No. CAAP-22-000429

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, AND HONOLULU BOARD OF WATER SUPPLY, Plaintiffs-Appellees, v. SUNOCO LP et al., Defendants-Appellants.	CIV. NO.: 1CCV-20-000380 (JPC) **APPEAL FROM:** **ORDERS DENYING JOINT MOTIONS TO DISMISS** **CIRCUIT COURT OF THE FIRST CIRCUIT** **The Honorable Jeffrey P. Crabtree**

BRIEF OF THE CHAMBER OF COMMERCE OF

THE UNITED STATES OF AMERICA AS

***AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS**

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. Indeed, the Chamber has twice participated as an amicus curiae in this litigation.[2]

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to those changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate change policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://tinyurl.com/y49xfg3a (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, *The Chamber's Climate Position: 'Inaction is Not an Option'*, https://www.uschamber.com/climate-

[1] This Court granted leave to file this amicus brief on March 6, 2023. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *Sunoco LP v. City & Cty. of Honolulu*, No. 22-523 (U.S. filed Jan. 5, 2023); *City & Cty. of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir. filed July 26, 2021).

change-position. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state law.

Climate change, by its very nature, is an interstate and international problem, and putative state-law claims that would impose liability for climate change must necessarily be resolved by federal law. The cross-border nature of climate change implicates "uniquely federal interests" for which a uniform federal policy and the application of federal law are essential. And even if federal law somehow did not govern claims based on cross-border climate change like Plaintiffs', the Clean Air Act preempts state law to ensure that climate change is addressed by a uniform *federal* approach.

In the limited range of circumstances where uniquely federal interests arise, the relevant legal questions often intersect with the interests of many of the Chamber's members, as they rely on the predictability and uniformity of federal policy. This case falls within that limited range: the Chamber and its members have a strong interest in ensuring that claims for which a uniform federal standard is necessary are governed by federal law, and not by a patchwork of state laws applied in piecemeal fashion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' lawsuit is fundamentally about global climate change—a cross-border, multinational problem that ultimately requires a cross-border, multinational solution. The United States' contribution to such a solution can be effectively achieved only by federal law; the law of a single state is ill-suited to address a phenomenon that touches every state and every nation. And here, it is federal law that governs Plaintiffs' claims about cross-border emissions. The U.S. Supreme Court has long recognized that federal common law applies to disputes about "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (citation omitted). That common law may be displaced only by federal statute, which then serves as the exclusive source of remedies for the claim. At no point is there room for a single state's law to play a role in resolving a claim about pollution from somewhere else, much less from pollution that originates all over the world.

The Circuit Court believed that federal common law did not apply because it thought that Plaintiffs' claims were about advertising, not global emissions; it reasoned that, because advertising is traditionally regulated by the states, it was appropriate for state law to govern

Plaintiffs' claims. But Plaintiffs' claims necessarily encompass the production and consumption of fossil fuels—advertising alone cannot cause climate change. And Plaintiffs' purported injuries are all alleged to arise from the global emissions that are responsible for global climate change, regardless of the source or cause of those emissions. Because Plaintiffs' claims ultimately turn on allegations about transboundary pollution, federal common law governs those claims, leaving no room for the operation of state law. That remains true even if the Clean Air Act (CAA) displaces federal common law; the effect of the displacement is that Plaintiffs are left with the remedies that the CAA provides, not that state law creeps into the picture.

Failure to apply governing federal law in cases such as this one will only hinder, not help, uniform federal efforts at addressing global climate change. Accordingly, this Court should reverse the Circuit Court's denial of Defendants' Motion to Dismiss for Failure to State a Claim.

ARGUMENT

I. Federal common law governs where a dispute implicates interstate and international interests.

A. Federal common law governs claims relating to global emissions.

"There is no federal *general* common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), but federal courts may "fashion federal law" in limited areas "where federal rights are concerned." *Milwaukee I*, 406 U.S. at 103 (citation omitted). Indeed, on "the same day *Erie* was decided, the Supreme Court released an opinion in which Justice Brandeis, the author of *Erie*, relied upon federal common law to resolve a case"—a cross-border dispute. *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 927 n.8 (5th Cir. 1997) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

Federal common law applies in three established categories of cases (which may overlap). First, federal common law applies in cases where "common lawmaking must be 'necessary to protect uniquely federal interests.'" *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). Second, federal common law is used in "those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 173-74 (1942). Finally, federal common law applies "[w]hen Congress

has not spoken to a particular issue," *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 313 (1981), but federal policy calls for a "uniform standard." *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted).

