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 FOR *AMICUS CURIAE*
WHEN JUSTICE
IN SUPPORT OF RESPONDENTS

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WHEN Justice is a 501(c)(3) nonprofit organization dedicated to advancing transparency, corporate accountability, and effective remedies for conduct that harms human health and the environment. WHEN Justice supports the use of legal, regulatory, and market-based mechanisms to ensure that entities responsible for environmental and human-health harms bear the costs of those harms rather than shifting them to individuals, communities, and taxpayers. Its work is grounded in the principle that economic prosperity, innovation, environmental protection, and public well-being are mutually reinforcing—not competing—objectives. WHEN Justice has a particular interest in preserving meaningful avenues of redress, including traditional state-law remedies, where misconduct causes harm to communities.

SUMMARY OF THE ARGUMENT

If Joe Smith hits a baseball in Missouri and breaks a window in Kansas, Kansas cannot ban baseball in Missouri, but it can surely make Mr. Smith pay for the broken window. "The cases are many in which a person acting outside the State may be held responsible according to the law of the State

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[1] Amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution intended to fund its preparation or submission. Mr. Sean Powers previously represented respondents in this matter; that representation ended in October 2024, and counsel submits this brief solely on behalf of amicus curiae.

for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258-59 (1933).

Petitioners now contend the Constitution demands a different rule if instead of an errant baseball, Mr. Smith's pollution causes damage in Kansas.[2] They are wrong. Neither the Constitution's text nor its structure support special treatment for interstate pollution or give unique immunity to the polluter. When the Framers limited the authority of the sovereign States, they did so expressly and with care. Here, the Constitution says nothing about the resolution of interstate pollution disputes, and there is no historical evidence that the Framers intended to subvert the accepted rule—that States can apply their own tort law to remedy damage within their borders—for that class of cases.

Perhaps recognizing that the Framers expressed no view on interstate pollution, petitioners argue more broadly that a State may never remedy in-state harm caused by outside acts because "each State alone can determine what conduct to permit or punish within its borders . . . and no State can impose its own policy choices on other States." Petrs. Br. at 24. Taken at face value, this dooms all interstate tort law, which is strong evidence that their logic is faulty. But to the extent they are unwilling to throw out the whole interstate tort regime, petitioners have created a different constitutional problem for themselves. How

[2] We address only petitioners' argument that the Constitution itself preempts these state-law remedies, though we note their statutory preemption arguments largely depend on them being right about the constitutional question.

does a judge decide that pollution (carried by a river) is constitutionally different than a defective product (travelling through streams of commerce)? Without textual guidance, there are no judicially manageable standards for drawing such lines, which makes these political questions reserved to Congress.

The categorical nature of petitioners' preemption raises yet more constitutional concerns. Their implied constitutional preemption regime effectively eliminates all compensatory remedies for those injured by interstate pollution—nobody could bring a trespass claim for polluted property; nobody could bring a personal injury claim for disease or death. Petitioners fail to recognize that such claims are property interests protected by the Fifth Amendment. And members of this Court have rightly recognized that abolishing them "in some general way" would raise "[q]uite serious constitutional questions" if a legislature did so without providing "for a reasonable alternative remedy." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring). The Takings Clause provides the most natural home for those concerns, but this Court has not had to resolve those questions because Congress rarely eliminates damages remedies under State law in a comprehensive way; and where it has seen the need, it has set up replacement compensation schemes. *E.g.*, *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 87-88 (1978). The caution of Congress in this sensitive area makes petitioners' implied preemption arguments more troubling and doubtful.

ARGUMENT

I. There Are No Special Constitutional Rules for Interstate Pollution Cases.

Sherlock Holmes famously calls attention to the dog that does not bark; the absence of a thing that should be there is often the most probative piece of evidence. Arthur Conan Doyle, "The Adventure of Silver Blaze" (1892). Here, petitioners' sweeping constitutional argument is missing a single reference to the text; and to the extent they argue constitutional preemption is implicit in the "structure of the constitution," they fail to address its actual architecture or the relevant history.

Without a viable argument about the Constitution's original meaning, petitioners primarily invoke federal common law precedents, arguing that federal law is needed to resolve all "disputes concerning injuries allegedly caused by interstate air and water pollution." Petrs. Br. at 24. However, none of those decisions did what petitioners are asking this Court to do now: preempt state law's ability to award damages to private parties injured by pollution.

