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 *AMICI CURIAE* FORMER U.S. GOVERNMENT OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. officials with decades of experience playing leading roles in climate change policy and negotiations under both Republican and Democratic administrations.[2] Because *amici* consider climate change to be an urgent global problem, they have collectively spent decades developing federal climate policy by framing statutes enacted by Congress, regulations adopted through lawful process, international agreements negotiated and implemented by the executive branch, and diplomacy sustained across administrations of both parties. *Amici* take no position on the merits of this lawsuit. Their interest in this litigation is to ensure that courts do not misapply preemption principles, particularly those relating to foreign relations, to displace otherwise meritorious state-court action to address the damage caused by climate change.

SUMMARY OF ARGUMENT

Respondents Boulder County and the City of Boulder ("Boulder") assert a number of tort claims under state law for injury caused to property and

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made a monetary contribution to fund the brief's preparation or submission.

[2] Appendix A highlights *amici*'s experience relevant to climate-change policy and diplomacy.

residents by Petitioners' activities.[3] Such claims fall within the lawmaking authority that the Constitution reserves to the States and their courts. *Amici* have always understood that the Clean Air Act preserves, not displaces, state courts' common-law powers over local harms. Its savings clause preserves state authority, providing that nothing in the Act shall "preclude or deny the right of any State or political subdivision thereof" to adopt or enforce "any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. When previous plaintiffs brought climate claims under federal common law, energy companies like Petitioners successfully argued that the Clean Air Act had displaced federal common law remedies. But now that plaintiffs proceed under state law, Petitioners reverse course and ask this Court to dramatically expand its limited power to make federal common law that would permanently nullify the tort law of all fifty States.

Amici submit that U.S. climate law and policy neither require nor authorize such an extreme act of judicial lawmaking. Vague claims of "foreign policy interference" cannot displace traditional state authorities absent a clear congressional directive. The Administration's recent actions regarding climate change do not amount to a clear federal policy that

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[3] Boulder asserts claims for public nuisance, private nuisance, trespass, unjust enrichment, and civil conspiracy, seeking damages for harm to its property and residents caused by Petitioners' role in causing and exacerbating climate change. *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, 586 P.3d 161, 165–66 (Colo. 2025).

preempts state law. The United States has withdrawn from the Paris Agreement and has submitted a notice regarding U.S. withdrawal from the United Nations Framework Convention on Climate Change (UNFCCC) to the UN Secretary-General as treaty depositary. The current administration has also dismantled the offices through which several *amici* conducted U.S. climate diplomacy and has moved to rescind the finding on which federal regulation of greenhouse gases has long rested. The Administration's withdrawal from international climate policymaking, however, cannot preempt state tort law under any doctrine of foreign-affairs preemption. There is no doctrine of preemption by disengagement, nor does executive withdrawal authorize federal courts to fashion federal common law in a policy vacuum.

ARGUMENT

Boulder's suit asks a Colorado court to do what state courts have always done: apply state tort law to redress injuries suffered within the State. Petitioners nonetheless contend that Boulder's claims must be dismissed because "the structure of our constitutional system" forecloses application of state law in this area "unless Congress affirmatively authorizes its application." Pet'rs' Br. 4. This theory radically inverts the settled constitutional design of a limited federal government and accordingly must be rejected.

First, no federal statute displaces Boulder's claims. The Clean Air Act does not expressly preempt them;

to the contrary, it preserves the States' traditional authority over local environmental harms.

Second, Boulder's actions do not "interfere" with the foreign policy vacuum created by this Administration's disengagement from international climate action. The absence of federal action, or mere statements by the President with no lawmaking force, cannot displace state police powers. *See Medellín v. Texas*, 552 U.S. 491, 530 (2008). Nothing in Boulder's suit obstructs an identified federal position. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 (2000) (holding state law preempted because it obstructed the objectives of a specific act of Congress). Nor can " Executive Branch communications that express federal policy but lack the force of law" be a basis for preemption. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994).

Third, there is no basis for this Court to find or fashion a sweeping federal common law that would bar Boulder's state claims. Petitioners would have this Court empower federal judges to issue federal common law rulings that supplant States' authority over persons and property within their own borders. Such a ruling would expand the federal courts' narrow common-lawmaking powers far beyond any precedent of this Court—effectively overruling *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the ninety years of settled law resting on it.

I. Congress Has Not Preempted Colorado's Historic Police Power to Establish Remedies for Tortious Injuries to Its Residents and Lands.

