Nos. 23-947, 23-952

In the Supreme Court of the United States

SUNOCO LP, ET AL.,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.,
Respondents.

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

v.

CITY AND COUNTY OF HONOLULU, HAWAII, ET AL.,
Respondents.

BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

On Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut
Avenue, N.W., Suite 400
Washington, DC 20036
Counsel for the American Tort Reform Association

Victor E. Schwartz
Cary Silverman
Counsel of Record
SHOOK, HARDY
& BACON L.L.P.
1800 K Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 783-8400
csilverman@shb.com

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues. ATRA is concerned with state and local government attempts to expand tort law to shift costs associated with responding to climate change. Such efforts are the latest attempt to subject industries that provide lawful products to unprincipled liability for societal problems regardless of fault, the cause of the harm, whether elements of the claim are met, or even whether liability will actually address the issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

A popular Netflix gameshow asks contestants, who are creative, skillful bakers, to attempt to trick celebrity judges by disguising a cake to look like an ordinary object – a sneaker, a cheeseburger, or a handbag – and then presenting the cake among the real objects. The judges are then asked, "Is it cake?" After they respond, the host puts a knife into the selected item to find out if it is, in fact, cake. The ques-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* affirm that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties received timely notice of the intention to file this brief.

tion presented to this Court in this Petition is similar: "Is it a tort" governed by state common law?

Here, the "bakers" are private plaintiffs' attorneys, retained by local government entities, that have artfully crafted a complaint to resemble state tort law claims when the lawsuit transparently seeks to set national environmental and economic policy that this Court has ruled is a matter of federal law. The government entities in this case, the City and County of Honolulu and Honolulu Board of Water Supply, have affixed an assortment of tort law labels to an action that claims energy producers' production, sale, and marketing of fossil fuels increased greenhouse-gas emissions and contributed to global climate change, harming Honolulu residents. In the Hawaii Supreme Court, this tactic succeeded. The court found that since the complaint alleges state law claims, i.e., it looks like a tort, a state court could decide the climate change-related claims based on state law. *See City & County of Honolulu v. Sunoco LP*, 573 P.3d 1173, 1201-02 (Haw. 2023) (finding "[t]he source of the Plaintiffs' alleged injury is not pollution, nor emissions" but instead "Defendants' alleged failure to warn and deceptive promotion"). But the Hawaii Supreme Court failed to take the needed final step: it did not adequately probe whether the complaint raises issues of interstate and international concern that are inherently matters of federal law.

This Petition presents the Court with an issue that arises in many similar lawsuits brought by state and local governments. That issue is whether skillful lawyers can, through artful pleading, have cases with national implications decided on the basis of

state law or whether federal law governs and bars such claims.

Amicus curiae submits this brief to provide the Court with relevant context on state and local climate change litigation. First, the brief demonstrates that these cases do not allege ordinary state law claims, but represent a continuing attempt to expand tort law beyond its traditional purposes and constraints. Federal law exclusively governs such matters of national environmental policy. Second, the brief shows that state and local climate change cases are pursued as part of a coordinated effort to impose environmental policy through the courts. With broad, nationwide regulatory goals in mind, advocacy groups and foundations financially support these cases from their inception through litigation. The means by which these cases are developed, litigated, and funded further suggests that these claims are necessarily governed by federal law.

This Court should grant the Petition to ensure that cases attempting to impose liability for harms caused by global climate change are decided based on federal law. State law claims are preempted.

ARGUMENT

I. Global Climate Change is Not Traditional State Tort Law

This Court should grant the Petition to indicate that in this and similar cases alleging that a business's or industry's activities contributed to global climate change, federal law governs, even if the complaint characterizes its claims as arising under state law.

Litigation over whether changes in global climate patterns, to which widespread use of fossil fuels may have contributed, caused property damage or led to other economic costs in a particular state bears no resemblance to a traditional state common law "tort." Rather, claims seeking redress for costs allegedly incurred as a result of interstate pollution implicate an "overriding federal interest in the need for a uniform rule of decision" that can be determined only through federal law. *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972). "[B]orrowing the law of a particular state would be inappropriate" for resolving this national issue. *See American Elec. Power v. Connecticut*, 564 U.S. 410, 422 (2011).

Is a claim alleging economic losses from global climate change a state common law tort? Tort law, of course, is most commonly associated with personal injury litigation. Tort claims most often stem from accidental injuries arising from automobile accidents, slip-and-falls, complications during medical treatment, or defective products. *See, e.g.*, Andreas Kuersten, *Introduction to Tort Law*, Congressional Research Service, No. IF11291 (2023). Unlike climate change litigation, negligence claims typically involve an injury to a specific person or person's property resulting from someone else's careless conduct. Traditional principles of tort law, such as duty and causation, confine the claim. As Justice Cardozo observed while sitting on the New York Court of Appeals, "Proof of negligence in the air, so to speak, will not do." *Palsgraf v Long Is. R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (quoting Frederick Pollock, The Law of Torts, at 455 (11th ed. 1920)).

