sources of … impairment" invites other states to do the same, thereby risking "conflicting disputes, increasing assertions and proliferating contentions" by competing state sovereign interests. *Id.* Because of that risk, only federal "comprehensive legislation," federally "authorized administrative standards," or federal "common law" are competent to resolve any claim about cross-border emissions. *Id.*

That Honolulu's claims are about "air and water in their ambient or interstate aspects" would be enough by itself to "undoubtedly" call for the application of fed-

eral law, *AEP*, 564 U.S. at 421 (citation omitted); *Milwaukee I*, 406 U.S. at 103. But there is more. Because Honolulu seeks to press a "global issue," its claims also implicate foreign policy and the United States' sovereign interests, which, too, call out for federal law. *Tex. Indus.*, 451 U.S. at 641 (identifying instances where "our federal system does not permit [a] controversy to be resolved under state law, … because the interstate or international nature of the controversy makes it inappropriate for state law to control").

No state or local government can claim a unique tie to the phenomenon of *global* climate change. To be sure, some commercial activity may happen within a particular state's or locality's borders, but any such localized activity within Hawaii is not the sole or even the primary basis of Honolulu's claims. And localized activity hardly justifies allowing the law of one state to decide a sweeping claim based almost entirely on emissions from outside that state's borders, emissions that cross state and national borders and have impacts mostly outside the state. After all, Honolulu is not alleging that what happened within its jurisdiction caused the alleged harms of *global* warming. Nor could it do so: as this Court explained in *AEP*, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." 564 U.S. at 422.

The Hawaii Supreme Court's decision favoring the application of state law over federal law encourages a patchwork of outcomes arising under disparate state laws, which are poor frameworks for "regulat[ing] the conduct of out-of-state sources." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). Allowing claims about global emissions to be decided by the varied laws of the

50 states would lead to fragmentation of judicial decisionmaking that in turn would hinder a coordinated and effective federal response to climate change. *See* pp. 20-21, *infra*. Moreover, leaving state courts to adjudicate disputes about interstate emissions while applying disparate standards would only make it "increasingly difficult for anyone to determine what standards govern." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010).

B. The Clean Air Act's displacement of federal common law does not authorize state law to govern interstate emissions.

The Hawaii Supreme Court reasoned that Honolulu could proceed on its state-law claims because the Clean Air Act displaces federal common law, the Act itself does not preempt state law, and the court thought that Honolulu *must* have some viable cause of action under state or federal law. *See* Sunoco Pet. App. 37a, 45a. Purporting to apply *AEP*, the Hawaii Supreme Court concluded that the displacement of federal common law meant acting as if it had no significance at all—*i.e.*, beginning the analysis with "the preemptive effect of *only* the CAA," with no role played at all by federal common law. Sunoco Pet. App. 37a.

But the state supreme court's reasoning overlooks a critical problem: federal common law applies only when state law *cannot* govern. *Tex. Indus.,* 451 U.S. at 641 (federal common law governs where the nature of the claim "makes it inappropriate for state law to control"). Congress's decision to displace the federal common law that governs interstate and international environmental claims does not invite state law in. State law remains incapable of effectively adjudicating an

interstate and international claim arising from cross-border emissions. Federal law does that—and Congress has recently proved the point by amending the Clean Air Act to add new measures to deter conduct that contributes to global climate change.

1. As the Second Circuit explained—using reasoning that conflicts with the Hawaii Supreme Court's reasoning here, Sunoco Pet. 17; Shell Pet. 15—the notion that the displacement of federal common law may "give birth to new state-law claims" is "difficult to square with the fact that federal common law governed [the] issue in the first place." *New York*, 993 F.3d at 98. When a federal statute displaces federal common law, it eliminates the causes of action or remedies that might have been available under common law—"our federal system" does not allow state-law claims into an area that is exclusively federal in character. *Tex. Indus.*, 451 U.S. at 641. Thus, for example, a State may surrender its federal common-law cause of action over water rights in an interstate compact. *See Hinderlider*, 304 U.S. at 104-05. But that does not imply the creation of state-law causes of action that otherwise are plainly displaced by federal common law. *See New York*, 993 F.3d at 110. "Such an outcome is too strange to seriously contemplate." *Id.* at 98-99.

