Nos. 23-947 and 23-952

In the Supreme Court of the United States

SUNOCO LP, ET AL., PETITIONERS

v.

CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.

SHELL PLC, FKA ROYAL DUTCH SHELL PLC, ET AL., PETITIONERS

v.

CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
CHRISTINE W. ENNIS
ROBERT P. STOCKMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Hawaii Supreme Court correctly affirmed the denial of petitioners' motion to dismiss, which argued that respondents' state-law claims alleging the deceptive marketing of fossil-fuel products were either governed by the federal common law of transboundary air pollution or preempted by the Clean Air Act, 42 U.S.C. 7401 *et seq.*

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

1. Petitioners are "extractors, producers, refiners, manufacturers, distributors, promoters, marketers, and/or sellers of fossil fuel products"—namely, "coal, oil, and natural gas." Compl. ¶¶ 4-5. In 2020, the City

and County of Honolulu (Honolulu) brought suit against petitioners in Hawaii state court, alleging five claims under Hawaii state common law: public nuisance, private nuisance, strict-liability failure to warn, negligent failure to warn, and trespass. Compl. ¶¶ 154-205. All five state-law claims rested on the same theory of liability: that petitioners have known for decades that greenhouse-gas emissions from the use of their fossil-fuel products would contribute to climate change; that instead of warning consumers about those consequences, petitioners engaged in deceptive marketing by concealing and misrepresenting the dangers of using their fossil-fuel products; and that as a result of that deception, consumers used more of petitioners' fossil-fuel products than they otherwise would have, causing "a substantial portion" of the injuries that Honolulu has suffered because of climate change. Compl. ¶¶ 7-13.

Petitioners removed the case to federal court pursuant to various statutes. *Honolulu* v. *Sunoco LP*, No. 20-cv-163, 2021 WL 531237, at *1-*2 (D. Haw. Feb. 12, 2021). The federal district court rejected each ground for removal and remanded the case to state court. *Id.* at *9. The district court observed that Honolulu had "chosen to pursue claims that target [petitioners'] alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels." *Id.* at *1. Viewing the claims "in th[at] light," the court found "no basis for federal jurisdiction." *Ibid.*

The Ninth Circuit affirmed. *Honolulu* v. *Sunoco LP*, 39 F.4th 1101 (2022), cert. denied, 143 S. Ct. 1795 (2023). Like the district court, the Ninth Circuit understood Honolulu's claims to be "about whether oil and gas companies misled the public about dangers from fossil fuels." *Id.* at 1113. Given the nature of Honolulu's claims,

the Ninth Circuit rejected petitioners' contention that the suit "belong[ed] in federal court." *Id.* at 1106. Petitioners filed a petition for a writ of certiorari on the question whether Honolulu's state-law suit was removable to federal court, and this Court denied review. *Sunoco LP* v. *Honolulu*, 143 S. Ct. 1795 (2023) (No. 22-523).[1]

2. In 2021, the Honolulu Board of Water Supply joined this suit as a plaintiff. 23-952 Pet. App. 7a, 107a. Honolulu and the Board, respondents here, filed an amended complaint with the same claims and theory of liability—*i.e.*, that petitioners deceptively marketed their fossil-fuel products. *Id.* at 100a-234a.

Petitioners moved under Hawaii Rule of Civil Procedure 12(b)(6) to dismiss the amended complaint for failure to state a claim. Joint Mem. in Support of Mot. to Dismiss for Failure to State a Claim, Cir. Ct. Doc. 347, at 1-29 (June 2, 2021) (Mem.). Petitioners characterized respondents' claims as "seek[ing] to regulate transboundary and international emissions and pollution." Mem. 11. Petitioners then argued that federal law precludes respondents' claims for two reasons. Mem. 11-24. First, petitioners contended that "federal common law governs all of [respondents'] claims." Mem. 5. Second, peti-

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[1] This Court called for the views of the Solicitor General on a petition seeking review of whether a similar state-law suit was removable to federal court. *Suncor Energy (U.S.A.) Inc.* v. *Board of County Comm'rs of Boulder County*, 143 S. Ct. 78 (2022) (No. 21-1550). The government filed a brief expressing the view that the suit was not removable and that the certiorari petition should be denied. U.S. Cert. Amicus Br. at 6-7, *Suncor*, *supra* (No. 21-1550). The Court subsequently denied review in that case and others—including this one—raising the same issue. See, *e.g.*, *Suncor Energy (U.S.A.) Inc.* v. *Board of County Comm'rs of Boulder County*, 143 S. Ct. 1795 (2023) (No. 21-1550).

tioners argued that "even if [respondents'] common law claims could be governed by state law," the claims would be "preempted" by the Clean Air Act, 42 U.S.C. 7401 *et seq.* Mem. 5; see Mem. 22-24.

