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 SENATORS TED CRUZ, CHUCK GRASSLEY, MIKE LEE, AND TED BUDD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are Senators Ted Cruz, Chuck Grassley, Mike Lee, and Ted Budd.[1] As members of the branch charged with formulating our country's environmental, energy, and national-security laws, *amici* have an especially strong interest in the outcome of this case. Allowing the Colorado Supreme Court's decision to stand would undermine the structure of our constitutional system and create significant tension between the United States and foreign countries by allowing individual states to create liability for actions taken exclusively within foreign sovereigns' territory.

SUMMARY OF THE ARGUMENT

Imagine a barrel of oil that is extracted from an Exxon-owned well in Texas, refined into gasoline in Texas, sold at a gas pump in Texas, and used to fuel cars in Texas. Does our Constitution allow Colorado tort law to impose liability on Exxon's extraction of the oil? The Colorado Supreme Court answered "yes." At the request of a handful of municipal governments in Boulder, the Colorado Supreme Court ruled that Colorado courts may apply Colorado law to drilling, mining, refining, and advertising across the globe.

The Colorado Supreme Court is mistaken. The Constitution—as evidenced by its structure and our Nation's Founding-era history—prohibits the application of Colorado law to activities taken outside of Colorado and having no connection to the state.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from Amici's counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Before the ratification of our Constitution, states interacted effectively as foreign sovereigns. Under the law of nations, a sovereign's authority extended only so far as its own territory. But because the law of nations contained no centralized enforcement mechanism, each sovereign could attempt to assert global jurisdiction (although no other nation would have to respect such assertion). The Constitution, however, "affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns." *Franchise Tax Bd. of Calif. v. Hyatt*, 587 U.S. 230, 245 (2019); *see also Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018) ("The Constitution . . . prohibits the States from exercising some attributes of sovereignty."). One such alteration was constitutionalizing the rule that a sovereign's authority only extended to its borders. As this Court has explained, "[n]o state can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court,* 104 U.S. 592, 594 (1881).

Boulder seeks to violate this core tenet of federalism by imposing its own tort law on fossil-fuel production, refining, and advertising in other states and, even more aggressively, in foreign countries. Because Boulder attempts to directly regulate activity outside of Colorado, it must show that the sole exception to the Constitution's extraterritorial-regulations doctrine applies by demonstrating that (1) Petitioners intended to create harm in Colorado and (2) that their activities had a direct and traceable connection to the relevant in-state harm. *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *cf. Young v. Masci*, 289 U.S. 253, 259 (1933). Because Boulder cannot allege that Petitioners intended to

create harm inside of Colorado and relies on the most indirect effects of drilling imaginable—i.e., alleged global temperature increases over the past century based in part on the emissions from third parties burning fossil fuels—it cannot extend its jurisdiction to cover the entire globe.

It should not be surprising that the Constitution prohibits Boulder from using Colorado law to appoint itself as a worldwide Environmental Protection Agency. In addition to limiting the power of states to regulate activities in their sister states, the Constitution vests the ability to conduct foreign affairs in the federal government, *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), because allowing 50 states to wield such power would "embroil the Confederacy with foreign nations," THE FEDERALIST NO. 42 (James Madison). The Framers were smart enough not to allow juries, who speak for the "voice of the[ir] community," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting), to impose liability on actions taken in a wholly different community.

Even if Boulder could rely on the putative link between the release of greenhouse gases and global climate change to skirt the Constitution's prohibition on extraterritorial regulations, it would walk itself into the preemptive force of the Clean Air Act. Although Boulder disclaims that it seeks to create liability for interstate (and international) air pollution, its theory of liability necessarily rests on the fact that air pollution from other jurisdictions is causing it harm. The Clean Air Act, however, prevents states from applying their own law to emissions from other states.

Boulder cannot have things both ways. If Boulder is attempting to apply Colorado law to out-of-state production, refining, and advertising of fossil fuels, then it fails to state a claim because of the extraterritorial-regulations doctrine. If Boulder is attempting to apply Colorado law to the emissions produced by the eventual burning of the extracted fuels by third parties, then Boulder fails to state a claim because of the Clean Air Act. No matter how Boulder formulates its theory or how this Court understands it, there is no escape from the fact that Boulder cannot sustain this suit under "Colorado law." Pet.App.6a.

ARGUMENT

I. The Extraterritorial-Regulation Doctrine Bars Boulder's Suit.

A. The Nature and Origin of the Extraterritorial-Regulation Doctrine.

This Court has long recognized that the "general legislative power of a State" extends so far as "to act upon persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880); *cf.* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 20 (1834) ("[N]o State or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein."). This basic precept of federalism allows the states to serve as laboratories of democracy, with no state being able to override the legal choices of another. Although this Court has applied the extraterritorial-regulation doctrine in a wide variety of cases, it has yet to provide an in-depth explanation for the doctrine's origin and nature. History reveals that the extraterritorial-

regulation doctrine is best understood—similar to a state's sovereign immunity outside the Eleventh Amendment—as emanating from the very structure of the Constitution itself. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023); *see also* Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) ("It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.").

