No. 25-170

IN THE

Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; EXXON MOBIL CORPORATION,

Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE HON. SCOTT A. SUROVELL, VIRGINIA SENATE MAJORITY LEADER, AND SENATOR R. CREIGH DEEDS, DELEGATE KATRINA E. CALLSEN, AND DELEGATE AMY J. LAUFER, MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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AMICI CURIAE,[1] MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICI*

Amici curiae are members of the Virginia General Assembly with a strong interest in preserving the constitutional balance that protects the states' historic role in remediating local harms through traditional tort law. *Amici* are submitting this brief to respectfully urge the Court to affirm the Colorado Supreme Court's decision and uphold the vital role for states in helping their residents seek recovery for injuries associated with climate change. Whether Respondents are able to secure recovery for these harms is ultimately a question for Colorado judges and juries to consider.

Amici curiae's perspective is shaped, in part, by their experience as legislators in a state that endured a remarkably similar preemption challenge to the one that Colorado and its municipalities face today. In *Virginia Uranium v. Warren, Inc.*, 587 U.S. 761 (2019), the Court upheld the Commonwealth of Virginia's state-level ban on uranium mining on private land—even as the federal Atomic Energy Act pervasively covered the processing of mined uranium ore into nuclear fuel. Upstream impacts on federally regulated activities did not derail Virginia's authority. *Id.* at 765.

SUMMARY OF ARGUMENT

This Court should uphold Colorado's plenary authority to open its state courthouse doors to consider claims of public nuisance, private nuisance, trespass, unjust enrichment, civil conspiracy, and violations of the Colorado Consumer Protection Act—notwithstanding upstream impacts on the production of greenhouse gas-emitting fuels.

1. The lead and concurring opinions in *Virginia Uranium* provide a controlling framework: federal courts should not assume preemption simply because a state law has an ancillary effect on upstream activities related to a federal regulatory regime. 587 U.S. at 770-71, 790-91.

2. Conflicting with *Virginia Uranium* and other precedents, Petitioners' propose a "causal chain" test for implied preemption that risks invalidating broad swaths of uncontested state authority, from state Renewable Portfolio Standards to gas taxes. *See infra* pp. 9-14.

3. Petitioners' theory also contradicts Congress's clear intention in framing the Clean Air Act to preserve state tort remedies: "Compliance with standards under this Act would not be a defense to a common law action for pollution damages." National Air Quality Standards Act of 1970, Report of the Committee on Public Works, United States Senate, S. Rep. 91-1196, at 38 (Sept. 17, 1970).

4. Finally, legal scholarship on preemption further confirms why application of *Virginia Uranium* is necessary here to preserve vital roles for state law and state courts. *See, e.g.,* Caleb E. Nelson, *Preemption*, 86 Va. L. Rev. 225–305, 231–32 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes").

ARGUMENT

I. *Virginia Uranium* calls for deference to Colorado's historic police powers in managing its courts.

Respondents' Colorado lawsuit has as much of an impact on greenhouse gas emission standards as a speeding ticket has on tailpipe pollution regulations. Issuing a fine to a motorist and directing him to drive more slowly *will* have the upstream benefit of reducing fuel consumption. But no one would label a traffic citation as an emissions regulation. By the same token, Respondents' state-law claims for climate-related injuries are not in conflict with any federal regulation under the Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq.*, because these claims do not seek to regulate greenhouse gas emissions nor do they conflict with any emissions limit that EPA might set. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528–29 (1992) (opinion of Stevens, J.) ("fraudulent-misrepresentation claims … are not pre-empted … Such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive.") (cleaned up).

As legislators from a state that withstood a similar preemption challenge to the one Colorado now faces, *amici curiae* know all too well the risks that "some brooding federal interest or appeal[] to a judicial policy preference" can pose to a state's legitimate exercise of its plenary authority. *Virginia Uranium*, 587 U.S. at 767.

Justice Gorsuch's lead opinion in *Virginia Uranium* confirmed that preemption must be grounded in "the text and structure of the statute." 587 U.S. at 778 (internal citation omitted). Courts "'start with the assumption that the historic police powers of the

States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). The contrary approach claimed by Petitioners would impose a "sweeping interpretation" of federal preemption and "would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty…." *Medtronic*, 518 U.S. at 488-89.

