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 FOR JONATHAN H. ADLER AS AMICUS CURIAE SUPPORTING RESPONDENTS AND AFFIRMANCE

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Professor Jonathan H. Adler is the Tazewell Taylor Professor of Law at the William & Mary Law School, where he teaches courses in administrative, environmental, and constitutional law. He previously served as the inaugural Johan Verheij Memorial Professor of Law and Founding Director of the Coleman P. Burke Center for Environmental Law at the Case Western Reserve University School of Law, where he remains a Senior Fellow. He has published extensively on the intersection of federalism and environmental law, including as applied to climate change, as well as the history and evolution of federal environmental law. He has submitted or participated in amicus briefs on a range of subjects within his expertise, including prior cases concerning the regulation of greenhouse gases under the Clean Air Act. Because this case has significant implications for federalism and environmental law, Professor Adler has an interest in this case's proper resolution.

Professor Adler takes no position on the threshold questions of appellate jurisdiction presented in this case, nor on the substantive merits of the underlying tort claims. He submits this brief only to address the questions of preemption.

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[1] No counsel for any party authored this brief in whole or part, and no person other than amicus and his counsel made a monetary contribution intended to fund preparation or submission of this brief. The William & Mary Law School provides financial support for faculty members' research and scholarship that helped defray the costs of preparing this brief. The School is not a signatory to this brief, however, and the views expressed here are solely those of the amicus curiae.

SUMMARY OF ARGUMENT

Global climate change presents many complex and intractable legal and policy questions. Assuming this Court has jurisdiction, the legal questions in this case are comparatively simple and straightforward. Nothing in federal law, let alone the Constitution, preempts state-law claims seeking relief from injuries allegedly caused or exacerbated by petitioners' conduct.

At issue in this case is whether allegedly aggrieved parties, including subnational governments, may seek redress under state law from defendants otherwise subject to state court jurisdiction for harms allegedly caused or contributed to by petitioners' conduct. In order to succeed, respondents will ultimately need to show that the damages they allege were caused by actions taken by defendants, that such actions are within the jurisdiction of state courts, and that such actions may be the subject of tort liability under state law. Allowing this case to proceed does not allow any State to impose a universal rule on all fossil fuel producers, let alone on all greenhouse gas emissions around the globe. The fact that emissions "cannot be unmixed and traced," Pet'rs' Br. 28, may complicate respondents' ability to prove their case, but it does not justify—let alone require—preemption of their claims.

Petitioners charge that respondents' claims are barred because both the Clean Air Act and the Constitution categorically preclude any claims seeking redress for harms caused by interstate pollution. Yet neither the Clean Air Act nor the Constitution imposes such a rule. To the contrary, as this Court has long understood, such suits may proceed, subject to certain limitations, even if they are viewed as efforts to seek redress for interstate pollution subject to federal regulation.

That the Clean Air Act may constitute a broad, "comprehensive" regulatory scheme does not mean that it preempts state-law efforts to seek remedies for the alleged harms caused by the accumulation of greenhouse gases in the atmosphere. Like other federal environmental statutes, the Clean Air Act was enacted against a background of extensive and essential state-law environmental protections, including those provided by common law causes of action. That the Clean Air Act was meant to supplement, enhance, and encourage state-level efforts, rather than supplant or preempt them, is evident from the text, history, and structure of the Act. It is also what this Court has recognized.

The Constitution's structure provides no more basis for closing the courthouse doors on respondents' efforts to seek redress for the harms they allege. Federal common law may once have preempted state attempts to control interstate air pollution under state law, but federal common law has been displaced, and no longer serves that function. Nor does any constitutional provision or doctrine identified by petitioners provide a basis for wholly preempting state-law claims seeking redress for harms such as those alleged here. Petitioners' attempt to cobble together an argument for constitutional preemption rests upon penumbras and emanations from various constitutional provisions that cannot hold the weight of their proposed rule. That is insufficient. "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1093 (2026) (quoting *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)). And "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion).

State law—statutes, regulations, and common law court decisions—has played an essential role in this nation's history of environmental protection. Resort to state law should not be foreclosed merely because such claims threaten economically important interests or rely upon expansive theories of liability or attenuated chains of causation. If such suits are to be preempted, that is a job for Congress, not the courts.

ARGUMENT

I. Federal Environmental Law Was Enacted Against a Background of State-Law Environmental Protection

Congress enacted the Clean Air Act, 42 U.S.C. § 7401 et seq.,[2] against a background of extensive state regulation and common law environmental protection. With this law, Congress expressly sought to supplement and enhance state-law efforts to maintain and improve air quality. With few exceptions, Congress preserved pre-existing state authority to control air pollution and redress environmental harms without

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[2] Though technically a series of amendments to prior statutes, it is common to refer to the law enacted in 1970 as *the* "Clean Air Act," as the prior statutes were largely non-regulatory in nature.

regard for whether States utilized administrative regulation or common law litigation.

