

No. 25-170

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

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SUNCOR ENERGY (U.S.A.) INC., ET AL.,  
*Petitioners,*

*v.*

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

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**On Writ of Certiorari to the  
Supreme Court of Colorado**

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**BRIEF OF PROFESSOR SAIKRISHNA B. PRAKASH  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONERS**

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## **QUESTIONS PRESENTED**

1. Whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

2. Whether this Court has statutory and Article III jurisdiction to hear this case.

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

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<sup>1</sup> No party's counsel authored this brief in whole or in part. No person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Boulder's theory of Colorado's legislative reach is a tad broad. In this case, Boulder argues that Colorado, one of 50 States in the Union, enjoys continental legislative power. Boulder supposes that Colorado may regulate fossil fuel production throughout the United States, because Boulder believes that such production has a distant but deleterious effect within Colorado. Boulder reasons that in a nation with far less production of fossil fuels, there would be far fewer greenhouse gas emissions.

Yet if it is the emission of greenhouse gases that harms Boulder, and if Boulder can sue fossil fuel producers—*entities with little or no emissions of their own*—Boulder must suppose that Colorado can regulate, nationwide, all entities that burn fossil fuels, including utilities, factories, and trucking firms, as well as those that emit greenhouse gases without any combustion, like crop and dairy farmers. Colorado might even regulate America's homeowners, millions of whom burn greenhouse gases when they cook their food and heat their homes. More so than fossil fuel producers, these sources are responsible for the release of greenhouse gases into the atmosphere.

Furthermore, if Colorado can regulate energy producers upstream of actual emitters, why not regulate downstream as well? That is, Boulder may imagine that Colorado could, if it so chose, regulate nationwide purchases of greenhouse gas-intensive products and services, including concrete, steel, livestock, fertilizers, plastics, textiles, and chemicals. After all, if there was less demand for these products,

there would be far fewer emissions. Under this approach, Colorado might impose liability, across the nation, on road builders, home constructors, and even ordinary consumers. This may seem beyond the pale, even fanciful. But the same could be said of Boulder's attempt to seek damages for the nationwide production of fossil fuels.

Boulder's claim to regulate does not end at the water's edge. Boulder asserts that Colorado enjoys legislative authority that encircles the globe, in a fashion that would make Imperial Rome and the British Empire blush. Boulder's suit is predicated on its view that Colorado has the legislative power to regulate producers and emitters *worldwide* because each one, large and small, contributes to greenhouse gas emissions. Indeed, the producers and emitters outside the United States are responsible for the bulk of emissions. The rice farmer in India, the cook in Peru, and the coal company in South Africa—each of them emits greenhouse gases and could be in Boulder's bullseye.

To be sure, Boulder has not yet sued greenhouse gas emitters either nationwide or worldwide. Nor has it sought to regulate consumers of greenhouse gas-intensive products. Yet its lawsuit reflects a desire to change the world and rests on a long-arm theory of regulatory power, where Colorado may regulate worldwide to stem the effects of greenhouse gas emissions. Its current forbearance is hardly a concession that it cannot regulate emissions and consumption across the globe.

Now, Boulder may be unable (or unwilling) to sue all those it might wish to reach. Neither Colorado's

courts nor the federal courts may have jurisdiction to try every producer of greenhouse gases. But whether American courts can exercise personal jurisdiction over every producer of fossil fuels, Boulder (population of approximately 106,000) effectively claims for Colorado legislative authority over *8 billion* people, for everyone emits greenhouse gases and everyone consumes greenhouse gas-intensive products. We should not conflate the undoubted limits of judicial jurisdiction with the indisputable breadth of Boulder's theory of Colorado's regulatory power. If a Chilean visits Colorado—and she emits greenhouse gases back home because she drives a car or has a cow, or both—Boulder must suppose that Colorado has the legislative power to seek damages from her and judicial power to find her liable for emissions in Santiago, Chile.

Boulder appears unaware or indifferent to the implications for itself and the United States. If Boulder, Colorado, may sue producers around the nation and the world, other sovereigns will retaliate. To begin with, Boulder City, Nevada, could sue producers and emitters throughout the United States, including those in Boulder, Colorado. No one should doubt that other States, and subunits, would sue for actions beyond their borders. The ensuing recriminations and conflicts would not only be disheartening, they would threaten our Federalism.

Further, the German city of Stein might regulate production and emissions within America. That is, once American sovereigns start imperiously regulating actions in foreign nations, those nations will claim long-arm regulatory authority over what

transpires in America. Boulder's theory of transnational legislative power envisions hundreds of sovereigns regulating activities across the entire globe, deep into the interior of every nation.

