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 AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including claims for environmental harms and toxic exposures. Throughout its 80-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ. AAJ addresses this Court to urge rejection of Petitioners' radical proposition that judges may set aside traditional state tort causes of action on the ground that state law is "incompetent" to remedy harms that are interstate or international in scope with no indication Congress so intended. To the contrary, Congress expressly provided in the Clean Air Act that the United State work cooperatively with state and local governments to address interstate air pollution.

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

SUMMARY OF THE ARGUMENT

1. Climate change is real. Petitioners and Respondents agree. And carbon emissions have harmed and will continue to harm people and property. Respondents—local governments charged with protecting the health and safety of their residents—have spent and will spend tax dollars to ameliorate their impacts, including rising temperatures, drought conditions, wildfires, and insect infestations. They brought this lawsuit under state law, alleging that producers and sellers of fossil fuels in Colorado, by their fraudulent misrepresentations and deceptive trade practices, have contributed to a public nuisance in their localities. Importantly, they do not ask Colorado courts to ban, limit, or tax the sales of fossil fuels or to impose caps on carbon emissions. Respondents' narrowly focused action seeks to recoup their expenditures to address the impact of this public nuisance on their communities.

Petitioners broadly resist any application of state law to their activities, first asserting that the Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"), preempts the entire field of regulation of interstate air pollution. Failing that, they assert that the "structure of the Constitution" renders the states not "competent" to address disputes involving interstate pollution. Neither rationale supports ousting Colorado law. To the contrary, Congress has clearly intended and provided for federal-state cooperation in this area.

The entire basis for Petitioners' rejection of the municipalities' claims is the supposition that "ambient" air or water pollution is "inherently federal" and has never been a legitimate area of state regulation. In fact, air and water pollution have long been matters for state regulation by common-law actions for the abatement of public nuisances. Respondents' causes of action fall well within the states' broad police power.

For example, state and local governments relied on traditional public nuisance doctrine and their police power to recoup their expenditures to treat health problems traced to years of producers and sellers misrepresenting and minimizing the dangers associated with cigarettes and, later, opioid drugs. The public nuisance doctrine was also a basis for requiring fossil fuel companies to bear the costs of removing leaking underground gasoline storage tanks and in requiring the producers of the gasoline additive MTBE to pay damages to local governments for contamination of public drinking water.

The Clean Air Act does not preempt the municipalities' state tort remedies. Congress did not include an express preemption provision in the statute, and there is no basis for implied preemption. Nor can Petitioners support their claim for implied field preemption. The CAA is not so comprehensive as to demonstrate an implied purpose on the part of Congress to exclude state regulation of greenhouse gases altogether. In fact, Congress provided for state regulation more stringent than EPA standards and included a savings clause preserving the right of any state or political subdivision to enforce any standard that is at least as stringent as the federal one. Importantly, Petitioners can point to no conflict between Respondents' state-law causes of action and any specific provision of federal law, as preemption under the Supremacy

Clause demands. The text of the CAA clearly shows that Congress intended to control and improve the nation's air quality through a combination of state and federal regulation.

2. Petitioners then resort to making the extreme argument that this Court's ordinary preemption principles do not apply: Congressional purpose is not relevant or needed because Petitioners' air pollution activities are shielded from state regulation not by any federal statute or law, but by the structure of the Constitution itself.

In their view, two principles that are implicit in the constitutional structure preclude any liability under one state's law for the climate effects of air pollution that can cross state lines.

First, imposing liability for the costs of addressing altered climate in Colorado does not amount to enforcing Colorado law or policy on other states. It is widely accepted that states can regulate or punish harm to persons or property within their borders, even where these effects were caused by actions outside the state. This Court has upheld awards of punitive damages in such circumstances, for the purpose of deterring tortious misconduct, including by actors in other states. Adopting Petitioners' view prohibiting states from awarding damages that may influence private decision-making in other states would throw wide areas of state law into chaos.

Second, for Colorado to award damages for addressing altered climate in Colorado does not offend the "equal sovereignty" of other states. The fact that other states may suffer similar harms does not diminish Colorado's or any state's authority to provide remedies. Nor does it render such disputes inherently federal. Application of state law to "interstate" disputes is only inappropriate in disputes between states as parties to the lawsuits, not simply where the subject of a private lawsuit can cross state lines.

Petitioners' proposal to authorize federal judges to set aside state-law remedies without regard to the intent of Congress is itself a threat to the federalism that underlies the structure of the U.S. Constitution.

3. Amici supporting Petitioners fear the consequences they imagine will follow if Respondents prevail. They expend a great deal of ink and energy to construct and attack a straw man. But their "strawsuit" is not this case.

