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 PREEMPTION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MICHAEL D. HAUSFELD
HAUSFELD LLP
1200 17th Street, N.W.,
Suite 600
Washington, DC 20036
mhausfeld@hausfeldllp.com

ADAM J. LEVITT
DANIEL ROCK FLYNN
DICELLO LEVITT LLP
10 North Dearborn Street,
6th Floor
Chicago, IL 60602
alevitt@dicellolevitt.com
dflynn@dicellolevitt.com

ERNEST A. YOUNG
Counsel of Record
3208 Fox Terrace Drive
Apex, NC 27502
(919) 360-7718
young@law.duke.edu

Counsel for Amici Curiae

394572

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QUESTIONS PRESENTED

1. Whether the Constitution or the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, categorically preempts state law nuisance claims for damages litigated against private parties regarding the marketing and production of greenhouse gases; and

2. Whether Congress intended the Clean Air Act's scheme for regulating air pollution emissions to preempt plaintiffs' state common law claims for deceptive marketing and upstream production of fossil fuels.

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INTEREST OF AMICI

Amici are law professors interested in federal preemption of state law.[1] Our interest arises from teaching and writing in a variety of related fields, including administrative law, constitutional law, environmental law, health law, and torts. Daniel Farber is the Sho Sato Professor at the University of California, Berkeley School of Law. Thomas McGarity holds the William Powers, Jr. and Kim Heilbrun Chair in Administrative Law at the University of Texas School of Law. Nina Mendelson is the Joseph Sax Collegiate Professor at the University of Michigan Law School. David Rubenstein holds the William Scott Research Chair at the University of Kansas School of Law. Wendy Wagner holds the Richard Dale Chair at the University of Texas School of Law. Ernest Young is the Alston & Bird Distinguished Professor at Duke Law School.

Each of us believes that legal scholarship should be concerned with and made useful to the decision of issues presently before the courts. We join this brief solely in our individual capacities as lawyers and scholars, and the views expressed here should not be attributed to our institutions.

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1. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court recently emphasized that "[t]here 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 Dept. of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). That principle decides this case. Defendants have asserted an unusually aggressive array of preemption arguments, but each boils down to broad structural preemption—that is, that Plaintiffs' claims are categorically preempted either by the general structure of constitutional federalism, or by Congress's wholly implicit intent in the Clean Air Act (CAA) to preempt the entire field of interstate air conditions. The constitutional argument lacks any textual foundation, and the theory upon which it rests has been rejected explicitly since the New Deal and in practice since the Marshall Court. Likewise, Defendants' implied field preemption argument is just another form of "pre-emption *in vacuo*," and it founders on Congress's express provision in the CAA that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

The plaintiffs in this case face multiple significant challenges on the merits. They must link their theories—which focus *not* on emissions but rather on deceptive marketing and upstream production of fossil fuels—to climate impacts suffered in Boulder. They carry a weighty burden to prove causation, and Defendants have other federal defenses that remain for consideration on remand. But they should be allowed to prove their case; federal preemption is not a proxy to screen out suits that may not ultimately prevail on the merits. Preemption under the Supremacy Clause is the critical line demarcating the boundary between national and state authority. Defendants' approach here, if accepted by this Court, would utterly transform that boundary with broad and unpredictable consequences. It would not only reshape all manner of tort litigation, but it would narrow state regulatory authority across the board and likely disrupt cooperative federalism regimes under a wide array of federal statutes.

ARGUMENT

I. No broad principle of structural preemption governs this case.

Defendants' view of structural preemption is breathtakingly broad. They argue that the Constitution preempts state regulation of "ambient" phenomena—by which they seem to mean phenomena like air pollution that is often interconnected across state boundaries. Petr. Br. at 27.[2] That would apply not only to greenhouse

2. Defendants use "ambient"—which typically means "existing or present on all sides," *see* Ambient, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/ambient (last visited July 21, 2026)—in an idiosyncratic way to suggest inherently interstate phenomena. *See* Petr. Br. at 27 ("Air and water are 'ambient' . . . in the sense that . . . pollution from a single source can readily flow from one state to another."). The word applies more broadly, however—for instance, to the "ambient noise level in the law library" or the "ambient temperature in Fresno." "Ambient" gases in the atmosphere, while not respecting state lines any more than sound or temperature do, are subject to state regulation. *See Huron Portland Cement Co. v. City of Detroit*, 362

gases and air or water pollution, but also to crime, market conditions, communicable diseases, or culture. To say that only federal law may regulate these subjects would be to revert to a model of constitutional jurisdiction that this Court abandoned long ago.