Before the Founding of our nation, a sovereign's powers were understood—under the law of nations—to extend only throughout its territory. In the words of Emmerich de Vattel, "the founding era's foremost expert on the law of nations," *Franchise Tax Bd.*, 587 U.S. at 239, each sovereign had the exclusive right to "direct[] and regulate[] at its pleasure every thing that passes in the country." EMER DE VATTEL, THE LAW OF NATIONS, ch. XVIII, § 204 (1758). And that "exclusive right" necessarily excluded other sovereigns from seeking to regulate the same conduct. *Id.* § 203; *see also* Story, *supra*, § 20 ("[N]o State or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein."). As Chief Justice Marshall put it, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive . . . ." *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812). Under the law of nations, each sovereign "possess[ed] equal rights and equal independence." *Id.* If one sovereign wished to extend its reach to govern events that took place in the territory of another sovereign, the second sovereign must "have consented" because the law of Nations

regarded each country as "being incapable of conferring extra-territorial power" upon itself. *Id.* at 136–37; *Hoyt*, 103 U.S. at 630–31 ("[W]hatever force and obligation the laws of one country have in another, depend solely upon the laws of the latter, that is, upon the comity exercised by it." (citing Story, *supra*, §§ 18–23)). If one sovereign sought to regulate actions in the territory of another sovereign without consent, no other nation would be obliged to respect the assertion of jurisdiction. And the nation who suffered the legal incursion had cause to demand satisfaction and, if not satisfied, engage in war. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769). Because no sovereign had "superior jurisdiction" to bring the case before a tribunal, diplomacy and violence were the only routes to resolve the conflict. *Id.*

In the era immediately preceding the Founding, the rules for determining the regulatory jurisdiction of sovereigns were simple. Sovereigns had plenary authority to regulate the actions taking place within their territory. Vattel, *supra*, § 204; *The Schooner Exch.*, 11 U.S. at 136. If a sovereign wished to regulate events within another sovereign's territory, the law of nations required consent (whether explicit or implied). *Hoyt*, 103 U.S. at 630–31. A sovereign state could proceed to violate the law of nations and assert worldwide jurisdiction without consent. *See Fuld v. PLO*, 606 U.S. 1, 35–36 (2025) (Thomas, J., concurring in the judgment) (explaining that limits on "extraterritorial jurisdiction," which "stemmed from general principles of international law" could be "override[n] through clear command" of a sovereign). If a sovereign elected to "override" the territorial limitations on its authority, *id.*, however, other

sovereigns would not be obligated to acknowledge such an act as legitimate. Stephen E. Sachs, *Pennoyer* Was Right, 95 TEXAS L. REV. 1249, 1270 (2017). Indeed, such a violation of the law of nations could provide cause for lawful retaliation, up to and including war. *See* Blackstone, *supra*, at 68. Because each state was a fully separate sovereign after they declared independence from England, The Declaration of Independence para. 5 (U.S. 1776), these rules governed their relationships between 1776 and 1789, *see McIlvaine v. Coxe's Lessee*, 4 Cranch 209, 212 (1808).

This system of international relations, however, proved an awkward fit under the Articles of Confederation. Because the Articles "contain[ed] no provision for the case of offenses against the law of nations," each state determined for itself when the law of nations was violated. THE FEDERALIST NO. 42 (James Madison). And because the states were now part of a league, that interpretive power meant that one state could draw the others into conflict. In the words of James Madison, the Articles of Confederation allowed a single "indiscreet member to embroil the Confederacy with foreign nations." *Id.*; THE FEDERALIST NO. 80 (Alexander Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART"). This risk was not speculative. After the Revolutionary War, the Spanish closed off navigation of the Mississippi River to Americans. Southern states viewed that action as violating their right under the law of nations to navigate the river. *See* 22 *Memorandum from Timothy Bloodworth to the North Carolina General Assembly Concerning a Treaty Between the United States and Spain* (December 16, 1786). Indeed, there was talk of raising

a southern army and fighting the Spanish for control of the Mississippi, which would have drawn the entire nation into a war against its will. *See* 13 JOHN P. KAMINSKI ET AL., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 149–52 (Wis. Hist. Soc'y Press, 1981). Luckily, tensions with the Spanish diminished and war was averted, but the incident made clear that allowing each state to act as a sovereign in the international sphere was a recipe for trouble.

