

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*

————— ◆ —————
**AMICI CURIAE BRIEF BY
PROFESSOR RICHARD EPSTEIN AND
PROFESSOR JOHN YOO
IN SUPPORT OF PETITIONERS**

————— ◆ —————
Ivan L. London
Counsel of Record
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
ilondon@mslegal.org

May 21, 2026

Attorney for Amici Curiae

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITIES AND INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	4
I. Respondents Are Using Technical Arguments to Avoid a Merits Decision....	4
II. The Decision Below Misstates the Law of Preemption and Should Be Reversed.....	6
III. Respondents Cannot Plead Any Valid Tort Claims	17
A. Respondents have failed to identify a proper defendant	22
B. There is no materiality or causation	24
C. Respondents cannot show any basis for justifiable reliance.....	28
CONCLUSION	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>American Electric Power v. Connecticut</i> , 564 U.S. 410 (2011).....	4, 6, 7, 8, 9, 10
<i>American Insurance Association v. Garamendi</i> , 539 U.S. 396 (2003).....	12
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	28
<i>Bell Atlantic, Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	28
<i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500 (1988).....	15
<i>Burgess v. M/V Tamano</i> , 370 F. Supp. 247 (D. Me. 1973)	19
<i>City & Cnty. of Honolulu v. Sunoco LP</i> , 537 P.3d 1173 (Haw. 2023).....	2, 20
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004).....	27
<i>City of New York v. Chevron Corp.</i> , 993 F.3d 81 (2d Cir. 2021)	2, 8

<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363 (1943).....	8, 9
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	5
<i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363 (2000).....	12
<i>Derry v. Peek</i> , L. R. 14 App. Cas. 337 (1889).....	30
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	8, 9
<i>Express Scripts, Inc. v. Anne Arundel County</i> , 353 A.3d 1084 (Md. 2026).....	18, 27
<i>Hencely v. Fluor Corp.</i> , 146 S.Ct. 1086 (2026).....	15, 16
<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938).....	8
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941).....	11
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972).....	9, 16

<i>Mayor & City Council of Baltimore v. B.P. P.L.C.</i> , 353 A.3d 1142 (Md. 2026)	22
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	16
<i>Osborn v. Bank of the United States</i> , 22 U.S. (9 Wheat.) 738 (1824).....	16
<i>State ex rel. Hunter v. Johnson & Johnson</i> , 499 P.3d 719 (Okla. 2021).....	18
<i>Ultramares Corp. v. Touche</i> , 174 N.E. 441 (N.Y. 1931)	31
<u>Statutes</u>	
28 U.S.C. § 1257(a).....	4
42 U.S.C. § 9613(f)	23, 24
<u>Regulations</u>	
Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).....	6
<u>Other Authorities</u>	
<i>Anonymous, Y.B. Mich.</i> , 27 Hen. 8, f. 27, pl. 10 (King’s Bench 1536)	19

Carbon Monitor, https://carbonmonitor.org/	29
<i>Kyoto Protocol to the United Nations Framework Convention on Climate Change</i> , Dec. 10, 1997, 2303 U.N.T.S. 162	12, 13
<i>Paris Agreement to the United Nations Framework Convention on Climate Change</i> , Dec. 12, 2015, T.I.A.S. No. 16-1104.....	12
<i>Praise of Erie—And of the New Federal Common Law</i> , 39 N.Y.U. L. REV. 383, 421–22 (1964)	9
<i>Restatement (Second) of Torts: Liability for Economic Harm</i>	19, 23, 24
<i>Restatement (Third) of Torts: Liability for Economic Harm</i>	21
<i>The Private Law Connections to Public Nuisance Law: Some Realism About Today’s Intellectual Nominalism</i> , 17 J.L. Econ. & Pol’y 282 (2022).....	19
United Nations, <i>IPCC report: ‘Code red’ for human driven global heating, warns UN chief</i> (Aug. 9, 2021), https://news.un.org/en/story/2021/08/10973 62	29
U.S. Energy Information Administration, <i>State Energy Data System 1960–2021: Prices and Expenditures</i> (2023).....	14

**IDENTITIES AND INTERESTS
OF *AMICI CURIAE*¹**

Professor Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University. He is also a Senior Fellow at the Civitas Institute, and the James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer at the University of Chicago Law School. Professor Epstein is one of the foremost scholars in the United States on tort and takings law, and he maintains a unique interest in ensuring that courts appropriately apply basic tort doctrine to the rapidly evolving field of public nuisances.

Professor John Yoo is the Emanuel S. Heller Professor of Law at the University of California at Berkeley and Faculty Director of its Law & Public Policy Program. He also serves as Senior Research Fellow, Civitas Institute, University of Texas at Austin; and Non-resident Senior Fellow at the American Enterprise Institute. He maintains a unique interest and expertise in ensuring that courts apply preemption doctrine appropriately.



¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

If the global and national climates are changing, then the Nation should decide collectively through legislation and administrative orders how best to address the changes. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (“[T]he question before us is whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law. Our answer is simple: no.”) (*New York*). Neither Boulder, Colorado, nor other state and local actors applying state and local common law and statutes can decide climate and energy policy for the entire Nation.

This point seems obvious. Yet facing the question “who gets to decide,” federal and state courts are struggling with the answer. Approximately sixty lawsuits like this one have been filed. Among the lawsuits, the Court of Appeals for the Second Circuit has rejected local attempts to manufacture common law claims to address alleged injuries arising (albeit only indirectly) from greenhouse gas emissions. *New York*, 993 F.3d at 91. But the Supreme Court of Hawaii has in turn rejected the Second Circuit decision for its supposedly “flawed reasoning.” *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1196 (Haw. 2023) (*Hawaii*).

Amidst this conflict in the courts, the dispute comes to this Court from Boulder, Colorado, whose court of last resort followed Hawaii in rejecting the

Second Circuit. This Court took the case to resolve this conflict that has spread its tentacles across the Nation.

The case raises three questions to the Court: (I) whether the Court should hear this case now; (II) whether federal law preempts these state lawsuits; and (III) whether the underlying tort claims have merit? The resolution in this forum should be clear. Decades of federal common and statutory law, acknowledged, interpreted, and applied by this Court's precedents, require ending these novel tort claims now on their pleadings.

Underlying the central issue of preemption—and really, all three questions—is the question of the merits of the tort claims. Respondents have failed to link recovery in this case with any actual emissions of carbon dioxide. Instead, they have sought to go back several links in the chain of fuel distribution to claim that the ordinary sales of the energy products in Colorado and elsewhere have allegedly caused losses within their state, even though all users of energy have received warnings from many sources of the supposed risks of climate change.

But this claim styled as “misrepresentation”—because Respondents cannot allege public nuisance—satisfies none of the standard requirements for either misrepresentation or nondisclosure. That is a compelling reason to stop cases like this one at the pleading stage with a final judgment against Respondents *now*.

No matter how they try to mask their aims, Respondents want to misuse the settled laws of nuisance and misrepresentation against Petitioners in this case and several others like it to set nationwide climate policy, all in violation of sound tort principles. The emptiness of Respondent’s “claims” means that a judgment against all plaintiffs—Respondents here—is warranted on the strength of the current record. This case is thus ripe for a final judgment on appeal under 28 U.S.C. § 1257(a).

Federal preemption is necessary to prevent Respondents from co-opting nationwide climate policy. Congress displaced local attempts to address nationwide climate issues in the Clean Air Act. See *American Electric Power v. Connecticut*, 564 U.S. 410, 422–23 (2011) (*AEP*). No state or local government can use a set of fanciful lawsuits under state common law to set nationwide climate and energy policy.

ARGUMENT

I. Respondents Are Using Technical Arguments to Avoid a Merits Decision.

The Court can act on this case now. Respondents seek to expand the scope of state public nuisance to include the simple selling of gasoline in Colorado. Petitioners allegedly become responsible for adverse consequences said to follow from carbon dioxide emissions. These tort claims have received a mixed reception in the courts. The question is teed up in at least sixty courts, with more to come.

So with the fate of this nation's energy industry and environment in the balance, the Court must rule on *this* case's merits now. Yet, Respondents nevertheless make the opaque claim that this Court lacks jurisdiction to hear this case because the decision of the Colorado Supreme Court is interlocutory and not fit for review.

The rule against hearing interlocutory appeals should not apply in this case. The basic rule makes good sense where there is a wide range of questions such that the resolution of one issue selected for appeal leaves the remainder of the case in limbo. But its presumption does not hold where, as here, the issue that has been isolated for appeal disposes of the entire case without having to conduct expensive trials that will consume judicial resources in multiple courts for years.

It is for that reason that the Court's bedrock decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476–87 (1975), allows needed appeals to precede exhaustive trials. Consider this case in light of *Cox Broadcasting*: here, Respondents' only motive in insisting that the case is not ripe for appeal is to generate another chapter in the endless procedural maneuvering designed to force Petitioners to settle.

Put a different way, a question of jurisdiction at this point might make sense if the merits of the case were lopsided in favor of Respondents or if the matters at issue did not interfere with the structure of domestic and international energy markets. Not only

is the case for preemption here powerful, but also Respondents have not stated a viable cause of action for any theory of misrepresentation or nondisclosure. Why remand?

II. The Decision Below Misstates the Law of Preemption and Should Be Reversed.

The Court should hold that federal common and statutory law preempts the claims here. Respondents filed tort claims against Petitioners (which are energy companies) based on harms they allegedly have suffered due to global climate change. They argue Petitioners are at fault because they played some role in increasing the concentration of greenhouse gases in the global atmosphere, thereby playing some indefinite, microscopic part in global climate change. *See* Pet.App.25a–26a (Samour, J., dissenting).

