No. 23-952

IN THE
Supreme Court of the United States

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.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawai'i

REPLY BRIEF FOR PETITIONERS

JOACHIM P. COX
RANDALL C. WHATTOFF
COX FRICKE LLP
800 Bethel Street
Suite 600
Honolulu, Hawai'i 96813
(808) 585-9440

DAVID C. FREDERICK
Counsel of Record
DANIEL S. SEVERSON
D. CHANSLOR GALLENSTEIN
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

Counsel for Petitioners

May 21, 2024

RULE 29.6 STATEMENT

Petitioners' Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

Respondents City and County of Honolulu and Honolulu Board of Water Supply (collectively, "Honolulu") admit they seek damages "for the effects of climate change allegedly *caused* by petitioners' breach of Hawai'i law." Opp. 1 (cleaned up). The Second Circuit analyzed the same causes of action and theories of liability and concluded that federal law preempts such claims: "municipalities may [not] utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *City of New York v. Chevron Corp.*, 993 F.3d 81, 85 (2d Cir. 2021). The Hawai'i Supreme Court deemed that decision "flawed" and instead indulged Honolulu's theory that petitioners' "deception inflated global consumption of fossil fuels, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous conditions in Hawai'i." App.15a, 42a. Those irreconcilable decisions on questions of national importance warrant this Court's immediate review.

Honolulu's opposition brief glances at the conflicts and strains to distinguish the cases. Indeed, Honolulu ignores that a deep conflict exists on Question 2 in the petition: whether the Clean Air Act preempts the claims. Honolulu says (at 3) its case concerns "deceptive marketing." But likewise, "[t]he primary fault [New York] allege[d] [wa]s that Defendants contributed to serious environmental harm that they knew their highly profitable production and marketing activities would cause." Appellant Br. 16, No. 18-2188, Dkt. 89 (2d Cir. Nov. 8, 2018) ("*New York* Appellant Br."). Honolulu also says (at 12) its case "does not and could not regulate pollution from any source." But again, New York "disagree[d]" that its claims "threaten[ed] to regulate emissions at all." *City of New York*, 993 F.3d at 92. Both cases alleged defend-

ants' promotion of fossil fuels induced global greenhouse gas emissions causing injury, and the courts diverged on federal preemption.

Because Honolulu alleges no harm other than that caused by transboundary emissions, its effort to impose liability for alleged misstatements and failures to warn necessarily seeks to reduce those emissions. Under Honolulu's theory, without global emissions, no global climate change and no injury occurs. Honolulu cannot avoid preemption by limiting its claims to emissions allegedly caused by misstatements. It is well-settled that States and municipalities may not directly regulate out-of-state emissions, and Honolulu cannot achieve that indirectly either.

The bulk of Honolulu's brief advances erroneous arguments addressing the merits of petitioners' preemption defenses better addressed after the Court grants certiorari. Honolulu's claims are preempted because the Constitution commits transboundary emissions and foreign affairs exclusively to national legislative and executive power. As this Court has held: "The Clean Air Act and the Environmental Protection Agency action the Act authorizes . . . displace the claims plaintiffs seek to pursue" regarding the "appropriate amount" of domestic greenhouse gas emissions. *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415, 427 (2011) ("*AEP*"). And under "our constitutional architecture," "foreign policy concerns foreclose" Honolulu's claims that "seek recovery for harms caused by foreign emissions." *City of New York*, 993 F.3d at 90, 101.

Finally, Honolulu's effort to avoid this Court's review by asserting a jurisdictional defect lacks merit. This contention ignores the trial court's statements

and Honolulu's own representations. The petition should be granted.

ARGUMENT

I. A RECOGNIZED SPLIT OF AUTHORITY EXISTS ON BOTH QUESTIONS PRESENTED

A. The Judgment Below Conflicts With Many Cases Correctly Holding That The Clean Air Act Preempts Claims Seeking To Regulate Out-Of-State Emissions

1. The state supreme court held that the Clean Air Act "does not preempt [Honolulu's] claims," App.5a, but the Second Circuit held that "[New York]'s claims are clearly barred by the Clean Air Act," 993 F.3d at 96. Remarkably, Honolulu's brief does not even attempt to address that conflict. On this question alone certiorari is warranted.

