

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 AMICUS CURIAE OF
CENTER FOR INDIVIDUAL RIGHTS
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Center for Individual Rights (CIR) is a non-profit, public interest law firm dedicated to defending individual rights essential to a free and flourishing society. CIR recognizes that protecting individual rights requires maintaining the constitutionally defined roles of our national and state governments. Through its Project to Restore Competitive Federalism, CIR identifies and develops significant cases aimed at strengthening the Framers' intended federal structure—one in which competition between the national and state governments, as well as among the States, serves as a vital safeguard for individual rights.

CIR has a proven track record in this area, successfully representing one of the prevailing parties in *United States v. Morrison*, 529 U.S. 598 (2000), which remains the Supreme Court's most significant post-New-Deal case limiting Congress's enumerated powers.

CIR recognizes that federalism does not mean that state interests should always prevail. States can transgress federal limits or, as here, project their authority beyond their boundaries to govern other States' citizens and businesses. Maintaining these horizontal limits on state power is critical for the people to realize the benefits of competitive federalism.

¹ Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae made a monetary contribution to its preparation or submission.

When a State regulates beyond its border, people in other States have no ability to counter that state policy by “voting with their feet” and moving to another State, or through their own State’s elections. CIR therefore has a significant interest in a case like this one where one State seeks to project its authority beyond its borders to displace the sovereignty, laws, and policies of other States.

STATEMENT

Boulder, Colorado, wants to set climate-change policy for the United States of America. That position is so intuitively contrary to the Constitution’s design that merely to propose it is almost sufficient to refute it. But explaining that intuition requires elaborating an obvious, yet often unstated, constitutional first principle: a State presumptively cannot govern beyond its borders.

Boulder artfully pleaded numerous state law claims seeking a Colorado court judgment under Colorado law, or the laws of yet undetermined States, for alleged harm stemming from global greenhouse gas emissions. The complaint is a clever effort to exploit a small gap suggested by *American Electric Power Company v. Connecticut*, 564 U.S. 410, 429 (2011), which foreclosed federal common law claims for the same harm, but left undecided whether state common law claims are permitted. Boulder’s claims are barred for a panoply of reasons including this Court’s prior decisions regarding interstate pollution and federal common law, the Clean Air Act, and U.S. foreign policy.

But underlying those specific grounds for decision is the deeper constitutional principle that no State can govern citizens of another State. This

extraterritoriality principle is evident from the Constitution's text and structure, and the broad sweep of the Court's cases addressing the relationships among States apply, reflect, and confirm it. But that principle, and horizontal federalism more broadly, remain underspecified. Horizontal federalism cases have been decided in their various doctrinal silos, for example, as dormant Commerce Clause, Due Process, or interstate pollution cases, without significant efforts to identify common ground among them. In a recent case, the Court suggested that the extraterritoriality principle is rooted in the Constitution's overall structure. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375-76, 376 n.1 (2023). But even though the Court has held that the Constitution obviously contains a territorial limit on State authority, the Court has not yet operationalized that structural principle.

This case underscores why the Court should identify and apply a structural extraterritoriality principle. States have always had the incentive to—and have tried to—tax, regulate, and otherwise exploit people in other States. But with greenhouse gases, the problem has become particularly acute. States have doggedly continued their efforts to regulate, both legislatively and judicially, either global greenhouse emissions themselves or the consequences of global climate change, by projecting state law beyond state borders. Indeed, numerous cases like this one are pending in state courts around the country. If the Court permits Boulder's claims to proceed, or precludes them with narrow grounds of decision, the next State's effort to regulate greenhouse gas emissions extraterritorially will spring up in this case's place. These recurring lawsuits may need to be resolved by

looking beyond the narrow field of interstate pollution doctrine to identify the deeper horizontal federalism dynamics at work. In short, the Court should rule that the extraterritoriality principle forecloses Boulder’s claims.

The Constitution entrusts the Judicial Branch with mediating the “bickerings and animosities [that] may spring up among the members of the union.” *The Federalist* No. 80, at 413 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Those disputes have now “assume[d] new shapes,” *ibid.*, as States and their localities experiment with using state law claims to force through their preferred national climate policy. Proceeding in that way will rekindle, and potentially inflame, the animosity among States that our Constitution’s horizontal structure was designed to resolve. States have often governed in diverse ways; they are, famously, “laboratories of democracy.” But as those experiments become more innovative, ambitious, and potentially destructive, the Court has a constitutional role to ensure that those experiments do not escape their respective labs.