This Court should reject the Colorado Supreme Court’s holding and the precedents on which it relied. The Court has already explained that the production, sale, and consumption of fossil fuels in any single state (or anywhere in the world) do not generate a sufficiently large temperature change to produce a rise in sea levels anywhere, let alone in any single city or state. “Greenhouse gases once emitted ‘become well mixed in the atmosphere.’” *AEP*, 564 U.S. at 422 (quoting Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009)).

Disregarding this Court's statement in *AEP*, the Colorado Supreme Court instead offered a convoluted mishmash of torts of public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass against Petitioners. In doing so, the court replaced this Court's finding in *AEP* with a finding of potential tort liability on the erroneous ground that greenhouse gas emissions in Colorado or elsewhere raise worldwide temperatures, which allegedly may cause weather changes that maybe harm Colorado.

As was explained to this Court more than a decade ago, "emissions in [New York or] New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422. The same is true for any supposed harm to Colorado. So the Colorado Supreme Court's embrace of the reasoning in *Hawaii* erroneously repeats a theory rejected by this Court in *AEP* and by the Second Circuit in *New York*. The court mistakenly concluded instead that federal law does not preempt Respondents' state tort law claims because the Clean Air Act had "displaced" federal common law. While pre-Act federal common law had allowed states to sue each other over air and water pollution, *AEP* held that the Act displaced that law. The Colorado Supreme Court, however, erred by holding that the Clean Air Act's displacement of a judicially created federal common law cause of action somehow allowed states to manufacture their own novel common law actions on the same question.

That's simply wrong. The court should have read the Clean Air Act's displacement of federal common law as also extinguishing any state law causes of action. As the Second Circuit found, *AEP* does not authorize state law to snap back into place "simply because Congress saw fit to displace a federal court-made standard with a legislative one." *New York*, 993 F.3d at 98. Rather, the Act made the EPA the "primary regulator of [domestic] greenhouse gas emissions," *id.* at 99 (citing *AEP*, 564 U.S. at 428), and states only can regulate internal emissions sources, not those from other states, *id.* at 100 (citing *AEP*, 564 U.S. at 422). This Court should reaffirm that, as the Second Circuit correctly held, states cannot "utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *New York*, 993 F.3d at 85.

Moreover, while *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), denied the existence of a general federal common law, it also explicitly affirmed the existence of a specialized federal common law where national concerns are paramount. And *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), decided on the same day as *Erie*, held that interstate water disputes are "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. In the absence of a federal common-law rule, the states in a dispute would presumably give priority to their own laws. Justice William O. Douglas expressed the same view in *Clearfield Trust Co. v. United States*,

318 U.S. 363, 367 (1943) (applying federal common law to deal with commercial paper to avoid “making identical transactions subject to the vagaries of the laws of the several states.”). And as Judge Henry Friendly observed, “[e]nvironmental protection is undoubtedly an area ‘within national legislative power,’ one in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’” *AEP*, 564 U.S. at 421 (quoting Henry Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 421–22 (1964)).

Indeed, a century of this Court’s precedent, including *Illinois v. City of Milwaukee*, 406 U.S. 91, 102–03, 102 n.3 (1972), recognizes that federal common law must govern here. As this Court observed, interstate pollution presents an “overriding . . . need for a uniform rule of decision” because states have conflicting self-interests, energy production and pollution are nationwide in scope, and the basic interests of federalism are involved. *Id.* at 105 n.6. The federal common law as it existed before the Clean Air Act would have preempted the state tort claims in this case.

AEP did not hold that the Clean Air Act revived the state causes of action that earlier federal law had preempted. *AEP*’s conclusion that the Act preempts judge-made federal causes of action applies with even greater force to state-made causes of action. “The critical point is that Congress delegated to EPA . . . whether and how to regulate carbon-dioxide

emissions [which] displaces federal common law.” *AEP*, 564 U.S. at 426. And here, federalism plays an important role. The lower federal courts are part of a unified judicial system that can correct deviations from established tort doctrine under a well-established body of federal law. By contrast, the state courts are autonomous and can develop tort law subject only to a weak set of constitutional constraints. State tort law can create higher levels of undesirable variation, as shown by the unprecedented tort theory adopted by trial and appellate courts in Hawaii and Colorado.

