

No. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
Petitioners,

v.

COUNTY COMMISSIONERS
OF BOULDER COUNTY, ET AL.,
Respondents.

*On Writ Of Certiorari
To The Supreme Court Of Colorado*

**BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT
OF PETITIONERS AND REVERSAL**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation matters affecting the public interest. PLF provides a voice for Americans who believe in limited government, private property rights, and individual freedom.

In furtherance of this mission, PLF attorneys have participated as lead counsel in several cases involving environmental regulation, administrative law, and property rights, including: *Sackett v. EPA*, 598 U.S. 651 (2023); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. 9 (2018); and *Rapanos v. United States*, 547 U.S. 715 (2006). PLF’s Environment and Natural Resources Practice Group works to remove government barriers that prevent individuals from unlocking America’s vast natural resources potential, advancing America’s energy development free of unreasonable government restrictions, and using natural resources productively.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents City of Boulder and Boulder County ask this Court to allow a lawsuit to proceed against two private energy companies in state court for the full costs of climate change in Colorado—wildfires, floods, drought, and whatever else may follow—with

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person other than PLF and its counsel made any monetary contribution toward the preparation or submission of this brief.

no ceiling on damages and no meaningful limit on retroactive liability. Indeed, Respondents' theory is breathtakingly expansive: that because Petitioners produced and sold fossil fuels, they should be liable in state court for natural disasters that cannot be directly traced to them. That theory is not simply wrong as a matter of tort law but threatens to serve as a blueprint for dismantling America's domestic energy sector through litigation. If accepted, every oil and gas producer, refiner, and distributor in the country faces the same exposure—enormous retroactive liability for unproven damages—in every jurisdiction where a weather event has caused municipal costs. The upshot is that the energy investment, production, and innovation on which Americans depend for economic opportunity, affordable power, and individual liberty would be suppressed through the accumulated weight of adverse state court judgments.

While this brief supports Petitioners in reversal, it addresses an independent constitutional defect that is inherent in Respondents' theory.² The Constitution's prohibition on the deprivation of life, liberty, or property without due process of law was designed to prevent exactly this kind of arbitrary, unbounded liability. See Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *Causation's Due Process Dimensions*, 13 Tex. A&M L. Rev. 295, 300-01 (2025) (explaining

² *Amicus* agrees with Petitioners that, if the federal government has constitutional authority to regulate greenhouse-gas emissions and their effects on the global climate, the structure of the Constitution forecloses Respondents' state-law claims for the reasons Petitioners give. See Brief for the Petitioners 21-43. The due process barrier addressed here operates independently of that antecedent question.

that due process limits prevent tort law “from becoming a subterfuge for redistributing wealth . . . in the absence of any connection between [a defendant’s] conduct and [a plaintiff’s] harm,” consistent with the Clause’s traditional role “in ensuring and protecting fundamental fairness, fair notice, and inalienable rights”).

And as this Court has explained, what constitutes “due process” in part depends on “settled usages and modes of proceeding existing in the common and statute law of England.” *See Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855). Since before the Founding, the Anglo-American legal tradition has consistently held that tort liability requires a direct, foreseeable, and proportionate connection between a specific defendant’s conduct and a specific plaintiff’s harm. *See Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 (1992) (legal causation requires “some direct relation between the injury asserted and the injurious conduct alleged,” and harm “flowing merely from the misfortunes visited upon a third person” is too remote to support liability).

Respondents’ lengthy causal chain—running from individual production decisions, through global atmospheric systems, through independent weather events, to specific municipal costs—cannot satisfy that standard. As Petitioners explain, Respondents’ claims necessarily implicate the emissions of “countless other sources worldwide” and rest on greenhouse gases that “mixed with other molecules of greenhouse gases in the atmosphere from other human and natural causes.” Brief for the Petitioners 2, 35-37. No

court can, for example, determine what, if any, fraction of Colorado floods is attributable to an energy company's production decisions spanning decades.

