THE NEXT BIG STATES' RIGHTS CASE MIGHT NOT BE WHAT YOU THINK

A SUPREME COURT PETITION OUT OF HAWAII COULD RESHAPE THE STATE SOVEREIGNTY LANDSCAPE

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The arguments have ended for the 2023 U.S. Supreme Court term, with blockbusters soon to be decided. As some of us start to look over the horizon to the 2024 Supreme Court term, which is just starting to come into focus, there is a blockbuster state sovereignty case from the Hawaii Supreme Court that is looming as a potential addition to the argument calendar. The case, *Sunoco LP v. City and County of Honolulu, Hawaii*, No. 23-947, involves an effort by local Honolulu authorities to impose liability on a bevy of energy companies for the effects of global climate change. It is a salient example of a growing wave of cases in which local governments seek money and policy priorities through state court public nuisance litigation over climate change. And it is the first of these cases to reach the U.S. Supreme Court in a real merits posture that would allow for a fulsome ruling covering the universe of these public nuisance cases over nationwide problems.

While *Sunoco v. Honolulu* has attracted widespread attention for its topic (climate change) and the size of the monetary awards it could produce (which surely total in the billions), it is more interesting for those of us who are lovers of state sovereignty for what it could mean for the protection of equal sovereignty between the states, and for how it could short-circuit the efforts of local governments to use state-law public nuisance claims to accomplish backdoor nationwide-regulation-by-judicial-fiat for a long list of policy areas.

I. SUNOCO V. CITY AND COUNTY OF HONOLULU

Sunoco LP v. City and County of Honolulu is scheduled to be conferenced on June 6, at the tail end of the Supreme Court's term and an opportune time for a grant of certiorari from a Court that has filled very little of its October Term 2024 docket.[1] But the litigation began on March 9, 2020, when the City and County of Honolulu filed a complaint against over a dozen entities

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[1] *See* October Term 2024, SCOTUSBLOG, https://www.scotusblog.com/case-files/terms/ot2024/ [https://perma.cc/A572-AMXK] (noting mere eight cases on Supreme Court's calendar for October Term 2024 as of date of article publication).

affiliated with corporate giants Sunoco, ExxonMobil, Royal Dutch Shell, Chevron, BHP Group, BP, Marathon Petroleum, and ConocoPhillips.[2]

In pressing their complaint, the City and County of Honolulu ("Honolulu") alleged both public and private nuisance.[3] The nuisance in question is global climate change. More specifically, Honolulu alleged that the various defendants were (1) "directly responsible for the substantial increase in all CO_2 emissions between 1965 and the present"; (2) "directly responsible for a substantial portion of the climate crisis-related impacts on Plaintiffs," including a rise in "average sea level . . . along the County's coastline," and "extreme weather" such as "hurricanes," "tropical storms," and "'rain bomb' events"; and (3) should be forced to "bear the costs of those impacts, rather than the City[,] . . . residents, or broader segments of the public."[4] Honolulu asked for relief totaling billions of dollars, including "compensatory damages" and "equitable relief, including abatement of the nuisance," which would undoubtedly entail building infrastructure in Hawaii and changes to corporate behavior outside of Hawaii.[5]

The Honolulu lawsuit is a representative example of a growing wave of state court public nuisance cases that have become a key avenue for local governments to try to obtain money and policy outcomes by judicial edict.[6] These cases are particularly prevalent on the issue of climate change, with climate change public nuisance actions filed by cities and counties from Maryland to Colorado and from South Carolina to California.[7] The climate change cases take a consistent approach, claiming that global climate change has caused billions of dollars of damage to the county or city, requiring not just monetary but also equitable relief to abate (i.e., undo) the effects of climate change.[8]

Like virtually all of these cases, the Honolulu case was removed to federal court before eventually being remanded back to Hawaii state courts.[9] Once back in state court, the Honolulu lawsuit went on a fast track to the Hawaii Supreme Court. The energy companies moved to dismiss on three grounds: (1) lack of specific jurisdiction; (2) federal common law preemption; and (3) federal Clean Air Act preemption.[10] The trial court denied the motions to dismiss and defendants appealed, at which point the Hawaii Supreme Court granted Honolulu's application for transfer from the Intermediate Court of Appeals, putting the case before the Hawaii Supreme Court on the central question of whether a public nuisance claim over global climate change and the emission of greenhouse gases can proceed under state law in the face of federal common law

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[2] Complaint, City & Cnty. of Honolulu v. Sunoco LP, Circuit Court of Appeals of the First Circuit, State of Hawaii (March 9, 2020), available at https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200309_docket-1CCV-20-0000380_complaint.pdf [https://perma.cc/9JZA-FEWN].

