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 Colorado Supreme Court

BRIEF OF THE LOCAL GOVERNMENT LEGAL CENTER, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Local Government Legal Center ("LGLC") is a coalition of government organizations formed in 2023 to provide education to local governments regarding the Supreme Court and its impact on local governments and officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages where more than 218 million Americans live.

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[1] Pursuant to Rule 37.6, Amici affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than Amici, its members, or its counsel has made a monetary contribution to its preparation or submission.

The International Municipal Lawyers Association ("IMLA") is the nation's oldest and largest organization devoted solely to local government law. Founded in 1935, IMLA is a nonpartisan, nonprofit, professional association of counsel encompassing more than 2,500 local government entities (including cities, counties, and subdivisions thereof), represented through their chief legal officers, state municipal leagues, and individual attorneys. IMLA advocates for the responsible development of municipal law and presents the collective viewpoint of local governments around the country in lawsuits before the United States Supreme Court, federal courts of appeal, and state supreme and appellate courts. IMLA regularly files as amicus in cases affecting the powers and responsibilities of local governments, including matters concerning the scope of local authority to protect the health, safety, and welfare of their residents.

Amici and its members have a direct interest in the outcome of this case. For decades, America's local governments have relied on state common law — including public nuisance, trespass, and related tort doctrines — to abate harms occurring within their jurisdictions and to recover the costs those harms impose on their residents and infrastructure. That authority is not a novel invention of climate litigation; it is the same traditional police power that has long allowed cities and counties to hold responsible parties accountable for contamination, pollution, and other harms first felt at the local level. Local governments are frequently the level of authority best positioned to bring these actions, because it is local budgets that most directly absorb the costs of injury to constituents, damage to infrastructure, and costs of emergency response.

Amici submit this brief to provide the Court with the perspective of the local governments whose traditional authority to seek redress in their own courts, under their own states' law, is at stake in the jurisdictional and preemption questions presented. Faced with deceptive and injurious conduct, local governments have the responsibility to take action despite the efforts of wrongdoers to divert and delay.

This case presents a paradigmatic example of such an effort. The local government response should not be short-circuited, as the Petitioner oil companies ask of this Court, by a decision that forecloses the day in court that Boulder County and other local governments across the country seek. The Petitioners' act of alchemy should not be credited so that provable misrepresentations harming local residents are inaccurately deemed an attempt to regulate automobile emissions and other claims are stripped of their focus on the local injuries they seek to remedy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae seriously question whether this case presents this Court with a proper vehicle to address the Questions Presented. Without a final judgment and with their liability uncertain, Petitioner oil companies (collectively, hereinafter, Suncor) seek to fit themselves into a narrow band of cases eligible for interlocutory review that this Court has reserved for certain government actors and, in very limited cases, private litigants where the litigation has effectively and finally resolved the key federal issue without any opportunity for it to be properly resolved at a later time. This action does not qualify for such solicitous treatment.

Still, if this Court reaches the merits, it should find that the Colorado Supreme Court correctly resolved the issue. To the extent that this action is exemplary of other cases brought by local governments against oil companies like Petitioners, the consistent overlap is found in the allegation that the companies have violated the state consumer protection act. *See* App. 50a; *cf. BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 234 (2021) (describing Baltimore's similar lawsuit as primarily "centered on the defendants' alleged failure to warn about the dangers of their products—and the injuries the City says it suffered as a result.").

Suncor asks this Court to preclude cities and counties from suing them when the companies misrepresent what they know about the adverse effects of their products, even when that tortious conduct is responsible for significant damages and costs to the public fisc. To make that argument colorable, the companies conflate a requirement about providing truthful information about their products with an attempt to create a patchwork regulatory approach to fossil fuels or some type of cross-border overreach that would dictate climate rules to other jurisdictions. Yet, no liability would attach and no changes in their products or their products' effects would be required if the companies did not engage in affirmative misrepresentations about their products.