Instead, federal common law expanded the remedies available to States injured by interstate pollution, giving them extraterritorial injunctions they could not obtain under their own law. But by giving injured States an *extraordinary* remedy, the Constitution did not take away the *ordinary* ones available to private parties facing harm to their person or property—a damages action under State law.

A. Neither the text nor structure of the Constitution bars States from remedying in-state harm caused by out-of-state pollution.

"Constitutional analysis must begin with the language of the instrument." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 235 (2022) (cleaned up). The text matters foremost because it was agreed to by the People and made "part of our fundamental law." *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring).

1. A textual command is particularly important for limits on the sovereign authority of the States. "After independence, the States considered themselves fully sovereign nations." *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 237 (2019). While the Constitution "split the atom of sovereignty," *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring), the States' "alienation of rights and powers was a momentous act that interpreters were not to attribute to vague or ambiguous provisions." Anthony J. Bellia Jr. & Bradford R. Clark, *Constitutional Federalism and the Nature of the Union*, 66 Wm. & Mary L. Rev. 281, 300 (2024). Instead, "a legal instrument had to do so in clear and express terms or by unavoidable implication." *Id.* This rule of constitutional interpretation is "an essential part of the background context that informs the original public meaning of the Constitution." *Id.* at 324.

Thus, under "the plan of the convention . . . the State governments would clearly retain all the rights of sovereignty which they before had," and alienated those rights only "in three cases." The Federalist No. 32 (Alexander Hamilton). First, "where the Constitution in express terms granted an exclusive authority to the Union; [second,] where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and [third] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT." *Id.* The Framers took "the most pointed care . . . to insert negative clauses" where they felt it would be "improper" for States to retain authority, and "the whole tenor of the instrument" was to leave the States with all authorities "not explicitly divested in favor of the Union." *Id.*

2. Providing redress for private wrongs is a central aspect of sovereignty; certainly so for harm to people and property found within a sovereign's borders. At the Founding "American jurists were [ ] quite familiar with the principle that government *owes* its citizens laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrong." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrong*, 115 Yale L.J. 524, 560 (2005) (emphasis added). As declared in one of this Court's earliest cases, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first *duties* of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (emphasis added).

This sovereign duty was generally reserved by the Constitution to the States. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938); *accord United States v. Morrison*, 529 U.S. 598, 617 (2000) ("the Founders denied the National Government and reposed in the States" the police power). While federal law may control some disputes between *sovereigns*, *infra* at 13, state law governs private disputes for the redress of private wrongs.

3. The question in this case is whether the Constitution either "expressly or by necessary implication" abrogates a State's respective tort authority in interstate pollution disputes because if "the Constitution is silent about the exercise of a particular power . . . the States enjoy it." *United States Term Limits v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting). Here, nothing in the Constitution expressly limits State authority in any transboundary case, much less interstate pollution ones. Nor are those limits implied by the broader structure.

The Constitution limited the authority of the States in ways that the Confederation had not, but again "the whole tenor of the instrument" was to leave the States with all authorities "not explicitly divested in favor of the Union." The Federalist No. 32 (Alexander Hamilton). A careful structure was erected: the federal government was given enumerated powers and the supremacy clause (U.S. Const. art. I, § 8, U.S. Const. art. VI, cl. 2); express limits were placed on state authority (U.S. Const. art. I, § 10; U.S. Const. art. IV); and there was a general reservation of rights to the States (U.S. Const. amend. X).

Under this structure, Congress is responsible for identifying which issues require preemptive federal law. Not only are the States represented in Congress, but Congress can change its mind if facts change or they got the balance wrong the first time.

Constitutional preemption is more permanent. Thus when the Framers wanted to conclusively eliminate State authority, they did so expressly. The States lost many of the traditional powers of *external* sovereignty, vis-à-vis foreign nations: they cannot enter into treaties, U.S. Const. art. I, § 10, cl. 1, tax imports or exports, art. I, § 10, cl. 2, or make war, art. I, § 10, cl. 3. But the limits on their powers to respond to circumstances and events within their own borders are far more circumspect: the States cannot impair contractual obligations, or pass bills of attainder or ex post facto laws, art. I, § 10, cl. 1; they must give full "credit . . . to the public Acts, Records, and judicial Proceedings of every other State," art. IV, § 1; and they have to return criminal fugitives (and once had to return fleeing slaves) regardless of their own laws, art. IV, § 2, Cl. 2, 3.

While petitioners and their amici suggest the Framers assumed that States could not regulate something entirely outside their borders, Petrs. Br. at 23-24 & Br. of Amicus Curiae Prof. Saikrishna B. Prakash Supporting Pet'rs, at 22, applying one's law to effects within one's borders is not an extraterritorial act.

