

No. 25-170

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**In the Supreme Court of the United States**

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SUNCOR ENERGY, INC., ET AL.,  
*Petitioners,*

v.

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

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*On Writ of Certiorari to the  
Colorado Supreme Court*

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**BRIEF OF AMICUS CURIAE  
CONSUMERS' RESEARCH  
IN SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

- (1) Whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate; and
- (2) Whether this Court has statutory and Article III jurisdiction to hear this case.

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## INTEREST OF AMICUS CURIAE

Consumers' Research is an independent educational 501(c)(3) nonprofit organization whose mission is to increase the knowledge and understanding of issues, policies, products, and services of concern to consumers and to promote the freedom to act on that knowledge and understanding. Consumers' Research believes that the cost, quality, availability, and variety of goods and services used or desired by American consumers—from both the private and public sectors—are improved by greater consumer knowledge and freedom. To that end, Consumers' Research engages in research, policy advocacy, and public engagement initiatives.

Consumers' Research has extensive experience studying consumer-related issues involving efforts to use litigation and regulatory pressure to reshape the national energy market in ways that drive up costs and reduce choice for consumers across the country. The holding of the Colorado Supreme Court, if left in place, would expose energy producers to a patchwork of inconsistent state-court judgments and effectively allow Colorado—or any other State—to dictate energy policy for the entire Nation. That would reduce competition, raise prices, and diminish the energy options available to American consumers in every State. For these reasons, Consumers' Research has a significant interest in this case.\*

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\* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

In our federal system, one State cannot govern the whole Nation. Yet the Colorado Supreme Court's judgment blesses Boulder County's efforts to do precisely that here. Invoking state nuisance law, Boulder County has obtained a judicial decree that regulates conduct occurring outside of Colorado's borders—in States where that conduct was both lawful and beyond Colorado's sovereign authority.

Federal law may preempt Boulder County's gambit. *See* Pet. Br. 12-14. But other federalism concerns presented here—and by similar gambits throughout the country—warrant a different result. Preemption assumes that absent the federal law, a State would have authority to regulate. Yet Colorado has never had authority to extend its laws beyond its borders and regulate conduct occurring in other sovereign States. That principle of territorial jurisdiction prohibits a State's laws from applying outside its borders. And that principle applies with full force to state common-law judgments. After all, a State exercises sovereign power not only through statutes and regulations, but also through applying its common law in civil litigation. Damages, abatement, and remediation orders are powerful tools for governing conduct, and States cannot use those litigation tools to accomplish what direct legislation could not.

This dispute implicates more than mere energy policy. If Colorado may impose its nuisance law on lawful conduct occurring in other States, every State may try to use its own tort law to regulate every

nationally significant industry. The resulting patchwork of competing state-law commands would wreak havoc on consumers; nationwide commerce would be governed by the most aggressive State's preferred policy. The Constitution does not permit that result. Because Boulder County's claims violate the doctrine of territorial jurisdiction, the judgment below should be reversed.

## ARGUMENT

### I. States Have Significant Authority—But Only Within Their Own Borders.

When the Founders ratified the Constitution, the longstanding “historic tradition” drawn from the law of nations was that “all the States enjoy equal sovereignty.” *Shelby County v. Holder*, 570 U.S. 529, 540 (2013) (cleaned up). Ratifying the Constitution both “preserve[d] the sovereign status of the States,” *Alden v. Maine*, 527 U.S. 706, 714 (1999), and “transform[ed]” the States “from a loose league of friendship into a perpetual Union based on the ‘fundamental principle of *equal* sovereignty among the States,” *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 246 (2019) (cleaned up). At the core of that inherent sovereignty lies the power of each State to prescribe rules governing conduct within its own territory. After all, “[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or prescribed within its borders.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

But coequal sovereignty among States has a necessary corollary: Each State’s power within its own borders stops at those borders. This Court reiterated just last Term that a “state[’s] sovereign authority is bounded by the States’ respective borders.” *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 14 (2025). Each State’s residual sovereignty under the Constitution carries with it an inherent constraint on its prescriptive power. A State may not prescribe rules that directly govern conduct beyond its “territorial limitations.” *Id.* (cleaned up); *see also, e.g., Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023) (discussing “territorial limits of state authority under the Constitution’s horizontal separation of powers”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (invoking the “principles of state sovereignty and comity”).

This general principle—that a State cannot regulate conduct occurring outside its territorial jurisdiction—stems from the preexisting inherent sovereignty of States. It’s embodied in provisions of the Constitution that address extraterritorial restrictions on States. And this Court has employed it to bar individual States from directly imposing their will on other States by regulating conduct outside their territorial jurisdiction. This principle of territorial jurisdiction functions as a doctrine of constitutional law and prevents Colorado from using its tort law to regulate fossil fuel activities that are outside Colorado’s territorial jurisdiction and that are lawful where they occur.