Foundationally, Respondents' claims fail on due process grounds independent of questions this Court granted certiorari to address. The core defect is causation: Respondents' multi-step theory cannot satisfy the foreseeability and directness requirements that due process demands. And that flaw does not stay contained. Once a plaintiff is permitted to recover without proving that a specific defendant's conduct caused a specific harm, the remaining constitutional limits on tort liability unravel with it. Punitive and retroactive damages lose the proportionality and fair-notice moorings this Court enforced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). One constitutional defect breeds others—each compounding the arbitrary deprivation of property the Due Process Clause was designed to forbid.

ARGUMENT

I. The Due Process Clause Incorporates Common-Law Causation Requirements

The Due Process Clause of the Fifth Amendment was understood by the founding generation to incorporate the substantive protections embedded in the English common-law tradition—protections that the Fourteenth Amendment equally guarantees against deprivations by state actors and in state-court proceedings. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (holding that the Fifth Amendment's Due Process Clause imposes the same prohibition on the federal government that the Fourteenth Amendment

imposes on the states—and that the two clauses must be read to guarantee equivalent protections). These protections include settled principles of the common law that ensured that liability was imposed only through fair, reliable, and nonarbitrary means. *Murray*, 59 U.S. at 277.

Heavily influenced by the writings of Sir William Blackstone and Sir Francis Bacon, the common law instructed that legal liability required a necessary connection between an act and its consequence. See 1 William Blackstone, *Commentaries on the Laws of England*, 84 (1765) (“So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.”).³ These principles required that legal consequences flow directly and foreseeably from individual conduct, establishing the causation requirements that became engrained in American due process jurisprudence. See Francis Bacon, *The Elements of the Common Lawes of England* (1630) (“it were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it content itself with the immediate cause”).

While this Court has not squarely held as much, its due process jurisprudence reflects that causation is not merely a policy choice, but a constitutional constraint rooted in the common-law tradition that due process preserves. Because due process incorporates

³ See also John Phillip Reid, *Constitutional History of the American Revolution* 89-92 (1995) (discussing founding-era understanding of “law of the land”). See also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1683-1715 (2012) (tracing due process to English constitutional tradition).

those settled common law usages, the causation requirements embedded in that tradition carry constitutional force—they are not merely policy considerations courts may set aside when convenient. *Burrage v. United States*, 571 U.S. 204, 210-11, 214 (2014) (recognizing but-for causation as a “background principle[]” of the legal tradition that courts presume Congress legislates against, confirming that individualized causation is fundamental to our legal system); *Holmes*, 503 U.S. at 268 (reflecting the same tradition in holding that legal liability demands “some direct relation between the injury asserted and the injurious conduct alleged”). The Court also has rejected “contributing cause” theories that would impose liability based merely on incremental contributions to a harm, holding instead that legal causation demands a direct causal link. *Burrage*, 571 U.S. at 218-19.

These principles show that causation requirements have typically limited legal liability to foreseeable, proximate consequences of individual conduct.⁴ The decisions discussed above—*Burrage*, *Holmes*, and their predecessors—primarily arise in statutory interpretation contexts, where this Court has presumed that Congress legislates against common-law background principles including individualized causation. They are not due process holdings on their face. But the constitutional argument does not depend on characterizing them as such. Those decisions establish that causation requirements are fundamental to the Anglo-American legal tradition and that courts presume against their displacement. These cases show

⁴ See Francis Wharton, *A Treatise on the Law of Negligence* 11 (2d ed. 1878) (negligent injuries are those where the actor “may foresee a probable danger”).

what the founding era understanding assumed: that due process forbids imposing liability based on speculative, attenuated, or aggregate theories of causation untethered from an individual defendant's conduct. *See Holmes*, 503 U.S. at 268 (“[T]he notion of proximate cause reflects ‘ideas of what justice demands’ Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged.” (citations omitted)).