A deferential standard is especially vital in areas of law where history and tradition favor regulation by the states. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 194 (1983) (rejecting a preemption challenge aimed at "historic state authority over the generation and sale of electricity"). Alexander Hamilton's early explanation on the "rights of sovereignty" retained by the states is instructive. Under the Constitution, he presumed, "this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant.*" The Federalist No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). Stated more colloquially, the rule is this: in baseball, a tie goes to the runner; in preemption jurisprudence, it goes to the states.

Deference to state government authority also means, as Justice Gorsuch articulated, that courts must look to "*what* the State did, not *why* it did it." *Virginia Uranium*, 587 U.S. at 774 (emphasis in original) (referencing *Arizona v. United States*, 567 U.S. 387 (2012)). In a complimentary vein, Justice Ginsburg's concurrence in *Virginia Uranium* expressly rejects the argument that a state law could be "preempted because it is a pretext for regulating" another field that Congress had delegated to a federal agency. *Virginia Uranium*, 587 U.S. at 789.

The lead and concurring opinions in *Virginia Uranium* likewise build upon this Court's ruling in *Pacific Gas*, which cautions that "inquiry into legislative motive is often an unsatisfactory venture" because "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." 461 U.S. at 216. (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (the "approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded'") (internal citation omitted).

To be sure, the *Virginia Uranium* dissenters worried that courts might wish to inquire into a state's legislative purposes to determine whether a state's action over a non-preempted field was being leveraged as a backdoor means of blocking an unpopular federal law. 587 U.S. at 797 (Roberts, C.J., dissenting) (citing *Pacific Gas*, 461 U.S. at 212-213). Yet that concern is not present here for the obvious reason that the only motives at issue are those of Respondents acting as non-state litigants. Their motivations cannot be ascribed to the legislature or state courts of Colorado. The state's only action has been to open the courthouse doors.

* * *

It is noteworthy that Petitioners' claims regarding implied preemption are far weaker than the failed claims considered in *Virginia Uranium.* There, a mining company had challenged Virginia's outright ban on an entire class of state-regulated activity (uranium mining), which was acknowledged to be a necessary predicate to a federally regulated activity (uranium milling and processing). There had been no in-state processing of uranium ore since 1982, *i.e.,* since the Commonwealth's ban on mining had been enacted. *See* National Research Council, Uranium Mining in Virginia: Scientific, Technical, Environmental, Human Health and Safety, and Regulatory Aspects of Uranium Mining and Processing in Virginia at 7 (The National Academies Press 2012), https://www.nationalacademies.org/projects/DELS-BESR-09-06. Yet those facts did not sway the Court to intervene—because Congress had not intervened. The Court would "not expose every state law on every subject to a searching judicial inquiry into its latent purposes." *Virginia Uranium,* 587 U.S. at 770.

In contrast, nothing about the City and County of Boulder's state-law claims purport to ban the production of fossil fuels. Nor is there any indication that Petitioners will be barred from continuing with any federally regulated activities. On the contrary, Respondents are merely seeking compensation for state-level injuries that are attributable to an upstream activity that the federal government is (unlawfully) declining to regulate. *See* Final Rule, EPA, Recission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards under the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026); cf. *Massachusetts v. EPA*, 549 U.S.

497, 532–33 (2007). ("EPA's decision … rests on reasoning divorced from the statutory text.")

* * *

Virginia Uranium serves as a North Star, articulating a foundational feature of preemption jurisprudence: "Consider just some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative purpose too precipitately…. That would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws." 587 U.S. at 775 (lead opinion); *id.* at 790–91 (Ginsburg, J., concurring) ("A state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field.").

If Petitioners wish to preempt Respondents' claims, they "must point specifically to 'a constitutional text or a federal statute' that" explicitly requires such a result. *Id.* at 767 (internal citation omitted) (quoting *ISLA Petroleum*, 485 U.S., at 495, 503). Yet *amici curiae* in support of Petitioners acknowledge that *no such text exists*. Br. of Alabama, et al., in Support of Pet'rs, at 25 (filed May, 21, 2026) ("One does not need 'text'"). This apparent concession should be fatal to Petitioners' claims of implied preemption. *Virginia Uranium,* 587 U.S. at 778 (lead opinion) ("only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect.").