First, Respondents' causes of action will not result in ruinous liability for the fossil fuel industry. The local governments are not seeking compensation for all the harm caused by global carbon emissions, only reimbursement for their own expenditures in ameliorating the effects in their communities.

Second, the localities do not seek to limit or impose caps on emissions that could result in a patchwork of standards or conflict with foreign policy or national energy goals.

Third, Respondents are not seeking to levy a "carbon tax" on either producers or consumers of fossil fuel. Whether energy companies choose to pass on liabilities to customers is a private decision, and it is no different than any other statutory or tort liability which is not deemed to be a "tax."

This Court should affirm the Colorado Supreme Court's decision.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT PREEMPT RESPONDENTS' STATE LAW CAUSES OF ACTION FOR REIMBURSEMENT OF THEIR EXPENDITURES TO AMELIORATE THE EFFECTS OF ALTERED CLIMATE IN THEIR COMMUNITIES.

"There is still time to save the world's peoples from the catastrophic consequence of pollution." Those were not the words of anti-fossil fuel activists. They were delivered in a speech by American Petroleum Institute President Frank Ikard at the oil industry's annual meeting in 1965.[2]

The thrust of the litigation before this Court is that the fossil fuel industry knew of the dangers that lay ahead for the American people if they did not alter their pace of consumption of fossil fuels. But the energy industry failed to meet that challenge. It chose profits instead, denying that carbon emissions and greenhouse gases were matters that Americans and their lawmakers needed to be concerned about.

There may yet be time to avert catastrophe. The energy industry has changed. For example, this year's ExxonMobil report on "Advancing Climate Solutions"

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[2] Frank N. Ikhard, *Meeting the Challenges of 1966*, *in* 45(1) AM. PETROLEUM INST., PROCEEDINGS OF THE AMERICAN PETROLEUM INSTITUTE, 1965 12 (1965), https://www.documentcloud.org/documents/5348130-1965-API-Proceedings/.

opens with the declaration that "Climate change is real"[3] and proceeds to outline efforts to reduce carbon emissions "now and well into the future." *Id.* at 25. In the meantime, in many areas it has fallen to local governments to take meaningful steps to address the effects of climate alteration that are already impacting their communities. Respondents here commenced this litigation to recoup at least some of their expenditures in this effort.

A. The Localities' Causes of Action Fall Well Within Traditional Police Powers.

1. Localities' causes of action seek reimbursement for their expenditures in furtherance of their obligations to the health and safety of their residents.

Respondents' primary claim is that fossil fuel companies fraudulently misrepresented and minimized the environmental dangers presented by their products, with the result that they were able to oversell their products and discourage or delay steps to address environmental impact. As a result, local governments, including Respondents, were obliged to address rising temperatures in Colorado, shifting drought and wildfire conditions, insect infestations,

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[3] ExxonMobil, *Executive Summary*, *in* ADVANCING CLIMATE SOLUTIONS: 2026 REPORT 3 (May 2026), https://corporate.exxonmobil.com/-/media/global/files/advancing-climate-solutions/2026/2026-advancing-climate-solutions-report.pdf. *See also* Brief for the Petitioners ["Pet. Br."] 6 ("Like ExxonMobil, Suncor is 'fully committed' to . . . reduc[ing] greenhouse gas emissions.'").

and other dangers to public safety and health. *See* Amended Complaint ⁋⁋ 145–96.

The damage to persons and property are and will be severe. *Id.* at ⁋⁋ 139–44. But Respondents do not seek compensatory damages for the harm to residents. Nor do they seek to enjoin or limit carbon emissions.[4] The gist of Respondents' lawsuit is narrow and focuses on their local governmental role. The local governments assert that they are duty-bound to protect their residents' health and safety, and in their Amended Complaint they detail the numerous ways they have expended resources to monitor, mitigate, and adapt to the effects of altered climate in their communities *Id.* at ⁋⁋ 221–321.

The localities allege that those costs "should be shared by Exxon and the Suncor Defendants because they knowingly caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate alteration, while concealing and/or misrepresenting the dangers associated with fossil fuels' intended use." *Id.* at ⁋ 5.

2. Respondents' state-law causes of action come well within the states' traditional police power.

Petitioners insist that "interstate pollution is an

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[4] *See id.* at ⁋ 542 ("Plaintiffs do not seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind.").

inherently federal area in which state law cannot govern." Pet. Br. 21; *id*. at 27 ("States have always lacked the authority to regulate interstate pollution."). To the contrary, as the Colorado Supreme Court correctly held, "the nuisance abatement issues and the other torts that Boulder has alleged in this case have been deemed traditional *state* law matters implicating important state interests." *County Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, 586 P.3d 161, 170–71 (Colo. 2026). Respondents' claims "involve areas of traditional state responsibility." *Id.* at 174.