Moreover, their atextual limit has a completely different flavor than the narrower ones found in the text, and limits State authority across a much wider field. It effectively adds words to the Full Faith and Credit Clause that say, "and States can also never apply their own law to conduct in another State, even if it causes harm within their borders." Adding such a capacious atextual limit undermines "the most pointed care" the Framers took "to insert negative clauses" when they saw the need. The Federalist No. 32 (Alexander Hamilton). Why go to the trouble of negotiating and debating the express limits, if the States had actually endorsed this type of blank check?

B. Unlike interstate sovereign immunity, petitioners' special rule for interstate pollution has no historical pedigree.

While not every constitutional doctrine is "spelled out in the Constitution," *Hyatt*, 587 U.S. at 247, judges do not have freewheeling authority to add or subtract from the text. *Cf. Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) ("implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution"). If permitted, such atextual limits must be clearly and specifically commanded by history. Here, there were no settled rules governing choice-of-law before the Founding, and certainly no clear prohibition on States applying their own law in transboundary disputes, much less a specific choice-of-law rule for pollution cases.

1. This Court's decision in *Hyatt* demonstrates how to properly find atextual but historically commanded limits. The question there was whether

States enjoyed sovereign immunity in the courts of sister States.

Immunity from private suit was a "fundamental aspect of the States' inviolable sovereignty . . . at the founding" with a common law and law-of-nations pedigree. *Hyatt*, 587 U.S. at 238-39 (cleaned up). After independence, the States enjoyed immunity in sister State's courts, thus the Framers "took as given that States could not be haled involuntarily before each other's courts." *Id.* at 239-40.

Debates about the Constitution made clear that the Framers did not intend to disturb this settled principle. There were "spirited" debates over whether States could be sued in the *superior* federal sovereign's "Article III courts" without their consent; and the fervor of those debates would have made "little sense" if the Framers intended to permit States to be sued in the courts of *co-equal* State sovereigns. *Id.* at 247. This conclusion was further confirmed by the fact that the Constitution disabled the States' ability to respond to sister States' refusal to honor their immunity. *Id.* at 245.

2. In *Hyatt*, there was thus a well-established pre-ratification norm that commanded sovereign immunity, and history surrounding the ratification debates that strongly suggested the Framers would have said something expressly if they intended the Constitution to subvert it. Here, there is no evidence of a settled historical norm prohibiting States from applying their own law to out-of-state pollution when it causes harm within their borders.

As noted above, while the historical record suggests one sovereign should not *legislate* within another's borders, no sources say or suggest that a sovereign regulates *extraterritorially* when it compensates harm to people and property within its borders. Instead, it is petitioners' rule that undermines the notion of territorial sovereignty that was prized before the Founding, by stripping a State of authority to address harm within its borders.

While choice-of-law rules were unsettled and emerging at the Founding, *lex loci delicti* became the dominant rule for torts in the early days of the Republic. Resps. Br. at 36-37. Under that Rule, "the law of the place of wrong determines whether a person has sustained a legal injury," Restatement (First) of Conflict of Laws § 378 (1934), and "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place," *id.* § 377. The theoretical underpinning for that rule is that the right accrues where the injury occurs; and thus, that moment in that place triggers the sovereign lawmaking function. *See* Joseph H. Beale, *A Treatise on the Conflict of Laws* § 377.1 (1935).

Not only is the State where the injury occurred *permitted* to apply its own law, but because torts were considered transitory, all other States—including those where the conduct occurred—were *expected* to apply that law as well. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 706-07 (2004) (collecting cases); *Dallas v. Whitney*, 118 W. Va. 106, 108-09 (1936) (applying Ohio law to blasting operations in West Virginia that caused property damage in Ohio).

"Even as many jurisdictions have modified the traditional rule of *lex loci delicti*, the location of injury continues to hold sway in choice-of-law analysis in tort cases." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 903 n.11 (2011) (Ginsburg, J., dissenting). In such places, "when the tort rule is designed primarily to compensate the victim for his injuries, the state where the injury occurred" will often "have the greater interest in the matter," and thus will provide the rule for decision. Restatement (Second) of Conflict of Laws, § 145 cmt. c (1971). It would be strange indeed if the vast majority of States that followed *lex loci delicti* for a century, and those that still do, were wrong about the Framers' intent. Suffice it to say, there is nothing approaching a clear historical signal commanding the elimination of *lex loci delicti* for interstate pollution cases.