In 2022, the state trial court denied petitioners' Rule 12(b)(6) motion. 23-952 Pet. App. 84a-95a. The court explained that "[s]tate law tort claims traditionally involve four elements: duty, breach, causation, and harm or damages." *Id.* at 86a. The court understood all of respondents' claims to rely on "the same basic theory of liability": that petitioners breached "a duty to disclose and not be deceptive about the dangers of fossil fuel emissions," thereby increasing fossil-fuel consumption and exacerbating the effects of climate change in Honolulu. *Id.* at 86a & n.1 (emphasis omitted).

The trial court then rejected petitioners' arguments that federal statutory and common law precludes respondents' claims. 23-952 Pet. App. 88a-93a. The court explained that "the Clean Air Act supplants the federal common law invoked by [petitioners]," *id.* at 92a, and that there is no federal "common law" policy "against timely and accurate disclosure of harms from fossil fuel emissions" in any event, *id.* at 90a-91a. The court likewise rejected petitioners' Clean Air Act preemption argument on the ground that there is no federal "statutory" policy against "timely and accurate disclosure" of such harms. *Id.* at 90a; see *id.* at 93a. The court, however, granted petitioners leave to file an interlocutory appeal to the Hawaii Intermediate Court of Appeals. 23-947 Pet. App. 86a-90a.

3. In 2023, the Hawaii Supreme Court accepted transfer of the appeal, 23-952 Pet. App. 96a-97a, and affirmed the denial of petitioners' Rule 12(b)(6) motion, *id.* at 1a-76a.

As an initial matter, the Hawaii Supreme Court rejected petitioners' characterization of respondents' suit. 23-952 Pet. App. 2a-3a. The court explained that, contrary to petitioners' contention, respondents' suit "does not seek to regulate emissions or curb energy production." *Id.* at 34a. Instead, the court emphasized, respondents' suit "seeks to hold [petitioners] accountable for allegedly (1) failing to warn about the dangers of their fossil fuel products and (2) deceptively promoting those products." *Ibid.*; see *id.* at 39a-40a.

The Hawaii Supreme Court then rejected petitioners' reliance on federal common law. 23-952 Pet. App. 38a-56a. First, the court held that the federal common law on which petitioners relied—*i.e.*, the federal common law of "transboundary pollution"—had been displaced by the Clean Air Act. *Id.* at 39a. The court observed that petitioners themselves had "acknowledge[d]" as much. *Id.* at 47a. Second, the court held that "[e]ven if federal common law governing interstate pollution claims had not been displaced, [respondents'] claims would not be preempted" because respondents' claims target petitioners' "allegedly tortious marketing conduct, not pollution traveling from one state to another." *Id.* at 52a-53a. The court noted that petitioners had "fail[ed] to point to any case recognizing federal common law governing tortious marketing suits." *Id.* at 55a. And the court found that petitioners had "waived any argument to expand federal common law to cover [respondents'] claims." *Ibid.*

The Hawaii Supreme Court also rejected petitioners' Clean Air Act preemption argument. 23-952 Pet. App. 56a-69a. The court explained that the Clean Air Act "regulates pollution," not "marketing conduct," and "does not concern itself in any way with * * * the use of de-

ception to promote the consumption of fossil fuel products." *Id.* at 64a. The court concluded that "because [respondents'] claims arise from [petitioners'] alleged failure to warn and deceptive marketing conduct, not emissions-producing activities regulated by the [Clean Air Act]," the statute "does not preempt [respondents'] claims." *Id.* at 62a.