Motivated by the failures under the Articles of Confederation, the ratification of the Constitution and creation of the federal government "affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns." *Franchise Tax Bd.*, 587 U.S. at 245. For example, Article I of the Constitution "divest[ed] the States of the traditional diplomatic and military tools that foreign sovereigns possess." *Id.* Similarly, Article IV imposed duties on states, such as honoring extradition requests and judgments from other states, that only existed as a matter of comity under the law of nations. *Id.* And perhaps most importantly, Article I gave Congress the power to "define and punish . . . Offenses against the Law of Nations," taking that power away from the States as Madison advocated in Federalist 42. U.S. CONST. art. I, § 8, cl. 10.

The transition from a loose confederation of states into a single nation transformed the law governing many subjects. Some areas which were previously governed by the law of nations, which was enforced through diplomacy and violence, became governed by constitutional restrictions on state power, which are enforced through "rules of law" applicable in

courts. *Rhode Island v. Massachusetts*, 12 Pet. 657, 737 (1838); *Kansas v. Colorado*, 185 U.S. 125, 143 (1902) ("[T]he Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms."). For instance, before the ratification of the Constitution, whether one state could hale another state (or any other sovereign) into its courts was a matter of comity under the law of nations. *See The Schooner Exch.*, 11 U.S. at 136; *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."). But the Constitution made that rule into one of constitutional significance. *See Franchise Tax Bd.*, 587 U.S. at 249 (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Nevada v. Hall*, 440 U.S. at 439–42 (Rehnquist, J., dissenting); *Alden*, 527 U.S. at 713 (describing how the Constitution's "structure" and "history" evince an intent to constitutionalize sovereign immunity). Similarly, before the ratification of the Constitution, a dispute about a state's borders was decided through "raw power." *Franchise Tax Bd.*, 587 U.S. at 246. But after the enactment of the Constitution, such a dispute would be decided under principles of federal law. *Id.*

The law-of-nations rule that one sovereign cannot regulate actions in the territory of another sovereign was another doctrine the Constitution transformed into a court-enforceable rule. *Cf.* Sachs, *supra*, at 1253 (explaining that "federal courts" would give "no more weight to laws asserting jurisdiction beyond state borders than to laws purporting to redraw those

borders themselves").[2] Like sovereign immunity, its application was necessary to avoid the kind of "direct conflict between sovereigns" that the Constitution took out of the states' hands. *Franchise Tax Bd.*, 587 U.S. at 246–47. If anything, the constitutionalization of the extraterritorial-regulation doctrine was even better established than sovereign immunity at the founding. One could have argued—as the Antifederalists did—that the grant of jurisdiction over lawsuits involving states in Article III abrogated sovereign immunity. *See* BRUTUS NO. 13 (Feb. 21, 1788) (objecting to Article III "because it subjects a state to answer in a court of law[] to the suit of an individual"). Indeed, this Court incorrectly held so in *Chisholm v. Georgia*, 2 Dall. 419 (1793), before the people overturned that ruling through the Eleventh Amendment. Given Article III's verbiage and the Antifederalist opposition, the issue of sovereign immunity aroused robust debate when the people decided whether to ratify the Constitution. *See Alden*, 527 U.S. at 717–19 (cataloguing the debates). Because nothing in the Constitution implied that states could regulate outside of their territory, however, there was little reason to debate whether the Constitution authorized such regulations.

Indeed, it is remarkable how well-settled the rule against extraterritorial regulation appeared to be in the aftermath of the Constitution. *See Printz v. United States*, 521 US 898, 907–08 (1997) (explaining that "the utter lack of statutes" exercising a power "suggests an assumed *absence* of such power"

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[2] Professor Sachs made this comment in the context of discussing personal jurisdiction and not regulatory jurisdiction, but the same analysis applies.

(emphasis in original)). In the words of this Court, the territorial restrictions on state power were "so obviously the necessary result of the Constitution" that such restrictions have "rarely been called in question and hence authorities directly dealing with it do not abound." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). Even in the furious days leading up to the Civil War, for example, no state sought to extend its reach and regulate conduct in other states. How easy it would have been for Massachusetts to declare that slavery was illegal in Georgia and to arrest any slaveowner that it could get its hands on.

