

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 OUR CHILDREN'S TRUST,
ALINA MIRANDA, ADITHYA BHASKARA,
WAVERLY FISHER, MADDISON SCHINK,
MURIEL S., EVERETT F., PENNY S., ETHAN
M., and DR. LISA PATEL AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether the Clean Air Act preempts state-law tort claims seeking monetary damages for physical harm to plaintiff local governments' communities caused by in-state and interstate greenhouse gas pollution from defendant companies' products.

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INTEREST OF AMICI¹

Our Children's Trust is a non-profit public interest law firm that empowers young people to enforce their constitutional rights in court when governments endanger their lives, health, and futures by fueling the climate crisis. Our Children's Trust represents clients in several states in constitutional challenges to governmental conduct that discriminates against and injures youth by enabling and mandating the use of fossil fuels, which has been documented to harm children. Our Children's Trust advocates for a world where the constitutional rights of every child are upheld by courts and honored by governments, protecting their lives, health, and futures for generations to come.

Alina Miranda (age 21), **Waverly Fisher** (age 21), **Adithya Bhaskara** (age 22), **Maddison Schink** (age 26), **Muriel S.** (age 17), **Everett F.** (age 8), **Penny S.** (age 10), and **Ethan M.** (age 8), (collectively Youth Amici) are from, attend school, or live in the City of Boulder or Boulder County. They are being directly harmed by air pollution from fossil fuels and climate disruptions. They have an interest in ensuring their local governments retain the authority to protect them from Petitioners' tortious conduct.

Dr. Lisa Patel, MD, MEd, FFAP, is the Executive Director for the Medical Society Consortium on Climate and Health and Clinical Associate Professor of Pediatrics at Stanford School of

¹ Pursuant to this Court's Rule 37.6, amici state that no counsel for either party authored this brief in whole or in part, and that no person other than amici made a monetary contribution to fund the preparation or submission of this brief.

Medicine. She is a national expert on climate change and children's health with a particular focus on air pollution and wildfires. She is a former Presidential Management Fellow for the Environmental Protection Agency. She is a prior member of the Executive Committee for the American Academy of Pediatrics Council on Environmental Health and Climate Change. She received her Master's in Environmental Sciences from Yale School of the Environment, her medical degree from Johns Hopkins School of Medicine, and completed her training in pediatrics at UCSF. Dr. Patel is a practicing pediatric hospitalist, caring for premature infants, newborns and hospitalized children. She is amicus curiae in her personal capacity.

Amici's interest in this case is to assist the Court in understanding how children's health is deteriorating from fossil fuel pollution, and through that lens, the import of state sovereign authority and duty over fossil fuel pollution-related injuries.

SUMMARY OF ARGUMENT

On December 30, 2021, the most destructive wildfire in Colorado's history ignited in Boulder County: the Marshall Fire. That fire forever changed Youth Amici's lives. Maddison was not home at the time, and she vividly remembers the call she received from her grandmother. Maddison's home needed to be evacuated, and her grandmother was hurriedly packing cherished items. Maddison's grandmother asked her to picture her room and pick three irreplaceable items to be packed up. She told her grandmother to grab her camera containing her favorite photos, her favorite childhood blanket, and her hiking backpack covered with patches from places

she had visited. Penny also vividly remembers the Marshall Fire: the bright orange flames reaching into the sky. The suffocating smoke. Her coughing. The race to evacuate. Fire weather.

In the end, the Marshall Fire destroyed over 1,000 homes. Alina's home was one of them. She lost everything: pets, her artwork, journals, and so much more. After the fire, she struggled to focus and had to take a break from school. Limited housing options forced her to be separated from her parents and she spent five weeks sleeping in a laundry room. While the homes of Maddison and Penny were spared, the memories, harm to their developing bodies, anxiety, and depression stick with them. Years later, Maddison still experiences anxiety and sometimes panic attacks on hot windy days, or when she sees fire trucks or gets alerts about nearby wildfires. Penny also experiences anxiety and knows how harmful the new smoke season is to her still-developing lungs. She monitors the air quality around her and consistently sees levels that are unhealthy.

Youth Amici have experienced firsthand the devastating toll that wildfires and smoke take on their community. They know climate change makes such fires more likely and more destructive. Beyond wildfires, climate change is also causing dangerous heat, extreme precipitation events, drought, low snowpack, and other climate instability throughout Boulder. Heat and poor air quality take a toll on Youth Amici's bodies, forcing them to miss school, work, or cancel plans with family and friends. Maddison currently lives in Adams County near a Suncor oil refinery and has noticed plumes of black smoke spewing from it and a decline in her health since

moving.² As pediatricians like Dr. Patel explain, climate disruptions and the polluted air Youth Amici breathe increase their chances of developing chronic illnesses. Children's physical and psychological development are altered in irrevocable ways.

It did not have to be like this. Just like the federal government knew over half a century ago,³ Petitioners in this case *knew this would happen*—they knew they were marketing and selling a product in Colorado that would unleash such harms and costs upon today's generation of Colorado children and youth. And they did so anyway.

Youth Amici had no role in causing climate change or fire weather in Boulder. Yet their lives are permanently changed by it; their developing lungs and bodies are regularly exposed to unhealthy air; their anxiety is inescapable; their safety is no longer something to be taken for granted, even in their own homes. At the same time, Boulder bears the costs of such climate disruptions and the entire community suffers.