An operative extraterritoriality principle, tied to the Constitution’s structure, would help ensure the continued working of our horizontal federalism in this and future cases.

SUMMARY OF ARGUMENT

I. Our Constitution’s federalism is both vertical, allocating power between national and state governments, and horizontal, addressing interstate relations. Horizontal federalism has three essential principles—state equality, territoriality, and noninterference—each of which supports the essential principle

that a State's authority is coextensive with its borders. First, the States are equal sovereigns; no State has special status in the national government or special privileges over any other State. Second, state jurisdiction presumptively ends at a State's territorial boundary, and States may only export their law in limited and well-known ways. Third, no State may interfere with the horizontal structural order, including by interfering with other States' sovereignty and territory. Importantly, the Constitution entrusts the Judiciary with role of refereeing disputes between and among the States.

II. From these common elements, found in this Court's varied horizontal federalism cases, emerges a modest and relatively simple rule that clearly forbids Boulder's effort to export Colorado law, and potentially other States' laws, onto residents of different States with different laws and policies. The Court has recently described this extraterritoriality principle and suggested, correctly, that it is rooted in the structure of the Constitution—not merely an aspect of dormant Commerce Clause doctrine, where it has previously been identified and applied. The Court should hold that a State presumptively violates the Constitution's extraterritoriality principle where it displaces the authority of another State by dictating what is lawful, required, or forbidden there.

III. Contrary to Boulder's framing, this is an interstate emissions case, not a run-of-the-mill tort case. This lawsuit seeks, through state law claims brought in one State's court, to set climate policy in every State. By applying the extraterritoriality rule, the Court would resolve the deeper issues this case presents while remaining faithful to this Court's existing

doctrine in horizontal federalism cases. The rule, applied here, simply forecloses a city like Boulder, or any State or locality, from forcing its laws upon other States where the regulated conduct is both lawful and, often, encouraged. And by placing the onus on Boulder to justify its assertion of authority, the rule leaves room for the application of settled doctrines like the minimum contacts test. But no historical practice comes close to justifying Colorado’s assertion of unlimited extraterritorial jurisdiction.

ARGUMENT

I. The Court Plays A Vital Role Enforcing Horizontal Federalism

The Constitution’s horizontal structural elements of state equality, territoriality, and noninterference all support an extraterritoriality principle, which the Judiciary has a constitutional role in enforcing.

A. Horizontal Federalism Has Three Essential Elements

“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The division of authority tends to resist “the accumulation of excessive power,” *United States v. Lopez*, 514 U.S. 549, 552 (1995), and so “[t]his constitutionally mandated division of authority ‘was adopted by the Framers to ensure protection of our fundamental liberties,’” *id.* (quoting *Gregory*, 501 U.S. at 458). These well-known descriptions focus on the Constitution’s division between national and state governments—“vertical federalism.”

Federalism is also horizontal, governing the relationship among the States. Indeed, a primary purpose for convening the constitutional convention was to address “defects of the Confederation” including by establishing “powers ... which provide for the harmony and proper intercourse among the States.” *The Federalist* No. 42, at 216, 218 (James Madison) (George W. Carey & James McClellan eds., 2001). The resulting Constitution, through its text and structure, makes an “effort to mediate competing claims of sovereign authority under our horizontal separation of powers.” *Pork Producers*, 598 U.S. at 376. The Court has described this dynamic as the “territorial limits of state authority under the Constitution’s horizontal separation of powers.” *Id.* at 376 n.1.

Just as principles of vertical federalism emerge from the Constitution’s structure, *see Printz v. United States*, 521 U.S. 898, 918 (1997), so too has the Court “consulted original and historical understandings of the Constitution’s structure and the principles of sovereignty and comity,” *Pork Producers*, 598 U.S. at 376 (cleaned up), to discern the principles of horizontal federalism. The Constitution’s structure contains three essential and interrelated elements of horizontal federalism: state equality, territoriality, and non-interference. *See* Michael S. Greve, *The Upside-Down Constitution* 68-71 (2012).

1. Equality

Each State has equal sovereignty. *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013). That sovereignty is not absolute, however, because “the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other

solely as foreign sovereigns.” *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 245 (2019). But the States “retained a residuary and inviolable sovereignty that is reflected throughout the Constitution’s text.” *Printz*, 521 U.S. at 919. Each State enjoys that residual sovereignty equally.

This “fundamental principle of equal sovereignty,” *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009), is longstanding, *see* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 *Duke L.J.* 1087, 1125-32 (2016). It has roots in the doctrine that new States are admitted on equal footing to “a union of states, equal in power, dignity, and authority.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). But the equal footing doctrine, like the equal sovereignty principle, emerges from a more fundamental source—the Union’s structure. “[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Id.* at 580; *see also* Colby, *supra*, at 23-24.