DISCUSSION

Respondents brought suit alleging that petitioners violated various state common-law duties by deceptively marketing fossil-fuel products. Petitioners filed a Rule 12(b)(6) motion to dismiss, arguing that respondents' claims are either governed by the federal common law of transboundary air pollution or preempted by the Clean Air Act. The Hawaii Supreme Court rejected those arguments and affirmed the denial of petitioners' motion, thereby allowing the suit to proceed.

The petitions for writs of certiorari seeking review of that ruling should be denied for multiple interrelated reasons.[2] This Court does not have jurisdiction to review the Hawaii Supreme Court's interlocutory decision, and even if it did, further review at this time would be unwarranted. In addition to presenting federal-common-law and statutory preemption arguments in their Rule 12(b)(6) motion, petitioners have taken the position in their answers filed in the trial court that respondents' state-law claims are barred by the Interstate and Foreign Commerce Clauses, the Due Process Clause, and federal primacy in foreign affairs. Those constitutional

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[2] In a brief filed simultaneously with this one, the United States has expressed the view that the motion for leave to file a bill of complaint in *Alabama* v. *California*, No. 158, Orig., should likewise be denied. The proposed complaint in that case seeks to enjoin other state-court suits brought against private energy companies.

arguments may ultimately be held to foreclose respondents' state-law claims to the extent they are based on emissions or other conduct outside Hawaii. Yet those defenses have not been addressed by the Hawaii Supreme Court, or even the trial court. The existence of those pending constitutional issues counsels against review now, which would risk piecemeal review of federal issues by this Court.

A. This Court Lacks Jurisdiction To Review The Hawaii Supreme Court's Interlocutory Decision, And The Existence Of Pending Constitutional Issues Counsels Against Review At This Time

The Hawaii Supreme Court's interlocutory decision does not satisfy 28 U.S.C. 1257(a)'s final-judgment rule. This Court therefore lacks jurisdiction to review the decision below. Moreover, even if that decision were a final judgment, the extent to which the Constitution itself may preclude respondents' claims would not be properly before this Court, and the interlocutory nature of the decision below would counsel against the Court's review at this time.

1. Under Section 1257(a), this Court's jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). "As a general matter, to be reviewed by this Court, a state-court judgment must be final 'as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Pierce County* v. *Guillen*, 537 U.S. 129, 140 (2003) (citation and some internal quotation marks omitted). The Hawaii Supreme Court's decision in this case is not final in that sense because it affirms the denial of a motion to dismiss and contemplates further proceedings. 23-952 Pet. App. 2a.

This Court has "acknowledged, however, that certain state-court judgments can be treated as final for jurisdictional purposes, even though further proceedings are to take place in the state courts." *Guillen*, 537 U.S. at 140-141. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court divided state-court judgments of that kind into "four exceptional categories." *Johnson* v. *California*, 541 U.S. 428, 429 (2004) (per curiam). As the parties invoking this Court's jurisdiction, petitioners bear the burden of establishing that this case falls within one of the four. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70-71 (1948).

Petitioners invoke only the fourth *Cox* category. 23-947 Cert. Reply Br. 3-4; 23-952 Cert. Reply Br. 9-11. That category encompasses cases in which (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (3) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-483.

Petitioners have not met their burden of showing that this case satisfies those factors. With respect to the first factor, this is not a case in which all that remains is the prospect that petitioners "might prevail on the merits on *nonfederal* grounds." *Cox*, 420 U.S. at 482-483 (emphasis added). Petitioners could instead succeed, in substantial part, on *federal* grounds under the Constitution. Petitioners have not shown that jurisdiction lies under Section 1257(a) in these circumstances. To the contrary,

this Court "observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved." *Flynt* v. *Ohio*, 451 U.S. 619, 621 (1981) (per curiam). Treating this case as nevertheless falling within the fourth exception would risk "piecemeal review with respect to federal issues." *Ibid.*