**A. The doctrine that States can regulate only within their territorial jurisdiction derives from the law of nations and predates the Founding.**

1. Upon declaring independence, the Colonies laid claim “to all the rights and powers of sovereign states.” *Franchise Tax Bd.*, 587 U.S. at 237-38. When those then-States later came together to form a union, they enshrined a constitutional order that “preserves the sovereign status of the States,” *Alden*, 527 U.S. at 714, and reserves to each State “numerous and indefinite” sovereign powers, *The Federalist*, No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). Each State retained authority over “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Id.* And against one another, the States stand “upon an equal footing, in all respects whatever.” *Pollard v. Hagan*, 44 U.S. 212, 224 (1845). Thus, the Founding proceeded from the “historic tradition that all the States enjoy equal sovereignty,” *Shelby County*, 570 U.S. at 540, and that “[t]he States in the Union are coequal sovereigns under the Constitution,” *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012).

This principle of equal sovereignty among States derives from the law of nations that preexisted the constitutional order itself. Swiss jurist Emmerich de Vattel wrote in his 1758 *Law of Nations* that each sovereign state has exclusive authority within its own territory, and no sovereign state could rule over or judge what occurs in another sovereign state. A “sovereign ... alone is directly interested in the

manner in which” it “makes use of [its] power,” so no “foreign power” can second-guess “the administration of that sovereign,” or “set himself up for a judge of his conduct, and to oblige him to alter it.” 2 Vattel, *The Law of Nations* §54, p. 155 (J. Chitty ed. 1854).

Vattel “was ‘widely consulted by the constitutional generation in the United States,’ and was ‘invariably invoked as authoritative on matters of international law.’” *Fuld*, 606 U.S. at 28 n.1 (Thomas, J., concurring in judgment). His view of the law of nations and States’ inherent, overlapping sovereignty found its way into our constitutional ratification debates. Those discussions of each State’s sovereignty confirm that the Framers understood territorial jurisdiction as a structural limit on State authority, such that States are sovereign within their own borders and may not regulate conduct that occurs outside their borders and is lawful in other States where it occurs.

At the Massachusetts Convention, William Heath articulated the baseline principle. “Each state is sovereign and independent to a certain degree, and the states have a right, and they will regulate *their own internal affairs* as to themselves appears proper.” 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 115 (Jonathan Elliot ed., 2d ed. 1836) (emphasis added). Heath was equally explicit about that principle’s corollary—Massachusetts had no power to interfere with slavery in the southern states, and “no right to compel” the “Southern States” to conform to Massachusetts’ own anti-slavery laws. *Id.* (emphasis added). Heath acknowledged that joining the Union neither expanded nor restricted the inherent law of nations

afforded to Massachusetts' internal affairs. Massachusetts' sovereignty still could not be encroached upon (except in the areas ceded to the federal government), and it still could not encroach on any other sovereign State. *See id.*; *see also* Shearer, *Locating Extraterritoriality*, 100 *Bost. U. L. Rev.* 1501, 1527 (2020).

James Madison confirmed the same principle from the opposite direction at the Virginia Convention. Madison acknowledged that an enslaved person who reached a free state “becomes emancipated by their laws,” thus conceding that Virginia’s slavery laws had no force beyond Virginia’s borders. 3 *Debates, supra*, 453. The laws of the states, Madison stated, were “uncharitable to one another in this respect.” *Id.* But Madison acknowledged that the laws of nations meant that “Virginia could not project its laws beyond its borders absent some constitutional authorization to the contrary.” Shearer, *supra*, 1528.

Other delegates underscored the same understanding of the territorial-jurisdiction principle. In New York, James Duane noted that “it will be in the power of every state” to regulate for themselves the matters left for the States, and asked rhetorically whether “[i]s every state to be compelled to adopt our ideas on all subjects?” and “[w]ill it not seem extraordinary that any one state should presume to dictate to the Union?” 2 *Debates, supra*, 327-28. In the same debate, Melacton Smith emphasized that state governments were designed for “local purposes” and could not operate beyond that sphere. *Id.* at 332. And in Pennsylvania, James Wilson grounded the entire system in popular sovereignty—sovereign

States could exercise power only to the extent it was granted by its people. *Id.* at 443-44. A State therefore cannot regulate those who never submitted to its authority, because the people could not have conferred such power in the first place.

Together, these statements demonstrate that the Framers viewed territorial jurisdiction as a preexisting aspect of sovereignty inherent in statehood that would survive the federal compact. A sovereign that could project its laws into sister states would undermine the coequality on which the Union was premised. The Constitution did not create that limit—it codified and enforced one that the Framers universally acknowledged already existed.

Given its ubiquity, the same principle moved from the ratification debates into the foundational legal treatises of the early Republic. The doctrine of territorial jurisdiction found its way into Justice Joseph Story’s seminal treatise on conflicts of laws. According to Justice Story, every sovereign State “establishes the exclusive jurisdiction ... within its own territor[y].” Story, *Commentary on the Conflict of Laws* §8 (1834). This meant that the laws of a State “can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction” of that State, and “no state or nation can, by its laws, directly affect, or bind property out of its own territory.” *Id.* §§7, 20. Likewise, “[n]o nation can be justly required to yield up its own fundamental policy and institutions in favour of those of another nation.” *Id.* §25.

