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 *AMICUS CURIAE* CTIA—THE WIRELESS ASSOCIATION IN SUPPORT OF PETITIONERS

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May 21, 2026

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INTEREST OF *AMICUS CURIAE*[1]

CTIA—The Wireless Association represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life, including wireless providers, device manufacturers, suppliers, as well as application and content companies. CTIA regularly files *amicus* briefs in cases presenting issues of importance to its members. *See, e.g.*, *FCC v. AT&T, Inc.*, No. 25-406 (U.S. argued Apr. 21, 2026); *Wis. Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140 (2025); *United States ex rel. Schutte v. Supervalu Inc.*, 598 U.S. 739 (2023); *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016); *T-Mobile S., L.L.C. v. City of Roswell*, 574 U.S. 293 (2015); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014); *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013); *City of Arlington v. FCC*, 569 U.S. 290 (2013); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

CTIA's members frequently face attempts by states to regulate their interstate activities. Because CTIA's members operate national, interstate networks, state-level regulation of network operations can require nationwide engineering or process changes, imposing significant compliance costs and encouraging a "race to the bottom" where the most burdensome state rules become a *de facto* nationwide standard. Those regulations are—or at least should

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission.

be—preempted under the Communications Act. *See, e.g.*, 47 U.S.C. § 152(a) ("The provisions of this chapter shall apply to all interstate . . . communication by wire or radio . . . ."). But too often, courts have wrongly held otherwise. *See, e.g.*, *N.Y. State Telecomms. Ass'n v. James*, 101 F.4th 135 (2d Cir. 2024); *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022). Thus, CTIA has a strong interest in how the Court explains preemption in this dispute involving the interstate activities of Suncor Energy and Exxon Mobil.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recently vindicated the structural separation of powers between Congress and the Executive Branch by instructing federal courts to identify the "best reading" of a statute, rather than defer to strained, contestable readings by government agencies. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). That principle of giving controlling effect to congressional intent—embodied in the text of the laws it enacts, interpreted according to the text's meaning at the time of enactment, *id.*—is no less important to vindicate the vertical separation of powers between the federal government and the States.

This Court has sometimes applied a presumption against preemption of state and local laws when Congress legislates "in [a] field which the States have traditionally occupied," within the States' "historic police powers." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But for as long as that presumption has existed, this Court has also recognized that it is "not triggered when [a] State regulates in an area where there has been a history of significant federal

presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (discussing *Rice*, 331 U.S. at 230). To the contrary, in such areas that have traditionally been "primarily a matter of federal law," "it may be presumed" that there is "no room for supplementary state regulation" and that the only permissible state-law actions are those "specifically preserved by the Act" of Congress at issue. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491–92 (1987) (cleaned up).

That distinction between areas historically regulated at the federal level and those within the States' traditional police powers vindicates a core constitutional principle dating back to the Founding—that the federal government, not the States, had the exclusive authority to regulate in the areas of foreign or interstate commerce. U.S. Const. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C.J.). While this Court's Commerce Clause jurisprudence has evolved over time, this traditional understanding of the division of federal and state power informed how Congress understood the limited role it was assigning to States under a number of complex, federal regulatory statutes governing primarily interstate activities.

In the Communications Act of 1934 that regulates CTIA's members' interstate communications networks and services, for example, careful attention to text, structure, and contemporaneous history show that Congress intended for States to regulate only local, intrastate activity. But in the decision below (and in several recent Communications Act cases), courts have uncritically applied a presumption against preemption to allow States to regulate concededly

interstate activities—contrary to constitutional and congressional design.