Adoption of *AEP*'s rule, moreover, would not unconstitutionally intrude into the proper scope of state authority under the Constitution's system of federalism. Under the Articles of Confederation, states had erected tariffs, duties, and trade barriers that prevented a free trade area within the United States. As Gordon Wood has described the impetus for constitutional reform in the 1780s, “it was ‘the corruption and mutability of the Legislative Councils of the States’ the ‘evils operating in the States,’ that actually led to the overhauling of the federal government in 1787.” Gordon S. Wood, *The Creation of the American Republic, 1776-87*, at 467 (1969). “The federal Constitution became the culmination of a decade's efforts by Americans to readjust their constitutional structures to fit what Hamilton called ‘the commercial character of America.’” *Id.* The Constitution gave the federal government the authority to regulate interstate commerce while also

prohibiting states from laying “Imposts or Duties on Imports or Exports.” It sought *to prevent* the states from engaging in harmful regulatory competition and a cycle of retaliatory sanctions that would punish free trade between the states.

Overruling the court in this case would prevent Colorado from exercising extraterritorial control over behavior the vast majority of which takes place in the rest of the Nation. If Colorado governments impose an effective tax on economic activity that takes place in other states, then those states will respond—without federal intervention—with similar taxes of their own. Extraterritorial application of Colorado law would spark the very cycle of harmful economic retaliation that the Framers wanted to suppress.

Properly concerned with the tension between federal and state authority, the Framers of the Constitution wisely crafted a balanced system that prevents a single state from regulating a nationwide industry. Applying *AEP*'s rule serves the interests of federalism by keeping orderly relations among the states while reserving federal government control over interstate pollution and nationwide industry.

This Court should also maintain federal common law preemption over interstate aerial pollution due to the foreign policy and national security interests at stake. This Court has long recognized that the Constitution vests the conduct of foreign relations in the federal government alone. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). It has

preempted state laws that might interfere with federal foreign policy, even in the absence of a treaty. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), for example, this Court preempted a state law that imposed sanctions on Burmese-related goods because it conflicted with federal foreign policy toward Burma.

This Court has further held that states cannot use their police powers to regulate areas that are the subject of diplomatic negotiations by the federal government. In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that the federal common law of foreign relations preempted a California law that required insurers to disclose information relating to pre-WWII insurance policies held by Swiss and German companies. The Court found that the state law conflicted with the Clinton administration's diplomatic efforts to achieve a settlement between the German government, financial institutions, and Holocaust survivors and their families.

In a similar way, these air pollution cases directly impact national foreign policy interests. The executive branch has entered into international agreements designed to regulate greenhouse gas emissions and has participated in international negotiations to identify areas for cooperation between nations. *See, e.g.*, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; Kyoto Protocol to

the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162; Rio Declaration on Environment and Development, Jun. 13, 1992, 31 ILM 874 (1992). Respondents attempt to impose a damages sanction on Petitioners for the very conduct, based on the same theory of harm, that is the focus of these national diplomatic efforts. The potential interference with federal foreign policy further demonstrates the need to preempt the state causes of action in this case.

The national security interests at stake are of the highest order. Controlling energy has long constituted an important national security goal that not only supports economic independence and stability but also U.S. diplomacy and military capabilities. If this Court were to allow these tort cases to proceed, then states and localities could handicap an interstate industry critical to the Nation's economy and security.

Development of energy resources makes a critical contribution to American security. It not only supplies the fuel for military operations themselves, but it also underpins the growing economy necessary to provide the resources for national defense. In 2021, the energy industry employed 7.8 million Americans; in 2022, employment rose to 8.1 million.² Americans last year spent \$1.3 trillion on energy, which amounts

² United States Energy and Employment Report 2023. <https://www.energy.gov/media/299601>, last visited May 19, 2026.

to 5.7% of the Gross Domestic Product. U.S. Energy Information Administration, State Energy Data System 1960–2021: Prices and Expenditures (2023). There are more than 11,000 utility-scale power plants in this Nation that deliver electricity to the Nation’s power grid.³

Conversely, weakness in the U.S. energy sector can harm American security. State laws that burden oil and gas production can reduce the resources available to defense and create vulnerabilities to enemy attack or pressure. During the 2026 conflict between the United States and Iran, the U.S. Armed Forces destroyed most of Iran’s military assets and established air superiority in the skies. Iran responded by blockading the Straits of Hormuz—through which about 20% of world oil supplies pass—to increase energy prices and place economic pressure on the United States and its allies. American increases in oil and gas production, which have made the United States energy-self-sufficient, may have reduced the direct impact of Iran’s blockade on the Nation. But Iran’s interdiction of oil exports from the Persian Gulf still pressured oil markets worldwide, which increased Tehran’s bargaining leverage. Allowing states to interfere with national oil and gas markets would increase the Nation’s vulnerability to the energy blackmail practiced by Iran.

³ <https://www.epa.gov/power-sector/electric-power-sector-basics>, last visited May 18, 2026.