As discussed below, due process imposes distinct but related causation requirements that Respondents' claims cannot satisfy. First, harm must be foreseeable: a defendant can be held liable only for consequences within the reasonable range of apprehension at the time of the allegedly wrongful conduct. Second, the causal connection must be direct: the defendant's conduct must be the immediate, rather than the attenuated or remote, cause of the plaintiff's injury. Third, causation must be individualized: due process bars liability based on aggregate or statistical theories that substitute aggregated industry activity for proof that a specific defendant's specific conduct caused a specific plaintiff's specific harm. Fourth, legal consequences must be proportionate to individual conduct.

The foreseeability requirement is essential in protecting individual liberty and enabling economic activity: it ensures that defendants can anticipate potential liability and adjust their conduct accordingly, and it prevents unlimited expansion of liability theories that would make productive activity economically unfeasible. As this Court has recognized, without foreseeability limits, “the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.” *Associated Gen. Contractors of*

Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983).

The foreseeability requirement has deep roots in common-law tradition. Chief Judge Cardozo’s opinion in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344 (1928), famously illustrates that liability extends only to those “within the range of apprehension.” The opinion articulates the principle that defendants cannot be held liable for consequences they could not reasonably foresee: “The risk reasonably to be perceived defines the duty to be obeyed.” *Ibid.* Likewise, this Court has consistently applied these foreseeability principles to constitutional and statutory liability. In *Holmes*, 503 U.S. at 268, the Court required “some direct relation between the injury asserted and the injurious conduct alleged.” Most importantly, the Court emphasized that “a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts was generally said to stand at too remote a distance to recover.” *Id.* at 268-69. This “third person” language is critical: when harm flows through the independent decisions and actions of intervening parties rather than directly from the defendant to the plaintiff, foreseeability disappears.

Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132-33 (2014), further confirms that proximate cause “generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct” and that remoteness exists when “the harm is purely derivative of ‘misfortunes visited upon a third person by the defendant’s acts.’” (quoting *Holmes*, 503 U.S. at 268). Even where the ultimate harm is foreseeable in some general sense, the insertion of intervening parties breaks the chain of proximate causation. *Id.* at 133-34 (quoting *Holmes*, 503

U.S. at 268-69). The presence of an intermediate step—harm to a third party that then causes plaintiff’s injury, renders the causation too attenuated. In other words, the Court rejected causation theories where harm flows through a butterfly chain.

This principle applies with particular force where multiple intervening steps involve independent actors making autonomous decisions. In *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10-11 (2010), the Court rejected a RICO claim where the causal chain required: (1) defendant’s failure to report cigarette sales; (2) the state’s inability to collect information; (3) the state’s failure to provide information to the city; (4) customers’ decisions not to pay city taxes; and (5) the city’s resulting revenue loss. The Court held this chain too attenuated because the “theory of liability rests on the independent actions of third parties and even fourth parties.” *Id.* at 15. The key principle from *Hemi* is that when the causal chain requires independent decisions by actors not controlled by the defendant, foreseeability evaporates—even if the general outcome might have been predictable. These requirements—that harm be foreseeable, that causation be direct, and that liability does not flow through the autonomous choices of third parties—apply with full constitutional force to Respondents’ claims, as Part II demonstrates.

Independent of foreseeability, traditional common-law principles require direct and immediate causal connection between defendant’s conduct and plaintiff’s harm, along with proportionate responses to individual conduct. As Lord Francis Bacon observed, “judgeth of acts by that, without looking to any further degree.” Bacon, *The Elements of the Common Lawes of England*, *supra*. This directness requirement also

prevents liability based on attenuated chains involving multiple actors and complex multilayered interactions precisely like those implicated by Respondents' claims.