The Constitution provides ample textual evidence of the equal sovereignty principle. For example, the States are equally represented in the Senate. U.S. Const. Art. I, § 3, cl. 1. The formula for apportioning seats in the House applies in the same manner to all States. *Id.* Art. I, § 2, cl. 3. Each State participates equally, as a State, in presidential elections through their electors. *Id.* Art. II, § 1, cl. 2. And each State has an equal role in ratifying constitutional amendments under Article V. *See* Akhil Reed Amar, *America’s Constitution: A Biography* 274-75 (2005). Moreover, any taxes that Congress imposes must be “uniform

throughout the United States,” not favoring one State or region over another. U.S. Const. Art. I, § 8, cl. 1.

The Court has repeatedly employed the equal sovereignty principle in numerous contexts, to include cases related to personal jurisdiction, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the Full Faith and Credit Clause, *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982), state sovereign immunity, *Hyatt*, 587 U.S. at 246, and Section 5 of the Voting Rights Act, *Shelby Cnty.*, 570 U.S. at 544.

State equality does not guarantee equal State outcomes. Some States may suffer a disparate effect from generally applicable national laws. Colby, *supra*, at 1148-1149. Some States are more populous, have more natural resources or geographic advantages, or may otherwise have more economic influence. But, at bottom, the equal sovereignty principle means that no State has special status in the national government or special privileges over any other State. *See Greve, supra*, at 69.

2. Territoriality

Each State enjoys its equal sovereignty within its own distinct territory. Indeed, the principle that a State’s residual sovereignty is coextensive with its territory “is so obviously the necessary result of the Constitution that it has rarely been called in question.” *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

Unlike vertical federalism, which allocates authority between the national government and the States based on subject matter, the Constitution’s horizontal

federalism allocates authority based on each State's territory. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315-20 (1992) "Indeed, territory is part of the very definition of the state." *Id.* at 316.

The Constitution takes territoriality as a given, even though it does not contain an express "territoriality clause." For example: States may not be joined, and a new State may not be established within the jurisdiction of an existing State "without the Consent of the Legislatures of the States concerned as well as of the Congress," U.S. Const. Art. IV, § 3. This clause is unworkable if we cannot know where one state ends and another begins, and notably this provision equates "jurisdiction" with a State's territory. Also, Senators and Representatives will be chosen from among States, and those delegates must be "Inhabitant[s]" of the electing State, which presumes the ability to identify the inhabitants of a State based on those living within its borders. U.S. Const. Art. I, § 2, cl. 2; *id.* Art. I, § 3, cl. 3.

Moreover, the Extradition Clause implies territorial limits to state power by invoking the concept of a "State having Jurisdiction of the Crime." U.S. Const. Art. IV, § 2, cl. 2. The Sixth Amendment requires that defendants receive a trial "by an impartial jury of the State and district wherein the crime shall have been committed," U.S. Const. Amend. VI, which presumes and limits territorial jurisdiction. And the Citizenship Clause refers to citizens "of the State wherein they reside," implying that borders differentiate one State from another. U.S. Const. Amend XIV, § 1.

Additionally, certain provisions refer to the crossing of physical borders. For example, the United States “shall” guarantee each State protection against invasion, meaning that a physical border is crossed. U.S. Const. Art. IV, § 4. A duty on imports or exports is a duty on goods that cross a physical state border. *See id.* Art. I, § 10, cl. 2. And commerce “among the several States” is commerce that originates in one State, crosses a physical and jurisdictional border, and ends up in another State. *See id.*, Art. I, § 8, cl. 3.

None of these provisions are operative if States do not have fixed boundaries marking the limits of their authority. And all of them support the Supreme Court’s territorial conclusions that “State sovereign authority is bounded by the States’ respective borders,” *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 14 (2025), and that no State may “impose its own policy choice on neighboring States,” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-71 (1996).

3. Noninterference

Finally, the Constitution contains numerous provisions that limit State interference with the horizontal federal order.

Free movement. The Constitution provides for the free movement of people within the United States. The Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, cl. 1, bars “discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States,” *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), thereby “plac[ing] the citizens of each State upon the same footing with citizens of other States,” *Paul v. Virginia*, 75 U.S. (8 Wall.) 168,

180 (1868). And Section 1 of the Fourteenth Amendment provides that citizens of the United States are citizens of any State in which they choose to reside, ensuring free exit and entry between and among the States.

