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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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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.

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The Government reverses its position that the Clean Air Act preempts claims in these climate cases seeking damages for the alleged effects of transboundary emissions from artfully pleaded causes. That reversal deepens an acknowledged conflict only this Court can resolve. The escalating spate of state-court lawsuits seeking damages for global emissions from an industry vital to the Nation requires urgent review.

The Hawai‘i Supreme Court green-lit claims seeking damages for "effects of climate change" allegedly caused by "the promotion and sale of fossil-fuel[s]." App.39a-40a. The Second Circuit did the opposite: it rejected identical claims seeking damages for "effects of global warming" allegedly caused by the "promotion[] and sale of fossil fuels." *City of New York v. Chevron Corp.*, 993 F.3d 81, 86, 88 (2d Cir. 2021). In both cases, plaintiffs admitted global greenhouse gas emissions are "a link in the causal chain." *Id.* at 91; App.67a. The Second Circuit recognized "such emissions as the singular source of the [alleged] harm," despite the City's "artful pleading," 993 F.3d at 91, 97, while the Hawai‘i Supreme Court concluded those emissions "only serve to tell a broader story," App.40a.

The Government contended New York could not "disavow[] an intent to regulate emissions" because its "allegations of injury from the effects of climate change all turn[ed] on greenhouse-gas emissions from burning fossil fuels"; focusing on earlier moments in the causal chain was "immaterial to the Court's analysis." U.S. *New York* Br. 11, 26. The Second Circuit adopted that view: the City could not "disavow[] any intent to address emissions [while] identifying such emissions as the singular source of the City's harm." 993 F.3d at 91. Indeed, the Government acknowledges (at 18-19 n.3) its consistent view has been that

the Clean Air Act preempts identical cases alleging "deception" leading to transboundary emissions. *See* U.S. *Baltimore* Br. 15 (plaintiff cannot "paper over the chain of causation"); U.S. *Rhode Island* Br. 12 ("This is mere smoke and mirrors.").

The Government offers no explanation for abruptly changing position in a case presenting the same claims and allegations in the same posture. The brief says (at 19 n.3) "the United States did not separately address that [deception] aspect of the claims." But deceptive marketing was central in *City of New York*. The Government argued that focusing on the promotion of fossil fuels was "immaterial": federal law preempts claims for damages allegedly caused by transboundary emissions. The Government's flip-flop, however, is consistent with the Biden Plan's policy pledge to "strategically support ongoing plaintiff-driven climate litigation against polluters." It's not based on law.

The Government agrees it previously argued the Clean Air Act preempts all state efforts to regulate out-of-state emissions and that the court passed on that question below. The Government presents no serious challenge to the cert-worthiness of QP2. And on QP1, the Government has explained "that the same arguments that prohibit . . . recognizing a Federal common law cause of action" for claims premised on global greenhouse gas emissions "very well may be preemption questions as well that could be addressed down the road with respect to State common law actions." *AEP* Tr. 28:11-16. Given the Government's shifting positions and the ballooning roster of climate cases, this Court should address those questions now.

ARGUMENT

I. THE UNITED STATES FAILS TO JUSTIFY REVERSING ITS POSITION FROM *CITY OF NEW YORK* AND OTHER CLIMATE CASES

A. The Government Argued The Clean Air Act Preempted New York's Identical Claims

The Second Circuit held New York's claims "are clearly barred by the Clean Air Act." 993 F.3d at 96. The Hawai'i Supreme Court concluded the Second Circuit's reasoning was "flawed" and held the Clean Air Act "does not preempt [Honolulu's] claims." App.5a, 42a. The Government argued "[t]he Clean Air Act preempts the City's state-law claims." U.S. *New York* Br. 7. But it now contends (at 17) the Hawai'i court was "correct."

The New York and Honolulu complaints are substantively identical. The Government asserts (at 20) the claims "differ" but cites allegations showing they're the same: the "promotion[] and sale of fossil fuels [despite] knowing the harms they would cause" in *City of New York* is equivalent to "failures to warn" here, and New York's complaint alleged "campaigns of deception" like Honolulu. *See New York* Am. Compl. ¶¶ 6-7 ("The purpose of this campaign of deception and denial was to increase sales"). New York alleged "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. BP P.L.C.*, 325 F. Supp. 3d 466, 468-69 (S.D.N.Y. 2018). Honolulu's complaint is the mirror image: "Defendants . . . have known for decades" "that unrestricted promotion and use of their fossil fuel products create greenhouse gas

pollution that warms the planet," but "nevertheless" "promoted . . . a massive increase in" fossil-fuel use, while "conceal[ing] and deny[ing] their own knowledge of those threats." App.100a-101a (¶¶ 1-2).