This Court has applied directness requirements to protect constitutional due process in complex causation scenarios. In *Associated General Contractors*, 459 U.S. at 532-33, the Court emphasized that well accepted common-law doctrines such as “foreseeability and proximate cause, directness of injury, [and] certainty of damages,” were “well-accepted common-law rules.” (footnotes omitted). Further, the intervening causes doctrine, fundamental to due process causation requirements, prohibits liability when “an intervening force supersedes prior negligence’ and thus breaks the chain of proximate causation required to impose liability on the original actor.” *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 835 (1996). This directness requirement is essential for maintaining the constitutional boundaries on legal liability that protect individual economic freedom. The intervening causes that saturate Respondents’ causal chain—the emissions of other nations, natural atmospheric variability, and independent land-use decisions—are precisely the kind of independent forces that sever directness and bar liability under these principles.

The third requirement is individualization. The Due Process Clause protects individual rights against collective liability theories that abandon traditional requirements for individualized proof of causation. This individualization requirement is the constitutional guarantee that private parties will not be held responsible for harms they did not individually and demonstrably cause. Respondents’ reliance on aggre-

gate and statistical causation violates these constitutional protections because it would subject private parties to liability based on collective activities rather than specific individual conduct. Respondents themselves have admitted that their claims are “based in part on ‘fossil fuel use by non-parties and the resulting emissions.’” Brief for the Petitioners at 35 (quoting Respondents’ own submissions below). The constitutional causation problem is thus self-evident from the face of the claims.

Finally, the legal consequences must be proportionate, and not punitive. Legal consequences must bear a reasonable relationship to a defendant’s identified individual conduct and the harm it actually caused. This Court has recognized this as a constitutional command: the Due Process Clause “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *see also Gore*, 517 U.S. at 574-75. Proportionality also requires fair notice—defendants must be able to anticipate from existing legal frameworks what conduct may expose them to liability and the severity of that liability. *Gore*, 517 U.S. at 574. These requirements apply to any legal consequence, compensatory or punitive, that deprives a private party of property without the individualized causal foundation due process demands.

II. Respondents’ Claims Fail Each Requirement Due Process Imposes

The constitutional requirements established in Part I—foreseeability, directness, individualized causation, and proportionality—are not satisfied by Re-

spondents' claims. Each of the liability theories Respondents advance thus independently violates due process.

A. Respondents' Multi-Step Causal Chain Cannot Satisfy the Foreseeability Requirement

Respondents' theory requires a court to find: (1) that the Companies' specific production and marketing decisions (2) contributed some incremental fraction to global greenhouse gas concentrations (3) that in turn shifted global climate systems (4) that in turn worsened specific weather events in Colorado (5) that in turn caused quantifiable municipal infrastructure costs. Connecting each of these steps is the emissions of hundreds of nations, natural climate variability, decades of compounding atmospheric physics, and countless independent third-party decisions. See *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1143-44 (9th Cir. 2013) (finding the causal chain between specific emissions sources and climate-related injuries "too tenuous" where impacts are "scientifically indiscernible"). This multi-step chain involving "third persons" (such as energy producers and global emitters) whose independent decisions break any connection is precisely the type of "remote" causation *Holmes* held insufficient. Because Respondent cannot tie a foreseeable chain of actions to harm, instead relying on speculative chains involving countless intervening actors, its claims fail the standard *Holmes* reflects—and that the Due Process Clause, through its incorporation of common-law causation tradition, makes constitutionally required.

Indeed, climate change represents precisely the type of unforeseeable consequence that traditional

causation doctrine, as illustrated in *Palsgraf*, was designed to exclude from legal liability. The distinction between general scientific knowledge and specific legal foreseeability is crucial for protecting individual liberty through predictable legal standards. While the companies may understand that fossil fuel use contributes to global emissions, this general knowledge does not create the specific, individualized foreseeability that due process requires for legal liability. See *Holmes*, 503 U.S. at 268 (foreseeability requires “some direct relation between the injury asserted and the injurious conduct alleged”).

No private energy company could reasonably have foreseen, at the time of any specific production decision, that it would bear legal responsibility for a particular municipal flood-damage cost decades later. Abandoning foreseeability requirements for climate cases would destroy the constitutional protections that enable energy innovation and development. Energy producers and individual Americans making energy-related decisions would face unlimited liability for global phenomena beyond their control or reasonable anticipation. This outcome would violate the due process principles designed to protect individual liberty through predictable legal frameworks.