A. Common Law Environmental Protection

Before there was federal environmental regulation, many environmental problems were addressed through common law protections. The principle that individuals must use their own property so as not to harm that of others (the Latin maxim s*ic utere tuo ut alienum non laedas*) dates back at least to the seventeenth century. *See William Aldred's Case*, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1610).

For centuries, the common law doctrines of nuisance and trespass aided landowners who sought to protect their property—and, by extension, their persons—from interferences caused by the activities of others. Nuisance law, in particular, was a means through which landowners could protect against environmental harms, such as those caused by air and water pollution. *See* William H. Rodgers, Jr., Environmental Law, § 2.1, at 112-13 (2d ed. 1994) ("Nuisance actions reach pollution of all physical media—air, water, land, groundwater—by a wide variety of means.").

The use of nuisance and other common law claims to abate and redress environmental harms has a long history in the United States. *See* J.B. Ruhl, *Making Nuisance Ecological*, 58 Case W. Res. L. Rev. 753, 753 (2008) ("Common law nuisance doctrine has the reputation of having provided much of the strength and content of environmental law prior to the rise of federal statutory regimes in the 1970s."). As the environmental consequences of economic development emerged, landowners and others regularly sought recourse in courts, invoking nuisance and other common law causes of action. *See* Christine Meisner Rosen, *'Knowing' Industrial Pollution: Nuisance Law and the Power of Tradition in a Time of Rapid Economic Change, 1840-1864*, 8 Envtl. Hist. 565, 565 (2003); Rodgers, *supra*, § 2.1, at 112-13 ("Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation."). Most such suits addressed local concerns, where causation and state court jurisdiction over defendants were easiest to demonstrate. *See* Lewis C. Green, *State Control of Interstate Air Pollution*, 33 Law & Contemp. Probs. 315, 315-16 (1968) (noting jurisdictional and causation problems). Nonetheless, there was no bar on pursuing common law claims for environmental harms that originated across state lines. *See, e.g.*, *State v. Lord*, 16 N.H. 357, 359 (1844) ("The nuisance complained of being within this State, it is not important that the dam which occasioned it was in the State of Maine."); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971) (declining to exercise original jurisdiction over Ohio's nuisance action against out-of-state and foreign corporations because "[t]he courts of Ohio . . . would decide it under the same common law of nuisance upon which our determination would have to rest."); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 215-16 & n.2 (6th Cir. 1974) (permitting nuisance claims by Ontario residents against three corporations operating seven plants across the Detroit River to proceed under Michigan law); *Carmichael v. City of Texarkana*, 94 F. 561, 574-75 (C.C.W.D. Ark. 1899) (sustaining a bill by Texas landowners against an Arkansas city whose sewer discharged across the state line, the court having "failed to find a single well-considered case where the American courts have not granted relief under circumstances such as are alleged in this bill").

As air pollution emerged as an environmental concern in the nineteenth century, state courts continued to provide remedies under state law. During the Progressive Era, for instance, anti-smoke activists targeted individual facilities, raising complaints and occasionally filing nuisance suits to control urban air pollution. *See* David Stradling, Smokestacks and Progressives: Environmentalists, Engineers, and Air Quality in America, 1881-1951, at 3 (1999).

The gradual adoption of environmental regulations at the local, state, and federal levels did not put an end to nuisance litigation. Far from it. The number of environmental nuisance cases continued to rise through the late twentieth century, even as environmental regulations proliferated at all levels of government. *See* Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 Fordham Envtl. L.J. 55, 64 (2002) (documenting increase in environmental public nuisance cases between the 1960s and 1990s). Common law causes of action remain an important element in environmental protection today, often serving to identify and highlight under-appreciated environmental problems or spurring political action to address environmental concerns more directly.

B. State Environmental Regulation

As the environmental effects of industrialization and economic development became more prevalent and well understood, early environmentalists turned to state and local legislatures to enact nuisance-control measures that could supplement common law litigation as a means of limiting pollution. *See* Stradling, *supra*, at 4 ("the late 1800s and the early 1900s contain abundant examples of urban and suburban environmental activism, much of it successful"). At the same time as Progressive Era anti-smoke activists sought to harness nuisance law, local governments began adopting smoke-control ordinances to improve local air quality. Philadelphia, for example, enacted a smoke-control ordinance in 1905, which quickly reduced smoke levels in the heart of the city. *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. Air Pollution Control Ass'n 44, 44 (1982). By 1970, when the Clean Air Act was enacted, over 100 municipalities had meaningful smoke-control ordinances.