Tort remedies for injuries to local land and residents lie at the heart of "'the historic police powers of the States,'" which federal law displaces only upon a "'clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Congress has expressed no such purpose in the Clean Air Act (or any other statute). *See* 42 U.S.C. § 7416. It has not "unmistakably . . . ordained" that States may no longer redress local injuries or regulate in the environmental field. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). To the contrary, the Clean Air Act "envisions extensive cooperation between federal and state authorities." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (citing 42 U.S.C. § 7401(a), (b)).

By its terms, the Clean Air Act is designed to facilitate continued state regulation of environmental harms. The Act structurally embeds state participation in environmental protection: States design and enforce implementation plans, 42 U.S.C. § 7410, submit plans governing existing sources within their borders, 42 U.S.C. § 7411(d)(1), and remain free to adopt standards more stringent than federal requirements, 42 U.S.C. § 7416. Where such "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring) (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973)).

Congress said as much in the statute itself. The Clean Air Act's savings clause (entitled "Retention of State authority") provides that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" any emission standard or "any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416.[4] The Clean Air Act's citizen-suit provision separately preserves "any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). A statute twice preserving state remedies cannot be read to silently abolish them. Congress does not preserve remedies it means to destroy.[5] The Clean Air Act's effect was to displace the *federal* common law

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[4] Congress thereby demonstrated that if it had intended the Clean Air Act to preempt Boulder's state-law claims, it knew how to do so. *See* 42 U.S.C. § 7416 (enumerating specific provisions of the Clean Air Act that have preemptive effect, none of which is applicable here). Where state claims do not conflict with any federal law, this Court has held that such claims are not preempted, even if they may "induce" a corporation to voluntarily change its conduct. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444–45 (2005).

[5] Nor do Boulder's claims "stand[] as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). To the contrary, Congress twice saved state standards, requirements, and common-law remedies. *See* 42 U.S.C. §§ 7416, 7604(e).

of *interstate* air pollution, *see Am. Elec. Power*, 564 U.S. at 423–24, not to erase the *state* common law governing damages caused to a State's residents or land by environmental hazards.[6]

II. Colorado's Police Power to Protect Its Citizens and Lands Is Not Preempted by Federal Foreign Policy.

Petitioners claim that Boulder's suit "would interfere with the United States' foreign policy on climate and energy issues." Pet'rs' Br. 42. This

[6] Once federal common law is displaced, ordinary principles of preemption control. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493–98 (1987). *Ouellette* conducted a familiar preemption inquiry: because the Clean Water Act (CWA) did not "speak directly" to whether an affected State's law was preserved, *id*. at 493, the Court asked whether suits stood as an obstacle to the CWA's objectives, *id*. at 491–97, and resolved that question under the presumption against preemption, *id*. at 491, n.11. The Court held that claims under the affected State's law were preempted as an obstacle to Congress's purpose, but the claims under the source State's law were not. *Id*. at 497–500. Petitioners and the United States seize on the Court's statement that "the only state suits that remain available are those specifically preserved by the Act," *id*. at 492, as though it imposed a special rule that state law is preempted unless Congress affirmatively authorizes it. *See* Pet'rs' Br. 31–32; U.S. Br. 16–17, Sept. 11, 2025; U.S. Br. 30, May 21, 2026. But the Court imposed no such requirement of express authorization. It determined what the Act "specially preserved" by applying ordinary conflict-preemption principles and the presumption against preemption, *id*. at 491 n.11, and it expressly preserved suits under the source-State's law, *id*. at 497–500. *Ouellette* thus governs only the choice of law, which has not been resolved here. The case thus confirms *amici*'s observation that state tort suits remain available notwithstanding the displacement of federal common law.

argument rests on a mistaken premise: that the Executive's current foreign-policy preferences can displace state law even absent an exercise of federal lawmaking authority. But this Court recognizes foreign-affairs preemption only in two situations not present here: where state law conflicts with a federal enactment having the force of law or where the State itself takes a foreign-policy position regarding foreign governments. Boulder's suit presents neither situation. To the contrary: this Administration has withdrawn from climate diplomacy. Boulder seeks only to enforce traditional state tort duties, not to pass judgment on foreign governments' conduct. Boulder's claims are therefore not preempted.

