No. 25-170

IN THE

Supreme Court of the United States

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

Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN FRAZELLE
HARITH KHAWAJA
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

August 3, 2026 * Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes and Constitutional Provisions

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the states' authority to remediate harms that occur within their borders, consistent with constitutional text and history, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The city and county of Boulder, Colorado, have suffered damage to their property and spent millions of dollars protecting their residents from the impacts of global warming. But when Boulder sought recompense for those injuries, Petitioners insisted that the Constitution precludes it. The United States now agrees. Claiming that the Constitution's structure forbids the application of state law to disputes involving interstate pollution, Petitioners and the United States rely chiefly on a handful of federal and state decisions beginning in the late nineteenth century. But none of those decisions endorses the novel limits on state power that Petitioners and the government have devised. Because these sweeping limits have no basis in constitutional text, history, or precedent, this Court should reject them if it reaches the issue.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

There is no question that states have the authority to provide remedies for harms their residents suffer within state borders, even when those harms are caused by conduct outside of the state. The Constitution reserves the general police power to the states, each of which retains "numerous and indefinite" powers to regulate the "order, improvement, and prosperity of the State" and its residents. *The Federalist No. 45*, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). This Court, accordingly, has acknowledged that those "acting outside the state may be held responsible according to the law of the state for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258-59 (1933). Early legislative practice confirms that states exercised this authority from the start.

Although this Court has never clarified what constraints the structure of the Constitution might place on state-law remedies for extraterritorial conduct, the United States claims to have unearthed two rules sharply limiting such remedies. First, the government argues, state law may address out-of-state conduct only when the actor has a "constructive presence" within the state. U.S. Br. 21. Second, and relatedly, the government claims that states can address harms caused by out-of-state conduct only when those harms are "direct, traceable, and particularized." *Id.* at 22. And because Boulder's injuries are among the "undifferentiated" effects of global warming, the United States says, the conduct challenged here is not "sufficiently proximate" under the Constitution to be subject to Colorado law. *Id.* at 23, 21.

These restrictions on state power are products of the government's imagination. None of the cases it cites identifies "constructive presence" as a constitutional prerequisite for states to address injuries caused by out-of-state conduct. Indeed, none of these cases even addresses, or had any occasion to consider, the geographical limits that the structure of the Constitution might impose on state regulatory authority. Each case instead employs the concept of "constructive presence" merely to resolve questions under state tort law or criminal law concerning matters like the location of an injury or which state's law governs a prosecution.

Likewise, the United States' constitutional rule of proximate cause lacks any basis in the authorities it cites. Those cases generally apply a simple rule that state law governs injuries that take effect within the state, even if the actor responsible for those injuries was elsewhere. None of these decisions asks how "direct," "traceable," or "particularized" the injury is. Nor do they suggest that our national charter silently imposes this specific version of a proximate-cause test as a constitutional rule restricting state authority.

For their part, Petitioners do not mention the "constructive presence" and proximate-cause rules the United States offers. Rather, they claim to have discovered a different reason why "our constitutional structure" forbids the application of state law here. Pet. Br. 13. According to them, "[f]or over a century, this Court has applied federal rules of decision" in cases involving interstate pollution. *Id.* at 24. The only explanation, Petitioners say, is that, under the Constitution, federal law must "necessarily and exclusively govern interstate-pollution disputes." *Id.* at 26.

Not even close. This Court's opinions explain why it applied federal law in these cases, and it was not for the reasons Petitioners claim.

Petitioners first cite a series of early twentieth-century decisions involving states as parties. As this Court repeatedly explained, however, federal common law was fashioned in those cases because they were disputes involving sovereigns brought under this Court's original jurisdiction. The purpose of that jurisdiction, these cases explain, is to provide a neutral forum to resolve disputes involving states in order to prevent the states from resorting to violence or self-help. Neither the rule nor the rationale of those cases applies here.

Second, Petitioners cite a trio of more recent cases that applied federal law to water-pollution disputes. But federal law was employed in each case because pertinent congressional legislation foreclosed the use of state law—not because the Constitution or federalism prohibited it.