Around a century after the ratification of the Constitution, however, states began to expand the reach of their laws to plausibly extend beyond their borders. For example, in *Bonaparte v. Tax Court of Baltimore*, 104 U.S. at 594, a bondholder claimed that her bonds issued by various states were exempt from taxation because they were universally "exempt from taxation by the debtor State." *Id.* This Court held the line, concluding that states could not set tax policy for bonds held outside of their own territory because "[o]ne State cannot exempt property from taxation in another." *Id.* Indeed, in the decades surrounding the turn of the 20th century, a myriad of cases came to this Court and were decided on extraterritorial-regulation grounds. *See Hoyt*, 103 U.S. at 630 (explaining that the "legislative power of a State to act upon persons and property within the limits of its own territory," does not extend to "persons and property" outside of its territory); *see N.Y. Life Ins. Co.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State."); *Huntington v. Attrill,* 146 U.S. 657, 669 (1892) ("Laws 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."). These cases, notably, did not rely on a specific clause of the Constitution but accepted that the very structure and nature of the Constitution prohibited extraterritorial regulation. *Nat'l Pork Producers Council*, 598 U.S. at 375 & 376 n.1 (reaffirming that the extraterritorial-regulation doctrine emanates from the structure of the Constitution and not one particular clause); Regan, *supra*, at 1875–1880, 1897–1902 (explaining why no single clause explains the extraterritorial-regulations doctrine); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation,* 84 NOTRE DAME L. REV. 1057, 1060 (2009) (explaining that the extraterritoriality principle is "a prohibition rooted in general structural principles of horizontal federalism").

Litigants who doubt the existence of the extraterritorial-regulations doctrine point to other provisions of the Constitution and claim that those provisions exhaust all of the Constitution's federalism doctrine. Brief for Vermont, *United States v. Vermont*, No. 2:25-cv-00463 (D. Vt. Nov. 17, 2025), ECF No. 53. But as Professor Regan has explained, these doctrines cannot explain the territorial limits on state power both as a historical matter and as a matter of this Court's precedents. *See*, Regan, *supra*, at 1875–1880, 1897–1902. For example, this Court has often relied on the Due Process Clause of the Fourteenth Amendment to limit the ability of states to regulate across borders through the use of personal jurisdiction. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). But jurisdiction

over a person and the territorial scope of a state's jurisdiction are not the same. *See Strassheim*, 221 U.S. at 285.

The concept of "tag jurisdiction" shows how the two concepts differ. If a person is served with process while physically present in a state, that state has personal jurisdiction over him. *See Burnham v. Super. Ct. of Calif., Cnty. of Marin*, 495 U.S. 604, 610–11 (1990); *Potter v. Allin,* 2 Root 63, 67 (Conn. Super. Ct. 1793); *Picquet v. Swan*, 19 F.Cas. 609 (C.C.D. Mass. 1828) (Story, J.). It does not matter whether the subject of the lawsuit has nothing else to do with that state. *Burnham*, 495 U.S. at 610–11. But the existence of personal jurisdiction only determines whether the court may hear the case, it does not determine whether that court may apply the law of the forum state to purely out-of-state activities. This Court explained as much in *Strassheim*. There, it explained that a state may punish out-of-state conduct only if (1) the conduct was "intended to produce and produc[ed] detrimental effects within" the state, *and* (2) "the state should succeed in getting him within its power." *Strassheim*, 221 U.S. at 285. The Court thus distinguished between the scope of a state's regulatory authority and the ability of the state to exercise personal jurisdiction over an individual.

A hypothetical illustrates the important differences between personal jurisdiction and territorial jurisdiction. Imagine that Georgia outlaws sports gambling, not just in Georgia but across the entire country (or even the world). Nevada resident John Doe places a bet in a Las Vegas casino, where sports gambling is legal, that the Las Vegas Golden Knights will win their hockey game that night in Las

Vegas. A few months later, John travels to Georgia, and the Georgia Attorney General properly serves him with a civil enforcement action for violating Georgia's anti-gambling law by placing a bet in Las Vegas. The Georgia courts would certainly have personal jurisdiction over John because he was present in Georgia when validly served. *Burnham*, 495 U.S. at 610–11. Yet it is equally obvious that Georgia could not apply its own gambling law against John for his lawful activities in Nevada, even though Georgia succeeded "in getting him within its power" through valid service.[3] *Strassheim*, 221 U.S. at 285.

Although this Court has consistently held that the "original and historical understandings of the Constitution's structure and the principles of 'sovereignty and comity' it embraces" prohibit states from directly regulating conduct outside their borders, it has allowed a narrow set of such laws to pass constitutional muster. *Nat'l Pork Producers Council*, 598 U.S. at 376 (quoting *BMW of N. Am.*, 517 U.S. at 572). If an action outside of a state was "intended to produce and produc[ed] detrimental effects within" the state, then the state can punish the person if it "should succeed in getting him within its power." *Strassheim*, 221 U.S. at 285.

B. The Extraterritorial-Regulation Doctrine Prohibits this Lawsuit.

Boulder's attempt to hold Exxon and Suncor liable for the extraction, refining, and advertising of fossil-

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[3] This hypothetical is largely taken from Professor Don Regan's example of "the traveling Illinois homosexual" in his seminal article on the nature of the extraterritorial-regulation doctrine. Regan, *supra*, at 1892–93.

fuel products across the globe is impermissible under the extraterritorial-regulation doctrine. Taking Boulder and the Colorado Supreme Court at their word, this lawsuit seeks to directly apply Colorado law to actions that took place (and will take place) in other states and countries. And the exception that allows a state to apply its law to certain out-of-state activities does not apply. *Id.*; *Nat'l Pork Producers Council*, 598 U.S. at 375–76.

