No. 25-170

IN THE
Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
Petitioners,
v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF CITY AND COUNTY GOVERNMENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

VICTOR M. SHER
Counsel of Record
MATTHEW K. EDLING
MICHAEL BURGER
MARTIN QUIÑONES
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com
matt@sheredling.com
michael@sheredling.com
marty@sheredling.com

Counsel for Amici Curiae

Mosaic - (301) 927-3800 - Cheverly, MD

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INTEREST OF AMICI

Amici are local governments or their legal officers representing more than six million residents in California, Hawaii, Illinois, and New Jersey. All have brought suit against various oil-and-gas companies, and some against the largest industry association. The local governments' complaints allege that those defendants developed extensive, highly accurate knowledge of the threats posed to the climate by the intended use of their fossil fuel products, but for many years failed to warn and affirmatively misled consumers and the public about those severe, widespread harms.

Amici bring varying common law and statutory causes of action under the laws of their respective states. First, most amici allege that the companies' long-running campaigns of misleading marketing, failures to warn, and related deceptive conduct led consumers to purchase and use fossil fuel products in greater amounts and for longer than they would have absent the deception, causing and exacerbating injuries to amici and their residents. Those amici pursue claims including public and private nuisance, trespass, and failure to warn, among others. Because amici recognize that some levels of fossil-fuel use would have been part of the mix of international and domestic energy sources even if the defendants had behaved truthfully, their claims seek to recover for only those injuries flowing from the defendants' wrongful deception—not climate change writ large—through remedies including nuisance abatement within their respective jurisdictions and damages. Second, some amici have brought claims to enforce consumer protection laws that prohibit unfair or deceptive business practices, and seek remedies including statutory penalties and disgorgement. Claims in the latter category are not before the Court in this case and are outside the scope of the Question Presented, as petitioners and their amici agree.

Respondents in this case, the County Commissioners of Boulder County and the City of Boulder, Colorado (together, "Boulder"), assert "two distinct theories of liability." Opp. Cert. at 3. Like amici, Boulder alleges petitioners misled the public about the role their fossil fuel products play in causing and exacerbating climate change, and seek to recover for ongoing injuries caused by that deception. *See ibid.* Boulder also alleges petitioners are liable for "*knowingly* caus[ing] and contribut[ing] to the alteration of the climate" through their production and sale of fossil fuels. *Ibid.* Amici have an interest in protecting their deception-focused claims and theories, which are distinct from Boulder's upstream production and sales claims.

Amici agree with Boulder that none of their claims or theories are preempted. Neither the Clean Air Act ("CAA"), nor the federal common law it displaced, nor anything in the Constitution prohibits states from providing remedies for injuries caused by climate change. However, even if Boulder's theory premising liability on petitioners' knowing contribution to climate harms were foreclosed by some federal rule, their theory premised on petitioners' extensive wrongful promotion and marketing practices would not be. Amici write to explain that petitioners' preemption theories are particularly inapposite as applied to deception-based claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like Boulder, amici allege that their fossil-fuel defendants violated well-established state-law duties by "promoting fossil fuels while allegedly concealing their environmental impacts." *See BP P.L.C. v. Mayor &*

City Council of Baltimore, 593 U.S. 230, 234 (2021). They contend industry leaders like petitioner Exxon Mobil Corp., through internal research and research shared within trade groups, became "aware of the global warming phenomenon caused by their products" as early as the 1960s, and developed a precise understanding of the severe harms their products would cause. *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1183 (Haw. 2023). And like Boulder, amici allege that instead of disclosing their knowledge, the defendant oil-and-gas companies and their surrogates "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. at 3a.

The defendants' deception efforts intensified in the 1980s, during which they not only failed to warn about their products' known dangers, but also "actively worked to discredit scientific evidence that supported the existence of global warming." *Honolulu*, 537 P.3d at 1182. More recently, as the public's understanding of the causes of climate change has begun to catch up with the defendants', those defendants pivoted to a strategy of misrepresenting their fossil fuel products as "clean" or "green" and misrepresenting the extent of their investment in renewable energy. *See, e.g.*, *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144, 148 (D.C. Cir. 2023). Fundamentally, amici's complaints "challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Honolulu*, 537 P.3d at 1181 (quotation omitted).

Most amici assert tort claims including public and private nuisance, trespass, and failure to warn, which seek remedies for climate-change related injuries in their respective jurisdictions caused by defendants' deception. As local governments, amici face enormous present and future costs stemming from climate change phenomena such as rising sea levels, increasingly frequent and intense storms, flooding, heat waves, droughts, wildfires, salt-water intrusion of water resources, and increased coastal water acidification. *See, e.g.*, *id.* at 1182–83. Those claims seek relief including damages and nuisance abatement for injuries flowing only from the incremental increase in fossil-fuel consumption caused by the challenged deception. Some amici also plead enforcement claims under local ordinances that prohibit unfair and deceptive acts and practices ("UDAP claims"); amici's claims under those ordinances do not seek to recover for environmental injuries caused by the defendants' deception and do not require any showing that the deception caused tangible harm. Those claims instead aim to remedy and prevent false and misleading marketing directed at amici's residents, and seek statutory penalties and injunctive relief against further deception.

Boulder's case presents deception-based theories and a theory premised on petitioners' knowing contribution to climate-related harms. Neither are preempted under any of petitioners' theories. Petitioners assert that state law is always preempted whenever it touches any set of facts involving pollution that crosses state boundaries. But because "[n]o constitutional provision says it is preempted," *Hencely v. Fluor Corp.*, 608 U.S. ___, 146 S. Ct. 1086, 1093 (2026), petitioners "must show that the r[ule] is somehow implicit in the constitutional text," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022). They cannot. Petitioners similarly argue that the Constitution necessarily federalizes any set of facts "involving" interstate air pollution, citing cases that applied the displaced federal common law that once governed certain nuisance cases brought by States to enjoin pollution entering interstate streams or drifting across state borders. Petrs. Br. at 24–26. That common law, however, was abrogated by the Clean Air Act, and cannot be resurrected through the Constitution's atextual interstices. And in any event, it never would have applied to deception-based claims.