Others shared Story's understanding. His contemporary, Chancellor James Kent, stated the anti-extraterritorial legislation principles with equal clarity in his *Commentaries on American Law*: "[I]f a statute ... was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow." 2 Kent, *Commentaries on American Law* 100 (New York, O. Halsted, 1827). For Kent, the principle followed from the nature of sovereignty itself, since "each nation has a right to govern itself as it deems proper, and no one nation is entitled to dictate" the "course of internal policy, to another." *Id.* at 91 (citing Vattel).

2. From the preexisting law of nations, early treatises, and ratification debates, the general principle that a State cannot impose its will outside of its territorial boundaries found its way into the Constitution itself. The doctrine of territorial jurisdiction is "one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole." Regan, *Siamese Essays*, 85 Mich. L. Rev. 1865, 1885 (1987). The principle that States must respect the sovereignty of sister States and may not regulate conduct occurring beyond their own borders appears in several constitutional guarantees. *Cf. Nat'l Pork Producers*, 598 U.S. at 408-09 (Kavanaugh, J., concurring).

*First*, the Full Faith and Credit Clause commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1. At its core, that rule requires mutual respect

among coequal sovereigns. The Clause forbids any State from “adopting any policy of hostility to the public Acts” of another State. *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). And it imposes a “constitutional obligation to enforce the rights and duties validly created under the laws of other states.” *Hughes v. Fetter*, 341 U.S. 609, 611 (1951).

The Full Faith and Credit Clause has an obvious territorial-jurisdiction dimension. Consider the context here: When a State applies its own tort law to impose liability for emissions occurring entirely in another State, it does more than adjudicate a dispute—it also displaces the source State’s policy judgments about how emissions should be regulated. The source State’s judgments—reflected in its statutes, permits, or regulatory schemes—are “public Acts” entitled to respect under Article IV. A contrary approach would allow one State, through its tort law, to override another’s sovereign decisions governing conduct within its own territory. That is precisely the “hostility” the Clause forbids. *See Kansas v. Colorado*, 206 U.S. 46, 95-97 (1907) (no state “can impose its own legislation” or “enforce its own policy upon the other[s]”). And it helps to explain why “the Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality.” Rosen, *State Extraterritorial Powers Reconsidered*, 85 *Notre Dame L. Rev.* 1133, 1153 (2010); *see also* Laycock, *Equal Citizens of Equal and Territorial States*, 92 *Colum. L. Rev.* 249, 290, 296-301 (1992).

*Second*, the Privileges and Immunities Clause likewise limits a State’s ability to regulate beyond its territorial borders. That Clause guarantees that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, §2, cl. 1. The Clause bars discrimination against out-of-state citizens absent a “substantial reason” beyond “the mere fact that they are citizens of other States.” *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Its aim is to place citizens of all States “upon the same footing.” *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

Tort liability that exceeds a State’s territorial jurisdiction implicates that constitutional guarantee. Again consider this context: When a State subjects out-of-state actors to its tort standards for emissions occurring wholly elsewhere, it imposes regulatory burdens on nonresidents who had no voice in shaping those standards. Those actors face liability if they do not conform their conduct in their home States to the forum State’s preferred rules. That is discrimination in substance—citizens located outside Colorado are saddled with obligations from the policy choices of a different sovereign. The Clause does not permit a State to subject nonresidents to such direct regulatory burdens absent a substantial, territorially grounded justification.

*Third*, the Import-Export Clause reinforces the same limit from a different angle. That Clause provides that no State may impose “any Imposts or Duties on Imports or Exports” without congressional consent. U.S. Const. art. I, §10, cl. 2. Although this Court has confined the Clause to foreign imports only,

see *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 133-36 (1869), the underlying concern is instructive: States may not use their control over market access to impose burdens on goods produced elsewhere. *But see Camps Newfound/Owatonna, Inc., v. Town of Harrison*, 520 U.S. 564, 636-37 (1997) (Thomas, J., dissenting) (“*Woodruff* was, in all likelihood, wrongly decided.... [T]he Constitution already affords us a textual mechanism” that “address[es] the more egregious of state actions discriminating against interstate commerce.”).

This manifestation of the territorial-jurisdiction principle is implicated when a State uses tort law to regulate out-of-state emissions. When a State imposes damages for conduct occurring in another State, that operates as a de facto levy on that conduct—forcing producers to internalize costs dictated by a foreign sovereign or abandon the activity altogether. The burden is regulatory in effect: it compels out-of-state actors to conform their operations to the forum State’s standards. That functional equivalence to an impost raises the same concerns the Clause was designed to prevent, particularly when one State seeks to influence production practices beyond its borders through the threat of liability.