1. Boulder's Lawsuit Seeks to Apply Colorado Law to Actions Taken Outside of Colorado.

To understand why the Constitution does not allow this lawsuit, it is important to understand Boulder's precise theory of liability. According to Boulder, Suncor and Exxon have committed various torts under Colorado law "by producing, promoting, refining, marketing[,] and selling fossil fuels at levels that have caused and continue to cause climate change." Pet.App.2a. Boulder also complains that Petitioners will continue to commit these torts in the future by failing to reduce their business footprints. Amended Compl. ¶ 322, No. 18CV30359 (Dist. Ct. Boulder Cnty., Colo. June 11, 2018) (Am. Compl.). These actions, Boulder admits, did not take place within Colorado. Instead, Boulder openly seeks to establish liability for actions that took place in other states and other countries.

The damages that Boulder seeks are those that it believes are the result of global climate change, such as "extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone,

higher transmission of viruses and disease from insects, altered stream-flows, bark beetle outbreaks, ecosystem damage, forest die-off, reduced snowpack, and drought." *Id.* ¶ 140. These costs, and others, amount to hundreds of millions of dollars within Boulder alone. If Boulder's theory comports with the structural limits on the reach of Colorado law, every single state and municipality in the country could seek hundreds of millions or billions of dollars in damages for the production of fossil fuels.

Boulder's theory of liability, however, runs headfirst into the extraterritorial-regulation doctrine. It seeks to use Colorado law to "'directly'" impose liability on actions that took place in other states and in foreign countries. *Nat'l Pork Producers Council*, 598 U.S. at 376 n.1 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982)) (emphasis omitted). The Colorado Supreme Court explained as much when it concluded that Boulder's claims target "defendants' upstream production activities."[4] Pet.App.21a; Cert Opp. at 26 (explaining that the lawsuit seeks to target "inputs to emitting facilities"). Creating liability for engaging in a specific activity is the paradigmatic example of a "direct" regulation of that activity.

This Court recently illustrated the distinction between a direct and an indirect regulation in *Nat'l Pork Producers Council*. There, California enacted a law that governed what kinds of pork could be sold in grocery stores within California. Unless the pork came from pigs raised under conditions that California considered humane, it could not be sold in

[4] As explained below, Boulder's theory also relies on the emission of greenhouse gases, which makes the suit preempted by the Clean Air Act.

California grocery stores. *Nat'l Pork Producers Council*, 598 U.S. at 365–66. Because California makes up such a large percentage of the national pork market, this regulation had the "practical effect" of requiring pig farmers across the country to follow California's rules. *Id.* at 371. The petitioners in that case did not (and could not) allege that California was directly regulating how pigs were raised in other states because the direct object of the regulation was California supermarkets, which are clearly within California's regulatory jurisdiction. This Court went to great pains to distinguish an extraterritorial *application* of a state's law (impermissible) and the extraterritorial *effect* of a state's law (permissible). *Id.* at 373–74. As this Court implied, *Pork Producers* would have presented a whole different question if California had explicitly regulated practices in other states instead of regulating "with reference to its own jurisdiction," i.e., California supermarkets. *Bonaparte*, 104 U.S. at 594. Boulder's lawsuit does not seek to merely have the practical effect of regulating out-of-state conduct, rather, it seeks to explicitly establish liability for that conduct.

Because Boulder seeks to establish direct liability on the extraction, sale, and other activities related to fossil-fuel production that occur outside of Colorado, it must demonstrate that Petitioners "intended to produce and produc[ed] detrimental effects within" the state. *Strassheim*, 221 U.S. at 285. Boulder cannot do either.

First, Boulder's Amended Complaint alleges nothing about Petitioners' intent to cause climate-related harms in Boulder. To be sure, the Amended Complaint makes allegations that Petitioners had

some knowledge of purported climate change in the 1970s and 1980s. But the alleged knowledge of some form of climate change does not translate into intent to create "detrimental effects within" Colorado. *Id.* Because nothing in the complaint alleges that Petitioners knew that their actions would cause harm within Colorado, Boulder cannot use Colorado law to seek damages for their out-of-jurisdiction conduct. *Id.*

Perhaps more importantly, Boulder's complaint does not—and could not—allege that the Petitioners' activities have caused "detrimental effects within" Colorado that would satisfy this exception. *Id.* At the threshold, there are a handful of different ways that this Court could analyze whether an out-of-state act sufficiently "produc[ed] detrimental" effects to fall outside of the extraterritorial-regulations doctrine. *Id.*; Amicus Brief of the United States at 14 (stating that there must be a "a direct and traceable connection" between the out-of-state conduct and the putative harm). The most obvious test to determine the requisite causal nexus for the extraterritorial extension of a state's regulatory reach is something similar to "'legal' cause." *Burrage v. United States*, 571 U.S. 204, 210 (2014) (quoting 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), pp. 464–466 (2d ed. 2003)). "'[L]egal' cause," often referred to as "'proximate cause,'" *id.*, requires the action of the defendant to bear a sufficiently direct connection with the harm alleged to be held liable for it. This Court has repeatedly stated that for an individual to be legally liable for some injury, there must have been "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258, 268 (1992); 1 JABEZ G.

SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 55–56 (1882).

The connection between Petitioners' worldwide "promoting, refining, marketing and selling" of fossil fuels over a multi-decade period and specific environmental effects in Colorado is so attenuated as not to qualify under any standard of causation. Emissions from an *end user* of fossil fuels cannot be traced to any specific real-world harm. As this Court has explained, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (*AEP*). The theory of liability that Boulder seeks to establish is even more attenuated. It seeks liability for various activities even earlier in the alleged causal chain (drilling, refining, advertising, etc.) that occur not only before the fossil fuels are burned, but before that burning emits pollutants that allegedly combine in the Earth's atmosphere to cause changes in the climate over decades. Putative global climate change and the alleged attendant harms within Boulder are the most "indirect" result imaginable from Petitioners' extraction and refining of fossil fuels.

2. This Court's Foreign Affairs Cases Confirm that Boulder's Lawsuit Is Unconstitutional.

Boulder's attempt to impose liability on actions taken in other states is impermissible under "original and historical understandings of the Constitution's structure," *Nat'l Pork Producers Council*, 598 U.S. at 376, and this Court's precedent analyzing that structure, *see Strassheim*, 221 U.S. at 285. But Boulder does not stop there. It seeks not only to extend

its jurisdiction to abridge the "equal sovereignty among the States," *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (quotation marks and emphasis omitted), but also to infringe on the sovereignty of foreign nations.

As James Madison explained in Federalist 42, one of the reasons our Constitution was necessary is that allowing States to engage in foreign-policy activities threatened to "embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42 (James Madison). Thus, the Constitution allocated "the foreign relations power to the National Government." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003); *Zschernig*, 389 U.S. at 432; *Fuld*, 606 U.S. at 15 (describing "the Federal Government's exclusive authority '[i]n international relations and with respect to foreign intercourse and trade'" (quoting *Board of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). Given this allocation of foreign-affairs authority, there is not even a fig leaf of justification for states to apply their own laws to activities taking place in foreign countries. *Cf. Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012) (en banc). Boulder seeks to use Colorado law to do precisely that, and the results will predictably allow it to "embroil the [United States] with foreign nations." THE FEDERALIST NO. 42 (James Madison); THE FEDERALIST at NO. 44, at 299 (James Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers").

Petitioners are global companies, and Boulder seeks to establish liability based on their global activities. Exxon Mobil, for example, has an "active exploration or production presence in about 35

countries" and operates "refining facilities in more than 15 countries." *Progress Through Partnership* at 4, EXXON MOBIL, https://perma.cc/5NDN-BR4Z**.** All of these countries have important relationships with the United States. Some share a border with the United States and are our closest trading partners. Others are a world away and are strategic military partners in the fight against global terrorism. Some countries—especially those in the Middle East that heavily rely on fossil fuels to power their economies—are not likely to welcome Boulder's *de facto* tax on the production of fossil fuels within their territory. Applying Colorado law to directly attach liability to drilling and refining operations in those countries would increase the marginal cost of extracting and refining their oil and thus harm their economies, in addition to the dignitary harm to their sovereignty. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). Allowing 50 states to apply their own laws to the extraction and refining of fossil fuels in the Middle East would create a geopolitical nightmare, undermining the United States' ability to speak with "one voice" when engaging in extremely sensitive diplomatic endeavors. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 449 (1979).

Because the Senate is specifically tasked with approving treaties with foreign nations, U.S. CONST. art. II, § 2, cl. 2, *amici* are in a unique position to appreciate the foreign-policy risks of Boulder's novel escapade. Senior members of the State Department also agree that allowing state law to penalize actions taking place in foreign countries would create a foreign-relations nightmare. When Vermont and New York attempted to legislatively extend their regulatory powers across the globe, Deputy Secretary

of State Christopher Landau filed declarations that laid out the dire foreign-policy consequences of their actions. When faced with liability for actions on their own soil, foreign nations "may seek to respond" by "retaliating" in the form of increasing the costs on U.S.-based fossil-fuel companies operating in their countries. Decl. of Christopher Landau, *Vermont, supra*, ECF No. 50-3 ¶ 18. If each state could extend its powers into foreign nations, it would be "difficult—if not impossible—to maintain a coherent national position" on energy-policy issues. *Id.* ¶ 20.