This case involves an area that this Court considered to be inherently national in character and that for over a hundred years had been governed by principles of federal common law. Pet. 22.[2] When Congress displaced that common law with a comprehensive federal regulatory scheme, some courts correctly concluded that this enactment did not "suddenly" make state law "presumptively competent" to regulate interstate activities but merely replaced "a federal court-made standard with a legislative one." *City of New York v. Chevron Corp.*, 993 F.3d 81, 98 (2d Cir. 2021). But the Colorado Supreme Court below wrongly concluded that replacing federal common law with statutory law meant that fifty States could each regulate inherently national activity unless a court could locate "clear and manifest purpose" to "supersede[]" state law. Pet. App. 11a (applying the presumption against preemption).

The Communications Act provides a similar case study. Section 2 of the Act provides that the federal government has jurisdiction over interstate communications, on one hand, and States have jurisdiction over intrastate communications, on the other. *See* 47 U.S.C. § 152. Congress borrowed this language originally from the late-nineteenth century Interstate Commerce Act, adopted at a time when courts still embraced the Founding-era view that States could not regulate interstate activities unless Congress

[2] CTIA's members take no position on the underlying environmental policy issues implicated by the federal and state laws at issue in this case.

authorized them to do so. *Leisy v. Hardin*, 135 U.S. 100, 108 (1890). In that era, reflecting the original constitutional design, congressional "silence" on an issue was "equivalent to a declaration that that particular commerce shall be free from regulation." *Missouri ex rel. Barrett v. Kan. Nat. Gas Co.*, 265 U.S. 298, 308 (1924).

Nonetheless, the absence of modern-day express preemption language in Section 2 of the Act has led courts wrongly to conclude that States may regulate even admittedly interstate services—such as the entire, end-to-end national broadband Internet network—through invoking a presumption against preemption or its equivalent. For example, the Ninth Circuit has reasoned that absent "express preemption" language in the Act, States "otherwise . . . have concurrent authority to regulate interstate services." *ACA Connects*, 24 F.4th at 1248. Similarly, the Second Circuit has concluded that the "*absence* of regulation" under the Communications Act means that Congress did not intend to preempt the field with respect to interstate broadband networks. *N.Y. State Telecomms. Ass'n*, 101 F.4th at 152.

The result of the misapplication of the presumption against preemption in cases like these, contrary to what Congress and the Constitution envision, can be devastating for providers of critical interstate communications services. Because communications network architecture and engineering often transcend state lines—as do the many phone calls, emails, text messages, and other communications that connect people nationwide—it can be impracticable if not impossible for providers to apply one set of technical

standards in California and another in Kansas. Rather than comply with a single, national set of regulations that reflect input from stakeholders across the country, providers often have to default to the most restrictive State's standards (which are ever-shifting). The result is significant regulatory cost and uncertainty, and damage to the constitutional structure, as regulators in Sacramento, Albany, or other state capitals can effectively impose nationwide standards on interstate commerce.

The Court should make clear that the presumption against preemption does not apply to state laws in traditionally federal fields like the one at issue in this case and that, if anything, preemption should be "presumed" in such "primarily . . . federal" areas. *Ouellette*, 479 U.S. at 491–92; *cf. Biden v. Nebraska*, 600 U.S. 477, 511–16 (2023) (Barrett, J., concurring) (explaining that interpretive presumptions are valid to the extent they function as a textual "interpretive tool reflecting common sense as to the manner in which Congress is likely" to legislate in light of background constitutional, legal, and historical contexts (cleaned up)).

ARGUMENT

I. The Presumption Against Preemption Should Not Apply Where, as Here, the Regulatory Field Is Traditionally Federal.

A. The Constitution's Structure Militates Against Applying the Presumption in This Context.

In holding that federal law did not preempt the state-law claims of the County Commissioners of Boulder County and the City of Boulder (collectively, "Boulder") against Suncor Energy and Exxon Mobil, the Colorado Supreme Court put a thumb on the analytical scale in favor of Boulder by applying the "presumption against preemption." Pet. App. 11a–12a. And other courts have done the same in related cases. *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1203 (Haw. 2023) ("Courts begin with the presumption that state laws and claims are not preempted."). But in cases like this involving "an area traditionally governed by federal law," Pet. App. 36a (Samour, J., dissenting), the presumption against preemption should not apply. To the contrary, if anything, in these areas preemption may be "presumed," *Ouellette*, 479 U.S. at 491, and the question is "whether federal law '*authorizes* resort to state law,'" Pet. App. 35a (Samour, J., dissenting) (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984) ("*Milwaukee III*")); *accord Chevron Corp.*, 993 F.3d at 99 (citing, *inter alia*, *Ouellette*, 479 U.S. at 492).