The state supreme court concluded that the Second Circuit's analysis was "flawed," Sunoco Pet. App. 40a, relying on the Fourth Circuit's analysis in *Mayor and City Council of Baltimore v. BP p.l.c.*, 31 F.4th 178 (4th Cir. 2022), which considered the related but distinct question whether federal common law provided a basis for removal jurisdiction. In particular, the court quoted *Baltimore*'s concern that the Second Circuit's common law analysis did not "mention any obligatory stat-

utes or regulations," only the policy concerns of having state law govern interstate-emissions claims. Sunoco Pet. App. 49a (quoting *Baltimore*, 31 F.4th at 203).

But the Hawaii Supreme Court missed a critical reason why *Baltimore*'s reasoning (reasoning seen in other similar removal cases) is inapposite here. As the Fourth Circuit itself acknowledged: "*City of New York* was in a completely different procedural posture." *Baltimore*, 31 F.4th at 203. Because it was exercising diversity jurisdiction, the Second Circuit was not "bound by the well-pleaded complaint rule," or the "heightened standard unique to the removability inquiry" that the Fourth Circuit applied. *Id.* In contrast, *Baltimore* and cases like it concerning removal jurisdiction expressly refused to consider ordinary preemption, which the Second Circuit addressed in *New York*—and which the Hawaii Supreme Court (incorrectly) addressed here. *Id.* at 198-99; *see New York*, 993 F.3d at 94. In doing so, these courts invoked the rule that the availability of federal preemption as a defense does not give rise to federal *jurisdiction.* 31 F.4th at 198 & n.2. Following that principle, the Fourth Circuit considered whether the removing parties met the "significant burden" that complete preemption requires. *Id.* at 199. The Hawaii Supreme Court erred by transposing that burden onto its consideration of whether, under *ordinary* preemption principles, federal law preempted state law on the merits.

2. The Hawaii Supreme Court also wrongly reasoned that state law *must* apply because otherwise, "Plaintiffs would have *no* viable cause of action under state or federal law." Sunoco Pet. App. 45a. But our constitutional structure does not require that a cause of action for global emissions *must* exist in some form,

lying either in federal or state law. If Congress, in exercising an exclusively federal authority to manage "air and water in their ambient or interstate aspects," decides not to craft a federal analogue to a state-law cause of action as part of comprehensive legislation, then a state court cannot raise up its own interstate cause of action, "no matter how desirable that might be as a policy matter." *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

While this Court observed in *AEP* that "the availability *vel non* of a state lawsuit depends *inter alia* on the preemptive effect of the federal Act," 564 U.S. at 429, that observation was not an invitation to apply state law to transboundary claims, despite the Hawaii Supreme Court's conclusions to the contrary. *AEP* merely recognized that not all state-law claims necessarily intrude on the supremacy of federal law—specifically, claims about emissions that are sourced within the state. *Id.* (quoting *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'" (citation omitted, emphasis in original)). The Court did not hold that "whether the state law nuisance claims were preempted depended *only* on an analysis of the CAA," Sunoco Pet. App. 47a, or that the principles of federalism that compel the application of federal common law in the absence of a federal statute were rendered irrelevant by Congress's enactment of such a statute. Rather, this Court merely concluded that, where a federal statutory scheme displaced the federal common law, federal common law no longer provided a "parallel track" in the form of an alternative cause of action. *AEP*, 564 U.S. at 425.