"Throughout our history," this Court has observed, "the several States have exercised their police powers to protect the health and safety of their citizens," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), and "States traditionally have had great latitude under their police powers" to do so. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). It is well settled, this Court recently noted, "that common-law duties and standards of care form part of a State's authority to regulate safety." *Montgomery v. Caribe Transp. II, LLC*, 146 S. Ct. 1199, 1204 (2026). States have a strong interest in providing a remedy for wrongful harms to their citizens "as well as enforcing their own safety regulations." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368 (2021).

The public nuisance cause of action is an important element of "[t]he American law of torts [which] aims to protect all citizens from the risk of physical harm to their persons or to their property." *Univ. of Denver v. Doe*, 547 P.3d 1129, 1145–46 (Colo. 2024). At common law in England and in state courts in America "smoke, or offensive vapors" were widely viewed as actionable public nuisances warranting injunctive relief. *See Ross v. Butler*, 19 N.J. Eq. 294, 299–302 (Ch. 1868) (collecting cases).

The state of Colorado adheres to the widely accepted definition of public nuisance in Restatement (Second) of Torts § 821B(1), as "an unreasonable interference with a right common to the general public." *Goodman v. South Suburban Park & Recreation Dist.*, No. 24CA1946, 2025 WL 3033756, at *5 (Colo. App. Oct. 30, 2025) (quoting *Docheff v. City of Broomfield*, 623 P.2d 69, 71 (Colo. App. 1980)). An interference is unreasonable if it injuriously affects the safety or health of the public. *Docheff*, 623 P.2d at 71; *Echave v. City of Grand Junction*, 193 P.2d 277, 280 (1948).

Traditionally, as the Colorado Supreme Court has observed, the state-law remedy of remediation of a public nuisance has been viewed as "essentially an exercise of the police power to protect public health and safety." *Bd. of Cnty. Comm'rs of Cnty. of La Plata v. Colorado Dep't of Pub. Health & Env't*, 488 P.3d 1065, 1074 (Colo. 2021) (quoting James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RES. & ENV'T 29, 29 (1990)).

State and local governments relied on this "centuries-old doctrine" to recoup billions of dollars in public funds that were spent to combat the effects of tobacco addiction and opioid addiction. Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 705–06 (2023). In the 1990s state attorneys general filed lawsuits against major tobacco companies seeking reimbursement for the public funds spent, mainly through Medicaid, to treat smoking-related illnesses. Not unlike the municipalities in this case, the states argued that the tobacco companies had known about and concealed the health risks and addictive nature of nicotine and should bear much of the cost. The companies ultimately reached a $246 billion agreement with all 50 states to resolve their reimbursement claims. *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 304–05 (2021).

Throughout the 2010s, states, cities, and counties across the country filed suits against opioid manufacturers, distributors, and pharmacy chains, arguing these companies had fueled a public health crisis by overselling and fraudulently minimizing addiction risks, requiring governments to spend billions of dollars for additional healthcare, law enforcement, foster care, and addiction treatment. *See, e.g.*, *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 938 (N.D. Cal. 2022). The bulk of the federal cases were consolidated into one of the largest MDLs in U.S. history. *See* Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136 (2018). States are in the process of implementing structures and plans to distribute at least $50 billion awarded to states and localities from opioid-related lawsuits. *See State Opioid Settlement Spending Decisions*, NAT'L ACAD. FOR STATE HEALTH POL'Y, http://nashp.org/state-tracker/state-opioid-settlement-spending-decisions/ (last updated Oct. 1, 2025).

The public nuisance doctrine was also central to early litigation efforts to require former gas station owners to pay for damage and remediation of public nuisance caused by leaking, abandoned, underground gasoline storage tanks. *E.g.*, *Exxon Corp. v. Yarema*, 516 A.2d 990, 993 (Md. App. 1986). *See* Michael J. Maher, *Common Law Liability for Leaking Underground Storage Tanks*, 13 N. ILL. U. L. REV. 519 (1993); David W. Ziegele & Jay A. Evans, *Regulating Underground Storage Tank Systems*, 27 TRIAL 34 (Sept. 1991).

Protection of consumers from deceptive commercial conduct and misrepresentation of consumer products is also an area in which states are traditionally authorized to regulate pursuant to their broad sovereign police powers. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (holding states have "traditional power to enforce . . . regulations designed for the protection of consumers"); *Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) ("[C]onsumer protection laws such as . . . false advertising law . . . are within the states' historic police powers and therefore are subject to the presumption against preemption.").

When local governments sued the manufacturers and distributors of a gasoline additive for contamination of ground water, a subject addressed in the CAA, the Second Circuit upheld a substantial verdict under state public nuisance law, stating that the action fell "well within the state's historic powers to protect the health, safety, and property rights of its citizens" so that in this case "the presumption that Congress did not intend to preempt state law tort verdicts is particularly strong." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013).