Just as Virginians were able to make their own state-law decisions on whether to maintain a moratorium on uranium mining, Coloradans should now be afforded the freedom to adjudicate claims seeking recovery for their acute, localized, climate change-related injuries.

II. Petitioners' "causal chain" theory of preemption would invalidate broad swaths of uncontested state authority in Virginia and every other state in the union.

Petitioners' chief error—failing to account for *Virginia Uranium* and its guidance on preemption—is compounded by their overbroad "causal chain" theory of field preemption, which is wildly overinclusive and would dramatically undercut state sovereignty. Petitioners frame their test as follows:

> "In particular, to prove the element of causation for its tort claims, respondents must show that, absent petitioners' production and marketing of their products, fewer fossil fuels would have been used .... Interstate emissions are thus a critical step in the *causal chain* between petitioners' alleged conduct and respondents alleged injuries."

Br. for Pet'rs, at 35-36 (emphasis added). This "causal chain" theory of preemption is not just overbroad—it is nonsensical.

Accepted on its own terms, Petitioners' test would render unlawful any state-law action whose mechanism or purpose has the effect of reducing greenhouse gas pollution from fossil fuels.[2] Such an approach

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[2] The production of fossil fuels, like so much economic activity, has an upstream impact on interstate interests. Yet this Court has already declined to hinge federal authority (in another context) based on upstream impacts on oil drilling and downstream impacts on oil refining, finding such connections far too attenuated. *Seven County Infrastructure Coalition. v. Eagle County, Colorado*, 605 U.S. 168, 179 (2025).

would invalidate broad swaths of uncontested state authority—to impose gas taxes, require efficiency standards through building codes, or promote renewable energy development via state public utility commissions—because these actions have upstream impacts on interstate, greenhouse gas emissions.

Virginia has joined nearly half of her sister states in enacting laws aimed at the vital task of decarbonization, with an ancillary, upstream impact on greenhouse gas emissions. *See* Center for Climate & Energy Solutions, *State Greenhouse Gas Emissions Targets*, https://www.c2es.org/document/greenhouse-gas-emissions-targets/ (last updated Aug. 2025) (calculating that "22 states and the District of Columbia have established economy-wide greenhouse gas emissions targets").

Virginia, for example, recently rejoined the Regional Greenhouse Gas Initiative (RGGI), and is managing its reentry to the program, in part, through historic state-law powers over electric utilities. *See* 2026 Va. Acts ch. 07, § 1-16 R of Item 365. RGGI is premised on reducing greenhouse gas emissions across its member states, with those emissions possibly serving as "a critical step in the causal chain," Br. for Pet'rs, at 36, between obligations imposed on electric utilities and state laws imposing those obligations. Yet for more than two decades, RGGI has existed without any intrusion whatsoever into EPA's authority under the Clean Air Act. *See* RGGI, *Regional Greenhouse Gas Initiative: Memorandum of Understanding*, https://www.rggi.org/sites/default/files/Uploads/Design-Archive/MOU/MOU_12_20_05.pdf at 2 (Dec. 20, 2005) (announcing a program "aimed at stabilizing and then reducing CO_2 emissions within the Signatory States" and signed by three Republican governors and four Democrats).[3]

RGGI is not the only climate change-oriented initiative under Virginia law. The Commonwealth's Renewable Portfolio Standard (RPS) program sets accelerating targets for the "[g]eneration of electricity from renewable and zero carbon sources." Va. Code § 56-585.5. The state's energy efficiency mandate similarly requires power companies to meet annual electricity savings goals. Va. Code § 56-596.2. And utilities must also increase development of energy storage (*i.e.,* battery) technologies to reduce reliance on backup, fossil-fuel generation. Va. Code § 56-585.5(E). All of these programs were enacted as part of the Virginia Clean Economy Act, 2020 Va. Act. ch. 1193, ch. 1194.

The list of Virginia's greenhouse gas-adjacent initiatives continues to the Commonwealth's "Clean Energy Policy," which affirms "that addressing climate change requires reducing greenhouse gas emissions across … all sectors, including the electric power, transportation, industrial, agricultural, building, and infrastructure sectors." Va. Code § 45.2-1706.1(A). The Virginia Department of Environmental Quality is further directed to "address climate change by developing and implementing policy and regulatory approaches to reducing climate pollution…." Va. Code § 10.1-1183(B)(2). It is impossible to forecast which of these state climate policies would pass must under Petitioners' muddled preemption test.