[3] *Id.*

[4] First Amended Complaint, City & Cnty. of Honolulu v. Sunoco LP, Circuit Court of Appeals of the First Circuit, State of Hawaii (March 22, 2021), available at https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210322_docket-1CCV-20-0000380_complaint.pdf [https://perma.cc/RM4M-D9KF].

[5] *Id.* at 115.

[6] *Public Nuisance Revealed: The Leftwing Plan To Reshape Our Society*, ALLIANCE FOR CONSUMERS, March 2023, https://allianceforconsumers.org/wp-content/uploads/2023/03/AFC-Public-Nuisance-Report-Final.pdf [https://perma.cc/2TQP-67W4].

[7] *Id.*

[8] *Id.*

[9] City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173, 1182 (Haw. 2023).

[10] *Id.* at 1184.

and federal statutory regulation through the Clean Air Act.[11] The Hawaii Supreme Court issued its decision on October 31, 2023, rejecting each basis for dismissal, conclusively determining the scope of federal common law and the scope of the Clean Air Act and confirming that the claims were not preempted on their merits by federal law and could proceed past a motion to dismiss.[12]

Petitions for certiorari are now pending at the Supreme Court of the United States, marking perhaps the first real opportunity for the Court to address the merits of this new wave of state public nuisance claims and how they properly interact with federal law when the identified nuisance is national or international in scope. Petitioners filed for Supreme Court review on February 28, 2024. Honolulu filed in opposition to certiorari on May 1, and Petitioners put forth their reply arguments on May 15. At least ten amicus briefs have been filed, with the most notable perhaps being the brief filed by twenty state attorneys general, authored by the Alabama Attorney General's Office. The case has attracted substantial attention from elite academics and other commentators.[13] It will be conferenced in a matter of weeks, with a likely decision on grant or denial of certiorari by the time the Court closes its usual calendar for the summer.

II. *HONOLULU* IS REALLY A STATE SOVEREIGNTY CASE ABOVE ALL ELSE

In many circles, *Honolulu* is misunderstood as a case pitting two camps against each other in a fight over the importance of global climate change and the concomitant culpability of energy companies. A classic headline of the genre came from Fast Company shortly after the Hawaii Supreme Court's decision: "Why Honolulu's Big Oil lawsuit just became 'the most important climate case in the United States.'"[14] Indeed, it is hard to find a high-profile write-up of the case that doesn't focus on the public policy fight over climate change and the role of the case in that fight, especially once the Hawaii Supreme Court greenlit a trial that could begin this year.[15]

While ideological combat over climate change drives headlines, and cases featuring potential judgments in the billions of dollars likewise attract attention, the case is far more interesting for what it could mean for the protection of equal sovereignty between the states.

The state sovereignty issue is front and center in the *Honolulu* litigation because public nuisance cases at their core involve "abatement of the nuisance"—undoing the alleged nuisance—and Honolulu has requested abatement and other equitable relief relating to global

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[11] *Id.* at 1184–85 (discussing circuit court's ruling on motion to dismiss and transfer of appeal).

[12] *Id.* at 1207–08 (summarizing holdings).

[13] *See, e.g.*, Richard A. Epstein and John Yoo, *Honolulu Tries to Mug Energy Companies*, WALL STREET JOURNAL, April 15, 2024, https://www.wsj.com/articles/honolulu-tries-to-mug-energy-companies-lawsuit-supreme-court-climate-df244ce5 [https://perma.cc/LH4G-X2A8]; Donald Kochan, *The Supreme Court must decide this issue on climate lawsuits someday. Why not do it now?*, THE HILL, May 21, 2024, https://thehill.com/opinion/judiciary/4670553-scotus-has-to-decide-this-issue-on-climate-lawsuits-someday-why-not-do-it-now/ [https://perma.cc/9GFM-5VNB].

[14] Emily Sanders, *Why Honolulu's Big Oil lawsuit just became "the most important climate case in the United States,"* FAST COMPANY, November 6, 2023, https://www.fastcompany.com/90977799/why-honolulus-big-oil-lawsuit-just-became-the-most-important-climate-case-in-the-united-states [https://perma.cc/8VF3-ZPKP].

[15] *See, e.g.*, John Culhane, *There Are Nearly 2,500 Climate Lawsuits. This Is the One to Watch*, SLATE, November 20, 2023, https://slate.com/news-and-politics/2023/11/hawaii-climate-lawsuit-honolulu-weather.html [https://perma.cc/Q678-YVNR]; Jennifer Hijazi, *Oil Giants Lose Hawaii Climate Appeal, Pushing Case to Trial*, BLOOMBERG LAW, October 31, 2024, https://news.bloomberglaw.com/environment-and-energy/oil-giants-lose-hawaii-climate-appeal-pushing-case-to-trial [https://perma.cc/8C8T-W6HW].

climate change.[16] When the identified nuisance relates to "the substantial increase in all CO_2 emissions between 1965 and the present," abatement necessarily implicates nationwide policy and adjustment of the defendants' actions far from Hawaii. This is especially true when you remember that carbon emissions (the culprit behind global climate change in this case) mix in our atmosphere, meaning it is impossible to ensure that the defendants are lowering the emissions that are causing the alleged nuisance in Hawaii without forcing them to change their operations throughout the country (and the world). And all of this is before considering the simple scope of the monetary relief and its implications for national policy: when the effects of the identified nuisance in one city or county equal billions in alleged damages (as here), the abatement aspect of the case will necessarily implicate (at least) nationwide public policy choices and the future operation of the defendants across all the states.