With respect to the second factor, petitioners' Rule 12(b)(6) motion relied on the federal common law of transboundary air pollution and the Clean Air Act. See pp. 3-4, *supra*. Even under petitioners' own theory, those authorities would preclude respondents' claims only to the extent those claims "seek to apply state law *extraterritorially* to regulate transboundary pollution." 23-947 Cert. Reply Br. 1 (emphasis added). Thus, even if this Court were to accept petitioners' arguments, respondents would not be precluded from pursuing claims involving *in-state* deceptive practices or *in-state* pollution. Br. in Opp. 8. And although petitioners dispute whether respondents have preserved any in-state claims, see 23-947 Cert. Reply Br. 3; 23-952 Cert. Reply Br. 10, that issue would itself be one for the state courts to address in further proceedings. Petitioners have therefore failed to show that reversal of the decision below on petitioners' federal-common-law and Clean Air Act arguments would be "preclusive of further litigation" on respondents' claims. *Cox*, 420 U.S. at 482-483.

Petitioners have also failed to show that "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. To satisfy that factor, it is not enough to assert that the state court decided a federal issue erroneously. If that were sufficient, the "fourth [*Cox*] exception [would]

swallow the rule." *Flynt*, 451 U.S. at 622. Instead, the question is whether this Court's resolution of the federal issue "can await final judgment without any adverse effect upon important federal interests." *Ibid.* The party invoking this Court's jurisdiction bears the burden of showing that "delaying review" until final judgment might "seriously erode" an "identifiable federal policy." *Ibid.*

Petitioners have failed to meet that burden here. In attempting to satisfy this requirement under the fourth *Cox* category, petitioners do not rely on either federal common law or the Clean Air Act. 23-947 Cert. Reply Br. 3-4; 23-952 Cert. Reply Br. 9-11. Instead, petitioners invoke "federal interests in the regulation of fossil fuels and greenhouse-gas emissions." 23-947 Cert. Reply Br. 3. But petitioners do not point to any "identifiable federal policy" embodying those interests—especially with respect to claims of deceptive marketing—that would demonstrate that the interests could not be adequately vindicated by this Court's review after final judgment. *Flynt*, 451 U.S. at 622. Petitioners also invoke 43 U.S.C. 1802(1) and the Constitution. 23-952 Cert. Reply Br. 11; 23-947 Cert. Reply Br. 3-4. But this case does not implicate Section 1802(1), which merely describes the "purposes" of a statute concerning the Outer Continental Shelf. 43 U.S.C. 1802. And petitioners' Rule 12(b)(6) motion did not raise, and the state courts did not address, any argument that the Constitution itself precludes respondents' claims. See pp. 11-13, *infra*.

Petitioners' reliance (23-947 Cert. Reply Br. 3) on *Coventry Health Care of Missouri, Inc.* v. *Nevils*, 581 U.S. 87 (2017), and *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251 (2013), is likewise misplaced. Although this Court did not address its jurisdiction in either decision,

the Court presumably concluded that each case fell within the fourth *Cox* category because of an express preemption clause. See U.S. Cert. Amicus Br. at 19-20, *Coventry Health Care of Missouri, Inc.* v. *Nevils,* 576 U.S. 1048 (2015) (No. 13-1305); U.S. Amicus Br. at 9 n.2, *Dan's City*, *supra* (No. 12-52). The statute at issue in *Dan's City*, moreover, contained an express finding by Congress that "state governance of intrastate transportation of property had become 'unreasonably burdensome' to 'free trade, interstate commerce, and American consumers.'" 569 U.S. at 256 (brackets and citation omitted). Because petitioners fail to point to any similar expression of federal policy that would call for immediate review here, petitioners have not met their burden of showing that this case fits the fourth *Cox* category.

This Court therefore lacks jurisdiction under Section 1257(a) to review the Hawaii Supreme Court's interlocutory decision. "At the very least," the need to resolve "this threshold jurisdictional issue would complicate [the Court's] review." *Gordon Coll.* v. *DeWeese-Boyd*, 142 S. Ct. 952, 955 (2022) (Alito, J., respecting the denial of certiorari); see *Wilson* v. *Hawaii*, No. 23-7517 (Dec. 9, 2024), slip op. 7 (Thomas, J., respecting the denial of certiorari) (explaining that the Hawaii Supreme Court's decision was "an interlocutory order over which [this Court] may not have jurisdiction"); *Wilson*, *supra*, slip op. 4 (Gorsuch, J., respecting the denial of certiorari) (emphasizing the "interlocutory" nature of the Hawaii Supreme Court's decision).