Further, this Court’s recent decision in *Hencely v. Fluor Corp.*, 146 S.Ct. 1086 (2026), is not to the contrary. In *Hencely*, this Court declined to extend the preemption of state product liability claims against military contractors to injuries that stemmed from activities on the battlefield. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), this Court had held such preemption proper *only* when the manufacturer had to follow the design specifications demanded by a government contractor. In *Hencely*, this Court found that neither the Constitution nor statutes preempted *all* hypothetical state lawsuits by a contractor involving combatant activities. *Hencely*, 146 S.Ct. at 1093.

The *Hencely* majority and dissent, however, agreed that the structure of the Constitution itself *could* require preemption of state laws. As Justice Thomas’s opinion observed, *Boyle* recognized that “a few areas, involving ‘uniquely federal interests,’ are so committed by the Constitution and the laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law.” *Id.* at 1094. Justice Alito’s dissent agreed. “We have long recognized that federal law preempts state laws that intrude on the powers that the Constitution confers exclusively on the Federal Government, as well as laws that substantially interfere with the operation of the Federal Government’s organs or the work of federal officers.” *Id.* at 1101 (Alito, J., dissenting).

This case presents the opposite situation from *Hencely*. Here, this Court has already recognized the preemption of state regulation of interstate pollution. See *Milwaukee*, 406 U.S. at 102–03, 102 n.3. This case does not present the Court with the question whether to extend federal preemption to a new area. Rather, it asks whether, when Congress enacted the Clean Air Act, it also reversed the preemption of state laws affecting interstate pollution that had governed for a century. Congress did not explicitly override the entire body of federal common law that governed interstate pollution. In the absence of such an explicit command by Congress, this Court has no reason to upset its precedents upholding field preemption created by the constitutional structure.

From the beginning, this Court recognized that the constitutional structure itself requires preemption of certain fields. For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court preempted state efforts to tax the national bank, a federal instrumentality, even though no federal law prohibited the tax. Chief Justice Marshall inferred preemption from the constitutional structure because otherwise states would “retard, impede, burden, or in any manner control” federal policy. *Id.* at 436. Chief Justice Marshall similarly held in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865 (1824), that the Constitution preempted state efforts that were “so objectionable” to federal operations and rights. Neither the majority nor the dissent in *Hencely* disagreed with this basic element of the constitutional

structure. Overturning precedent finding interstate pollution to be a matter of federal common law would deny the basic principles of federalism.

III. Respondents Cannot Plead Any Valid Tort Claims.

The Court should stop these state and local attempts to set national climate policy through frivolous state tort actions. In one breath, Boulder asserts five traditional common law claims under Colorado law: public nuisance, private nuisance, trespass, unjust enrichment, and civil conspiracy. J.A.112–23, J.A.127–36 (Am. Compl. ¶¶ 444–88, 501–30). Specifically, Boulder seeks “past and future damages” for its injuries caused by global “climate change.” J.A.136 (Am. Compl. ¶ 532). It also seeks “remediation” or “abatement of the hazards” of global climate change “by any other practical means.” J.A.138 (Am. Compl. ¶ 534). Yet, in the next breath it insists that its claims do not purport “to impose liability for activities that the [Clean Air Act] regulates.” Pet.App.15a. Boulder’s “claims do not seek compensation for any [greenhouse-gas emissions] by [Petitioners] but direct their legal action solely to Petitioners’ ‘upstream production activities.’” Pet.App.21a, none of which involves emissions.⁴

⁴ A trial court in South Carolina saw such claims roughly the same way: “For the reasons below, the Court grants Defendants’ motions and dismisses Plaintiff’s Complaint with prejudice. . . .

But even with the pleading sleight-of-hand, the alleged facts cannot support a public nuisance claim. Here, the errors of the decision below take at least two forms. *First*, even as confined to physical injuries, tort law does not allow individual injuries to be aggregated into a public nuisance. *See, e.g., Express Scripts, Inc. v. Anne Arundel County*, 353 A.3d 1084, 1133–34 (Md. 2026) (holding that licensed dispensing of a controlled substance is not an actionable public nuisance, Maryland common law never recognized a government entity’s ability to recover damages for public nuisance, and allegations regarding individual injuries failed to sufficiently allege conduct affecting a public right). That rule applies to the dissemination of information to members of the public too. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 726–27 (Okla. 2021) (reversing a \$465 million judgment against a defendant for “creating a public nuisance in the marketing and selling of its opioid products” because the plaintiffs failed to establish that their injuries came from an attack on a common right).

The rule applies here. The distribution of information on the supposed harms from global warming follows a unique path through many different suppliers of information to many different consumers. Respondents cannot pinpoint a single damning statement from a sole source that reached all

[A]lthough Plaintiff’s claims purport to be about deception, they are premised on, and seek redress for, the effects of greenhouse gas emissions.” *City of Charleston v. Brabham Oil Co.*, 2020-CP-10-03975 (S.C. Ct. of Common Pleas Aug. 6, 2025), at 2.

drivers and other users of carbon-related products in the same way at the same time. The required “common interest” is just missing from this lawsuit.