The Hawai'i decision further conflicts with the judgments of other appellate decisions. The Fourth Circuit held that the Clean Air Act preempts nuisance suits seeking to "appl[y] home state law extraterritorially." *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 296 (4th Cir. 2010); *see Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 852-53, 865 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013). And the decision expressly conflicts with the Seventh Circuit's judgment that "federal law must govern" unless "Congress[] authorizes resort to state law." *Illinois v. City of Milwaukee*, 731 F.2d 403, 411 (7th Cir. 1984); *see* App.44a n.9.

Honolulu's attempt to distinguish the savings-clause cases only confirms the conflict. "In each," it contends (at 16), "the plaintiffs alleged that a point-source emitter violated state tort duties by releasing airborne pollutants," and therefore the Clean Air Act

did not preempt the state-law claims. Courts allowed those cases to go forward because the plaintiffs alleged harm from *intrastate* emissions. Honolulu, by contrast, seeks to hold the energy companies liable for allegedly "inflat[ing] global consumption of fossil fuels, which increased greenhouse gas emissions," App.15a—claims that are "clearly barred by the Clean Air Act." *City of New York*, 993 F.3d at 96.

Honolulu attempts (at 16) to distinguish this precedent by arguing the tortious conduct causing environmental harms "is *not production of emissions*"; Honolulu says (at 3) the Clean Air Act "does not concern itself" with "deceptive marketing." Likewise, "[New York] argue[d] that the Clean Air Act 'addresses emissions, but is silent as to the remedy for environmental harms . . . resulting from the production, promotion, and sale of fossil fuels.'" 993 F.3d at 97 n.8. But in both cases, "emissions a[re] the singular source of the [alleged] harm." *Id.* at 91; *see* Pet.21.

At oral argument in *AEP*, the United States recognized that "the same arguments that prohibit the Court from . . . recognizing a Federal common law cause of action for displacement very well may be preemption questions as well that could be addressed down the road with respect to State common law actions." Oral Arg. Tr. 28:11-16, *AEP*, No. 10-174 (U.S. Apr. 19, 2011). This case presents that very question.

2. The Hawai'i court erred in concluding that the Clean Air Act does not preempt these claims. As the United States explained in *City of New York*, "the best reading of the [Clean Air Act] is that (like the [Clean Water Act]) it preempts state-law suits involving emissions of air pollutants except those 'pursuant to the law of the *source* State.'" U.S. Amicus Br. 9, No.

18-2188, Dkt. 210 (2d Cir. Mar. 7, 2019) (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987)). And where, as here, the "allegations of injury from the effects of climate change all turn on greenhouse-gas emissions from burning fossil fuels," the claims "seek[] to hold Defendants liable based on the same conduct (greenhouse gas emissions) and the same alleged harm (sea level rise) that the Supreme Court in *AEP* concluded conflicted with the [Clean Air Act]." *Id.* at 11-12.

Every court of appeals and state high court to consider this question has held that only source-state suits can proceed under the Clean Air Act. *See* Pet.24-27. Honolulu cannot distinguish *Ouellette* or the many cases following it by artfully framing the claims as about "deception." Under Honolulu's theory of causation and harm, any misrepresentations matter only insofar as they allegedly increased greenhouse gas emissions, which it acknowledges are undifferentiated and untraceable. App.223a (¶ 171). Honolulu thus seeks to hold the energy companies liable for emissions from every corner of the globe.

B. The Judgment Below Conflicts With The Second Circuit's Correct Holding That The Constitution Preempts Claims Seeking To Regulate Foreign Emissions

1. The state supreme court held "this lawsuit can proceed" under state law on the theory that petitioners "inflated global consumption of fossil fuels, which increased greenhouse gas emissions." App.2a, 15a. This necessarily includes foreign emissions. But in considering claims for foreign emissions, the Second Circuit held that "condoning an extraterritorial nuisance action here would not only risk jeopardizing our nation's foreign policy goals but would also seem to

circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *City of New York*, 993 F.3d at 103. The Second Circuit explained that, because "the Clean Air Act does not regulate foreign emissions," "[New York]'s claims concerning those emissions still require us to apply federal common law," which "preempts state law." *Id.* at 95 & n.7. The state court concluded "federal common law does not preempt state law" without analyzing Honolulu's claims based on foreign emissions. The petition (at 14-15) detailed the many ways in which the state court conflicted with the Second Circuit. Honolulu offers no meaningful response, and this Court's review is warranted.