Boulder would have this Court endorse a theory that would upend a world of sovereign, independent nation-states and replace it with a disordered scheme in which no country has exclusive sovereignty, let alone any measure of true independence. Some nations might compel firms to extract fuels, while others might attach draconian liability for the same mining or drilling. Some nations might believe that the burning of fossil fuels helps raise their people's standard of living and incentivize their consumption through subsidized prices; others might scowl at this encouragement and sue the person who uses fossil fuels to run her factory or to heat her home. This regulatory cacophony is not a bug in Boulder's theory; it seems to be a feature.

There is a sound and ancient answer to Boulder's misreading of Colorado's legislative power. Long ago, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430–32 (1819), Chief Justice John Marshall rightly said the parts cannot control the whole. He meant that a single State could not tax an instrumentality of the whole nation, even when that entity operated within that State. But in an extravagance that Maryland perhaps never imagined, Boulder claims on behalf of Colorado not only the legislative power to regulate within every State in the Union, but also across the whole world. In doing so, Boulder claims such legislative power for every sovereign, domestic

and foreign, for if Boulder is right all of them may extend their laws and policies across the globe.

The Constitution bars Boulder's vagrant claims of legislative and regulatory authority. Like other sovereigns, Colorado's sovereignty is territorial, essentially confined to Colorado. In the eighteenth century, nation-states had territorial jurisdiction and lacked legislative power to regulate foreigners in foreign lands. By ratifying the Constitution and joining the Union, the thirteen original States and their 37 later admittees effectively yielded up the right to even attempt to regulate such conduct.

If anyone in the United States can unilaterally regulate the conduct of foreigners in foreign states, it would be Congress, through the delicate and careful exercise of its legislative powers. This Court should be deeply reluctant to conclude that "the peace of the WHOLE [was] left at the disposal of a PART." The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). If, however, Boulder is right, every State (and many localities) has legislative power to enflame each other and every nation under heaven. And every other nation has the lawful power to regulate production and emission in the United States.

A part of this Union cannot control what occurs in the other parts. A part of this Union cannot graspingly reach across national borders to regulate what occurs in other nations and thereby antagonize those sovereigns. And a part of this Union should not insist upon extranational regulatory power in a

manner that invites reciprocal regulation from more than a hundred foreign sovereigns.

Boulder's theory of Colorado's regulatory reach well exceeds the latter's constitutional grasp. This Court should reject Boulder's novel reading of Colorado's legislative jurisdiction, one grounded on a misunderstanding of territorial sovereignty, our federal system, and the international order.

## ARGUMENT

### **I. The Implications of Boulder's Worldwide Assertion of Legislative Authority Are Sobering and Should Give This Court Pause.**

Boulder's theory of liability implies that Colorado can regulate any activity—domestic or foreign—no matter how remote or tenuous the effect is within the State. Per Boulder, worldwide greenhouse gas emissions trigger climate change that injures Boulder. Yet Boulder has not sued emitters; it has sued fossil fuel *producers*. This is telling.

If Boulder can sue fossil fuel producers for the harm arising from the subsequent use of those fuels, then it clearly can sue greenhouse gas emitters. The latter actually send greenhouse gases into the atmosphere, either through burning fossil fuels or engaging in activities (spreading fertilizer or dairy farming) that emit greenhouse gases. Hence Boulder must suppose that it could seek damages from any domestic user of fossil fuels, from manufacturers to shippers to car drivers. More so than producers,

emitters of greenhouse gases are the ones, under Boulder's theory, that cause it harm.

The authority Boulder claims for Colorado may extend further. If Boulder can regulate the producers of fossil fuels, who are not the major emitters, then, perhaps it may regulate *consumers* of greenhouse-gas-intensive products and services. After all, if people limited their purchase of greenhouse-gas-intensive products, many emitters (factories, shippers, dairy farmers, etc.) would emit far less. No one doubts that end-user consumption is a major driver of emissions.

To be sure, Boulder never expressly claims that Colorado can regulate consumption of greenhouse-gas intensive products. Yet such authority seems to follow from its theory. If Colorado can attach liability for distant acts because they affect Colorado, then Colorado essentially claims the legislative power to regulate those distant acts in other ways. Put another way, whether the liability that Colorado attaches arises from the common law of Colorado or a Colorado statute does not matter. Further, no sensible theory of sovereignty would sanction Colorado's attempt to attach tort liability extraterritorially while simultaneously barring the extraterritorial regulation of the consumption of fossil fuel-intensive products.

To better assess the reach of Boulder's long-arm theory of Colorado's regulatory authority, consider the people and firms that Colorado could regulate. Under Boulder's theory, Colorado could regulate, and collect damages from, oil, natural gas, and coal firms across the United States. Additionally, Colorado could regulate, across the nation, all emitters, including factories, utilities, and farmers (farms are significant

emitters). Colorado could also regulate, and recoup damages from, homeowners (users of wood, gas, or oil), for American homes emit greenhouse gases.