2. Section 1257(a) further limits this Court's review to "right[s] * * * *specially set up or claimed* under the Constitution or the treaties or statutes of, or * * * authority exercised under, the United States." 28 U.S.C. 1257(a) (emphasis added). Accordingly, "this Court has

almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [this Court] ha[s] been asked to review.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)).

In moving to dismiss under Rule 12(b)(6), petitioners argued that respondents' claims were either governed by federal common law or preempted by the Clean Air Act. Mem. 5. To the extent petitioners' Rule 12(b)(6) motion invoked the Constitution at all, it did so only in connection with their federal-common-law argument, without citing any particular constitutional provision. See, *e.g.*, Mem. 12 ("'The basic scheme of the Constitution . . . demands' that federal common law apply in these circumstances.") (brackets and citation omitted). Petitioners' Rule 12(b)(6) motion did not argue that the Constitution itself precludes respondents' claims, and in ruling on that motion, the state courts likewise did not address any such constitutional issue. See 23-952 Pet. App. 3a-5a, 11a, 15a-18a (summarizing the issues raised and addressed below).

Petitioners now contend, however, that "[i]t is * * * the Constitution * * * that is doing the relevant work." 23-947 Cert. Reply Br. 7; see 23-947 Pet. 24, 27-28; 23-952 Pet. 16-23. To be sure, petitioners may ultimately prevail on their contention that respondents' claims are barred by the Constitution—specifically, the Interstate and Foreign Commerce Clauses, the Due Process Clause, and federal constitutional structure—to the extent the claims rely on conduct occurring outside Hawaii. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572, 573 n.20 (1996) (explaining that "principles of state sover-

eignty and comity" mean "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," while reserving judgment on "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State"). But no such question was addressed or properly presented below. And regardless of whether the "requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential," "the circumstances here justify no exception." *Adams*, 520 U.S. at 90. Thus, even if the decision below fell within the fourth *Cox* category, the extent to which the Constitution itself may preclude respondents' claims would not be properly before this Court.

3. In any event, even if the possibility of piecemeal review were not a jurisdictional problem, see pp. 8-9, *supra*, it at least counsels against review at this juncture. As discussed, the only federal issues raised in petitioners' Rule 12(b)(6) motion—and addressed below—were petitioners' federal-common-law and Clean Air Act arguments. See pp. 3-6, *supra*. But in their answers to respondents' amended complaint, petitioners have raised additional federal issues, including whether and to what extent the Constitution itself precludes respondents' claims. See, *e.g.*, Shell Answer, Cir. Ct. Doc. 742, at 32, 34 (Sept. 12, 2022) (asserting defenses based on the Commerce Clause, the Due Process Clause, the foreign-affairs doctrine, and separation of powers); Sunoco Answer, Cir. Ct. Doc. 750, at 27, 29 (Sept. 12, 2022) (same).

The state courts may well address those additional federal issues in further proceedings. In particular, the state courts could conclude that the Constitution bars the state-law claims to the extent they rely on conduct

occurring outside Hawaii, even though the Hawaii Supreme Court concluded that the Clean Air Act does not preempt those claims. Postponing review until final judgment would thus allow the Court to consider all of the federal issues presented in this case at one time. *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 83 (1997).

B. The Merits Of The Decision Below Do Not Warrant This Court's Review At This Time

1. The Hawaii Supreme Court correctly rejected petitioners' reliance on federal common law for two independent reasons. 23-952 Pet. App. 38a-56a.

a. First, as the United States has previously explained, the federal common law that petitioners invoke —the federal common law of "transboundary [air] pollution," 23-952 Pet. App. 39a; see Mem. 11—has been displaced by Congress in the Clean Air Act, at least with respect to greenhouse-gas emissions. See U.S. Cert. Amicus Br. at 11-15, *Suncor Energy (U.S.A.) Inc.* v. *Board of County Comm'rs of Boulder County*, 143 S. Ct. 1795 (2023) (No. 21-1550). This Court so held in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*).

Despite acknowledging that displacement, petitioners contend that respondents' claims are still governed by federal common law. 23-952 Pet. App. 47a. But "federal common law is 'subject to the paramount authority of Congress.'" *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981) (citation omitted). "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, * * * the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 95 n.34.