Second, this error is compounded because Respondents’ case flouts other requirements for a public nuisance. Under § 822 of the Restatement (Second) of Torts, a private nuisance holds an actor “liable in an action for damages for a non-trespassory *invasion* of another’s interest in the private use and enjoyment of land.” (emphasis added). Section 821B(1) of the Second Restatement defines a public nuisance as “an unreasonable *interference* with a right common to the general public.” (emphasis added). And as just explained, the use of the word “common” *restricts* the scope of these elements. Public nuisance law has never included issues of misrepresentation, concealment, or nondisclosure rather than invasion or interference. The most common invasions of public rights are blocking rights of ways, *Anonymous, Y.B. Mich.*, 27 Hen. 8, f. 27, pl. 10 (King’s Bench 1536), or discharging pollutants into public waters, *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973). And the law has always “used the same definition of nuisance to cover both public and private nuisances,” with the former used to reach damage to the public at large, instead of damages to neighboring property owners. Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today’s Intellectual Nominalism*, 17 J.L. Econ. & Pol’y 282, 283 (2022).

Here, Respondents make sure to add the word “invasion,” but simply to aver that Petitioners’ “fossil fuel activities would cause and contribute to climate change and thus cause these invasions of Plaintiff’s property.” J.A.121 (Am. Compl. ¶ 475). Respondents, however, never identify *who* committed these alleged invasions; they never show that Petitioners released or discharged any greenhouse gas onto Colorado’s land, air, or waters. Instead, unidentified third-party users of Petitioners’ products (which would have to include Respondents themselves and their residents) made the alleged “invasions.”

To fill this “nuisance” void, Respondents invent a new claim that twists the law of misrepresentation. The Supreme Court of Hawaii blessed the approach. *Hawaii*, 537 P.3d at 1187. But Respondents pled vague counts of fraudulent misrepresentation and fraudulent concealment that fail to satisfy the required elements of even these misrepresentation torts. Once the verbal surplusage is stripped away, all that remains is a bare assertion that Petitioners sold lawful products in a lawful manner.

Despite settled law, the proceedings below are replete with references to alleged misrepresentations and concealment. But misrepresentation and concealment claims must start with the proposition that the defendant has possession of material information that is not known to the plaintiff, after which the defendant makes a false statement to the plaintiff or omits to mention a relevant material fact.

The plaintiff must, to its detriment, then rely on the false statement or improper omission to its detriment.

The Restatement explains:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.

See Restatement (Third) of Torts: Liability for Economic Harm § 9.

Here, Respondents fail each required element. They do not name the full class of proper defendants, they do not explain causation, and they do not explain their justifiable reliance.

A trial court judge in Baltimore recently characterized the identical failures of a similar lawsuit:

Baltimore seeks compensatory and punitive damages, disgorgement of profits, civil penalties under the MCPA, and equitable relief. . . . [But t]he explanation by Baltimore that it only seeks to address and hold Defendants accountable for a deceptive

misinformation campaign is *simply a way to get in the back door what they cannot get in the front door.*

Mayor & City Council of Baltimore v. B.P. P.L.C., 24-C-15-004219 (Circuit Ct. for Baltimore City July 10, 2024), at p. 11 (emphasis added). The Maryland Supreme Court affirmed that trial court's observation. *Mayor & City Council of Baltimore v. B.P. P.L.C.*, 353 A.3d 1142 (Md. 2026). The trial court's point in the Maryland case is obviously correct. Courts cannot allow Respondents to manipulate state tort laws of misrepresentation and nuisance to get from Petitioners the same damages as they could if they were the actual polluters—all while denying that their case has anything to do with actual pollution. Narrowing the review from the big picture to closer scrutiny of these three elements further reveals Respondents' inability to plead their claims:

A. Respondents have failed to identify a proper defendant.

Respondents single out large energy companies as defendants. But they do not explain why they picked these two firms from the many energy producers worldwide or the many dealers and retailers of fossil fuel products in Colorado. They do not name any false statement made by Petitioners to Colorado drivers or other residents about fossil fuels and climate change. They do not even explain that any misstatements or substantive omissions reached Boulder residents within the relevant time.

Nor is this a case of concealment in the absence of a duty to disclose. The promotion of oil and gas, for example, does not resemble the specific health claims that tobacco companies made about their products. Their charges do not say that Petitioners told the public—through advertisements—about anything other than price, mileage, additives, and services.

Sellers, distributors, and consumers manage, use, consume, and promote fossil fuel products in countless goods and services sold or delivered within Colorado without mentioning carbon dioxide or global warming. On Respondents' theory, the list of other defendants must go far beyond the sellers of fossil fuel products to include the sellers of cars, trucks, and airplanes in Colorado, and the many companies that supply natural gas and coal products to Colorado residents. Respondents continue to use fossil fuels in their own operations, and they have unlimited access to vast amounts of information on what they consider to be the scope and importance of global warming. Yet no individual Respondent in this case sued the state or county, or even reduced their own claims to reflect their own culpability on the very theory they impose on Petitioners.

