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 OF THE CENTER FOR ENVIRONMENTAL ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Center for Environmental Accountability (CEA) is a non-profit organization whose mission is to promote transparency, excellence, and accountability in environmental policy, as well as fidelity to the rule of law.[1] Its commitment to a healthy environment includes commitment to a healthy *human* environment, such that people from all walks of life can thrive. To date, it has submitted at least sixteen distinct sets of comments to agencies at the federal and state level in at least twelve different areas of environmental law and policy, including many issues touching on energy and climate. It also submitted an *amicus curiae* brief in support of petitioners in *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168 (2025).[2] CEA respectfully submits that its broad familiarity with environmental law and policy, together with its specific insights on energy and climate, enable it to be of considerable help to the Court.

SUMMARY OF THE ARGUMENT

Jurisdiction here is clear. The judgment below finally resolved a self-contained original action. Under settled precedent, that is sufficient. *See Atlantic Richfield Co. v.*

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1. No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to pay for the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

2. *See* https://environmentalaccountability.org/publications/ (last visited May 18, 2026).

Christian, 590 U.S. 1, 12 (2020). This case also satisfies the criteria for the fourth category of *Cox Broadcasting Corp. v. Cohn*. *See* 420 U.S. 469, 482-83 (1975). The Supreme Court of Colorado rejected petitioners' claim of federal preemption; reversal by this Court on that issue would end the case; and vital federal interests are at stake.

On the merits, federal law squarely precludes respondents' actions. For over a century, this Court has recognized that federal common law controls disputes over "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*). *See also Kansas v. Colorado*, 206 U.S. 46, 98 (1907) (resolving an interstate water dispute according to "what may not improperly be called interstate common law"). This is because the structure of our Constitution requires a federal rule of decision where sovereigns of equal dignity lay claim to the same resource. This is exactly such a case. Several municipalities in Colorado are facing off against every other state—and the rest of the world, for that matter—over access to the global upper atmosphere.

To be sure, this case also implicates the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, which itself may preempt respondents' claims. But that does not change the outcome of this case. If the Clean Air Act does ***not*** "speak directly" to greenhouse gases, then federal common law controls, precisely as it did in *Milwaukee I* and *Kansas v. Colorado*. *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) (cleaned up). And if, by contrast, the Act ***does*** speak directly to greenhouse gases, then the interaction of federal common law and the Act would equally preempt respondents' claims, because nothing

in the Act displaces the structural truth that sovereigns of equal dignity cannot impose their laws on each other.

Nor would rescission of the Endangerment Finding affect this analysis. *See* Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026). Whether or not the rescission stands up to challenge, *see*, *e.g.*, *Am. Pub. Health Ass'n v. U.S. Envtl. Prot. Agency*, D.C. Cir., No. 26-1037 (petition filed Feb. 18, 2026), and whatever the rescission's effect on the EPA's authority under the Clean Air Act, the Act either ***does*** or ***does not*** "speak directly" to respondents' claims, and under either possibility respondents' claims are precluded.

ARGUMENT

I. This Court has Jurisdiction to Hear This Case.

Jurisdiction here is clear. The case below was an original action under Colorado Appellate Rule 21, and the decision by the Supreme Court of Colorado to deny relief was a final judgment disposing of that action. 28 U.S.C. § 1257(a) empowers this Court to review such judgments if a party asserts a right or immunity based on the Constitution or laws of the United States. Petitioners did exactly that, arguing that respondents' claims against them were precluded by the Constitution itself or by the Clean Air Act.

Respondents' arguments to the contrary are not persuasive. Far from being anomalous, *Atlantic Richfield Co. v. Christian* follows a long line of cases. 590 U.S. 1

(2020). In *Fisher v. District Court*, 424 U.S. 382 (1976), for example, a Montana trial court dismissed an adoption proceeding on the ground that exclusive jurisdiction lay with a Cheyenne tribal court. The would-be parents asked the Supreme Court of Montana for a "writ of supervisory control or other appropriate writ to set aside the order of dismissal." *Id.* at 385. The Court granted the writ, concluding that the lower court in fact had jurisdiction to hear the case. The child's mother, Fisher, then sought review in this Court, which reversed on the merits. The Court saw no impediment to hearing the case, writing as follows in a footnote:

> The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction under 28 U.S.C. § 1257(3) [a predecessor of § 1257(a)]. It is available only in original proceedings in the Montana Supreme Court, and *although it may issue in a broad range of circumstances*, it is *not equivalent to an appeal*.