Commerce. The Constitution also creates, in effect, a “national common market” in which all States can participate. *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350 (1977). The Commerce Clause provides Congress with the power “to regulate Commerce among the several States.” U.S. Const. Art. I, § 8, cl. 3. This Court has long held that the Clause’s negative implications bar discrimination against out-of-state competitors, *Granholm v. Heald*, 544 U.S. 460, 472, 473-76 (2005), and precludes state laws that unduly burden interstate commerce, *see Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27 (1959). This is still true even though the current state of dormant Commerce Clause doctrine has been met with some skepticism, as discussed further below.

Moreover, the restrictions in article I, section 10, are designed to curb a State’s natural tendency to exploit other States. For example, States may not, absent congressional consent, “lay any Imposts or Duties on Imports and Exports” except for the narrow purpose of funding inspection laws (and even then, any excess must be remitted to the national government). U.S. Const. Art. I, § 10, cl. 3. Although the Court has narrowed this Clause’s reach, it is properly understood to apply between and among the States. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting).

So too with the Tonnage Clause, Art. I, § 10, cl. 3, which prevents one State, perhaps blessed with a suitable port, from “obtaining certain geographical vessel-related tax advantages” by imposing taxes that will be borne by citizens of other States. *See Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 7 (2009). And the Compact Clause, U.S. Const. Art. I, § 10, cl. 3, prohibits States from entering into any Agreement or Compact with one another (or with a foreign power) without the consent of the Congress, which prevents one group of States from combining against others.

Jurisdiction. The Constitution also provides limits to each State’s jurisdiction. The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, for example, imposes a “constitutional obligation to enforce the rights and duties validly created under the laws of other states.” *Hughes v. Fetter*, 341 U.S. 609, 611 (1951). And by requiring “minimum contacts” before a State may lawfully exercise jurisdiction, the Fourteenth Amendment’s Due Process Clause is “faithful to the principles of interstate federalism embodied in the Constitution” thus “ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *World-Wide Volkswagen*, 444 U.S. at 292, 293.

* * *

The Supreme Court has long held that “[n]o State can legislate except with reference to its own jurisdiction.” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). This is because “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by

the comity of other States.” *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); see *United States v. Rodgers*, 150 U.S. 249, 282 (1893) (holding that state authority is “coextensive with its territory”). Taken together, horizontal federalism’s three structural elements inform the Court’s assessment of where one State’s jurisdiction ends and another’s begins.

B. The Constitution Entrusts The Judiciary With Resolving Horizontal Federalism Disputes

Federal courts are empowered to “referee disputes about where one State’s authority ends and another’s begins—both inside and outside the commercial context.” *Pork Producers*, 598 U.S. at 375. Indeed, the Constitution anticipates that the Judicial Branch will resolve disputes among States and their citizens. Article III extends federal judicial power to “Controversies between two or more States,” “between a State and Citizens of another State,” “between Citizens of different States,” and “between Citizens of the same State claiming Lands under Grants of different States.” U.S. Const. Art. III, § 2. It also provides the Supreme Court with original jurisdiction in cases “in which a State shall be Party.” U.S. Const. Art. III, § 2, cl. 2. Each of these provisions operationalize concerns that one State’s court should not resolve a multi-state dispute.

The most clear-cut horizontal federalism dispute is an original jurisdiction proceeding where, for example, States dispute borders, *New Hampshire v. Maine*, 532 U.S. 742 (2001), or water rights, *Florida v. Georgia*, 592 U.S. 433 (2021). But, as Alexander Hamilton wrote, in his typically understated fashion, “there are

many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union.” *The Federalist* No. 80, *supra*, at 413. “Whatever practices may have a tendency to disturb the harmony between the States, *are proper objects of federal superintendence and control.*” *Ibid.* (emphasis added). That is why “the judicial authority of the union ought to extend to ... cases ... which involve the PEACE OF CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves.” *Id.* at 411 (capitalization in original).

As Hamilton anticipated, horizontal federalism questions have reached the Court in numerous forms, although perhaps not as frequently as he may have expected. Some notable post-New-Deal examples include: state laws discriminating against interstate commerce, *e.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005), state laws regulating commerce beyond a State’s borders, *e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), personal jurisdiction, *e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), interstate sovereign immunity, *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230 (2019), a state law excluding non-residents from practicing law, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), punitive damages for out-of-state conduct, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), state taxation of interstate activity, *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015), and, of course, the interstate pollution cases, *e.g.*, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

By deciding these varied cases, the Court has made clear that horizontal federalism principles are not merely matters of comity subject to “process federalism,” once incorrectly thought to protect States’ interests within vertical federalism, *cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985). Horizontal federalism, instead, consists of constitutional rules, even if separated into specific constitutional doctrines, that it is emphatically the province of the Judiciary to enforce.