The Government's assertion (at 19 n.3) it previously did not "directly" consider "deceptive-marketing claims" cannot be squared with its *amicus* brief defending the district court's ruling that New York's "complaint contains extensive allegations regarding Defendants' past attempts to deny or downplay the effects of fossil fuel use on climate change." 325 F. Supp. 3d at 469; *see* U.S. *Oakland* Br. (N.D. Cal.) 2, 4 (noting plaintiffs' "claims . . . assertedly challenged Defendants' deception" and describing *City of New York* as "similar"). New York maintained the "primary fault" it alleged was "marketing activities" that "downplayed the risks of climate change," *New York* Appellant's Br. 5, 16; and the Second Circuit rejected New York's "artful pleading," 993 F.3d at 97.

The Government argued "the complaint on its face" "alleged harms from out-of-state greenhouse gas emissions" and therefore urged the Second Circuit to "conclude that those claims are preempted by the Clean Air Act." U.S. *New York* Br. 5. Now, in conclusory fashion, the Government asserts (at 17) the Clean Air Act "does not categorically preempt" Honolulu's claims, but fails to justify its about-face.

B. The Government Previously Recognized Artful Pleading Cannot Elude Preemption Of Transboundary Emissions Claims

Focusing on the promotion or marketing of fossil-fuel products, an earlier step in the causal chain leading to emissions, is artful pleading that cannot avoid preemption. The Government explained New York could not "disavow[] an intent to regulate emissions"

because its "allegations of injury from the effects of climate change all turn on greenhouse-gas emissions from burning fossil fuels, not on their production and sale." U.S. *New York* Br. 11. "[T]hat the City's claims target production and sale of fossil fuels, rather than directly targeting the resulting emissions, is immaterial to the Court's analysis." *Id.* at 26. Thus, New York could not "distinguish [*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987),] by framing its claims as production and sale rather than emissions." *Id.* at 13.

The Government likewise argued Baltimore's claims would "'overturn the judgment of Congress'" in "the Clean Air Act" and "violate" "'preemption principles.'" U.S. *Baltimore* Br. 1 (quoting *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 303, 306 (4th Cir. 2010)). "[Baltimore's] Complaint does not limit liability to emissions sourced from or acts within the State of Maryland" but depends on conduct "across the entire world." *Id.* "Baltimore strives to paper over the chain of causation," but its "allegations of injury from Defendants' conduct come from the effects of climate change," which "traces through the emission of greenhouse gases." *Id.* at 15.

The *Baltimore* court followed the Government's recommendation and dismissed the case, noting a common defect across cases: "Again, the bottom line is that Baltimore, like *NYC* (and if truth be told *Honolulu*), intends to hold the Defendants liable under Maryland law, for the effects of emissions made around the globe over the past several hundred years." *Mayor & City Council of Baltimore v. BP P.L.C.*, 2024 WL 3678699, at *7 (Md. Cir. Ct. July 10, 2024) (cleaned up). "The explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive misinformation campaign

is simply a way to get in the back door what they cannot get in the front door." *Id.* at *5.

C. The Government Relies On An Untenable Distinction Between A "Duty Not To Pollute" And A Duty Not To Cause Pollution By "Deceptive Marketing"

The Government presents (at 18) a false dichotomy: Honolulu's "state-law claims seek to enforce a duty not to deceive . . . rather than a duty not to pollute." In reality, New York, Honolulu, and others advancing these cases all seek to enforce the same duty: a duty not to cause pollution by means of deception. In other words, the "duty not to deceive" is necessarily a duty to warn consumers not to use products that *increase emissions*.

The Government previously argued that "[t]o grant relief on these claims would intrude impermissibly on the role of the representative branches to determine what level of greenhouse gas regulation is reasonable." U.S. *New York* Br. 29; *see* U.S. *Baltimore* Br. 17; U.S. *Rhode Island* Br. 7. That remains true regardless of how plaintiffs articulate the duty in question. The federal government makes determinations about the "appropriate amount" of emissions, and that "complex balancing" is disrupted when non-source States impose liability for those same emissions. *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). The Government cannot dispute that imposing liability for allegedly excessive emissions, whether for violating a duty to warn or a public nuisance, second-guesses policymaking by the elected branches.

