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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

The Buckeye Institute was founded in 1989 as a nonpartisan independent research and educational institution—a think tank—to formulate and promote free-market policy in the States. The Buckeye Institute performs and publishes timely and reliable research on key policy issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. Its Economic Research Center is renowned for the cutting-edge economic models that allow it to analyze the dynamic impacts of policy proposals at the state and federal levels. The Buckeye Institute also files lawsuits and submits amicus briefs to further its mission.

The Buckeye Institute's interest in this case is based on its economic analysis of the remedies sought in lawsuits like this one. Buckeye has long opposed carbon taxes for the injuries they would inflict on the U.S. economy, job creation, and economic growth and dynamism. As Buckeye's research shows, money-damages remedies for carbon emissions are economically equivalent to a tax and threaten all the same consequences.

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[1] In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is not an ordinary tort suit. Instead, it is an attempt to wield state law to impose a surcharge on the worldwide production and marketing of fossil fuels. In economic terms, that is a tax. And that should inform the Court's legal analysis. Federalism principles generally deny states the power to tax outside their territories, much less in foreign lands, no matter the label that a state slaps on such an exaction. And a global carbon tax, as the City of Boulder and surrounding County seek to impose here, threatens severe economic consequences for workers, consumers, and ultimately the Nation as a whole. The same doctrines that forbid a city or state from setting federal tax policy should also doom this attempt to achieve the same end through the back door.

The Buckeye Institute's dynamic economic scoring model demonstrates how Boulder's climate nuisance claims, and similar suits brought by other state and local governments, seek to impose a carbon tax in purpose and effect. Indeed, as plaintiffs' counsel recently admitted, it has long been climate activists' strategy to impose backdoor carbon taxes—taxes that they are incapable of imposing through the normal legislative process—through these nuisance lawsuits. It is no surprise then that this lawsuit's remedy would be tantamount to a carbon tax, both in economic terms and under this Court's functional approach to identifying taxes.

A nationwide carbon tax like the one Boulder seeks to introduce through Colorado law inherently exceeds its powers under state law and intrudes on exclusive federal powers in almost every imaginable way. This brief focuses on two.

First, the remedy sought in this suit runs afoul of constitutional restrictions on states' extraterritorial regulation, including especially through the imposition of liability under taxing schemes or otherwise.

Second, Boulder's global carbon tax tramples over the President's constitutional prerogative to set—as he has pursuant to congressional delegation—the United States' policy on global carbon taxes.

For these reasons, and those canvassed in the Petitioners' brief, the decision below authorizing Colorado to reach, regulate, and tax beyond its borders should be reversed.

ARGUMENT

I. Boulder's Lawsuit Seeks To Impose a *De Facto* Carbon Tax

Having failed to achieve a carbon tax through the normal legislative process, plaintiffs have resorted to the courts in an attempt to impose through fiat what they cannot accomplish through persuasion. It is no surprise then that Boulder's public-nuisance action against energy producers looks nothing like a conventional attempt to recover for discrete injuries. As the economic evidence demonstrates—and as Boulder County's own counsel recently admitted—the lawsuit is structured and intended to impose a large,

policy-driven tax on the production and consumption of fossil fuels to alter energy producers' behavior and finance plaintiffs' climate objectives. In economic substance and practical effect, this lawsuit, and those like it, seeks a result much like a carbon tax.

Rather than seek compensation calibrated to specific local harms, Boulder seeks massive, aggregate monetary relief untethered from individualized causation. Boulder's scheme is designed to reshape the State's—and ultimately the Nation's—energy economy, in direct conflict with federal policy. This lawsuit's structure represents a *de facto* carbon tax in purpose and effect: It imposes an across-the-board financial liability on a particular category of economic activity, which in turn raises energy prices, reduces investment, changes behavior, and contracts overall economic output. The Buckeye Institute's modeling confirms that climate nuisance litigation operates in precisely this manner and would severely injure the United States economy. Of course, as plaintiffs' counsel has admitted, pushing fossil fuel producers into bankruptcy is plaintiffs' ultimate goal.