Several types of cross-border disputes—particularly those that implicate the interests of more than one State or sovereign—present "uniquely federal interests" that require the application of a federal common law because state law cannot govern. Courts have applied federal common law in cases involving interstate water disputes,[3] tribal land rights,[4] interstate air carrier liability,[5] interstate disputes over intangible property,[6] and foreign relations.[7] In such cases, federal common law is necessary because "local law will not be sufficiently sensitive to federal concerns, it is not likely to be uniform across state lines, and it will develop at various rates of speed in different states." 19 Wright & Miller, Fed. Prac. & Proc. Juris. § 4514 (3d ed. 2022). Moreover, the federal structure created by the Constitution does not allow States to engage in such cross-border regulation. *Tex. Indus.*, 451 U.S. at 641 ("In these instances, our federal system does not permit the controversy to be resolved under state law…."); *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (the "sovereignty of each state … implie[s] a limitation on the sovereignty of all of its sister States").

Cases about global emissions, like this one, squarely implicate the interests that necessitate federal common law. Accordingly, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U.S. at 103; *accord Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011); *see also Hinderlider*, 304 U.S. at 110 (apportionment of interstate stream "is a question of 'federal common law'"). "Environmental protection" is, after all, "an area 'within national legislative power,'" and thus, it is appropriate for

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[3] *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Kansas v. Colorado*, 206 U.S. 46, 95 (1907).

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

[5] *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926-29 (5th Cir. 1997).

[6] *Delaware v. Pennsylvania*, 143 S. Ct. 696, 706 (2023) (discussing federal common law rules for escheatment of money orders).

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

federal courts to "fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (citation omitted).

As the U.S. Supreme Court has recognized, allowing states to apply their own varying common-law rules to environmental phenomena crossing state lines would mean "more conflicting disputes, increasing assertions and proliferating contentions" about the standards for adjudging claims of "improper impairment." *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)). Absent uniform, nationwide rules of decision, 50 different state courts, facing a panoply of "unprecedented case[s] … based exclusively" on "state law causes of action," Cir. Ct. Dkt. 618, at 2, would be forced to adjudicate 50 sets of "vague and indeterminate" legal theories. *Milwaukee II*, 451 U.S. at 317. Such fragmented judicial decision-making would inevitably hinder a coordinated and effective federal response to climate change, as state courts would inevitably reach different results and impose inconsistent regulatory measures—whether they be injunctions that order changes outright, or liability rules that have the same effect by threatening prohibitive damages awards. A piecemeal approach to adjudicating disputes about interstate emissions would only make it "increasingly difficult for anyone to determine what standards govern," and where those standards should apply. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010).

Because claims regarding transboundary emissions implicate "uniquely federal interests," "our federal system does not permit the controversy to be resolved under state law," as the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640-41 & n.13; *City of N.Y. v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021) (case about cross-border greenhouse gas emissions "implicates the conflicting rights of states and our relations with foreign nations," and thus "poses the quintessential example of when federal common law is most needed" (citations, internal quotation marks, and modifications omitted)), *aff'g City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018).

B. The Circuit Court applied an overly limited and distorted understanding of federal common law.

The Circuit Court believed that federal common law did not "preempt" Plaintiffs' claims because, among other reasons, Plaintiffs' claims presented no "unique federal interest" and presented no "significant conflict" between federal policy and the operation of Hawai‘i state law. The court's reasoning was flawed in at least two critical respects.

1. While the Circuit Court correctly recognized that federal common law applies in situations implicating "uniquely federal interests," Cir. Ct. Dkt. 618, at 5, it erred in failing to conclude that *this case* implicates the "uniquely federal interests" of global climate change and cross-boundary pollution. The Circuit Court incorrectly determined that the relevant interest here is *only* an interest in regulating "deceptive promotion." Cir. Ct. Dkt. 618, at 5-6. To be sure, Plaintiffs argue that their claim is about so-called "climate deception," and they say that they "do not seek to abate or otherwise 'regulate greenhouse-gas emissions.'" Plaintiffs' Answering Br. 16-17 (citation omitted). But that is not quite true. *See id.* at 5 ("The Complaint seeks … equitable relief to abate the local hazards created by [Defendants' alleged] campaigns—*e.g.*, infrastructure projects to protect Plaintiffs from sea-level rise.").