In *AEP*, for example, the Court did not remand for consideration of the viability of the plaintiffs' state-law

claims in light of the federal common law that the Clean Air Act had displaced. 564 U.S. at 429. To the contrary, the Court described any remaining disputes over the scope of that "displaced" body of federal common law as "academic." *Id.* at 423. The Court then treated the viability of the plaintiffs' state-law claims as a matter of Clean Air Act preemption, instructing the lower courts to consider "the availability *vel non* of a state lawsuit" in light of "the preemptive effect of the federal Act." *Id.* at 429.

This Court took a similar approach in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987). After concluding that the Clean Water Act, 33 U.S.C. 1251 *et seq.*, had displaced the federal common law governing transboundary water pollution, *Ouellette*, 479 U.S. at 489, the Court did not suggest that the prior federal-common-law regime had any bearing on the extent to which state-law claims could go forward. Instead, the Court treated the viability of state-law claims as solely a matter of Clean Water Act preemption, to be addressed in light of statutory provisions that "specifically preserve[d] [certain] state actions" and "allow[ed] source States to impose stricter standards." *Id.* at 497, 499; see *id.* at 488-500. Petitioners' assertion that federal common law governs respondents' claims even after Congress displaced that body of law cannot be reconciled with *AEP* or *Ouellette*.

This Court addressed a similar argument in *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988), where it rejected the contention that a Puerto Rico law imposing price and allocation controls on petroleum products was preempted by the Emergency Petroleum Allocation Act (EPAA), which had since been repealed. The Court ob-

served that "repeal of EPAA regulation did not leave behind a pre-emptive grin without a statutory cat." *Id.* at 504. So too here, the displacement of the federal common law "did not leave behind a pre-emptive grin" without a common-law "cat." *Ibid.*

b. Second, even if Congress had not displaced the federal common law on which petitioners rely, that body of federal common law would still not govern respondents' claims. 23-952 Pet. App. 52a-56a. "There is no federal general common law." *AEP*, 564 U.S. at 420 (citation omitted). "Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez* v. *FDIC*, 589 U.S. 132, 136 (2020). Petitioners invoke one such area of federal common law here: the federal common law of transboundary air pollution. That specialized body of federal common law imposed on polluters certain duties not to pollute. See *AEP*, 564 U.S. at 421.

But respondents in this case do not allege the violation of such a duty. Rather, they allege the violation of a different one: "a duty to disclose and not be deceptive about" the dangers of using fossil-fuel products. 23-952 Pet. App. 86a (emphasis omitted); see *id.* at 103a-106a. Indeed, every court to have addressed respondents' claims has described them as claims "about whether oil and gas companies misled the public about dangers from fossil fuels." *Honolulu* v. *Sunoco LP*, 39 F.4th 1101, 1113 (9th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023); see 23-952 Pet. App. 34a, 86a n.1; *Honolulu* v. *Sunoco LP*, No. 20-cv-163, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021).

Because respondents do not allege the violation of a duty not to pollute, the federal common law that petitioners invoke would not govern respondents' claims

even if it still existed. To establish that federal common law governs respondents' claims, this Court would have to fashion a new body of federal common law—one that governs "tortious marketing." 23-952 Pet. App. 55a. But petitioners have not cited "any case recognizing federal common law governing tortious marketing suits," and they have "waived any argument to expand federal common law to cover [respondents'] claims." *Ibid.*

Given that state-law ground of waiver found by the Hawaii Supreme Court, the decision below would be a poor vehicle for considering whether federal common law governs respondents' claims. Even if this Court were to look past Congress's displacement of the federal common law on which petitioners rely, that federal common law still would not reach tortious marketing.

2. The Hawaii Supreme Court was also correct in concluding that the Clean Air Act does not categorically preempt respondents' claims. 23-952 Pet. App. 56a-69a. In arguing that the Act preempts respondents' claims in their entirety, petitioners do not rely on any express preemption clause. Instead, petitioners rely on a theory of obstacle preemption drawn from this Court's decision in *Ouellette*. Mem. 22-24; 23-952 Pet. 29-31.