Petitioners invent a new "extraterritoriality principle" to support their interstate pollution argument, under which every application of State law must be deemed "bounded by the States' respective borders." Petrs. Br. at 24 (quotation omitted). That supposed principle has no basis in the Constitution's text or this Court's precedents. This Court has, to the contrary, repeatedly declined to adopt such a rule because "the legislative jurisdictions of the States overlap" and "it is frequently the case . . . that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). Because "virtually all state laws create ripple effects beyond their borders," the Court recently "decline[d] . . . incautious invitations" to "recognize an 'almost *per se*' rule against the enforcement of state laws that have 'extraterritorial effects.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390–91 (2023).

Even if petitioners' constitutional arguments had merit in some contexts, they would still fail as applied to claims premised on deception. Advertising and consumer protection are well-recognized subjects within the States' police authority, and those types of claims have never been subject to a uniform federal rule of decision. By the same token, claims to remedy deceptive marketing do not implicate States' "competing claims to regulate shared natural resources," *contra* Petrs. Br. at 3, even where the alleged deception concerns a product's environmental impacts.

Petitioners' foreign policy arguments fare no better. The United States' climate negotiations with other countries have addressed whether *national governments* should pay compensation for climate change to other *national governments*. The potential liability of private parties has never been part of the discussion. Even if petitioners' concerns were sufficient to preempt other claims or theories, moreover, they would not preempt claims focused on companies' misleading and deceptive statements. The United States has no foreign policy interest in protecting manufacturers from the consequences of their deceptive marketing. Nor does any such interest arise simply because the allegedly deceptive practices mislead consumers and the public about climate change.

Petitioners' preemption arguments under the Clean Air Act, which are meritless with respect to all of Boulder's claims, *see* Resp. Br. at 43–51, are especially inapposite as applied to deception-based claims. The simple reason is that the "CAA does not concern itself in any way with the acts that trigger liability . . . , namely: the use of deception to promote the consumption of fossil fuel products." *Honolulu*, 537 P.3d at 1205 (quotation omitted). No recognized preemption principle applies, and petitioners' amorphous argument that state law generally conflicts with the Act's "structure" is not a legitimate basis for implied preemption. *See* Petrs. Br. at 44.

ARGUMENT

I. Claims for Climate-Change Related Injuries That Premise Liability on Deceptive Marketing Are Separable and Categorically Different From Claims Premised on Polluting Conduct.

State-law claims alleging that a manufacturer is liable for violating a duty not to mislead consumers about the environmental impacts of its products differ materially from claims alleging that the manufacturer violated either a duty not to pollute or a duty not to introduce polluting products into the marketplace knowing they will cause environmental harms. "Numerous courts have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers" as attempts to regulate or punish the lawful and truthful sale or consumption of fossil fuels. *Honolulu*, 537 P.3d at 1201. If this Court reaches petitioners' merits arguments, it should likewise examine the actual elements of Boulder's claims and affirm. The Court should resist petitioners' suggestion to treat all claims that in some way touch fossil fuels or climate change as analytically indistinguishable.

Claims targeting misleading marketing or consumer deception have always been cognizable under state law. Boulder's deception-based claims here are likewise not preempted by the Clean Air Act or the Constitution because those claims do not, and do not seek to, regulate interstate air pollution, among other reasons.

A. Claims targeting deceptive marketing do not premise liability on the defendants' having emitted pollution or having merely manufactured and sold a product that creates pollution.

The crux of petitioners' constitutional theory is that state law can never "resolve claims seeking relief from the effects of interstate air and water pollution," because those disputes necessarily implicate the interests of states as "coequal sovereigns with competing claims to regulate shared natural resources" that "lack the power to regulate conduct beyond their borders." Petrs. Br. at 3; *see id.* at 13. Even if those premises were correct—and they are not for the reasons discussed in Respondents' Brief and below—deception-based theories do not implicate those concerns.

Deception-based claims do not regulate interstate pollution for the simple reason that they do not "incentivize[]—much less compel[]—Defendants to curb their fossil fuel production or greenhouse gas emissions." *Honolulu*, 537 P.3d at 1201. That is so because in a deception case "liability is causally tethered to [the defendants'] failure to warn and deceptive promotion," and "the source of [the p]laintiffs' alleged injury" is the defendants' "allegedly tortious marketing conduct, not pollution traveling from one state to another." *Ibid.* (quotation omitted). Boulder's deception claims "seek compensation for [petitioners] allegedly tortious conduct" in misleadingly marketing their products, not the release of greenhouse gases from their lawfully sold products. *See* Pet. App. at 21a. The court below therefore correctly "reject[ed petitioners'] contention that [Boulder's] action is, in essence, an attempt to regulate [greenhouse gas] emissions." *Ibid.*

The deception theory Boulder asserts is not novel. Similar theories give rise to claims under "tort causes of action [that] are well recognized," particularly nuisance and failure to warn, and those causes of action are "tethered to existing well-known elements." *Honolulu*, 537 P.3d at 1195. *See, e.g.*, *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 83–85, 101–04 (2017) (affirming public nuisance judgment for injuries caused by deceptive marketing of lead paint); *Delaware v. Monsanto Co.*, 299 A.3d 372, 383–87 (Del. 2023) (reversing dismissal of public nuisance claim for harms caused by deceptive marketing of PCBs). No claims that Boulder or amici assert would require a plaintiff to prove, or a court to find, that greenhouse gas pollution above a certain level is *per se* unreasonable. A judgment for the plaintiff on such a claim thus would "not prevent Defendants from producing and selling as much fossil fuels as they are able, as long as Defendants make the disclosures allegedly required, and do not engage in misinformation." *Honolulu*, 537 P.3d at 1185 (quotation omitted).