A. Inaction by the Executive cannot displace state tort law.

Executive action can preempt state law only when it has legal force. *See Kansas v. Garcia*, 589 U.S. 192, 212 (2020) ("The Supremacy Clause gives priority to 'the Laws of the United States,' not the . . . preferences of federal officers.") (citing U.S. Const. art. VI, cl. 2). *Amici* respect and have exercised a President's authority to make executive agreements settling international claims, and they recognize "valid executive agreements are fit to preempt state law." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416-17 (2003). But the current Executive is enforcing neither a federal enactment nor an international agreement with which Boulder's state claims could conflict.

The Trump Administration has announced the United States' withdrawal from the Paris Agreement and has submitted notice to withdraw from the UNFCCC, the principal instruments through which several *amici* conducted U.S. climate diplomacy across administrations of both parties. Exec. Order No. 14,162, 90 Fed. Reg. 8455, 8455 (Jan. 20, 2025); Memorandum on Withdrawing the United States from International Organizations, Conventions, and Treaties That Are Contrary to the Interests of the United States, 91 Fed. Reg. 2281 (Jan. 7, 2026). At most, these announcements reflect a decision to disengage from multilateral climate governance. But there is no doctrine of preemption by disengagement. The United States's current posture principally reflects the *absence* of global climate policymaking, not the implementation of a coordinated agenda with which Boulder's lawsuit would interfere. *See* Susan Biniaz, *W(h)ither Climate "Multilateralism"?*, Just Security (July 14, 2026), https://www.justsecurity.org/146516/climate-multilateralism-un-cop/ (noting the United States' "absence" in ongoing efforts at climate multilateralism); *see also* James Trinder, *Bonn Showed Climate Diplomacy is Entering a Two-Track Implementation Era*, CAN Europe (July 3, 2026), https://caneurope.org/news/climate-diplomacy-two-track-implementation-era/ ("The United States remain[s] absent from climate diplomacy."). This total retreat from international climate policy does not establish a comprehensive federal regulatory scheme occupying the field with which state common-law nuisance claims could conflict. If anything, these actions do the opposite: they create a foreign climate policy vacuum that leaves nothing with which state claims might conflict.

The Trump Administration's departure from the domestic climate policy arena confirms this policy vacuum. The EPA has renounced much of its authority to regulate climate change by issuing a repeal of the Endangerment Finding,[7] which gave the EPA the authority to regulate greenhouse gas emissions under the Clean Air Act.[8] *See* Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg.

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[7] The EPA's recent rescission of the motor-vehicle endangerment finding, *see* 91 Fed. Reg. 7,686 (Feb. 18, 2026) (codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1039), reflects the agency's conclusion that it *lacks authority* to regulate greenhouse-gas emissions from motor vehicles—not a policy judgment that such emissions are best left unregulated by state tort suits. *See* Env't. Prot. Agency, EPA-420-R-26-003, Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards Response to Comments, 301 (2026) (stating that "the Agency's discretion to now revisit and correct those errors does not equate to discretionary action to regulate the subject of the prior rules [greenhouse gas emissions from motor vehicles]"). The EPA's decision not to regulate for lack of statutory authority cannot preempt state common law claims. *Cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002) (ruling that the Coast Guard's considered decision not to regulate did not preempt state common-law claims because it did not embody a policy that "the State[] should not impose" its own rule).

[8] Nor does the EPA's surviving authority over stationary sources supply the conflict Petitioners attempt to manufacture. Boulder seeks no emissions standard or limitation on any stationary source and invokes no affected-State law of the kind *Ouellette* forecloses. Rather, it seeks monetary relief for in-state injury to local property caused by Petitioners' conduct as suppliers, which § 7411 does not address. Having held only that the Clean Air Act displaced *federal common law*, *American Electric Power Co. v. Connecticut* expressly reserved "the availability *vel non* of a state lawsuit." 564 U.S. 410, 429 (2011).

36288, 36290 (proposed Aug. 1, 2025) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1039). Other federal agencies have also retreated from climate policy: the Securities and Exchange Commission proposed rescission of a 2024 rule requiring companies to disclose their material climate risks, arguing that the rule "exceed[s] the statutory limits on the Commission's . . . authority." Rescission of Climate-Related Disclosure Rules, 91 Fed. Reg. 33296, 33298 (proposed June 3, 2026) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249). Each of these actions removes federal regulations, but none replaces them with any affirmative federal rule that Boulder's claims could contradict.