This Court should hold that Colorado law continues to govern Respondents' claims unless Congress has made its intent to supplant it with federal law crystal clear

B. The Clean Air Act Does Not Preempt Respondents' Causes of Action.

Petitioners do not make a supportable argument that the CAA preempts the localities' state-law remedies. *See* Pet. Br. 43–47. Nor can they. The Colorado Supreme Court correctly held that the CAA neither expressly nor impliedly preempts Respondents' state-law causes of action. 586 P.3d at 170–72.

Petitioners, however, appear to renew their contention that the CAA ousts Colorado law on the basis of implied field preemption. Specifically, Petitioners contend, the CAA "sets forth a pervasive statutory scheme clearly intended to 'dominate the field' of interstate pollution regulation." Pet. Br. 44 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)). State law causes of action are barred because "here, Congress has occupied the entire relevant field of regulation." *Id.*

This line of argument fails as well—for at least three reasons.

First, some members of this Court have become "skeptical" of claims of field preemption "in the absence of a congressional command." *Kansas v. Garcia*, 589 U.S. 191, 214 n.* (2020) (Thomas, J., concurring). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S.

625, 640–41 (2012) (Sotomayor, J., concurring in part and dissenting in part).

Second, Petitioners pay no heed to this Court's repeated command that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic,* 518 U.S. at 485. In this case, Congress gave no textual signal that its purpose was to occupy the entire field of interstate air pollution.

Nor did Congress enact a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). The CAA explicitly authorizes emissions standards for stationary and mobile emitters of greenhouse gases, but makes no provision for the producers or sellers of the petroleum products that produce the emissions or for liability for misrepresentation of petroleum products or for the creation of a public nuisance. Even within the field of regulating emissions, the CAA does not evince an intent to exclude a state role. The Tenth Circuit, in an earlier review of this case, reminded Petitioners that the CAA "is designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions." *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1263 (10th Cir. 2022) (citing 42 U.S.C. § 7416).

That section, entitled "Retention of State authority," states:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt

> or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except . . . any emission standard [less stringent than the federal standard.]

42 U.S.C. § 7416. This provision is often referred to as the CAA's "states' rights savings clause." *Bell v. Cheswick Generating Station*, 734 F.3d 188, 191 (3d Cir. 2013).

Third, Petitioners describe no conflict between any provision of the CAA and Respondents' causes of action. As Justice Thomas has explained, federal preemption of state law is a solution to a problem inherent in our federalist system in which persons are subject to two sovereigns, and "the overlapping, dual jurisdiction of the Federal and State Governments makes it necessary to decide which law takes precedence." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 610 (2019). *See also Martin v. United States*, 145 S. Ct. 1689, 1700 (2025) (Gorsuch, J.) ("The Supremacy Clause supplies a rule of decision when federal and state laws *conflict*.") (citing U.S. Const., Art. VI, cl. 2) (emphasis added).

The text of the Supremacy Clause itself makes clear that conflict is its crucial element.[5] Justice

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[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

Thomas has explained, the term "notwithstanding" denotes the constitutional presumption that "state law applies unless it conflicts with federal law." *Parker*, 587 U.S. at 610 (citing *PLIVA*, *Inc.* v. *Mensing*, 564 U. S. 604, 617–18 (2011)). *See also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) ("Under the Supremacy Clause, preemption occurs if *and only if* state law contradicts a valid rule established by federal law.") (emphasis added).

In this case, Petitioners can point to no federal-state conflict. As noted earlier, the CAA imposes no regulations on producers or sellers of emissions-producing products. Moreover, the statute's emissions regulations clearly allow states to enforce their own more stringent emissions standards. This Court has recognized that, even in fields heavily regulated by federal law, such provisions reflect the view of state tort remedies as "complementary," augmenting the federal government's finite resources and adding greater access to information. *Wyeth v. Levine*, 555 U.S. 555, 578–79 (2009). Indeed, "[p]arallel state tort liability is an enforcement tool that can have a salutary information-forcing effect, and that, in turn, helps ensure the effectiveness of [federal regulation]." *Monsanto Co. v. Durnell*, 146 S. Ct. 2001, 2023 (2026).

The Tenth Circuit was surely correct in concluding that "[t]he purpose of the [CAA] is to control and improve the nation's air quality *through a combination of state and federal regulation*." *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1118 (10th Cir. 2009) (emphasis added).

II. THE "STRUCTURE OF THE CONSTITUTION" DOES NOT PREEMPT THE MUNICIPALITIES' STATE-LAW REMEDIES TO RECOVER EXPENDITURES TO COMBAT THE EFFECTS OF CLIMATE ALTERATION IN THEIR COMMUNITIES.