That multiple parallel lawsuits exist around the country does not establish that the issue is federal in nature, as the oil companies and their *amici* contend, but instead highlights the adverse impact on local government and their constituents that results from a misleading marketing scheme. When other industries have engaged in similar misrepresentations about the safety or healthfulness of their products, no preemptive effect has stopped those lawsuits – and none should here.

Preemption should not block Boulder's other claims either. Local government plays an important and congressionally recognized role under the Clean Air Act that deserves this Court's attention and precludes preemption. Not only does the constitutional structure accommodate the critical part that local government play in safeguarding both the public fisc from expenses caused by bad actors, but the Framers anticipated that local government would have an outsized function in assuring its residents health, safety, and welfare.

Even without regard to that recognized function within our constitutional system and within the Clean Air Act, nothing in federal law supports Suncor's fanciful preemption argument. The most relevant common law was displaced by the Clean Air Act, leaving not even vapors that might signal preemption, as this Court has already acknowledged. The Clean Air Act itself contains no text or other indication that local government lawsuits over the impact oil companies have on municipal and county expenses, infrastructure, and other functions are preempted. Instead, the only textual commitment evident from the Act supports the role of local government. And, finally, Suncor's invocation of an equal-sovereignty principle as a bar on these lawsuits holds no water. An adjudication over whether an offender pays for the damage it causes within the jurisdiction has no impermissible extraterritorial impact.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Petitioner oil companies (collectively, "Suncor") have asked this Court to use this case to short-circuit the litigation process for measurable harms they have caused, painting a variety of distinct legal theories brought separately by state and local governments, as attempts to regulate fossil fuels nationwide, if not worldwide. The assertion is transparently alarmist without real basis.

Even if the claim had arguable merit, which it assuredly does not, Suncor has chosen an improper vehicle for the exercise of this Court's jurisdiction. They failed to prevail in state court on a motion to dismiss based largely on claims of federal preemption. It is plainly not a final judgment, and no party claims otherwise. In seeking to cut off litigation at this early stage, Suncor seeks treatment that is reserved for an extremely narrow category of specially privileged litigants – and it does not qualify.

The "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.* is available for an extremely narrow class of cases. 337 U.S. 541, 546 (1949), Qualified immunity provides the paradigmatic example of when such special treatment applies. The burden on *government* actors is so great where qualified immunity is denied that the decision becomes "effectively unreviewable on appeal from a final judgment," exposing the defendant and its government employer to burdens "conceptually distinct from the merits of the plaintiff's claim." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Much of the special solicitude accorded to a defendant in those circumstances arises from qualified immunity's existence as "an entitlement not to be forced to litigate the consequences of *official conduct*," a right lost if erroneously permitted to proceed. *Id.* (emphasis added). In fact, the protection is so great that a defendant gets two bites at the same apple, an appeal from denial of a motion to dismiss and from a subsequent denial of summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 307–09 (1996).

Claims of absolute immunity qualify for interlocutory review based on the same logic. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). The Eleventh Amendment immunity available to States and arms of the state also qualifies for immediate appeal under the "same rationale." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). And members of Congress asserting the protective shield of the Speech and Debate Clause also enjoy qualification under the collateral order doctrine for the same reasons. *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979).

What unites these examples is that the interest in protection from the rigors of unwarranted litigation is bestowed upon government defendants, which, among other things, shows due regard for the impact on the public fisc. The same solicitude is not normally accorded private defendants, like Suncor here. In fact, the only private defendants provided similar protection from facing allegations in court are criminal defendants who lost a motion to dismiss on double-jeopardy grounds. *Abney v. United States*, 431 U.S. 651, 659 (1977). The unique rationale behind that collateral appeal is that the defendant is "contesting the very authority of the Government to hale him into court to face trial on the charge against him." *Id.*