Finally, Colorado could regulate purchases of greenhouse gas-intensive products. It could limit the nationwide consumption of dairy products, concrete, steel, aluminum, livestock, fertilizers, plastics, textiles, chemicals, and electricity.<sup>2</sup> Concrete and steel are used in homes, apartments, bridges, and skyscrapers. Grocery stores buy milk, cheese, and other dairy products. Farmers buy fertilizer to grow crops that people and livestock eat. Hospitals purchase surgical masks and other single-use items for patients and staff. Boulder's theory contemplates that it can regulate them all, for if there were no demand for these products, emissions would be lower.

In short, Boulder imagines it can regulate actions nationwide that adversely affect Boulder. Hence it can regulate and sue fossil fuel producers, greenhouse gas emitters, and consumers of fossil-fuel intensive products. No one doubts that each contributes, directly or indirectly, to greenhouse gas emissions.

The regulatory authority Boulder asserts does not stop at the shores of the United States; it circles the globe. Boulder's suit is premised on worldwide emissions causing a worldwide effect that allegedly impacts Boulder. This theory seems to subject every person—*over 8 billion*—and countless entities

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<sup>2</sup> See generally EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2022* (2024), [https://www.epa.gov/system/files/documents/2024-04/us-ghg-inventory-2024-main-text\\_04-18-2024.pdf](https://www.epa.gov/system/files/documents/2024-04/us-ghg-inventory-2024-main-text_04-18-2024.pdf).

worldwide to *Colorado's* legislative authority. Whether someone is a cattle rancher in Argentina, a taxi owner in Singapore, or a cook in Zimbabwe, each would be subject to Colorado's rules. After all, each contributes to fossil fuel emissions.

Boulder's theory of worldwide legislative power for Colorado opens a Pandora's Box. If Colorado can regulate emissions worldwide, as Boulder claims, then every other sovereign can do the same. For our purposes, that would mean every other State of the Union and every foreign nation, and each of its sovereign subunits, can regulate fossil fuel producers and greenhouse gas emitters in the United States. Boulder, Idaho, could regulate energy producers in Boulder, Colorado. Further, the Republic of Greece, which currently has no control over American soil, could attach liability for emissions from Athens, Georgia. And the Russian Federation, hardly a shrinking violet, could impose liability on homeowners in Moscow, Idaho.

We must bear in mind that the United States remains one of the top producers of fossil fuels and one the biggest emitters of greenhouse gases. In the face of Boulder's lawsuit, and the hundreds of others that would follow in its wake, why would Japan or Indonesia refrain from imposing liability on U.S. farmers or U.S. fossil fuel producers for contributing to greenhouse gases? U.S. corporations and citizens could not easily escape liability. Japan, Indonesia, and the rest of the world could come to the United States and file lawsuits, invoking a theory of climate liability under their own laws, against corporations or individuals over which a U.S. court had jurisdiction. As Alexander Hamilton rightfully observed, the laws

of “Japan, not less than of New York, may furnish the objects of legal discussion to our courts.” The Federalist No. 82, at 493.

It matters not a whit that Boulder asserts Colorado’s supposed authority through tort liability rather than via constraining production or emissions. First, “what cannot be done directly cannot be done indirectly,” because “[t]he Constitution deals with substance, not shadows,’ and the prohibition ... is ‘levelled at the thing, not the name.’” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (alteration omitted) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866)).

Second, and more importantly, liability drives behavior no less than other more obvious directives. This Court has recognized that liability is a form of regulation. *See, e.g., Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (“[R]egulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” (cleaned up)). The Court was right, for tort liability seeks to “regulate,” namely “adjust by rule or method” the underlying behavior. 2 Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773), <https://johnsonsdictionaryonline.com/1773page/regress>; *Regulate*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/regulate> (last visited May 19, 2026) (“to govern or direct according to rule”).

Boulder seeks to override the structural principle from *McCulloch*, one immanent in the Constitution.

Boulder's theory has a part of the Union controlling actions throughout the whole nation. Not content with that reach, Boulder thinks Colorado can regulate the entire world. Were Boulder to prevail, no one should doubt that the rest of the nation and world would respond in kind. Such a brash assertion of worldwide legislative authority by a small section of a single nation is incongruous.

## **II. The Constitution Bars Boulder's Vagrant Theory of Global Authority for Colorado.**

The Constitution imposes limits on state authority. Some are express. Some are implied. Indeed, the Court has recognized several implied structural limits on States. One of these is especially relevant here: state legislative authority is generally limited to its territory. The Founders were well aware of this constraint, for they had just fought a war to vindicate America's territorial sovereignty. After independence, no one else could regulate American soil. Nor could one State of the Union regulate any other State, for each was free and independent. Boulder's attempt to deploy state tort law to regulate the entire United States and the world would have left the Founders thunderstruck.