This conclusion follows from first principles. The Court created the presumption against preemption to guard against permitting inadvertent federal

encroachment into the "historic police powers of the States." *Rice*, 331 U.S. at 230. But under the Constitution's structure, not every regulatory domain falls under the auspices of the States' "historic police powers." *Id.*; *see, e.g.*, *Locke*, 529 U.S. at 108 (discussing the field of "national and international maritime commerce" in which "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers"). After all, the Constitution deliberately "split the atom of sovereignty itself into one Federal Government and the States." *Seila Law LLC v. CFPB*, 591 U.S. 197, 223 (2020) (cleaned up). And in doing so, the Framers allocated authority over certain fields to the federal government, removing that authority in turn from the domain of the States' police power. *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838) (under the Constitution, States are "sovereign within their respective boundaries, save that portion of power which they have granted to the federal government").

In other words, the "Constitution limits state sovereignty in several ways," both "directly" and "implicit[ly]." *Murphy v. NCAA*, 584 U.S. 453, 470 (2018) (citing, *inter alia*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008)). And as relevant here, one prominent way in which the Constitution did so was by committing the field of interstate commerce to Congress. *See* U.S. Const. art. I, § 8, cl. 3.

Rectifying the commercial relations among the States—or lack thereof—under the Articles of Confederation was the main impetus for the Constitutional Convention. *Gibbons*, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring in the judgment) (the "immediate

cause, that led to the forming of a convention," was "a conflict of commercial regulations, destructive to the harmony of the States"). As Alexander Hamilton observed, some States had adopted "interfering and unneighborly regulations" that were "contrary to the true spirit of the Union" that, "if not restrained by a national control, would be multiplied and extended" to the ultimate demise of the Nation. *The Federalist* No. 22 (Alexander Hamilton); *accord The Federalist* No. 7 (Alexander Hamilton) (expressing the dangers of each State pursuing "a system of commercial policy peculiar to itself").

So apparent was the need for a "unity of government" in the field of interstate commerce, *The Federalist* No. 11 (Alexander Hamilton), that members of the founding generation spanning the ideological spectrum were essentially of one accord in the view that this power should belong to the national government, not the States. *E.g.*, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533–34 (1949) (explaining that this "necessity" was "so obvious and so fully recognized" at the Constitutional Convention that "the few words of the Commerce Clause were little illuminated by debate"); 3 Elliot, *The Debates in the Several State Conventions* 260 (1836) (James Madison) (asserting in the Virginia ratification debates that "[a]ll agree that the general government ought to have power for the regulation of commerce" and that such power would protect the Union against "interfering regulations of different states").

On one hand, Federalists of the day argued "that 'nothing short of vesting Congress with full powers to regulate the internal as well as the external commerce

of all the states, can reach the mischiefs'" then-plaguing the country. Peter S. Onuf & Cathy Matson, *Republicanism & Federalism in the Constitutional Decade*, 102 Am. Antiquarian Soc'y 181, 190–91 (1992) (quoting *Resolutions of the Merchants, Traders and others of the town of Boston, April 22, 1785*, *Pennsylvania Gazette*, June 8, 1785); *see also* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1886 (2011) (discussing a pseudonymous piece by "Pro Bono Republicae" published in the Pennsylvania Gazette around the same time, which "call[ed] it 'a very ridiculous idea, that every State should enjoy a power of regulating its trade, for every State has a separate interest to pursue, and thus different regulations will always clash'"); *cf. The Federalist* No. 22 (Alexander Hamilton) (identifying the "gradual conflicts of State regulations" of commerce as an inherent threat to national unity).