As the Second Circuit explained in a very similar case, "[a]rtful pleading cannot transform [Plaintiffs'] complaint into anything other than a suit over global greenhouse gas emissions." *City of New York*, 993 F.3d at 91. It is only "*because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'"—that Plaintiffs have the necessary predicate to allege damages and seek equitable relief. *Id.* In fact, Plaintiffs do not dispute that their purported injuries and harms allegedly arise from global climate change caused by international and interstate emissions.

Climate change is an international and interstate phenomenon. In order for climate change to occur, as alleged by Plaintiffs here, myriad events caused by myriad actors must occur all around the world. *BP P.L.C.*, 325 F. Supp. 3d at 472. As Defendants explain (Opening Br. 27-29), the alleged harm comes "from emissions all over the world," and emissions from fossil fuels occur only when they are *extracted* and *consumed*. The alleged injuries described by the Circuit Court: "flooding, a rising water table, increased damage to critical infrastructure like highways and utilities," cannot and do not occur from promotion, Cir. Ct. Dkt. 618, at 3—instead, they occur when fossil fuels are produced and used, as Plaintiffs so allege. Plaintiffs' claims are ultimately and necessarily about impacts on the environment, and thus necessarily implicate the federal interest in global emissions.

Plaintiffs allege that they have suffered "local hazards." Plaintiffs' Answering Br. 5. But localized impact hardly justifies allowing the law of one state to decide a claim concerning emissions that sweep across municipal, state, and national borders and have localized impacts in all states and all nations. After all, Plaintiffs do not claim that what happened within their

respective governmental borders caused the alleged harm of *global* climate change. Nor could they do so: as the Supreme Court explained in *AEP*, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." 564 U.S. at 422.

Because Plaintiffs' claim, "stripped to its essence," is a "suit seeking to recover damages for the harms caused by global greenhouse gas emissions," 993 F.3d at 91, the Circuit Court erred by concluding that the key relevant interest is in "deceptive promotion," not the consequences of interstate and international emissions.

2. The Circuit Court also appears to have improperly conflated federal common law with federal preemption doctrine. Cir. Ct. Dkt. 618, at 5 ("Defendants argue that federal common law 'governs' or preempts the claims in this case."). The two analyses are distinct and start from different foundational principles. When federal common law applies, the "implicit corollary" is that there is no state law to apply. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (where federal common law applies, "state law is … replaced"); *Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used."). That can happen in the absence of any federal statute. *See Hinderlider*, 304 U.S. at 110 (interstate water rights are "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"). Preemption doctrine, by contrast, focuses on whether Congress has ousted state law through enacting a statute. *See Rodrigues v. United Pub. Workers, AFSCME Local 646, AFL-CIO*, 135 Haw. 316, 322, 349 P.3d 1171, 1175 (2015).

Put differently, federal common law exists in areas where there can be no state law to apply; federal preemption arises when state law must give way to federal law. So the Circuit Court erred in asking "whether federal common law broadly replaces state-law tort claims, *per se*," Cir. Ct. Dkt. 618, at 6, as the very reason that federal common law applies in the first place is because there is no state law to balance against federal law. While the Circuit Court searched for a conflict between federal common law and substantive state law, the relevant question here is whether "the use of state law" in this area is appropriate at all. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). For the reasons provided above, it is not.

II. The CAA's displacement of federal common law does not give life to Plaintiffs' state-law claims.

Despite its apparent rejection of Defendants' argument that federal common law governed Plaintiffs' claims, the Circuit Court went on to hold that "the Clean Air Act supplants the federal common law," or, alternatively, that federal common law continues to exist, but "does not preempt the state law claims in this case." Cir. Ct. Dkt. 618, at 8-9. Both of these holdings are wrong, and reflect a misunderstanding of the impact that the CAA's displacement of federal common law has on Plaintiffs' alleged state-law claims.