A comparison with *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), illustrates the point. The Second Circuit held that New York City's claims were preempted because they sought to hold fossil fuel companies directly liable for the climate impacts caused by "those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world." *Id.* at 86. The City expressly admitted that its "particular theory of the claims asserted . . . d[id] not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation," and relied instead on "a narrower theory that would require Defendants to pay for the severe harms resulting from their lawful and profitable commercial activities." Br.

for Appellant at 19, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018). New York City made clear that its theory of liability did not require any showing that the defendants deceptively marketed their products in New York or anywhere else, or even that they violated any duty of care. *See also ibid.* ("Nuisance and trespass offer a means to reallocate the costs imposed by lawful economic activity."). That is why the Second Circuit held that the City's theory would "effectively impose strict liability for the damages caused by fossil fuel emissions," such that the defendants could not "avoid all [ongoing future] liability" unless they "cease[d] global production [of fossil fuels] altogether." 993 F.3d at 93. A judgment for New York City on that theory, the Second Circuit reasoned, would thus "compel [the defendants] to develop new means of pollution control"; and that result would "regulate cross-border emissions," albeit "in an indirect and roundabout manner." *Ibid.* (quotations omitted).

Numerous courts, including in the decision below, have disagreed with *City of New York*'s preemption analysis, especially with respect to federal common law. Pet. App. 19a–20a; *see also e.g.*, *Honolulu*, 537 P.3d at 1198–1200; *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 202–04 (4th Cir. 2022); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 55–56 (1st Cir. 2022). But even assuming the Second Circuit's holdings were correct, its reasoning does not apply to the materially different allegations and theories at issue in Boulder's deception-based claims.

The United States urged that very distinction between *City of New York*'s theories and deception-based claims in opposing the petitions for certiorari in *Honolulu*. *See* Brief for United States as Amicus Curiae, *Sunoco LP v. City & Cty. of Honolulu*, Nos. 23-947 & 23-952 (U.S. Dec. 10, 2024). Deception-focused claims "differ from those addressed in *City of New York*" and the cases the Second Circuit relied on, because "none of those other decisions involved state-law claims . . . alleging the violation of a duty not to deceive, rather than a duty not to pollute." *Id.* at 19–20. The Second Circuit's reasoning focused on the "specialized body of federal common law [that] imposed on polluters certain duties not to pollute," before it was displaced by the Clean Water Act and Clean Air Act. *Id.* at 16. Neither the former federal common law nor either of the statutes that displaced it "'concern[s] itself' with the kind of deceptive marketing alleged here." *Id.* at 18 (quoting *Honolulu*, 537 P.3d at 1186).

B. Deception-based claims seek relief for injuries caused by the defendants' deception, not all harms for which greenhouse gas emissions are a but-for cause.

The scope of relief sought makes plain the critical distinction between deception-based theories of liability and theories that might regulate emissions. Amici have consistently made clear that they seek relief "only for the effects of climate change allegedly *caused* by Defendants' breach of" state law duties not to deceive. *Honolulu*, 537 P.3d at 1185–86. Amici seek relief for harms flowing from the defendants' deception. They do not seek remedies for all anthropogenic climate change, or even for all injuries caused by the defendants' fossil fuel products.

Amici will prove at trial that the defendants' deception was a substantial cause of amici's injuries, over and above any harms flowing from fossil fuel use that would have occurred *absent* the defendants' wrongful deception. Amici will demonstrate causation and damages in part through expert testimony showing that the defendants' failure to warn, misrepresentations, and misleading promotion and marketing substantially altered consumer behavior and slowed the public's transition from fossil fuels to other primary sources of energy, which in turn exacerbated the plaintiffs' injuries. Analogous causation and damages evidence is frequently used in antitrust litigation, for example, to prove conditions that would have prevailed but for the alleged anticompetitive conduct. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 56 (D.D.C. 2017) (damages calculations in antitrust cases "compare plaintiffs' actual experience" against what it "would have been, 'but for' the antitrust violation") (citation omitted), *aff'd*, 934 F.3d 619 (D.C. Cir. 2019); *LePage's Inc. v. 3M*, 324 F.3d 141, 165 (3d Cir. 2003) (similar). Similar evidence also has been used to show harm to consumers from deceptive marketing in cases concerning lead paint and tobacco, among other products. *See, e.g.*, *ConAgra Grocery Prods.*, 17 Cal. App. 5th at 104 (deceptive promotion of lead paint, for use known to be hazardous, contributed to public nuisance); *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 763 (8th Cir. 2003) (deceptive marketing of light and low-tar cigarettes).

Contrary to petitioners' assertions, such factual determinations do not constitute "a policy determination of the appropriate level of greenhouse-gas emissions." Petrs. Br. at 36. Resolving them will not entail, let alone require, normative decisions about consumer choice, reasonableness of national or sectoral emissions levels, atmospheric greenhouse gas concentrations, or climate policy. As noted above, proving this theory would "not prevent Defendants from producing and selling as much fossil fuels as they are able" so long as they "do not engage in misinformation." *Honolulu*, 537 P.3d at 1185. And the possibility that some companies might voluntarily reduce production or change other business practices in response to a judgment is immaterial. Preemption analysis asks whether state and federal law impose irreconcilable duties. It "does not call for speculation as to whether a jury verdict will prompt [a] manufacturer to take any particular action." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005).