State regulations also followed in much of the country, beginning with Oregon in 1951. By 1970, every State had an air pollution control program, although stringency varied. Stern, *supra*, at 47. California, in particular, adopted far-reaching pollution control strategies, particularly with regard to motor vehicles. *See generally* James E. Krier & Edmund Ursin, Pollution and Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940-1975 (1977). Indeed, it was California's aggressiveness in regulating automobile emissions that led Congress to preempt other States from adopting vehicle emission standards of their own. *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. Econ. & Org. 313, 330-31 (1985).

State-level air pollution controls were more than symbolic, producing meaningful reductions in key air pollutants. *See* U.S. EPA, Monitoring and Air Quality Trends Report, 1972, at 1-6, 1-12 (1973) (noting pre-1970 air pollution declines); Indur M. Goklany, Clearing the Air: The Real Story of the War on Air Pollution 111-12 (1999) (same). For some pollutants, the reductions were actually more rapid prior to the enactment of the Clean Air Act. *See* Robert W. Crandall, Controlling Industrial Pollution: The Economics and Politics of Clean Air 19 (1983) ("[P]ollution reduction was more effective in the 1960s, before there was a serious federal policy dealing with stationary sources, than since the 1970 Clean Air Act Amendments"). While state and local government efforts were no doubt insufficient to meet the public's growing demand for environmental protection, they played an important role in reducing pollution prior to the adoption of meaningful federal environmental regulation.

II. Congress Sought to Supplement and Encourage State Pollution Control Efforts, Not to Supplant Them

Congress was well aware of the extensive and expanding state-level efforts to control pollution when considering, and ultimately adopting, federal environmental laws. Congress enacted laws that would supplement state efforts and provide powerful incentives for further state regulatory action. The express purpose of many federal statutes was to augment incomplete or insufficiently protective state and local efforts.

A. Cooperative Federalism Aims to Encourage State Regulation

While federal environmental laws grant expansive regulatory authority to federal agencies, most environmental statutes are implemented following a "cooperative federalism" model. *See New York v. United States*, 505 U.S. 144, 167 (1992) (describing the model). Under this model, the federal government outlines the contours of a given regulatory program. States are then encouraged to implement the program in lieu of the federal government. Provided the federal standards are met, States are free to tailor the details of their individual programs to accommodate local conditions and concerns, as well as to adopt more stringent measures to control pollution or address its consequences. State programs that meet federal standards are typically eligible for federal financial assistance. Those that do not face potential sanctions, including federal preemption of their programs. Under the "cooperative federalism" model, conditional preemption is a tool to prevent unduly lax state efforts, not a means to prevent States from being unduly aggressive.

This cooperative federalism model was explicitly adopted so as to ensure continued state involvement in environmental protection. Federal environmental law relies upon the ability of state policymakers to identify, implement, and enforce environmental requirements. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1196 (1977) (noting that the federal government "is dependent upon state and local authorities to implement [environmental] policies because of the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources."); *see also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 381-88 (2005). This model also expressly preserves the ability of States to be more protective and more aggressive in addressing environmental harms. *See, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489-90 (1987) ("Even if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government.").

B. Preemption Is Rare Under Federal Environmental Law

Because Congress sought to supplement and enhance state environmental efforts, federal environmental law rarely preempts state environmental law. Federal preemption of state environmental law is the exception, and is nearly always explicit in the statutory text.

As a general rule, federal environmental law only preempts state laws that risk imposing multifarious standards on products sold in national markets, such as automobiles, *see* 42 U.S.C. § 7543(a), motor fuels, *see* 42 U.S.C. § 7545(c)(4)(A), and aircraft, *see* 42 U.S.C. § 7573. *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in Federal Preemption: States' Powers, National Interests 178 (Richard A. Epstein & Michael S. Greve eds., 2007) (observing that federal environmental laws "aim to eliminate state regulation where it would undermine the efficient scope of markets for particular commercial commodities"). State pollution control measures are rarely preempted.

Even when Congress chooses to preempt state law, federal preemption tends to be narrowly targeted at the specific federal interest to be protected. So, for example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts state labeling requirements for federally registered pesticides that are different from or in addition to those imposed by the EPA on a federally approved label. *See* 7 U.S.C. § 136v(b); *Monsanto Co. v. Durnell*, 146 S. Ct. 2001, 2017 (2026). Yet FIFRA does not preempt other requirements imposed on the sale or use of pesticides by state law, whether imposed by legislation, regulation, or common law tort principles. *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 444 (2005). Federal preemption of state-law regulations governing gasoline content does not preempt state-law claims against fuel manufacturers, refiners, and distributors seeking damages for environmental contamination caused by such fuels. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 102 (2d Cir. 2013).