Importantly, as explained herein, Youth Amici live in a country whose federal government is a government of enumerated powers. Under the federal Constitution, the Tenth Amendment reserves police and public trust powers to Youth Amici's state, implemented by local governments. The federal

² Noelle Phillips, *Suncor's Commerce City Refinery Emits Black Smoke After Maintenance*, Denv. Post (July 28, 2026), <https://www.denverpost.com/2026/07/28/suncors-commerce-city-black-smoke/>.

³ See James Gustave Speth, *They Knew* (2022); The White House, *Restoring the Quality of Our Environment* (1965).

Constitution—through the Tenth, Fifth, and Fourteenth Amendments—recognizes and protects the state constitutional and public-trust law Youth Amici and other youth represented by Our Children’s Trust rely on to preserve their inalienable rights. Because those state laws are recognized and protected by the federal Constitution, they are not preempted by the Clean Air Act, the federal common law, or contrary theories of federalism purportedly implicit in the federal Constitution, as Petitioners argue. This Court should reject Petitioners’ broad theory of preemption, especially one that would encompass areas of law that are not before the Court.

ARGUMENT

I. FOSSIL-FUEL AIR POLLUTION DISPROPORTIONATELY HARMS THE HEALTH, SAFETY, AND WELFARE OF CHILDREN

Every step in the life-cycle of fossil fuels—from extraction and refining to transportation and combustion—emits air pollution that harms children’s health in two ways: *first*, by harming children when they breathe air contaminated by fossil fuel pollution, and *second*, by increasing environmental health hazards caused by greenhouse gas (GHG) pollution and ensuing climate disruptions, including wildfires and the associated smoke, extreme heat, flooding, drought, and other climate disasters. *See* Figure 1. These dual health hazards from fossil fuels—breathing polluted air and climate disruptions—are intertwined and compound one another’s effects with devastating consequences for children.

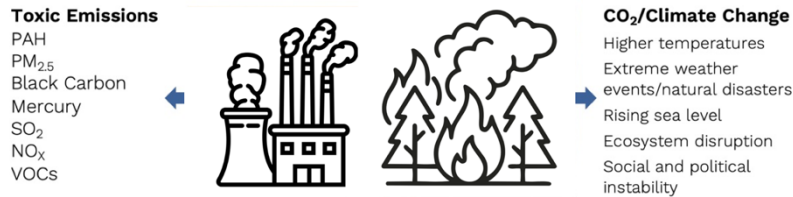


Figure 1. Fossil fuels harm children’s health through direct air pollution and by causing climate change.⁴

Children and youth shoulder disproportionate health injuries from breathing air polluted by fossil fuels and climate change over the course of their lifetimes compared to adults. This is “because of their unique behavior patterns; developing organ systems and physiology; greater exposure to air, food, and water contaminants per unit of body weight; and dependence on caregivers.”⁵ Children with preexisting chronic respiratory conditions are especially vulnerable to the dual health harms from fossil fuels.

The extraction, transport, and combustion of fossil fuels emit particulates, nitrogen oxides, volatile organic compounds, and contribute to the formation of ozone. These air pollutants tend to be concentrated near the pollution sources, and disproportionately harm children. Exposure to particulate matter increases children’s risk of asthma, impairs lung development, and increases risk of

⁴ Adapted from Frederica P. Perera, *Multiple Threats to Child Health from Fossil Fuel Combustion: Impacts of Air Pollution and Climate Change*, 125 *Env’t Health Persps.* 141, 142 (2017).

⁵ Samantha Ahdoot et al., Am. Acad. Pediatrics, *Climate Change and Children’s Health: Building a Healthy Future for Every Child*, 153 *Pediatrics* e2023065505, 1 (2024).

neurodevelopmental disorders and diminished IQ.⁶ Exposure to fine particulate matter (2.5 micrometers or smaller) during pregnancy increases risks for premature birth, low birthweight, stillbirth, hypertensive disorder of pregnancy, gestational diabetes mellitus, gestational hypertension, and preeclampsia.⁷ There is no “safe” level for fine particulate matter, because there is no threshold below which the risk of premature death decreases.⁸ Every increase of 10 micrograms per cubic meter in fine particulate matter concentration can increase all-cause mortality by 7.3%.⁹ Exposure to ozone and nitrogen dioxide exacerbates existing asthma and increases a non-asthmatic child’s risk of developing asthma.¹⁰ Exposure to air pollution from fossil fuels at a young age can disrupt the healthy physical and

⁶ Li-Zi Lin et al., *The Epidemiological Evidence Linking Exposure to Ambient Particulate Matter with Neurodevelopmental Disorders: A Systematic Review and Meta-Analysis*, 209 *Env’t Rsch.* 112876 (2022); Frederica Perera et al., *Climate Change, Fossil-Fuel Pollution, and Children’s Health*, 386 *NEJM* 2303 (2022).

⁷ Shuaixing Song et al., *Ambient Fine Particulate Matter and Pregnancy Outcomes: An Umbrella Review*, 235 *Env’t Rsch.* 116652 (2023); Maria Harris et al., *Prenatal and Childhood Traffic-Related Pollution Exposure and Childhood Cognition in the Project Viva Cohort*, 123 *Env’t Health Persp.* 1072 (2015).

⁸ Rebecca E. Berger et al., *Air Pollution Still Kills*, 376 *NEJM* 2591 (2017).

⁹ Qian Di et al., *Air Pollution and Mortality in the Medicare Population*, 376 *NEJM* 2513 (2017).

¹⁰ Stephanie Holm & John Balmes, *Systematic Review of Ozone Effects on Human Lung Function, 2013 Through 2020*, 161 *Chest* 190 (2022); U.S. EPA, *Integrated Science Assessment for Oxides of Nitrogen – Health Criteria 1-17 to 1-22* (2016).

psychological development of children and result in lifelong harms, including increased risk of disease during adulthood.