Several amici supporting petitioners assert that it would be impossible for any plaintiff to prove causation between the defendants' misrepresentations and the plaintiff's injuries, or prove injury above a speculative level. *See, e.g.*, Br. Amicus Curiae of Pac. Legal Found. at 11–22 (May 20, 2026); Br. Amicus Curiae of Prof. Richard Epstein, et al. at 24–28 (May 21, 2026). Amici are confident those assertions are wrong, and look forward to proving their cases. But even if the evidence were ultimately inadequate—and no case has advanced far enough to test or even conduct discovery on those points—those unremarkable state-law questions of proof do not rise to constitutional significance. Nothing in federal law or the U.S. Constitution bars amici from putting forth their cases because they involve challenging questions of proof.

Regardless of how the Court decides any of Boulder's claims, the UDAP claims asserted by some amici and other local governments are not implicated by the questions before the Court, as petitioners and their amici agree. Br. Amicus Curiae of Prof. Todd. Zywicki, *et. al* at 3 (May 21, 2026) (UDAP claims "are not within the scope of the questions presented to this Court."). The cities of Chicago and New York have both brought UDAP enforcement claims, for example, that do not "seek[] relief for injuries allegedly caused by the effects of . . . greenhouse-gas emissions on the global climate." *Contra* Pet.I. The cities request civil penalties and other remedies authorized by their respective ordinances prohibiting deception of the cities' consumers, such as injunctions against unfair business practices. *See* Municipal Code of Chi. §§ 2-25-090, 4-276-470, 4-276-480; NYC Code §§ 20-700, 20-703.[1] At oral argument before the Colorado Supreme Court, Exxon's counsel conceded that claims seeking such "traditional relief" under consumer protection statutes would not be preempted under petitioners' theories.[2] In any event, no UDAP claims are before the Court. Boulder initially pleaded UDAP claims under Colorado law, but those claims were dismissed without prejudice on particularity grounds in the trial court, and were not before the Colorado Supreme Court on appeal. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc.*, 2024 WL 3204275, at *32–33, *39 (Colo. Dist. Ct. June 21, 2024); App.141–42.

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[1] The attorneys general of Connecticut, Massachusetts, Minnesota, and Vermont, among others, have also brought UDAP enforcement actions under their respective States' laws. *See Connecticut v. Exxon Mobil Corp.*, No. HHDCV206132568S (Conn. Super. Ct.); *Massachusetts v. Exxon Mobil Corp.*, No. 1984CV03333 (Mass. Super. Ct.); *Minnesota v. Am. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct.); *Vermont v. Exxon Mobil Corp.*, No. 21-CV-2778 (Vt. Super. Ct.).

[2] *See* Oral Argument at 14:45, *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.* (Colo. Feb. 11, 2025) No. 2024SA206, available at app-api.live.coloradojudicial.gov/api/embedded/share-media?id=99ebdc24-f671-40f5-806b-7a5799625a46 ("Colorado has a consumer protection act. Most states do. That's fine as long as the relief that is being sought is the traditional relief.").

II. Even Assuming That Claims Targeting Polluting Conduct or the Production and Sale of Polluting Products Are Preempted, Deception-Based Claims Are Not.

Petitioners acknowledge that their preemption arguments do not rest on any statutory or constitutional text. *See* Petrs. Br. at 23–24, 44–46. That should be the end of the inquiry. "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it," *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988), and it is never sufficient in a preemption analysis "for any party or court to rest on a supposition (or wish) that 'it must be in there somewhere,'" *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (Gorsuch, J., lead opinion). Petitioners' arguments that the Constitution and Clean Air Act *implicitly* preempt Boulder's claims are meritless, and would not apply to deception-based claims in any event.

The Court has repeatedly cautioned against the fast-and-loose preemption analyses petitioners advocate, which rely on "brooding federal interest[s]" and "judicial policy preference[s]" that "should never be enough to win preemption of a state law." *Va. Uranium*, 587 U.S. at 767. A litigant hoping to supplant state law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Ibid.* (quoting *ISLA Petroleum*, 485 U.S. at 503). That is especially true where a party argues the Constitution directly preempts state law, because all "[c]onstitutional analysis must begin with 'the language of the instrument.'" *Dobbs*, 597 U.S. at 235 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 186–189 (1824)).

A. The Constitution does not preempt claims targeting a defendant's deceptive business practices simply because the alleged deception concerns conduct that crosses state borders.

1. The Constitution does not prohibit the operation of state law to redress misrepresentations about interstate pollution.

For the reasons stated in Respondents' Brief, there has never been a constitutional prohibition against state law applying to every dispute potentially bearing on "interstate pollution." *See* Resp. Br. at 23–38. In petitioners' telling, federal law must govern all such cases—no matter the specific parties, claims, or facts—because they implicate the states' "competing claims to regulate shared natural resources," *see* Petrs. Br. at 3, in the same manner and to the same extent as one state suing its neighbor to settle a territorial dispute. That would be a startlingly broad rule, and it lacks any grounding in the Constitution or this Court's precedents. But even if there were some basis for it, petitioners' rule would not reach Boulder's deception-based claims. Claims alleging false advertising or deceptive business practices have never been subject to a uniform federal rule of decision. And deception-based claims like Boulder's are outside the ambit of the defunct federal common law because, unlike in the cases petitioners cite, those claims cannot alter or define the states' respective interests in shared environmental resources.

For much of the twentieth century, this Court recognized federal common law rules of decision "to abate a public nuisance in interstate or navigable waters" or a nuisance caused by air pollution traveling from another state. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) ("*Milwaukee I*"). That body of law first arose in original actions in this Court by a plaintiff State, and was confined to such actions for 60 years. *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 495–96 (1971) ("[T]his Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another.").[3] The Court reasoned that those disputes could only be resolved under a federal rule of decision because they "involve[] a direct conflict between sovereigns," and the States could not constitutionally "supply rules of decision governing disputes implicating their conflicting rights." *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 246–47 (2019) ("*Hyatt III*") (cleaned up).