In truth, this Court has never held that the Constitution forbids state law from addressing injuries experienced within a state as a result of interstate pollution. It should not do so now. If the Court reaches the issue, it should reject Petitioners' invitation to craft a broad new constitutional restriction on state power that is unsupported by text, history, or precedent.

ARGUMENT

I. States Can Provide Remedies for Harms Originating Outside of the State, and the Constitution Does Not Impose any "Constructive Presence" or Proximate-Cause Requirement.

The Constitution's text and history, as well as early legislative practice, establish that states may remediate harms caused by conduct occurring beyond their borders. As this Court has long recognized, "[t]he cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it." *Young*, 289 U.S. at 258-59.

While recognition of states' authority to redress harms caused by conduct outside their borders is longstanding, the precise scope of that authority has never been definitively settled. Claiming to find certainty where none exists, the United States offers an account of this Court's decisions in which states may provide remedies for out-of-state conduct only when the actor is "constructively present" within the state—a factor the government says is missing here. U.S. Br. 21. This claim is baseless. None of the cases cited by the United States describes "constructive presence" as the constitutional justification for states to remedy harms caused by out-of-state conduct. Instead, these cases employed the constructive presence fiction to resolve questions about venue, choice of law, and legal responsibility under state law. None of these cases addresses, or had any occasion to consider, the limits that the structure of the Constitution might impose on states' regulatory authority.

The United States' claim that the Constitution imposes a particular proximate-cause standard on state law remedies here, *see* U.S. Br. 22, is equally spurious. According to the United States, courts have held that only "direct, traceable, and particularized" effects of out-of-state conduct, not "undifferentiated" effects, can justify state remediation of that conduct. *Id.* at 22-23. But no such analysis can be found in any of the decisions cited, much less an analysis linking this supposed rule to the structural implications of the Constitution. In fact, not a single case cited by the United States even uses the words "direct," "particularized," or "traceable" in discussing the harms caused by out-of-state conduct. This Court should not fall for this attempt to fabricate a broad new constitutional doctrine out of whole cloth.

A. States can protect their residents from harms emanating from beyond state borders.

The Constitution establishes a system of "dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), that limits federal powers, U.S. Const. art. I, § 8, and reserves the general police power to the states, *see id.* amend. X; *United States v. Lopez*, 514 U.S. 549, 566-67 (1995). As James Madison explained, our federalist system delegates "few and defined" powers to the federal government, while retaining "numerous and indefinite" ones in the states. *The Federalist No. 45*, at 292 (Clinton Rossiter ed., 1961). Accordingly, states have primary control over matters "concern[ing] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 273. And this includes the power to prevent harms from taking effect "within the territory of a State." *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

In exercising this power, states can remedy harms occurring inside their borders when the injury-causing conduct took place outside the state. "The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it." *Young*, 289 U.S. at 258-59; *see, e.g.*, *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939) (subjecting Massachusetts company to California workers' compensation law for injury sustained in California). Indeed, after the Founding, state law often redressed in-state harms caused by out-of-state conduct. *See* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1145 (2010); *see also* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice* *of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1069-72 (2009). For example, Texas permitted the prosecution of offenses that did "not in their commission necessarily require a personal presence" in the state. *Hanks v. State*, 13 Tex. Ct. App. 289, 305 (1882) (quoting Tex. Pen. Code Ann. § 454 (1879)); *e.g.*, *id.* at 308-09 (prosecution for forging a land certificate for property located in Texas, even though all the criminal acts occurred in Louisiana); *see also* Resp. Br. 35-36.

At the same time, this Court has recognized the relevance of "territory and sovereign boundaries" in delimiting the scope of states' regulatory authority. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023). And it has acknowledged that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1882).