In the nineteenth and early twentieth centuries, this Court interpreted the Commerce Clause as an *exclusive* grant of power to the national government, thus barring the states from regulating anything that would fall within that grant. The Constitution thus barred Congress from regulating *intra*state commerce that did not involve "more states than one," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824), while symmetrically barring the states from regulating *inter*state commerce, *Leisy v. Hardin*, 135 U.S. 100 (1890). At least in theory, this regime foreclosed all state regulation of cross-border problems.[3] It was precisely the regime that Defendants describe in their opening brief.

Even during the "dual federalism" period, however, the jurisdictional lines were more permeable than Defendants acknowledge.[4] This Court recognized exceptions on both

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U.S. 440 (1960). Nothing in the word signifies exclusive federal regulatory jurisdiction.

3. *See, e.g.*, *Robbins v. Shelby Cty. Taxing Dist.*, 120 U.S. 489, 494 (1887) ("[I]n the matter of interstate commerce the United States are but one country, and must be subject to one system of regulations, and not to a multitude of systems.").

4. *See, e.g.*, *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 319 (1851) (stating that the national commerce power created a regime of "selective exclusivity"). By the 1840s, Chief Justice Taney stated that "the mere grant of power to the

sides of the line: states regulated interstate activity for purposes within the states' police power, *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251-52 (1829), and national authorities could reach intrastate activity where necessary to facilitate regulation of *inter*state activity, *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 351 (1914). Claims seeking damages to deter fraudulent advertising or defray the cost of mitigating environmental damage would surely have fallen within the "police power" exception, even in the heyday of strict limits on state regulatory authority. Defendants' categorical theory of constitutional preemption has *never* existed in real life.

It certainly does not exist now. In 1937, this Court changed course and rejected the dual federalist model. Landmark decisions like *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Wickard v. Filburn*, 317 U.S. 111 (1942), recognized the national economy's basic interconnectedness, upholding national power to regulate even small activities, like producing minute quantities of wheat exceeding a regulatory quota. At the same time, this Court significantly narrowed its dormant Commerce Clause doctrine, generally permitting state regulation so long as states did not *discriminate* against interstate commerce.[5] The antidiscrimination doctrine

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general government cannot . . . be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. . . . [State] regulations [of commerce] are valid unless they come in conflict with a law of Congress." *Thurlow v. Com. of Mass.*, 46 U.S. (5 How.) 504, 579 (1847) (opinion of Taney, C.J.).

5. *See, e.g.*, *S.C. Hwy. Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 189 (1938) (observing that "so long as the state action

does not purport to exclude state regulation altogether from any substantive area. And this Court has "expressly cautioned against judges using the dormant Commerce Clause as 'a roving license for federal courts to decide what activities are appropriate for state and local governments to undertake.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 380 (2023) (plurality opinion) (quoting *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 343 (2007)). Defendants relabel that "roving license" as structural preemption, but it amounts to the same thing.

Since the New Deal, state and national regulatory jurisdiction have been largely concurrent; the boundary between them is set by the Supremacy Clause, with state regulation foreclosed only when it conflicts with the terms of particular federal statutory regimes.[6] Hence this Court's cautious approach to federal common law and preemption. As the post-New Deal Court retreated from broad notions of constitutional exclusion under the dormant Commerce Clause, state law could apply in a

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does not discriminate, the burden [on interstate commerce] is one which the Constitution permits"); *see* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 489 (1997) ("[T]he dormant Commerce Clause . . . had been wielded extremely aggressively against the states during the *Lochner* era but was drastically scaled back by the Court starting in 1938.").

6. *See* Ernest A. Young, *'The Ordinary Diet of the Law': The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 257-59, 268-69 (2012); *see also* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 231 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law . . . .").

broader range of situations, thereby reducing the need for federal common law.[7] State law can apply even in areas like federal contracting—a heartland of Judge Friendly's "new federal common law."[8] Under current law, judge-made federal rules of decision are unavailable unless state law conflicts with overriding federal interests.[9] As Professor Thomas Merrill has observed, this Court "increasingly avoids invoking federal common law . . . preferring to cast its rulings in terms of interpretation of authoritative federal texts or preemption. Although it would be rash to declare that federal common law is dead, a heavy aura of

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7. *See, e.g.*, *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963) (noting that post-*Erie*, "[t]he instances where we have created federal common law are few and restricted," and refusing to create a federal common law right of action for abuse of process because "federal officials are usually governed by local law" in that area).

8. *See* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408-11 (1964). Defendants suggest Judge Friendly thought federal common lawmaking authority necessarily excluded state law, Petr. Br. at 26, but both Friendly and this Court rejected that view. *See* Friendly, *supra*, at 410; *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-30 (1979) (stating that even in federal contracts cases, courts must "determine whether application of state law would frustrate specific objectives of the federal programs," and rejecting "generalized pleas for uniformity").