B. Respondents’ Causal Chain Also Fails the Directness and Immediacy Requirement

Independent of foreseeability, Respondents’ multi-step causal chain cannot satisfy the directness requirement that Part I establishes as a separate and independently sufficient constitutional bar.

The Companies’ production activities do not directly cause floods or wildfires in Boulder. At most,

they—along with a multitude of other actors—may contribute to a global concentration of greenhouse gases which interact with atmospheric systems over decades to alter regional climate patterns, which may affect weather events, which may cause municipal costs. *See, e.g., Washington Env't Council*, 732 F.3d at 1143-44 (holding the causal chain between local agencies' failure to regulate five oil refineries and plaintiffs' climate-change related injuries was "too tenuous" because the refineries had a "scientifically indiscernible" impact on climate change).

Respondents' causation theory is exactly the type of tenuous chain theory that fails the directness requirement of due process. The actions of these companies as they relate to energy production do not directly cause climate change but, at most, contribute to global emissions that interact with complex climate systems involving countless variables. Indeed, climate change does not directly cause Respondents' alleged damages, and at most contributes to environmental conditions that may affect the environment through multiple intervening factors. The attenuation of causation becomes even more pronounced when examining the nature of the claimed injury itself. A temperature increase of one to two degrees Fahrenheit does not, on its own, constitute cognizable legal harm to any specific party. Rather, Respondents' theory requires multiple attenuated causal steps beyond temperature change. Other nations' energy policies, natural climate variability, technological developments, market forces, and individual consumer choices all independently influence the global phenomena Respondents attribute to these two defendants—and each independently severs the causal chain.

C. Aggregate and Statistical Causation Theories Violate the Individualized Proof Requirements That Due Process Demands

Respondents' aggregate causation theory abandons precisely the individualized proof requirement that Part I establishes as a constitutional floor. Rather than showing that Petitioners' specific conduct caused a specific, quantifiable harm, Respondents rely on collective industry emissions as a proxy for individual causation—a substitution the Due Process Clause does not permit.

This Court's decisions in *Burrage v. United States*, 571 U.S. 204 (2014), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), suggest these constitutional parameters. In *Burrage*, the Court rejected a "contributing cause" theory that would impose liability where the defendant's contribution was one factor among several in producing the ultimate harm, holding instead that legal causation requires a direct but-for link: the harm "would not have occurred" absent the defendant's conduct. 571 U.S. at 218-19. The Court's decision reflects our constitutional tradition, not merely statutory interpretation. *Id.* at 210-11 (but-for causation is a "background principle" of the legal tradition incorporated into modern law). In *Gross*, the Court confirmed that "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims," 557 U.S. at 177 (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)), and that departures from this default require clear affirmative justification. *See also Schaffer*, 546 U.S. at 56-57. In an ocean of actors, no one can demonstrate that any specific party more likely than not caused any specific

injury to any particular plaintiff. *See Washington Env't Council*, 732 F.3d at 1144 (“Because a multitude of independent third parties are responsible for the changes contributing to [p]laintiffs’ injuries,” the Court concluded, “the causal chain is too tenuous to support standing.”).

When fossil fuel producers contribute an infinitesimal fraction to global emissions yet face liability for worldwide climate impacts through an overexpanded causation analysis, the legal response is grossly disproportionate to individual conduct and independently violates due process. The constitutional problem is compounded in the damages context specifically. Unlike prospective relief, compensatory and punitive damages are a permanent action requiring a court to determine what fraction of a company’s historical production caused what fraction of a municipality’s weather-derived repair costs. No methodology exists for that determination, and the absence of any coherent damages methodology is itself a signal that this causal theory cannot support liability. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (“The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case” emissions rulings.).