In adopting federal rules of decision for those cases, the Court analogized interstate pollution nuisance cases to "interstate disputes over borders," "water rights" in interstate streams and lakes, and "the interpretation of interstate compacts," *id.* at 246 (collecting cases). Those types of cases were "recognized as presenting fed-

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[3] *See e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 311 (1981) (nuisance suit by Illinois "to eliminate all overflows and to achieve specified effluent limitations on treated sewage" into Lake Michigan by cities in Wisconsin); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (nuisance suit by New Jersey to "restrain[] the city from dumping garbage . . . off the coast of New Jersey"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (nuisance suit by New York to "enjoin[]" New Jersey from "discharging . . . sewage" into New York Harbor); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (nuisance suit by Georgia to enjoin copper companies from "discharging noxious gas" that drifted across border from Tennessee); *Missouri v. Illinois*, 180 U.S. 208, 242–43 (1901) (nuisance suit by Missouri to enjoin Illinois from "drawing . . . the sewage of the city of Chicago into the Mississippi river" through artificial channels).

eral questions," *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), because they resolved the directly conflicting rights of states against one another. The federal common law of interstate nuisance reached its zenith with *Milwaukee I*, which held that such claims were cognizable not only in this Court but in the district courts, "[t]he rule of decision being federal." *Milwaukee I*, 406 U.S. at 108 n.10.

Petitioners insist that notwithstanding the abrogation of all potentially relevant federal common law by the Clean Water and Clean Air Acts, the Constitution independently prohibits state law from "redress[ing] inherently transboundary issues such as global climate change," regardless of the legal or factual context. Petrs. Br. at 3. They say every case involving interstate pollution represents a zero-sum dispute directly between States that would be decided through war or diplomacy if the States were fully independent sovereigns. *See id.* at 22. But all the federal common law pollution nuisance cases that petitioners cite alleged that the defendant unlawfully polluted a shared air or water resource and sought to enjoin or restrict further pollution. *See* Pets. Br. at 24–26; *see also* n. 3 *supra.* None involved claims like Boulder's that hinged on a duty to disclose or not to deceive consumers, or involved any analogous claim for fraud, failure to warn, or deceptive business practices. Theories of liability and requested relief in deception-based cases do not require anyone, anywhere, to alter their practices emitting pollution or lawfully selling products that pollute—the defendants need only market their products truthfully to avoid future liability. Adjudicating whether private entities have breached that age-old common law duty does not require a court to authorize or prohibit any entity's right to pollute a shared natural resource, much less to allocate such rights among States.

Deception-based claims implicate none of the federal concerns petitioners assert, and in fact seek to vindicate traditional *state* prerogatives. This Court has long recognized that States hold a core "substantial" "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). Petitioners' deception-based liability turns on alleged misconduct this Court has likewise long recognized as traditionally regulated by the States, including misleading advertising, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001), unfair business practices, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989), and consumer fraud, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144–46 (1963). States have never been precluded from redressing deceptive marketing that affects their residents simply because the defendant's business is national in scope. *Cf.* Brief of Alabama, et. al., as Amici Curiae at 22 (May 21, 2026) (arguing that "[r]esolving an interstate controversy under a single State's law is a violation of state sovereignty"). Petitioners and their amici complain that vindicating those core state interests might be contrary to other States' policy preferences, but those concerns are already protected by existing constitutional doctrines as discussed below.

2. The "extraterritoriality principle" this Court once applied in some Dormant Commerce Clause cases has no independent force, and the concerns petitioners raise are adequately addressed by existing constitutional constraints on state choice-of-law rules.

The strict constitutional prohibition against "extraterritorial" application of state law that petitioners advance does not exist. Petitioners ask in essence that the Court constitutionalize choice-of-law determinations normally governed by state law and reduce them to a single rule: no extraterritorial application. But the Court decades ago "abandoned" efforts to "embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws," finding that method left the Court "[w]ithout a rudder to steer us." *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496, 499 (2003) ("*Hyatt I*"). Nothing about this case suggests the Court should return to that rudderless course. Existing guardrails established pursuant to the Commerce, Due Process, and Full Faith and Credit Clauses, among others, already constrain conflicts of law in multi-state cases, with thorough grounding in text and history.

No supposed "extraterritoriality principle" flows from the Due Process or Full Faith and Credit Clauses. The modern rule under both provisions is that "a State's substantive law [may] be selected in a constitutionally permissible manner" where there exists "a significant contact or significant aggregation of contacts, creating State interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 494 (quotation omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985). *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310–13 (1981); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 541–42 (1935). And no such rule flows from the Commerce Clause: This Court recently rejected the proposition "that *any* question about the ability of a State to project its power extraterritorially must yield to an 'almost *per se*' rule under the dormant Commerce Clause" that "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers" and "provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them." *Pork Producers*, 598 U.S. at 375–76. The handful of cases petitioners cite are inapposite. *See* Petrs. Br. at 24. Some of them address Full Faith and Credit questions under the Court's now-obsolete framework. *See Brown v. Estate of Fletcher*, 210 U.S. 82, 95 (1908). Others address due process limitations on personal jurisdiction, *Fuld v. Palestine Liberation Org.*, 606 U.S. 1 (2025), or punitive damages, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). None stands for petitioners' sweeping prohibition against any application of one State's law outside the physical borders of the State.