On the other hand, though "the Anti-Federalists objected to a great many things in the new Constitution," "nary a peep was heard against the view that the control over commerce in its foreign and interstate aspects should be centralized." Friedman & Deacon, *supra*, at 1893–94; *see also, e.g.*, *Federal Farmer* No. 6 (1787) ("The powers of the union ought to be extended to commerce, the coin, and national objects . . . .").

And those in the middle concurred. For instance, at the Constitutional Convention James Madison explained that the "regulation of Commerce was in its nature indivisible and ought to be wholly under one authority" and that giving Congress the power to regulate interstate commerce would "exclude this power

of the States." 2 M. Farrand, Records of the Federal Convention of 1787, at 625 (1911); *accord The Federalist* No. 14 (James Madison) ("WE HAVE seen the necessity of the Union . . . as the guardian of our commerce and other common interests . . . ."). And Robert R. Livingston explained in the New York ratification debates that the authority to regulate interstate commerce had to be allocated to the federal government because "this power could never be trusted to the individual states, whose interests might, in many instances, clash with that of the Union." 2 Elliot, *supra*, at 214–15.

Accordingly, the Constitution vested in the new federal "Congress the power to regulate commerce . . . among the States" with a view to ensuring "uniformity of regulation against conflicting and discriminating State legislation." *Mobile County v. Kimball*, 102 U.S. 691, 697 (1880); *see also McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States."). And this allocation of authority to the federal government not only "granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States" but also inherently "effected a curtailment of state power" of its own force. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *see also, e.g.*, 1 Farrand, *supra*, at 416 (quoting James Wilson who placed "Commerce" alongside "War, Peace, [and] Treaties" as powers "peculiar" to the federal government).

Leading federal jurists in the early post-ratification period recognized as much. For instance, while

riding circuit, President Jefferson's first appointee to this Court, Justice William Johnson, Jr., held that a pro-slavery South Carolina law violated the Commerce Clause, reasoning in the process that the "unquestionable" and "universal construction" of the Commerce Clause at the time was that it vested in the "general government . . . a paramount and exclusive right." *Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366). And soon thereafter, in this Court's "first extended discussion of the dormant commerce power," Friedman & Deacon, *supra*, at 1905, Chief Justice Marshall spoke approvingly of the view that the Commerce Clause gave "full power" over interstate commerce to the federal government, *Gibbons*, 22 U.S. (9 Wheat.) at 209 (opinion of Marshall, C.J.), leaving "exclusively internal commerce" alone to the States, *id.* at 195.

Subsequently, that understanding was "accepted constitutional doctrine" for the better part of the Nation's history. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *see also, e.g.*, *H.P. Hood & Sons*, 336 U.S. at 535 ("[T]he right to engage in interstate commerce is not the gift of a state, and . . . a state cannot regulate or restrain it."); *Int'l Text-Book Co. v. Pigg*, 217 U.S. 91, 112 (1910) ("It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."); *R.R. Co. v. Husen*, 95 U.S. 465, 471–72 (1877) ("[W]hatever may be the nature and reach of the police power of a State . . . . It cannot invade the domain of the national government. . . . police powers[] can[not] be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the

Constitution."); *cf. Mayor, Aldermen & Commonalty of City of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding a state law against a Commerce Clause challenge on the basis that it was not "a regulation of commerce, but of police").