Moreover, the Clean Air Act reflects Congress's decision to replace federal tort law with federal regulatory law, not to give way to *state* tort law in the area of cross-boundary emissions. Indeed, Congress recently amended the Act as part of its continuing efforts to address the domestic sources of emissions causing global climate change. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 136, 136 Stat. 1818, 2023-74 (providing funding for "improving climate resiliency" and instructing EPA to "impose and collect a charge on methane emissions"); *see* Waste Emissions Charge for Petroleum and Natural Gas Systems, 89 Fed. Reg. 5,318 (Jan. 26, 2024) (proposed rule to implement mandated emissions charge). And the Clean Air Act's framework gives states and local governments the ability to use the judicial process to seek relief relating to the global climate. *E.g.*, 42 U.S.C. § 7607(b)(1); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (a state has standing to sue under the Clean Air Act to pursue its "well-founded desire to preserve its sovereign territory"). That Congress has not provided at the federal level the specific vehicle that Honolulu seeks to use here does not mean that there is a vacuum for Hawaii law to fill.

II. The Clean Air Act leaves no room for a state-law claim about out-of-state, cross-border emissions.

After determining that the uniquely federal interest in interstate emissions did not prevent Honolulu from proceeding with its state-law claims, the Hawaii Supreme Court likewise concluded that the Clean Air Act did not prohibit such claims, either. But the Clean Air Act does not invert the federalism balance and cede interstate regulation to state law.

1. The state supreme court reasoned that there was no clash between the Act and Honolulu's claims because Honolulu did not "seek to regulate emissions," and, in any event, the Clean Air Act "simply does not occupy the entire field of emissions regulation." Sunoco Pet. App. 57a-58a. But the Clean Air Act reinforces, not refutes, the premise of federalism that is responsible for the application of federal common law on matters of "air and water in their ambient or interstate aspects": that a single State's law cannot govern when the basis of a claim is an out-of-state emission that crosses state and national borders. Much like the Clean Water Act, the Clean Air Act leaves room for state-common-law actions only where the claim concerns an "in-state source of pollution." *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-96 (3d Cir. 2013); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 692 (6th Cir. 2015) (noting that "claims based on the common law of the source State" are "not preempted by the Clean Air Act," whereas "claims based on the common law of a non-source State … are preempted by the Clean Air Act"); *see also Ouellette*, 479 U.S. at 490 ("Even though it may be harmed by the discharges, an affected State only has an advisory role [under the Clean Water Act] in regulating pollution that originates beyond its borders."); *Cooper*, 615 F.3d at 305-06 (extending *Ouellette*'s source-state rule to the Clean Air Act, and noting that, as with the Clean Water Act, the Clean Air Act "carefully defines the role of both the source and affected States" (quoting *Ouellette*, 479 U.S. at 497)). Honolulu does not invoke the "slim reservoir" of the source-state exception here. *See New York*, 993 F.3d at 100.

As this Court recognized in *Ouellette* with respect to the Clean Water Act, there is good reason not to apply a single State's law to emissions from outside of the State's borders. Applying "an affected State's law to an out-of-state source … would undermine the important goals of efficiency and predictability." *Ouellette*, 479 U.S. at 496. Allowing the common-law standards of multiple States to resolve disputes about the same cross-border emissions would "lead to chaotic confrontation between sovereign states," and make it "virtually impossible to predict the standard" that applies. *Id.* at 496-97 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)). The discordant common-law suits that would result if multiple States were permitted to apply their laws to out-of-state emissions would "undermine [the] regulatory structure" provided by the Clean Air Act. *Id.* at 497; *New York*, 993 F.3d at 96 ("[T]he City's claims are clearly barred by the Clean Air Act.").

The regulatory chaos would be even more pronounced were a State to seek to apply its law to a claim involving *global* climate change caused by emissions from all around the world. If Hawaii can apply its laws to claims about emissions from all over, then there is no reason that each of the 49 other States cannot do the same. The Clean Air Act leaves no room for "multiple and conflicting standards to guide emissions," let alone 50-plus different standards, many of which are based on common-law principles derived from "ill-defined omnibus tort[s] of last resort." *Cooper*, 615 F.3d at 302. Rather, where "Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime, … preemption principles caution at a minimum against according states a wholly different

role and allowing state [common] law" to extend beyond the "joint federal-state rules so meticulously drafted." *Id.* at 303. That caution compels a "uniform, national disposition," *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947), and bars Honolulu's claims here.