Whatever constraints geography places on state power under the Constitution, however, they remain largely undefined. It is not even clear where in the Constitution such constraints are rooted, beyond the specific limits deriving from provisions like the Due Process Clause. *See, e.g.*, *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 162 (1914) (applying the Fourteenth Amendment and Contract Clause to state regulation of contracts formed out of state). And while this Court has repeatedly held that state law can address the in-state harms arising from out-of-state conduct, *e.g.*, *Young*, 289 U.S. at 258-59; *Pac. Emps. Ins. Co.*, 306 U.S. at 503, it has rarely identified limits on that authority, *cf. Bonaparte*, 104 U.S. at 594-95 (holding that because the *situs* of a debt follows the location of the debtor, only Maryland law could apply to a debtor residing there); *Nielsen v. Oregon*, 212 U.S. 315, 319 (1909) (addressing an unusual statutory regime in which both Oregon and Washington exercised jurisdiction over the same area).

Despite this Court's appropriate caution in addressing such foundational questions about federalism, the United States claims to discern a unifying doctrine of "constructive presence" and a specific rule of proximate cause imposed by the Constitution. These rules are fabrications, as explained below.

B. The Constitution does not dictate a "constructive presence" standard.

According to the United States, a "constitutional prohibition" prevents states from remediating harms to their residents caused by extraterritorial conduct unless the actor has a "constructive presence" within the state. U.S. Br. 18, 21. In support, the United States cites a smattering of cases from the late nineteenth and early twentieth centuries. *See* U.S. Br. 21-23. None of those cases even remotely supports this concocted rule.

The United States derives its rule primarily from *Hyde v. United States*, 225 U.S. 347 (1912), but that case does not endorse any such rule. Indeed, it does not even address constitutional limits on state regulatory authority. In *Hyde*, this Court discussed "constructive presence" while interpreting statutes setting forth the elements and venue rules for the crime of criminal conspiracy.

Hyde was thus a statutory-interpretation case. It involved a prosecution for conspiracy to defraud the government, where co-conspirators committed overt acts in multiple jurisdictions. *Id.* at 350. The "question, therefore, . . . presented" concerned "venue in conspiracy cases," i.e. "whether it must be at the place where the conspiracy is entered into, or whether it may be at the place where the overt act is performed." *Id.*

at 357. Interpreting the federal conspiracy statute, this Court held that the commission of an overt act was "necessary to the offense" of conspiracy, not merely evidence of it. *Id.* at 359. The Court then applied another statute providing that when an offense was begun in one judicial circuit and completed in another, it would "be deemed to have been committed in either," and could be "punished in either district, in the same manner as if it had been actually and wholly committed therein." *Id.* at 360 (quoting statute). The Court thus concluded that courts "acquir[e] jurisdiction" over a conspiracy prosecution wherever a co-conspirator committed an overt act within that court's jurisdiction. *Id.* at 359.

In short, *Hyde* has nothing to do with structural limitations on state authority. While the Court wrote that "there may be a constructive presence in a state, distinct from a personal presence, by which a crime may be consummated," *id.* at 362, this Court simply used that term to express the idea that co-conspirators in other states may be "constructively present" for venue purposes in the jurisdiction where one co-conspirator commits an overt act. *Id.* That was why, in *Hyde*, the District of Columbia could exercise jurisdiction over all co-conspirators. *Id.* This Court did not employ the "constructive presence" concept in reference to constitutional limits on state power.

The United States similarly misconstrues *Simpson v. State*, 17 S.E. 984 (Ga. 1893), its chief example of the constructive presence doctrine in practice. Here, too, the concept was simply a principle of criminal responsibility bearing on "the question of jurisdiction." *Id.* at 986. The Supreme Court of Georgia held that an individual who fired a pistol from South Carolina intending to strike someone in Georgia could be prosecuted for assault under Georgia law. *Id.* That was because he was "constructive[ly]" present in Georgia, even if he never set foot in the state. *Id.* at 985. As the court explained, "one shooting from another state, goes, in a legal sense, where his bullet goes." *Id.*

Constructive presence, therefore, was employed only to clarify where a crime occurs under state law. The doctrine explained how a person could commit a crime in a state without personal presence there. *See id.* ("*in crime* there may be a constructive as well as an actual presence" (emphasis added)). As the court explained, "[t]he law deems that a crime is committed in the place where the criminal act takes effect." *Id.* (quoting 1 Joel Prentiss Bishop, *Criminal Procedure* § 53).