*Fourth*, while some now question the applicability of the dormant Commerce Clause to early territorial jurisdiction decisions, see *Nat’l Pork Producers*, 598 U.S. at 376 n.1; Regan, *supra*, 1888, the archetypal dormant Commerce Clause cases made clear that one State may not “project its legislation into other States” or “contro[l] commerce occurring wholly outside the boundaries of a State.” *Healy v. Beer Institute, Inc.*,

491 U.S. 324, 334 (1989) (cleaned up); *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (“New York has no power to project its legislation into Vermont.”). Dormant Commerce Clause cases now consider hard questions about whether in-state regulations “discriminate ... against out-of-state economic *interests*” or have “extraterritorial effects,” but all agree that the dormant Commerce Clause precludes a State from “*directly* regulat[ing] out-of-state” conduct that has “*no connection to the State.*” *Nat’l Pork Producers*, 598 U.S. at 364, 373, 376 n.1; *see also Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (applying the dormant Commerce Clause where a law “directly regulates” conduct that “take[s] place across state lines, even if wholly outside the State”) (plurality op.). After all, at the Founding, no individual State had authority to regulate commerce beyond its borders. The Commerce Clause vested this nationwide regulatory power in Congress, and its “negative” corollary simply confirms that the States retained no such extraterritorial commerce authority themselves.

When applied to prohibit States from directly regulating conduct that occurs outside their territorial borders, the dormant Commerce Clause forecloses the use of state tort law to regulate matters like out-of-state emissions. Imposing liability under one State’s law for conduct occurring wholly in another State is, in substance, an attempt to “*directly* regulat[e] out-of-state” activity with “*no connection to the State.*” *Nat’l Pork Producers*, 598 U.S. at 376 n.1 (emphasis added). It is a projection of one State’s policy choices into another’s territory—the very thing *Healy* and *Baldwin* forbid. And the defect is only magnified in

the interstate-emissions context, where multiple States could impose competing tort regimes on the same conduct, subjecting actors to inconsistent obligations and effectively placing nationwide commerce under the control of whichever State's law is most restrictive.

*Fifth*, one application of the Fourteenth Amendment's Due Process Clause implicates the territorial jurisdiction principle, barring one State's laws from regulating conduct occurring wholly in another. U.S. Const. amend. XIV, §1. This Clause operates as "an instrument of interstate federalism" that limits a State's lawful reach. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980); see also *Rosen, supra*, 1137-38 ("[D]ue process primarily protects individuals from being unfairly subject to another state's laws."). That limit applies to both jurisdiction and choice-of-law—a State may apply its own substantive law only where it has "significant contact[s]" with the conduct at issue, such that applying its own law to out-of-state conduct is neither "arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (cleaned up). Where the conduct occurred entirely in another State, and was lawful under that State's regulatory regime, applying another State's contrary law to conduct outside its territorial boundaries is "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822. In that circumstance, applying forum law does not adjudicate a local dispute—it displaces another sovereign's policy choices within that other sovereign's territory.

The territorial jurisdiction concerns reflected in the Due Process Clause have particular force here. Imposing Colorado tort liability for emissions that occurred outside of Colorado is an effort to “project [Colorado’s] regulatory regime into the jurisdiction of another State,” *Healy*, 491 U.S. at 337, and to “infring[e] on the policy choices of other States,” *BMW*, 517 U.S. at 571-72. But as discussed, this Court has foreclosed that gambit: “[A] State cannot punish a defendant for conduct that may have been lawful where it occurred.” *State Farm*, 538 U.S. at 421-22. When the challenged conduct is lawful in the State where it occurs, imposing liability under another State’s law does not *supplement* that regime—it *overrides* it. The Due Process Clause forbids that exercise of a State’s power outside its territorial jurisdiction.

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Taken together, those historical sources and constitutional provisions confirm that the doctrine of territorial jurisdiction is not a free-floating inference from the constitutional structure alone. It is grounded in the preexisting law of nations and principles of sovereignty. And it is embodied in the Constitution’s text, where it manifests in multiple clauses that operate in different doctrinal settings and converge on the same limit. The Constitution did not disrupt that well-understood baseline. It preserved the States as coequal sovereigns, and did not expand States’ extraterritorial regulatory authority beyond what they had before the Founding. *See Cole v. Cunningham*, 133 U.S. 107, 112 (1890) (“The constitution did not mean to confer any new power on

the states.”); *Livermore v. Jenckes*, 62 U.S. (21 How.) 126, 128-29 (1858). To the contrary, the Constitution presupposes the absence of any such power by individual States. See *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 160-61 (1914). And if the Constitution were to have conferred on the States a sweeping new authority to regulate conduct beyond their borders—authority unknown to the law of nations and incompatible with coequal sovereignty—it would have said so clearly. But it does not say anything about such a new, sweeping power. So the rule that preexisted the Founding remains in effect now—States may govern within their borders, but they may not govern beyond them.