Regarding harms to children from climate disruptions, the extraction, transport, and combustion of fossil fuels emit heat-trapping GHGs, especially carbon dioxide (CO₂). Hotter air holds more moisture, drying the land. A warmer, wetter atmosphere increases extreme heat, wildfires and wildfire smoke, floods, droughts, severe storms, and vector-borne (e.g., tick- and mosquito-borne) diseases.¹¹ These hazards from climate change are not uniform across the country; they are unevenly distributed and locally-specific. The fossil fueled climate hazards harming children and youth in Boulder, including Youth Amici, include wildfires and associated smoke, extreme heat, increased frequency and intensity of flooding, declining snowpack, longer droughts, and water shortages.¹²

Increased heat and drought from climate change cause fire weather with increased risk and likelihood of wildfires, and hence wildfire smoke.¹³ Wildfire smoke contains a potent cocktail of air pollutants that are hazardous or deadly to inhale, including particulate matter and nitrogen dioxide (which also result from the extraction and burning of fossil fuels,

¹¹ CDC, *Preparing for the Regional Health Impacts of Climate Change in the United States* 3 (2024).

¹² *Climate Change in Boulder County*, <https://bouldercounty.gov/climate/impacts/> (last visited July 30, 2026).

¹³ Yizhou Zhuang et al., *Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk Over the Western United States*, 118 PNAS e2111875118 (2021).

as noted above).¹⁴ Higher temperatures combine with pollutants from burning fossil fuels (and from wildfire smoke) to form ground-level ozone, which increases respiratory-related emergency room visits¹⁵ and mortality.¹⁶ Ozone levels above American Thoracic Society recommendations are associated with an estimated 6,800,000 lost school days annually.¹⁷

Although climate change is one of the greatest public health threats facing humanity, for children it is a public-health emergency¹⁸ because “[c]hildren are

¹⁴ Minghao Qiu et al., *Wildfire Smoke Exposure and Mortality Burden in the USA Under Climate Change*, 647 *Nature* 935 (2025); Min Zhang et al., *Wildfire Smoke PM_{2.5} and Mortality Rate in the Contiguous United States: A Causal Modeling Study*, 12 *Sci. Advances* eadw5890 (2026).

¹⁵ Xue-yan Zheng et al., *Short-term Exposure to Ozone, Nitrogen Dioxide, and Sulphur Dioxide and Emergency Department Visits and Hospital Admissions Due to Asthma: A Systematic Review and Meta-analysis*, 150 *Env’t Int’l* 106435 (2021).

¹⁶ Weizhi Deng et al., *Fires Reverse Progress Toward Ozone Air Quality Standards in the United States*, 392 *Sci.* 1088 (2026); Yangmingkai Li et al., *Growing Impacts of Fire Smoke on Ozone Pollution and Associated Mortality Burden in the United States*, 12 *Sci. Advances* eaec2903 (2026).

¹⁷ Janet Currie et al., *Does Pollution Increase School Absences?*, 91 *Rev. Econ. Stat.* 682 (2009); Kevin Cromar et al., *Adverse Health Impacts of Outdoor Air Pollution, Including from Wildland Fires, in the United States: “Health of the Air,” 2018-2020*, 21 *Ann. Am. Thoracic Soc.* 76 (2024).

¹⁸ Lukoye Atwoli et al., *Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health*, 385 *NEJM* 1134 (2021) (editorial simultaneously published in 230 other medical and public-health journals); *see also, e.g.*, World Health Org., *The Health Argument for Climate Action 2*

at higher risk of climate-related health burdens than adults[.]”¹⁹ Children are more vulnerable to extreme heat and are at greater risk of heat exhaustion, heat stroke, renal dysfunction, and respiratory disease exacerbation because young children’s temperature-regulation systems are not fully developed and children lose fluids more quickly than adults.²⁰ Simply put, children are more likely to end up in the emergency room when temperatures are higher or when the air is polluted by wildfire smoke or other pollutants from fossil fuels.²¹ A child’s repeated exposure to polluted air and climate disruptions compounds the harm to their health and wellbeing throughout their development. See Figure 2.

(2021) (“Climate change is the single biggest health threat facing humanity.”); Anthony Costello et al., *Managing the Health Effects of Climate Change*, 373 *Lancet* 1693, 1693 (2009) (“Climate change is the biggest global health threat of the 21st century.”); USGCRP, *Fifth National Climate Assessment* 15-6 (2023) (“Climate change has profound negative effects on human health.”).

¹⁹ Ahdoot, *supra* note 5.

²⁰ Courtney W. Mangus & Therese L. Canares, *Heat-Related Illness in Children in an Era of Extreme Temperatures*, 40 *Pediatrics in Rev.* 97 (2019); Zhiwei Xu et al., *The Impact of Heat Waves on Children’s Health: A Systematic Review*, 58 *Int’l J. Biometeorology* 239 (2014); Caroline J. Smith, *Pediatric Thermoregulation: Considerations in the Face of Global Climate Change*, 11 *Nutrients* 2010 (2019).

²¹ *E.g.*, Aaron S. Bernstein et al., *Warm Season and Emergency Department Visits to U.S. Children’s Hospitals*, 130 *Env’t Health Persp.* 17001 (2022).