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[3] The Memorandum of Understanding establishing RGGI was signed in 2005; RGGI's first auction of carbon dioxide emissions allowances occurred in 2008. RGGI, *Elements of RGGI,* https://www.rggi.org/program-overview-and-design/elements (last visited July 29, 2026).

Even more, Virginia laws on mundane matters could also come within the crosshairs of Petitioners' rambling, "causal chain" theory of preemption. Like the overwhelming majority of states, Virginia maintains a Commercial Property Assessed Clean Energy (C-PACE) loan program to assist building owners with energy-efficient upgrades to their properties.[4] The list of eligible projects includes a host of measures that are well-within a state's traditional authority to manage: "Energy efficiency improvements;" "Renewable energy improvements;" and "Electric vehicle infrastructure improvements," to name a few. Va. Code § 15.2-958.3.

Even state regulations for the licensure of liquefied petroleum gas fitters might be preempted if Petitioners have their way. These regulations call for the revocation of a license if an operator performs their work "incompetently as demonstrated by an egregious or repeated violation of the standards," Va. Code § 54.1-1134. When enforced, these provisions reduce leaks from fossil fuels.

Virginia, like every state in the union,[5] also imposes a motor vehicle fuel tax (*i.e.,* gas tax), Va. Code § 58.1-2217, and maintains speed limits, Va. Code § 46.2-870. Together, these policies have an unmistakable, upstream impact on reducing fossil-fuel emissions. *See e.g.,* Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 Vand. L. Rev. 515, 556–56 (2004) (discussing "state and local efforts to

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[4] Pace Equity Finance, *States with Active C-PACE Financing*, https://www.pace-equity.com/c-pace-states/ (identifying 40 states with C-PACE programs) (last visited July 23, 2026).

[5] Tax Foundation, *Gas Taxes by State, 2025*, https://taxfoundation.org/data/all/state/gas-taxes-state/ (Sept. 2, 2025).

reduce emissions by reducing speed limits"). In the Washington, D.C. region—where cars registered in Maryland frequently travel into Virginia—traffic congestion has long been a major source of air pollution. Virginia addresses this problem with laws designed to promote carpooling and establish high-occupancy vehicle lanes "to facilitate the rapid and orderly movement of traffic to and from urban areas during peak traffic periods." Va. Code § 33.2-501.

All of these statutory initiatives have at least an indirect effect on interstate greenhouse gas emissions; none are preempted by the federal Clean Air Act, and for good reason. Similar, state-regulated, renewable energy programs have survived other constitutional challenges.

Writing for the U.S. Court of Appeals for the Tenth Circuit in *Energy & Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015), then-Judge Gorsuch authored the court's opinion upholding Colorado's Renewable Portfolio Standard (RPS) in the face of a dormant commerce clause challenge. Colorado law required in-state electricity providers "to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources." *Id.* at 1170.

Coloradois part of an interconnected grid serving eleven states and portions of Canada and Mexico." *Id.* at 1171. Challengers to the Colorado program claimed that it would affect electricity prices out-of-state, harming "out-of-state coal producers." *Id.* The Tenth Circuit acknowledged that the Colorado RPS program would impact out-of-state energy prices, but found those impacts did not cross any constitutional red line: "we hardly mean to suggest non-price regulations don't impact price in or out of state. In today's interconnected national marketplace such a suggestion would be beyond naive." *Id.* at 1173. The Tenth Circuit nevertheless *rejected* a test that would brand as unconstitutional "any state regulation that 'control[s] ...conduct'" because such a test would "risk serious problems of overinclusion." *Id.* at 1175.

In sum, the "controls conduct" test evaluated in *Epel* was rejected as woefully overbroad. It failed to account for Colorado "standing upon her extreme rights," *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 238-39 (1908), in implementing an RPS program. [6] Petitioners' "causal chain" theory of preemption suffers similar deficiencies, boldly overreaching into areas of traditional state sovereignty. It fails to provide any limiting principle for delineating the outer bounds of implied preemption.

III. The cooperative federalism structure of the Clean Air Act works to block Petitioners' broad overreach into areas of traditional state control.