But despite, or perhaps because of, the varied ways in which these horizontal federalism disputes have arisen, the Court has decided these cases within legal silos—for example, as dormant Commerce Clause, Due Process, Privileges and Immunities, or federal common law of nuisance cases. The Court has not reliably accessed or expounded unifying principles, and as a result, horizontal federalism remains substantially undertheorized. *See* Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 495, 529 (2008). Deciding this case in the silo of interstate pollution cases, without regard to broader horizontal federalism principles, threatens to obscure this case’s constitutional significance.

II. The Constitution’s Structure Has An Operative Extraterritoriality Principle

The Court has held that the dormant Commerce Clause prevents a State from regulating out-of-state commerce. In a recent dormant Commerce Clause case, the Court suggested that the extraterritoriality principle is more fundamental and is rooted in the Constitution’s overall structure. The Court should embrace that insight and acknowledge that the

Constitution's structure supplies an operative extraterritoriality principle.

A. The Court Has Described A Structural Extraterritoriality Principle

In *Pork Producers*, the Court rejected the theory that the dormant Commerce Clause contains an “almost *per se*” rule against state laws with “the practical effect of controlling commerce outside the state.” 598 U.S. at 371. In fairness to that litigant, the Court had previously used broad language referring to “the category of state regulation that is virtually *per se* invalid.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). But the Court was right in *Pork Producers* to find that formulation unworkable. “Almost *per se*” does not provide much guidance. *Pork Producers*, 598 U.S. at 375. And, as the Court stated, many laws have “the practical effect of controlling” behavior in other states. *Id.* at 374. For example, “[s]tate income tax laws lead some individuals and companies to relocate to other jurisdictions.” *Ibid.*

The Court did not, however, jettison the baseline rule against state extraterritoriality. It correctly recognized “the role territory and sovereign boundaries play in our federal system.” *Pork Producers*, 598 U.S. at 375. It provided examples of where the Court has “resolve[d] disputes about the reach of one State’s power.” *Id.* at 376. And although the Court rejected the “almost *per se*” rule proposed in that case, the Court also suggested that the extraterritoriality principle lies in “the territorial limits of state authority under the Constitution’s horizontal separation of powers.” *Id.* at 376 n.1. In so doing, the Court cited

the equal sovereignty principle as a potential basis for the extraterritoriality principle. *Ibid.* (citing and quoting *Shelby County*, 570 U.S. at 535 (“[A]ll States enjoy equal sovereignty.”)).

The Court also cited an influential law review article that argues “the extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.” Donald H. Regan, *Siamese Essays: (i) Cts Corp. v. Dynamics Corp. of Am. and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1885 (1987). Other commentators have agreed that the extraterritoriality principle is “better understood as a prohibition rooted in general structural principles of horizontal federalism.” See, e.g., Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law & Legislation*, 84 Notre Dame L. Rev. 1057, 1060 (2009).

B. The Extraterritoriality Principle Is Not Confined To The Dormant Commerce Clause

Among the Court’s helpful insights in *Pork Producers* is that the dormant Commerce Clause is just “one more effort to mediate competing claims of sovereignty under our horizontal separation of powers,” *Pork Producers*, 598 U.S. at 376, but it is not the sole basis for the extraterritoriality principle, *id.* at 376 n.1 (citing *Regan, supra*, at 1887 (“[T]he extraterritoriality principle does not flow from the dormant commerce clause.”)).

As ordinarily described, the dormant Commerce Clause prohibits state laws that (i) discriminate against out-of-state economic interests, *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994), (ii) impose burdens on interstate commerce that are “clearly excessive in relation to the putative local benefits,” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), or (iii) have “extraterritorial effects,” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). This third category is what Justice Gorsuch, while on the Court of Appeals, described as “the least understood” and the “most dormant” aspect of the dormant Commerce Clause. *Energy & Env't Legal Inst. v. Epel*, 793 F. 3d 1169, 1172 (10th Cir. 2015).

That lack of understanding stems from at least three sources. *First*, the purported origin of the dormant Commerce Clause’s extraterritoriality rule, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), is not really an extraterritoriality case. It is a non-discrimination case addressing “an economic barrier against competition.” *Id.* at 527. *See Pork Producers*, 598 U.S. at 372 (discussing *Baldwin* as an antidiscrimination case).