**B. This Court has consistently applied the principle of territorial jurisdiction to prevent a State from regulating conduct in other States.**

The principle that a State cannot regulate beyond its territorial jurisdiction might be one of the “least understood” and “most dormant” of the principles of horizontal federalism. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). Even so, this Court has never seriously questioned or doubted it. Rather, it has confirmed that a State such as Colorado “has no power to project its legislation into [another State] by regulating” conduct that occurs outside of Colorado’s territorial borders. *Baldwin*, 294 U.S. at 520. Indeed, this principle was so clear that in prior litigation implicating whether a State could directly regulate conduct within its borders in a way that *indirectly* affected conduct outside its borders, it was simply “not disputed” that

a State could never directly regulate conduct outside of its borders. *Id.*

Over time, the principle has been called different names, including “interstate federalism,” *Fuld*, 606 U.S. at 14, “comity,” *Franchise Tax Bd.*, 587 U.S. at 245, “territorial limits” under the “horizontal separation of powers,” *Nat’l Pork Producers*, 598 U.S. at 376 n.1, and the “extraterritoriality principle.” Regan, *supra* at 1885 (1987). Whatever label courts attach to it, the underlying constitutional principle has remained the same: A State may not legislate or regulate conduct that falls outside its territorial boundaries. *See also Healy*, 491 U.S. at 334 (a State’s statute can “ha[ve] an impermissible extraterritorial effect”). “The limits of state power are defined in view of the relation of the states to each other in the Federal Union,” *Burnet v. Brooks*, 288 U.S. 378, 401 (1933), so “assert[ing] extraterritorial jurisdiction ... exceed[s] the inherent limits of the State’s power,” *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

This Court’s early decisions confirm that those territorial limits on state power were both understood and enforced from the beginning. In *Ogden v. Saunders*, this Court explained that “when ... the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.” 25 U.S. (12 Wheat.) 213, 369 (1827). Nor could a State insist—absent a federally-imposed rule of

comity—that its own bankruptcy law be given effect in other States. That would be “*a power which no State possessed,*” or even “ever pretended to possess.” *Id.* at 275-76. Elsewhere the Court noted that “the government of a particular territory[] could have no force beyond its limits.” *Strader v. Graham*, 51 U.S. (10 How.) 82, 94 (1850). And the Court held that a State’s “[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states”—a principle that derived from “[t]he general rules of international comity” well “before the American Revolution.” *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

As a “consequence of territorial limitations on the power of the respective States,” *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), “[n]o State can legislate except with reference to its own jurisdiction,” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). And no state “can impose its own legislation” or “enforce its own policy upon the other[s].” *Kansas*, 206 U.S. at 98. It would be “impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority.” *N.Y. Life Ins.*, 234 U.S. at 160-61. Indeed, this Court has “long recognized that the Constitution restricts a State’s power to reach out and regulate conduct that has little if any connection with the State’s legitimate interests.” *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 154 (2023) (Alito, J., concurring in part). This principle is “an ‘obviou[s]’ and ‘necessary result’ of our constitutional order,” and its origin is not “confined to any one clause or section,

but is expressed in the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another." *Id.* (quoting *N.Y. Life Ins.*, 234 U.S. at 161).

Applying the principle of territorial jurisdiction, this Court has consistently prevented States from extending their legislative or regulatory reach beyond their own borders. Consider *Bonaparte*. There, a person who owned securities that were exempt from taxation by the issuing States (New York, Pennsylvania, and Ohio) argued that those securities were also exempt from taxation once moved to and registered in Maryland. This Court resolved the question in a single sentence: "No State can legislate except with reference to its own jurisdiction." *Id.* at 594. That is, the tax laws of New York, Pennsylvania, and Ohio provided no tax exemption for Maryland's tax laws. *See* *Regan*, *supra*, 1887.

So too in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). There, the State of Illinois enacted a statute regulating corporate takeover bids. This statute was "written in such a way that it could apply to target corporations that were not incorporated in Illinois and that had no Illinois shareholders." *Regan*, *supra*, 1897. A plurality of the Court found that this statute had a "sweeping extraterritorial effect, since it "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois," and "would apply even if not a single one of [a company]'s shareholders were a resident of Illinois." *Edgar*, 457 U.S. at 641-42 (plurality op.).

And more recently, this Court considered the territorial jurisdiction principle in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). There, a Connecticut law required out-of-state beer distributors to affirm that the wholesale price of their products sold into Connecticut was no higher than the price of the same goods sold into any other state. This Court found that statute violated the territorial jurisdiction principle, holding that “[a] state statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Id.* at 336.

Taken together, these decisions confirm that a State may not legislate except with respect to conduct within its own territorial borders or that directly touches its territorial boundaries. And a State may not achieve indirectly—through statutes with sweeping reach or pricing mandates—what it cannot do directly.