To be sure, *Simpson* may reflect background conventions about the role of geography in defining a state's criminal jurisdiction, because the court did not understand the law at issue as attempting to reach crimes that took effect outside state borders. But the court never described "constructive presence" as the exclusive means by which a state could punish the conduct of someone located outside the state. Nor did the court purport to derive any such principle from the federal Constitution. *But see* U.S. Br. 21, 18 (portraying *Simpson* as illustrating the outer bounds of an "exception" to a "constitutional prohibition on extraterritorial regulation").

In a similar fashion, the United States misreads *Strassheim v. Daily*, 221 U.S. 280 (1911), which simply addressed whether acts alleged in an indictment "constitute[d] a crime against the laws of Michigan." *Id.* at 281. Michigan sought to prosecute an individual for selling machinery under false pretenses to the state. *Id.* The fraudulent acts, however, largely occurred in Illinois. *Id.* at 284. In allowing the prosecution to proceed, this Court reasoned that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect." *Id.* at 285.

Strassheim thus invoked the idea of constructive presence (or something resembling it) only to determine whether a person was "a criminal under the laws of Michigan." *Id.* The case involved no constitutional questions, and this Court made no attempt to define the limits of state regulatory authority. That is further evident from the cases *Strassheim* cites, which similarly treat the doctrine of constructive presence as a matter of criminal responsibility under state law. *See, e.g.*, *Commonwealth v. Smith*, 93 Mass. 243, 259 (1865) (construing criminal statutes to hold that a defendant could be convicted for subornation even though he had induced perjury from "without the limits of the state"). And all that *Strassheim* required even in this context was that the out-of-state conduct succeed in "producing detrimental effects within" the injured state. 221 U.S. at 285.

C. The Constitution does not dictate a proximate-cause standard.

The United States also purports to have discovered a constitutional rule of proximate cause that limits state authority: it says that states may punish out-of-state conduct only when it causes "localized problems with direct, traceable, and particularized effects" in the state. U.S. Br. 23. And because Boulder's injuries are just part of the "undifferentiated" consequences of global warming, so the argument goes, this proximate-cause standard is not satisfied here. *Id.*

None of the cited authorities remotely supports this supposed constitutional rule. In fact, none even uses the words "localized," "direct," "traceable," or "particularized" in discussing the injuries caused by out-of-state conduct. These cases instead turn on concepts specific to tort and criminal law—addressing, for instance, the locus of an injury or the duty of care. None relies on or even references the structure of the federal Constitution, much less holds that our national charter constitutionalizes the United States' preferred rule of proximate cause as an indelible limit on state authority.

The United States principally relies on *Young v. Masci*, 289 U.S. 253 (1933), but *Young* simply resolved tort-law questions about the locus of an injury and rejected a due process right to contractually opt out of state tort law. This Court expressly declined to address any other issues. Far from supporting any "direct, traceable, and particularized effects" rule, the case is irrelevant here.

At the time of *Young*, New York law imposed liability upon owners of motor vehicles for death or injuries resulting from negligence by other drivers who operated the vehicle with the owner's permission. *Id.* at 255-56. A New Jersey resident lent his car to his nephew, who in turn struck an individual in New York. The owner argued that applying the statute to him would deprive him of "his liberty to contract and his property" under the Fourteenth Amendment, because New Jersey law allowed him to make agreements to lend his car to others without risk of such liability. *Id.* at 258. Rejecting that argument, this Court reasoned that "[l]iability for a tort depends upon the law of the place of the injury," and that "agreements made elsewhere cannot curtail the power of a state to impose responsibility for injuries within its borders." *Id.* As this Court noted, it had "no occasion to decide" any further question, including "where the line is to be drawn generally between conduct which may validly subject an absent party to the laws of a state and that which may not." *Id.* at 260.