As explained above, if federal common law applies to a claim, that means that there is no state law to apply—not that existing state laws are set aside for federal common law. When Congress thereafter overrides the federal common law by legislative enactment, the statutory scheme "displace[s] any federal common-law right." *AEP*, 564 U.S. at 424. That displacement, however, does not make state-law claims suddenly viable. The reason why federal common law applies in the first place is that there is no competent state law to apply. As the Second Circuit explained, the notion that a state-law claim lies dormant and may "snap back into action" once federal law is displaced is "difficult to square with the fact that federal common law governed [the] issue in the first place." *New York*, 993 F.3d at 98.

When a federal statute displaces federal common law, it eliminates the causes of action or remedies that might have been available under federal common law. Thus, for example, a State may surrender its federal common-law cause of action over water rights in an interstate compact. *See Hinderlider*, 304 U.S. at 104-05. But that does not invite state-law causes of action that otherwise are plainly displaced by federal common law. *See id.* at 110. Instead, a plaintiff is left only with the remedies, if any, that are available under the federal statutory scheme that displaces and replaces federal common law. Here, Plaintiffs are left only with the remedies provided by the CAA. The CAA's displacement of federal common law does not restore what never existed in the first place, *i.e.*, state common law capable of effectively adjudicating an interstate and international claim for harms arising from cross-border emissions.

Consider the following example: an air carrier loses a package being shipped from New York to Hawai‘i. Federal common law governs for such a loss, because a dispute about *interstate* carriage is an issue that only federal law can adequately resolve. *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1197 (9th Cir. 1999). Under federal common law, a plaintiff

can sue for breach of contract for the missing package. *E.g.*, *EIJ, Inc. v. United Parcel Serv., Inc.*, 233 F. App'x 600, 601-02 (9th Cir. 1999). Suppose Congress enacts a law with a limited federal cause of action for lost packages transported by an interstate air carrier, with pre-determined caps on maximum liability—or one abolishing the federal cause of action altogether. That statute would certainly displace the federal common law cause of action. But that does not mean that claims brought under New York or Hawai'i law would suddenly become viable. The lost package is still an interstate problem, and still can be resolved only by federal law. Any cause of action must be federal, whether common law or statutory; if there is no federal cause of action, there is no action.

In this case, the same logic applies. Plaintiffs' claims necessarily arise under federal common law, as they pertain to "air and water in their ambient or interstate aspects," and state law cannot adequately resolve claims regarding transboundary pollution. The CAA, in turn, displaces the federal common law in this area. Plaintiffs are left only with those remedies that Congress has prescribed in the CAA. *Milwaukee II*, 451 U.S. at 332 (observing that Congress's changes to the Clean Water Act meant that "no federal common-law remedy was available"); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (displacement means that the federal common law "does not provide a remedy"); *id.* at 857 ("displacement of a federal common law right of action means displacement of remedies"). When Congress sets aside federal common law, it does not restore what never existed at all: remedies provided by a single state's law to try to address a fundamentally inter-state problem.

The CAA's savings clause, 42 U.S.C. § 7604(e), does not make state-law claims viable. The savings clause merely recognizes that states may continue to regulate in areas within "their traditional power"—in particular, *in-state* emissions. *Cooper*, 615 F.3d at 303-04. Regulating another state's emissions, much less the emissions of every state and every country, is not within the "traditional power" of one state. Moreover, the U.S. Supreme Court has made clear that the very similar savings clause set forth in the Clean Water Act should not be construed as permission for states to "impose separate discharge standards on a single point source," as "the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 493-94 (citation omitted). The same is true of the CAA's savings clause. *Cooper*, 615 F.3d at 304 (holding, with respect to the CAA's savings clause, that "non-source states" cannot be allowed to "ascribe to a generic savings clause a meaning that the Supreme Court in *Ouellette* held Congress never intended").

Because Plaintiffs have not alleged (and cannot allege) a claim under the CAA, which is now the only source of remedies that exists in the space once occupied by federal common law, they have failed to state a viable claim about cross-border emissions. The Circuit Court should have dismissed Plaintiffs' case for failure to state a claim.

CONCLUSION

This Court should reverse the Circuit Court's decision denying Defendants' motion to dismiss for failure to state a claim, and instruct that the court dismiss the case with prejudice.

Respectfully submitted,

DATED: Honolulu, Hawaii March 16, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document will be duly served upon the below-named parties electronically via the Judiciary Electronic Filing and Service System (JEFS).

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DATED: Honolulu, Hawaii, March 16, 2023.

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