No equivalent basis allows Suncor to add themselves to that tiny list. Instead, for the same reasons as this Court dismissed for want of jurisdiction, coincidentally from the Colorado Supreme Court in *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam), this Court should dismiss the case as improvidently granted. Cases cited by Suncor to broaden the availability of interlocutory review appear to share a distinction that Suncor does not enjoy: a functionally final judgment. Take, for example, *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), a case upon which Suncor heavily relies. There, this Court undertook review of a case that could not be filed in federal court, even if a state court was free to hear it because the federal bar on advisory opinions did not apply. It did so because it held the Arizona Supreme Court's decision constituted a disposition of "final judgment altering tangible legal rights," *id.* at 619, that inflicted a "direct, specific, and concrete injury." *Id.* at 623-24.

To be sure, Suncor asserts that it qualifies under the *Cox Broadcasting* category available when delayed review would cause irreparable erosion of a federal right or policy. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975). Such an application where a federal defense of a private party was rejected at an interlocutory stage would be an extravagant use of that limited category. Permitting a *Cox Broadcasting* review whenever a federal preemption defense is rejected at a preliminary stage would effectively eliminate the finality requirement of Section 1257(a) and invite piecemeal appellate litigation in every case involving a federal preemption defense, not only immeasurably multiply appeals, but will encouraging dilatory tactics by well-heeled private defendants that will strain the already-limited resources of public plaintiffs as in these cases.

At the same time, there is little logic to Suncor's claim that waiting for a final judgment would erode federal policy. Suncor can, and undoubtedly will, raise the federal preclusion defense again after final judgment in the underlying trial court proceedings, and this Court could review the issue at that point without any permanent loss to or even adverse effect on the federal interest. *See Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (Thomas, J., respecting denial of certiorari).

To proceed when liability remains uncertain would not resolve an actual, live controversy between adverse parties. This Court has acknowledged that "'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). The need to avoid advisory opinions has particular import in the context of preemption. Where a state court has not yet determined whether liability exists, any federal ruling that the cause of action would be preempted by federal law is purely advisory — it operates on a legal fiction rather than on an established legal reality. Without a settled understanding of what liability exists under state law, this Court will enter upon turf it has long disdained because of the risk of a friction-generating error with yet-undefined or still somewhat inchoate state law. *Cf. Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997).

II. FEDERAL LAW DOES NOT PREEMPT THIS ACTION.

Should this Court take up the preemption issue, it should affirm the Colorado Supreme Court. That Court addressed two distinct claims. In one, "Boulder alleges that, through their advertising, defendants have for decades intentionally misled the public about the impacts of climate change and the role that defendants' fossil fuel products have played in exacerbating those impacts." Pet. App. 3a. This is the allegation that many state and local governments have advanced. *See, e.g., BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 234 (2021) (Baltimore "sued various energy companies for promoting fossil fuels while allegedly concealing their environmental impacts;" most of the City's causes of action, "centered on the defendants' alleged failure to warn about the dangers of their products—and the injuries the City says it suffered as a result.").

In a separate set of allegations different from those raised by Baltimore, Boulder claimed Suncor "knowingly caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change." Pet. App. 2a. As a result of both allegations of misconduct, Boulder "alleges that it has incurred and will continue to incur millions of dollars in costs to protect its property and residents from the impacts of climate change. *Id*.

It would be easy to lump Boulder's causes of action together and treat them as indistinct, thereby deserving of a single analysis of their relationship to federal law. But it would be error to do so. The misrepresentation claims provide an easy basis upon which to find preemption lacking. The remaining claims are also not preempted, but require a slightly deeper consideration.