Where, as here, the Executive has announced policy changes, but has exercised no lawmaking authority, *Medellín* forecloses preemption entirely. 552 U.S. at 532. The *Medellín* Court made clear that general federal foreign policy considerations—even "plainly compelling" interests of a "sensitive" nature—cannot displace generally applicable state law absent lawmaking authority exercised by the political branches. *Id*. at 498–99, 523–24. In *Medellín*, the President tried to use a presidential memorandum—invoking treaty compliance and foreign-relations considerations not present here—to compel Texas state courts to follow a judgment of the International Court of Justice that bound the United States under international law. *Id*. at 497–99. Writing for the Court, the Chief Justice rejected that claim, holding that "a Presidential directive issued to state courts" could not bind them to implement the President's wishes when Congress had neither legislated nor affirmatively "acquiesced in his asserted power . . . to override state law." *Id*. at 529–532. The President's inherent foreign-affairs powers do not allow him to "reach[] deep into the heart of the State's police powers and compel[] state courts to . . . set aside neutrally applicable state laws." *Id.*

Medellín compels a ruling against preemption here. President Trump may have expressed a preference for an energy policy that deviates from past administrations, but Congress has not endorsed it by statute. His actions proclaim presidential preference; they do not exercise lawmaking authority. The President has no "unilateral authority to create domestic law" to govern state courts through his foreign-policy powers. *Medellín*, 552 U.S. at 530.

Nor can Petitioners or the United States conjure a conflict from the federal government's position in climate change treaty negotiations. The United States asserts that the federal government has "long opposed the establishment of liability and compensation schemes at the international level for alleged climate change." U.S. Br. 27. Several *amici* helped formulate and articulate that negotiating position, but that position was limited to liability and compensation schemes that make *nation-states* liable to *other nation-states* for past emissions. *See* State Dep't Cable from the Special Envoy for Climate Change to Chiefs of Mission and Officers Handling Climate Change Issues, Subject: Climate Change Commc'ns Package, (Apr. 30, 2015), National Security Archive https://nsarchive.gwu.edu/document/30423-document-15-state-department-cable-special-envoy-climate-change-chiefs-mission-and. This position has never addressed the very different question of whether private corporations may evade ordinary tort liability for injuries inflicted within a State. Boulder's suit seeks a domestic damages judgment against private defendants under state common law; its actions neither create an international compensation scheme nor conflict with the United States' historic opposition to one.

B. Boulder's state lawsuit does not conflict with any identified federal foreign policy.

Presidential climate policy cannot preempt state action unless there is a conflict of sufficient "clarity or substantiality." *Garamendi*, 539 U.S. at 419 n.11. No such clear or substantial conflict exists here. In *Garamendi*, the Court found a "sufficiently clear conflict to require finding preemption" between California legislation and federal policy addressing the Nazi Government's confiscation of Jewish life insurance policies. *Id.* at 420. California's law compelled insurers to disclose "far more information about far more policies," *id.* at 423, than a pact that the President had negotiated with Germany, which agreed to facilitate claims settlement on the condition of receiving some security from lawsuits in U.S. courts. *Id*. at 401, 405–06. But that federal-state conflict was overt and consequential: California sought to impose disclosure obligations that threatened to undermine the ongoing operation of a specific executive agreement regarding a sensitive international dispute. *Id*. at 410–12. Nothing comparable exists here. Petitioners cite no treaty or executive agreement that

Boulder's tort claims contradict, and *amici* know of none. *Garamendi* does not authorize the preemption of state law based on whatever incidental effects it might have on conduct occurring worldwide. *See id.* at 420 ("[S]tate legislation . . . [with] *more than incidental effect* in conflict with *express* foreign policy of the National Government would require preemption of the state law." (emphasis added)); *see also United States v. California*, No. 2:19-cv-02142, 2020 WL 4043034, at **11-23 (E.D. Cal. July 17, 2020) (sustaining California's cap-and-trade agreement with Quebec against a preemption challenge based on the President's withdrawal from international climate agreements). Given the strong traditional state interest in providing tort remedies and protecting local property, foreign-affairs preemption requires the kind of clear or substantial conflict that is entirely absent here. *See Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 639 (2013) (affirming "a State's traditional authority to regulate tort actions").