The problems with Boulder's lawsuit (and those like it around the country) do not end there. Not only does Boulder seek to use Colorado law to "embroil the [United States] with foreign nations," THE FEDERALIST NO. 42 (James Madison), it also proposes to have a jury of Coloradans decide how much money Exxon and Suncor will owe for their actions in other states and in foreign countries. Am. Compl. ¶ 544 ("Plaintiffs demand a trial by jury."). Normally, juries serve the public good because they are the "voice of the community" in the judicial process. *BMW of N. Am.*, 517 U.S. at 600 (Scalia, J., dissenting); *Barry v. Edmunds,* 116 U.S. 550, 565 (1886). That feature, however, becomes a bug when the jury is seeking to impose liability based on actions taken wholly within a *separate* "community." *BMW of N. Am.*, 517 U.S. at 600 (Scalia, J., dissenting). A jury asked to decide the amount of damages that will be imposed for conduct taking place in other states and foreign countries would have every incentive to rack up the bill, as the benefits but not the costs will be felt by those in their community.

II. This Lawsuit Cannot Proceed as a Regulation of Greenhouse-Gas Emissions.

The premise of Boulder's complaint and the Colorado Supreme Court's decision—that this case is about liability for the production, refining, sale, and advertising of fossil fuels, *see* Pet.App.17a—makes this an easy case under the extraterritorial-regulations doctrine. But there is another way to think about the theory of liability here: a regulation of the emission of greenhouse gases. Those gases, after all, are the manner in which Boulder allegedly suffers its harm. As the Second Circuit concluded when facing a similar lawsuit, "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively "exacerbate global warming"—that the City is seeking damages" from producers of fossil fuels. *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *Minn. ex rel Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 717–18 (8th Cir. 2023) (Stras, J., concurring). Because the emission of greenhouse gases is "a link in 'the causal chain'" of the Boulder's damages, and because the Clean Air Act preempts states from applying their own law to establish liability based on out-of-state emissions, these claims are preempted. *City of New York*, 993 F.3d at 91.

This Court has long held that states cannot apply their own law in lawsuits that involve out-of-state air- or water-pollution sources. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 (1972) (*Milwaukee I*); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). Historically, disputes that involved air or

water moving from one state to another were governed by the federal common law of interstate pollution. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38 (1907) (applying federal common law to a dispute about "outside nuisances"). Indeed, an "unbroken string of cases has applied federal law," not State law, to resolve such conflicts. *City of New York*, 993 F.3d at 91 (collecting cases). When transboundary pollution is at issue, "federal interests . . . are incompatible with the application of state law" for two reasons. *Id.* Applying State law would (1) result in emissions from a single source being regulated by up to 50 State laws at a single moment, and (2) subvert "basic interests of federalism" by allowing States essentially to serve as judges in their own disputes. *Id.* at 91–92 (quoting *Milwaukee I*, 406 U.S. at 105 n.6); *AEP*, 564 U.S. at 421.

Throughout our nation's history, a dispute involving interstate air pollution would have been governed by the federal common law of interstate pollution, as established by "known and settled principles of national or municipal jurisprudence." *Minn. ex rel Ellison*, 63 F.4th at 718 (citation omitted) (Stras, J., concurring) (cataloguing this history); *see Milwaukee I*, 406 U.S. at 105; *cf.* THE FEDERALIST NO. 80 (Alexander Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."). The federal common law of interstate water pollution and interstate air pollution, however, have been displaced by the Clean Water Act and Clean Air Act, respectively. *City of Milwaukee v. Illinois & Michigan,*451 U.S. 304 (1981) (*Milwaukee II*); *AEP*, 564 U.S. at 415. Thus, no plaintiff can bring a claim under those sources of law. *Id.* at 429.

Much ink has been spilled by the lower federal courts and state supreme courts about the exact contours of the preemption analysis here. Some courts have determined that the constitutional principles that necessitated federal common law in the first place continue to disable the use of state law, despite federal common law being displaced as a rule of decision in federal courts. *See, e.g.*, *City of New York*, 993 F.3d at 92–93. Other courts have determined that the sole question is the preemptive scope of the Clean Air Act and that the reasons why federal common law governed in the first place are irrelevant to the inquiry. *See e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1181 (Haw. 2023). The Colorado Supreme Court took the latter position. Pet.App.11a.

Although the dispute over what happens to the preemptive force of the federal common law when it is displaced by a federal statute is interesting, that debate is largely academic with respect to the Clean Air Act. For even if the constitutional principles undergirding the federal common law no longer allow for the preemption state law, standard tools of interpretation demonstrate that the Clean Air Act's preemptive scope reaches at least as far as the federal common law's preemptive scope. Thus, the assertions of the Colorado and Hawaii Supreme Courts that "'displaced federal common law plays no part in this court's preemption analysis'" are wrong. Pet.App.11a (quoting *Honolulu*, 537 P.3d at 1199). In other words, a state law theory of liability that would have been preempted under the federal common law would likewise serve as an "obstacle" to the goals on the Clean Air Act and thus be preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881–82 (2000). And

because this suit would have been preempted under the federal common law, it is preempted under the Clean Air Act.