III. The Clean Air Act Does Not Preempt State-Law Claims Seeking Compensation for Harms Allegedly Caused by Climate Change

The Clean Air Act does not preempt state efforts to mitigate or redress the consequences of air pollution under state law, nor does it preempt efforts to hold manufacturers responsible for their products or marketing decisions. The text, structure, and purpose of the Act all indicate that Congress sought to preserve the ability of state law to address air pollution concerns, with but a few exceptions such as the preemption of state automobile emission standards and fuels. Thus even if the Court concludes respondents' claims should be evaluated as an effort to control interstate air pollution (a characterization respondents contest and the lower court rejected), respondents' claims are still not preempted.

A. The Clean Air Act Preserves State Authority to Address Pollution Subject to Federal Regulation

The Clean Air Act expressly recognizes the importance of state law to controlling air pollution and ensuring air quality. Congress made the express finding that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). It further provided that the Act's purposes included "provid[ing] . . . assistance" to state and local governments in their efforts. *Id.* § 7401(b)(3); *see also id.* § 7401(b)(4) (declaring purpose of encouraging "regional air pollution prevention and control programs").

The text and structure of the Clean Air Act expressly allow States to adopt more aggressive air pollution control and mitigation efforts than were mandated or provided for in the Act. The "cooperative federalism" structure of the Clean Air Act provides that, with few exceptions, state air pollution control standards are only preempted insofar as they are *less* stringent than federal standards. Accordingly, 42 U.S.C.

§ 7416 provides that, with the exception of mobile source emission standards, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," unless the state standard in question is *less* stringent than that provided for under federal law. In plainer terms, the Act creates a federal floor below which States may not drop without encouraging federal intervention, but does not create a ceiling.

The Act is also explicit that its authorization of citizen suits to enforce its terms should not be understood to curtail or limit pre-existing common law rights. Thus, 42 U.S.C. § 7604(e) provides that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . . ." It further preserves the rights of public entities, including "local" authorities to obtain "any judicial remedy or sanction in any State or local court." These clauses make clear that Congress was seeking to preserve the ability of citizens and subnational governments to utilize state law for environmental protection, including by resort to the courts, not preempt them. *Virginia Uranium* is instructive: There, too, "Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders." 587 U.S. at 765. Congress made the same choice here. *See also* Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law*

Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor, 68 Fla. L. Rev. 1597, 1602 (2016) ("The CAA's drafters unquestionably sought to preserve common law damage claims.").

The Clean Air Act's text should be sufficient to resolve petitioners' statutory preemption claim. Resort to the Clean Air Act's structure confirms that it was meant to be a supplement, not a substitute, for state-level action, even if that allowed States to pursue policy measures disfavored by the federal government. In *Union Electric Co. v. EPA*, 427 U.S. 246, 262 (1976), for example, this Court expressly rejected the claim that the EPA may reject a State Implementation Plan on the grounds that it is "more stringent than federal law demands," even if the EPA were to conclude that the State were adopting regulations that were economically or technologically infeasible. So long as the plans met the minimum requirements detailed in the Act—that is, the plans were above the federal floor—the Administrator "must" approve them. *Id.* at 265. That a State that adopts unnecessarily stringent air quality regulations might lose industry to other States was "fully consistent with the structure and purpose" of the Act. *Id.*

Petitioners repeatedly claim that Congress's erection of a "comprehensive" regulatory scheme governing air pollutants lodges exclusive authority for determining whether and how stringently to regulate air pollutants in the hands of the federal government. *See* Pet'rs' Br. 4, 13, 15, 44. Even if petitioners' interpretation of the Act were accurate—and it is not—the conclusion would not follow. However comprehensive the Act's regulatory scheme may be, it does not oust States from setting air pollution controls for most sources, either through regulation or common law litigation. As already noted, the Act's savings clauses expressly hold to the contrary. Indeed, *Union Electric* concerned the "heart" of the CAA—the provisions requiring States to submit and enforce implementation plans adequate to achieve federal air quality standards or be subject to sanctions. *See* 427 U.S. at 249.