The Government also ignores the causation and harm elements of Honolulu's claims, which indisputably hinge on increased emissions. Pet. 21-23. The Government has recognized preemption from those

elements independent of the applicable duty. *See* U.S. *New York* Br. 11 (New York's "allegations of injury from the effects of climate change all turn on greenhouse-gas emissions from burning fossil fuels, not on their production and sale"); U.S. *Baltimore* Br. 15-17 (same). Because "regulation can be effectively exerted through an award of damages," *Kurns v. Railroad Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (cleaned up), a state-law claim attacking transboundary emissions through the causation or harm element is no less regulatory than a claim imposing a direct "duty to reduce emissions."

Moreover, since petitioners sought certiorari, the Hawai'i Supreme Court has acknowledged in adjudicating insurance for *this very lawsuit* that Honolulu's claims concern "reducing GHG emissions": the court explained Honolulu sued petitioners because their "actions, the complaint alleged, increased carbon emissions, which have caused and will cause significant" "climate change-related harms." *Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. of Pittsburgh*, 557 P.3d 837, 840-41, 856 (Haw. 2024). That frank assessment exposes the state court's inconsistent conclusion here that "[t]his suit does not seek to regulate emissions and does not seek damages for interstate emissions." App.3a.

"Stripped to its essence," Honolulu's complaint, like New York's, "seek[s] to recover damages for the harms caused by global greenhouse gas emissions." 993 F.3d at 91. Thus, regardless of whether the Government correctly characterized the relevant "duty," Honolulu's "claims, if successful, would operate as a *de facto* regulation on greenhouse gas emissions." *Id.* at 96.

D. The Government Erroneously Suggests Honolulu Could Avoid Preemption By Proceeding On An In-State-Emissions Case It Never Pleaded

As the Government previously recognized in a similar context, the preemption ruling below is final under 28 U.S.C. § 1257 because "the federal issue has been finally decided by the [state court], . . . reversal by this Court would preclude further proceedings, and a serious erosion of federal policies is alleged." U.S. *Goodyear* Br. 11 n.9. Indeed, the Government repeatedly has argued the Court has jurisdiction over interlocutory appeals from state-court preemption decisions. *See also* U.S. *Dan's City* Br. 9 n.2; U.S. *Mississippi Power* Br. 17-18. And it recognized "[a]pplication of state nuisance law" in these cases "would substantially interfere with the ongoing foreign policy of the United States." U.S. *New York* Br. 15-16; *see* U.S. *Oakland* Br. (Reh'g) 10 ("[T]he federal interests in the subject matter are acute.").

The Government imagines (at 9) Honolulu could proceed on remand with an alternative in-state-emissions-only claim it never pleaded. But because Honolulu pleaded a case that necessarily depends on global emissions, reversal would end the case. *See* Reply 10. Honolulu acknowledged before the Hawai'i Supreme Court that "the Complaint's theory . . . envision[s] that there would be liability for representations made . . . around the world," not "just . . . here in Hawaii." *Honolulu* Tr. 31:33-58. Common sense dictates that no case pleading harms from global climate change can proceed solely from one State's in-state emissions.

The Government itself recognized in another identical case that "[t]he harm alleged is the attenuated

result of emissions occurring and accumulating *worldwide*. . . . There is no way to apply *Ouellette's* 'source state' concept to this house of cards." U.S. *Oakland* Br. (Reh'g) 9-10. And the Government argued New York's "complaint on its face" "challenge[s] conduct . . . almost entirely outside the State of New York," "so the City's claims must likewise be dismissed." U.S. *New York* Br. 5; *see id.* at 23 ("The City's claim for damages depends on . . . emissions . . . worldwide.").

Finally, Honolulu's counsel concluded in an identical case that an order holding "that the Clean Air Act . . . preempts [Delaware]'s claims 'for injuries resulting from out-of-state or global greenhouse gas emissions'" "eliminates" the claims; "it is clear from the face [of] the Complaint that [plaintiff] did not plead claims for harms caused *exclusively* by in-state emissions." Delaware Rule 54(b) Mot. 2, 11 (quoting *Delaware ex rel. Jennings v. BP Am. Inc.*, 2024 WL 98888, at *9 (Del. Super. Ct. Jan. 9, 2024)).