Honolulu concedes (at 13) that the state court "did expressly disagree" with the Second Circuit's analysis. Honolulu shrugs off the clear conflict by arguing (*id.*) the "disagreement was not outcome-determinative," erroneously assuming the claims "do *not* regulate emissions." The Second Circuit saw through this ruse; the state supreme court's failure to do the same demonstrates why this Court's resolution is necessary.

Honolulu again resorts to arguing (at 11) that the theory of liability in *City of New York* was "materially different" than the claims here, but the claims in both cases are substantively identical. New York's case concerned not just the "production and sale of fossil fuels," but also their "promotion." 993 F.3d at 88, 91, 97 n.8. New York alleged, as Honolulu does here, that "Defendants have known for decades that their fossil fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists," yet still "extensively promoted fossil fuels for pervasive use, while denying or downplaying these threats."

City of New York v. B.P. P.L.C., 325 F. Supp. 3d 466, 468-69 (S.D.N.Y. 2018). Indeed, the district court recognized that New York's "amended complaint contains extensive allegations" regarding climate deception. *Id.* at 469.

On appeal, New York argued the defendants were liable for "nuisance and trespass" damages because, "for decades, Defendants promoted their fossil-fuel products by concealing and downplaying the harms of climate change." *New York* Appellant Br. 27. The "primary fault the City allege[d]" was that the defendants' "production and marketing activities would cause" "environmental harm." *Id.* at 16. Honolulu says (at 12) New York brought claims for merely "producing and selling fossil fuels." But in its own words, "that's a misstatement of the City's theory," which "goes beyond" "production of oil" and "plead[ed] throughout the complaint" that defendants were "trying to obfuscate the science" of climate change. Oral Arg. Audio 22:14-22:42, *City of New York*, No. 18-2188 (2d Cir. Nov. 22, 2019), https://ww3.ca2.uscourts.gov/oral_arguments.html.

2. Honolulu contends that petitioners' constitutional preemption theory is "novel" and purportedly finds no basis in the constitutional structure or this Court's case law. The only novelty here is the expansiveness of *Honolulu's* claims; petitioners' defenses rest on well-settled principles.

"[A] few areas [of law], involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted). Those areas include claims involving transboundary emissions, *see Illinois v. City of Milwaukee*,

406 U.S. 91, 105 n.6 (1972); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); the conflicting rights of States, *see Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (citing Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1322-31 (1996));[1] and acts that "impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

Honolulu also does not meaningfully respond to petitioners' argument (at 21-23) that "[t]he proper inquiry," to determine whether a state-law claim is preempted by federal law, "calls for an examination of the elements of the common-law duty at issue." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). Instead, Honolulu elides that inquiry by characterizing its lawsuit as about "the effects of climate change allegedly *caused* by petitioners' breach of Hawai'i law regarding failures to disclose, failures to warn, and deceptive promotion." App.39a (cleaned up). Avoiding discussion of the claims' elements does not save them from preemption. Honolulu necessarily will have to prove transboundary emissions caused by petitioners' alleged wrongful conduct to satisfy the elements of causation and harm. *See* Pet.21-23.

Honolulu contends (at 12-13) that, "[s]o long as petitioners adequately disclose and accurately represent the climate-change risks of their fossil fuels, they can produce and sell as much fossil fuels as they are able without incurring additional liability." That is nonsensical. Massive damages of course would penalize petitioners for "causing" increased greenhouse gas

---

[1] *See also* Bradford R. Clark, *Boyle as Constitutional Preemption*, 92 Notre Dame L. Rev. 2129, 2134 (2017).

emissions beyond levels Hawai'i law deems permissible. And "future liability" for producing and selling fossil fuels would need to comply with the liability rule Honolulu asks the state courts to impose. This Court has found preemption in that paradigm of a State using damages as a form of regulation. *E.g.*, *Kurns v. Railroad Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). Here, such limitless liability would force energy companies to "change [their] methods of doing business . . . to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. "Any actions" the energy companies "take to mitigate their liability" in Hawai'i "must undoubtedly take effect across every state (and country)." *City of New York*, 993 F.3d at 92. Federal law preempts such extraterritorial state-law liability rules.