Granted, this Court's Commerce Clause jurisprudence would eventually evolve substantially from that traditional understanding. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 15–16 (2005) ("[O]ur understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."); *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 309 (1992) ("Our interpretation of the 'negative' or 'dormant' Commerce Clause has evolved substantially over the years . . . ."), *overruled on other grounds by South Dakota v. Wayfair*, 585 U.S. 162 (2018).[3] Even so, "[c]onsistent with these [first] principles," *Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 98–99 (1994) (citing, *inter alia*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)), the Court has not abandoned this traditional understanding (even if it has reworked how it applies). *See Pike*, 397 U.S. at 142 (enunciating a "general rule" out of prior dormant Commerce Clause cases); David S. Day, *Revisiting* Pike: *The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause*

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[3] *But see N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022) (the Constitution's "meaning is fixed according to the understandings of those who ratified it"); *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring) ("the meaning of constitutional text is fixed at the time of its ratification"); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring in the judgment) ("The Constitution's meaning is fixed, not some good-for-this-day-only coupon . . . .").

Doctrine, 27 Hamline L. Rev. 45, 46 (2004) (describing *Pike* as a "conscious effort to synthesize" earlier dormant Commerce Clause caselaw). Rightly so—as a majority of this Court recently confirmed, "the Constitution the Framers adopted in Philadelphia in 1787" demands nothing less. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 407 & n.3 (2023) (Kavanaugh, J., concurring in part and dissenting in part); *accord id.* at 395 (Roberts, C.J., concurring in part and dissenting in part) ("Today's majority does not pull the plug [on *Pike*]. For good reason: . . . it . . . reflects the basic concern of our Commerce Clause jurisprudence that there be 'free private trade in the national marketplace.'" (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997))).

In any event, this traditional understanding of the division of federal and state power confirms that the regulation of interstate activity is not within the ambit of the States' "historic police powers." *Rice*, 331 U.S. at 230. Further, this traditional understanding formed the backdrop against which Congress enacted a number of complex regulatory statutes governing primarily interstate activities. And those enactments must be interpreted in light of that background understanding. *See, e.g.*, *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) ("It is a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." (cleaned up)); *TRW Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment) ("To apply a new background rule to previously enacted legislation would reverse prior congressional judgments . . . .").

That is the case here. Suncor Energy and Exxon Mobil are alleged to have engaged in activities in a field that has long been recognized to belong to the federal government to regulate—the field of conduct affecting "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 105 n.6 (1972), *abrogation on other grounds recognized by City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"); *see also Milwaukee II*, 451 U.S. at 313 n.7 (indicating that the Court had previously fashioned a federal-common-law rule of decision in the case "because state law cannot be used" in that field); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("Environmental protection is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." (cleaned up)); *Chevron Corp.*, 993 F.3d at 91 ("For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." (collecting authorities)).

Against this backdrop, Congress enacted the Clean Air Act. In doing so, Congress "displace[d]" the previous "federal common-law" rules that courts had crafted. *Am. Elec. Power Co.*, 564 U.S. at 424. But Congress did so "not in a field in which the states have traditionally occupied, but one in which the states have traditionally *not* occupied." *Chevron Corp.*, 993 F.3d at 98 (cleaned up); *accord Mayor & City Council of Balt. v. B.P. P.L.C.*, 353 A.3d 1142, 1171–76 (Md. 2026).

So "in contrast to situations implicating federalism concerns and the historic primacy of state regulation,"

"no presumption against pre-emption obtains in this case." *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 348 (2001) (cleaned up); *accord Locke*, 529 U.S. at 108 (declining to apply this "artificial presumption" in similar circumstances); *cf.* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2087 (2000) ("[T]he constitutional structure of federalism does not admit to a general presumption against federal preemption of state law."). To the contrary, preemption is implicit in the statute, and "the only state suits that remain available are those specifically preserved" by the Clean Air Act. *Ouellette*, 479 U.S. at 492; *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387–88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . . .").

B. The Field of Interstate Communications Illustrates Why the Presumption Should Not Apply to Primarily Interstate Activities.

The field of interstate communications, in which CTIA's members operate, provides a helpful parallel illustration for why the presumption against preemption does not apply—and, if anything, the converse does—in this case.