9. *See Atherton v. FDIC*, 519 U.S. 213, 218-19 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (stating that the power to make federal common law depends upon a "'significant conflict between some federal policy or interest and the use of state law'") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *see generally* Ernest A. Young, *Preemption and Federal Common Law*, 83 Notre Dame L. Rev. 1639 (2008).

illegitimacy hangs over any claim for newly minted federal common law rules."[10]

Likewise, this Court's recognition of broad national legislative authority prompted a shift in preemption doctrine, requiring clear evidence that Congress intended to displace state law.[11] And Congress's post-New Deal enactments generally reflect a legislative commitment to concurrent state and federal authority. Federal environmental law accords states a large discretionary role in the federal scheme,[12] often explicitly saves state law and remedies from preemption, and leaves untouched many related issues like deceptive marketing of fossil fuels. Even where Congress has sought to allocate specific functions exclusively to federal regulators, as

10. Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 Colum. L. Rev. 452, 463 (2010).

11. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Mintz v. Baldwin*, 289 U.S. 346 (1933); *see generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 806 (1994) (observing that the Court "replaced a strict division of powers version of federalism with a new version embodying the presumption that state powers . . . survive unless clearly ended by Congress. Preemption doctrine was thus modified to reflect this new presumption, and thereafter, Congress was affirmatively required to manifest an intent to preempt"). Although judges occasionally debate the scope or strength of the *Rice* presumption, *all* contemporary preemption cases focus on Congress's particularized intent to preempt state law manifested in the terms of particular statutes—not broad categories of structural preemption. *See Hencely*, 146 S. Ct. at 1093.

12. *See, e.g.*, *Ohio v. EPA*, 603 U.S. 279, 283 (2024) ("The Clean Air Act envisions States and the federal government working together to improve air quality.").

in energy law, it has done so in a far more fine-grained way than Defendants' categorical rule of structural preemption would permit, and this Court has rejected broad preemption arguments in situations implicating both state and federal responsibilities.[13]

Whether Plaintiffs' state law claims are foreclosed must be a function of any preemptive effect of the statutes that Congress has enacted—in particular, the Clean Air Act—not of broad and categorical structural principles concocted by Defendants and defined by judges.

II. Defendants' examples of structural preemption are either mistaken or inapplicable.

Defendants attempt to support their broad and categorical rule that the Constitution preempts all state efforts to regulate greenhouse gases by cobbling together three more specific theories. None is plausible.

13. *See ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (observing that the Natural Gas Act assigns wholesale gas sales to federal regulation while reserving retail sales to the states, and holding state antitrust claims against pipelines' behavior affecting both were not preempted); *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 168 (2016) (Sotomayor, J., concurring) (observing that, even in finding preemption, the Court had focused on the specific provisions of the Federal Power Act "rather than resting on generic pre-emption frameworks unrelated to" that statute). *See* Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 Emory L. J. 921 (2018) (describing how Congress originally sought to divide the energy field between state and federal regulators by statute but over time the statutory scheme recognized important areas of concurrent jurisdiction).

A. This Court's federal common law cases on interstate nuisance claims are far more limited than Defendants recognize, and in any event have been superseded by the Clean Air Act.

Defendants rely most prominently upon a line of cases in which American states have sued other states, or sometimes other actors, to abate an interstate nuisance. These cases are complex, generally focused on issues other than preemption, and engage substantive matters far afield from the consumer protection concerns of Plaintiffs' suits. The decisions tend to offer little explanation and must be approached with care. They certainly do not support the categorical rule of structural preemption that Defendants would derive from them.

Defendants begin with *Missouri v. Illinois*, 200 U.S. 496 (1906), and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), which they read to stand for the proposition that federal common law governs interstate pollution disputes. *See* Petr. Br. at 24-25. That would be surprising, because "federal common law" in the sense we speak of it today is largely (outside admiralty) a post-*Erie* concept. Neither *Missouri* nor *Tennessee Copper* saw any need to pinpoint the source of nuisance law applied in those cases; they do not speak in terms of "federal" substantive law.[14] Ordinarily, a pre-*Erie* federal court in such a case would apply "general" law, and indeed the literature on general law often cites interstate disputes as an area where federal courts have resorted to general law.[15] Subsequent

14. Defendants interpolate the word "federal" into a quotation from *Missouri*, Petr. Br. at 25, but it is not in the original opinion.

15. *See, e.g.*, Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 508-09 (2006).

decisions interpreting these cases as predicated on a federal law of interstate nuisance, *see Illinois v. City of Milwaukee ("Milwaukee I")*, 406 U.S. 91, 105 n.6, (1972), have read that into the decisions.