And state sovereignty isn't a hidden aspect of the Honolulu litigation; the intent of the climate change public nuisance cases seems focused on fundamentally shifting our nationwide approach to energy, as can be seen in even a casual perusing of the comments from the public officials who are filing these cases. Indeed, the commentary class recognizes this; as one commentator in Slate succinctly put it in discussing the *Honolulu* litigation: "climate change litigation has fueled hopes that Big Oil will soon be called to account—and, perhaps, change or die."

Perhaps unsurprisingly, this state sovereignty aspect of the *Honolulu* litigation received substantial attention from the twenty state attorneys general in their amicus brief before the U.S. Supreme Court. The state attorneys general open their brief with state sovereignty, explaining that "[t]his suit is an affront to the equal sovereignty of Amici States and a dire threat to their policy choices."[17] They go on to detail how "[t]he theory behind this suit [] would trample over every State's sovereignty to regulate energy and other activity within its borders" in light of the need for equitable relief and abatement "to reach conduct *everywhere* to redress the alleged injuries."[18] The states also focus on the billions in monetary relief as a state sovereignty issue, most notably by asking, "how much lawful conduct in other States can Hawaii deem tortious?"[19] The states then end their brief with not just a plea for a grant of certiorari to protect the national economy—something that echoes much of the media commentary critical of the Honolulu litigation—but also a plea for the U.S. Supreme Court to grant certiorari as a way to protect "our federal scheme" from "any further damage."[20]

As the amici states note, the state sovereignty questions are particularly strong in this case because the alleged nuisance is global climate change. But it is important to note that any public nuisance litigation over a national or international issue implicates many of the same state sovereignty questions.

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[16] First Amended Complaint, City & Cnty. of Honolulu v. Sunoco LP, Circuit Court of Appeals of the First Circuit, State of Hawaii (March 22, 2021), available at https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210322_docket-1CCV-20-0000380_complaint.pdf [https://perma.cc/RM4M-D9KF].

[17] Brief of Alabama and 19 Other States as Amici Curiae in Support of Petitioner at 1, Sunoco LP v. City & Cnty. of Honolulu, Hawaii, No. 23-947.

[18] *Id.* at 7–8.

[19] *Id.* at 9.

[20] *Id.* at 22.

This state sovereignty overlay to the modern wave of local-government public nuisance cases over nationwide issues (and single-state cases along the same lines) is a key differentiator of these cases from longstanding public nuisance applications to local issues like blocked roads or site-specific air or land disruption. The modern public nuisance cases over supposed nationwide nuisances all implicate the same core sovereignty questions as are presented in *Honolulu* precisely because they implicate nationwide abatement and return to that key question: "how much lawful conduct in other States can [a single state or local government] deem tortious?"

The state sovereignty questions here are also distinct from the long-running battle over intra-state regulation and the dormant commerce clause. It is one thing for a large state like California to impose stringent rules in its own state that it knows will effectively force a company to change the products it sells or produces in another state, or that California hopes will have that effect. It is an entirely different—and novel—sovereignty analysis when a state launches a lawsuit to impose liability for out-of-state activity and affirmatively demands changes to behavior outside the state under common law theories like public nuisance.

If federalism says that a state should be free to largely regulate within its own boundaries, it is easy to see why states in many cases view these public nuisance efforts over nationwide issues as being something like a form of anti-federalism, and why these cases as a category, and the *Honolulu* litigation in particular, present major sovereignty implications, even as most headlines focus on the money at stake and the contentious underlying policy question of how to properly address climate change.

III. IF THE COURT TAKES UP *HONOLULU*, IT COULD END THE MODERN PUBLIC NUISANCE MOVEMENT

The Supreme Court granting certiorari in the *Honolulu* litigation would make sense at a fundamental level, as the case involves a state supreme court decision analyzing the contours of federal law and determining the divide between state and federal regulatory authority in a high-stakes dispute involving potentially billions of dollars of liability. And that is how most commentators seem to be thinking of the case and its potential outcomes.

But the case is also a strong contender for Supreme Court review because of its state sovereignty implications, which the state attorneys general have now well put to the Court. And in resolving the case on the merits, the Court could deliver a state sovereignty win that would echo across the full range of modern public nuisance cases, not just cases about climate change.