### **A. The Constitution Imposes Implied Limits on States.**

Article I, section 10 imposes many express limits on state authority. Among other things, they cannot coin money, or pass bills of attainder, *ex post facto* laws, or laws impairing contractual obligations. U.S. Const. art. I, § 10, cl. 1.

Yet section 10 is hardly an exhaustive list of the limits on States. To read it that way is to embrace the “ahistorical literalism” that this Court has rightly rejected. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 247 (2019). Instead, “there are implied, as well as express, prohibitions in the constitution upon the power of the states.” 3 Joseph Story, *Commentaries on the Constitution of the United States* 274 (1833). Failing to enforce these implied limits permits States to unilaterally unravel the Constitution that We the People ordained and established.

The Court drew on implied structural limits in *McCulloch*. It found that “the unavoidable consequence of that supremacy which the constitution has declared” is that “states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.” 17 U.S. at 436.

Sovereign immunity is another example of an implied limit. Though not explicit in the Constitution, “at the time of the founding, it was well settled that States were immune under both the common law and the law of nations,” and “the Constitution’s use of the term ‘States’ reflects both of these kinds of traditional immunity.” *Hyatt*, 587 U.S. at 241.

The Constitution likewise implicitly constrains state authority in foreign affairs. Although some of these limits are explicit, *see* U.S. Const. art. I, § 10, cl. 1 (prohibiting the making of treaties or alliances), others are implied. The President alone may recognize nations, governments, and diplomats. Congress and

the States may not. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015).

The principle of equal state sovereignty also restrains the States. “[O]ur Nation ‘was and is a union of States, equal in power, dignity and authority.’” *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)). This long-standing principle means that “[e]ach state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.” *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). Where “the extent and the limitations of the rights of the two states” collide, this Court should “settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.” *Id.* at 98; *see Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 369 (1827) (“But when ... the States pass beyond their own limits ... there arises a conflict of sovereign power, ... which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.”).

Equal sovereignty has influenced how this Court has addressed various interstate conflicts. Because States cannot impose their own rules on one another, this Court has settled interstate boundary disputes, not by reference to state law but to federal common law. *See, e.g., Louisiana v. Mississippi*, 202 U.S. 1, 50–53 (1906) (resolving boundary dispute between Louisiana and Mississippi using federal common law). Particularly relevant to this case, the principle of equal state sovereignty has also led the Court to adopt a federal rule to settle disputes over water rights, *see*

*Kansas*, 206 U.S. at 97–98, and pollution, see *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (when faced with an interstate nuisance, the proper “alternative to force is a suit in this court”).

Many of these limits lack a firm grounding in the text. Yet they all reflect the nature of sovereignty and the Constitution’s structure, including the partial subordination of the States to the national government and each State’s limited jurisdiction.

### **B. Constitutional Structure Limits the Extraterritorial Reach of State Authority.**

Another implied limit on state sovereignty, one recognized by the Founders and early legal commentators, inheres in the tight link between territory and sovereignty. No State may regulate activity in another merely because it causes some effects at home. Maryland cannot regulate gun sales and possession in Virginia because some persons will transport them across the Potomac. New York cannot regulate violence in New Jersey because some of it will spill over to the Empire State. California cannot regulate Nevada’s gaming industry even though millions of Californians gamble there. As should be obvious, the Constitution never declares or implies that by joining the Union, Virginia granted New York authority to regulate within Virginia.

These limits reflect sensible understandings of the relationship between territory and sovereignty and the preconditions for the harmonious relations amongst co-equal sovereigns. Indeed, absent territorial limits on a State’s legislative power, no State in the Union could be sovereign in any real sense

because every State would regulate everywhere across the nation, effectively erasing state boundaries. State sovereignty rests on limited federal power *and* the absence of other sovereigns, be it Indiana or India, exercising concurrent territorial authority. The Founders recognized these principles and incorporated them into the Constitution's design.

1. *At the Founding, a nation's legislative authority generally extended no further than its own territory.*

Leading international law treatises articulated the territorial limits of sovereignty. Emmerich de Vattel was “the founding era’s foremost expert on the law of nations.” *Hyatt*, 587 U.S. at 239.<sup>3</sup> In his influential *The Law of Nations*, Vattel observed: “The whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory*.” Emmerich de Vattel, *The Law of Nations* 99 (1797). Further, “[i]t is her province ... to exercise justice in all the places under her jurisdiction.” *Id.* at 166; *see also* 1 Lassa Oppenheim, *International Law: A Treatise* 171 (1905) (“sovereignty is *territorial* supremacy”).