C. Federal common law gave States an extraterritorial injunction they could not obtain under their own laws; it did not strip ordinary damages remedies available to private parties.

As respondents have ably briefed, States routinely and constitutionally award damages to remedy in-state harm caused by out-of-state acts. Resps. Br. at 34-37. Looking to reverse that norm, petitioners principally rely on this Court's recognition of federal common law as the rule of decision for *sovereign* interstate pollution disputes. Those precedents do not support the preemptive rule they now seek.

Federal common law never operated as a looming restraint on the ability of States to remedy private harms within their borders. Instead, it was a rule of necessity that grew out of the Constitution's implicit recognition that States needed a way to shut down polluting activity outside their borders but lacked the ability to do so under their own authority. Petitioners' argument flips the interests underlying federal common law on their head: where once it offered special protection for the sovereign interests of States injured by pollution; now it would undermine those interests and give special immunity to out-of-state polluters. This Court should not embrace that transformation.

1. Let's start with what federal common law is for: resolving disputes between sovereigns, not policing private lawsuits. "[T]he Constitution affirmatively altered the relationships between the States," such that they could no longer resolve their disputes through "pure political power." *Hyatt*, 587 U.S. at 245-47. But because ours was meant to be "a perpetual Union," *id.* at 246, and the States did not "agree to submit to whatever might be done," *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907), the Constitution gave the States new ways of resolving their grievances. "[T]he alternative to force is a suit in this court." *Id.*

Out of this grant of jurisdiction, this Court mediated cases involving "the conflicting rights of States" under what is now recognized as "federal common law." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 & n.13 (1981). Like all areas of federal common lawmaking, this one is narrow. Purely private disputes are not meet for this type of federal common lawmaking; instead, it is for disputes previously "settled by treaty or force." *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (internal quotations omitted); *accord Louisiana v. Texas*, 176 U.S. 1, 16 (1900) ("It must appear that the controversy to be determined is a controversy arising directly between [the States], and not a controversy in the vindication of grievances of particular individuals."). Federal common law thus exists to provide neutral principles for determining States' respective rights where they are in sharp conflict—border disputes are the quintessential example.

2. The very cases petitioners lean on hardest, prove the opposite of what they need. While this Court recognized States' ability to invoke federal common law to enjoin out-of-state pollution before the advent of federal environmental statutes, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011),[3] two things stand out from these decisions, which undermine petitioners' reliance on them. First, this Court was concerned with the rights of the State injured by pollution; not the rights of the State where pollution was occurring. Second, the need for federal common law was intrinsically tied to the inadequacy of damages and the injured State's need for an injunctive remedy.

[3] While petitioners contend this tradition dates back more than a century, this is an incomplete picture. Most decisions predated *Erie* and did not address the source law for the rule of decision. That question did not arise until *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n. 3 (1971), which suggested state law should apply. That ruling was reversed the next year when *Illinois v. City of Milwaukee* held federal common law governed. 406 U.S. 91, 102-03 & n. 3 (1972). That federal common law, however, was short-lived and held to be displaced a decade later. *See generally City of Milwaukee v. Illinois*, 451 U.S 304 (1981).

In private disputes, damages are the default rule and injunctions are extraordinary remedies. But when the States joined the "union" and lost the ability to "forcibl[y]" abate "outside nuisances," they did not "sink to the position" of a private party and could not "be required to give up quasi-sovereign rights for pay." *Tennessee Copper Co.*, 206 U.S. at 237-38. A State injured by out-of-state pollution, therefore, needed access to extraterritorial injunctive relief.

But there was a problem; the State could not rely on its own laws to enforce the injunction because "enforcement measures do not travel with the sister state judgment as preclusive effects do" but "remain subject to the even-handed control of forum law." *Baker v. GMC*, 522 U.S. 222, 235 (1998). The State also could not be "compelled to resort to the tribunals of other States for redress." *Wyandotte Chemicals Corp.*, 401 U.S. at 500. Thus, without a federal forum (and federal law), the injured State's sovereign interests were always subject to the control of the polluting State: either the injured State would have to press its claim in the polluting State's courts, or it would have to hope that the polluting State would honor injunctive decrees issued by the injured State's courts.

Federal common law existed to solve this specific problem by giving States a unique and extraordinary federal remedy. *See Missouri v. Illinois*, 200 U.S. 496, 520–21 (1906); *Tenn. Copper Co.*, 206 U.S. at 237–38.