Even more, no statistical analysis can demonstrate that Petitioners’ production decisions in any particular year, rather than, for example, China’s energy plants, other producers, or any of countless contributing factors, more likely than not caused any particular flood event in Boulder County. The global climate system involves millions of variables and individual decisions across decades or centuries. *See Jonathan H. Adler, Warming Up to Climate Change Liti-*

gation, 3 Va. L. Rev. 63, 67-69 (2007) (discussing challenges of establishing causation in climate litigation where harms result from cumulative effects of countless individual decisions and emission sources, and the global nature of emissions). Subjecting any individual defendant to liability based on statistical contribution to this global phenomenon abandons the individualized proof that *Burrage* and *Gross* reflect as a background constitutional principle—one embedded in due process tradition and one that Respondents cannot satisfy. *See also Juliana v. United States*, 947 F.3d 1159, 1169-70 (9th Cir. 2020) (acknowledging “many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources”).

D. Respondents’ Disproportionate, Retroactive, and Punitive Damages Claims for Lawful, Federally Authorized Conduct Independently Violate Due Process

Respondents’ theories independently violate the proportionality and fair-notice requirements framework this Court established in *Gore* and *State Farm*.

In *Gore*, 517 U.S. at 575, the Court held that due process prohibits awards that are “grossly excessive” relative to the defendant’s conduct. The Court’s analysis emphasizes that constitutional due process requires reasonable proportionality between legal consequences and individual conduct. *Gore* identified three guideposts for evaluating the constitutionality of punitive damage awards: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of the punitive award to the actual or potential harm suffered by the plaintiff; and (3) the difference between the punitive award and the civil penalties authorized

or imposed in comparable cases. 517 U.S. at 574-75. *State Farm* reinforced these guideposts and made clear that they are constitutional requirements, not mere factors in a balancing test: “The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” 538 U.S. at 416.

Gore identified several factors relevant to reprehensibility, including whether the conduct “evinced an indifference to or a reckless disregard of the health or safety of others,” whether the “conduct involved repeated actions,” and whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” 517 U.S. at 576-77. Petitioners produced and sold fossil fuels—a product that was legal, federally regulated, urged by government policy, and upon which is essential to the American economy and American consumers. The federal government did not merely permit fossil fuel production—it authorized drilling on federal lands and waters, provided tax incentives for exploration and production, contracted for fuel for the Department of Defense, and generally made domestic energy production a cornerstone of national security policy. Conduct the government has authorized, subsidized, and promoted across administrations cannot be characterized as reprehensible to justify massive punitive sanctions. *Gore*, 517 U.S. at 579 (conduct involving “no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive” is at the low end of the reprehensibility scale). The Court emphasized in *State Farm* that punitive damages may not be used to punish defendants for lawful out-of-state conduct or for conduct that did not harm the plaintiff, 538 U.S. at 422-23—yet Respondents’ punitive theory is precisely

a vehicle for punishing the Companies for production activity spanning the globe and across decades, nearly all of which bore no demonstrable relationship to any specific harm in Colorado.

Because Respondents cannot establish what fraction of its flood and wildfire costs are attributable to Petitioners' specific actions rather than natural climate variability or the actions of other parties, the compensatory award itself has no basis. The Court in *Gore* cautioned that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate . . . the severity the penalty that a State may impose,” 517 U.S. at 579, and in *State Farm* held that “ratios greater than those [the Court] ha[s] previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).

Respondents' compensatory damages claim suffers the same constitutional deficiency as its punitive claim, and for the same reason. A compensatory award is constitutionally grounded in the proposition that a defendant caused an identified harm at an identified magnitude. Here, because Respondents cannot establish what fraction of municipal costs are attributable to any individual defendant's specific conduct rather than the emissions of millions of other global actors, any award framed as “compensatory” necessarily functions as a punitive sanction. It punishes the defendant not for causing Respondents' harm solely by participating in the fossil fuel industry. An award untethered from individual causation is not compensatory in any constitutional sense; it is a penalty imposed on a defendant for its share of an industry. *Gore* and *State Farm*'s proportionality framework

applies with equal force to such awards. *See State Farm*, 538 U.S. at 423 (“a defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business”).