A. Petitioners Propose to Preclude State Remedies for Harms That Can Cross State Lines Unless Expressly Authorized by Congress.

Implicitly acknowledging that this Court's ordinary preemption jurisprudence does not support setting aside Respondents' state-law remedies, as the Colorado Supreme Court squarely held, Petitioners urge this Court to adopt a radical theory for rejection of state law without any indicia that Congress so intended or any conflict between federal law and the state remedy at issue.

Petitioners posit that the municipalities seek to recover damages "caused by the effects of interstate greenhouse-gas emissions," which they characterize as "ambient." Pet. Br. 21. Because ambient air and water pollution "can readily flow from one State to another," *id.* at 27, "interstate pollution is an inherently federal area in which state law cannot govern." *Id.* at 21. Indeed, "State law is not competent to govern those claims." *Id.*

Petitioners' proposal to displace state law is not based on conflict with any act of Congress or congressional purpose. Nor do Petitioners assert that the state-law remedies sought by Respondents offend any particular provision of the Constitution. Petitioners rely instead on a judge-made rule that "arises from the fundamental structure of the Constitution." *Id.* Because the subject of this dispute is pollution that can travel interstate, remedies for injuries are an "inherently federal area." *Id.* Petitioners therefore urge this Court to hold that the local governments' claims "fall squarely within the inherently federal area of interstate-pollution disputes that are foreclosed by the Constitution." *Id.* at. 39.

Petitioners turn the federalist scheme on its head. As Chief Justice Rehnquist made clear, the fundamental idea that "'[t]he Constitution created a Federal Government of limited powers,'" while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) (quoting *New York v. United States*, 505 U.S. 144, 155 (1992)); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Petitioners candidly admit that this shockingly broad intrusion into the authority of local governments to protect the health and safety of their communities has no basis in the Constitution's text. They purport to find judicial authority to oust state law in two vaguely defined "principles" that are "not spelled out in the Constitution" but are "nevertheless implicit in its structure." Pet. Br. 23 (quoting *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 247 (2019)). They describe these as the "extraterritoriality principle" and the "equal sovereignty principle." *Id.* at 23–24. Petitioners wildly distort this Court's precedents in their effort to persuade this Court to adopt their prescription for judicial lawmaking.

B. Recovery of Expenditures to Ameliorate the Public Nuisance Effects of Carbon Emissions Due in Part to Petitioners' Fraudulent Misrepresentations Does Not Amount to Enforcement of Colorado Law Outside of Colorado.

Petitioners contend that imposition of tort liability in this case would allow Colorado "to exercise 'extra territorial jurisdiction,'" that is, to "regulate and control activities wholly beyond its boundaries." *Id.* at 24 (quoting *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954)). Petitioners' version of the "extraterritoriality doctrine" has no basis in this Court's precedents and, if implemented, would be wholly unworkable.

1. *States may regulate activities that cause harm to persons or property within their boundaries, even if those activities originate in other states.*

Petitioners contend that each sovereign state can regulate or punish conduct within its borders as it sees fit, but not harmful conduct that crosses state lines. *Id.*

In a case that could be a law school hypothetical come to life, the Supreme Court of Georgia held that a man standing on the South Carolina shore of the Savannah River and fired a pistol at a man across the border in Georgia could be indicted under Georgia law. *Simpson v. State*, 17 S.E. 984, 986 (Ga. 1893). The court's survey of authorities demonstrated "beyond question that a criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter." *Id*. In fact, the matter was "too well established for serious controversy." *Id*.

That view is reflected in the Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965), which states:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . . the conduct and its effects are . . . constituent elements of a crime or tort.

See also Ronald E. Bornstein & N. Elaine Dugger, *International Regulation of Insider Trading*, 1987 COLUM. BUS. L. REV. 375, 401–02 (1987).

This "effects" rule is widely accepted by U.S. courts. Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT'L & COMP. L. 631, 648 (2016). *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

Oddly, Petitioners cite as authority for their contrary view two well-known decisions by this Court that undermine their position. *See* Pet. Br. 24 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

In *Gore*, BMW's New Jersey subsidiary-distributor repainted cars that had been damaged during transport from Germany, then shipped them to dealers to be sold to customers as "new." Plaintiff Gore purchased his BMW in Alabama and subsequently sued for fraud under Alabama law. This Court upheld the jury's award of compensatory and punitive damages based on the diminution in the car's value, despite the fact that the subject of the dispute crossed state lines and the award punished the BMW distributor for its out-of-state conduct. "No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car." *Gore*, 517 U.S. at 568–69. By contrast, the Court held that Alabama could not award punitive damages for similar non-disclosures in sales to other BMW customers in other states "that had no impact on Alabama or its residents." *Id*. at 573.