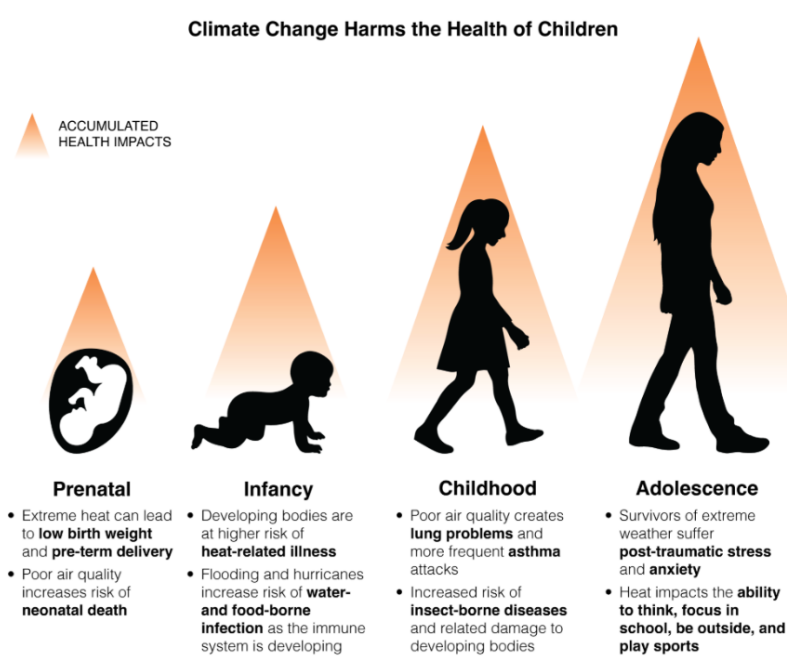


Figure 2. Illustrating the compounding harms to children's health caused by air pollution and climate change.²²

The harms to children's health, however, are not only physical. When the air is smoky or temperatures are dangerously hot, children's lives shut down and their pursuit of happiness vanishes: one by one, religious, educational, cultural, and recreational activities are canceled or foregone out of necessity, to protect children's health and safety. Being prisoners in their own homes, with an air purifier or air conditioner, if they are lucky, is a pale substitute for a Saturday walk to synagogue for Shabbat, fishing with parents, a pick-up game of basketball, a hike with a

²² Adapted from Lancet Countdown on Health and Climate Change, *Policy Brief for the United States of America* (2019).

youth group, or attending summer camps—a quintessential aspect of childhood now routinely disrupted by extreme climate events.²³ Each canceled or foregone activity is a loss—a lost opportunity for childhood joy, healthful physical activity, and intergenerational bonding. The losses are more than mere inconveniences and disrupt an essential part of childhood development, with lifelong consequences.

These are the freedoms truly at stake for children in Boulder. These are among the interests the Respondents here have the legal power and duty to protect.

II. THE FEDERAL CONSTITUTION PRESERVES STATE SOVEREIGN AUTHORITY TO PROTECT HEALTH, SAFETY, AND WELFARE

There is nothing about the “structure of our Constitutional system” that divests Respondents of their right to pursue relief against private corporations for damages they knowingly inflicted. On the contrary, “[t]he Constitution created a Federal Government of limited powers.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Pursuant to the Tenth Amendment, the states and their people “retain substantial sovereign authority under our constitutional system.” *Id.* at 457. The powers reserved to the states “extend to all the objects, which in the ordinary course of affairs, concern the lives,

²³ Ava Berger, *Climate Change Is Now Threatening a Pillar of Childhood: Summer Break*, NPR (July 26, 2026), <https://www.npr.org/2026/07/26/nx-s1-5900911/wildfire-smoke-fires-camp-minnesota>.

liberties and properties of the people; and the internal order, improvement and prosperity of the state.” *Mayor, Alderman & Commonalty of N.Y. v. Miln*, 36 U.S. 102, 133 (1837). The Tenth Amendment reserves police powers and sovereign duties concerning public welfare to the states, including duties under the Public Trust Doctrine, unless “delegated to the United States.”

Petitioners’ preemption argument rests on four faulty contentions: that (a) “the structure of our constitutional system continues to foreclose resort to state law unless Congress affirmatively authorizes its application”; (b) “States have no residual or inherent power under our Constitution to regulate in this area,” (c) “no federal law authorizes state common-law claims for harms caused by diffuse interstate and international emissions”; and (d) “allowing respondents’ state-law claims to proceed is incompatible with . . . the Clean Air Act, and this Court’s precedents.” Each of these propositions fundamentally misunderstands federalism.

A. The “Structure of Our Constitutional System” Reserves to the States Any Powers Not Explicitly Granted to the Federal Government or Prohibited to the States

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. “The [Tenth] amendment states but a truism that all [power] is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100, 124 (1941). Quoting James Madison, this Court has observed, “[t]he powers delegated by the proposed

Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *Gregory*, 501 U.S. at 458 (quoting *The Federalist* No. 45, at 292-93 (James Madison) (C. Rossiter ed., 1961)). Unless the Constitution *enumerates* a power as belonging to the federal government, the power is reserved to the states. *New York v. United States*, 505 U.S. 144, 176 (1992).

The states, Petitioners argue, “surrendered their ability to redress inherently transboundary issues such as global climate change when they agreed to enter the Union.” Not so. In forming a union, the states may have surrendered “forcible abatement” through, e.g., a military, but “they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests[.]” *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

In *Tennessee Copper*, Georgia sought injunctive relief against foreign corporations for air pollution discharges in Tennessee harming Georgia’s territory. 206 U.S. at 236. As a result of such discharge, Georgia alleged, “a wholesale destruction of forests, orchards, and crops is going on, and other injuries are done and threatened in five counties of the state.” *Id.* at 236. In sustaining Georgia’s right to pursue its claims, this Court held in relevant part:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they

better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

Id. at 238. The same principle applies here. Respondents, a Colorado county and municipality, seek to require Petitioners to share a portion of the financial burden their communities must bear in coping with an altered climate brought about in part by Petitioners' tortious conduct.