The United States next cites a series of state court cases, but none of them demands the close "nexus" or "particularized" harm that the United States purports to derive from the Constitution. U.S. Br. 22.

In *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), "[t]he [only] question to be determined" was whether, under New York law, car manufacturers "owed a duty of care and vigilance to any one but the immediate purchaser." *Id.* at 1051. The court held that manufacturers had a duty to protect subsequent users against dangers that could be foreseen. *Id.* at 1053. While *MacPherson* marked a significant development in New York's substantive tort law, it has nothing to do with limits on state regulation across borders.

Similarly, the United States' reliance on *State v. Lord*, 16 N.H. 357 (1844), is misplaced, because *Lord* concerns the *locus* of criminal offenses. The court permitted New Hampshire to prosecute an individual for criminal nuisance after a dam he constructed in Maine overflowed and damaged a highway in New Hampshire. As the Supreme Court of New Hampshire explained, "the gist of the offence charged is not in the erection of the dam, but in the overflowing and damaging of the highway in" New Hampshire. *Id.* at 359. Because the "nuisance complained of" occurred within the state, New Hampshire law applied. *Id.* The court did not discuss how "direct," "localized," or "traceable" the in-state harms needed to be. Nor did it examine whether the injury was "particularized" or "undifferentiated." It merely applied a simple rule: state law governs in-state harms.

The United States also cites *Cameron v. Vandegriff*, 13 S.W. 1092 (Ark. 1890), for propositions that it does not endorse. This one-paragraph opinion addressed questions of negligence, evidence, and the measure of damages. The court permitted recovery under Arkansas tort law for injuries sustained when a rock detonated in "Indian territory" struck someone in Arkansas, explaining that the "cause of action arose" in Arkansas because the injury occurred there. *Id.* at 1093. Instead of assessing the directness, traceability, or particularity of the injuries, as the United States would have it, the court simply invoked the same simple rule used in *Lord*, applying the law of the place where the injury took effect. *See id.*

Much the same can be said about *Commonwealth v. Macloon*, 101 Mass. 1 (1869), which also did not apply anything resembling the United States' proximate-cause test. *Macloon* allowed a murder prosecution to proceed in Massachusetts against citizens of Maine and Britain when the victim died in state, even though the injuries were inflicted on the high seas. *Id.* at 6. Surveying cases and treatises discussing the common law of murder, the court found that "a homicide beginning with a stroke upon the high seas, and consummated by death upon land," could be tried "in the county where the death took place." *Id.* at 13. The court further held that nothing in the state or federal constitutions or in the law of nations prohibited such a prosecution. *Id.* Once again, the opinion did not ask how direct, traceable, or particularized the injuries were or imply that such standards form a constitutional limit on state power.

In sum, not a single case cited by the United States stands for a constitutional rule that states can remedy harms originating beyond their borders only when the harms are "direct, traceable, and particularized," or that the Constitution somehow disables states from addressing "undifferentiated" harms suffered by their residents. U.S. Br. 23. That standard is nothing more than an attempt to graft tort law rules of the government's choosing onto the Constitution.

II. Precedent Applying Federal Law to Interstate-Pollution Disputes Does Not Foreclose the Application of State Law Here.

For their part, Petitioners develop a different—but equally dubious—account of why the Constitution requires federal law to apply here. Arguing that federal law "necessarily and exclusively governs interstate-pollution disputes," Petitioners claim that "[f]or over a century, this Court has applied federal rules of decision to disputes concerning injuries allegedly caused by interstate air and water pollution." Pet. Br. 24, 26.

That assertion papers over the real reasons this Court, by its own telling, applied federal law in these cases. First, federal law governed the early twentieth-century interstate-pollution cases Petitioners cite because those cases were disputes involving sovereigns brought under this Court's original jurisdiction. Second, federal law governed the trio of more recent water-pollution cases Petitioners rely upon because of congressional legislation and its implications, not because of the Constitution or federalism.

Simply put, this Court has never held that the Constitution forbids state law from addressing injuries experienced within a state as a result of interstate pollution.