A. The Damage Awards Sought in Lawsuits Like This One Are Tantamount to Damaging Carbon Taxes

The Buckeye Institute's economic analysis and modeling demonstrate that large-scale climate nuisance litigation operates identically to a carbon tax, with all the damaging consequences of a carbon tax. That should be unsurprising, since plaintiffs' counsel recently said the quiet part out loud, noting plaintiffs' legal strategy amounts to "an indirect carbon tax,"

with the ultimate goal of forcing fossil fuel producers to "declar[e] bankruptcy." *Can State Courts Set Global Climate Policy*, The Federalist Society, at 32:55-34:43 (Oct. 8, 2025) (comments of David Bookbinder).[2] Plaintiffs' counsel is not the only climate-nuisance advocate to make such an admission. Nearly twenty years ago, Jonathan Zasloff, a UCLA Professor, wrote that nuisance litigation "has promise because…it essentially becomes a carbon tax—precisely the instrument that…is routinely dismissed as politically unfeasible. The difference is that it is judicially, not legislatively, imposed." Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827, 1827 (2008). Following failed attempts to impose carbon taxes and other anti-energy policies through the political process, plaintiffs' nuisance litigation represents the latest effort of climate activists to implement their preferred policy—this time through litigation rather than legislation.

Climate activists represent net-zero can be achieved with a roughly $800 billion carbon tax. Citizens' Climate Lobby, *Why Put a Price on Carbon?*[3] Nuisance litigation is the latest attempt to achieve this $800 billion carbon tax, as "awarded nuisance damages would effectively impose a backdoor carbon tax, which will raise business and energy costs and ultimately mean higher prices for goods and services for American families." Rea S. Hederman Jr., Sai C. Martha, and Aswin Prabhakar, The Buckeye Institute,

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[2] *Available at* https://fedsoc.org/events/can-state-courts-set-global-climate-policy.

[3] *Available at* https://citizensclimatelobby.org/price-on-carbon/.

Damaging Consequences: The Economic Impact of a Federal Carbon Tax (Apr. 14, 2026).[4] Indeed, nuisance suits in states around the country today are actively seeking hundreds of billions of dollars. Bill Schuette, *Courtroom Carbon Tax: How Climate Lawsuits Pick Your Pocket at the Pump*, Washington Examiner (May 11, 2026).[5]

Using its proprietary dynamic economic model STELA (state tax and economic long-run analysis), The Buckeye Institute has modeled the impacts on the American economy if plaintiffs and their allies could successfully use nuisance litigation to achieve their ultimate goal of net-zero carbon emissions. *See* Hederman *et al.*, *supra*. STELA was calibrated using publicly available federal data and relied on a "similar dynamic scoring framework used by federal agencies to evaluate federal tax proposals." *Id.* at 10. The Buckeye Institute calibrated STELA to "predict how court-imposed climate-related damages and a national carbon tax will affect GDP, employment, tax revenue, consumption, and investment at the national level." *Id.*[6]

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[4] *Available at* https://www.buckeyeinstitute.org/library/docLib/2026-04-14-Damaging-Consequences-The-Economic-Impact-of-a-Federal-Carbon-Tax-policy-report.pdf.

[5] *Available at* https://www.washingtonexaminer.com/op-eds/4560949/carbon-tax-climate-lawsuits-gas-prices/.

[6] STELA has undergone a double-blind peer review and incorporated comments from those reviews consistent with current academic standards and methodologies. A full technical description of STELA, which allows researchers to independently validate STELA's accuracy and the authors' conclusions may be found in Hederman, *et al.*, *supra* at Apps. A & B.