To that end, the principle of territorial jurisdiction applies equally to a State’s direct legislation and to lawsuits invoking a State’s common law. After all, a “state[s] power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.” *BMW*, 517 U.S. at 572 n.17. Awarding damages is a “potent method of governing conduct and controlling policy,” *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (cleaned up), so a State “may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States,” *BMW*, 517 U.S. at 572.

Accordingly, the principle of territorial jurisdiction also bars a State from using its common law to regulate out-of-state conduct.

This principle of territorial jurisdiction and its limits on a State's regulatory reach resolves this case. Boulder County's lawsuit would do exactly what the Constitution forbids: Regulate conduct occurring wholly in other States and lawful under those States' own laws. The Constitution does not permit one State to act that way, to exclude or burden out-of-state actors based on its own preferences, or to directly impose its will on conduct beyond its jurisdiction.

**C. This Court's precedent on interstate environmental disputes confirms that no single State may govern conduct beyond its borders.**

Long before the modern regulatory state, this Court confronted the recurring problem of two sovereign States fighting over interstate pollution. Each time the Court considered such a case, it applied the doctrine of territorial jurisdiction and reached the same conclusion—this sort of interstate dispute cannot be resolved by the law of any one State. That conclusion rested on the Constitution's allocation of sovereign power and on the conclusion that letting a single State's policy dominate another's is fundamentally inconsistent with the equal dignity of every member State in the Union. Thus, for well “over a century,” this Court has understood the need for federal resolution of such disputes and “has applied federal law to disputes involving interstate air or water pollution.” *City of New York v. Chevron Corp.*,

993 F.3d 81, 91 (2d Cir. 2021) (collecting Supreme Court cases).

1. This Court’s earliest treatment of interstate environmental disputes established the baseline that a single State’s law cannot regulate environmental disputes that involve conduct occurring outside its territorial jurisdiction and that is lawful where it occurs. The “cardinal rule, underlying all the relations of the states to each other, is that of equality of right.” *Kansas*, 206 U.S. at 97. No state can “impose its own legislation” or “enforce its own policy upon the other[s].” *Id.* at 95, 97. So when it comes to regulating things that occur in multiple States, either Congress or “interstate common law” must provide “the rule which shall control.” *Id.* After all, “[t]he rule of decision” for matters involving multiple states “has always been ... what we now know as the federal common law.” *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 718 (8th Cir. 2023) (Stras, J., concurring); *see also Kansas*, 206 U.S. at 98 (identifying applicable law as “what may not improperly be called interstate common law”).

One year earlier, in *Missouri v. Illinois*, 200 U.S. 496 (1906), Missouri sued to enjoin the discharge of sewage into an Illinois river that flowed downstream into Missouri waterways. This Court did not ask (or decide) whether Missouri or Illinois substantive law governed. Missouri pleaded a nuisance claim much like the nuisance claim here—a bare allegation that some abstract action taken inside one State had somehow or other injured residents in another State. *See id.* This Court declined to defer to Missouri’s application of its own nuisance law. Instead, it noted

that no one pretended that Missouri's claim of "nuisance" was the same as the "simple kind that was known to the older common law." *Id.* at 522. It then ruled that Missouri's nuisance claim lacked causation or proof of injury. *Id.* at 522-26.

Since Missouri's claim in that case was unlike a normal nuisance tort claim, lacking either direct causation or injury, it amounted to the kind of claim where one State sought to hold another State accountable for a generalized harm. And the Court did acknowledge that in theory, if "a nuisance" was "created by a state upon a navigable river like the Danube," it would have "amount[ed] to a *casus belli* for a state lower down, unless removed." *Id.* at 520-21. Under the law of nations, such a dispute would be "settled by treaty or by force." *Kansas*, 206 U.S. at 98. But since the Constitution suspends the ability of States to either wage war upon each other or enter into treaties without congressional approval, such disputes must be settled by this Court. *Id.* at 97 ("Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes.").

Nor was this principle limited to suits between States. One year after *Missouri*, this Court applied the same framework to a case involving interstate air pollution. In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), Georgia sought to enjoin a Tennessee company from "discharging noxious gas" across the state line. *Id.* at 236. There, the Court held that Georgia was entitled to seek "specific relief" rather than "give up quasi-sovereign rights for pay." *Id.* at 237. But more important, as relevant here, is what the

Court did *not* do. It did not apply Georgia law to the Tennessee defendant. Nor did it apply Tennessee law to the dispute. Instead, the Court applied a body of federal equity principles derived from the logic of interstate sovereignty itself, because “the forcible abatement of outside nuisances” is not a power any single state can constitutionally claim. *Id.*

Those early decisions reflected a consistent understanding that when States’ sovereign interests collide across territorial lines, neither States’ laws applied and neutrality requires a federal rule. Hence this Court declined to apply “municipal law” to resolve interstate water disputes in *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), and instead applied principles of “equality of right” derived from “federal, state and international law” alike. *Id.* at 670. It did the same in *New Jersey v. New York*, 283 U.S. 336 (1931), recognizing that every state has “real and substantial interests” in shared natural resources and that “[d]ifferent considerations come in when we are dealing with independent sovereigns” and also with “the quasi-sovereignties bound together in the Union.” *Id.* at 342. In *Iowa v. Illinois*, 147 U.S. 1 (1893), the Court rejected the views of dueling state courts over competing claims to river rights in favor of the “equality” principle derived from the neutral federal rule. *Id.* at 13. And in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), the Court again confirmed that this territorial-jurisdiction principle applies to lawsuits involving private parties and environmental disputes. It held that the apportionment of interstate water “is a question of federal common law upon which neither the statutes

nor the decisions of either State can be conclusive.” *Id.* at 110.