A. Federal Law Does Not Sanction Marketing Misrepresentations.

Boulder alleges that oil companies, despite knowing better, hawked the cleanliness of their fuel and the efforts they made to support the environment. The allegations are reminiscent of those advanced by the tobacco industry when it promoted "safer" cigarettes based on "advances" in filtering technology, added menthol flavoring, and the reduction of "noxious gases," while its own research confirmed that connection between smoking and cancer that it insisted remained unproven. *See, e.g.,* Richard Kluger, Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip

Morris 271, 300, 359-64, 371 (1997). The duplicity was publicly revealed by documents revealed by whistle-blowers and archived due to litigation by state and local governments. The papers assembled "told a tale of industry deceit and indifference to public health considerations." Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DePaul L. Rev. 331, 339 (2001).

Our commercial speech doctrine explicitly puts misleading speech outside the protection of the First Amendment. *In re R. M. J.*, 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (government retains a "legitimate interest in protecting consumers from 'commercial harms'"). Without that constitutional protection, misleading commercial speech is ripe for litigation on behalf of consumers.

Nothing about federal-state relationships limit that authority. Beginning in the 1960s, recognition grew that existing tort and contract remedies, as well as the prevailing authority of the Federal Trade Commission ("FTC"), were inadequate to protect consumers from unfair or deceptive trade practices. The FTC itself then proposed that States aid the effort by adopting their own "Little FTC Act" to curb unfair or deceptive acts or practices. J.R. Franke & D.A. Ballum, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 Santa Clara L. Rev. 347, 357 (1992).

Cities and counties, like a number of states, have initiated litigation over a wide variety of consumer-protection concerns that affect the health of their residents and the livability of their environs. They authorize damages for material representations that tend to deceive or mislead. These laws reflect the ideal that "honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception." *Fed. Trade Comm'n v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937). Moreover, these laws reflect an exercise of States' "police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 719 (1985)). They do not single out environmental concerns for liability, but evenhandedly require truthful marketing.

Local government's modern use of state-law consumer-protection claims, in both state and federal courts, to address issues of common (but local) concern began more than three decades ago, when cities joined state attorneys general litigating asbestos and tobacco claims. *See* Sarah L. Swan, *Plaintiff Cities*, 71 Vand. L. Rev. 1227, 1233 (2017). The tobacco litigation relied heavily on state consumer-protection laws. *See* Rabin, 51 DePaul L. Rev. at 337. Today, cities are major claimants in opioid litigation and rely heavily on state consumer-protection laws in a variety of other matters. *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 Stan. L. Rev. 285, 291, 303 (2021).

Nothing in federal common law or any of the federal environmental statutes touch upon the exercise of this authority by state or local governments. Instead, to challenge that authority, Suncor seeks to transmogrify these false marketing causes of action into one that would establish a patchwork of conflicting state and local regulations over the contribution of oil companies to climate change. This Court should not adopt Suncor's formulation, rejecting it as the Fourth Circuit did similar claims by the oil companies. It characterized the defendants' assertions about the gist of these types of actions, as "rest[ing] on a fundamental confusion" that seeks to treat a "misinformation campaign" as the equivalent of "emission standards," which they plainly were not. *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022), *cert. denied*, 143 S.Ct. 1795 (2023).

Requiring truthful and non-misleading marketing cannot be rationally deemed "an attempt to regulate" greenhouse-gas emissions and plainly does not conflict with any conduct the federal government seeks to encourage. Because Suncor cannot colorably argue that misleading marketing somehow promotes an established federal policy or that Boulder's claims somehow interfere with federal objectives, its preemption argument falls flat.

B. Federal Law Does Not Preempt Boulder's Remaining Claims.

Suncor attacks Boulder's remaining claims as seeking to regulate climate change. Among its arguments, Suncor asserts that this lawsuit is impliedly preempted by the "structure of the Constitution." Petrs. Br. 21. In making the argument, Suncor purposely fails to acknowledge local government's appropriate role in our constitutional structure.

1. Local government plays a critical role in society, the economy, and environmental protection, and the Constitution's structure accommodates that role.