The Buckeye Institute used STELA to model the economic effects that Coloradans would suffer from climate nuisance suits. Though many climate nuisance suits do not specify a specific damages figure, one recent suit, *County of Multnomah v. ExxonMobil*, sought over $50 billion in damages for supposed climate-related harms. Buckeye used this proposed figure[7] to dynamically score how damages or abatements on a similar scale would impact the Colorado economy. First, Buckeye took the per capita damages from *County of Multnomah* and adjusted them by the ratio of per capita incomes between Multnomah County and Colorado. Buckeye then input that figure into STELA as an equivalent hypothetical corporate tax on Colorado's economy, which the model then used to estimate changes to GDP, investment, consumer spending, and employment. STELA's results were eye-popping: Colorado's GDP would decrease by $537.4 billion (2024 dollars); investment would decline by $317.8 billion; consumer spending would fall by $86.5 billion; and the state would lose 642,000 jobs.

The Buckeye Institute has also deployed STELA to model the impact of a hypothetical $800 billion annual carbon tax, which is the ultimate goal of climate nuisance suit activists. Specifically, STELA modeled "the economic effects of a court-ordered abatement of carbon emissions, using an $800 billion annual carbon tax as an effective proxy." *See* Hederman *et al.*, *supra*, at 7. The model's conclusions were stark: "In 2027, GDP would decrease by $980.4 billion (2024 dollars);

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[7] The Buckeye Institute's use of Multnomah County's alleged damages in no way endorses the accuracy of that plaintiff's damages estimate.

investment would decline by $385.8 billion; consumer spending would fall by $378.4 billion; and the economy would shed two million jobs. On a per capita basis, every American would bear nearly $2,900 in lost economic output." *Id.* Modeling the consequences further in time tells a similar story: "By 2034, annual GDP losses would grow to $1.2 trillion, investment would decline by $470.0 billion, consumer spending would fall by $483.8 billion, and 2.4 million jobs would be lost, as the sustained tax burden compounds across the country." *Id.* These outcomes would devastate the energy sector. Which, of course, is the entire point of these nuisance suits: achieve through the courts what plaintiffs and their allies cannot achieve through their representatives.

Further, all of these outcomes are indistinguishable from a carbon tax in a number of salient ways. First, like a carbon tax, nuisance suit damages attach a compulsory financial cost to carbon-based energy, making it more expensive for producers to produce and consumers to consume. Second, like a carbon tax, these damages would be awarded as a result of the otherwise lawful production and sale of fossil fuels, awarding damages based on the producers' supposed aggregate contribution to global climate change. Third, like a carbon tax, many of these increased costs will have to be passed on to consumers if energy companies want to survive and remain profitable. Finally, like a carbon tax, the goal of these lawsuits is to change behavior – i.e., to first limit and then ultimately eliminate the production of fossil fuels.

B. The Relief Sought Here Is a Tax in All But Name

As discussed above, a money-damages nuisance remedy for fossil-fuel production is economically equivalent to a tax. It also resembles one in legal terms. All the key elements of a tax—compulsory financial cost for carbon-based energy, money paid for otherwise lawful conduct, and costs passed on to consumers—mean that the remedy sought here fits all too comfortably within this Court's "functional approach" for evaluating whether something is properly considered a tax. *NFIB v. Sebelius*, 567 U.S. 519, 565 (2012).

As an initial matter, it does not matter whether litigants label their scheme a "tax" or not, as the Court looks to its "practical operation." *Id.* at 564–65 (noting the "label" is not determinative and concluding something labeled a "penalty" was in reality a tax); accord *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) ("In passing on the constitutionality of a [State] tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.'") (citation omitted).

And, as explained above, the remedy sought in these nuisance suits "looks like a tax in many respects." *NFIB*, 567 U.S. at 563. For Boulder City and County, the nuisance litigation "yields the essential feature of any tax: It produces at least some revenue for the Government." *Id.* Indeed, the revenue to Boulder County and other state and local governments from these nuisance suits would far exceed the $4

billion per year at issue in *NFIB*. And the tax-collecting body, by bringing the lawsuit, makes itself the enforcer of the tax, just like the IRS was the enforcer in *NFIB*. *Id.* at 566 (finding relevant whether the body responsible for "collecting revenue" enforced the alleged tax).