2. The Hawaii Supreme Court concluded that there was "no 'actual conflict' between Hawai'i tort law and the CAA." Sunoco Pet. App. 61a. Honolulu's claims, the court reasoned, were about "marketing conduct, while the CAA regulates pollution." *Id.*

But as the Second Circuit explains, that reasoning requires a suspension of disbelief that "ignores economic reality." 993 F.3d at 92. Advertisements and marketing do not cause the emissions that contribute to global climate change—the emissions occur when oil and natural gas are produced, refined, and combusted. In the words of the Hawaii Supreme Court, the "adverse impacts on the earth" occur with "[t]he accumulation of greenhouse gases" caused, in large part, as "a byproduct of combustion of fossil fuels." Sunoco Pet. App. 7a.

Honolulu's suit reflects an attempt to "regulate cross-border emissions in an indirect and roundabout manner," *City of New York*, 993 F.3d at 93. In some respects, the attempt is not even *in*direct; in particular, its complaint asks for "[e]quitable relief, including abatement of the nuisances complained herein in and near the County." Haw. Cir. Ct. Dkt. No. 45, at 115. If allowed to proceed, Honolulu's suit will inevitably contribute to the "patchwork of nuisance injunctions" that would arise through the pursuit of competing state-law suits that seek the abatement of worldwide emissions

based on "marketing" or other claims. *Cooper*, 615 F.3d at 302; *see also* pp. 19-20, *infra* (describing the suits).

III. This Court should grant certiorari now, before state courts begin to impose remedial orders that will require this Court's urgent intervention.

The Hawaii Supreme Court's decision is among the first to affirmatively use state law to govern a claim about out-of-state emissions. Unless this Court intervenes now, it certainly will not be the last. Honolulu's is one of 29 lawsuits filed by state, local, and tribal governments since 2017 that seek competing remedies for overlapping claims of alleged harm arising from emissions outside of the plaintiff-governments' respective jurisdictional borders.[7] Their complaints allege a

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[7] *Cnty. of San Mateo v. Chevron Corp.*, No. 17CV03222 (Cal. Super. Ct. July 17, 2017); *City of Oakland v. BP p.l.c.*, No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017); *City of Santa Cruz v. Chevron Corp.*, No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017); *Cnty. of Santa Cruz v. Chevron Corp.*, No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); *City of New York v. BP p.l.c.*, No. 18-cv-182 (S.D.N.Y. Jan. 9, 2018); *City of Richmond v. Chevron Corp.*, No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); *King Cnty. v. BP p.l.c.*, No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); *Rhode Island v. Shell Oil Products Co.*, No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018); *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018); *Massachusetts v. ExxonMobil Corp.*, No. 1984CV0-3333 (Mass. Super. Ct. Oct. 24, 2019); *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Mar. 9, 2020); *Minnesota v. Am. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020); *Dist. of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-003179-

hodgepodge of different causes of action, ranging from common-law public and private nuisance claims and claims based on other tort theories, to statutory consumer-deception claims. All seek damages, and many seek broad forms of injunctive relief.[8]

The collision of state-law decisions, and the growth of "conflicting disputes, increasing assertions[,] and proliferating contentions would seem to be inevitable" if States are permitted to apply their laws to claims of