Intruding on another sovereign’s territory was a cause of war, underscoring the link between territory and sovereignty. Vattel said that “[t]he least encroachment on the territory of another is an act of injustice.” Vattel, *supra*, at 169. For that reason,

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<sup>3</sup> Vattel was the “most widely cited [international jurist] in the first 50 years after the Revolution.” *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 462 n.12 (1978) (citing 1 James Kent, *Commentaries on American Law* 18 (1826)).

Vattel cautions that “to avoid the commission of any such act, and to prevent every subject of discord ... the limits of territories ought to be marked out with clearness and precision.” *Id.*; *see also* Oppenheim, *supra*, at 173 (due to “territorial supremacy ... a State is not allowed to send its troops ... or to exercise an act of administration or jurisdiction on foreign territory, without permission”).

Sovereigns were equals, with no nation having inherent authority over the territory of another. Thomas Rutherford in his *Institutes of Natural Law*—another “treatise routinely cited by the Founders,” *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 684–85 (2026) (Thomas, J., dissenting)—declared: “Every state has, by the law of nations, an *exclusive* jurisdiction over its own territory.”<sup>2</sup> Thomas Rutherford, *Institutes of Natural Law* 593 (1756) (emphasis added). Per Rutherford, a nation “could not be a distinct ... body, if its members were subject to any other jurisdiction besides its own.” *Id.* at 517; *see id.* (each nation “has the right to judge for itself, how far its own members are to be punished, and whether they are to be punished at all”). Because each nation had exclusive territorial jurisdiction, “no one ... ha[d] jurisdiction over the rest.” *Id.* at 595.

Because a nation’s legislative authority generally ended at its borders, diplomacy and treaties were utilized to address troubling conduct in other nations. As Vattel explained, “Between bodies politic,—between sovereigns who acknowledge no superior on earth,—treaties are the only means of adjusting their various pretensions,—of establishing fixed rules of conduct.” Vattel, *supra*, at 229; *see also* 1 John Bassett

Moore, *A Digest of International Law* 466–67 (1906) (“As each nation’s sphere of action is circumscribed by jurisdictional limits ... there are interests common to all for the preservation of which international cooperation is essential. Such cooperation is secured by international agreements[.]”).<sup>4</sup>

After the Declaration of Independence and under the Articles of Confederation, the “Free and Independent States” operated under these familiar limits on sovereignty. See *Hyatt*, 587 U.S. at 237–38 (cleaned up). Per international law, “independence ‘entitled’ the [States] ‘to all the rights and powers of sovereign states.’” *Id.* at 237–38 (quoting *McIlvaine v. Coxe’s Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808)). Of course, no free and independent nation claimed the authority to regulate extraterritorially. France did not regulate actions in England; Japan did not regulate

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<sup>4</sup> Modern customary international law suggests a more expansive prescriptive (legislative) jurisdiction for nations, extending it beyond territory to effects, nationality, passive personality, the protective principle, and universal jurisdiction. *Restatement (Fourth) of Foreign Relations Law* § 402 (A.L.I. 2018). Nonetheless, nations are not to exercise this authority where it would be “unreasonable.” *Id.* § 405. They also must respect each other’s equal sovereignty. See, e.g., G.A. Res. 2625 (XXV), *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* (Oct. 24, 1970).

The federal government is the entity within the United States that can properly (and judiciously) exercise *America’s* greater rights to legislative jurisdiction. If the President (with Senate consent) made a fossil fuels treaty, one that regulated producers worldwide, that would pose different questions. Likewise, were Congress to impose liability on global producers and emitters, that too would be far removed from a State’s unilateral attempt to assert long-arm regulatory power.

actions in Russia. Had either France or Japan made such a move, it would have given cause for war.

2. *By joining the Union, the States bound themselves to a system that constrained extraterritorial regulation.*

The Constitution rests on this recognition of the territorial reach of legislative power. In Federalist No. 32, Alexander Hamilton observed that “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by [the Constitution], *exclusively* delegated to the United States.” The Federalist No. 32, at 198.

That preexisting sovereignty was generally limited to state territory. As James Madison elsewhere explained, “[t]he powers reserved to the several States will extend to ... the *internal* order, improvement, and prosperity of the State.” The Federalist No. 45, at 292–93 (emphasis added). Madison knew of these territorial limits on state power. For example, he saw the need for a uniform federal bankruptcy law. Such a law, he observed, would “prevent so many frauds where the parties or their property may lie or be removed into different States.” The Federalist No. 42, at 271. His cogent point presupposed difficulties arising from the territorial limits on each State’s reach. The Constitution supplied federal solutions to this and other interstate problems. It surely did not implicitly grant each State a power to regulate beyond its borders, one that no sovereign in that era enjoyed.

To the contrary, the Constitution “divested” some state legislative power “in favor of the Union.”