3. Creating a remedy for a sovereign is one thing. Taking away a remedy that already belongs to a private party is another. The latter involves

preemption, which simply cannot exist "*in vacuo*, without a constitutional text or a federal statute to assert it." *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1093 (2026) (cleaned up). Federal common law, therefore, cannot give judges authority to preempt state law beyond what the Constitution necessarily demands.

We are aware of only two cases where this Court has held that federal common law, or the structure of the Constitution, eliminates a private party's common law claims under State law; both were narrow and neither supports the sweeping preemption sought here. The first is *Hyatt*, which as discussed above, held that a private party could not sue one State in another's courts. *Supra* at 9-10. That rule has little bearing on the issues at hand: sovereign immunity implicates sovereign rights in a direct way; and preventing a claim against one (sovereign) actor is categorically different than eliminating them as to an entire fleet of (private) actors.

The second case is *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). This is the only case that we have seen where federal common law has been used to immunize a *private* defendant from liability for a *domestic* injury. And what a narrow grant of immunity that is: a tort plaintiff cannot recover against a military contractor for a design the military specifically required. *Id.* at 512–13. Petitioners effectively ask this Court to turn *Boyle*'s pinhole into a gate that lets a Mack truck through. *Hencely* forecloses this effort: if South Carolina tort law can constitutionally govern a suit brought by a U.S. serviceman injured by a military contractor's negligence in Afghanistan, it is implausible that the Framers intended to make States constitutionally incapable of redressing entire categories of harm to people and property within their borders. 146 S. Ct. at 1097-99.

4. As discussed above, the federal common law of interstate pollution was born of necessity to resolve disputes where States are directly in conflict. This Court never recognized that necessity where private parties seek to recover damages based on interstate pollution. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 n.17 (1981) ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party."); *AEP*, 564 U.S. 410, 422 (2011) ("We have not yet decided whether private citizens . . . may invoke the federal common law of nuisance to abate out-of-state pollution."); *accord Hencely*, 146 S. Ct. at 1094 (federal common law is generally inappropriate "when litigation is purely between private parties" (quoting *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956)). While extraterritorial injunctions *might* implicate constitutional concerns involving the conflicting rights of States, a damages remedy for private parties simply does not.

Practice tells us as much. There is no federal common law of products liability or federal common law for the internet. Interstate damages remedies under State law are routine. But despite their ubiquity—and with the exception of *Boyle*—this Court has never found a compensatory remedy under the law of the State of injury constitutionally barred.

Though a State might exceed its authority (and impede on the authority of others) if it applied its law to conduct with no connection to its territory, this Court has repeatedly recognized that a State has a paramount interest in applying its law to conduct that causes injury within its borders. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 360 (2021); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

Damages remedies under one State's law can coexist with another State's exclusive regulatory authority in ways that an injunction likely could not. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (permitting State law damages award even where safety regulation "is the exclusive concern of the federal law"). Damages liability under State A's law may impact the behavior or profits of the private actor, but they do not eliminate State B's regulatory authority or prevent it from permitting necessary operations.

This much is clear from cases applying *lex loci delicti*. Take *Dallas v. Whitney*. There, the defendant used explosives in connection with roadwork in West Virginia, which broke "the plate glass of the plaintiff" in Ohio; the West Virginia court applied Ohio law to find a compensable trespass even though no negligence was found and the road work could surely not have been completed without the blasting. 118 W. Va. at 108-09. Paying for damage in Ohio as a matter of Ohio law did not undermine West Virginia's control of road development in West Virginia.

While this Court has found that damages can change (dare say, regulate) private behavior, the fact that the polluter might absorb, pass-on the cost, or shut down cannot create a constitutional problem. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023) ("many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior"). A change in private behavior is not the proper lodestar for the constitutional inquiry; the question is whether that change in private behavior directly interferes with another States' sovereignty.

It does not. While States may not like that businesses within their borders are on the hook for damages they cause elsewhere, this Court has never held that they have a sovereign interest in shielding them from such liability. Moreover, a state's interest in limiting liability for conduct within its territory is clearly not the only sovereign interest at play when that conduct creates concrete harm in a sister State; and the Constitution has never made the "State of the injury" subservient. *Carroll v. Lanza*, 349 U.S. 408, 414 (1955).

5. This case does not involve an extraterritorial injunction under state law, and this Court need not resolve when they are constitutionally permissible. *See generally* Polly J. Price*, Full Faith and Credit and the Equity Conflict*, 84 Va. L. Rev. 747 (1998) (noting that doctrine in this area is underdeveloped). We mention them now only to demonstrate how permitting a damages remedy under injured State law reconciles all States' interests, while the other two approaches—allowing both injunctive and

damages remedies under injured State law or denying both—may not.