The critical role of third-party suppliers is also ignored. Under joint and several liability, Petitioners' alleged misrepresentations amount to at most a tiny fraction of those made by the thousands of firms whose activities involve fossil fuels. Under the two prevailing rules for apportioning loss, § 433A of the

Restatement (Second) Torts and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f), there must be a reasonable basis for division, for example here by market share, for any fraction of alleged misrepresentations made. Petitioners' supposed contributions would be *de minimis*.

B. There is no materiality or causation.

In every tort case, a plaintiff must show that the actions attributed to the defendant have caused the specified harm. The complaint here fails to do that. Therefore, Respondents must prove causation by showing that the alleged misrepresentations satisfy two conditions.

First, they must show that if the requisite misstatements or omissions had not taken place, there would have been a lower level of consumption of fossil fuels. *Second*, they must show that without the increases in fuel-consumption levels, the alleged local adverse events would have been reduced or even eliminated.

As to the first condition, Respondents cannot maintain their claims because they and the public at large knew as much or more about global warming as Petitioners. Respondents do not even allege that Petitioners' statements produced increases in fuel-consumption levels. At most, Respondents allege that Petitioners' supposed misrepresentations caused increases "in 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 streamflows, bark beetle outbreaks, ecosystem damage, forest die-off reduced snowpack, and drought.” J.A.39 (Am. Compl. ¶ 140).

Nor can Respondents satisfy their pleading burden on tort claims by simply claiming vague adverse climate effects from temperature increases, as if this were a poorly pled *res ipsa loquitur* case. Moving back one link mightily increases the length of the causal chain. To succeed, Respondents must allege at a minimum that increased consumption of fossil fuels attributable to nonspecific representations by *these* Petitioners were both material and sufficient to produce changes in consumption levels that could in turn lead to higher levels of emissions. Then they must allege that these supposed increases in emissions would have produced the necessary temperature changes to cause the alleged adverse climate events. Respondents cannot claim that the consequences of *all* weather-related changes must be laid on Petitioners’ doorsteps because of their general marketing activities.

Respondents’ causal chain is composed of missing links. It ignores the sequence of events that would theoretically link Petitioners’ conduct to the possible damages, given that Petitioners’ fossil fuel *sales* also include coal, natural gas, and gasoline.

These different energy sources are distributed through different channels. Coal is often sold to industrial users; natural gas is used for heating and industrial purposes; gasoline is commonly sold at automobile service stations. Respondents do not identify the different improper communications that accompany each distinct method of distribution, and they cannot show that the supposed forms of misinformation were material and sole sources of greenhouse gases information to whatever hypothetical groups of buyers.

Take, for example, the sale of gasoline at service stations. If Petitioners had revealed all allegedly true information about global warming, Respondents do not explain what difference it would make in the driving patterns of individual drivers, all of whom have been bombarded with identical claims about the dangers of greenhouse gases for years on end. Consumers *might* believe that reducing their individual gasoline consumption might have only an infinitesimal effect on global warming. They would then have to balance this microscopic harm (if it is harm at all) against the major changes in lifestyle that would occur if they could not drive to work or take their kids to school.

Those sacrifices would loom too large for individuals willingly to change major driving habits. Consumers and consumption levels are far more responsive to taxes and regulations that immediately affect prices. Changes in consumer behavior due to

federal regulation of fossil fuels swamp any weak voluntary responses to the repetition of familiar charges about the dangers of greenhouse gases. What's more, the disparate modes of production and distribution for coal and natural gas are also subject to comprehensive regulation. The *Express Scripts* court, 353 A.3d at 1131–1134, offered powerful reasons for judges to stay their hands in fashioning common law remedies in already heavily regulated areas like environmental law. After all, “Litigation should not be used to achieve legislative goals.” *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1123 (Ill. 2004). Respondents would prefer that the Nation make different decisions about climate and energy policy, but expanding tort law by allowing this case to go forward is not the way to get there.

In sum on this point, it is implausible that any communications by Petitioners about their products would have influenced levels of consumption. The increasing demand for Petitioners' products in Colorado and worldwide has a far greater impact on consumption than anything Petitioners supposedly said or did. The theory that global consequences attach to both local sales campaigns and to the alleged nondisclosure of research activities over the last fifty or more years creates an open ticket to collect tens of billions of dollars, not only in Boulder, but also worldwide. Yet each allegation of an adverse event claimed to arise from misrepresentation during fossil fuel sales is both speculative and unsustainable.