In accord with the Act's text and structure, lower courts have consistently concluded that nothing in the Act itself precludes state common law claims against air polluters, even those that are subject to the Act's regulatory and permit requirements. The case of *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015), is illustrative. In *Merrick*, local landowners complained that ethanol emissions from a distillery caused the growth of "whiskey fungus" on their properties. *Id*. at 686. Although the distillery operated under permits issued pursuant to the Clean Air Act, the court readily concluded that the Act did not preclude the plaintiffs from pursuing nuisance claims, any more than the satisfaction of federal emission standards would preclude the State from adopting more stringent regulations. "State courts are arms of the 'State,' and the common law standards they adopt are 'requirement[s] respecting control or abatement of air pollution,'" the court explained, rejecting any claim that the Act would preempt state common law nuisance suits while not preempting state regulations. *Id.* at 690. As the court noted: "A federal statute does not preempt state law if Congress did not intend the statute to do so, and 'the best evidence of' Congress's intent 'is the statutory text adopted by both Houses of Congress and submitted to the President.'" *Id.* (quoting *W.*

Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991)). The court also relied on Congress's own understanding: "Compliance with standards under this Act would not be a defense to a common law action for pollution damages." *Id.* at 691 (quoting S. Rep. No. 91-1196, at 38 (1970)).

Other courts presented with similar questions have reached the same conclusion: Regulation of facilities under the Clean Air Act does not immunize them from potential liability under state law. *See, e.g., Bell v. Cheswick Generating Station*, 734 F.3d 188, 197-98 (3d Cir. 2013) (CAA does not preempt class action nuisance claims for air pollution against comprehensively regulated facility); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 85 (Iowa 2014) (rejecting CAA preemption claim); *Her Majesty v. City of Detroit*, 874 F.2d 332, 342-43 (6th Cir. 1989) (same). The Act expressly authorizes States to maintain more stringent pollution standards, and in most States, compliance with pollution permits does not preempt nuisance or other common law claims. *See* Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 Envtl. L. 403, 435 (1997) ("the vast majority of states specifically preserve nuisance remedies in their statutes or their courts have inferred such preservation."); *see also id.* at 493-512 (appendices summarizing applicable laws in all fifty States). Further, "many cases have held that a party seeking to show a nuisance is not required to show a violation of some other law." *Freeman*, 848 N.W.2d at 70 (collecting cases).

If the CAA does not preempt state law concerning the emission or effects of traditional air pollutants, including under those provisions at the "heart" of the

Act—those provisions that are, by any account, its most comprehensive—it defies comprehension how the Act could preempt state regulation concerning greenhouse gas emissions or the consequences such emissions may have on local jurisdictions without any language that would remotely suggest such an effect. Yet that is petitioners' position.

The EPA's regulation of greenhouse gases is anything but "comprehensive." This Court has concluded that greenhouse gases are air pollutants when emitted from mobile sources, *see Massachusetts v. EPA*, 549 U.S. 497, 528-30 (2007), and for some stationary sources, *Utility Air Regulatory Grp. v. EPA* ("*UARG*"), 573 U.S. 302, 331-33 (2014). Yet this Court has also concluded that it is "obviously untenable" and "inconsistent with the statutory scheme" to treat greenhouse gases as air pollutants for every portion of the Act. *See id.* at 316, 319.

Petitioners argue the Clean Air Act "occupie[s] the entire relevant field of regulation." Pet'rs' Br. 44. Not so. Congress has enacted very little that addresses greenhouse gas emissions or the consequences thereof. *See* Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. Envtl. Aff. L. Rev. 1, 1 (2009) ("From 1999 to [2007], more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted."). Petitioners note the "EPA is tasked with establishing nationwide air quality standards." Pet'rs' Br. 45. This is a non sequitur. Greenhouse gases have never been classified as criteria air pollutants for which the EPA sets National Ambient Air Quality Standards. *See UARG*, 573 U.S. at 308. Nor, for that matter, are they air pollutants for the purposes of triggering the Act's Prevention of Significant Deterioration or Title V requirements. *See id*. at 333.

The Clean Air Act cannot plausibly be described as authorizing the "comprehensive" regulation of greenhouse gases, let alone of the fossil fuel industry.[3] Despite petitioners' best efforts, they identify no regulatory controls of greenhouse gas emissions with which state-level efforts to constrain greenhouse gas emissions could conflict, let alone any provisions of the Clean Air Act that apply to manufacturers or distributors and that could conflict with respondents' claims.

B. *International Paper Co. v. Ouellette* Confirms that Interstate Pollution May Be Subject to State Law

This Court's precedents confirm that the Clean Air Act does not categorically preclude state-law claims seeking relief for the consequences of interstate pollution. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court concluded that state-law claims were not wholly preempted by federal law.

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[3] The EPA has concluded that greenhouse gases are no longer subject to regulation as air pollutants under 42 U.S.C. § 7521(a)(1), *see* 91 Fed. Reg. 7686 (Feb. 18, 2026), and has proposed barring the regulation of GHGs from stationary sources under 42 U.S.C. § 7411 as well. *See* Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units, 90 Fed. Reg. 25,752 (proposed June 17, 2025). Moreover, the EPA's rationale for concluding it lacks authority to regulate greenhouse gases under § 7521(a)(1) would, if applied consistently, preclude regulation under § 7411 as well. The United States also offers no explanation why it is regulation under § 7411, and not under § 7521(a)(1), that is in "conflict with Boulder's claims." U.S. Br. 34 n.4. Neither provision regulates fossil fuel producers as such.