Federalist No. 32, at 201 (Alexander Hamilton). The Founders curbed state power because of their experiences under the Articles of Confederation. The Federalist Papers discuss the discord that arises when States prioritize their own policies at the expense of the whole, a tendency that would poison interstate and international relations. Interstate conflicts ranged from territorial disputes to burdensome state regulations on interstate commerce to disagreements over the public debt. The Federalist No. 7 (Alexander Hamilton), at 60–64.

Conflict among the States had caused bitter feelings. Hamilton described how “[t]he interfering and unneighborly regulations of some States ... have, in different instances, given just cause of umbrage and complaint to others.” The Federalist No. 22, at 144. And “if not restrained by a national control,” Hamilton worried they “would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.” *Id.* at 144–45. Without the Union, he argued “we may reasonably expect from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.” *Id.* at 145. In his view, “[w]hatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.” The Federalist No. 80, at 477–78.

The proclivity of States to pursue their narrow interests also jeopardized relations with other nations. The Articles of Confederation, unlike the

proposed Constitution, did not provide authority to define and punish offenses against the law of nations, meaning it was, in Madison's view, left "in the power of any indiscreet member to embroil the Confederacy with foreign nations." The Federalist No. 42, at 265.

Hamilton raised similar concerns: "the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." The Federalist No. 80, at 476. John Jay, the former Secretary of Foreign Affairs, observed that treaty violations by the States might lead to war. The Federalist No. 3, at 43–44. If the Founders believed that little Rhode Island could somehow regulate British Canada and Spanish Florida, something sure to raise overseas hackles, they would have expressly restrained the States. They did not do so because they could not imagine a State extending its legislative reach across the Union and around the globe.

Even the Anti-Federalists, the votaries of state authority, did not suppose that States could claim authority over the entire nation, let alone the world. Agrippa wrote that under the Articles of Confederation, each State "has *within its own limits* the sovereignty over its citizens, while some of the general concerns are committed to Congress." The Antifederalist No. 11, at 28 (Morton Borden ed., 1965) (emphasis added). Similarly, The Federal Farmer wrote: "The states being sovereign and independent, are all considered equal." The Antifederalist No. 63, at 183. That independence meant *territorial* sovereignty. Massachusetts could neither regulate Connecticut nor China. Nothing in these statements

hints at the abnormal scheme that Boulder imagines, with freewheeling States imposing tort liability worldwide and foreign nations doing the same on every person in the United States.

With the Constitution's creation of the Union, any power to regulate across state lines rests with Congress. *See* U.S. Const. art. I, § 8; The Federalist No. 80, at 477–78 (Alexander Hamilton) (“Whatever practices may have tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.”). The Constitution presupposed that “the municipal laws of no one state can be resorted to as a general rule for the rest.” 1 St. George Tucker, *Blackstone's Commentaries*, App. Note D, at 152 (1803) (emphasis added).

Similarly, any ability to unilaterally address matters outside the United States would rest with Congress, and not the individual States, or their thousands of subunits. U.S. Const. art. I, §§ 8, 10. As Justice Joseph Story wrote, “it is clear, that no state [of the Union] can introduce any system, which shall extend beyond its own territorial limits, and the persons, who are subject to its jurisdiction.” 3 Story, *Commentaries on the Constitution*, *supra*, at 7; *see also* 1 Tucker, *supra*, App. Note D, at 151 (“[T]he *municipal* law of one state or nation has no force or obligation in any other nation.”).

The Framers recognized that States might have issues with neighbors, domestic and foreign, and left open a narrow and clear path by which they might regulate beyond their borders: interstate compacts. Compacts with Utah and Mexico might grant Colorado regulatory power over each. However,

Colorado would need the consent of Utah, Mexico, *and* Congress, for compacts are sovereign contracts and all state compacts require the consent of Congress. U.S. Const. art. I, § 10, cl. 3. Crucially, Congress may judge whether Colorado’s proposed compacts would serve the interest of the Union. Yet, Boulder’s theory that Colorado can regulate any extraterritorial activity that remotely affects it would render the Compact Clause largely irrelevant, for each State of the Union would enjoy inherent unilateral authority to regulate beyond its borders. The Compact Clause (and the Treaty Clause) reflects sound and inherent limits on a sovereign’s legislative power. Colorado cannot escape those constraints by unilaterally imposing tort liability nationwide and globally.

*3. Early Supreme Courts and executive practice reflect the common view that state legislative authority had territorial limits.*

In 1808, Chief Justice Marshall, writing in a capture case, declared: “It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.” *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808). Territory was a critical limit: “[T]he pacific rights of sovereignty must be exercised within the territory of the sovereign.” *Id.*

In the decades that followed, the Court continued to reaffirm this principle. *See, e.g., United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 386–87 (1818) (“the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power”); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories,

except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”).