In *State Farm*, plaintiffs obtained an award against their insurer for fraud and bad faith in the insurer's handling of their auto accident litigation. This Court reiterated the position it enunciated in *Gore*: A state can punish out-of-state conduct that causes in-state harm, but that activity "must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422.

Colorado's decision to allow Colorado local governments to pursue recovery of expenses to address climate conditions in Colorado caused in part by Petitioners' conduct falls well within the scope of Colorado's sovereign authority to remedy harms to its citizens that originate beyond its borders.

2. The indirect effects of a state's regulation on the decisions of private parties in other states does not amount to extraterritoriality.

An award of damages to Respondents in this case would not implicate Petitioners' extraterritoriality concerns for an additional reason: Although a liability award may incentivize an out-of-state defendant or others to alter their conduct, such indirect effects do not constitute an impermissible attempt to regulate or control activities wholly beyond Colorado's borders.

This Court has rejected the idea that state liability rules are impermissibly extraterritorial merely because they influence private decision making and thus have "a practical effect of controlling commerce outside the state." *National Pork Producers Council v. Ross*, 598 U.S. 356, 371–76 (2023). Such a rule would cast doubt on "all manner of" widely accepted state laws, including environmental and tort laws that may have an impact on the decisions and conduct of companies in other states or other nations. *Id.* at 374.

Product liability cases, for example, very often arise out of injury to a consumer by a product that was designed and manufactured in another state. Damage awards not only compensate the wrongfully harmed plaintiff, but also incentivize the defendant and other manufacturers to alter the unreasonably dangerous design, add warnings, or otherwise invest in safety. This is a foundational principle of state products liability law, *see, e.g.*, William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119–20 (1960), and of negligence law generally. *See* Guido Calabresi, *The Costs of Accidents*

68–129 (1970) (contrasting governmental regulatory mandates with the indirect influence of "general deterrence" exerted by tort law to incentivize safety measures).

Voluntary adoption of safety measures by a company in State B in response to a tort award in State A does not amount to State A imposing its law on State B. Nor would a verdict in Respondents' favor in this case, if it led energy companies in other states to invest in lower-emissions alternatives. It is simply the normal operation of tort liability in our system of federalism.

C. Application of State Law to Decide Disputes Between Private Parties Concerning Interstate Pollution Does Not Offend the Principle of Equal Sovereignty.

Petitioners also contend that Colorado law is incompetent to impose liability in this case based on the "fundamental principle of equal sovereignty among the States," a limit on state sovereignty that is "implicit" in the structure of the Constitution. Pet. Br. 23. Petitioners explain that because air pollution respects no political boundaries, allowing Colorado to apply its law to this national problem would result in one "State having more sovereign power than another," *Id.* at 22 (quoting *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011)).

For that reason, Petitioners assert, interstate air pollution disputes are "meet for federal law governance." *Id.* at 22 (quoting *American Elec. Power*, 564

U.S. at 422), and "inappropriate for state law to control." *Id.* at 28 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

Petitioners take precisely the wrong message from this Court's decision in *Texas Industries*. The mere fact that private activity is within the federal government's authority to regulate interstate commerce does not oust state regulation. The full passage cited by Petitioners confirms that state law is inappropriate in interstate disputes *between states* as parties:

> [N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, . . . federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, [and] *interstate . . . disputes implicating the conflicting rights of States*.

451 U.S. at 641 (emphasis added).

Petitioners' heavy reliance on *Hyatt* is significantly inapt. That case did not involve state regulation of the interstate activities of private parties; it concerned implied constitutional limits on states *as parties* in litigation. The *Hyatt* Court held that a state cannot be sued in the Courts of another state. 587 U.S. at 233. Other precedents of this Court cited by Petitioners confirm that the "interstate disputes" for which state law is inappropriate are *lawsuits between states*. *See* Pet. Br. 25 (citing *Missouri v. Illinois*, 200

U.S. 496 (1906); *Georgia v. Tennessee Copper Co*., 206 U.S. 230, 236 (1907)[6]; *New York v. New Jersey*, 256 U.S. 296, 301–02 (1921); *North Dakota v. Minnesota*, 263 U.S. 365, 373–74 (1923); *New Jersey v. New York*, 283 U.S. 473, 483 (1931); *Illinois v. Milwaukee*, 406 U.S. 91, 107 n.9 (1972)).

The application of state law in such disputes is inappropriate not because of the interstate nature of the subject of the dispute, but because, in the same way that federal law applies in suits concerning the location of the border between two states, one state should not have the advantage of applying its own law. *Cissna v. Tennessee*, 246 U.S. 289, 295 (1918).