The rigid extraterritoriality rule this Court has declined to find in the Constitution's words does not lurk implicitly between them, either. There are, of course, "constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice." *Hyatt III*, 587 U.S. at 247. But when this Court has identified implicit constitutional rules, it has done so only after an exhaustive analysis of historical practice. In *Hyatt III*, for example, the Court held that the States enjoy sovereign immunity in each other's courts only after investigating a wide array of sources, including the Declaration of Independence, Blackstone's Commentaries, the Federalist, nineteenth-century treatises, eighteenth-century state and federal jurisprudence, and the Constitutional Convention Debates. *See id.* at 236–48; *see also, e.g.*, *Trump v. Cook*, 609 U.S. ___, 2026 WL 1855613, at *4–6 (U.S. June 29, 2026); *Trump v. Slaughter*, U.S. ___, 2026 WL 1855612, at *7–11 (U.S. June 29, 2026); *Myers v. United States*, 272 U.S. 52, 109–77 (1926) (affirming President's power to remove officers after discussing colonial practice, debates of the First Congress, nineteenth-century treatises, and executive practices "acquiesced in by the whole government for three-quarters of a century").

Historical practice contradicts petitioners' proposed rule that state law may never reach conduct outside the state's physical borders. "Since the founding, States have enacted an 'immense mass' of '[i]nspection laws, quarantine laws, [and] health laws of every description' that have a 'considerable' influence on commerce outside their borders." *Pork Producers*, 598 U.S. at 375 (alteration in original) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 203). For a time, the Court located an extraterritoriality rule in the Commerce Clause, on the premise that "[a] State's power to 'protect the lives, health, and property' of its residents was 'essentially exclusive,'" and "the Federal Government's power 'to regulate commerce among the several states' was 'also exclusive.'" *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring). "But that line has come and gone," and state and federal governments have long shared regulatory authority over commerce once within each other's exclusive domains. *See id.* at 378. The extraterritoriality rule soon became "the most dormant doctrine in dormant commerce clause jurisprudence," *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015) (Gorsuch, J.), with good reason: "In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Pork Producers*, 598 U.S. at 374.

Having interred the extraterritoriality principle derived from the Commerce Clause, the Court should not "revive and rebuild" that principle from ill-defined constitutional interstices "into a weapon far more powerful" than exists in the text itself. *Epel*, 793 F.3d at 1175. "Although extraterritoriality underlies th[e] constitutional imperatives" imposed by the Due Process and Commerce Clauses, among others, "it carries no freestanding weight outside of them." *Snyder*, 735 F.3d at 380 (Sutton, J., concurring). That Boulder's claims may be cognizable under some States' laws and not others' does not alter the calculus or present a problem of constitutional dimensions. Choice-of-law rules exist to address precisely that situation, because "the legislative jurisdictions of the States overlap" and "it is frequently the case" as a feature of the federal system "that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). One State's decision to "use its police powers to protect its citizens from alleged deceptive marketing," *Honolulu*, 537 P.3d at 1207, does not infringe the sovereignty of States that take an opposing position.

The United States as amicus makes the novel assertion that state law may only apply to conduct occurring outside the state where "the [in-state] effects of the out-of-state conduct [are] direct, traceable, and particularized," creating a "legal fiction of constructive presence" by the defendant within the state. U.S. Br. at 22, 25. That is not the law, and the United States has not identified any case support for that proposition since at least 1916. *See id.* at 21–23. That is unsurprising, since this Court has long since held that "[a]s a consequence of the modern practice of conducting widespread business activities throughout the entire United States, . . . more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states." *Watson v. Emps. Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954). The constitutional question is whether there exists a "significant contact or significant aggregation of contacts, creating state interests," not constructive presence in that state, "such that choice of its law is neither arbitrary nor fundamentally unfair." *Hyatt I*, 538 U.S. at 494 (quotation omitted). The Court has long since abandoned "a choice-of-law analysis which, for all intents and purposes, g[ives] an isolated event . . . controlling constitutional significance" where "there might have been contacts with another State . . . which would make application of its law neither unfair nor unexpected." *Hague*, 449 U.S. at 308 n.11. The United States' assertion that state law can only reach a defendant's out-of-state conduct if the defendant "can be treated as constructively, if not actually, present in the State where the effects occur," U.S. Br. at 21, ignores more than a century of contrary jurisprudence.

3. Foreign affairs considerations do not preempt, and in fact support, state laws targeting misrepresentations about a product's impacts on the environment.

Foreign affairs decisions can preempt state law through field preemption where a State intrudes into the field of foreign relations by "establish[ing] its own foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 441 (1968), or through conflict preemption where there is a "sufficiently clear conflict" between state law and an "express federal policy," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 & n.11, 425 (2003). To constitute a "rule of domestic law" with preemptive force, a foreign policy position, "as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellín v. Texas*, 552 U.S. 491, 523–24 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). By the same token, the Court evaluates potential conflicts between state law and foreign policy against "the backdrop of traditional state legislative subject matter." *Garamendi*, 539 U.S. at 425. Otherwise-valid state laws do not impermissibly invade federal prerogatives unless they "produce something more than [an] incidental effect in conflict with express foreign policy of the National Government." *Id.* at 420.

For the reasons explained in Respondents' Brief and detailed by other amici, no foreign policy considerations preempt claims like Boulder's, nor sweepingly preempt all state law that touches on greenhouse gases or other pollution originating outside the United States. *See* Resp. Br. at 41–42. Boulder's claims do not establish any foreign policy and do not conflict with any express foreign policy the United States has adopted.