The claims of irreversible damage require a detailed and separate account of each element in the chain of causation. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic, Corp. v. Twombly*, 550 U.S. 544 (2007). Respondents failed to explain the direct link between Petitioners’ supposed statements or non-statements, which may or may not have accompanied the sales of their products, to the asserted physical damages. They cannot carry their pleading burden if they cannot rule out other well-known causes—poor forest management etc.—that bring about the same alleged harms produced by greenhouse gas emissions.

C. Respondents cannot show any basis for justifiable reliance.

American law distinguishes between speaking falsely to someone and actively *deceiving* someone. It is not possible to deceive a person who knows the true facts, because that knowledge precludes any justifiable reliance on the defendant’s statements or omissions.

Here, Respondents did not identify anyone who could show actual reliance on Petitioners’ supposed misrepresentations. They had to identify a misrepresentation or concealment *by Petitioners* that fossil fuels “do no harm to the environment.” They offered no explanation why *these* defendants, among thousands of other possible parties, including Respondents themselves, had this supposed unique duty of disclosure to the public.

But even if every statement uttered by Petitioners were false, Respondents could still not justifiably rely on the supposed statements about climate change. Hundreds, if not thousands, of sources proclaim the threat that greenhouse gases pose to the environment. Respondents cannot claim that these defendants withheld critical information about the effects of greenhouse gases. *Whether correctly or not*, intensive public knowledge and discussion of these issues already exist. For example, the United Nations' Intergovernmental Panel on Climate Change issued a 2021 report in a press release: "Climate change is widespread, rapid, and intensifying, and some trends are now irreversible, at least during the present time frame."⁵ In the same press release, UN Secretary-General António Guterres declared that the IPCC's Working Group's report was nothing less than "a code red for humanity." "The alarm bells are deafening, and the evidence is irrefutable." Guterres called publicly for a fossil fuel ban to avoid "an escalating crisis."

Websites such as Carbon Monitor⁶ give exhaustive updates on all-issues carbon. Just recently, James Gustave Speth published a book, *They*

⁵ United Nations, *IPCC report: 'Code red' for human driven global heating, warns UN chief* (Aug. 9, 2021), <https://news.un.org/en/story/2021/08/1097362>, last visited July 9, 2025.

⁶ <https://carbonmonitor.org/>, last visited July 9, 2025.

Knew.⁷ Who is “they”? It is *not* Petitioners, but rather, as the subtitle says, it is “The *US Federal Government’s* Fifty-Year Role in Causing the Climate Crisis.”

One can agree or disagree with any of these studies, but what Respondents cannot show or even allege is that in all this “information”—some good, some bad—Petitioners’ supposed silence has led to changes in fossil fuel consumption, let alone to changes in temperature. Public statements from a multitude of public and private sources make it impossible to conceive of Petitioners as playing a significant role, let alone a decisive one, in the public creation and transmission of carbon-related information. Respondents cannot sufficiently allege that Petitioners by some devious schemes were able to keep the public in the dark.

How can there be reliance? The law of fraud rests on the rule that a defendant cannot keep *private* information secret in its commercial dealings with others. The minimum condition to prove a fraud case is *asymmetric* information between the two parties. The defendants must know something that the plaintiffs do not. A leading illustration is the English case, *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889). There, the fatal misrepresentation was that defendants had “the right to use steam or mechanical motive power instead of horses” to run their trams

⁷ <https://mitpress.mit.edu/9780262545099/they-knew/>, last visited July 9, 2025.

along the public way, even though they had secured such authorization for only part of that way. *Id.* at 347. The concealment of that vital information hurt the plaintiffs' investment prospects. The plaintiffs, who had no independent source of information, relied on the defendants. This case raises the opposite prospect. It bears similarity to the situation condemned nearly 100 years ago by Justice Benjamin Cardozo, in a case involving financial fraud undetected by accountants, against imposing "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

Here, Respondents have filed only generic allegations that anyone could repeat virtually verbatim, with a few name changes, against a broad universe of defendants. Every producer, user, and consumer of fossil fuels, and every entity in the supply chain in between, could become the next defendant in a suit for contributing to energy use, which allegedly increases greenhouse gases, allegedly raises global temperatures, and then allegedly causes climate change, which may harm Colorado somewhere, maybe including Boulder County—along with every other state in the Union. Hundreds of cities and counties could bring copycat complaints that could plunge these defendants, or any of a thousand other firms, into the same morass. The Court should reverse the decisions below and should reject such limitless theories of tort liability.



CONCLUSION

For these reasons, the Court should reverse the decisions below.

Respectfully submitted,

Ivan L. London

Counsel of Record

MOUNTAIN STATES

LEGAL FOUNDATION

2596 South Lewis Way

Lakewood, Colorado 80227

(303) 292-2021

ilondon@mslegal.org

May 21, 2026

Attorney for Amici Curiae