Nor does this Court's decision in *American Electric Power* offer support for the proposition that the "ambient" nature of air and water pollution render the states incompetent to adjudicate litigation between non-state parties. The Court indicated that, to the contrary, state law of public nuisance may provide a remedy for interstate pollution. 564 U.S. at 429. Because the parties had not briefed the issue, the Court reserved the question of whether plaintiffs could recover under state law public nuisance causes of action. *Id.*

This Court should answer that question in the affirmative and reject the invitation to drastically expand the judicial power to jettison state law remedies where there is no showing that Congress so intended or that the remedies conflict with federal law.

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[6] Justice Holmes pointedly observed for the Court, "This is a suit by a state for an injury to it in its capacity of quasi-sovereign." 206 U.S. at 237.

This Court should preserve the federal-state balance it has struck in its ordinary preemption jurisprudence.

D. Petitioners' Proposed Expansive Federal Judicial Power to "Displace" State Law Remedies Itself Violates the Structure of the Constitution.

The system of federalism that is the key characteristic of our constitutional republic is not enforced by statute or any specific provision in the Constitution, nor even by this Court's judicial authority. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). Rather, the autonomy of the states is "properly protected by the procedural safeguards inherent in the structure of the federal system," which gives the states representation in Congress. *Id.* at 552. Indeed, the Founders relied on "the structure of the Federal Government itself" to allow the states to guard against federal overreach. *Id.* at 551. The states can protect their interests on the floor of Congress. But for that safeguard to be effective, courts must insist "that the historic police powers of the States" not be set aside "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

Courts have found preemptive intent in the statutory text or implied where there is direct conflict between state and federal law. But Petitioners look to no statutory or constitutional text; they invoke only a vague notion that the federal government has an overriding interest in applying its law when the subject of the litigation is one that can cross state lines.

This Court has made it clear that calling upon "some brooding federal interest" or "judicial policy preference" falls far short of protecting our constitutional federalist structure. *Kansas*, 589 U.S. at 202 (quoting *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. 761, 767 (2019) (Gorsuch, J.)). Petitioners' proposal that federal judges set aside state remedies on that unmoored basis would undermine proper judicial respect for the States as "'independent sovereigns in our federal system,'" *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic*, 518 U.S. at 485), and invite "unintended encroachment on the authority of the States." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

In sum, "[t]here is no federal preemption *in vacuo*," *Kansas*, 589 U.S. at 202 (quoting *Puerto Rico Dep't. of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)), and this Court should reject Petitioners' invitation to create it in this case.

III. THE DIRE WARNINGS VOICED BY PETITIONERS' SUPPORTING AMICI ARE GROUNDLESS AND DO NOT SUPPORT DENYING RESPONDENTS THE RIGHT TO RECOUP REASONABLE EXPENDITURES TO AMELIORATE THE EFFECTS OF CLIMATE ALTERATION.

Petitioners' supporting amici offer a variety of arguments why fossil fuel corporations should not be required to reimburse local governments for their expenditures to combat the effects of climate alteration.

But rather than address the lawsuit detailed in Respondents' Amended Complaint and upheld by the Colorado Supreme Court, amici expend a great deal of ink and effort to construct and then knock down a straw man lawsuit. But their strenuous refutation of this "strawsuit" provides no support for Petitioners' novel preemption theory. Indeed, most of their dire warnings are simply not this case.

A. Permitting Respondents' Causes of Action to Proceed Will Not Result in Ruinous Liability.

For example, several amici warn that liability will impose extreme costs on the fossil fuel industry and harm on the wider economy. The brief submitted by the Atlantic Legal Foundation (ALF) states that local governments "are necessarily seeking damages for harms attributed to all interstate and international emissions combined." Brief of Atlantic Legal Foundation, et al. as Amici Curiae Supporting Petitioners at 11. ALF forecasts "staggering" costs if each of the 90,837 governments in the U.S. can "pursue its own multimillion-dollar state-court damages suit against the nation's largest fossil fuel energy companies" inflicting "crushing burdens and crippling litigation costs." *Id.* at 18.

Similarly, the Washington Legal Foundation (WLF), joined by small business organizations, echoes the prediction that 90,837 governmental units will pursue lawsuits against energy companies, along with, perhaps, "every person in the Nation." Brief of Washington Legal Foundation, et al. as Amici Curiae Supporting Petitioners at 17. Judgments would "run into the trillions," ruining the entire fossil fuel industry and with it the United States and world economies. *Id*. at 17–18. *See also* Brief for the American Petroleum Institute as Amicus Curiae Supporting Petitioners at 26 ("The damages requested by Respondents and other plaintiffs across the country could severely impact the energy industry and cause ripple effects throughout the American economy."); Brief of General (Retired) Richard B. Myers, et al. as Amici Curiae Supporting Petitioners at 5 ("Respondents seek to impose ruinous liability on Petitioners for their production and sale of these essential products.").