Importantly, a Tenth Amendment-reserved power can only be preempted through the federal exercise of an *enumerated* power, such as the commerce power. *Mayor*, 36 U.S. at 139; *New York*, 505 U.S. at 159 (“the core of sovereignty retained by the States under the Tenth Amendment” encompasses all power not expressly “delegated to the Federal Government under the affirmative provisions of the Constitution”); *Hodel v. Va. Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 291 (1981). This enumeration requirement dooms Petitioners’ “structural” constitutional preemption argument, which identifies no enumerated federal power whatsoever. Instead, it performs an 18-page interpretative dance. *See* *Pets.’ Br.* at 21-39.

Respondents “retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” *Gregory*, 501 U.S. at 461. Among these is the power to seek redress against Petitioners for intentionally misleading the public about the role their fossil fuel products have played in exacerbating the impacts of climate change

and knowingly causing and contributing to the alteration of the climate. Nothing about the “structure” of our “constitutional system” has divested Respondents of their power, and even duty, to seek redress for these injuries—which Respondents’ citizens are suffering in their home jurisdictions. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“under our federal system, the States possess sovereignty concurrent with that of the Federal Government”).

B. States Have “Inherent Power” to Exercise Their Police Powers to Ensure the Safety of Their Citizens

Boulder’s tort claims are not a regulation. But even if they were, the states enjoy expansive police power to protect the health and well-being of their citizens that may not be abridged unless prohibited to the states or explicitly granted to the federal government. *New York*, 505 U.S. at 176. This police power encompasses seeking redress against tortfeasors.

Police power is the plenary power to make any and all laws necessary “as to the protection of the lives, limbs, health, comfort, and quiet of all persons,” among other ends. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Berman v. Parker*, 348 U.S. 26, 32 (1954). States have police power; the federal government does not. *United States v. Lopez*, 514 U.S. 549, 566 (1995). The states’ police powers preceded the adoption of the Constitution, and thus, according to Chief Justice John Marshall, “remain, after the adoption of the [C]onstitution, what they were before, except so far as they may be abridged by [the Constitution].” *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Gregory*, 501 U.S. at 458 (quoting *The Federalist* No. 45, at 292-93). Among these “numerous and indefinite” powers is the protection of citizens’ health and well-being. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82 (1946) (“Protection of the safety of persons is one of the traditional uses of the police power of the States.”). Under the Tenth Amendment, “[i]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends[.]” *Mayor*, 36 U.S. at 139.

Protecting the safety of the public is the primary purpose for which government exists, and is supported by authorities dating back to Roman times. Two thousand years ago, Cicero gave us the Latin phrase “salus populi suprema lex esto,” meaning “the safety of the community is the highest law.” Gilmer, *Cochran’s Law Lexicon* 265 (5th ed. 1973); *see also Keith v. Clark*, 97 U.S. 454, 460 (1878) (“Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety”); *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (citing Cicero for deep roots of fundamental right to marry); *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, Thomas, JJ., concurring) (“A State’s most basic responsibility is to keep its people safe.”).

Here, Respondents have “a quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). Respondents’ claims against Petitioners are consistent with, and a fulfillment of, that interest. See *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.”); see also *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power[.]”). Indeed, Colorado has a policy “to achieve the maximum practical degree of air purity in every portion of the state”, has declared “that the prevention, abatement, and control of air pollution in each portion of the state are matters of statewide concern and are affected with a public interest”, and has exercised its police power “for the purpose of protecting the health, peace, safety, and general welfare of the people of this state” to reduce, prevent, and control air pollution. Colo. Rev. Stat. Ann. § 25-7-102.

A state’s police power “is one of the least limitable of governmental powers.” *Queenside Hills Realty*, 328 U.S. at 83. While “federal statutes enacted under the commerce power [may] preempt particular exercises of state police power,” *Hodel*, 452 U.S. at 292, Congress “must make its intention to do so unmistakably clear in the language of the statute.” *Gregory*, 501 U.S. at 460 (citation modified). “[I]t is incumbent upon the federal courts to be *certain* of Congress’ intent” to preempt. *Id.* (emphasis added, citation omitted); *Wis. Pub. Intervenor v. Mortier*, 501

U.S. 597, 605 (1991) (a state’s exercise of police power may not be foreclosed by Congress “unless that was [Congress’s] clear and manifest purpose” (citation omitted)). This unmistakable-clarity requirement exists because “Congress does not readily interfere” with the “substantial sovereign powers” states retain “under our constitutional scheme[.]” *Gregory*, 501 U.S. at 461; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (presumption against preemption); *Bond v. United States*, 572 U.S. 844, 866 (2014) (“Absent a clear statement” by Congress, this Court “will not presume Congress to have authorized such a stark intrusion into traditional state authority.”).

While the Clean Air Act is an exercise of Congress’s commerce power, Petitioners cannot identify any statutory language making an unmistakably clear statement of congressional intent to foreclose Respondents from pursuing tort claims against Petitioners under state law—because none exists. Tacitly acknowledging this fatal flaw, Petitioners instead ask the Court to examine whether Congress has “affirmatively authorize[d]” Respondents to pursue damages claims against tortfeasors for deceiving and harming Respondents’ citizens. But that gets the inquiry exactly backwards, inverting the fundamental principle of federalism.