Ouellette involved a defendant whose discharges into the waters of one State (the source State) affected the waters of another (the affected State). 479 U.S. at 483-484. The plaintiff sued, alleging that the defendant's discharges violated the law of the affected State. *Id.* at 484. This Court held that the Clean Water Act precluded "applying the law of an affected State" to impose a duty not to pollute on "an out-of-state source." *Id.* at 494. The Court explained that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interfer-

ence with the achievement of the 'full purposes and objectives of Congress.'" *Id.* at 493-494 (citation omitted).

Analogizing this case to *Ouellette*, petitioners contend that the Clean Air Act likewise precludes applying Hawaii law to regulate "air pollution originating out-of-state." Mem. 23. But unlike in *Ouellette*, the defendants here are fuel marketers, not "emitters." 23-947 Pet. 25. And most importantly, respondents' state-law claims seek to enforce a duty not to deceive—*i.e.*, "a duty to disclose and not be deceptive about" the dangers of using fossil-fuel products—rather than a duty not to pollute. 23-952 Pet. App. 86a (emphasis omitted); see 23-952 Pet. 21 (acknowledging that the "proper inquiry" focuses on the "common-law duty at issue") (citation omitted). That distinction matters because while the Clean Air Act "regulates pollution," it "does not concern itself" with the kind of deceptive marketing alleged here. 23-952 Pet. App. 64a. Thus, unlike in *Ouellette*, respondents' claims would not necessarily stand as an obstacle to the achievement of Congress's "purposes and objectives." 479 U.S. at 493 (citation omitted).

Ouellette therefore does not support petitioners' theory that the Clean Air Act preempts respondents' claims in their entirety. And while there may be arguments that the Act nevertheless limits the scope of respondents' claims or the relief that could be granted, the decision below would be an unsuitable vehicle for considering those narrower theories because the precise contours of respondents' claims have not yet been developed or addressed in the state courts below.[3]

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[3] In previous lower-court filings in other cases, the United States took the position that the Clean Air Act preempts certain state-law claims that the United States characterized as seeking to "regulate out-of-state pollution sources." U.S. Amicus Br. in Support of Mot.

C. Petitioners Have Not Demonstrated That Any Appellate Court Would Have Reached A Different Outcome Than The Court Below

Petitioners contend that the decision below conflicts with the decisions of other appellate courts. 23-947 Pet. 14-21; 23-952 Pet. 9-16, 23-29. But none of those other decisions involved state-law claims like the ones here—claims alleging the violation of a duty not to deceive, rather than a duty not to pollute. Petitioners therefore have not established that any appellate court would have reached a different outcome in the particular circumstances of this case. And because the Hawaii Supreme Court is the only appellate court that has addressed the viability of claims like the ones here, this Court would benefit from further percolation in the lower courts. See 23-947 Pet. 31 (citing other cases in which similar issues could arise).

1. The Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), involved claims alleging that private energy companies violated various state-law duties by producing, promoting, and selling fossil-fuel products that the companies knew were the source of greenhouse-gas emissions that posed a risk to the planet's climate. 993 F.3d at 86-87. Because the

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to Dismiss at 2, *Mayor & City Council of Baltimore* v. *B.P. p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct. Mar. 20, 2020); U.S. Amicus Mem. of Law in Support of Mot. to Dismiss at 2, *Rhode Island* v. *Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. May 5, 2020); see U.S. Amicus Br. at 7-13, *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (No. 18-2188). The *Baltimore* and *Rhode Island* cases included claims of deception, but the United States did not separately address that aspect of the claims. Having considered that issue directly in this case, the United States is of the view that the Act does not categorically preempt deceptive-marketing claims like the ones here.

companies could have "avoid[ed] all liability" only by "ceas[ing] global production [of fossil-fuel products] altogether," the Second Circuit viewed the claims as a "regulat[ion]" of "cross-border emissions." *Id.* at 93. The Second Circuit then held that the claims had to "be brought under federal common law," *id.* at 95, but that any federal common-law claim would fail because "the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions," *ibid.*, and because federal common law would not extend extraterritorially to reach foreign emissions, *id.* at 101.