Rather than conflict with the constitutional structure as Suncor and its allies contend, permitting local government to move forward with these lawsuits serves the Framers' vision of government serving the peoples' ends. Those that framed the federal Constitution recognized that local governments would form an essential part of the sovereign nation they were building. For example, James Madison wrote that the government being formed was "neither wholly *national* nor wholly *federal"* and that despite the supremacy accorded decisions of the national government, "communities united for particular purposes" would still rely on powers vested partially in municipal legislatures," and that "local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 246, 245 (James Madison) (Clinton Rossiter ed., 1961).

The Framers believed that local government would be "more familiarly and minutely conversant" with the people's "domestic and personal interests" for purposes of regulation while also allowing the people to engage the local government with greater impact on policy as an exercise in self-government. *Id.*, No. 46, at 294-95 (Madison). Thus, as Alexander Hamilton echoed that sentiment, the "superintendence of local administrations" will form the "immediate and visible guardian of life and property … to which the sensiblity of individuals is more immediately awake" and provide the "great cement of society," when government diffused among various levels and channels. *Id.*, No. 17, at 120 (Alexander Hamilton).

Today, local government plays a critical role in every aspect of modern life – and any examination of the issues in this case, where Congress has not enacted a law that can be said to conflict with what Boulder seeks to settle in court – must account for that role. Pursuant to 13 U.S.C. § 161, the U.S. Census Bureau undertakes a census of governments every five years. In the 2022 survey, we learned that there are 3,031 county governments, 35,705 township and municipal governments, 12,546 independent school districts, and 39,555 other special-purpose local governments. Fed. Reserve Bank of St. Louis, "Local Governments in the U.S.: A Breakdown by Number and Type (Mar. 14, 2024), https://www.stlouisfed.org/publications/regional-economist/2024/march/local-governments-us-number-type.

As one would expect with these numbers, counties and municipalities play an incredibly important role in American society and its governance. This Court has observed that "virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs." *Avery v. Midland Cnty.*, 390 U.S. 474, 483 (1968). Being closest to the people and their problems, "States universally leave much policy and decisionmaking to their governmental subdivisions." *Id.* at 481. Therefore, as one scholar recognized, "many of the most vexing issues of social policy and legal institutions are found at the local level," which is the only place where they can be addressed. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 Rutgers L.J. 627, 627 (2001).

Perhaps for that reason, many state constitutions grant local governments significant home-rule powers to address "local affairs." Since Missouri adopted the first constitutional home-rule provision in 1875, "[m]ost states grant most of their municipalities home rule." National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. Rev. 1329, 1351, 1354 (2022).

These constitutionally mandated home-rule provisions:

> creat[e] for municipalities both a power of initiation – that is, a power to act in the absence of an express state legislative grant – and a power of immunity – that is, a power to act in the specified area notwithstanding any conflicting state law.

Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. U. L. Rev. 1337, 1341 (2009) (footnote omitted).

In fact, every level of "government is vested with the responsibility of protecting the health, safety, and welfare of its citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007); *see also id.* at 343 (noting that public health, safety, and welfare "responsibilities set state and local government apart from a typical private business."). Localities have long enjoyed primacy in providing for the health and welfare of its citizens, which "primarily, and historically, [is] a matter of local concern." *Hillsborough Cnty. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985).

To discharge this solemn duty, state and local governments maintain "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985) (cleaned up).

Municipalities, by themselves, also provide an outsized contribution to the health of State economies. In 2017, municipalities accounted for 90 percent of the Gross State Product (GSP) in 21 states and 80 percent of GSP in 32 states. U.S. Conference of Mayors, U.S. Metro Economies: Economic Growth and Full Employment, Annual GMP Report 1 (2018), http://www.usmayors.org/wp-content/uploads/2018/06/Metro-Economies-GMP-June-2018.pdf.