In the alternative, Petitioners mischaracterize the lawsuit as an attempt to “regulate in this area,” and argue field preemption under the Clean Air Act. Even if this case involved regulation (it does not), Petitioners’ field-preemption argument fails because the Clean Air Act does not “make reasonable the inference that Congress left no room for the States to supplement it,” as field preemption requires; it does

the opposite. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citation omitted). “To regulate and abate nuisances is one of [the] ordinary functions” of states’ police power. *Nw. Fertilizing Co. v. Vill. of Hyde Park*, 97 U.S. 659, 667 (1878). The Clean Air Act expressly states that “air pollution control at its source *is the primary responsibility of States[.]*” 42 U.S.C. § 7401(a)(3) (emphasis added). Moreover, Petitioners’ field-preemption argument is ironic, considering that the federal government currently denies that the Clean Air Act authorizes federal regulation of GHGs *at all*, a matter being litigated in the D.C. Circuit. *See Rescission of the Greenhouse Gas Endangerment Finding*, 91 Fed. Reg. 7686, 7686 (“The EPA determines that CAA section 202(a)(1) does not authorize the Agency to prescribe emission standards in response to global climate change concerns.”); *Am. Pub. Health Ass’n v. U.S. EPA*, No. 26-2037 (D.C. Cir.). The American Petroleum Institute, of which Petitioner Exxon Mobil is a member, is currently urging the D.C. Circuit Court to assume the Clean Air Act does not authorize EPA to regulate GHGs. Private Resp’t-Intervenors’ Opp’n to Mot. to Stay Final Rule at 14, *Am. Pub. Health Ass’n*, No. 26-2038, Dkt. No. 2181086.

But the Court need not reach that issue, because Respondents’ tort claims do not constitute regulation. In *Sprietsma v. Mercury Marine*, this Court rejected the argument that an express preemption clause in the Federal Boat Safety Act directed at “a [state or local] law or regulation” encompassed common-law tort claims. 537 U.S. 51, 63 (2002). The Court reached this conclusion based not only on the plain language of the preemption clause, but also because “[i]t would have been perfectly rational for Congress not to pre-

empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an *important remedial role* in compensating accident victims.” *Id.* at 64 (emphasis added).

The same is true here. The County and City of Boulder are not engaged in an effort to “control (an activity or process) esp. through the implementation of rules.” *Regulate*, Black’s Law Dictionary (12th ed. 2024). Rather, Respondents’ litigation seeks to hold Petitioners accountable for their deceptive and destructive conduct and, in so doing, achieve a remedial outcome for the benefit of their residents. In short, even if Petitioners were correct (they are not) that states lack power to “regulate in this area,” their position has no bearing on this Court’s analysis.

C. The Public Trust Doctrine Requires States to Seek Compensation for Damage to Public Trust Assets

The Public Trust Doctrine provides an additional and independent basis for the power—and duty—of state and local governments to protect (and recover losses of) natural resources, including air and water, that are essential for their citizens’ health, safety, and welfare, especially children and future generations. State public trust obligations cannot be preempted.

The Public Trust Doctrine is “rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.” Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 315 (1980). Pursuant to the Public Trust Doctrine, the sovereign trustees—governments—are affirmatively obligated to prevent

substantial impairment or waste of trust property, and use skill and care to preserve the trust property for present and future generations. See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Env't L. 43, 69 (2009).

The Doctrine gives force to the expectation—central to the purpose of organized government—that natural resources essential for a child's survival will remain abundant, justly distributed, and bequeathed to future generations. See, e.g., Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J.L. & Pol'y 281, 283 (2014) (“[O]ne central purpose of government is to protect the essential natural resources that enable our society to function, evolve, and reproduce for future generations.”); see U.S. Const. pmbl. (forming the Union to “secure the Blessings of Liberty to ourselves and our Posterity”). The sovereign fiduciary duty to protect such vital assets from irrevocable damage remains the *sine qua non* of the public trust. Unlike discretionary police powers, the Public Trust Doctrine imposes *affirmative* duties on trustees to preserve and maintain trust assets. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003).

Air and water have long been understood to be among the resources protected by the Public Trust Doctrine. 2 William Blackstone, *Commentaries on the Laws of England* *14 (1766) (“[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common Such (among

others) are the elements of light, air, and water[.]”); *Geer v. Connecticut*, 161 U.S. 519, 525-26 (1896). The fact that air and water are shared resources, not limited to one jurisdiction, confirms the public trust nature of them. As one leading public trust scholar explains, “[i]t is well established that all sovereigns with jurisdiction over the natural territory of a transboundary asset have legitimate property claims to the resource.” Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 Env’t L. 259, 287 (2015).

American courts routinely recognize the ancient origins of the Public Trust Doctrine, tracing it to ancient legal systems. See, e.g., *Lawrence v. Clark Cnty.*, 254 P.3d 606, 608 (Nev. 2011); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 167 (Mont. 1984); *Nat’l Audubon Soc’y v. Super. Ct.*, 658 P.2d 709, 718 (Cal. 1983). Specifically, the Doctrine is traced from Roman law, through English common law, to American colonies, to present day. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012); J. Inst. 2.1.1 (T. Sanders trans., 4th ed. 1867); Matthew Hale, *De Jure Maris*, Harg. Law Tracts, *reprinted in* Stuart Moore, *A History of the Foreshore and the Law Relating Thereto* (3rd ed. 1888); The Federalist No. 46 (James Madison) (“The federal and State governments are in fact but different agents and trustees of the people”); *Martin v. Waddell’s Lessee*, 41 U.S. 367, 413 (1842). Subsequently, this Court recognized the Public Trust Doctrine in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892). In *Illinois Central Railroad*, this Court found the navigable waters of the Chicago harbor, and the land under them, are “a subject of concern to the whole people of the state” and must be

held “in trust for their common use and of common right, as an incident of their sovereignty.” *Id.* at 455, 459-60.