Contrary to petitioners' contention (23-947 Cert. Reply Br. 1), the claims in this case differ from those addressed in *City of New York*. The claims in *City of New York* targeted fossil-fuel products themselves, seeking to hold the companies responsible for the products' production, promotion, and sale, even in the absence of any deception; the claims in this case, in contrast, target only the products' deceptive marketing. Compare Appellant Br. at 9, *City of New York*, *supra* (No. 18-2188) ("The complaint focuses exclusively on [the companies'] production, promotion, and sale of fossil fuels while knowing the harms they would cause."), with Resp. Opp. to Mot. to Dismiss for Failure to State a Claim, Cir. Ct. Doc. 375, at 8 (July 19, 2021) ("[Respondents'] claims focus entirely on [petitioners'] failures to warn and campaigns of deception."). Thus, whereas the companies in *City of New York* could have avoided further liability only by "ceas[ing] global production [of fossil-fuel products] altogether," 993 F.3d at 93, the Hawaii Supreme Court concluded that petitioners in this case could avoid further liability simply by "issuing warnings and refraining from deceptive conduct," 23-952 Pet. App. 69a. Indeed, respondents themselves acknowledge that, "so long as

[petitioners] start warning of their products' climate impacts and stop spreading climate disinformation, they can sell as much fossil fuel as they wish without fear of incurring further liability." *Id.* at 15a.

Given the nature of respondents' claims, petitioners err in asserting that the outcome of this case necessarily would have been different if it had arisen in the Second Circuit. In *City of New York*, the Second Circuit concluded that the plaintiff's claims "must be brought under federal common law." 993 F.3d at 95. But the court reached that conclusion only because it understood those claims to "regulate cross-border emissions." *Id.* at 93. The court did not consider whether "federal common law govern[s] tortious marketing suits" like respondents'. 23-952 Pet. App. 55a; cf. *Connecticut* v. *Exxon Mobil Corp.*, 83 F.4th 122, 142 (2d Cir. 2023) (holding that a tortious marketing suit, brought by a State against private energy companies, could be resolved "'*without* reaching' the federal common law of transboundary pollution") (emphasis added; citation omitted). The Second Circuit also concluded that "the Clean Air Act's displacement of federal common law d[id] not resuscitate the [plaintiff's] state-law claims." *City of New York*, 993 F.3d at 98 (capitalization altered). But again, the court reached that conclusion only because it understood those claims to regulate "emissions," *id.* at 100—not deceptive marketing.

2. Petitioners likewise err in asserting that the decision below conflicts with *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291 (4th Cir. 2010), cert. denied, 564 U.S. 1054 (2011), and *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). Those cases involved suits brought against out-of-state polluters seeking to enforce certain state-law duties not

to pollute. See *Cooper*, 615 F.3d at 296; *Milwaukee*, 731 F.2d at 404-406. In *Cooper*, the Fourth Circuit held that the suit was preempted by the Clean Air Act. 615 F.3d at 301-306. In *Milwaukee*, the Seventh Circuit held that the suit was preempted by the Clean Water Act. 731 F.2d at 414. But neither case involved state-law claims like the ones here, alleging the violation of a duty not to deceive.

3. The remaining decisions that petitioners cite are also inapposite. Each involved state-law claims brought against in-state polluters alleging the violation of duties not to pollute, rather than duties not to deceive. See *Merrick* v. *Diageo Americas Supply, Inc.*, 805 F.3d 685, 686, 689, 695 (6th Cir. 2015); *Bell* v. *Cheswick Generating Station*, 734 F.3d 188, 189-190, 192-193, 197 (3d Cir. 2013), cert. denied, 572 U.S. 1149 (2014); *Freeman* v. *Grain Processing Corp.*, 848 N.W.2d 58, 63-64, 82-85 (Iowa 2014), cert. denied, 574 U.S. 1026 (2014); *Brown-Forman Corp.* v. *Miller*, 528 S.W.3d 886, 888-889, 893 (Ky. 2017). And each decision allowed the state-law claims to go forward, finding no preemption under the Clean Air Act. See *ibid.* None of those decisions conflicts with the Hawaii Supreme Court's finding of no preemption here.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
CHRISTINE W. ENNIS
ROBERT P. STOCKMAN
Attorneys

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