Any federal common lawmaking in these cases seems to have rested on far narrower grounds than Defendants assert. *Tennessee Copper* did suggest that the national Constitution entitled Georgia to relief under principles of federal equity if they could prove a case for nuisance on the merits. *See* 206 U.S. at 237-38. But this Court has recognized a basis for federal equity dating back to the Founding, *see Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999),[16] without extending that authority to formulate federal common law rules. And federal equity can be no authority for displacing Plaintiffs' damages claims here.[17]

As Defendants acknowledge, Petr. Br. at 24-25, both this Court and scholars have grounded decisions like *Missouri* and *Tennessee Copper* in a substantive principle of sovereign equality among states. That principle has no application to the Plaintiffs' claims against private actors here. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), Justice Brandeis wrote that "whether the water of an interstate stream must be apportioned between the two States is a question . . . upon which neither the statutes nor the decisions of either State

16. *See also* William Baude, Jack Goldsmith, John Manning, James Pfander, & Amanda Tyler, *Hart and Wechsler's The Federal Courts and the Federal System* 783-88 (8th ed. 2025).

17. *See Tennessee Copper*, 206 U.S. at 238 (suggesting that the Court could likely *not* have provided a remedy in a suit between private parties or an action at law).

can be conclusive."[18] This is an important principle, but extending it to foreclose any state-law claims involving cross-border pollution or other "ambient" interstate activity stretches it beyond all recognition.[19] All of the interstate dispute cases of which we are aware involve sovereign equality concerns, which arguably demand a neutral rule of decision to prevent self-dealing. And substantively, there is a considerable difference between zero-sum boundary and resource allocation cases, which often require exclusive judicial jurisdiction,[20] and *in*

18. Although *Hinderlider* involved a private party's suit, the issue in dispute concerned the allocation of water rights between Colorado and New Mexico. *See* 304 U.S. at 95-96. *See also* Anthony J. Bellia, Jr., & Bradford R. Clark, *General Law in Federal Court*, 54 Wm. & Mary L. Rev. 655, 713 (2013) ("Disputes between states are beyond the authority of either state to resolve, and the Constitution itself requires federal courts to apply general law rules designed to uphold the constitutional equality of the states."); Nelson, *General Law*, *supra*, at 508 (agreeing that "if a state disagrees with neighboring states about its boundaries or its right to the water in interstate rivers, it cannot authoritatively resolve the dispute simply by passing a statute arrogating all of the disputed territory or water to itself").

19. When cases like *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230 (2019), speak of "the interstate . . . nature of the controversy" making it "inappropriate for state law to control," *id.* at 246, they are referring to the clash among sovereign equals, not simply activity that crosses state lines. *See id.* at 246-27.

20. *See Hyatt*, 246-47 (emphasizing that "a dispute over borders or water rights . . . involves a direct conflict between sovereigns"); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466-67 (1939) (acknowledging the principle that a single court must have jurisdiction over cases administering a corpus).

personam claims for damages based on tortious activity that crosses a border. The sovereign equality of states may impose some constraint on choice of law rules,[21] but the Constitution has never been held to require that all cases implicating the interests of multiple states must be governed by federal common law.[22]

In any event, the federal common law of interstate nuisance was itself preempted by the 1972 Amendments to the Clean Water Act. In *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) ("*Milwaukee II*"), this Court recognized that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." Defendants nonetheless argue that the preemptive force of the old interstate nuisance jurisprudence remains, even though its substance does not. Petr. Br. at 29-30. This argument depends entirely on the underlying contention that the Constitution itself forecloses states from regulating interstate pollution. *See id.* at 30. For reasons discussed in Part I, that argument is simply incorrect.

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21. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992) (arguing that the equality of states ought to require that states may not systematically prefer their own law over the law of other states).

22. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (holding that the Constitution requires only that a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair").

This Court necessarily rejected any such notion in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). That case held that Detroit could apply its Smoke Abatement Code to ships operating in interstate commerce on Lake Huron. That was true even though the case fell within the maritime jurisdiction, traditionally an enclave of extensive federal common lawmaking. Citing cases all the way back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court explained:

> Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. 362 U.S. at 442.

Defendants' claims of broad constitutional preemption of state law would also wreak havoc with the CAA's structure. That statute delegates broad discretion to state governments in formulating state implementation plans to meet federal air quality standards.[23] And as we discuss in Part III, the CAA incorporates two broad savings

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23. *See generally Ohio v. EPA*, 603 U.S. 279, 283-84 (2024) ("Because the States bear 'primary responsibility' for developing compliance plans, EPA has 'no authority to question the wisdom of a State's choices of emission limitations.'") (quoting 42 U.S.C. § 7401(a)(3) and *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975)); *Virginia v. EPA*, 108 F.3d 1397, 1406-09 (D.C. Cir. 1997); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183 (1995).

clauses preserving state regulations and remedies. If the Constitution prohibits state regulation in this area, then it is unclear how Congress could nonetheless authorize it.[24]

Defendants' argument diverges dramatically from how federal common law generally works. The best understanding of the interstate conflicts cases from *Missouri* through *Milwaukee I* is that, in order to respect the equality of sovereign litigants, the Court applied general law principles to cases where neither state could dictate its own law. And, as *Milwaukee II* made clear, the Court did this in the absence of congressional action, but with the clear understanding that Congress might step in at any point and weigh the competing considerations differently. *See* 451 U.S. at 317 ("[W]e 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.") (internal quotation marks omitted). Congress having done just that, the measure of preemption becomes the CAA and any other relevant federal statutes.