Id. at 385 n.7 (some citations omitted) (emphasis added).

The famous case of *World-Wide Volkswagen Corp. v. Woodson* similarly arose from denial of a writ of prohibition by the Supreme Court of Oklahoma. 444 U.S. 286 (1980). In this case, World-Wide appeared specially in state court to contest personal jurisdiction. After the court overruled its objections, it unsuccessfully sought a writ of prohibition from the Supreme Court of Oklahoma. It then took its case to this Court, which reversed, per Justice White, without even addressing the question of whether the decision by the Supreme Court of Oklahoma was final for purposes of § 1257.

Another example is *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931). *Bandini* began as an action by the state in state court to enjoin waste of natural gas. The court granted a preliminary injunction against Bandini, which then asked an intermediate appellate court for a writ of prohibition. Bandini argued that the trial court lacked jurisdiction to hear the case because the statute on which the state was suing denied due process. The intermediate appellate court denied relief, and the Supreme Court of California refused to hear Bandini's appeal. This Court accepted the case. "This Court has jurisdiction," wrote Chief Justice Hughes for the Court. "The proceeding for a writ of prohibition," he continued, "is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237(a) of the Judicial Code [a predecessor of § 1257(a)]." *Id.* at 14.[3]

Respondents may argue that what matters is not the *form* of the action below, but its *substance*, that is, whether the decision below actually terminated the litigation in state court. *See* Brief in Opposition [to Petition for a Writ of Certiorari] at 12 (Brief in Opposition). But the cases above do not follow such a pattern. Nor did they all involve "bells that could not be unrung." No one would want the wrong court to assign parental rights, but nothing would have prevented World-Wide or Bandini from presenting their federal arguments to this Court at the end of litigation in the state system.

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3. *See also Rescue Army v. Municipal Court*, 331 U.S. 549, 566 (1947) (describing *Bandini*'s view of this Court's jurisdiction as "well settled"); *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257.").

This Court also has jurisdiction under the fourth category of *Cox Broadcasting Corp. v. Cohn*. *See* 420 U.S. 469, 482-83 (1975). The decision below rejected petitioners' claim of federal preemption; reversal by this Court on that issue would terminate the litigation; and important federal interests are at stake.

II. Federal Common Law Precludes Respondents' Claims.

As this Court knows, *Erie Railroad Co. v. Tompkins* put an end to "federal *general* common law." 304 U.S. 64, 78 (1938) (emphasis added). But some cases, by their nature, cannot be governed by state law. This includes situations where two or more sovereigns of equal dignity lay claim to the same resource. Where this is the case, federal *specific* common law controls. As this Court recognized in *Texas Industries, Inc. v. Radcliff Minerals, Inc.*, federal common law governs "interstate and international disputes implicating the *conflicting rights of States* or our relations with foreign nations." 451 U.S. 630, 641 (1981) (emphasis added). This "'new' federal common law addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*) (quoting Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 408 n.119, 421-22 (1964)).

This Court has often relied on this principle. In fact, it did so the same day as *Erie*, in an opinion by Justice Brandeis himself. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). *Hinderlider* involved a claim to water in the La Plata River, which flows

from Colorado into New Mexico. Although both states assigned water by priority of appropriation, a compact between the two states contemplated an alternative regime in times of shortage. In such circumstances, the engineers of the two states could agree to "rotate[]" use of waters between the states "in alternating periods." *Id.* at 97.

This set up a conflict. Under Colorado law, the Ditch Company was "entitled to divert 39¼ cubic feet of water per second, subject to five senior priorities aggregating 19 second feet," with no allowance for administrative adjustment. *Id.* at 98. In the summer of 1928, however, flow fell to 57 cubic feet per second. Thus, if the senior users took their share and the Ditch Company took as much of its share as possible, no water would remain for users in New Mexico, some of whose claims predated the Ditch Company's. *See id.* The engineers invoked the compact and the Ditch Company's gate was shut. *See id.* at 95. It then brought an action to compel Hinderlider, Colorado's Engineer, to restore its access to water. The trial court refused relief, but the Supreme Court of Colorado held in its favor. *See id.* at 99.