While a majority of the Court concluded that the Clean Water Act preempted state-law claims seeking to supplant the law of the source State with that of the affected State, the Court concluded unanimously that state common law claims for interstate pollution were *not* preempted insofar as the plaintiffs sought to apply the law of the State in which the pollution source was located.[4]

Key to the Court's holding in *Ouellette* was a recognition that the Clean Water Act expressly limited the rights of downstream States to having an "advisory role in regulating pollution that originates beyond its borders" and is subject to permitting under the Act. 479 U.S. at 490. This approach was dictated by the text and structure of the Clean Water Act, under which all point sources are required to have permits before discharging any pollutant into any navigable water of the United States. *See* 33 U.S.C. § 1311. As a cooperative federalism statute, the Clean Water Act allows the source State to set the stringency of the permit, subject to the federal regulatory floor, as well as to determine whether such a permit precludes nuisance claims under state law. Affected States are entitled to notice and an opportunity to comment on source State permits, but no authority to dictate their stringency. *See Ouellette*, 479 U.S. at 490-91 (citing 33 U.S.C. §§ 1341(a)(2), 1342(b), (d)). The text of the Clean Water Act "makes

[4] On remand, the district court refused to dismiss the plaintiffs' claims, including those for air pollution, *see Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987), and the case settled. *See* Peter Langrock, Addison County Justice: Tales from a Vermont Courthouse 86 (1997).

it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.* at 491.

Ouellette stressed that the federal regulatory scheme did not preclude States from adopting more stringent controls than required by federal law. "Because the Act specifically allows source States to impose stricter standards," the *Ouellette* Court explained, "the imposition of source-state law does not disrupt the regulatory partnership established by the permit system." *Id.* at 499. Lest there was any confusion, the Court reiterated the point, noting "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state." *Id.* at 497. Attempts by an affected State to impose its own law on an out-of-state source were only preempted because they conflicted with the Clean Water Act's treatment of interstate pollution, and not any broader legal principle. *See Ouellette*, 479 U.S. at 497 ("The CWA precludes *only* those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." (emphasis added)).

Ouellette makes clear that the enactment of a broad federal pollution control regime does not inherently preempt all state-law claims. Any preemption of state law must be a consequence of express statutory provisions that explicitly oust or directly conflict with the application of state law in a specific context. No such arguments can be made for the preemption of state-law claims concerning greenhouse gas emissions under the Clean Air Act, let alone the production and marketing of fossil fuels. If anything, the Clean Water Act is more comprehensive and prescriptive than is the

Clean Air Act, and has a less expansive savings clause, so if the Clean Water Act does not preempt all state-law claims relating to interstate pollution, the Clean Air Act cannot be read to do so, particularly with regard to pollutants, such as greenhouse gases, that are only covered by a small portion of the Act's regulatory provisions.

C. Congress Has the Authority to Preempt State Law But Has Not Done So

There is little question Congress has the constitutional authority to limit or preclude suits against fossil fuel companies for harms associated with their products. Where Congress was concerned that tort litigation might have untoward effects, it has enacted broad legislation to preclude disfavored litigation. Congress enacted, and this Court has enforced, the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-03), to curb suits against firearms manufacturers. *See generally Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025). If Congress were equally concerned about suits against fossil fuel companies, it could enact equivalent legislation, but it has not done so.[5]

This Court should be particularly reluctant to infer preemption of state law where doing so would preclude the application of state law to matters without a

[5] Bills are pending in the current Congress to preempt suits against energy companies *inter alia* seeking damages for harms allegedly caused by climate change. *See* Stop Climate Shakedowns Act of 2026, S. 4340, 119th Cong. (2026); Stop Climate Shakedowns Act of 2026, H.R. 8330, 119th Cong. (2026).

clear command from Congress to do so. "The preemption of state laws represents 'a serious intrusion into state sovereignty'" of the sort that should only result from "a clear congressional command." *Va. Uranium*, 587 U.S. at 773 (lead opinion) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (plurality opinion)). Lacking such a command, there is ample "reason to hesitate before concluding that Congress meant" to broadly preempt the application of state law without even hinting at that intent, particularly given the "economic and political significance" of the preemption asserted. *See West Virginia v. EPA*, 597 U.S. 697, 721, 723 (2022); s*ee also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (Congress must make its intention "clear and manifest" to preempt "the historic police powers of the States"); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (plain-statement rule protecting state sovereignty); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

This Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621-22 (2020)). An "overly broad" interpretation of the Act's preemptive effect "would impinge" upon the States' longstanding and traditional authority to protect their environment and safeguard the well-being of their citizens. *Id*. at 680. Petitioners, however, offer only a "passing attempt to square [their] interpretation" with the text, structure, and history of the Act. *Id.* [6]

IV. The Constitution Does Not Preempt State-Law Claims Seeking Compensation for Harms Allegedly Caused by Climate Change

Petitioners' argument that the Constitution categorically precludes state-law claims seeking relief for injuries allegedly caused by interstate pollution is even less grounded than their statutory argument. In effect, petitioners argue for a categorical rule barring any resort to state law for injuries caused by any phenomenon that extends beyond a State's borders that is unmoored from constitutional text, structure, and history. No such constitutional principle exists, and for good reason.

Just last Term, in *Hencely v. Fluor Corp.*, 146 S. Ct. 1086 (2026), the Court held that state tort claims against a federal contractor were not preempted where the Federal Government "neither ordered nor authorized" the challenged conduct, *id.* at 1099, explaining that "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it," *id.* at 1093 (quoting *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)). "No provision of the Constitution and no federal statute justifie[d] that preemption of the State's

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[6] Petitioners also suggest this Court should find preemption because of respondents' alleged "intent" to advance their policy preferences through this litigation, yet "this Court has generally" focused its preemption inquiry on "*what*" was done, "not *why*" it was done. *Va. Uranium*, 587 U.S. at 774 (lead opinion).

ordinary authority over tort suits. Nor d[id] any precedent of this Court command such a result." *Id.* at 1099. Petitioners identify no text either. They identify instead an inference drawn from the interstate character of the harm, and ask this Court to give that inference a preemptive force that neither the Constitution nor any statute supplies.

This Court has never endorsed a categorical rule barring the application of state law to phenomena of an interstate character, and to do so would itself impose a severe indignity upon state sovereignty. While this Court once recognized that federal common law was available for the resolution of interstate disputes between States, including suits filed by States seeking injunctive relief against emissions from other States, such federal common law no longer exists and no longer preempts state-law claims (if it ever did).

As this Court recognized in *Ouellette*, state-law claims that do not conflict with federal law may proceed, subject to choice-of-law and other constraints, and this includes claims that arise from interstate pollution. If, as in *Ouellette*, a State could maintain state-law claims against an industrial facility for emissions governed and permitted by the Clean Water Act, there is no barrier to the claims here which concern the production and distribution of fuels that generate emissions that are not subject to any such permits under federal law and, in many applications, are not subject to federal regulation at all.

A. Federal Common Law Has Been Displaced and Cannot Preempt State-Law Claims

Petitioners maintain that "the foundational principle of equal sovereignty" requires that all "disputes over the regulation of air and water in their ambient or interstate aspects" must be governed by "federal law." Pet'rs' Br. 13. Accordingly, petitioners maintain that the rule of decision in any case implicating interstate pollution must be provided by federal law, and that the application of state law to all such cases is precluded. Petitioners are correct that the Constitution prevents States from imposing their legal and policy choices on their neighbors, but they are wrong that this principle has ever required a categorical prohibition on the application of state law to disputes related to interstate pollution.

The principle petitioners invoke, moreover, has to run both ways. If Colorado may not impose its policy judgments upon conduct occurring elsewhere, then neither may other States impose upon Colorado the costs of the conduct they license. Petitioners' proposed rule is not neutral as between the two. It would leave an affected State and its subdivisions without recourse under any State's law, while leaving source States free to authorize the conduct that generates the harm—converting a principle of equal sovereignty into a one-way immunity for source States. This Court's decisions do not prefer one sovereign over the other. They accommodate both.

Prior to the enactment of federal environmental laws, this Court heard cases arising under its original jurisdiction in which one State would seek the abatement of pollution emanating from another State. If the Court concluded that upstream or upwind jurisdictions failed to respect the territory of their downstream or downwind neighbors, the Court issued injunctions against pollution sources. *See, e.g., Georgia* *v. Tennessee Copper Co*., 206 U.S. 230, 239 (1907) (issuing an injunction against the discharge of noxious gases that crossed state lines and harmed Georgian land); *Wisconsin v. Illinois*, 278 U.S. 367, 420-21 (1929) (enjoining the defendants from excessively diverting waters from the Great Lakes to the Chicago Drainage Canal for the purpose of sewage disposal); *New Jersey v. City of New York*, 283 U.S. 473, 476, 482-83 (1931) (issuing an injunction restraining New York City from dumping garbage into the ocean).