A damages remedy is bound to a specific dispute between specific parties—the defendant need only pay for an identified loss. Injunctions clearly *can* sweep more broadly. If State A shuts down a factory permitted in State B, it has taken *actual* not merely *practical* control and denied State B the benefits of the factory. *Cf. Pork Producers*, 598 U.S. at 374.[4] Allowing damages but denying an injunction reconciles both States' interests: State A does not suffer uncompensated harm; State B gets to keep the benefits. Taking both remedies away, however, makes State A subservient to Sister B: State A bears the cost; State B keeps the benefits.

II. There Are No Judicially Manageable Standards for Determining When One State's Tort Remedies Violate Another's "Sovereignty."

The question in this case is ultimately not whether it would be good or bad for fossil fuel companies to pay for climate change. The questions are who decides and how? Because there is no clear constitutional command, the decision to eliminate State law is lawmaking that must belong to Congress. *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (Gorsuch, J., lead opinion); *accord Hencely*, 146 S. Ct. at 1093.

[4] It will not always be the case that an extraterritorial injunction overturns another State's sovereign decision. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). And *Baker* does a lot to address any concerns where it does.

As Part I shows, the Constitution does not take a position on interstate pollution, nor whether it is inappropriate to apply State law to that subset of interstate disputes; it is silent. Knowing this, petitioners press a much broader constitutional rule that compensatory remedies under one State's law will *always* constitute impermissible extraterritorial regulation. Petrs. Br. at 23-24. Because that would throw out countless precedents from this Court, they must really mean *sometimes*. This implied concession makes their argument even more constitutionally problematic because it forces judges to make the call about which interstate disputes may proceed constitutionally under state law and which cannot.

Petitioners have offered no clear test to guide such a delicate line-drawing exercise; nor is it clear what overarching constitutional value that line-drawing is meant to serve. Without a clear test to ensure even-handed application, this endeavor plainly creates an unacceptable risk of judges not determining what the law is but enshrining in law their own views about a particular dispute. But "a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium*, 587 U.S. at 767 (Gorsuch, J., lead opinion); *accord Erie*, 304 U.S. at 78 (recognizing that federal common law creates the risk of judges "brushing aside" laws that they dislike); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) ("the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the

States"). Indeed, this is precisely what textualism and originalism were meant to prevent.

1. The thrust of petitioners' argument is that interstate air pollution is different than other interstate torts because it involves conduct that is not directed at one particular State, and multiple, mixed and hard to separate sources; climate change, they say, amplifies those concerns because of the scale. Petrs. Br. at 27-28. But none of these concerns are unique to pollution; and while climate change is certainly a big issue, State law routinely deals with the *local* impacts of *big* problems.

State law and state courts deal with multi-factor and uncertain causation all the time: whether it is tobacco, asbestos, opioids, PFAS, or social media addiction, plaintiffs in such cases are injured by the acts of numerous companies—which have typically transgressed State or international borders and combined in a fairly undifferentiated way to cause them harm. While sometimes those defendants singled out a specific State, that is not always true, and it is hard to see how deceptive acts on the internet or defective products that are dropped into streams of commerce are somehow more targeted at particular States than interstate pollution.

Even more importantly, these *facts* petitioners identify do not suggest any *test* for the constitutional line. And constitutional preemption needs a test: without one, *ad hoc* rulings invite too much of a judge's preferences into the equation.

2. In *Pork Producers*, several members of this Court recognized the inherent problem with leaving constitutional line-drawing to judges without clear standards. Similar to that case, the heart of petitioners' argument seems to be that it would be problematic if oil companies had to pay for climate change; but surely it is equally problematic if those injured by climate change have to bear the costs? The meaning of the Constitution cannot turn on how a judge weighs which side of that coin is more problematic. *See Pork Producers*, 598 U.S. 356, 381-82 (2023) (Gorsuch, J., joined by Thomas and Barrett, JJ.).

Instead, we have two default rules to answer such questions: first, we inherited a common law tradition, where courts and, more importantly, juries determine where liability rests and who should bear the cost; and "our federalism" means those courts presumptively use state law. When to disrupt those defaults is a policy choice that "usually belong[s] to the people and their elected representatives" in Congress. *Id.* at 382.