For purposes of this case, the issue on appeal was whether Colorado law could control. This Court made clear that it could not:

> The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in

> litigation concerning other interstate streams, but has been consistently denied by this Court.

Id. at 102.

An earlier case in this vein is *Kansas v. Colorado*, 206 U.S. 46 (1907). Like *Hinderlider*, this dispute arose over a river (the Arkansas) that flowed from one state (Colorado) into another (Kansas). Unlike in *Hinderlider*, however, the two states had disparate approaches to water rights. Whereas Colorado relied upon prior appropriation, Kansas relied on the older riparian rule, which imposes various restraints on diversion for agricultural purposes. If Kansas could impose its rule on Colorado, much of the water diverted in Colorado would have had to stay in the river. If, by contrast, Colorado could impose its rule on Kansas, then relatively little water would have remained in the river for use downstream. Given the situation, the only solution was a rule of federal common law. As the Court observed:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

Id. at 97. If the two states were "absolutely independent nations," the Court went on to note, their dispute could be settled "by treaty or force." But, "[n]either of these ways being practicable, it must be settled by decision of this court." *Id.* at 98. The Court ultimately held for Colorado, reasoning that the water went to greater use there than in

Kansas. *See id.* at 117. The key point, however, is not what happened to the water, but what law controlled. Although Colorado won the case, the governing law, in the words of this Court, was something that "may not improperly be called interstate common law." *Id.* at 98.

Hinderlider and *Kansas v. Colorado* could be called "apportionment cases" rather than "environmental cases," but the point is the same. In both situations, two or more jurisdictions of equal dignity lay claim to the same resource, be it water as a factor in agriculture or water as a solvent or conduit for impurities. To be sure, water as a factor in agriculture is measured simply by volume and rate of flow, whereas water as a solvent is measured by more abstract chemical principles, some of which may be subject to debate, but the idea is the same. A single resource is at stake and the players have equal standing. No one player's rules can control.

Accordingly, in *Illinois v. City of Milwaukee*, a dispute over pollution rather than irrigation, this Court famously declared the rule that controls the instant case: "When we deal with air and water in their ambient or interstate aspects there is a federal common law." 406 U.S. 91, 103 (1972) (*Milwaukee I*). In *Milwaukee I*, Illinois tried to bring an original action in this Court to abate discharges into Lake Michigan by Milwaukee and other Wisconsin defendants. *See id.* at 93. Although the Court remitted the state to federal district court, *see id.* at 108, it was abundantly clear that federal common law would control:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.

> But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs, consideration of state standards may be relevant.

Id. at 107 (footnote omitted).

The instant case is a hypertrophic version of *Milwaukee I*. Instead of one state facing off against several subdivisions or instrumentalities of another state over access to a single body of water, subdivisions of Colorado are facing off against the rest of the United States, and the world, over access to the global upper atmosphere. But the principle is the same as in *Milwaukee I*, *Hinderlider*, and *Kansas v. Colorado*: where sovereigns of equal dignity lay claim to the same resource, the laws of no one sovereign can control. Instead, the dispute must be resolved at a higher level of law, such as by a treaty of the United States, an act of Congress, or a rule of federal common law. *See* U.S. Const. art. VI, cl. 2. Just as Colorado could not impose its law on New Mexico in *Hinderlider* or on Kansas in *Kansas v. Colorado*, and just as Illinois could not impose its law on Milwaukee in *Milwaukee I*, so too here Colorado may not impose its law of nuisance or trespass on the rest of the United States or the world.

Respondents may argue that they seek only damages, not to impose the laws of Colorado outside Colorado. *See* Brief in Opposition at 3. But this is not true in function or in fact. This Court has recognized that "'regulation can be . . . effectively exerted through an award of damages,' and '[t]he obligation to pay compensation can be, indeed

is designed to be, a potent method of governing conduct and controlling policy.'" *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). In other words, the remedy respondents seek is every bit as regulatory and interjurisdictional as an interstate or international tax on fossil fuels. And at least one of their counsel has acknowledged this, describing the remedy respondents seek as a "carbon tax." Brief for the Petitioners at 38.