Respondents’ damages claims also reach back to production and marketing decisions made across several decades—many of which occurred long before any court recognized any type of climate change tort claim; long before current climate attribution science existed as a legal tool; and long before any regulatory or legal framework put private energy companies on notice that their federally permitted activities might expose them to state tort damages. This retroactive imposition of liability constitutes an independent due process violation regardless of whether the underlying causation theory is permitted to proceed.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a majority of the Court expressed serious constitutional concern about retroactive liability of this magnitude. The plurality struck down the Coal Industry Retiree Health Benefit Act as a regulatory taking in part because it imposed “severe retroactive liability on a limited class of parties that could not have anticipated the liability” and that this retroactivity raised concerns because it “deprive[d] citizens of legitimate expectations and upset settled transactions.” *Id.* at 533 (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)). Justice Kennedy, concurring in judgment, also recognized that imposing liability for conduct that occurred before any legal duty existed raises serious constitutional concerns, even if their analytical frameworks differed. *Id.* at 547-49 (Kennedy, J., concurring in the judgment and dissenting in part) (concluding that the Coal Act must be in-

validated as violative of due process based on our nation's history of "distrust" with retroactive statutes and that stating that due process protections "must be understood to incorporate our settled tradition against retroactive laws of great severity"). The core constitutional principle is clear: individuals and private parties are entitled to rely on existing law in ordering their affairs, and imposing substantial liability based on legal theories that did not exist when the conduct occurred violates the fair notice guarantee embedded in due process.

The retroactivity problem is particularly acute here. Climate change tort theories—the proposition that private energy companies are liable in state court for the diffuse global harms of climate change—did not exist as a recognized legal claim when Petitioners made the production decisions Respondents challenge. The first serious legal scholarship proposing such liability emerged in the late 1990s and early 2000s. See Jonathan H. Adler, *Standing in the Hot Seat: Climate Change Litigation*, 8 Engage: J. Federalist Soc'y Prac. Groups No. 1 (2007) (surveying the emergence of climate tort theory as a novel legal proposition). The Colorado trial court did not deny the Companies' motion to dismiss until 2024 and no court had ever imposed damages liability on a private energy company for climate change at the time of the challenged conduct. The Companies therefore conducted their operations under federal regulatory frameworks that sanctioned fossil fuel production, with no indication that such production would expose them to state-law tort damages of the magnitude Respondents seek.

The retroactivity problem is compounded by the aggregate causation structure. Because Respondents

cannot identify what fraction of their claimed damages results from any one defendant's historical emissions in any particular year, any damages award necessarily rests on an arbitrary analysis on a global scale and across decades of lawful commerce. The combination of retroactive liability and arbitrary apportionment falls squarely within the due process prohibition recognized in *Eastern Enterprises*. 524 U.S. at 528-29 (striking down liability that was “severe,” “retroactive,” imposed on “a limited class of parties,” and based on conduct occurring under a different legal regime). The Companies' situation is even more constitutionally troubling than the coal company's in *Eastern Enterprises*: not only is the liability retroactive, but it is based on causal theories that did not exist, imposed for conduct that was affirmatively authorized and subsidized, measured by an aggregate global phenomenon rather than any identified specific harm, and potentially unlimited in scope.⁵

⁵ Market share liability—the doctrine introduced in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980)—cannot bridge Respondents' causation gap. *Sindell* arose from a specific, narrow evidentiary problem: plaintiffs injured by DES, a chemically identical drug manufactured by hundreds of companies, could not identify which manufacturer's specific product their mother had ingested decades earlier. The causal mechanism was scientifically established; only the tortfeasor's identity was unknown. Courts have consistently refused to extend the doctrine beyond that context. See *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 240-41 (2001) (rejecting market share for handguns—products not fungible and marketing practices not uniform); *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 552 (1st Cir. 1993) (rejecting for lead paint); *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1253 (5th Cir. 1997) (market share theory “would create too much risk that a