The nuisance litigation fits this Court's framework for a tax in other ways, too. It is a paradigmatic example of a scheme that "will raise considerable revenue" and is "intended to affect individual conduct," which is a type of tax this Court has recognized is "nothing new." *Id.* at 567. This Court is familiar with many "obviously regulatory measures" that are in fact taxes aimed at curtailing conduct, such as the high taxes placed on cigarettes, marijuana, and sawed-off shotguns. *Id.* The nuisance litigation is no different, as it seeks to impose a de facto carbon tax as a means of curtailing the production of fossil fuels. This, on its face, "leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* at 574. But for fossil fuel producers, that choice is illusory, as the nuisance litigation, if permitted to continue, leaves energy producers with the choice of ceasing operations or paying such an extensive series of taxes across the country that they will be forced to "declar[e] bankruptcy." Comments of David Bookbinder, *supra*.

II. Boulder's *De Facto* Carbon Tax Is Unlawful on Multiple Grounds

Viewed through the lens of the Court's cases concerning state taxation and regulation, Boulder's lawsuit and the remedy it seeks contravene many constitutional doctrines. Among them are the federalism

and separation-of-powers doctrines raised by Petitioners. Here, The Buckeye Institute focuses on the remedy's conflict with principles limiting extraterritorial taxation under the Commerce Clause and Due Process Clause and its intrusion on foreign affairs powers reserved to the federal government.

A. This Lawsuit Seeks to Impose an Unconstitutional Extraterritorial Tax

"The Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 19 (2008) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983)). "It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. … the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (cleaned up).

"State sovereign authority is bounded by the States' respective borders." *Fuld v. Palestine Liberation Org.*, 145 S. Ct. 2090, 2104 (2025). Pursuant to that baseline, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (citation and quotation marks omitted). This is the notion

embedded in the bedrock of the federalist "Constitution's structure," *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 (2023), that a State is "without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries[,]" *Watson v. Emp's Liability Assurance Corp.*, 348 U.S. 66, 70 (1954).

The Commerce Clause applies to state taxes where, as here, the tax reaches interstate conduct. For this Court to uphold such a tax, it must satisfy at least four elements: the tax is legal only when it "(1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 310–11 (1994) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Similarly, the Due Process clause requires that state taxes (1) have "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" and (2) "must be rationally related to 'values connected with the taxing State.'" *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. 262, 269 (2019) (citations omitted). Under Due Process, a state may only "tax an apportioned sum of the corporation's multistate business." *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 773 (1992).

This first prong for the Commerce Clause is "closely related…to the due process requirement that there be 'some definite link, some minimum connection,

between a state and the person, property or transaction it seeks to tax.'" *S. Dakota v. Wayfair*, 585 U.S. 162, 177 (2018) (quoting *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344–45 (1954)) (internal citation omitted). It "asks whether the tax applies to an activity with a substantial nexus with the taxing State" and whether the taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction." *Id*. at 188.

Indeed, that requirement undergirds "both the Due Process and Commerce Clauses" and necessitates that "a State may not tax value earned outside its borders." *Allied-Signal*, 504 U.S. at 777 (citing *Miller Brothers Co.,* 347 U.S. at 344–45). And the inquiry "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state" is "subsumed in both constitutional requirements." *MeadWestvaco Corp.*, 553 U.S. at 24–25.

In short, Colorado may only tax what may "in fairness be attributed to the taxpayer's activities within the State." *Allied-Signal*, 504 U.S. at 780. This is true for multinational companies like Petitioners. *See id*. For example, in *South Dakota v. Wayfair*, the Court found the nexus "sufficient" because South Dakota's tax was tailored and applied "only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. … This quantity of business could not have occurred unless the seller availed

itself of the substantial privilege of carrying on business in South Dakota." *Wayfair*, 585 U.S. at 188.