The effects of respondents' action for damages, if successful, are not hard to discern. ***First***, the price of petitioners' products would go up everywhere petitioners do business. To be sure, the *degree* of inflation would depend on elasticity of demand, and petitioners' shareholders would absorb some of the impact. But no economist would deny that the supply curve for petitioners' products would move up and to the left, raising prices and reducing consumption. This is the "carbon tax" to which one of respondents' counsel referred. ***Second***, to the extent petitioners' shareholders absorbed the impact of respondents' action, the price of petitioners' stock would fall, deterring investment and reducing petitioners' ability to raise capital in the equity markets. ***Third***, creditors would demand a premium before lending to petitioners, given their exposure not only to respondents' suit, but also to similar suits if respondents' action were allowed to go forward.

In fact, if respondents' action were allowed to go forward, similar actions would proceed not only against petitioners but also against other producers, and not only in Colorado but in many other states. Ultimately, this

would have a global effect on the price of fossil fuels, on demand for such products, and on petitioners' access to equity and debt markets, given the mobility of fossil fuels and capital. In fact, the aggregate damages sought in these actions could pose an existential threat to petitioners and similar producers, pushing them toward bankruptcy. This too one of respondents' counsel has publicly acknowledged. *See* Brief for the Petitioners at 38.

Respondents contend that they do not seek to base liability on emissions, but only on the production and sale of fossil fuels. See Brief in Opposition at 3. This is a distinction without a difference. The harms they allege in their complaint are keyed to emissions, not production and sales. The Second Circuit got it right. "Artful pleading cannot transform [respondents'] complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases . . . that [they are] seeking damages." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2021). Although Respondents repeatedly describe their allegations as "marketing" claims, *see, e.g.*, Brief in Opposition at 3, they do not sue for fraud, which is a tort in Colorado. *See M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). Nor do they allege anywhere in their complaint that anyone ever relied on any of petitioners' alleged misrepresentations, although reliance is an element of that cause of action. *See id.* A search of the complaint for the word "rely" or any of its cognates will not yield a single allegation of this nature.

Relatedly, respondents describe federal common law and the structure of the Constitution as non-overlapping sources of legal authority on which petitioners have relied at

different stages of this litigation, implying that petitioners are throwing arguments against the wall. *See*, *e.g.*, Brief in Opposition at 1 (describing petitioners' arguments as "ever-evolving"). This is unavailing. Federal common law and the structure of the Constitution are not distinct sources of authority. They are two sides of the same coin, at least where Congress has not mandated common law by statute. Precisely because we have a federal system in which states do not invade each other over natural resources, and precisely because no one state's law can control such disputes, the structure of the Constitution demands a controlling rule of federal law. Whether that rules comes from a treaty, an act of Congress, or federal common law is beside the point. This Court has repeatedly made this observation. In *Massachusetts v. Environmental Protection Agency*, for example, it noted that, "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions. . . ." "These sovereign prerogatives," it wrote, "are now lodged in the Federal Government. . . ." 549 U.S. 497, 519 (2007). "It may be imagined," this Court similarly observed in *Missouri v. Illinois*, "that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court." 200 U.S. 496, 520-21 (1906).

Similarly, respondents accuse petitioners of contradicting themselves because, on the one hand, they quote language from this Court describing federal common law as "uniform," yet, on the other, recognize

that Congress has power to preserve state law when it displaces federal common law. *See* Brief in Opposition at 29. They are attacking a straw man. Although this Court has often recognized that pragmatism might necessitate a uniform rule of federal common law, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), nothing prevents Congress from *both* displacing federal common law *and* allowing some state rules to control. *International Paper Co. v. Ouellette* turned on this point. "Although Congress intended to dominate the field of pollution regulation," this Court observed, "the savings clause [of the Clean Water Act] negates the inference that Congress 'left no room' for state causes of action." 479 U.S. 481, 492 (1987). This is also how the Dormant Commerce Clause works. Although courts will enjoin attempts by states to protect local commerce from interstate competition, Congress itself is free to authorize precisely such behavior. *See*, *e.g.*, *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.").