The cases speak with one voice. Whenever this Court has confronted environmental or conservation disputes touching the sovereign prerogatives of multiple States, it has never let one State project its law beyond its borders and dictate the rules of decision for the Nation as a whole. That restraint reflects the core principle implicated here—no State may wield its law extraterritorially to regulate conduct and interests belonging to its sister States.

2. Consistent with those cases, this Court’s decision in *Milwaukee I* and its progeny make clear that a single State’s law can never govern interstate pollution claim. And the later displacement of federal common law still does not open the door for States to regulate interstate emissions through their own law.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”), Illinois sought to abate sewage discharges into Lake Michigan by Wisconsin municipalities. This Court ruled that the interstate “nature of the problem” implicated the interests of multiple sovereign States and thus could not be resolved by the law of any single State. *Id.* at 103 n.5. In “deal[ing] with air and water in their ... interstate aspects,” the “overriding federal interest” required “a uniform rule of decision.” *Id.* at 103, 105 n.6. Illinois could not be asked “to submit to whatever might be done,” *id.* at 104 (cleaned up), but neither could Wisconsin municipalities be subjected to Illinois law.

The Court made clear that the dispositive point was not merely geographic but structural. Lake Michigan is “bounded ... by four States,” one of which happened to be permitting the pollution that the other opposed. *Id.* at 105 n.6. When the policies and wills of sovereign States are set on a collision course, the “nature of the problem” created an interstate conflict that required a neutral arbiter—namely, federal law. *Id.* at 103 n.5. State law cannot provide that neutrality. Only federal law—“not the varying common law of the individual States”—can furnish “a basis for dealing in uniform standard with the environmental rights of [each] State.” *Id.* at 107 n.9 (cleaned up).

*Milwaukee I*'s logic survived Congress's later regulation of environmental matters. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (“*Milwaukee II*”), the Court held that the Clean Water Act displaced the federal common-law remedy recognized in *Milwaukee I*. But at the same time, the Court confirmed that displacing the remedy did not eliminate the structural principle necessitating it in the first place. Federal substantive law must apply to interstate environmental disputes, since “state law cannot be used” to neutrally decide between the competing interests of sovereign States. *Id.* at 313 & n.7. Even after “new federal laws and new federal regulations” have been enacted and replace the “federal common law of nuisance,” *id.* at 314 (cleaned up), States are still “not left free to develop their own doctrines” in the areas where state law remains inherently unable to resolve interstate disputes, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

The Seventh Circuit applied that this exact principle in *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984) (“*Milwaukee III*”). Illinois argued that once the Clean Water Act displaced the federal common law that controlled in *Milwaukee I*, “Illinois law must again control.” *Id.* at 406. The Seventh Circuit rejected that contention outright: “[T]he state claiming injury cannot apply its own state law to out-of-state discharges.” *Id.* at 410. And for good reason. “The very reasons the [Supreme] Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why ... federal law must govern” the interstate pollution question still. *Id.* at 410-11.

The Seventh Circuit’s correct reasoning squarely forecloses the notion, embraced by the Colorado Supreme Court, that where federal common law once existed but was later replaced by federal statute, a single State’s common law can snap back into the void and still have effect. *See* App.17a. “[S]tate law does not suddenly become competent to address issues that demand a unified federal standard simply because Congress ... displace[d] a federal court-made standard with a legislative one.” *City of New York*, 993 F.3d at 98; *accord* App.26a (Samour, J., dissenting). As Justice Samour correctly recognized in dissent below, this Court’s precedents collectively establish that “simply because federal common law relating to” this issue “has been displaced by statute doesn’t mean that the conditions that made state law inappropriate to govern these claims in the past have vanished.” App.26a. And “Congress’s decision to displace federal common law and to take control of this area did not suddenly render state law competent to regulate interstate and international air pollution.” *Id.*

3. This Court’s most recent examination of interstate emissions—in *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (“*AEP*”)—reaffirmed the same environmental territorial-jurisdiction limitation announced *Missouri, Kansas, Milwaukee II*, and their progeny. “[S]uits brought by one State to abate pollution emanating from another State” are “meet for federal law governance.” *Id.* at 421-22. “[H]ere,” where States brought public nuisance claims against private energy companies for their alleged greenhouse gas emissions, “borrowing the law of a particular State would be inappropriate” to resolve such interstate disputes. *Id.* at 422.