As discussed in Part III, Congress decided to leave "primary responsibility" for "air pollution prevention . . . and air pollution control" with "States and local governments." 42 U.S.C. § 7401(a)(3). There is no requirement that Congress expressly "authorize" claims

24. Moreover, this Court has upheld EPA decisions requiring pollution sources to comply with a downstream affected state's water quality standards. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). That would be impermissible if all state regulation were constitutionally forbidden.

under state law. *See* Petr. Br. at 30.[25] *Milwaukee II* acknowledged the presumption against preemption of *state* law in this context, while favoring displacement of federal common law by a new federal statute. *See* 451 U.S. at 316-17. Defendants' contrary assertion that some broad principle of structural preemption survived the CAA is flatly inconsistent with this Court's later reading of *Milwaukee II*; in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court interpreted *Milwaukee II* as holding "that federal legislation now occupied the field, pre-empting all *federal* common law. The Court left open the question of whether injured parties still had a cause of action under *state* law." *Id.* at 489 (emphasis in original).[26] And *Ouellette* explicitly held that state law actions could be brought against polluters under the law of the source state.[27]

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25. If there *is* such a requirement, *amici* submit that the savings clause for state remedies "under any statute or common law," 42 U.S.C. § 7401(a)(3), should satisfy it.

26. Defendants pick out language in *Ouellette* stating that "the regulation of interstate water pollution is a matter of federal, not state law," Petr. Br. at 26 (quoting *Ouellette*, 479 U.S. at 488), but that language simply described the Court's earlier holding in *Milwaukee I*—not the law after the CWA included an extensive role for States.

27. *See* 479 U.S. at 497 ("The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State.") (emphasis in original); *see also id.* ("By its terms the CWA allows States . . . to impose higher standards on their own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions.") (citing 451 U.S. at 328). Likewise, Defendants' quotations to

Both *Ouellette* and *AEP* considered the scope of preemption of particular sorts of state law claims under the specific provisions of the CWA and CAA. That careful analysis is inconsistent with categorical principles of structural preemption. The law of interstate nuisance was *never* categorical in the way that Defendants suggest, but in any event that way of thinking surely perished after the Clean Air Act Amendments.

B. This Court has explicitly refused to concoct a broad constitutional principle barring state regulation with extraterritorial effects.

Three years ago, this Court unanimously refused to recognize an "extraterritoriality doctrine" that would forbid enforcement of state law merely because it has the "'practical effect of controlling commerce outside the

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worries about "in irrational system of regulation" or "chaotic confrontation" between states, Petr. Br. at 26, are in the context of allowing suits under *both* source states' and affected states' laws. *See* 479 U.S. at 496. The Court did not see such problems as intrinsic to state regulation under an appropriate choice of law regime.

Defendants likewise invoke *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), for the categorical proposition that "federal law applies to disputes involving interstate pollution." Petr. Br. at 26. But the language on which they rely is out of context. It occurs in the course of rejecting the possibility that *federal* common law claims might nonetheless adopt a state rule of decision—a possibility identified in *Kimbell Foods* and other cases. See 440 U.S. at 728-29. More recent federal common law cases have emphasized that, absent a specific conflict with federal interests or policy, state law applies of its own force, *see Atherton*, 519 U.S. at 218-19; *O'Melveny & Myers*, 512 U.S. at 87-88, and AEP did not foreclose this.

State.'" *Ross*, 598 U.S. at 371. It is venturesome, then, for Defendants to argue that imposing liability on them for impacts of climate change in Colorado will shape their behavior in ways the Constitution forbids. Petr. Br. at 22. Their alleged change in business practices relating to marketing and production of fossil fuels is indistinguishable from the arguments raised and rejected in *Ross* that California's law shaped pork production practices outside the state. *See Ross*, 598 U.S. at 371. In an otherwise divided decision, Defendants' proposition failed to garner a single vote.[28]

This Court did adopt a much more modest extraterritoriality rule in *Ouellette*. By restricting state law claims to the law of the source state, the Court ensured that only one state's rule could govern that source's emissions. *See* 479 U.S. at 493-94. But this rule sprung not from the Constitution, but from the CWA's emissions permitting system, which prioritized the source state. *See id.* at 490. Plaintiffs' claims do not target emissions at all and thus implicate no similar permitting regime under the CAA. *Ouellette* illustrates, however, that Congress could impose a similar choice of law rule if it desired—and it highlights that the trial court in this case has yet to address any choice of law arguments concerning what state's law applies to Plaintiff's common law claims.