In fact, the Plaintiffs' theory of the case resembles the classic *Palsgraf* scenario, in which a man running for departing train was pushed by one railroad employee and pulled by another into the car, dropped a small package that contained fireworks onto the rails, triggering an explosion, with the resulting shock causing a scale at the opposite end of the platform to strike and injure the plaintiff. The court ruled that there was no actionable tort claim because the chain of events that led to the plaintiff's injury was too attenuated.

Here, the Plaintiffs' theory of the case is that energy producers "concealed and misrepresented the climate impacts of their products" and allegedly misled "consumers and the rest of the world . . . . , inflat[ing] the overall consumption of fossil fuels, which increased greenhouse gas emissions, which exacerbated climate change, which created the hazardous environmental conditions" that allegedly injured Plaintiffs. *City & County of Honolulu,* 573 P.3d at 1184 (quoting Plaintiffs' position at motion hearing). They seek to hold the defendants responsible for a wide range of events, including sea level rise, extreme weather, loss of endemic species, and diminished availability of fresh water. *See id.* at 1182-83. This Rube-Goldberg-machine-like tort claim then demands that the Defendants pay for a slew of costs attributed to global warming from lost tourism revenue to treating heat-related illnesses. *See id.* at 1184. This chain of events, relying on a novel duty to the world, could not be more attenuated. It is not a "traditional tort case." *Id.* at 1187.

Certainly, there are property-related torts, though they have little in common with today's cli-

mate change suits. A traditional public nuisance action, which provides a means for the government to require an owner to stop an unlawful activity on its property that interferes with public health, safety, or some other public right, does not fit climate change lawsuits. *See* Restatement (Second) of Torts § 821B (1979). Public nuisance claims are often associated with the obstruction of a public highway or a navigable stream, or the effects of criminal activity at a particular location on the surrounding area. *See id.* cmt. b. This remains true today. *See, e.g., Haynes v. Haas*, 463 P.3d 1109, 1110-11 (Haw. 2020) (finding plaintiff, who was assaulted, had a viable public nuisance claim against defendants that permitted the assailant and other homeless individuals to live in storage units on their premises in violation of land use and public health laws, which made surrounding non-residential area home to vagrants, drug users, and criminals).

Several state supreme courts have rejected attempts to transform public nuisance law into an all-encompassing tort. *See, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *In re Lead Paint Litig.*, 924 A.2d 484, 501 (N.J. 2007). They have generally found that public nuisance law, which is rooted in land use, is not the means to address alleged external costs associated with the lawful manufacturing and selling of products. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Wash. L.J. 541, 552-61 (2006); *see also* Am. Tort Reform Ass'n, The Plaintiffs' Lawyer Quest for the Holy Grail: The Public Nuisance "Super Tort" (2020) (discussing the history of failed attempts to expand public nuisance law as a means of addressing

broad societal problems and the more recent use of such claims to target climate change and other areas).

Another example is trespass, which typically involves a person intentionally entering the property of another. *See* Restatement (Second) of Torts § 158 (1965). A trespass claim may also arise when a person places an object in the air, water, or ground "with knowledge that it will to a substantial certainty" enter the property of another. *See id*., Reporter's Notes, cmt. i. Applying this principle, there are some circumstances in which trespass claims may provide a remedy for environmental harms, such as water diverted from one property to another, leading to destruction of crops or land. *See, e.g., Solomon v. Niulii Mill & Plantation,* 32 Haw. 865, 866 (1933); *Anderson v. State*, 965 P.2d 783, 784 (Haw. Ct. App. 1998).

Hawaii courts do not appear to have diluted the tort to allow a trespass claim without a physical intrusion along these lines, at least, until now. In fact, even in cases involving a physical intrusion, Hawaii courts have dismissed novel trespass claims. *See, e.g., Spittler v. Charbonneau*, 449 P.3d 1202, 1208-09 (Haw. Ct. App. 2019) (finding no reported Hawaii appellate decision reciting the elements of the tort of trespass and holding that a tree's dropping of leaves, flowers, or fruit onto a neighboring property, or interference caused by plant roots, does not constitute a trespass).

The Hawaii Supreme Court's decision does not assess the viability of any of the alleged state tort claims. It recognizes that the elements of these torts vary and, rather than consider whether Plaintiffs can meet their distinct requirements, merges the

torts together as arising out of the Defendants' general marketing practices and failure to warn of the dangers of using oil and gas. *See, e.g.*, *City and County of Honolulu*, 537 P.3d at 1187, 1189.

Even if the Plaintiffs' asserted tort claims are viable under state law, this Court has held that actions alleging claims involving "air and water in their ambient or interstate aspects," including global climate change, are governed by federal law. *American Elec. Power*, 564 U.S. at 421 (quoting *Milwaukee*, 406 U.S. at 103).

In sum, claims alleging property damage or financial losses from changes in global weather patterns are not traditional matters of state tort law. These lawsuits attempt to set national public policy and environmental regulation through state law claims – regulation through litigation. The Court should grant the Petition to assure that such actions are governed by federal law, even if the claims are artfully pled in state law terms.