II. THE COURT SHOULD RESOLVE PREEMPTION NOW

A. The Court Has Jurisdiction

Honolulu questions this Court's jurisdiction, but this case fits within the fourth *Cox* factor: "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). This case meets both criteria.[2]

Reversing the state supreme court will end the litigation. If this Court grants review and holds that Honolulu's claims are preempted, then the case is

---

[2] Honolulu incorrectly asserts (at 7) petitioners violated Rule 14 by "fail[ing] to address this jurisdictional deficiency." That rule requires only that a petitioner reference the lower-court record "so as to show . . . that this Court has jurisdiction." Sup. Ct. R. 14.1(g)(i). Petitioners satisfied that rule.

over. Honolulu agreed in opposing an interlocutory appeal: "[t]he case will . . . terminate if [an appeal] reverses the 12(b)(6) Order . . . *in its entirety* with respect to *all* of Plaintiffs' causes of action." Dkt. 649, at 5 (Haw. 1st Cir. Ct. May 9, 2022). The trial judge also agreed, noting that reversal of the denial of the motion to dismiss for failure to state a claim "would likely speedily terminate the case." Dkt. 676, at 1, *id.* (May 18, 2022). Because Honolulu's claims necessarily stem from alleged harm from interstate and global emissions, reversal of the state court judgment on either question presented would end the case. If the Court holds that the Clean Air Act preempts claims involving interstate emissions, it follows that Honolulu could not pursue the theory based on foreign emissions. *See Delaware ex rel. Jennings v. BP Am. Inc.*, 2024 WL 98888, at *9-10 (Del. Super. Ct. Jan. 9, 2024), *interlocutory review denied*, 2024 WL 2044799 (Del. May 8, 2024).

Honolulu insinuates (at 8) that reversal of the state court would not end the litigation because it still could pursue claims for Hawai'i-based emissions. But like New York, Honolulu's complaint does "not seek to take advantage of this slim reservoir of state common law. Rather, it wishes to impose [Hawai'i] nuisance standards on emissions emanating simultaneously from all 50 states and the nations of the world." 993 F.3d at 100. Honolulu offers no factual allegation that emissions only from Hawai'i materially altered global emissions sufficient to cause global warming.

To permit this lawsuit to proceed under Hawai'i law would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and

energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93; *see also* Pet.12-13, 20; *AEP*, 564 U.S. at 427 (emissions standards raise "questions of national or international policy"); 43 U.S.C. § 1802(1) (oil resource management policies exist "to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade"); *see generally* General (Retired) Richard B. Myers & Admiral (Retired) Michael G. Mullen Amici Br. (Apr. 1, 2024).

B. Further Percolation Is Unwarranted

Dozens of nearly identical lawsuits are pending in state courts across the country. Six were filed after the Hawai'i Supreme Court decision. There are already multiple conflicting state court decisions, *see* Pet.25, and, as Honolulu acknowledges (at 31), "[they] will not be the last." On May 16, 2024, another state court allowed two more identical cases to proceed into discovery and toward trial by not ruling on the motions to dismiss raising the defenses at issue here.[3] Twenty States disagree with Honolulu's theory, thereby creating the substantial risk of a multi-state fragmented approach of "'vague' and 'indeterminate'" legal standards to a global issue. *Ouellette*, 479 U.S. at 496. Because that will make it "increasingly difficult for anyone to determine what standards govern," *Cooper*, 615 F.3d at 298, the Court should decide this issue now.

This case presents an ideal vehicle to resolve the Clean Air Act and constitutional preemption defenses before dozens of state courts add further confusion.

---

[3] Mem. & Order; Order, *City of Annapolis v. BP PLC*, No. C-02-CV-21-000250 (Anne Arundel Cnty. Cir. Ct. May 16, 2024).

Honolulu does not question that this case presents a purely legal question that will dispense with its claims. The questions presented were fully briefed to and ruled on by the state court. Resolution of the questions presented here immediately will affect the dozens of substantively identical cases pending in state courts across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOACHIM P. COX
RANDALL C. WHATTOFF
COX FRICKE LLP
800 Bethel Street
Suite 600
Honolulu, Hawai'i 96813
(808) 585-9440

DAVID C. FREDERICK
Counsel of Record
DANIEL S. SEVERSON
D. CHANSLOR GALLENSTEIN
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

Counsel for Petitioners

May 21, 2024