The United States avers that it "has long opposed the establishment of liability and compensation schemes at the international level for alleged climate change," and that Boulder's claims "create[] new frictions in all international negotiations that implicate climate policies." U.S. Br. at 3, 9, 27; Decl. of Christopher Landau ¶18, Dkt. No. 12, *United States v. Minnesota*, No. 26-cv-2456 (D. Minn. May 11, 2026). Those assertions rest on incorrect premises, and are insufficient to preempt Boulder's claims regardless. The only potentially relevant, Senate-ratified treaty that could constitute domestic law with preemptive force is the 1992 United Nations Framework Convention on Climate Change ("Framework Convention"), May 9, 1992, 1771 U.N.T.S. 107, but that agreement does not set emissions targets for member nations and does not address national or individual liability for harms caused by climate change. The 2015 Paris Agreement, from which the Trump Administration has withdrawn, contains a section concerning loss and damages that also explicitly "does not involve or provide a basis for any liability or compensation" on the part of any member nation or its citizens. Rep. of the Conf. of the Parties on Its Twenty-First Session, ¶ 51, U.N. Doc. FCCC/CP/2015/10/Add.1 (2016). Neither of those international agreements contain any express policy in conflict with Boulder's claims, and the United States has not attempted to show otherwise.

Insofar as the United States has opposed international liability for climate change, it has done so with respect to one *national government's* liability to another *national government*. *See* Decl. of Todd Stern ¶24, Dkt. No. 43, *United States v. Minnesota*, No. 26-cv-2456 (D. Minn. June 18, 2026) (statement by former United States Special Envoy for Climate Change that "[t]he United States' negotiating efforts have never concerned the liability of non-governmental actors" under state law, "or any other compensation that may occur under domestic law"). No treaty or executive agreement to which the United States is a party suggests that private actors may not be held liable under one nation's laws for injuries related to climate change. To the extent Boulder's claims do not align with the President's goals in inchoate negotiations with other countries generally, that does not constitute express foreign policy under this Court's precedents. *See Medellín*, 552 U.S. at 524 (state convictions found by International Court of Justice to be in violation of international law not preempted by presidential memorandum because while President's "interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" are "plainly compelling," they "do not allow us to set aside first principles"). This Administration's general foreign policy objectives do not carry the force of law and cannot preempt Boulder's claims.

Petitioners' arguments are particularly weak with respect to Boulder's deception-based claims. Neither the Framework Convention nor the Paris Agreement speaks to the issue, and the United States has never suggested it has a foreign policy interest in allowing oil-and-gas companies—or companies in any industry—to misrepresent their products' dangers without consequence. To the contrary, express United States foreign policy supports strong measures to protect consumers and prevent deceptive business practices. The free trade agreement between the United States, Mexico, and Canada requires, for example, that "[e]ach Party shall adopt or maintain national consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities," and declares that "coordination between the Parties to address these activities effectively is important and in the public interest" because "fraudulent and deceptive commercial activities increasingly transcend national borders." United States–Mexico–Canada Agreement art. 21.4(2)–(3), Nov. 30, 2018 (entered into force July 1, 2020). As a founding member of the 38-nation Organisation for Economic Co-operation and Development, moreover, the United States is expected to maintain domestic laws that offer "[e]ffective mechanisms to stop businesses and individuals engaged in fraudulent and deceptive commercial practices," as well as "[e]ffective mechanisms that provide redress."[4]

Against the longstanding backdrop of state authority over consumer protection, deceptive business practices, and advertising, state laws addressing mislead-

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[4] *See* OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders 11 (2003), https://www.oecd.org/en/publications/oecd-guidelines-for-protecting-consumers-from-fraudulent-and-deceptive-commercial-practices-across-borders_9789264103573-en-fr.html.

ing marketing of fossil fuels in no way conflict with the United States' foreign policy interests. *See, e.g.*, *Medellín*, 552 U.S. at 532 (rejecting preemption based on presidential action that would "reach[] deep into the heart of the State's police powers").

B. The Clean Air Act Does Not Speak to or Regulate Marketing Practices and Does Not Preempt State Law Claims to Remedy Consumer Deception.

Petitioners argue that the Clean Air Act's "pervasive statutory scheme clearly intended to 'dominate the field' of interstate pollution regulation" such that any "[a]pplication of state tort law in that area" would "be inconsistent with the Act" and thus preempted. Petrs. Br. at 44.[5] Not so. Field preemption "occurs when federal law occupies a field of regulation so comprehensively that it has left no room for supplementary state legislation." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 479 (2018) (cleaned up). In those circumstances, "[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

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[5] The United States has taken the position that it lacks authority under the Clean Air Act to regulate greenhouse gas emissions from mobile sources but retains authority to regulate those emissions from stationary sources. *See* U.S. Br. at 34 n.4; 91 Fed. Reg. 7686 (Feb. 18, 2026). Those assertions are, at minimum, in serious tension with each other, and with the petitioners' and the United States' field and conflict preemption arguments here. Especially given that tension, the executive's views on the Act's preemptive effect on Boulder's claims should be accorded little weight. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

The Clean Air Act does not occupy the field of interstate air pollution, as this Court and the courts of appeals have long recognized. The Act's saving clauses "negate[] the inference that Congress 'left no room' for state causes of action," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (construing Clean Water Act's materially identical saving clauses), and "[t]he Clean Air Act generally seeks to preserve state authority," *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 670–71 (9th Cir. 2003). *See also North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). Stated more directly, the Act makes "the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As for deceptive marketing, the Act does not speak to those concerns at all, much less "occupy [that] field exclusively." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012) (quotation omitted).