Second, as discussed above, “extraterritorial effects” can be difficult to assess. *See Pork Producers*, 598 U.S. at 374-375. If litigants, as in *Pork Producers*, ask courts to weigh practical effects, courts sometimes express unease with this kind of balancing. *Ibid.* In *Brown-Forman*, 476 U.S. at 580-84, and *Healy*, 491 U.S. at 335-39, the laws were not invalid because they had sufficient extraterritorial effects, but because they had “a specific impermissible extraterritorial effect” of setting prices in other States, *Pork Producers*, 598 U.S. at 374.

Third, where the Court has applied the dormant Commerce Clause’s extraterritoriality doctrine, principles of horizontal sovereignty could have instead supplied the grounds for the decision. In the “price affirmation cases,” each State used its own law to control conduct in other States. New York conditioned the legality of in-state liquor sales on prices charged in other States. *Brown-Forman*, 476 U.S. at 580. Connecticut likewise made the lawfulness of its beer prices depend on prices in neighboring States. *Healy*, 491 U.S. at 338-39. Those laws were invalid because they projected law into different States by dictating pricing there.

In two cases about state corporate takeover laws, the decisions turned on where the corporations subject to those respective laws were located. In *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982), the Court invalidated an Illinois law asserting regulatory authority over tender offers for out-of-state corporations and shareholders. The Court held that “[t]he limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts.” *Ibid.* The Court also referred to the “application of a state statute to commerce that takes place wholly outside of the State’s borders” and “the limits on the jurisdiction of state courts,” *id.* at 642-43, both of which are territorial horizontal federalism principles. Conversely, the Court upheld an Indiana takeover law that applied only to Indiana corporations having a corporate presence in Indiana. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987). Because the state law applied to corporations in that State, there was no extraterritoriality problem.

In sum, the extraterritoriality principle is not peculiar to the dormant Commerce Clause but is instead a structural constitutional principle.

C. The Extraterritoriality Principle Is Based In The Constitution’s Text And Structure

Pork Producers correctly suggested that the extraterritoriality principle is structural and not tied to a specific clause in the Constitution. This is the “obviously ... necessary result,” *New York Life Ins.*, 234 U.S. at 161, evident from “the text and structure of the Constitution,” *Hyatt*, 587 U.S. at 248. This is true even though there is no “extraterritoriality clause” in the Constitution. The principle, instead, is one of “many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice.” *Hyatt*, 587 U.S. at 247.

The Court applies this mode of structural constitutional reasoning in numerous different contexts. And although the Court may divide, sometimes sharply, about the results of that analysis, the structural mode of analysis is well-established. For example, the Court routinely engages in structural reasoning regarding the contours of the Executive Power, including the President’s Appointments Clause power, *Morrison v. Olson*, 487 U.S. 654, 675 (1988) (“separation-of-powers concerns”), removal power, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 222-23 (2020) (“incompatible with our constitutional structure”); executive privilege, *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (“constitutional underpinnings”); and executive immunity, *Trump v. United States*, 603

U.S. 593, 606, 617-19 (2024) (“constitutional structure”).

So too in separation of powers cases more broadly. The power of judicial review described in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803), derives from the nature of the Constitution as a written, supreme, limited charter of government, not from a particular word, phrase, or clause in the Constitution. In *Mistretta v. United States*, 488 U.S. 361, 380-411 (1989), the Court upheld the structure of the U.S. Sentencing Commission based on structural reasoning regarding the nature of judicial branch functions and the separation of powers. And every participating member of the Court agreed, in *Gundy v. United States*, 588 U.S. 128 (2019), that the nondelegation doctrine prohibits some type of delegation of legislative power to the Executive, even though there is no “non-delegation clause” in the Constitution. *Id.* at 135-36 (2019) (plurality opinion); *id.* at 148-49 (Alito, J., concurring in the judgment); *id.* at 153-54 (Gorsuch, J., dissenting).

Finally, the Court also identifies structural constitutional principles in vertical federalism cases. For example, in *Printz*, 521 U.S. at 918-25, the Court derived the anti-commandeering rule from constitutional structure, historical practice, and dual sovereignty, not simply from the Tenth Amendment’s text. And perhaps most famously, in *McCulloch v. Maryland*, 17 U.S. 316, 425-37 (1819), the Court, in its second holding, reasoned from the structure of the Constitution itself that Maryland could not tax the Bank of the United States, “even though there is no express provision for the case,” *id.* at 426.