III. Rescission of the Endangerment Finding Does Not Alter the Outcome of This Case.

The Environmental Protection Agency's decision to rescind the Endangerment Finding is certainly relevant to this case. *See* Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026). But whatever the effect of the rescission, and however it stands up to challenge, *see*,

e.g., *Am. Pub. Health Ass'n v. U.S. Envtl. Prot. Agency*, D.C. Cir., No. 26-1037 (petition filed Feb. 18, 2026), the outcome here is the same. If the Clean Air Act does ***not*** "speak directly" to greenhouse gases, *AEP*, 564 U.S. at 424 (cleaned up), then federal common law controls, precisely as it did in *Hinderlider*, *Kansas v. Colorado*, and *Milwaukee I*, because no one state's law may govern a dispute between sovereigns of equal dignity. Meanwhile, if the Act ***does*** speak directly to greenhouse gases, then the interaction of federal common law and the Act would equally preempt those claims, because nothing in the Clean Air Act displaces the structural truth that sovereigns of equal dignity cannot impose their laws on each other. To be sure, Congress can *allow* one state's law to control, but that requires an affirmative statement on Congress' part, as this Court recognized in *Ouellette*. *See* 479 U.S. at 492. But there is no statement in the Act that would allow Colorado to impose its law on any jurisdiction other than Colorado, and nothing in respondents' complaint indicates that they are limiting their claims to conduct in that state.

Respondents contend that the conventional presumption against preemption applies, but the circumstances of this case preclude that possibility. Where, as here, a federal statute displaces a body of federal common law that itself was broadly preclusive for structural reasons, that broad preclusion survives, and only an affirmative act of Congress could provide otherwise. In other words, the presumption in this context flips to one against preemption. This is not at all unusual. As this Court explained in *United States v. Locke*, there are certain areas where "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." 529 U.S. 89, 108 (2000). That would

include areas where, as here, our constitutional structure prevents sovereigns of equal dignity from imposing their laws upon each other, absent authority from Congress.

IV. No Court and No Jury Could Feasibly Address Respondents' Allegations.

A final, cogent reason for this Court to reverse lies in the fact that what respondents are asking the courts of Colorado to do is beyond the institutional capacity of any court. Colorado's law of nuisance, like the law of nuisance generally, asks courts (or juries) to compare the social burdens and benefits of the defendant's allegedly tortious conduct. *See City of Denver v. Mullen*, 3 P. 693, 699 (Colo. 1884) (asking if the use is "reasonable"); *Public Serv. Co. v. Van Wyck*, 27 P.3d 377, 391 (Colo. 2001) (citing Restatement (2d) of Torts § 826, cmt. d) (asking the trier of fact to "weigh the gravity of the harm and the utility of the conduct causing that harm").[4] This may be feasible where the neighbors of a cement plant allege injury from the plant's "dirt, smoke and vibration." *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y.2d 219, 222 (1970). Experts could perhaps testify to the value of the facility as a going concern, its importance to the community and the local economy, and the diminution in value of nearby property due to its activities.

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4. Colorado's law of trespass, on its face, does not appear to call for a comparison of the social benefits and burdens of defendant's activities. *See Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). On the other hand, necessity is generally seen as an affirmative defense to civil trespass, *see Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910), which would appear to return the trier of fact to a comparison of fossil fuel's social benefits and burdens.

But respondents' case bears no resemblance to such a local phenomenon, limited as it is to a single airshed and relatively discrete vectors of injury. In fact, a judge or jury hearing respondents' case would have no greater prospect of getting the right answer than central planners would have in running an entire economy. We have seen this movie before and we know how it ends. The calculus is just too complex. As one economist noted:

> Both central economic planning and judging on wealth-maximizing or related utilitarian grounds supplant a price system with centralized, non-price direction. To get decisions right, therefore, both planners and courts must act as if they compute relative prices and estimate marginal utilities. The computation problem, however, exceeds human capacity.

Peter H. Aranson, The Common Law as Central Economic Planning, 3 Const. Pol. Econ. 289, 299 (1992).

In fact, what respondents are asking the courts of Colorado to do is even harder than this. For not only are the factors on either side of the equation beyond number; they are measured in incommensurate units. As Justice Gorsuch observed in *National Pork Producers Council v. Ross*, answering questions like these is like trying to "decide 'whether a particular line is longer than a particular rock is heavy.'" *National Pork Producers Council v. Ross*, 598 U.S. 356, 381 (2023) (Gorsuch, J.) (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)). *See also* James M. Buchanan, Positive Economics, Welfare Economics, and Political Economy, 2 J. L. & Econ. 124, 126

(1959) ("'Efficiency' in the sense of maximizing a payoff or outcome from the use of limited resources is meaningless without some common denominator, some value scale, against which various possible results can be measured.").