In any event, standard extraterritoriality principles generally permit any given jurisdiction to impose liability

28. Brannon P. Denning, National Pork Producers Council v. Ross: *Extraterritoriality is Dead, Long Live the Dormant Commerce Clause*, 2023 Cato Sup. Ct. Rev. 23, 29 ("[I]f there *was* still some life left in extraterritoriality, *National Pork Producers* delivered a unanimous *coup de grace*.").

for harms occurring *inside* the jurisdiction as a result of conduct outside its borders.[29] That is all Colorado purports to do here (and at least some of Defendants' conduct occurred inside Colorado). As *Ross* recognized, "many (maybe most) state laws have the 'practical effect of controlling extraterritorial behavior" including "all manner of 'libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws,' and plenty else besides." 598 U.S. at 374 (quoting Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L. J. 785, 804 (2001)). These are, as the Court concluded, "valid exercises of the States' constitutionally reserved powers." *Id.* at 375. The constitutional principle Defendants invoke does not exist in anything like the form they assert.

C. Foreign affairs preemption is, at best, a narrow doctrine dependent on state interferences with particular national foreign policies embodied in positive law.

Defendants' foreign affairs preemption argument is a variant of their constitutional preemption argument, this time predicated on climate change's status as a subject of international cooperation and negotiation among nations. Ordinarily, successful arguments that state law must give way to national diplomacy have been grounded in

29. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.").

positive law—that is, a statute imposing sanctions on a foreign government that implicitly limits additional state sanctions,[30] or an executive agreement with another country that state law may undermine.[31] Defendants have pointed to no such federal positive law in this case.

Defendants must therefore rely on *Zschernig v. Miller*, 389 U.S. 429 (1968). That decision struck down an Oregon statute denying inheritance to heirs from countries—usually East-bloc communist nations—that were likely to confiscate the property passed through an Oregon will. The Court was troubled by the law's encouragement of state judges to criticize communist nations at the height of the Cold War. It held the law preempted because it "may disturb foreign relations," *id.* at 441, even though no national treaty, statute, or executive agreement was involved.

Without federal positive law for guidance, courts applying *Zschernig* necessarily arrogate the foreign affairs power to themselves. As Professor Jack Goldsmith has pointed out, "[t]he content . . . of the judge-made federal law [in *Zschernig*] was based on a judicial analysis of the requirements of U.S. foreign relations."[32] The constitutional design, however, "left the determination of when the national foreign relations interest would be best served by the exclusion of state power largely to the

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30. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

31. *See Am. Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003).

32. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1630 (Nov. 1997).

discretion of the political branches."[33] The exercise of that discretion requires "satisfaction of procedural hurdles that make it costly and difficult for the political branches to make foreign relations law"[34]—that is, production of positive law, rather than, as here, Presidential statements of opposition to a lawsuit. *Zschernig* was perceived as a radical departure from these norms when it was decided,[35] and it has remained an isolated outlier since.

To the extent that *Zschernig* has force at all, it "resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments and involve[s] sitting in judgment on them." *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting) (quoting Louis Henkin, *Foreign Affairs and the United States Constitution* 164 (2d ed. 1996)). Defendants argue for a broader rule preempting state law based on any "'likelihood' that 'state [action] will produce something more than incidental effect in conflict with express foreign policy of the National Government.'" Petr. Br. at 40 (citing *Garamendi*, 539 U.S. at 420). That is unsupported in the Constitution's text or this Court's caselaw.[36] Defendants' categorical

33. *Id.* at 1645.

34. *Id.* (noting that this design was meant "to preserve state influence and protect state interests").

35. *Id.* at 1649.

36. *Garamendi* applied no such rule. It refused to sort out the meaning of *Zschernig*, *see* 539 U.S. at 419-20, and focused entirely on state law's interference with "the national position" on settlement of insurance claims arising from the Holocaust, "expressed unmistakably in the executive agreements signed by the President with Germany and Austria," *id.* at 421.

version of the "one voice" aspiration in foreign affairs is inconsistent with both the division of foreign affairs powers among the three national branches but also those branches' practice of "tolerat[ing], deferr[ing] to or even encourag[ing] state and local measures impacting on foreign affairs."[37] Because states have strong interests in international commerce and collective solutions to cross-border problems, moreover, states necessarily and generally successfully engage in activities that touch on foreign relations all the time.[38] And because international law (and international opinion) are frequently concerned with nations' treatment of their own nationals within their own territory, almost any subject of state activity or regulation may implicate foreign relations.[39]

This Court has rejected claims that state law must yield absent conflict with a national positive law, even when it puts the United States in violation of an international court's judgment on an issue which has often complicated American foreign relations. *See Medellin v. Texas*, 552 U.S. 491 (2008) (upholding state administration of the

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37. Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975, 975 (2001).