Importantly, the people of the original thirteen states, in forming the federal union, reserved state public trust resources for themselves, and their sovereign states as trustees, through the Tenth Amendment. See Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 *Env’t L.* 399, 406-07 (2015). Upon federation, “[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively.” *Pollard v. Hagan*, 44 U.S. 212, 230 (1845). Concomitantly, the original thirteen colonies passed sovereign trust obligations to the federal government to manage federal lands that were not yet incorporated into the union as states. “[T]he United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283 (1997).

Later states, including Colorado, became trustees over public trust resources through the statehood acts of Congress. “[B]efore the equal footing conveyance occurred, a trust applied to the federal lands that were subject to the conveyance.” See Blumm & Schaffer, *supra*. Accordingly, as a sovereign, each new state became trustee as “a matter of state law” to protect the people’s beneficial use of vital natural resources. *PPL Mont.*, 565 U.S. at 603.

Critically, as an attribute of sovereignty, states cannot abdicate their reserved public trust duties, nor

can the federal government “preempt” them. *See, e.g., Geer*, 161 U.S. at 527 (describing the sovereign trust over wildlife resources as an “attribute of government”). As this Court declared in *Illinois Central*, “[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government[.]” 146 U.S. at 453. As one federal district court noted: “The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.” *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). A state’s public trust responsibilities cannot be abdicated even where there has been no previous adjudication of the applicability of the Public Trust Doctrine, and where a trustee may have “slept on public rights.” *Ariz. Ctr. for Law in Pub. Int. v Hassell*, 837 P.2d 158, 171 (Ariz. Ct. App. 1991). Succeeding trustees are not foreclosed from awakening to their trustee duties and protecting the trust *res*, as the children of each generation so depend.

Trust obligations run to each branch of government, including local governments. *See* Sean Lyness, *The Local Public Trust Doctrine*, 34 Geo. Env’t L. Rev. 1, 12-13 (2021); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013) (“With respect to the public trust, . . . all existing branches and levels of government derive constitutional duties and obligations with respect to the people.”); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1006 (Haw. 2006) (“We therefore hold that the County has a duty, as a political subdivision of the State, to protect the waters located adjacent to the Property.”). Therefore, local governments, including Respondents here, are also trustees. The authority of local governments to

protect public trust resources is at its peak in home rule states like Colorado. Colo. Const. art. XIV, § 16; *id.* art. XX; Lyness, *supra*.

In *Robinson Township*, the Pennsylvania Supreme Court ruled in favor of local governments, finding a state law compelling local municipalities to allow oil and gas drilling violated the state's constitutionally codified Public Trust Doctrine. *Robinson Twp.*, 83 A.3d at 954-59, 1000.

When third parties, such as Petitioners here, have allegedly damaged trust assets, trustees, like Respondents, must exercise their affirmative trust duties to restore such assets by pursuing monetary damages. Wood & Galpern, *supra*. This duty cannot be abdicated or preempted.

* * *

In sum, Boulder's tort claims are a lawful exercise of police powers and the Public Trust Doctrine reserved to the states under the Tenth Amendment, which have a centuries-old history within our system of federalism. *See* Resp'ts Br. at 9, 35-37. Boulder's suit fits comfortably within the plain text of the federal structure: police power is textually committed to the states by the Tenth Amendment, and state and local governments' "primary responsibility" for reducing air pollution is expressly recognized by the Clean Air Act. 42 U.S.C. § 7401(a)(3). Boulder's suit is therefore not displaced by the "structure" of the Constitution, by the Clean Air Act, or by federal common law. A holding of preemption in this case would authorize unprecedented federal intrusion on states' authority, and *duty*, to protect the property, health, safety, and welfare of their citizens.

III. A BROAD PREEMPTION HOLDING WOULD IMPEDE INDIVIDUAL CONSTITUTIONAL RIGHTS THAT ARE NOT BEFORE THIS COURT

Petitioners request a staggeringly broad preemption holding: one that preempts not only state-law tort claims against private tortfeasors, but also all state-law claims involving GHG pollution, including types of claims not before this Court. This Court should not accede to Petitioners' request, because such a holding would obliterate children's state-law rights to public trust resources that are protected by their state and federal constitutions before they are fully developed adults, can protect themselves, or have power to vote.

"The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory*, 501 U.S. at 458 (citation modified). The Due Process Clauses of the Fifth and Fourteenth Amendments protect against invasions of individual "liberty" interests "without due process of law[.]" U.S. Const. amends. V, XIV. A Due Process-protected "liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies[.]" *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citation modified); *see, e.g., Gutierrez v. Saenz*, 606 U.S. 305, 314 (2025) (recognizing a Fourteenth Amendment-protected state-created liberty interest); *Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (in Fifth Amendment context).

A state-created liberty interest exists when a state (1) “ha[s] the authority to create, or not, a right,” and (2) “the State having created the right[, . . .] itself recogniz[es] that its deprivation” is prohibited or authorized only under certain circumstances. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Under those state-created circumstances, “the [individual’s] interest has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.” *Id.*, *holding aff’d*, *Sandin v. Conner*, 515 U.S. 472, 483 (1995).