Economic development and infrastructure improvements, both of which are closely related to residents' financial and social well-being, remain key urban planning and policymaking issues, as is housing, homelessness, and housing insecurity. National League of Cities, State of the Cities 2023, at 2, 5-6 (Jul. 21, 2023), https://www.nlc.org/resource/state-of-the-cities-2023/. Municipalities are where public safety is most usefully addressed *Id*. at 4. Regardless of commonality of these issues throughout the nation, all problems are truly local.

That same concentration of people, activity, and infrastructure make cities and populous counties uniquely vulnerable to the adverse impacts of a host of climatic changes, including sea-level rise; increasingly frequent and severe storms that pose immediate threats to human life and critical infrastructure; damaged and disappearing coastlines; degraded ecosystems and reduced ecosystem services function; increases in heat-related deaths; poor air quality and exacerbated health problems; longer droughts that combine with increased temperatures and water evaporation rates to strain water supplies; and heightened wildfire risk. *See* 2 M. Keely *et al.*, *Ch. 11: Built Environment, Urban System, and Cities* in Impacts, Risks, and Adaptation in the United States: The Fourth National Climate Assessment 444-47 (D.R. Reidmiller *et al.* eds., 2018).

It is little wonder, then, that local governments bear an enormous burden when their efforts to address the harms they experience resemble a Sisyphean task due to the fossil fuel industry's allegedly repeating misconduct. This Court should not stop this process of seeking accountability for the industry's role in causing the damage local government must remediate.

2. No federal common law nor any shadowy remnants of federal common law foreclose Boulder's claims.

Suncor asserts that, despite the passage of the Clean Air Act, some residual federal common law remains in the ethers of constitutional structure and somehow occupies the field to exclude this lawsuit because its impact will have extraterritorial effect. This inventive argument is nothing less than fanciful.

Unlike state courts with respect to state common law, federal common law occupies a narrow spectrum limited largely to what Congress authorizes in order "to formulate substantive rules of decision." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). That authority generally exists with respect to the "rights and obligations of United States, interstate and international disputes implicating conflicting rights of States or relations with foreign nations, and admiralty cases." *Id.* at 640-41 (footnotes omitted). As a result, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. 132, 136 (2020). For that reason, the "instances where [federal courts] have created federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). That power is also conditioned on an identified need "to protect uniquely federal interests." *Rodriguez*, 589 U.S. at 136. None of these areas of law and no uniquely federal interest are implicated by this lawsuit.

Critically, this Court has also noted that instances where federal common law is recognized traditionally respects federalism. Where that occurs, there is little risk of intruding upon the "independence of state governments" because those carefully delineated areas of exclusive federal interest necessarily fall outside state authority. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.,* 535 U.S. 826, 832 (2002). Therefore, "[i]f state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *City of Milwaukee v.*

Illinois, 451 U.S. 304, 313 n.7 (1981). The choices do not admit of a need for a federal common law bar to Boulder's action.

A useful lesson can be drawn from the time when interstate water pollution was the subject of federal common law. Congress ended any need for federal common law by enacting the Clean Water Act and thereby supplanted that body of judge-made law. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487-90 (1987) (describing the judicial and legislative history). The *Ouellette* Court explained that state public nuisance laws survived the law's enactment as a valid basis for lawsuits seeking to abate cross-border pollution. *Id*. at 498-99. The applicable state laws here deserve no lesser respect as a valid basis for liability.

The same pattern of prior federal common law being supplanted by federal statute occurred with respect to interstate air pollution. In *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"), this Court explained that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement" of emissions. For that reason, "'the need for such an unusual exercise of law-making by federal courts [has] disappear[ed].'" *Id*. at 423 (quoting *City of Milwaukee*, 451 U.S. at 314). That statement utterly undermines the type of spectral presence Suncor still seeks to attribute to the preexisting federal common law.