Even if the CAA preempted the field of "interstate pollution regulation" as petitioners suggest, Petrs. Br. at 44, deception-based claims would fall well outside that field. Petitioners assert that Boulder's claims regulate interstate pollution because "[i]nterstate emissions" form "a critical step in the causal chain between petitioners' alleged conduct and respondents' alleged injuries." *Id.* at 36. But the field preemption inquiry asks whether state and federal law "are directed to the same subject," *Kurns*, 565 U.S. at 634 (quotation omitted), and deception-based claims are not directed to any subject covered by the CAA. "[N]ot every state law that in some remote way may affect" an occupied field is preempted. *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

This Court has repeatedly rejected similar attempts to expand preempted fields beyond Congress's clear intent. In *Silkwood v. Kerr-McGee Corp.*, for example, the Court held that "a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility" was not preempted, despite "the federal government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power." 464 U.S. 238, 241, 248, 258 (1984). Federal law gave the Nuclear Regulatory Commission "exclusive authority to regulate safety matters" at nuclear facilities, but that field did not encompass all "damages for radiation injuries." *Id.* at 256. To the contrary, even though a punitive damages award involved finding that the defendant was "grossly and wantonly reckless" in exposing the plaintiff to radiation hazards, *see id.* at 245–46 (quotation omitted), the Court rejected the argument that because such an award "punishes and deters conduct related to radiation hazards, it falls within the prohibited field," *id.* at 249.

The Court reached conclusions similar to *Silkwood* in cases concerning workers' compensation awards for injuries at a federally owned nuclear facility, *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179–86 (1988), and claims of retaliation by nuclear facility employees for reporting inadequate radiation safety, *see English*, 496 U.S. at 80–86. In each of those cases, it made no difference for field preemption purposes that nuclear safety practices were "a critical step in the causal chain' leading to the plaintiffs' injuries." *See* Petrs. Br. at 44. So too here: Even if the CAA preempted the field of interstate air pollution, the field does not encompass misleading statements to consumers about that pollution.

There is no conflict preemption either. Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43, or where state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009) (quotation omitted). The latter category, often referred to as obstacle preemption, cannot arise from the mere "possibility that federal enforcement priorities might be upset" or by an "overlap" in subject matter with state law. *Kansas v. Garcia*, 589 U.S. 191, 212 (2020). Rather, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quotation omitted). Neither impossibility nor obstacle preemption applies to Boulder's deception-based claims.

It is obviously possible for companies to comply with their state-law duties not to deceive consumers and with whatever emissions-related duties the Clean Air Act imposes on them. "Defendants could simply avoid federal and state liability by adhering to the CAA and separately issuing warnings and refraining from deceptive conduct as required by [state] law; it is not a 'physical impossibility' to do both concurrently." *Honolulu*, 537 P.3d at 1207 (citation omitted). Obstacle preemption is no better fit. Courts have consistently held that state law claims with a much closer nexus to air pollution regulation do not interfere with or inhibit the Clean Air Act's purposes and objectives.[6] Claims

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[6] *See, e.g.*, *Oxygenated Fuels*, 331 F.3d at 672–73 (state ban on gasoline additive "enacted for the purpose of protecting groundwater" did not interfere with Clean Air Act's "central goal of . . . reduc[ing] air pollution" or "inhibit federal efforts to fight air pollution"); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab.*

targeting deceptive marketing of fossil fuels do not hamper the Clean Air Act's purposes and objectives for the simple reason that the Act "expresses no policy preference and does not even mention marketing regulations." *Honolulu*, 537 P.3d at 1205.

Petitioners' Clean Air Act preemption arguments are not supported by any recognized preemption analysis. They essentially ask the Court to find that Boulder's claims are against the CAA's gestalt, without any further specificity or textual underpinning. But an assertion of statutory preemption "does not justify a 'freewheeling judicial inquiry into whether a state statute [or claim] is in tension with federal objectives,'" because "it is Congress rather than the courts that pre-empts state law." *Whiting*, 563 U.S. at 607 (cleaned up). The Court should reject petitioners' position, especially with respect to deception-based claims.

Litig., 725 F.3d 65, 95–96, 104 (2d Cir. 2013) (state common law claims concerning same gasoline additive not preempted because defendants "could have complied with [the CAA]" and state law duties); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1216, 1219–20 (9th Cir. 2020) (Clean Air Act "precludes state or local governments from imposing any restriction that has the purpose of enforcing emission characteristics for pre-sale, motor vehicles," but does not preempt laws "prohibiting tampering with air pollution control systems in motor vehicles" *after* sale of new vehicle); *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 535, 540–42 (5th Cir. 2013) (municipal ordinance granting "head-of-the-line privileges" to taxicabs running on compressed natural gas "ahead of gasoline-powered taxis in the queue for soliciting passengers" at regional airport not preempted).

CONCLUSION

The Colorado court correctly held that Boulder's claims are not preempted by the Constitution or the Clean Air Act. Claims alleging that oil-and-gas companies have misled consumers about the climate harms their products pose are even further afield and fall within traditional areas of state regulation. The Court should hold that claims targeting deceptive marketing or promotion of products are not preempted, and affirm.

Respectfully submitted,

VICTOR M. SHER
MATTHEW K. EDLING
MICHAEL BURGER
MARTIN QUIÑONES
SHER EDLING LLP
100 MONTGOMERY ST., STE. 1410
SAN FRANCISCO, CA 94104

Counsel for Amici Curiae

August 3, 2026

AUTHORIZED LAW OFFICERS OF AMICI CURIAE CITIES AND COUNTIES

Mary B. Richardson-Lowry
Corporation Counsel
City of Chicago

John D. Nibbelin
County Attorney
County of San Mateo

Victoria J. Takayesu
Corporation Counsel
County of Maui

Brandon W. Halter
County Attorney
County of Marin

Arlene Q. Perez
Corporation Counsel
City of Hoboken

David Chiu
City Attorney
City and County
of San Francisco

Ryan Richardson
Oakland City Attorney

Dana Viola
Corporation Counsel
City and County
of Honolulu

Jason M. Heath
County Attorney
County of Santa Cruz

Shannon Moore
Interim City Attorney
City of Richmond