But there is no "limiting principle," *Allied-Signal*, 504 U.S. at 780, to the relief that Boulder City and County seek in this lawsuit. They seek to impose a one-time tax on *all* of Petitioners' ongoing conduct all over the entire world, without apportionment limited to conduct linked to Colorado. It is not taxing conduct based on benefits or protection Colorado gives to Petitioners. Rather, the damages award is meant to be a tax award for all of the emissions Petitioners allegedly contribute to around the world. As Petitioners note, "plaintiffs allege harms … from the effects of increased greenhouse-gas emissions on the global climate." Pet. Br.37. A one-time corporate tax on such ongoing global conduct has no nexus to Colorado's "protections" or "benefits" for Petitioners. There is no "rational relationship between" the damages sought "and the intrastate values of the enterprise." *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 328 (1982). Accordingly, were the remedy considered a tax, it would be unconstitutional, and the same sovereignty- and federalism-based principles underlying the Court's tax-related cases equally bar extraterritorial regulation through the litigation of state-law claims.

B. Boulder's Carbon Tax Interferes with Federal Constitutional Prerogatives to Set Foreign Policy

The Constitution's Foreign Commerce and Foreign Affairs Clauses each prohibit a State, through

taxation, from tramping on the constitutional prerogatives of the federal branches. Here, Boulder's *de facto* carbon tax violates both Clauses.

1. First, this Court's higher standards for a state tax that affects foreign commerce dooms Colorado's lawsuit. "In the unique context of foreign commerce, a State's power is further constrained because of the special need for federal uniformity." *Barclays Bank PLC*, 512 U.S. at 311 (cleaned up). "A tax affecting foreign commerce therefore raises two concerns in addition to the four delineated in *Complete Auto*." *Id.* "The first is prompted by the enhanced risk of multiple taxation. The second relates to the Federal Government's capacity to speak with one voice when regulating commercial relations with foreign governments." *Id.* (cleaned up).

The lawsuit interferes with the federal government's ability to speak with one voice on global carbon taxes, emissions, and foreign policy regarding the same. "[A] state tax at variance with federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp.*, 463 U.S. at 194. Here, the Boulder lawsuit violates both options.

Global carbon taxes must be left to the federal government. In 1992, President George H. W. Bush signed, and the Senate unanimously ratified, the United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994), the

"ultimate objective" of which was the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.*, Art. 2. 39. Under the Framework Convention, "[a]ll Parties," including the United States, "shall . . . . (b) [f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change [and] (c)[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors . . . ." *Id.*, Art. 4.1(b), (c). Congress has tasked the State Department "to formulate United States foreign policy with reference to environmental matters relating to climate." *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

In that vein, the President issued Executive Order 14260 on April 8, 2025, outlining his policy that the Attorney General should look at "State laws purporting to address 'climate change' … and funds to collect carbon penalties or carbon taxes."[8] Similarly, the

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[8] *Available at* https://www.whitehouse.gov/presidential-actions/2025/04/protecting-american-energy-from-state-overreach/.

Administration has refused to join in a proposed global carbon tax stating:

> President Trump has made it clear that the United States will not accept any international environmental agreement that unduly or unfairly burdens the United States or harms the interests of the American people. Next week, members of the IMO will vote on the adoption of a so-called NZF aimed at reducing global carbon dioxide gas emissions from the international shipping sector. This will be the first time that a UN organization levies a global carbon tax on the world.
>
> The Administration unequivocally rejects this proposal before the IMO and will not tolerate any action that increases costs for our citizens, energy providers, shipping companies and their customers, or tourists.[9]

Similarly, the Administration has brought two lawsuits in New York and Vermont[10] under the theory

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[9] Joint Statement by Secretary of State Rubio, Secretary of Energy Wright, and Secretary of Transportation Duffy (Oct. 10, 2025), *available at* https://www.state.gov/releases/office-of-the-spokesperson/2025/10/taking-action-to-defend-america-from-the-uns-first-global-carbon-tax-the-international-maritime-organizations-imo-net-zero-framework-nzf.

[10] *United States v. New York*, No. 1:25-cv-03656 (S.D.N.Y.); *United States v. Vermont*, No. 2:25-cv-00463 (D. Vt.).

that the States are interfering with the Administration's prerogative to set global emissions policies.