For example, in *United States v. Windsor*, New York enacted a statute to recognize and protect the right of same-sex couples to marry. 570 U.S. 744, 764 (2013). Contrary to New York’s law, the federal Defense of Marriage Act (DOMA) defined marriage as between a man and woman. *Id.* at 764, 752. Yet this Court held DOMA did not preempt New York’s marriage law because “the definition and regulation of marriage” is “[b]y history and tradition” within the states’—not Congress’s—authority. *Id.* at 764-65. On the contrary, because DOMA “injure[d] the very class” which New York “sought to give further protection and dignity” to, DOMA violated the *Fifth Amendment’s* liberty protection, on equal protection grounds. *Id.* at 766, 769. On that basis, this Court declared DOMA unlawful. *Id.* at 775.

Amicus Our Children’s Trust (OCT) represents children in states such as Montana, Pennsylvania, and Hawai‘i who are beneficiaries of their respective states’ obligations to preserve the public trust with

respect to GHG emissions subject to state control. Just as DOMA in *Windsor* did not preempt a New York couple’s Fifth Amendment-protected state-law liberty interest in the individual right to marry, the Clean Air Act similarly does not preempt our clients’ state-law liberty interests in the right to public natural resources. Nor does it preempt children’s interests in having their state or local governments recover from tortfeasors for damages that otherwise would be paid by the citizens, i.e., youth amici here.

Just as with marriage, protection of state citizens’ trust-beneficiary rights to use and enjoy state public trust resources has traditionally been within states’—not Congress’s—authority. *See* Section II.C, *supra*; *see, e.g., Ill. Cent. R.R.*, 146 U.S. at 453; *PPL Mont.*, 565 U.S. at 603-04; *Ching v. Case*, 449 P.3d 1146, 1175 (Haw. 2019). States have long exercised this authority by limiting pollution originating within their borders. The Clean Air Act expressly recognizes as much, noting that “air pollution control at its source is the primary responsibility of States and local governments[.]” 42 U.S.C. § 7401(a)(3); *Ohio v. EPA*, 603 U.S. 279, 283 (2024).

Just as New York exercised its traditional state powers in *Windsor* to protect same-sex couples’ right to marry, many states have enshrined robust individual public-trust rights and corresponding state duties in their state constitutions or statutory codes. *See, e.g.,* Penn. Const. art. I, § 27 (“As trustee of [Pennsylvania’s public natural] resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”); Mont. Const. art. II, § 3 (“All persons” have the “inalienable right[] . . . to a clean and healthful environment”); Mont. Const. art.

IX, § 1 (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”); Mont. Const. art. IX, § 3(2) (“All . . . atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.”); *Held v. State*, 560 P.3d 1235, 1249 (Mont. 2024) (statute prohibiting state consideration of GHG emissions violated plaintiffs’ state constitutional right to a clean and healthful environment); Haw. Const. art. XI, § 1 (“For the benefit of present and future generations, the State . . . shall conserve and protect Hawaii’s natural beauty and all natural resources”); Haw. Const. art. XI, § 9 (“Each person has the right to a clean and healthful environment”); Haw. Rev. Stat. § 225P-8 (requiring state to reduce GHG emissions from transportation); *In re Maui Elec. Co.*, 506 P.3d 192, 202 & n.15 (Haw. 2022) (the right is an “affirmative [state] constitutional obligation[]” that “subsumes a right to a life-sustaining climate system,” including “[t]he need to mitigate the catastrophic effects of anthropogenic climate change”); *In re Haw. Elec. Light Co.*, 526 P.3d 329, 336 (Haw. 2023); Tex. Const. art. XVI, § 59(a) (“The conservation and development of all of the natural resources of this State, . . . are each and all hereby declared public rights and duties”); Mich. Comp. L. § 324.1701 (“[A]ny person may maintain an action . . . for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”).

All states have the sovereign fiduciary duty to protect their citizens’ state public trust assets,

including the air, *see* Section II.C, *supra*. And certain states have codified this duty as an individual right and strictly prohibited or narrowly constrained the deprivation of that right; for these reasons, these citizens’ “interest has real substance” under the federal Constitution, thereby entitling them to the Constitution’s due process protections, including procedural due process. *Wolff*, 418 U.S. at 557. Crucially, that procedural protection is fulfilled by state citizens’ “full and fair opportunity to litigate” the enforcement of their state rights in state court. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 (1982).

This Court should reject Petitioners’ request to preclude “state-law claims seeking relief for injuries allegedly caused by” GHG emissions. *See* Pets.’ Br. at 11. Such a ruling would have significant unintended consequences, potentially disrupting bodies of state law that are not before this Court, and which have centuries-old histories within our system of federalism. A broad preemption ruling could unintentionally prejudice our young clients’ full and fair opportunity to litigate their state-law rights in state court, and would pit this Court’s preemption doctrine against federally-protected individual rights, because the Fifth and Fourteenth Amendments recognize and protect OCT’s clients’ state-law rights as a matter of federal law. A broad preemption ruling from this Court could *obliterate* the very state-law rights to resources that support life, liberty, and property, which the federal Constitution protects, amounting, in essence, to this Court amending the federal Constitution.

CONCLUSION

Fossil fuel pollution has put children in a health emergency. They depend on their state and local governments to protect them and their survival resources, like breathable air, throughout their lives. This Court should affirm the judgment of the Colorado Supreme Court, or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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