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20 (N.J. Super. Ct. Sept. 2, 2020); *City of Charleston v. Brabham Oil Co.*, No. 2020CP1003975 (S.C. Ct. Comm. Pleas Sept. 9, 2020); *Connecticut v. Exxon Mobil Corp.*, No. HHDCV206132568S (Conn. Super. Ct. Sept. 14, 2020); *Cnty. of Maui v. Sunoco LP*, No. 2CCV-20-000283 (Haw. Cir. Ct. Oct. 12, 2020); *City of Annapolis v. BP p.l.c.*, No. C-02-CV-21-000250 (Md. Cir. Ct. Feb. 22, 2021); *Anne Arundel Cnty. v. BP p.l.c.*, No. C-02-CV-21-000565 (Md. Cir. Ct. Apr. 26, 2021); *Vermont v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. Sept. 14, 2021); *Municipality of Bayamon v. Exxon Mobil Corp.*, No. 22-cv-1550 (D.P.R. Nov. 22, 2022); *Cnty. of Multnomah v. Exxon Mobil Corp.*, No. 23CV25164 (Or. Cir. Ct. June 22, 2023); *People v. Exxon Mobil Corp.*, No. CGC23609134 (Cal. Super. Ct. Sept. 15, 2023); *Municipality of San Juan v. Exxon Mobil Corp.*, No. 23-cv-01608 (D.P.R. Dec. 13, 2023); *Shoalwater Bay Indian Tribe v. Exxon Mobil Corp.*, No. 23-2-25215-2 (Wash. Super. Ct. Dec. 20, 2023); *Makah Indian Tribe v. Exxon Mobil Corp.*, No. 23-2-25216-1 (Wash. Super. Ct. Dec. 20, 2023); *City of Chicago v. BP p.l.c.*, No. 2024CH01024 (Ill. Cir. Ct. Feb. 20, 2024); *Bucks County v. BP p.l.c.*, No. 2024-01836-0000 (Pa. Comm. Pleas Ct. Mar. 25, 2024).

[8] *E.g.*, Compl. at 169, *City of Chicago v. BP p.l.c.*, No. 2024CH01024 (Ill. Cir. Ct. Feb. 20, 2024) (seeking order requiring "Defendants to immediately undertake the necessary action that will result in a final and permanent abatement of the common law private nuisance"); Compl. ¶ 265, *People v. Exxon Mobil Corp.*, No. CGC23609134 (Cal. Super. Ct. Sept. 15, 2023) (seeking "temporary and permanent equitable relief … to protect the natural resources of California from pollution, impairment, or destruction").

cross-border pollution. *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted). And to little positive end: as global climate change is "a global collective action problem, … a few jurisdictions acting alone cannot hope to make meaningful progress on the problem." J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. Pa. L. Rev. 1499, 1518 (2007). State courts imposing divergent regulatory requirements by judicial fiat will only muddy the waters, "making compliance confusing and potentially costly." *Id.* at 1531; Robert B. McKinstry, Jr. & Thomas D. Peterson, *The Implications of the New "Old" Federalism in Climate-Change Legislation: How to Function in a Global Marketplace When States Take the Lead*, 20 Pac. McGeorge Global Bus & Dev. L.J. 61, 89 (2007) ("A multiplicity of contrasting state programs can pose particular difficulties for the regulated community, which operates in markets throughout the United States and the world.").

The impact of cross-border emissions on global climate change is an area where there is "an overriding federal interest." *Milwaukee I*, 406 U.S. at 105 n.6. The array of state-law actions seeking relief under "vague and indeterminate" standards threatens to seriously (and perhaps irreversibly) undermine the federal government's ability to respond to global climate change. And the causes of action are not limited to petitioners here; any alleged contributor to global climate change could find itself in the crosshairs of a similar state-law tort claim over cross-boundary emissions, in any state court with personal jurisdiction.

This Court should grant certiorari now to restore the supremacy of federal law, before a dissonant patchwork of state-law decisions emerges to hinder a

uniform federal response. The state court's assertion of jurisdiction over this global issue is reason enough for this Court to step in. If the Court waits for a state court to impose its own professed solution to this global issue, the Court may be forced to deal with the issue in more urgent fashion. This case presents the opportunity to resolve this crucially important matter now.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

MARK M. MURAKAMI
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street,
Ste. 1600
Honolulu, HI 96813

WILLIAM M. JAY
Counsel of Record
ANDREW KIM
JULIA C. STAMPER
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amicus Curiae

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