At least three tools of statutory interpretation demonstrate that the Clean Air Act, at a minimum, preempts any action that could not have proceeded under the federal common law of interstate air pollution.

First, consider the non-derogation canon. "[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012); *Scharfield v. Richardson*, 133 F.2d 340, 342 (D.C. Ct. App. 1942) (Vinson, J.). Thus when a statute regulates an area traditionally occupied by the common law, silence or gaps in the statute should not be interpreted to abrogate well-settled common-law rules. *Id.* If that statute enacts a rule that is obviously inconsistent with the common law, the statute will govern. But the fact that the statute alters the common law in one way does not imply that it alters the common law in another way. *Id.* The non-derogation canon has clear import in this context. Before the Clean Air Act, the federal common law provided the rule of decision and preempted states from applying their own law to out-of-state pollution sources. *AEP*, 564 U.S. at 423. The Clean Air Act displaced the federal common law and appointed the EPA as the "primary regulator of greenhouse[-]gas emissions." *Id.* at 428. It did not, however, purport to alter the preemptive force of the federal common law at all, let alone with clarity. Thus even if the federal common law lost its preemptive force, the natural

implication is that the Clean Air Act simply incorporated the same preemptive scope.

Second, consider the elephants-in-mouseholes canon.[5] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). As the Colorado Supreme Court understood things, the Clean Air Act's displacement of the federal common law of interstate air pollution enacted a seismic shift in the governance of interstate air pollution. From the beginning of our country's history, states could not apply their own law to out-of-state emissions. *See City of New York*, 993 F.3d at 91 (collecting cases). But the Colorado Supreme Court thinks that the Clean Air Act silently allowed unprecedented state-law causes of action by creating a comprehensive statutory scheme for the regulation of such pollutants under federal law. It would be quite strange, to say the least, for Congress to cede such vast power to the states without a word.

Third, consider the negative-implication canon. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002). One of the Clean Air Act's saving clauses allows states "to adopt or enforce" a "standard or limitation respecting emissions of air pollutants or . . . a[] requirement respecting control or abatement of air pollution" within its own borders that is stricter than the one mandated by the EPA. 42 U.S.C. § 7416; *see Ouellette*, 479 U.S. at 497 (interpreting the same clause in the Clean Water Act). Allowing states to impose more-stringent restrictions than the EPA mandates on the release of air pollutants within their

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[5] This canon is often understood as the "major questions doctrine" in the administrative-law context, but the fact that Congress does not enact massive changes without notice applies across the board.

own states leads to the negative implication that states may not impose such restrictions on emitters in *other* states. In other words, the negative implication is that states are forbidden from doing precisely what the federal common law forbade them from doing before the enactment of the Clean Air Act. This savings clause dovetails perfectly with the conclusion that the Clean Air Act incorporated the preemptive scope of the federal common law of interstate air pollution.

Put together, these traditional canons of interpretation point to a common-sense conclusion: Congress did not *sub silentio* authorize a massive expansion of state authority over interstate emissions through the Clean Air Act.

Because this suit would have been preempted before the passage of the Clean Air Act, it can only go forward if the Clean Air Act authorizes it. *Id.* at 492. The Clean Air Act does no such thing. Only two provisions of the Clean Air Act could possibly be relevant to authorizing this kind of suit, but neither greenlights this kind of suit.

First is the "states' rights" savings clause, which establishes that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. This clause looks promising at first, but as described above, this Court has interpreted the identical clause in the Clean Water Act only to allow for the regulation of *in-state* sources of pollution. *Ouellette*, 479 U.S. at 492. Given that these clauses use the same wording and

are contained within similar statutes, they plainly have the same meaning. *City of New York*, 993 F.3d at 99; *Bell v. Cheswick Generating Station*, 734 F.3d 188, 195–96 (3d Cir. 2013) (same).

The second potentially relevant clause is the "citizen-suit savings clause," which states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Like the states' rights savings clause, however, the citizen-suit clause has already been interpreted by this Court to allow for suits under "the law of the [pollution's] *source* [s]tate." *Ouellette*, 479 U.S. at 497. Thus, neither of the savings clauses shows that the Clean Air Act has authorized this lawsuit. *Id.*

III. Conclusion

Boulder seeks to use Colorado law to impose its policy preferences on the rest of the world. But Colorado law does not govern activities in the other 49 states, much less countries thousands of miles away. This Court should reverse.

Respectfully submitted,

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