E. The Government Mischaracterizes The Federal Common-Law Arguments

Regarding foreign emissions, the Hawai'i 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. The Second Circuit held federal law "preempts state law" as to those foreign emissions. 993 F.3d at 95 & n.7.

The Second Circuit's resolution of this issue followed the Government's unequivocal argument that New York's claims were "also preempted by the Foreign Commerce Clause and by the foreign affairs power of the Executive Branch because they have more than an incidental or indirect effect on the actions of foreign nations and impermissibly intrude into the field of

foreign affairs." U.S. *New York* Br. 13. The Government noted there and in identical cases that "[e]fforts to address climate change, including in a variety of multilateral fora, have for decades been an important element of U.S. foreign policy and diplomacy." *Id.* at 15; *see* U.S. *Baltimore* Br. 17-18; U.S. *Oakland* Br. (9th Cir.) 15-19.

The Government does not disavow that position here. Indeed, it suggests quiet agreement that claims arising from transboundary emissions are preempted. *See* U.S. Br. 12 ("petitioners may ultimately prevail" on their constitutional structure preemption arguments).

The Government instead unpersuasively suggests (at 13, and for the first time by anyone) that petitioners did not "properly" present this argument below by referencing federal common law. But the Government previously maintained "[plaintiffs'] claims are irreconcilable with . . . the structure of the Constitution (as the Supreme Court recognized by holding that interstate pollution claims are governed by federal common law)." U.S. *Oakland* Br. (Reh'g) 12. Briefing before the Hawai'i Supreme Court argued "our federal constitutional structure does not allow varying state laws" to claim damages for transboundary emissions. *Honolulu* Appellants' Br. 26. Defendants similarly argued the trial court should follow the Second Circuit's "simple and straightforward approach," including that "federal law necessarily governs interstate or international pollution claims to the exclusion of state law, because 'the basic scheme of the Constitution so demands.'" *Honolulu* MTD Reply 8, 12 (quoting *AEP*, 564 U.S. at 421). In any event, the federal common law of transboundary emissions – and its preemptive effect – is rooted in the Constitution. *See* Reply 7-8.

Notably, Honolulu does not argue petitioners did not present this issue. And the Government concedes the Clean Air Act preemption argument is "properly before this Court." U.S. Br. 13.

Accordingly, granting and reversing on either question presented would terminate the litigation. Reversing on QP1 would preempt Honolulu's existing case. Reversing on QP2 would satisfy constitutional avoidance by preempting Honolulu's existing case and limiting any future case to allegations asserting an in-state-emissions-only claim consistent with the Clean Air Act. *See AEP*, 564 U.S. at 429.

II. THE UNITED STATES' SHIFTING POSITIONS CONFIRM IMMEDIATE REVIEW IS NEEDED

In *City of New York*, the Government was "aware of similar suits by thirteen other municipalities, one State, and one fisheries association against fossil-fuel producing companies." U.S. *New York* Br. 4. Now there are more than 30 suits under burgeoning state laws and States beginning to enact retroactive liability for climate change. The Government previously cautioned that allowing state-law claims seeking climate-related damages would invite cases involving "almost unimaginably broad categories of both potential plaintiffs and potential defendants." TVA *AEP* Br. 15-16. And the Government recognized that, although plaintiffs have "tried to plead around this Court's decision in AEP," the theory of causation and damages "still depends on alleged injuries . . . caused by emissions from all over the world." *Baltimore* Tr. 31:4-12. Yet these lawsuits are proliferating. On December 4, 2024, the Town of Carrboro, NC sued Duke Energy (an alleged successor to a defendant in *AEP*) using the same playbook Honolulu's counsel is using here.

The Government's abrupt shift in position will only sow further confusion in the lower courts and encourage similar untenable litigation. The most the Government's December 2024 position offers is delayed resolution of the critical federal preemption issues. The Government never acknowledges the costs from the unbounded discovery plaintiffs seek, the proliferation of copycat lawsuits, and the threat of even a single ruinous final judgment in these cases to an industry vital to economic and national security. With the Government's inconsistencies, the need for this Court's review now is even clearer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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