Federal common lawmaking does not open for judges the same door that this Court shut in *Pork Producers*. While this Court has emphasized the narrowness of that doctrine—and need not reformulate it here because, as explained above, it does not support petitioners' preemption—it contains some of the same problems identified just above. Presently, federal common law is preemptive where there is a "significant conflict" between "an identifiable federal policy or interest" and "the operation of state law" in an area of "uniquely federal interest." *Boyle*, 487 U.S. at 507. While it is rarely found—because private disputes are not subject to it—those modifiers leave room for mischief. Which federal interests are unique? The Constitution supplies no obvious answer. When is a conflict significant enough? Silence. And how are federal interests even identified, if not codified in a statute—are they the policy positions of whoever occupies the White House at the time?

3. Finally, judicially created preemption is problematic in any case and especially so where it is a constitutional preemption rule. If this Court improperly finds statutory obstacle preemption, Congress can fix the mistake by amending the statute. This corrective may not be available if the Constitution forecloses remedies. *Cf. Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting) ("How could congressional consent lift a constitutional prohibition?"). This Court need not answer Justice Scalia's question here, but it is a good reason to reject petitioners' constitutional argument, which clearly lacks a specific constitutional command.

III. Eliminating All Compensatory Remedies in Interstate Pollution Cases Raises Constitutional Questions Under the Takings Clause.

Parts I and II show that petitioners' rule cannot be located in the Constitution's text, structure, or history, and that it offers no judicially manageable standard for federal courts to apply. But petitioners' theory also has a property-rights problem.

Under petitioners' regime nobody can obtain compensatory relief when they are injured by interstate pollution because: the Constitution implicitly eliminates personal injury and property claims under state law; and Congress implicitly eliminated any federal common law remedies that presumably took their place.[5] There are doctrinal flaws with both premises—and we have addressed the first at length—but the consequences of this argument are both staggering in their practical impact (insofar as they put the burden of interstate pollution entirely on those harmed) and constitutionally troubling.

Common law claims, such as trespass, are intangible but ancient and constitutionally protected property interests. Congress, of course, has broad power to regulate commerce and to preempt state law. But it is also restrained by the Constitution when it exercises that power, including by the Takings Clause of the Fifth Amendment. And as Justice Marshall observed, eliminating core common law claims, such as trespass, "in some general way" raises "serious constitutional questions," particularly where there is

[5] As this dispute did not fall within the previously recognized federal common law and because there is no constitutional basis for creating new federal common law, *see* Part I, this Court need not address displacement. But to the extent this Court disagrees, and federal common law is constitutionally required in this case, it should reserve the question. In *AEP*, federal common law was displaced because Congress addressed both the conduct (source pollution) and the remedy (emission caps) in the Clean Air Act; there is no evidence that Congress has spoken "directly" to the sale or marketing of fossil fuel or compensation for pollution. 564 U.S. at 424.

no “provision for a reasonable alternative remedy.” *Pruneyard*, 447 U.S. at 93-94 (Marshall, J., concurring).

This Court need not decide, as an abstract matter, whether the Constitution forbids Congress from eliminating all compensatory remedies for interstate pollution. It is simply another reason to doubt petitioners’ preemptive rule that rests on two implications, i.e., that the Framers intended to strip States of their ability to provide compensatory remedies and that Congress intended to displace any federal common law remedies as well.

1. The Fifth Amendment provides that no “private property shall be taken for public use, without just compensation.” U.S. Const. amend. V. The purpose of the amendment “is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017) (cleaned up). As Justice Thomas observed, the clause “embodied the Framers’ understanding that property is a natural, fundamental right, prohibiting the government from taking property from A. and giving it to B.” *Kelo v. City of New London*, 545 U.S. 469, 510-511 (2005) (cleaned up).

The Takings Clause protects not only real property, but also “intangible property” interests. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Tort claims—certainly those protecting real property—are intangible property, which this Court has repeatedly afforded protection under the Fifth Amendment’s Due

Process Clause. *See, e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs"). And if a cause of action is "property" for purposes of the Due Process Clause, it is property for purposes of the adjacent Takings Clause.

With respect to what government action constitutes a taking, this Court has tried to separate physical from regulatory takings, though pinning down the difference in cases involving intangible property can be difficult. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("a strict line between a taking and a regulation is difficult to discern or to maintain"); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000). Suffice it to say, a law that eliminates an intangible property right entirely would be problematic under either approach.