Here also the Court should use the common mode of structural constitutional reasoning to imply and operationalize an extraterritoriality principle rooted in the Constitution's structure. Indeed, fully resolving the first question presented—whether federal law, any of it, bars Boulder's state law claims—implicates constitutional questions, to include the extraterritoriality principle.

D. The Court Should Acknowledge The Structural Extraterritoriality Principle

The Court should now operationalize the structural extraterritoriality principle that it has described in *Pork Producers* and that is evident from the Constitution's structure. The Court should hold that a State presumptively violates the Constitution's extraterritoriality principle where it displaces the authority of another State by dictating what is lawful, required, or forbidden there.

This rule presumptively forecloses the imposition of one State's law beyond "its own jurisdiction." *See Bonaparte*, 104 U.S. at 594. A State can only justify exporting its law to another sovereign territory by reference to some settled principle of law allowing extraterritorial effects. *See Huntington*, 146 U.S. at 669 ("[l]aws ... can have extra-territorial effect only by the comity of other States"); *cf. World-Wide Volkswagen*, 444 U.S. at 292 (discussing minimum contacts). In other words, no State may displace another State's law in a foreign territory without establishing a connection to that territory that is substantial enough to confer jurisdiction. *See Edgar*, 457 U.S. at 642-43; *cf. Gore*, 517 U.S. at 572.

The rule is grounded in the principles of horizontal federalism. It gives effect to the equal sovereignty of every State. *Pork Producers*, 598 U.S. at 376 n.1. It implements the principle of territoriality by reflecting that each State’s authority presumptively ends at its border. *Id.* at 375 (“the role territory and sovereign boundaries play in our federal system”). And it employs the principles of noninterference by requiring the displacement by one State of another State’s law. *Id.* at 374 (discussing *Healy* and *Brown-Forman*). At the same time, this rule incorporates certain well-known circumstances that can sometimes justify extraterritorial effects, but it places the onus on a State to justify its attempt to intrude on another State’s sovereignty by displacing the other State’s law or policy.

Indeed, the Court has applied this rule before without identifying it. For example, in *Edgar*, 457 U.S. at 642, the Court barred “the application of a state law to commerce that takes place wholly outside of the State’s borders,” but cabined its analysis within dormant Commerce Clause doctrine. And in *Gore*, 517 U.S. at 572, the Court ruled that that “it follows from these *principles of state sovereignty and comity* that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” (emphasis added). Although the Court analyzed the case within the framework of the Fourteenth Amendment’s Due Process Clause, the territoriality element of horizontal federalism was prominent in the decision. The Court concluded that “by attempting to alter BMW’s nationwide policy, Alabama would be infringing on the policy choices of other States.” *Ibid.*

Identifying this test is a modest step. It supplies a coherent workable rule, grounded in the Constitution's structure, and is necessary to resolve this case. The rule does not supply a grand unifying theory of the many different silos of horizontal federalism. Nor does it seek to resolve all of the subsidiary, and potentially difficult, issues that might arise in those various silos. For example, the rule does not attempt to bring order to, nor does it conflict with, the various aspects of dormant Commerce Clause doctrine. Here, the rule would resolve the case and provide guidance to other courts facing similar cases.

III. The Court Should Apply The Structural Extraterritoriality Principle To Preclude Boulder's Claims

Determining whether the rule could apply requires first resolving the parties' meta-dispute about how to frame this case. Boulder has argued that, because it sued oil companies, and not emitters, this is an ordinary tort litigation. Br. in Opp. at 33-34. Petitioners argue that this is an interstate pollution case with horizontal federalism dynamics. Pet. Br. at 21-35. As between the two, Petitioners' framing is certainly correct, but whatever framing the Court adopts, the Court will not fully resolve the actual dispute at issue if it declines to address the fundamental principles of horizontal federalism driving this and the multiplicity of lawsuits seeking to influence national climate policy.

A. Boulder's Liability Theories Seek To Control Conduct Outside Of Colorado

Boulder has argued that this is not an emissions case because it has sued suppliers, not emitters, on

“two distinct theories of liability”—misrepresentation and knowingly contributing to climate alteration. Br. in Opp. at 3. Setting aside any state law issues with these theories, and construing the claims as Boulder itself does, the essential extraterritoriality problem is that Petitioners, or any fossil fuel company, cannot avoid liability without shutting down operations in other States where operation is lawful and often desired. That is quite obviously a massive extraterritoriality problem. *See Gore*, 517 U.S. at 572 (“[B]y attempting to alter ... nationwide policy, [Colorado] would be infringing on the policy choices of other States.”). *Cf. Trump v. Anderson*, 601 U.S. 100, 120 (2024) (Sotomayor, J., concurring) (“The contrary conclusion that a handful of officials in a few States could decide the Nation’s next President would be especially surprising with respect to Section 3.”).