A. Federal common law was used in original-jurisdiction cases because they were disputes involving sovereigns.

Petitioners first rely on a series of cases from the early twentieth century that applied federal common law to interstate-pollution disputes. Contrary to Petitioners' narrative, however, those cases did not eschew state law because principles of "equal sovereignty" or "extraterritoriality" required applying federal law. Pet. Br. 24. None of those cases endorsed anything like the categorical limit on state authority that Petitioners urge this Court to adopt for the first time.

Rather, those cases applied federal law because they involved a sovereign state invoking this Court's original jurisdiction to resolve an interstate dispute. That unique posture necessarily precluded applying state law because doing so would defeat the purposes of original jurisdiction. As this Court explained, the Constitution confers original jurisdiction over "cases in which a state shall be a party," *Missouri v. Illinois*, 200 U.S. 496, 519 (1906), in order to provide a neutral forum for states to resolve interstate disputes, and to serve "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force," *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923).

This Court repeatedly endorsed that rationale in the cases Petitioners cite. For example, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), the Court explained that "[w]hen the states by their union made the forcible abatement of outside nuisances impossible to each, . . . [t]hey did not renounce the possibility of making reasonable demands" upon each other. *Id.* at 237. Rather, "[t]he alternative to force is a suit in this court." *Id.* Accordingly, the Court applied federal common law to enjoin a Tennessee corporation from emitting fumes that had destroyed forests in Georgia. *Id.* at 238-39. Likewise, in *North Dakota v. Minnesota*, the Court explained that its original jurisdiction was generally limited to disputes which might otherwise be "the subject of diplomatic adjustment" or cause for warfare. 263 U.S. at 373. The "history of the creation" of original jurisdiction thus required the Court's "procedure" to "differ" in such cases. *Id.* at 372.

Other cases Petitioners cite follow the same logic, applying federal law because of the original-jurisdiction nature of the dispute. *See Missouri*, 200 U.S. at 520 (applying federal common law because the original jurisdiction suit implicated the "relations between states"); *New York v. New Jersey*, 256 U.S. 296, 302 (1921) (applying federal common law because New York had "resort[ed] to the remedy of an original suit in this court"); *New Jersey v. City of New York*, 283 U.S. 473, 476 (1931) (same).

In short, none of these cases contains either the rule or the reasoning that Petitioners offer, and none suggests that state law cannot provide a remedy for Boulder's injuries.

B. This Court has never held that interstate pollution is immune from state-law remedies.

Apart from original-jurisdiction cases, Petitioners cite three decisions from the late twentieth century, claiming they establish that the structure of the Constitution requires federal law to govern interstate-pollution disputes. Not so.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), this Court applied federal common law in light of Congress's pervasive regulation of interstate water pollution, which demonstrated an intent to displace state law in this area. *Id.* at 101-04. Most notably, by passing an earlier version of the Clean Water Act, Congress "ma[de] clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." *Id.* at 102.

Ignoring the bulk of the opinion, Petitioners ascribe the result to a judicially perceived "overriding federal interest in the need for a uniform rule of decision." Pet. Br. 25 (quoting *Milwaukee I*, 406 U.S. at 105 n.6). But Petitioners overread the single footnote on which they rely. To be sure, this Court stated that it has fashioned federal common law where important federal interests called for it, and that the dispute at hand—which involved Lake Michigan, "bounded, as it is, by four States"—implicated "basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. But except for this brief observation in a footnote, the opinion rests on other grounds: the participation of a state as the plaintiff, and the implications of Congress's regulatory choices, both of which "require[d]" the application of federal law. *Id.* (citing *Tenn. Copper*, 206 U.S. at 237).

The idea that a lone footnote in *Milwaukee* established broad constitutional restrictions on state authority stretches the decision far beyond what it reasonably can be taken to stand for. That is particularly so because this Court's modern jurisprudence casts doubt on the breadth of that footnote. When the question has actually been presented, this Court has been reluctant to displace state law simply because a party invokes some freestanding "federal interest" without a supporting rule of decision supplied by a "constitutional text, federal statute, or treaty made under the authority of the United States." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019)); *see also Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1094-96 (2026).