If Respondents were seeking compensation for all damages caused by climate alteration, the total could be great indeed. But that is not this case. *See* Amended Complaint ⁋ 542 ("Plaintiffs **do not** seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind.") (emphasis in original).[7] The local governments seek reimbursement for amounts that have or will be spent to mitigate the effects of climate alteration. *Id.* at ⁋ 532. These claims do not represent new societal costs, but rather a shifting of the burden from taxpayers to the entities that played a role in making those expenditures necessary. Because many units of local government are small and command limited budgets, it cannot be assumed that many will be in a position to seek to recoup large expenses. More importantly, to the extent that an ounce of expenditure to soften the impact of climate alteration is successful in preventing

[7] Although Petitioners do seek compensatory damages for harm to their local-government property, *see* Amended Complaint ⁋⁋ 532–33, neither party addresses this claim.

much greater damage, the U.S. economy will gain a net benefit.

B. Fears of a "Carbon Tax" Are Unwarranted.

In a related argument, some supporting amici breathlessly declare that in this litigation and similar suits across the country, "state and municipal executives are attempting to use the judiciary to impose what amounts to a carbon (dioxide) tax." Brief of Government Accountability & Oversight as Amicus Curiae Supporting Petitioners at 11. *See also id.* at 2 (These suits "represent nothing less than a campaign to impose the equivalent of taxation."); Brief of Former State Solicitors General as Amici Curiae Supporting Petitioners at 9 (alleging public nuisance litigation is the result of a well-funded campaign aimed at "imposing a carbon tax."); Brief of National Association of Manufacturers as Amicus Curiae Supporting Petitioners at10–12 (similar).

True, the advisability of a carbon tax is a matter for the legislative branch and not this Court. But that is not this case. Amici provide no evidence that energy companies would add the cost of liability awards to the price of petroleum products or whether the amount would be more than miniscule. In any event, governments impose taxes on products, not private manufacturers who price their products to include their costs. The notion that a tort award (or an award for breach of contract, antitrust violation, or civil rights violation) may be viewed as an impermissible "tax" on the product or service is a wholly unworkable fiction.

C. Fears of Undermining National Security or National Energy Goals Are Unwarranted.

Several amici postulate that allowing Respondents to proceed with their state law claims will lead affected energy companies to reduce their production of fossil fuels, with adverse effects on American national priorities. For example, the brief filed by retired General Richard B. Myers and retired Admiral Michael G. Mullen states that damage awards in these lawsuits would "force reductions" in the production of fossil fuels and "pose a grave threat to our national security because any future damages award will necessarily restrict fuel supply" and reduce the availability of fossil fuels to the military. Brief of General (Retired) Richard B. Myers, et al. at 10–11. *See also id.* at 12 (arguing Respondents' complaint risks "making oil and gas prohibitively costly and scarce.").

The National Association of Manufacturers' brief argues somewhat differently that when American oil companies cut back, foreign companies in the Middle East, North Africa and Latin America take advantage "by cranking up" production. The result is not shortage and high prices, but rather dependence on "authoritarian leaders and politically unstable countries." Brief of National Association of Manufacturers at 24.

Again, that is not this case. "Plaintiffs do not seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere." Amended Complaint ⁋ 542. That liability might indirectly influence the oil market is unremarkable. This Court has explained that a neutral state law of general applicability is not invalid even if it exerts effects on decision making in other countries. *Medellin v. Texas*, 552 U.S. 491, 531 (2008); *cf. American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425–26 (2003) (preempting a California insurance statute targeting European countries, but distinguishing it from "a generally applicable 'blue sky' law"). Indeed, the notion that state liability laws must not be allowed to affect decisions by other nations, however indirectly, would essentially cripple America's civil justice system.

D. Fears of Difficulties in Obtaining Liability Insurance to Cover the Local Governments' State-Law Claims Does Not Warrant Federal Preemption of Those Claims.

The American Property Casualty Insurance Association and other insurance-related associations complain that insurers cannot rationally set premiums for policies covering "unbounded and indeterminate . . . liabilities that states and municipalities across the country may seek to impose for climate change." Brief of American Property Casualty Insurance Association, et al. as Amici Curiae Supporting Petitioners at 10.

Setting aside that governmental climate alteration expenditures for which they might seek reimbursement should be ascertainable, those expenditures are designed to mitigate the damage that property-casualty insurers also cover. Significantly, the insurers highlight a KPMG article stating that the insurance industry is already facing difficulties covering climate-change losses due to "[s]evere convective storms, flooding, wildfires, windstorms, and earthquakes." *Id.* at 14–15, n.8. One might safely surmise that measures designed to mitigate these impacts would be welcome in many quarters of the property-casualty insurance industry.

CONCLUSION

For these reasons, the decision by the Colorado Supreme Court should be affirmed.

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Respectfully submitted,

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