*AEP* forecloses the theory embraced by the Colorado Supreme Court below. While in *AEP* the Court left open (in dicta) the theoretical possibility of some state-law nuisance claims, the Court noted only that the Clean Water Act “does not preclude” suits brought under “the law of the *source* State.” *Id.* at 429 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987)). But this lawsuit was not brought under “the law of the *source* State.” *Id.* Boulder County instead sued under Colorado law—the law of the allegedly affected State, not the source State.

The type of claim *AEP* left open—an intrastate dispute governed by the law of the source State—never required federal common law in the first place. Interstate disputes like this one, by contrast, have never been left to the law of a single State. *Ouelette* confirms the point. There, this Court held that federal law preempted one State trying to enforce its state nuisance law against an out-of-state emissions source, even though federal law did not preempt state actions

brought under the law of the source state. *Ouelette*, 479 U.S. at 497. Allowing every State to apply its own emissions laws nationwide would result in regulatory “uncertainty” and “chaotic confrontation between sovereign states.” *Id.* at 496 (cleaned up). If energy producers like Suncor must conform their conduct to the competing tort regimes of every State claiming downstream effects from global operations, “[t]he result would be” an impossible “patchwork of standards” that would harm “industry and the environment alike.” *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 296 (4th Cir. 2010) (Wilkinson, J.); see also *City of New York*, 993 F.3d at 91; App.25a, 28a (Samour, J., dissenting).

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Colorado law may govern “persons and property within the limits of its own territory.” *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880). But Boulder County seeks to directly regulate conduct that occurs outside those limits. There is no historical analogue for what Boulder is trying to do, because this Court’s cases have never permitted it. It should not start now.

## **II. Boulder County’s Lawsuit Violates the Doctrine of Territorial Jurisdiction.**

As described, the doctrine of territorial jurisdiction is grounded in the Constitution’s text, the inherent structure of horizontal federalism and State sovereignty, and this Court’s prior precedents on interstate disputes. Its rule is straightforward: “No State can legislate except with reference to its own jurisdiction.” *Bonaparte*, 104 U.S. at 594. No State

“can impose its own legislation” or “enforce its own policy upon the other[s].” *Kansas*, 206 U.S. at 95, 97. And each State’s “sovereign authority is bounded by the States’ respective borders.” *Fuld*, 606 U.S. at 14. Boulder County’s lawsuit violates every one of these commands.

Here, Boulder County seeks to regulate conduct that occurred almost entirely outside Colorado. Suncor is headquartered in Canada. ExxonMobil is headquartered in Texas. Their extraction and production activities span the globe, and they operate legally under the laws of each jurisdiction where they operate.

Colorado “has no power to project its legislation” into those jurisdictions. *Baldwin*, 294 U.S. at 521. And labeling its desired remedy “compensat[ion],” “remediation,” and “abatement,” App.50a, rather than “regulation,” does not cure the constitutional defect. State power is “exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute,” *BMW*, 517 U.S. at 572 n.17, and Colorado cannot “punish a defendant for conduct that may have been lawful where it occurred,” *State Farm*, 538 U.S. at 421-22.

The implications of affirming the Colorado Supreme Court’s jurisdiction extend far beyond energy policy. Doing so would license a form of interstate regulatory warfare that will cripple every industry to the detriment of consumers nationwide. If one State may use its tort law to impose liability on out-of-state energy producers for their global operations, every State may do the same. Colorado

could impose tort liability on out-of-state manufacturers of gas stoves and furnaces for alleged abstract air quality harms—effectively forcing manufacturers to stop producing appliances that are legal, preferred, and widely sold in every other state. Consumers in other states would lose access to cheaper, reliable products because Colorado decided to litigate them out of existence.

Nor are the implications of affirming the Colorado Supreme Court’s judgment limited to environmental issues. If Colorado can impose its law on conduct that occurred lawfully in other States, a state with strict usury laws could impose tort liability on out-of-state consumer lenders for “predatory” lending to customers who voluntarily sought those products online. Even though such consumer lenders would be operating lawfully under their home States’ regulations, consumers in all States with limited banking infrastructure would lose access to the only credit available to them. Or a state like California could impose tort liability on every out-of-state firearms manufacturer and dealer, regardless of whether those firearms—lawful under the laws of every other State—ever found their way into California.

Each of those scenarios is constitutionally indistinguishable from what Boulder County attempts here. No State “can impose its own legislation” or “enforce its own policy upon the other[s],” *Kansas*, 206 U.S. at 95, 97, and no State can “impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” *BMW*, 517 U.S. at 572. If that principle means anything, it means that Colorado

cannot directly regulate the lawful fossil fuel activities that occur outside of its territorial borders. And it means that Boulder County cannot do through nuisance litigation what Colorado could never do through legislation.

### CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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