Take the intentional climate alteration theory. The only way Petitioners could have avoided past damages, and can avoid the future damages Boulder seeks, J.A. 136, is to cease operating in States where their conduct is entirely lawful or where their operation is encouraged. Boulder’s lawsuit seeks to displace and control the policies of those energy-promoting States, in violation of the extraterritoriality principle.

So too with the misrepresentation theory. Boulder seeks damages for alleged misrepresentations that occurred outside of Colorado, on which people outside of Colorado allegedly relied, leading to emissions outside of Colorado. Under this theory, Boulder suffered harm from the alleged misrepresentations even if Boulder had never relied on the misrepresentations—indeed, had Petitioners never sold any hydrocarbons at all in Colorado. The geographic mismatch between

the alleged misrepresentation-reliance and the alleged harm means that Boulder seeks to recover for conduct that was lawful where it occurred, leading to the same extraterritoriality problem that plagues the climate alteration theory.

Boulder has argued that, even if the conduct were lawful in the States where it occurred, that conduct caused harm in Colorado, analogizing to opioid and asbestos litigation. Br. in Opp. at 33-34. That analogy does not work here. In those types of cases, the plaintiffs seek damages stemming from their consumption of or exposure to the product. But Boulder does not seek those kinds of damages—for, as hypothetical examples, the negative health effects from exposure to hydrocarbons or the economic harm from not receiving the benefit of the bargain when purchasing them. Boulder, instead, seeks damages related to the spillover effects caused when *everyone* consumes the product—which, here, are greenhouse gas emissions.

Boulder's argument thus confirms that this case is not a run-of-the-mill tort suit. It is a case about interstate emissions and national climate policy. In essence, this case concerns the export of state power through state-court litigation to override other States' sovereignty, laws, and policies, thereby imposing a national climate policy. Many similar cases are already pending in state courts around the country. More will surely follow if the Court allows Boulder's claims to proceed or issues a narrow ruling that invites still more novel state-law theories.

The natural result would be interstate hostility. State courts around the country would apply their view of the common law of all fifty States (and territories), to

nationwide greenhouse gas emissions. The conflicting and overlapping standards would create a suffocating web of legal jeopardy. The “bickerings and animosities” between pro-suit and anti-suit States would result in the kind of balkanization the Constitution’s horizontal federalism protections were designed to avoid.

Identifying the more fundamental constitutional harm and applying the structural extraterritoriality principle could cure that potential mischief.

B. The Extraterritoriality Principle Precludes Boulder’s Claims

Where, as here, Colorado seeks to displace the authority of other States by dictating greenhouse gas emissions policy in those other States, Colorado violates the Constitution’s extraterritoriality principle.

Applying that test here also avoids tougher questions about when, if ever, exporting state law extraterritorially can pass muster. Boulder has no jurisdiction to apply its own law to conduct that “takes place wholly outside of the State’s borders.” *See Edgar*, 457 U.S. at 642. Indeed, Boulder’s theories of liability are targeted at extraterritorial emissions and alleged misrepresentations with no direct connection to Colorado. Boulder cannot therefore justify its assertion of extraterritorial displacement by pointing to any known legal doctrine. This lack of justification should doom Boulder’s attempt to regulate the rest of the States at large.

This proposed analysis decides what is necessary to resolve this case and no more. Although the Court often demonstrates understandable concern for the practical consequences of its decisions, the Court does

not resolve all potential future applications of each new decision. For example, when the Court addressed the limitations of Congress’s Commerce Clause power in *United States v. Morrison*, 529 U.S. 598, 607-18 (2000), it did not attempt to anticipate and resolve each future Commerce Clause case. So the Court addressed new Commerce Clause issues raised in *Gonzales v. Raich*, 545 U.S. 1, 15-33 (2005), and *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547-58 (2021). And when the Court addressed the “dual for-cause limitations on ... removal” at issue in *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010), the Court’s decision was not so comprehensive as to obviate the need to later address Removal Clause issues in *Seila Law*, 591 U.S. at 213-18, and *Trump v. Slaughter*, No. 25-332.

* * *

The state-court litigation approach to national climate policy, typified by this case, produces results that violate constitutional protections designed to mediate animosities among the States. In this horizontal federalism case, the Court should address this latest manifestation of interstate conflict by ruling that the Constitution’s structural extraterritoriality principle precludes Boulder’s claims.

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

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