Many such riddles are present here. To give one example, are the geopolitical advantages of having a secure source of cheap, transportable energy greater or less than the advantages of having less carbon dioxide in the atmosphere? Liquified natural gas and petroleum can be shipped and transshipped all over the world, protecting nations from episodic threats. We saw this during the invasion of Ukraine, when Europe pivoted from Russia to the United States for natural gas. *See* Tom Fairless, European Businesses Weathered War Storm, Wall St. J., Mar. 25, 2023, at A8 ("One year [after the invasion], many European companies have overcome the blow after slashing energy use and pivoting to a friendly and booming U.S. market.").

To give a second example, are the socioeconomic advantages of broad access to meaningful blue-collar work greater or less that the advantages of having less carbon dioxide in the atmosphere? Jobs matter, in both financial and non-financial terms, and they may depend on the availability of cheap, reliable energy. As one scholar has noted, "[s]elf-identities cannot easily be attained on a symbolic level alone; rather, they must be grounded in the actual doing of social tasks." Andrew J. Cherlin, Labor's Love Lost: The Rise and Fall of the Working-Class Family in America 174 (2014). *See also* William Julius Wilson, When Work Disappears: The World of the New Urban Poor 73 (1996) ("In the absence of regular employment, life, including family life, becomes less coherent.").

Fossil fuels also contribute immensely to human flourishing, enabling people to enjoy a standard of life that might otherwise be impossible. Respondents may argue that people in the developed world are at an inflection point between fossil fuels and renewables, such that they could flourish without fossil fuels, but this is far from clear. An increase in the price of energy in London, for example, has induced many people there not to resort to wind and solar, but instead to burn wood. *See* Stephen Castle, Why London's Chimney Sweeps Are Enjoying a Resurgence, N.Y. Times, Jan. 18, 2026 ("According to the National Association of Chimney Sweeps, demand [for their services] has been bolstered by high energy prices, the popularity of wood-burning stoves and an international climate that has prompted warnings that electricity supplies could be vulnerable to attack by hostile states like Russia."). And many people in the developing world are quite clearly at the inflection point between fossil fuels, on the one hand, and such traditional sources of energy as wood, on the other. *See* International Energy Agency, A Vision for Clean Cooking Access for All at 3 (2023) ("[N]early one third of people around the world cook their meals with rudimentary methods. They burn coal, firewood, and even animal dung as fuel, breathing in hazardous fumes daily."). The people of the United States are certainly allowed to care about people in the developing world, even if they are not required to do so. *See* Tibor Scitovsky, Two Concepts of External Economies, 62 J. Pol. Econ. 143, 144 (1954) (noting that "[t]he individual person's satisfaction may depend not only on the quantities of products he consumes and services he renders but also on the satisfaction of other persons"). The fact that we are willing to spend billions of dollars per year for public

assistance demonstrates that we put a high value on the happiness of others.

For a fourth example, who knows what benefits artificial intelligence may bestow on the human race, dependent as AI is, at least today, on vast amounts of cheap, reliable energy. Just as fossil fuels sharply reduce the amount of time people have to devote to gathering energy, so too artificial intelligence offers the prospect of giving millions, and perhaps billions, of people a head start on practically every intellectual problem.

The point is not that fossil fuels easily win these comparisons. The point instead is that these are extraordinarily complex questions that lie beyond the institutional capacity of judges and juries. Instead, they lie with Congress, which reconstitutes the polity in all its heterogeneity. Congress has 535 voting members, none of whom reports to any other, and each of whom has an inalienable role in the legislative process. If Congress decided to impose a tax on fossil fuels, or to appropriate money to enable jurisdictions like Boulder to absorb the asserted costs of global warming, the people by their representatives would have chosen that course of action. And, unlike courts, Congress is not doctrinally bound to do what would be impossible here—to get the calculus right. This proposition is especially telling to the extent respondents' claims would regulate *foreign* emissions, given the political branches' exclusive responsibility for foreign policy. *Cf. Jesner v. Arab Bank, PLC*, 584 U.S. 241, 265 (2018) (litigation under the Alien Tort Statute) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the decision below.

Respectfully submitted,

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