Accordingly, these issues should be left to the federal government.

Second, the lawsuit violates a clear federal directive—the Clean Air Act. "The [Clean Water] Act pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987). The Clean Air Act's comprehensive framework, which includes specific provisions for regulating emissions, 42 U.S.C. §§ 7410, 7411, 7521, preempts state laws that attempt to regulate out-of-state. Thus "the only state suits that remain available" to provide redress for injuries allegedly caused by interstate emissions are "those specifically preserved by" the Clean Air Act. *Ouellette*, 479 U.S. at 500. Those are quite limited. *See id.*; *cf.* 42 U.S.C. § 7416. The federal directive is unmistakable: To the extent States may regulate emission—through lawsuits or elsewise—that regulation must be source-State and constitutional. For all the reasons discussed herein and by Petitioners, this lawsuit is constrained to neither the bounds of Colorado nor the bounds of the Constitution.

2. Boulder's *de facto* global carbon tax also would deny the federal political branches their constitutional prerogatives to set foreign policy.

Specifically, it conflicts with the current Administration's express policies on carbon taxes, thereby triggering what been dubbed "dormant foreign affairs preemption." *Am. Ins. Ass'n v. Garamendi*, 539 U.S.

396, 439 (2003) (Ginsburg, J., dissenting). This genre of preemption sprung from *Zschernig v. Miller*, where this Court determined an Oregon probate statute prohibiting inheritance by a nonresident alien where the foreign heir might face confiscation in the foreign country was invalid as an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. 429, 432 (1968).

"Preemption based on constitutional structure is especially important when state law intrudes upon the Federal Government's exclusive authority to conduct relations with other nations." *Hencely v. Fluor Corp.*, 608 U.S. __, __, 146 S. Ct. 1086, 1103 (2026) (Alito, J., dissenting). It is only the "Federal Government" that "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Our constitutional system therefore "imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*; *cf. United States v. Belmont*, 301 U.S. 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

Although there is a reserved "power of the States to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L.Ed. 23 (1824), such power is "limit[ed]" by the Constitution, *Bos. Stock Exch.*, 429 U.S. at 328–29, including by foreign affairs preemption.

This Court has suggested that where "a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects foreign relations," the Court would look at the "the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Garamendi*, 539 U.S. at 420 & n.11. The Court left open the possibility of also weighing "the strength of the federal foreign policy interest." *Id*. Regardless, the end point is straightforward: "the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." *Id*.

Here, Boulder's attempt to impose a global carbon tax traipses over the Administration's policies on those taxes, including ongoing multilateral talks. As described above, the federal government seeks to speak with one voice on environmental issues. The result is clear: It is the Administration's prerogative to set foreign policy on the environment, including global carbon taxes, and it has done so by disapproving of state carbon taxes and disapproving of proposed global carbon taxes. Accordingly, under the *Garamendi* interest-balancing test, this is (1) a foreign affairs issue trusted to the political branches; (2) delegated to the President; and (3) explicitly expressed by the President. The strength of the federal interest is evinced in the consistent conduct of the political branches to retain the power to regulate environmental issues.

Lawsuits like this one are functionally equivalent to the imposition of a corporate tax, as explained above. Boulder's extremely costly approach substantially involves the global economy, a dynamic that could be repeated by many other states using tort litigation as a de facto carbon tax. Yet this allows states to, under another name, issue the exact types of global carbon taxes the President has put under scrutiny as interfering with the political branches' environmental policymaking. There is more than a "likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government," so this "would require preemption of the state [lawsuits]." *Garamendi*, 539 U.S. at 420.

Nor do the governments here have a strong interest in a *de facto* global carbon tax, as judged by standards of traditional practice. Although corporate taxation is a traditional practice of states, regulation of out-of-state conduct, especially with global environmental stakes, cannot be said to be "traditional" state regulation in any sense. Boulder does not have the legal right to impose a global carbon tax against the federal political branches' will. This lawsuit should fail.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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