Some on the ideological left and right may envision that any merits decision in the *Honolulu* litigation would involve the U.S. Supreme Court determining the extent of climate change, its causes, or some other contentious aspect of the climate change policy debate. But none of that is necessary. Indeed, the most straightforward way for the Court to address the case on the merits and do good for the law would be a ruling limiting state-law public nuisance litigation to local nuisances, rather than allowing these cases to reach beyond state boundaries and be used as a cudgel to wage nationwide policy fights through the courts. This approach would leave state law public nuisance claims for traditional nuisances while practically constraining the reach of such claims. And this approach would: (1) match with ascendant doctrinal thinking at the Court, and (2) do the most for state sovereignty by essentially ending the practice of local governments

pressing state law public nuisance litigation over nationwide issues like gun violence, climate change, or the next ascendant public policy debate at a national level.

Limiting state law public nuisance claims, like those pressed in the *Honolulu* litigation, to local (or at least intra-state) nuisances would comport with the thinking the Court has applied in other areas in recent years. For starters, limiting state law public nuisance claims to local issues comports with the Court's approach to separation of powers questions as well as federalism case law that is focused on protecting residual state sovereignty within our federal system.

But perhaps most notably, limiting the use of state law public nuisance claims to address nationwide issues would match with the considerations at play in the Court's ascendant Major Questions Doctrine jurisprudence. The Court has made plain in its Major Questions Doctrine jurisprudence—from *Alabama Association of Realtors* through *Biden v. Nebraska*—that it is uncomfortable with federal agencies finding newfound power to resolve questions of "vast economic and political significance" without clear statutory authorization.[21] While this line of cases is focused on federal agency power, it would be entirely consistent with the ideological underpinnings of the Major Questions Doctrine for the same Court to prevent local governments from flexing a newfound power to suddenly effect nationwide policy solutions via a public nuisance authority that has until recently not been used for anything resembling this type of effort. The same structural and procedural problems that arise from sudden federal agency aggrandizement in the absence of clear statutory authority arise from the sudden aggrandizement of local governments who, in the words of the state amici in the *Honolulu* litigation, suddenly believe they have the power to use state courts to "deem tortious" substantial amounts of "lawful conduct in other States."[22]

And limiting public nuisance like this would strike a broad blow in favor of state sovereignty by short-circuiting the universe of these public nuisance cases over nationwide problems. The Honolulu lawsuit is a representative example of a growing wave of modern public nuisance cases about supposed nationwide nuisances, all of which implicate the same core sovereignty questions as are presented in the *Honolulu* litigation because they implicate nationwide abatement and the question put forth by amici states: "how much lawful conduct in other States can [a single state or local government] deem tortious?" Left-wing localities and activists have increasingly turned to public nuisance litigation targeting nationwide issues as they recognize that their policy goals cannot get past the post in Congress or most statehouses, leaving local governments to use public nuisance claims to accomplish backdoor nationwide-regulation-by-judicial-fiat in a long list of policy areas. A U.S. Supreme Court merits decision in *Honolulu* limiting the national reach of state-court public nuisance lawsuits would reach beyond climate change litigation to constrain these efforts by local governments (and others). Such a ruling would effectively mark the end of public nuisance litigation over firearms, plastic bottles, and countless other policy fights. This

[21] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477 (2023); West Virginia v. EPA, 597 U.S. 697 (2022); Alabama Ass'n of Realtors v. Dep't. of Health & Hum. Servs., 141 S. Ct. 2320 (2021).

[22] Brief of Alabama and 19 Other States as Amici Curiae in Support of Petitioner at 9, Sunoco LP v. City & Cnty. of Honolulu, Hawaii, No. 23-947.

would, in turn, put control for each of these issue areas into the hands of the state officials, putting states into ascendancy and maximally protecting state sovereignty.[23]

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If you care about the separate, equal sovereignty of the states, keep your eye on *Sunoco v. Honolulu*. The *Honolulu* litigation might walk and talk like a case purely about climate change, but underneath is a tantalizing opportunity for the Supreme Court to hand states a huge sovereignty win and reshape the way policy fights happen in the courts for years to come. That certainly makes the case more likely to be granted and gives good reason for us all to pay attention to it as it goes to conference. It is also a good reminder that the next big states' rights case isn't always the case you might think.

[23] *See, e.g.*, Petition for Writ of Mandamus of State of Ohio, In re National Prescription Opiate Litigation, No. 20-3075 (6th Cir., filed Aug. 30, 2019), at 10–11 ("The counties advance claims that belong to the State," which, if allowed to proceed, "will cripple the federal dual-sovereign structure of these United States."), available at https://static.reuters.com/resources/media/editorial/20190903/opioidsMDL--ohioAGmandamus.pdf [https://perma.cc/M6Z7-FUDJ].