III. Respondents' Theory Would Devastate Domestic Energy Production And Undermine Individual Economic Liberty.

If Respondents' causation theory is accepted—if a private energy company's fractional contribution to global greenhouse gas emissions is sufficient to establish state-court liability for climate-related municipal costs—then every oil and gas producer, mining operation, natural gas distributor, and petroleum refiner faces unlimited retroactive liability in every jurisdiction where a weather event has caused municipal costs. This Court has already recognized that courts are ill-suited to serve as ad hoc greenhouse gas regulators. *See American Electric Power*, 564 U.S. at 428 (“The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case” greenhouse gas rulings.); *see also Juliana*, 947 F.3d at 1175 (“[T]he plaintiffs’ case must be made to the political branches or to the electorate at large,” because courts lack the institutional competence to manage climate policy.). Allowing these state tort claims to proceed on Respondents’ causation and damages theories produces the same result through a different door. Here, the consequences of altering national energy policy by accepting Respondents’ claims illustrate the fundamental problem with climate-causation litigation. Because market share theory, if adopted, would apportion that unlimited exposure across every participant in the domestic energy industry, the potential liability is effectively uncapped.

defendant will be held liable for more harm than it caused, or, worse yet, without causing any harm at all to the plaintiff”).

If Respondents prevail, the consequences will not be confined to Colorado. Many climate-change cases are pending across the nation, each resting on the same speculative causal chain and each seeking the same open-ended damages. If cases of this nature were permitted to continue flooding our judicial system, with each asserting a variation on the same causation theory Respondents' advance, the economic consequences would devastate American energy production and the individual liberty it enables. The economic stakes are not abstract. When liability exposure is unlimited, retroactive, and uninsurable, investment in domestic energy production, exploration, and development stops. The entrepreneurs and independent producers who have driven American energy abundance cannot survive untethered liability measured by an entire global industry. See Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. Econ. Persp. 183, 184-87 (2004) (documenting how expanded and unpredictable liability theories in asbestos litigation created over \$200 billion in liabilities and bankrupted more than 100 companies despite limited evidence of individual causation in many cases). Unlimited climate liability would prevent individual entrepreneurs and innovators from developing America's vast energy resources. See W. Kip Viscusi, *The Dimensions of the Product Liability Crisis*, 20 J. Legal Stud. 147, 148-58 (1991) (expanded and unpredictable liability regimes cause market withdrawals and cost increases that harm consumers).

Respondents' counsel has publicly acknowledged that "[t]ort liability is an indirect carbon tax" and that the purpose of this litigation is to accomplish through state court judgments what environmental advocates have been unable to accomplish through the political

branches. Inst. for Energy Research, *Supreme Court Will Hear a Climate Case Against Oil Companies* (Feb. 25, 2026). See *American Electric Power*, 564 U.S. at 427 (Congress and the Executive are the proper forums for “complex balancing” of climate policy considerations, not courts). That is not a tort claim—it is an admission that this litigation is policy by other means. The political branches are the constitutionally designated forums for making the fundamental policy choices about energy production, climate risk, and economic development that Respondents’ claims implicate. When state tort liability becomes the mechanism for making those choices, through the accumulation of case-by-case judicial determinations that private energy companies are forced to continuously defend, judicial power expands far beyond its constitutional domain. See *Juliana*, 947 F.3d at 1171 (courts cannot resolve disputes “entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches”).

CONCLUSION

The Due Process Clause requires that liability rest on a direct, foreseeable, and proportionate causal connection between a specific defendant's conduct and a plaintiff's specific harm. Respondents' claims satisfy none of those requirements. The causal chain that somehow stretches from energy production decisions to municipal damages is far too attenuated and too saturated with independent intervening causes to support liability. If this causation theory is blessed, the potential punitive damages and retroactive liability that may result would likely devastate America's energy development and harm all Americans who rely on abundant energy to make their lives better.

Respectfully submitted,

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