Recognizing the "federal interest in a uniform rule of decision," in the absence of an applicable federal statute, the Court accepted the responsibility of applying federal common law to such disputes, and precluded the application of state law to such disputes. At the same time, the Court noted that the adoption of "new federal laws and new federal regulations" could relieve it of the obligation to divine and apply federal common law standards. *Illinois v. City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 107 (1972).

Once Congress enacted federal pollution control statutes, there was no longer any need for this Court to fashion and apply a federal common law of interstate nuisance. Leaning heavily on the principle that federal common law is to be disfavored, the Court concluded that the enactment of a relevant statute displaced the federal common law—replacing judicially fashioned rules of decision that broadly preempted the application of state law within the field with legislatively crafted rules that only preempt state law to the extent dictated by Congress.

The displacement of federal common law by a federal statute presented a different question from that of preemption of state law. *See* Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. Econ. & Pol'y 217, 233-47 (2022). Whereas the latter requires due regard for state prerogatives, "[s]uch concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required." *City of Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 316-17 (1981). To the contrary, the Court should "'start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," and thus the presumption is that federal common Aldre should be displaced. *Id.* at 317.

This Court has affirmed that displacement applies equally in the context of air pollution. In *American Electric Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410 (2011), the Court concluded that, so long as greenhouse gases are subject to regulation as air pollutants under the Clean Air Act, this "displace[s] any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id*. at 424.[7] As in *Milwaukee II*, "the relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *AEP*, 564 U.S. at 426 (*quoting Milwaukee II*, 451 U.S. at 324).

Contrary to petitioners' suggestion, *AEP* made clear that federal common law no longer precluded

[7] Of course, should this Court or Congress overturn the statutory holding of *Massachusetts v. EPA*, the Clean Air Act would no longer displace suits under federal common law.

state-law suits, as federal common law had been displaced. Rather, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. Assuming, for the sake of argument, that federal common law would have preempted state-law claims concerning climate change by preempting the relevant field, it has been displaced by a federal statute that, as shown above, does not preempt state-law claims.

Given its displacement, federal common law no longer serves to preempt all state-law claims. *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144, 152 (D.C. Cir. 2023) ("In the Clean Air Act, Congress displaced federal common law through comprehensive regulation, but it did not completely preempt state law"); *see also Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 710 (8th Cir. 2023) ("Because Congress has not acted, the presence of federal common law here does not express Congressional intent of any kind—much less intent to completely displace any particular state-law claim."); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707 (3d Cir. 2022); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 748 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1265 (10th Cir. 2022). Petitioners' arguments to the contrary directly contradict what this Court has found. "The Companies' argument—that the District's state-law claims implicating interstate air pollution arise under federal common law even following the Clean Air Act—simply cannot be squared with *American Electric* or *Ouellette*. Under the Companies' view all state-law claims dealing with interstate pollution would remain barred by federal common law. Yet *Ouellette* explicitly concluded that some state-law claims could proceed despite the Clean Water Act, confirming that the federal common law of interstate pollution was no longer a jurisdictional bar to state-law pollution claims." *Exxon Mobil Corp.*, 89 F.4th at 153. Federal common law does not have the "Schrödinger quality" of existing for purposes of preemption while being unavailable to provide a rule of decision. *Cf. id.* at 152. The federal common law of interstate nuisance does not preempt respondents' claims with regard to the effects of greenhouse gas emissions because such federal common law no longer exists.

B. Constitutional Limits on State Authority Do Not Justify Closing the Courthouse Doors

The Constitution properly constrains the application of state law in many instances. The Dormant Commerce Clause bars States from adopting discriminatory policies or imposing greater burdens on out-of-state firms than on in-state firms. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). The Due Process Clause prevents States from subjecting those beyond a State's jurisdiction to state law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). States also may not impose punitive damages for lawful out-of-state conduct that does not meaningfully affect the State's legitimate interests. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996). There may also be First Amendment limits on the extent to which state law may subject firms to liability for their advertising decisions. Yet none of these limitations justifies the categorical rule of preemption petitioners advocate. Indeed, few (if any) of these limitations are properly before the Court at this time.

The Court should decline petitioners' invitation to craft a new constitutional rule that would categorically preclude States from seeking to use state law to address environmental problems that relate to interstate pollution. Environmental problems rarely respect jurisdictional lines. Yet this has never barred the application of state law to environmental concerns, nor foreclosed efforts by state policymakers and affected parties to utilize state law to redress environmental harms.

The Constitution provides the federal government with ample power to direct climate change policy and limit or preempt inconsistent, ineffective, or ill-advised state laws. Such power may be exercised by the political branches, through the process of bicameralism and presentment. The power to adopt an unheralded, unprecedented, and unbounded rule concerning interstate environmental problems does not lie in this Court, and this is reason alone to reject petitioners' arguments.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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