38. *See, e.g.*, Julian Ku, *Gubernatorial Foreign Policy*, 115 Yale L. J. 2380 (2006) (collecting examples); Ernest A. Young, *Foreign Affairs Federalism in the United States*, The Oxford Handbook of Comparative Foreign Relations Law 259-75 (Curtis Bradley ed., 2019) (noting state diplomatic efforts concerning climate change).

39. *See* Goldsmith, *supra*, at 1673 ("[T]he changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations.").

death penalty in defiance of an International Court of Justice order). As Justice Scalia noted, *Medellin* shows that "[e]ven in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. This is not the first time it has found that a nuisance and a bother in the conduct of foreign policy." *Arizona v. United States*, 567 U.S. 387, 423-24 (2012) (Scalia, J., concurring in part and dissenting in part).

Zschernig still stands alone as this Court's only case applying "dormant foreign affairs preemption" in the absence of some federal positive law. This Court has routinely avoided relying on *Zschernig*. In the *Crosby* case, for example, the Court held a Massachusetts law imposing sanctions on countries doing business in Burma to be preempted by a federal statute imposing narrower sanctions. *See* 530 U.S. at 373-74. But it did not follow the First Circuit's opinion, which had relied on *Zschernig*;[40] rather, the Court found preemption based on its analysis of the federal Burma sanctions statute enacted by Congress. *See* 530 U.S. at 373-74. This case must likewise stand or fall on statutory preemption.

III. The Clean Air Act does not preempt Plaintiffs' claims.

This Court has generally focused on statutory text rather than broad arguments about structural preemption. The *AEP* Court said as much, noting that

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40. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52-53 (1st Cir. 1999).

"[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." 564 U.S. at 429. But the Clean Air Act is an unlikely source of broad preemption for two reasons. First, it regulates emissions of pollutants, and plaintiffs' lawsuits do not seek limits on emissions. Second, the CAA explicitly sets out a major role for state regulation and accords the states considerable discretion. That is inconsistent with any notion that Congress occupied the field of climate regulation in the CAA.

A. The CAA does not regulate the activities that are the focus of Plaintiffs' lawsuit.

Plaintiffs' causes of action seek damages for concealing the real impacts of climate change and for producing fossil fuels that other actors go on to burn, causing emission of greenhouse gases. The Clean Air Act, on the other hand, says nothing about marketing or upstream production; it "speaks directly to emissions of carbon dioxide" from power plants and other sources. *AEP*, 564 U.S. at 424. Whatever the CAA's preemptive effect on state regulation of the same subjects, it does not reach state-law claims predicated on entirely different activity.

This Court's cases construing the preemptive impact of the CAA and the CWA concern the availability of common law claims that nonetheless target the same activity as the federal statutes themselves; they are all cases about emissions. In *AEP*, plaintiffs brought "federal common-law public nuisance claims against carbon-dioxide emitters" and sought "a decree setting carbon-dioxide emissions for each defendant at an initial cap." 564 U.S. at 415. Likewise, in *Ouellette*, the defendant discharged effluents into Lake Champlain, and plaintiffs sought both damages relief from those discharges and an injunction requiring the defendant to restructure its water treatment system to reduce discharges. *See* 479 U.S. at 483-84. In each case, then, plaintiffs both targeted the same activity as the federal statute and sought the same sorts of remedies that the statute itself sought to impose. Even so, *Ouellette* held that state law nuisance claims were not preempted so long as they rested on the law of the source state, and *AEP* reserved the preemption of state-law nuisance claims as an open question.

The case for preemption is much weaker here, because Plaintiffs' claims target activity that the CAA does not regulate. Defendants will argue that Plaintiffs' focus on production and marketing is just artful pleading and that imposing damages for pre-emissions stage activity is just an attempt to get at emissions indirectly. This argument has little purchase with regard to Plaintiffs' deceptive marketing claims, which fall wholly outside the CAA's purview. Even with respect to the upstream production claims, this case is meaningfully different from an emissions case. On the merits, Plaintiffs will bear the potentially difficult burden of tying Defendants' production to emissions that caused climate change damages in Boulder. But to say that these additional steps make no difference for preemption purposes is necessarily to argue that federal law preempts regulation of *all* activities that potentially influence greenhouse gas emissions. That would include, for example, land use decisions about siting data centers, promulgation of "green" building codes, and even educational programs designed to increase awareness of the dangers of climate change. Federal statutes that regulate one aspect of a problem do not ordinarily restrict every other policy measure that might have an impact on the federally regulated activity.[41]