As Justice Story explained in *Commentaries on the Conflict of Laws*: “That the laws ... of any state cannot by any inherent authority be entitled to respect extra-territorially, or beyond the jurisdiction of the state, which enacts them, is the necessary result of the independence of distinct sovereignties.” Joseph Story, *Commentaries on Conflict of Laws* 22 (1834) (quoting *Blanchard v. Russell*, 13 Mass. 1, 4 (1816)).

Early executive practice likewise demonstrates the link between sovereignty and territory. The 1783 Treaty of Paris, concluding the Revolutionary War, saw Great Britain relinquish all her claims to the “government, propriety and territorial rights” over the United States. Definitive Treaty of Peace, Gr. Brit.-U.S., art. 1, Sept. 3, 1783, 8 Stat. 80, 81. This British renunciation served as recognition of America’s territorial sovereignty. Similarly, our first treaty with France saw the latter guarantee the “sovereignty and independence, absolute and unlimited” of the United States. Treaty of Alliance, Fr.-U.S., art. XI, Feb. 6, 1778, 8 Stat. 6, 10. The guarantee would have been hollow had France supposed that it could regulate acts within the United States.

As noted earlier, an international agreement could create an exception to a nation’s exclusive authority over a sovereign territory. The 1788 Consular Convention between the United States and France created several exceptions, granting both countries authority to take testimony and decide certain legal matters within each other’s territory.

Fr.-U.S., Nov. 14, 1788, 8 Stat. 106. Yet when France established capture courts within the United States, the Secretary of State rejected its pretensions. Thomas Jefferson declared the establishment of such courts to be “diametrically opposite to what we conceive to be the common rights of nations.” Letter from Thomas Jefferson to Edmond Charles Genet (c. July 16, 1793), <https://founders.archives.gov/documents/Jefferson/01-26-02-0454>. He explained, “a nation has of natural right entire and exclusive jurisdiction over the territory it occupies.” *Id.* If it granted authority to “judges appointed by another nation, it’s limits depend on the instrument of cession.” *Id.* Because the Convention never granted France the “power ... to establish complete courts of admiralty” in America, France had violated American sovereignty. *Id.*

### **C. The Founders Would Have Regarded This Lawsuit as Fantastical.**

The War of Independence was fought to vindicate the American view that the British Parliament (which governed England and Scotland) could neither tax American colonies—who each had their own legislatures—nor regulate their commerce. As just one example, the Stamp Act Congress denied Parliament’s authority to tax the colonies. In its petition, it asserted that only colonial assemblies could tax the peoples of America. *See Resolutions of the Stamp Act Congress, Resol. V (Oct. 19, 1765), in Documents of American History 57, 58 (7th ed. 1963)* (“[T]hat no taxes ever have been, or can be constitutionally imposed on [the people of these colonies], but by their respective legislatures.”).

Patrick Henry introduced a resolve in the Virginia Assembly that “any person who shall, by speaking or writing, assert or maintain that any person or persons other than the General Assembly of this Colony, have any right or power to impose or lay any taxation on the people here, shall be deemed an enemy to His Majesty’s Colony.” Virginia Stamp Act Resolutions (May 30, 1765), in *Documents of American History*, *supra*, at 55, 56.

Of course, the Declaration of Independence denounced the King for “combin[ing] with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation ... For imposing Taxes on us without our Consent.” The Declaration of Independence paras. 14, 18 (U.S. 1776).

We triumphed in our insistence upon *American* territorial sovereignty. As noted earlier, the 1783 Treaty with Britain saw it begrudgingly acknowledge our claim—the United States were “free, sovereign and Independent States.” Definitive Treaty of Peace, Gr. Brit.-U.S., *supra*, art. I, 8 Stat. at 81. Again, Britain “relinquishe[d] all claims to the government, propriety and territorial rights of the same, and every part thereof.” *Id.*; *cf.* 1 Story, *Commentaries on the Constitution*, *supra*, at 17 (“By the treaty ... Great Britain relinquished all claim, not only to the government, but to the ‘propriety and territorial rights of the United States[.]’”). After the 1783 Treaty, Britain could no longer claim to govern us, via Parliament or by common law tort rules.

Every other nation that recognized the United States was implicitly doing the same. They were recognizing our nation's sovereign territorial rights to govern ourselves. Likewise, by establishing relations with foreign nations, the United States (including every single constituent State) was recognizing the same territorial rights in other nations. When we recognize a foreign nation, we implicitly disclaim any pretension to rule it.

Imagine the withering American reaction had Imperial Britain adopted Boulder's view of a sovereign's regulatory reach. Suppose that in 1784, after the Treaty of Paris, the British Parliament passed liability rules to better govern our guns, militias, and army. Under Boulder's theory, notwithstanding Britain's recognition of our sovereignty and independence, Britain could have done this, because every sovereign could regulate any activity that affects it, despite the action occurring in another sovereign's territory. Further, France, Spain, and the Maratha Confederacy might have legislated for us as well and sued Americans in their courts for actions wholly in America. Such assertions of legislative power would have been unimaginable to any of the Founders. A nation that rightfully paid a "decent Respect to the Opinions of Mankind," The Declaration of Independence para. 1, would never implicitly adopt such an indecent, aggressive theory of legislative power for its constituent States, one that surges past territorial boundaries and flows unchecked all over the globe.