As stated above, Respondents' state-law claims are not in conflict with any federal regulation under the Clean Air Act because the City and County of Boulder, Colorado do not seek to regulate greenhouse gas emissions. To the extent that Respondents' state-law case has an upstream impact on pollution, that indirect impact (even if intentional) is outside of the regulatory design of the CAA.

[6] Decades before adoption of the modern Clean Air Act Amendments of 1970, Justice Holmes famously heralded the role of states in protecting their citizens, notwithstanding upstream impacts on cross-border concerns, *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237-39 (1908).

Impliedly extending the CAA to bar states from addressing these impacts would contradict the cooperative federalism model that Congress established. The Senate Report on the Clean Air Act's citizen-suit provision, 42 U.S.C. § 7604, CAA § 304, is crystal clear on this point. The Report states:

> "It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with standards under this Act would not be a defense to a common law action for pollution damages*."

S. Rep. 91-1196, at 38 (Sept. 17, 1970) (emphasis added).

What the statutory background provides, the text confirms. Congress recognizes that air pollution "is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), and expressly allows states and localities to "adopt or enforce ... any requirement respecting control or abatement of air pollution" above the national standards through its Savings Clause, 42 U.S.C. § 7416. Nothing in the CAA expresses a congressional intent to broadly preclude state tort regimes.

Indeed, preservation of the states' role in combatting air pollution has been a feature of the CAA from Congress's earliest amendments. The first major, federal law on air pollution, the Air Pollution Control Act of 1955, confirmed a vibrant role for states in remedying air-pollution harms: "it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution." Pub. L.

159, 69 Stat. 322 (July 14, 1955). *See also* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 Envtl. L. 1549, 1585 (1991) (documenting the origins of the Clean Air Act). A principal role for state and local actors was reaffirmed by the Clean Air Act of 1963, which announced that "municipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action." Pub. L. 88-206, 77 Stat. 396 (Dec. 17, 1963).

It is therefore incongruous for Petitioners to argue field preemption, Br. of Pet'rs at 38-39, given the CAA's long history of preserving an essential role for states in remedying air-pollution injuries. *See, e.g., Commonwealth of Virginia v. Browner,* 80 F.3d 869, 877 (4th Cir. 1996), *cert. denied* 519 U.S. 1090 (1997) (holding that language on Title V permits "creates a floor of rights, rather than a ceiling, and ensures that the CAA does not inadvertently diminish standing rights previously granted under state laws.").

Field preemption is especially inappropriate here because the EPA has issued a final rule "repudiating the EPA's positions since 2009" and is now controversially asserting that the Clean Air Act "does not authorize the EPA to prescribe GHG emission standards based on global climate change concerns…." *See* 91 Fed. Reg. at 7695. Even *amicus curiae* in support of Petitioners, the American Petroleum Institute (API), has raised concerns about EPA's rationale. In comments filed with the agency, API cautioned:

> "[T]he U.S. Supreme Court already decided the question of whether … EPA may regulate GHGs under the CAA for their effect on global climate. In its landmark *Massachusetts v.*

> *EPA* decision, the Court squarely concluded 'that it does.' … Broader context also counsels against an approach that could potentially conflict with the Supreme Court's decision in *Massachusetts v. EPA*."

See Comments of the American Petroleum Institute on the Proposed Rule Entitled "Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards," Docket ID No. EPA-HQ-OAR-2025-0194 (submitted Sep 22, 2025), https://www.regulations.gov/comment/EPA-HQ-OAR-2025-0194-0869.

In *International Paper Co. v. Ouellette*, this Court worried that some nuisance lawsuits might "circumvent the NPDES permit system" of the Clean Water Act. 479 U.S. 481, 494 (1987). EPA is now objecting to *any* federal permit system under the Clean Air Act for climate-related harms. EPA is not occupying the field; it is attempting to abandon it.

IV. The presumption against preemption is necessary to protect states' sovereignty.

At their core, Petitioners' claims are premised on an unusual presumption—that the Court should *assume* the existence of a "uniform federal law … in the context of global climate change." Br. for Pet'rs, at 13. This argument flouts this Court's longstanding respect for the role of states.