In the form we know it today, the field of interstate communications took shape in the late nineteenth century. At that time, federal authority over the field of interstate commerce generally was understood to be "exclusive." *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895); *accord Wabash, St. Louis & Peoria Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886) (regulations in

this field "must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations"). Per this traditional understanding, States had no "jurisdiction" to regulate in the field unless authorized to do so by "congressional action." *Leisy*, 135 U.S. at 108. Otherwise, Congress's "silence" was "equivalent to a declaration that that particular commerce shall be free from regulation." *Kan. Nat. Gas Co.*, 265 U.S. at 308.

Against this backdrop, Congress enacted the Mann-Elkins Act, amending the Interstate Commerce Act to give the Interstate Commerce Commission authority over "telegraph, telephone, and cable companies . . . engaged in sending messages from one State . . . to any other State" (while leaving to States the regulation of such messages transmitted "wholly within one State"). Pub. L. No. 61-218, § 7, 36 Stat. 539, 544–45 (1910). As this Court recognized soon thereafter, that jurisdictional allocation—tracking the Court's contemporary Commerce Clause jurisprudence—"was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefor was an occupation of the field by Congress which excluded state action." *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919); *accord W. Union Tel. Co. v. Boegli*, 251 U.S. 315, 316 (1920) (holding that the Mann-Elkins Act "so clearly establish[ed] the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate . . . an interstate telegram").

Congress then carried that interstate-intrastate jurisdictional allocation forward in the Radio Act of 1912, Pub. L. No. 62-264, § 1, 37 Stat. 302, 302 (1912); in the Radio Act of 1927, Pub. L. No. 69-632, § 1, 44 Stat. 1162, 1162 (1927); and ultimately in the Communications Act of 1934, 47 U.S.C. § 152(a)–(b). Unsurprisingly given the construction that language had been given in predecessor statutes, originally this allocation was understood to make the field of interstate communications exclusively federal generally. *See, e.g.*, *FRC v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 279 (1933) ("No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."); *Allen B. Dumont Lab'ys v. Carroll*, 184 F.2d 153, 156 (3d Cir. 1950) ("We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States."); *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("[T]he duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in this area."). As this Court later noted, the plain language of the Communications Act "divide[s] the world . . . into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction," even though actions regulators take "within their respective domains" can affect "the other 'hemisphere.'" *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

In other words, according to the original meaning of Section 2 of the Communications Act of 1934, the field of interstate communications is "inherently federal in character." *Buckman Co.*, 531 U.S. at 347. Preemption is therefore innate—that is, "it may be presumed," *Ouellette*, 479 U.S. at 491—except insofar as "congressional action" provides otherwise. *Leisy*, 135 U.S. at 108; *cf. C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause." (quoting *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984))). In this field, too, a presumption against preemption has no place.

II. Applying the Presumption Against Preemption in Traditionally Federal Fields Exacerbates the Very Problems That the Constitution's Structure Is Meant to Ameliorate.

The commitment of historically national fields to the federal government reflects the Framers' conviction baked into the Constitution's structure "that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (Cardozo, J.). As James Madison explained, the commitment of interstate matters such as these to the national government "provide[s] for the harmony and proper intercourse among the States." *The Federalist* No. 42 (James Madison); *accord Pennsylvania v. West*

Virginia, 262 U.S. 553, 596 (1923) ("By the Constitution . . . the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. . . . It means that in the matter of interstate commerce we are a single nation—one and the same people."). But too often in such fields, the inapt presumption against preemption has been wielded to frustrate these aims, undermine rather than reinforce the Constitution's structure, and create regulatory confusion.

Consider, for instance, the fundamental principle that each State in the Union enjoys "equal dignity and sovereignty," *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 245 (2019), a principle "essential to the harmonious operation of the scheme upon which the Republic was organized," *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (cleaned up). A necessary corollary of this principle is that no state "can enforce its own policy" upon another. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907). But when the presumption against preemption is wrongly applied to regulations in traditionally federal fields, states can do just that.[4]

Under the principle of equal sovereignty, neither states nor their subdivisions may "impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *BMW of*

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[4] *But see Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) ("[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."); *cf. First Choice Women's Res. Ctrs., Inc. v. Davenport*, 608 U.S. ----, 2026 WL 1153029, at *11 (2026) ("Our Constitution . . . prohibits subtle . . . interference with protected liberties no less than it does heavy-handed frontal attacks." (cleaned up)).