Even if the CAA were an instance of field preemption, it would still be necessary to define the field. An obviously strong causal connection between one activity and another will not necessarily broaden the scope of federal field preemption. In *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761 (2019), federal law preempted the field of regulating the operation and safety of nuclear power plants. Rather than barring nuclear power plants, Virginia banned uranium mining in the state. The mining company argued that the mining ban would have the effect of discouraging nuclear power plants, noting Virginia's admission that it banned mining to protect the public from the same nuclear safety hazards that federal law addressed. *Id.* at 776. Nonetheless, this Court held mining regulation to be outside the preempted field. Again, the present case presents a weaker argument for preemption than the one rejected in *Virginia Uranium*.

B. The CAA does not preempt any field.

This Court has held that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Fla. Lime & Avocado*

41. *See, e.g.*, *Kansas v. Garcia*, 589 U.S. 191 (2020) (holding the federal immigration law restricting prosecution of immigrants for working without authorization did not prohibit state identity theft and false information prosecutions immigrants seeking employment).

Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).[42] Not only have Defendants pointed to no language in the CAA expressly preempting any field, but the statute's text expressly eschews any sort of field preemption.

The CAA begins by declaring that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The CAA then adds not one but two express savings clauses. The first states that, with certain exceptions, "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," so long as it is not "less stringent" than existing standards adopted under the statute. 42 U.S.C. § 7416. The second saves state remedies "under any statute or common law" from preemption by the Clean Air Act's remedial scheme. 42 U.S.C. § 7604(e). None of these provisions is consistent with field preemption.

The regulatory structure that the CAA creates likewise forecloses any such finding that Congress has preempted the field of emissions regulation. The CAA is a cooperative federalism arrangement; it assigns the national EPA responsibility to determine safe levels of

42. The Court cited *Huron Portland Cement*, which rejected the notion that federal law governing air pollution or maritime commerce foreclosed applying local air quality regulations to vessels engaged in interstate commerce. *See* 373 U.S. at 142. *See also* Nelson, *Preemption*, *supra*, at 227 (observing that "[t]he Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes").

pollutants but delegates to states the authority to devise state implementation plans to reach those levels.[43] The states' ability to formulate and enforce implementation plans is far too discretionary to be consistent with any notion of field preemption; rather, the statutory scheme depends on the states devising their own approaches to emissions regulation that promise to achieve the air quality standards that EPA sets.[44] If states could not regulate emissions, they could not fulfill the role in which Congress has cast them.

Nor does the CAA preempt unilateral state action outside the CAA framework. By saving state remedies "under any statute or common law," the statute makes clear that states are not limited to enforcing their implementation plans within the CAA process. Under the analogous CWA scheme, *Ouellette* held that state law nuisance claims are not preempted so long as they are brought under the law of the source state. 479 U.S. at 497-98. Likewise, *AEP* reserved the question whether the CAA preempts state law nuisance claims. *See* 564 U.S. at 429. The majority of lower courts to consider the issue have held—following *Ouellette*—that the CAA does not preempt state nuisance claims brought under the law of the state in which the emitter is located.[45]

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43. *See Ohio*, 603 U.S. at 283-84; Dwyer, *supra*, at 1190-99.

44. *See Train*, 421 U.S. at 79 (holding that EPA has "no authority to question the wisdom of a State's choices of emission limitations").

45. *See, e.g.*, *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015); *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013).

The nuanced approach of *Ouellette* and *AEP* is fundamentally inconsistent with any sort of broad field preemption. And Defendants have hardly attempted to make any narrower claim of conflict or impossibility preemption. It may be that narrower preemption claims may prove more persuasive in particular circumstances, but the exceptionally aggressive preemption arguments that Defendants have advanced here are completely at odds with the statute Congress enacted.

CONCLUSION

The Supreme Court of Colorado's rejection of Defendants' preemption defense should be affirmed.

Respectfully submitted,

Michael D. Hausfeld
Hausfeld LLP
1200 17th Street, N.W.,
Suite 600
Washington, DC 20036
mhausfeld@hausfeldllp.com

Ernest A. Young
Counsel of Record
3208 Fox Terrace Drive
Apex, NC 27502
(919) 360-7718
young@law.duke.edu

Adam J. Levitt
Daniel Rock Flynn
DiCello Levitt LLP
10 North Dearborn Street,
6th Floor
Chicago, IL 60602
alevitt@dicellolevitt.com
dflynn@dicellolevitt.com

Counsel for Amici Curiae

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