For decades, this Court's precedents have confirmed not just that a presumption against preemption exists, but why it is necessary to preserve the integrity of quasi-sovereign states. *See, e.g., Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

Congress."); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States…. This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

As Justice Scalia confirmed, "There is no federal pre-emption *in vacuo,* without a constitutional text or a federal statute to assert it…. [P]re-emption, if it is intended, must be explicitly stated." *Puerto Rico Dep't of Consumer Affairs. v. Isla Petroleum Corp.,* 485 U.S. 495, 503-04 (1988). With this framework intact, state tort regimes that have an upstream impact on areas of federal regulation have withstood preemption challenges across a wide array of tort-law contexts.

These include cases implicating:

(1) pharmaceuticals, *Wyeth v. Levine*, 555 U.S. 555, 573 (2009) ("Impossibility pre-emption is a demanding defense. On the record before us, Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements.");

(2) nuclear safety, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But… Congress intended to stand by both concepts and to tolerate whatever tension there was between them.");

(3) pesticides, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("Even if Dow had offered us a plausible alternative reading of [a statutory pre-emption clause]—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption…. The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption."); and

(4) tobacco, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528–29 (1992) (opinion of Stevens, J.) (a plaintiff's "fraudulent-misrepresentation claims… with respect to advertising and promotions… are not pre-empted by [express preemption clause in the Federal Cigarette Labeling and Advertising Act]. Such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive.").

Cipollone is an especially apt analog, as the plaintiffs there sought recovery for smoking-related injuries, but were not attempting to regulate on the public-health impacts of tobacco use. By the same token, the City and County of Boulder are seeking recovery for climate-related injuries already incurred and are not attempting to regulate greenhouse gas pollution. In *Cipollone,* this Court upheld a plaintiff's right to seek state-law damages based on Failure to Warn, Fraudulent Misrepresentation, Conspiracy to Misrepresent or Conceal Material Facts. 505 U.S. at 524-30. These are exactly the kind of traditional common-law claims that Respondents have raised here.[7]

[7] An analogous distinction was noted by the Supreme Court of Montana in *Held v. Montana*, 580 P.3d 1235 (Mont. 2024). There,

The Court's most recent case on preemption, *Monsanto v. Durnell,* 609 U.S. ___, ___, No. 24-1068, slip op. at 9 (June 25, 2026) (Opinion of the Court), reaffirms this approach as it relies on a clear and explicitly worded preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."). *See also Hencely v. Fluor Corp.,* 608 U.S. ___, ___, 146 S. Ct. 1086, 1096 (2026) ("Congress knows full well how to make its intention to preclude private liability known.") (internal citation omitted).

Moreover, scholarship on preemption has understood these cases and the Court's presumption against preemption as necessary to create a structure that preserves state sovereignty. *See* Jonathan Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J. L. Econ. & Pol'y 217, 220 (2022) ("Under longstanding precedent, it is more difficult to preempt state common law than it is to displace federal common law."); Caleb E. Nelson, *Preemption*, 86 Va. L. Rev. 225–305, 231–32 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes").

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the court sided with plaintiffs, who articulated climate-related harms (wildfires, extreme heat, drought, "disappearing glaciers in Montana"), *id.* at 1256, and claimed relief via the Montana Constitution's guarantee to "a clean and healthful environment." *id.* at 1248-49. The Montana high court explained, "[O]ur focus here … is not on redressing climate change, but on redressing [plaintiffs' state-law] constitutional injuries …." *Id.* at 1254.

Even if there were "sound policy reasons to treat greenhouse gases differently," that would be a determination "made by legislators, not judges." Adler, 17 J.L. Econ. & Pol'y at 246 (2022); *see also Tennessee Copper Co.,* 206 U.S. at 239 ("Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights.").

This Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *United States Forest Service v. Cowpasture River Preservation Association,* 590 U.S. 604, 621–22 (2020). *See e.g., Hencely*, 608 U.S. ___, ___, 146 S. Ct. 1086, 1098 (2026) ("[T]he mere fact that the conduct here occurred overseas in a warzone perhaps makes this a good case for Congress to intervene, but it does not give courts a license to bar all such suits on their own authority.").

In short, preempting state-law claims on climate change-related injuries risks the very same "costs to cooperative federalism and individual liberty" that the Court rightly identified in *Virginia Uranium*, 587 U.S. at 775.

CONCLUSION

For the reasons stated above, members of the Virginia General Assembly as *amici curiae* ask this Court to affirm the decision of the Colorado Supreme Court and reject Petitioners' attempt to federalize state tort law claims seeking damages for climate change-related injuries.

Respectfully submitted,

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