N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996). But absent the Court's intervention, courts around the country are at risk of doing just that, by applying a presumption against preemption that would permit conflicting and overlapping state laws to govern in traditionally federal fields, contrary to congressional intent.

These problems are not merely theoretical: they have arisen in recent years in cases implicating the field of interstate communications impacting CTIA's members. For instance, in *New York State Telecommunications Association*, CTIA and several affiliated trade associations challenged as preempted a New York law that imposed rate regulations on the concededly interstate provision of broadband Internet service to certain New Yorkers. 101 F.4th at 139, 148, 148 n.10. Repeatedly invoking the presumption against preemption, and ignoring the statutory background and original meaning of Section 2 of the Communications Act, the majority rejected this challenge, reasoning that "nothing in the text suggests that the FCC has *exclusive* jurisdiction over interstate communication." *Id.* at 148–51. On this basis, New York's law regulating "the rates charged" for "interstate communications services" was upheld. *Id.* at 153. But as Judge Sullivan—the author of the Second Circuit's decision in *Chevron Corp.*—rightly noted in dissent, the court's decision wrongly "embolden[ed] states like New York to impose costs on broadband internet service that extend well beyond their borders." *Id.* at 169 (Sullivan, J., dissenting).

Or consider *ACA Connects*, another case in which CTIA and affiliated trade associations sued to challenge as preempted a state law regulating the

inherently interstate activity of providing broadband Internet service. 24 F.4th 1233. Not only ignoring the original meaning of Section 2 of the Communications Act but also interpreting the Act as if it "assum[ed] that states . . . would have concurrent authority to regulate interstate services," the court concluded that CTIA and the other trade associations were "unlikely to prevail on their argument" that the law was preempted and affirmed the denial of a preliminary injunction. *Id.* at 1248. And that had the predictable effect of permitting California to "enforce its own policy" beyond its borders. *Contra Kansas*, 206 U.S. at 95; *see, e.g.*, Opening Br. of Pls.-Appellants Broadband Provider Ass'ns at 61, *ACA Connects*, 24 F.4th 1233 (No. 21-15430), 2021 WL 1499801 (explaining how mobile providers had been "forced to withdraw beneficial service offerings from the marketplace" generally because of the law).

But allowing one State to "effectively force other States to regulate in accordance with [its] idiosyncratic state demands" does not comport with "the Constitution the Framers adopted in Philadelphia in 1787," let alone the Communications Act. *Nat'l Pork Producers Council*, 598 U.S. at 407 & n.3 (Kavanaugh, J., concurring in part and dissenting in part) (defending the *Pike* balancing test's role in effectuating this constitutional commitment in cases involving nondiscriminatory state laws). And such a "chaotic regulatory structure," *Ouellette*, 479 U.S. at 497, not only contravenes the Framers' design but also self-inflicts economic harm on the Nation. *See also Milwaukee III*, 731 F.2d at 414 ("For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic

confrontation between sovereign states."); Pet. App. 45a (Samour, J., dissenting) ("Such local regulation will invite chaos."). Neither the Constitution, nor the presumption against preemption meant to implement its structure, compels such a result. Rather, in traditionally federal fields like the one at issue in this case—or the one CTIA's members operate in—the presumption against preemption has no place. To the contrary, preemption "may be presumed." *Ouellette*, 479 U.S. at 491. The Court should use this opportunity to make that point clear.

CONCLUSION

The Court should reverse the judgment of the Colorado Supreme Court.

Respectfully Submitted,

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May 21, 2026

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