To conclude, the principle that a State's legislative authority is tied to its territory is an

essential feature of our federalism and the international order. Territorial limits ensure that the people of Colorado have the right to govern Colorado, and that the people of Texas have the same right over Texas. The territorial limits of sovereignty also ensure that the people of America, rather than the governments of Russia or China, rule America. Boulder's theory of liability would eradicate those limits by ignoring Colorado's and America's borders, plunging the Nation into the interstate and international discord the Framers sought to avoid.

### **III. *National Pork Producers* Reaffirmed Territorial Limits on Sovereignty.**

Recently, in *National Pork Producers Council v. Ross*, the Court addressed a Dormant Commerce Clause challenge to a California law prohibiting the in-state sale of pork from pigs “confined in a cruel manner.” 598 U.S. 356, 365–366 (2023). The National Pork Producers Council argued that this law had the *practical effect* of regulating out-of-state conduct by “impos[ing] substantial new costs” on out-of-state pork producers who sought to sell their products in California. *Id.* at 371. It claimed that the Court's precedents established an “almost *per se*” bar on such “extraterritorial effects.” *Id.* at 373 (cleaned up). The Court rejected that argument, observing that “[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior.” *Id.* at 374 (cleaned up).

Unlike California's law in *National Pork Producers*, Boulder's lawsuit does not merely involve the indirect extraterritorial effects of in-state regulation of sales and production within Colorado.

Boulder's lawsuit is a prime example of *direct* extraterritorial regulation. Boulder, via Colorado law, seeks to attach liability for oil and gas production and use outside of Colorado. Fossil fuel producers cannot escape liability by eschewing the Colorado market, as pork producers could with respect to California.

More importantly, *National Pork Producers* reaffirmed the territorial limits on state legislative power. The majority observed that its decision did "not mean to trivialize the role territory and sovereign boundaries play in our federal system." *Id.* at 375. To the contrary, in "carrying out [the] task" of "referee[ing] disputes about where one State's authority ends and another's begins," "this Court has recognized the usual legislative power of a state to act upon persons and property within the limits of its own territory." *Id.* (cleaned up). That beneficial limit, the Court said, is "a feature of our constitutional order that allows different communities to live with different local standards." *Id.* (cleaned up).

By insisting that Colorado law should apply across the nation, Boulder seeks to topple that salutary "constitutional order," one where each distinct community may adopt its own standards. Were Boulder to prevail, the boundaries between the States would be but lines on a colorful map and we would have replaced beneficial self-rule with what best can be described as regulatory anarchy.

The core of Boulder's claim is that worldwide greenhouse gas emissions alter the atmosphere, raising temperatures. By regulating extraterritorial production, Boulder effectively assumes legislative power over worldwide fossil fuel production and

greenhouse gas emissions. If Boulder's disruptive theory of the Constitution is to be believed, Boulder, Montana may likewise invoke Montana tort liability rules to regulate production and emission in Colorado, the entire territory of the United States, and around the globe. Furthermore, if Boulder's theory of extranational regulation is sound, foreign sovereigns may regulate production and emission within the United States. The Rock, a city in Australia, might regulate the inhabitants of Boulder, Colorado. Indeed, Australia and hundreds of foreign sovereigns may regulate the many Boulders in the United States and every other inch within it. In short, Boulder's suit, if sanctioned, would hardly be a novel exception to the hallowed rule of territorial sovereignty. It would pulverize that rule, leaving only rubble.

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Justice Kennedy once observed that "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Boulder invites this Court to do one better. Boulder seeks a truly extraordinary act of fission, requesting this Court to shatter state and federal sovereignty into thousands of pieces, where every State of the Union (and its sub-jurisdictions) and every foreign nation (and its sub-jurisdictions) can assert regulatory power over every square inch of America, and every square centimeter of the world.

The parts cannot exercise legislative control over the whole nation; Boulder must yield to the constitutional design of exclusive territorial sovereignty. The parts certainly cannot control the

whole world; Boulder's pretensions must yield to the realities of international law, and the constitutional design predicated on that order.

What Boulder seeks is not the vindication of Colorado's sovereignty; what it seeks is the hasty, unthinking distention of it. Ironically, if Boulder prevails, the result will be the effective *obliteration* of Colorado's sovereignty. Neither Colorado nor the United States will long enjoy sovereignty or independence once other States and nations pursue the same schemes, as they inevitably will. The Court should save Boulder from itself.

### CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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