Petitioners' reliance on *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*), fares no better. Indeed, it is essentially an attempted sleight of hand. Quoting the statement (again, in a footnote) that "if federal common law exists, it is because state law cannot be used," *id.* at 313 n.7, Petitioners try to link this statement to the early twentieth-century cases applying federal common law to interstate-pollution disputes. The implication is that those earlier cases employed federal common law because of a determination that state law could not apply to interstate pollution. Not true. The earlier cases, all original-jurisdiction suits, used federal law for the separate reasons discussed above. After the *Erie* revolution, which post-dated those cases, federal common law is recognized as appropriate only in "a few and restricted instances," *id.* at 313 (quotation marks omitted); *see id.* at 312 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)), but that was not the case in the early twentieth century, so the use of federal standards during that era reflects no judgment that state law cannot govern matters involving interstate pollution.

If anything, *Milwaukee II* cuts against Petitioners. The dissent there echoed Petitioners' theory, insisting that federal common law ought to apply in the case because of "an overriding federal interest in the need for a uniform rule of decision" and because "the controversy touche[d] basic interests of federalism." *Id.* at 336-37 (Blackmun, J., dissenting) (quoting *Milwaukee I*, 406 U.S. at 105 n.6). But this Court rejected that basis for exercising its lawmaking power, explaining that previous interstate-pollution cases "resolv[ed] disputes between one State and the citizens or government of another" when "Congress ha[d] not spoken" directly to the issue. *Id.* at 315 n.8.

Finally, Petitioners misconstrue *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which is nothing more than a statutory-interpretation case about preemption. Although Petitioners cherry-pick quotes to suggest that the opinion endorsed broader doctrinal limits on state power, that is not so.

For instance, according to Petitioners, *Ouelette* says that "the regulation of interstate water pollution" is "a matter of federal, not state law." Pet. Br. 26 (quoting *Ouelette*, 479 U.S. at 488). But this passage simply describes *Milwaukee I*'s holding "that state common law was preempted" by the interstitial federal common law this Court fashioned in that case—a choice that rested on the implications of federal legislation. *Ouelette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 107 n.9). And, as Petitioners concede, the federal common law *Milwaukee I* created was later displaced by Congress's more comprehensive water-pollution regime. *See id.* at 488-89 (citing *Milwaukee II*, 451 U.S. at 317-18). That regime expressly left room "for state causes of action." *Id.* at 492. Accordingly, *Ouelette* itself "negates the inference" that Petitioners draw from one isolated quote. *Id.*

Petitioners also note that *Ouelette* highlights the "irrational system of regulation" and "chaotic confrontation between sovereign states" that might result if a state applied its own law to an interstate water pollution dispute. Pet. Br. 26 (quoting *Ouelette*, 479 U.S. at 496-97). True, but that remark is not about constitutional limits on state authority; rather, it is about why *Congress* foreclosed the application of state nuisance law by enacting a comprehensive scheme of federal regulation. Applying any individual state's law, this Court explained, "would undermine the important goals of efficiency and predictability in the [federal] permit system," and "it is unlikely—to say the least—

that *Congress* intended to establish such a chaotic regulatory structure." *Id.* at 496-97 (emphasis added).

* * *

Petitioners claim that the Constitution silently forbids state law from addressing harms experienced within a state that were caused by air pollution originating elsewhere. But *Ouelette*, *Milwaukee I*, and *Milwaukee II* come nowhere close to embracing such a proposition. Nor do this Court's pre-*Erie* cases applying federal common law to pollution disputes involving state parties. Precedent offers no basis for the categorical new limit that Petitioners seek to impose on the states' historic power to remedy injuries suffered within their borders.

CONCLUSION

For the foregoing reasons, if this Court reaches the merits, it should affirm the judgment of the Supreme Court of Colorado.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN FRAZELLE
HARITH KHAWAJA
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

August 3, 2026 * Counsel of Record