The Eighth Circuit's cautious approach to the issue merits consideration here. It held that "[e]ven if federal common law still exists in this space and provides a cause of action to govern transboundary pollution cases, that remedy doesn't occupy the same substantive realm as state-law fraud, negligence, products liability, or consumer protection claims." *Minnesota by Ellison v. Am. Petroleum Inst.,* 63 F.4th 703, 710 (8th Cir. 2023). That court concluded that where, as here, "Congress has not acted to displace the state-law claims, and federal common law does not supply a substitute cause of action, the state-law claims are not completely preempted." *Id.* at 710–11. Moreover, congressional inaction "does not express Congressional intent of any kind—much less intent to completely displace any particular state-law claim." *Id.* at 710.

Because federal statutory law displaced federal common law, the only relevant question in the current dispute becomes one of ordinary preemption. *See City of Milwaukee*, 451 U.S. at 327–29. This Court has long recognized that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Lohr*, 518 U.S. at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Here, however, Congress has not expressed an intent despite ample opportunity to do so in light of this long-running litigation. The common law, reflecting what Congress did in abrogating it without replacing it, then, supplies no basis for preemption.

3. The Clean Air Act does not foreclose Boulder's claims.

When this Court recognized that the Clean Air Act displaced federal common law, it stated that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. As in *Ouellette*, this Court should hold that the Clean Air Act provides no basis to preempt Boulder's action.

Congress, in passing the Clean Air Act, declared that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is *the primary responsibility of States and local governments*." 42 U.S.C. § 7401(a)(3) (emphasis added). That forthright declaration of a role for state and local government hardly sounds like the stuff of preemption.

The Act further declared that a "primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." *Id.* at § 7401(c). That type of cooperative federalism is served by actions like the one brought here by Boulder. And it is good public policy: state and local governments need not wait for federal action before undertaking their own initiatives to protect their citizens from hazardous pollutants.

In fact, the Clean Air Act specifies that "[n]othing in this section shall restrict any right which any person ... may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief[.]" 42 U.S.C. § 7604(e) (emphases added). The "any other relief" standard certainly provides the best indicia that Congress placed no limits on what a lawsuit might accomplish. *See W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (a statute's text provides the best evidence of congressional intent).

A second savings clause assures that "any State *or political subdivision thereof*" may adopt or enforce emission standards as long as it is *not less stringent* than the federal government sets and, additionally, permits States and their political subdivisions to establish control or abatement requirements. 42 U.S.C. § 7416. None of the relief sought by Boulder surmounts this acknowledgement of authority.

These savings clauses reflect Congress's judgment that it wants to preserve state and local authority in this space. Local governments play an enormously important role in addressing problems associated with increased air pollution and remedying their effects. Funding that effort should not fall on taxpayers alone if a case like Boulder's can satisfy state law on where liability lies.

4. *No equal sovereignty principle forecloses Boulder's claims.*

Suncor advances another creative argument when it says "federal law necessarily and exclusively governs interstate-pollution disputes" because allowing any state's law to apply would violate the "equal sovereignty" of other states. Petr. Br. 26- 27. It is true that this Court has recognized some limits on the extraterritorial reach of state law. For example, the Due Process Clause, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" by denying personal jurisdiction, "even if the forum State has a strong interest in applying its law to the controversy." *Bristol-Myers Squibb Co. v. Superior Ct.,* 582 U.S. 255, 263 (2017). Due process also limits the punishment and deterrence a State may mete out through punitive damages by withholding authority to assess the damages for its extraterritorial effects. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996).

However, the type of limit that Suncor and its amici presuppose invade another State's equal sovereignty does not count as such an invasion. A distinct difference exists between *adjudicating* a claim and *displacing* another state's substantive law. State court judgments in a wide variety of areas, such as products liability, often affect liability in other states, as Boulder has explained in its brief. *See* Resp't Br. 36–37. After all, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023). To deny a locality authority to pursue liability under those laws would "cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." *Id.* at 375. This Court should reject that invitation.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully ask this Court to either dismiss this matter as improvidently granted or, should it reach the merits, affirm the judgment of the Colorado Supreme Court in this case.

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Respectfully submitted,

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