II. The Development, Funding, and Litigation of Climate Change Lawsuits Brought by State and Local Governments Further Demonstrate Their Interstate Nature

The method by which these state and local government climate change lawsuits are developed, filed, and litigated also indicates that they are not ordinary state tort law claims. These lawsuits are supported by organizations that have as their objective advancing a national agenda and they are litigated by lawyers who are subsidized by foundations with similar goals.

After this Court's decision in *American Electric Power Co. v. Connecticut*, lawyers, activists, and funders joined in La Jolla, California in 2012 to brainstorm new litigation strategies. *See generally* Seth Shulman, Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies 11 (Union of Concerned Scientist and Climate Accountability Inst., Oct. 2012). The "ultimate goal" of at least some participants was to "shut down" the coal, gas, and oil industries. *Id*. at 13. To the extent participants identified a role for Congress, it was to aid their state-based litigation efforts. Participants suggested using Congress's subpoena power to obtain internal documents from companies that could be used in litigation and employing committee hearings to turn public opinion against the defendants. *See id.* at 11, 21, 28.

Since that time, activists and attorneys have given private briefings to government officials, urging them to initiate climate change-related investigations of energy producers. *See, e.g.*, Terry Wade, *U.S. Prosecutors Met with Climate Groups as Exxon Probes Expanded*, Reuters, Apr. 15, 2016. There are now at least two dozen pending climate change lawsuits filed by states and political subdivisions. *See* Jess Bravin & Erin Mulvaney, *Supreme Court Allows State-Law Climate Suits Against Oil Companies to Proceed*, Wall St. J., Apr. 24, 2023; Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand*, Frontline, PBS, Aug. 1, 2022. The lawsuits generally seek to make the energy industry cover costs that governments have spent on climate-

resiliency projects in response to rising sea levels and more frequent and intense storms. *See id.* They single out a select group of businesses and ignore the collective contributions to climate change by the rest of the world.

The coordinated, national nature of these lawsuits continues as most are litigated by the same private law firm – the firm representing the City and County of Honolulu and Honolulu Board of Water Supply in this case – rather than through the government's publicly-funded attorneys. *See* Sher Edling LLP, Climate Damage and Deception, https://www.sheredling.com/cases/climate-cases/ (last visited Mar. 25, 2024) (listing representation of four states, the District of Columbia, sixteen cities and counties, and two tribes in climate change litigation). State and local governments often retain the outside attorneys that bring these suits on a contingency-fee basis, adding a profit motive to the litigation. In this instance, for example, Honolulu retained the San Francisco-based law firm as "Special Deputy Corporation Counsel" with "no upfront cost." *See* Resilience Office, Office of Climate Change, Sustainability and Resiliency, Fossil Fuel Litigation, https://www.resilientoahu.org/fossil-fuel-litigation (last visited Mar. 25, 2024). With eyes on a massive settlement, the law firm could receive tens or hundreds of millions of dollars.

While private law firms await a contingency fee, outside advocacy groups have subsidized state and local climate change litigation. For example, the New Venture Fund's Collective Action Fund for Accountability, Resilience and Adaptation (CAF), has long funded climate litigation. *See* MacArthur Found.,

Grant Search, New Venture Fund, https://www.macfound.org/grantee/new-venture-fund-43535/ (last visited Mar. 25, 2024) (reporting two $3 million grants to CAF in 2020 and 2023 to "enable cities, counties, and states hard hit by climate change to file high-impact climate damage and deception lawsuits represented by expert counsel"). Other foundations, in turn, contribute to CAF to support the litigation efforts. For example, correspondence revealed that a foundation associated with actor Leonardo DiCaprio is a "serious supporter" of Sher Edling's ongoing climate change litigation. *See* Thomas Catenacci, *Leonardo DiCaprio Funneled Grants Through Dark Money Group to Fund Climate Nuisance Lawsuits, Emails Show*, Fox News, Aug. 15, 2022. Some have raised concern with an arrangement in which tax-exempt groups funded through charitable donations back a private law firm, removing some risk involved in pursuing the litigation, when the law firm stands to later profit from a contingency fee should there be a settlement or judgment. *See id*.

In sum, the development, funding, and litigation of the climate change suits is a further reason to be skeptical that these claims are matters of traditional state tort law, rather than part of a broad, coordinated attempt to set national environmental policy. This Court should grant certiorari to soundly reject efforts to trespass on the functions of Congress and the Executive Branch by bringing climate change lawsuits under false state tort law labels.

CONCLUSION

The claims alleged in this and similar lawsuits raise unique issues of environmental, energy, and economic policy that impact all Americans. Ultimately, efforts to address climate change require national and global solutions, developed through legitimate democratic means, rather than faux state-based tort litigation.

For these reasons, *amicus curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

Victor E. Schwartz
Cary Silverman
Counsel of Record
SHOOK, HARDY & BACON L.L.P.
1800 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 783-8400
csilverman@shb.com

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Ave., N.W., Suite 400
Washington, DC 20036

Counsel for the American Tort Reform Association

Dated: April 1, 2024