2. While we recognize that this Court has yet to hold that any particular instance of preemption violates the Takings Clause, Congress' preemption power cannot be free from this constitutional limitation. Every day, pipelines and railroads that need a right-of-way across private land obtain it through eminent domain and by paying just compensation. But if preemption was not limited by the Takings Clause, there would be an obvious work-around: any legislature wishing to build a pipeline or lay track across a landowner's property could skip condemnation altogether and simply declare that no

trespass claim lies against pipelines or railroads. No one has ever supposed that shortcut available—the Constitution does not offer sovereigns a choice between paying for what they take and legislating the underlying property right out of existence. It requires the former precisely because the latter is not a permissible substitute.

These concerns have been raised before, and this Court has been able to avoid answering them only when it found that Congress had provided an adequate alternative remedy for the tort claims it eliminated.

In *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), there was a challenge to the Price-Anderson Act, which replaced state law recoveries for nuclear accidents with a no-fault federally-administered $560 million fund. The plaintiffs challenged the Act under both the Due Process Clause and the Takings Clauses, principally arguing that the Act's statutory scheme was an inadequate replacement for common law rights.

The Court rejected the constitutional challenges because the Price-Anderson Act provided "a reasonably just substitute for the common-law or state tort law remedies it replaces," *id.* at 88, which involved "uncertain recovery of damages of this magnitude from a [defendant], whose resources might well be exhausted at an early stage." *Id.* at 90-91; *see* *also id.* at 93.[6] *Duke Power* thus suggests that the just compensation for taking one's common law claims action is not some sum certain, but some means of pursuing monetary recovery backed up by a claim against the government.

3. We are not suggesting that every act of preemption constitutes a taking. As this Court correctly recognized, "a person has no property, no vested interest, in any rule of the common law." *Duke Power*, 438 U.S. at 88 n.32. But that principle safeguards Congress's power to alter or supersede a particular rule within a common-law claim—not its power to eliminate the claim itself for an entire category of injury. *See Marbury*, 5 U.S. at 163 ("one of the first duties of government is to" protect individuals from injury).

Congress can, for example, preempt a failure-to-warn claim premised on a pesticide label that EPA has specifically approved; the implication being that Congress has made a substantive determination about the adequacy of the label. *See, e.g.*, *Monsanto Co. v. Durnell*, 146 S. Ct. 2001 (2026). But as this Court's regulatory takings doctrine makes clear, when regulation goes "too far" it becomes a taking. Thus, it would be a different kettle of fish if Congress just declared that nobody could sue a pesticide manufacturer or for pesticide exposure at all.

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[6] *Duke Power* is consistent with Due Process cases where this Court has looked to the existence of alternative remedy where a legislature has eliminated common law recoveries. *New York C. R. Co. v. White,* 243 U.S. 188 (1917); *Middleton v. Texas Power,* 249 U.S. 152 (1919); *Truax v. Corrigan*, 257 U.S. 312 (1921).

But that is how petitioners' theory here operates: it does not modify a rule within the tort theory or foreclose one theory while leaving others open—it would extinguish the claim itself, for an entire class of injuries, leaving no rule and no remedy.[7]

This is precisely the concern Justice Marshall recognized in *Pruneyard*:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

Id. at 93-94 (footnote omitted).

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[7] As respondents explain, Resps. Br. at 28-31, petitioners' constitutional argument suggesting *no* State law can provide compensatory remedies in this case also makes little sense in light of *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). While this Court held that the Clean Water Act impliedly preempted a damages action under an injured State's law where the out-of-state polluter was discharging under a federal permit, it preserved compensatory remedies under the law of the source State. *Id.* at 497-500. Here, petitioners' constitutional argument creates a perverse asymmetry: a defendant regulated under a federal permit faces damages liability under *Ouellette*; a defendant engaged in conduct that is not regulated by Congress—like the fossil fuel *sales* and promotion in this case—would face no liability at all.

Eliminating all compensatory relief for those injured by interstate pollution is enormously consequential. Congress infrequently preempts common law claims, expressly. And we are aware of no preemption regime enacted by Congress that preempts as categorically (insofar as it immunizes all acts regardless of their culpability) or as widely (as it would impact all property and people across the United States) without providing compensation. *Cf. Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (addressing vaccine compensation scheme); *Duke Power*, 438 U.S. at 90-93. Making an entire class of injuries irremediable raises novel and difficult constitutional questions and requires an unmistakable constitutional or congressional command that is plainly missing here.

CONCLUSION

States have a sovereign interest in remedying harm to people and property within their borders. Big, complex problems do not negate that interest. A company that moves defective products across borders through streams of commerce can be held liable under state law, and so too can internet companies that operate in a digital world without borders. The fact that climate change is an important and politically divisive issue is not a reason to relax the ordinary rules governing constitutional interpretation; it is why they must hold.

Respectfully submitted,

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