Unable to identify any concrete conflict, Petitioners and the United States cite *Hines* to insist more generally on a notion of field preemption: that federal power "in the field affecting foreign relations" must "be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *see* Pet'rs' Br. 40; U.S. Br. 27. But *Hines* created no such freestanding general rule of foreign-affairs preemption. On the very page Petitioners cite, the Court took up the preemption question, expressly "leaving open . . . the argument that the federal power in this field, whether exercised or unexercised, is exclusive." *Hines*, 312 U.S. at 62. *Hines* concluded instead that specific congressional legislation had preempted state law, which is not the case in the absence of a federal act of lawmaking. *Id*. at 60.

Nor do *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), and *United States v. Pink*, 315 U.S. 203 (1942), supply the broad rule of preemption that *Hines* does not. *See* Pet'rs' Br. 40. Both cases—like *Hines*—involved the affirmative exercises of federal lawmaking authority. *Curtiss-Wright* upheld an arms embargo that Congress had authorized by joint resolution. 299 U.S. at 311–12, 329–30. *Pink* gave effect to an executive agreement reached as part of the United States's recognition of the Soviet Union's government—a policy that Congress had "tacitly recognized" by statute. 315 U.S. at 211–13, 227–28. Far from establishing that the foreign-affairs power of its own force displaced state law, these cases confirm that preemption may be appropriate where it follows lawmaking by Congress and the President acting together.

Nor can the United States rely on *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), to argue that state tort law should be nullified because the President must "speak for the Nation with one voice in dealing with other governments." U.S. Br. 27 (quoting *Crosby*, 530 U.S. at 381). The "one voice" referred to in *Crosby* meant the "express investiture of the President with statutory authority" to control sanctions against Burma (Myanmar)—a delegation the Court described as placing the President at the "maximum" of his power—which Massachusetts's competing sanctions regime undermined. *Crosby*, 530

U.S. at 375–77, 381 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Any "one voice" principle in this Court's precedents can displace state law only when it is embodied in a similar concrete exercise of federal lawmaking. *See Crosby*, 530 U.S. at 388.

Where the Executive's voice lacks the force of law, this Court has declined to invalidate state law. In *Barclays*, "the question ultimately and most energetically presented" was whether California's worldwide combined tax reporting scheme prevented the federal government from speaking with "one voice in international trade." 512 U.S. at 320 (citation and internal quotation marks omitted). The Executive Branch had opposed California's tax policy for years—through Presidential legislative proposals, letters to the Governor of California, and amicus filings in this Court—arguing the scheme unconstitutional. *Id.* at 328 & n.30. Foreign governments had lodged *formal* diplomatic protests, and one had enacted retaliatory legislation. *Id.* at 324 n.22. Nevertheless, the Court upheld the California law, finding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned" practice. *Id.* at 330. If sustained Executive opposition, formal protests from "virtually every developed country in the world," threatened foreign retaliation, and an absence of federal lawmaking could not displace state law, *id.* at 324 n.22, then neither can Petitioners and the United States here—who identify no federal position with the force of law that Boulder's suit could disturb, and no comparable record of concrete international friction.

C. Mere emanations from the federal foreign-affairs power cannot displace state tort law.

Lacking any affirmative exercise of federal authority by the political branches, Petitioners fall back on the discredited case of *Zschernig v. Miller*, 389 U.S. 429 (1968), to make the sweeping assertion that any subject touching on foreign affairs must give way to absolute federal supremacy, *see* Pet'rs' Br. 40. Such preemption must occur, they argue, even where, as here, the federal government has failed to act in a manner that would preempt contradictory state law. But *Zschernig*'s much-criticized reasoning does not furnish the support that Petitioners seek. In *Zschernig,* this Court invalidated an Oregon probate statute allowing nonresident aliens to inherit only if the country of the alien's nationality assured certain reciprocal rights to American citizens. After reviewing the "history and operation of this Oregon statute," the Court concluded that it amounted to "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432.

From its inception, *Zschernig*'s invention of a dormant foreign-affairs preemption capable of displacing state law was narrowly designed for those rare circumstances in which state law unavoidably required States to develop their own foreign-policy positions respecting the actions of other sovereign nations. *Zschernig* addressed an uncommon category of state laws that necessarily embroil state institutions in the formulation or appraisal of foreign policy. The Court's constitutional concern was that Oregon had required its courts to evaluate the conduct of foreign governments and, in doing so, directly engage in international diplomacy at the state level. *Id.* at 435, 441. The *Zschernig* majority stressed that the statute at issue had invited "minute inquiries concerning the actual administration of foreign law" and "into the credibility of foreign diplomatic statements," resulting in "great potential for disruption or embarrassment" and "unavoidable judicial criticism of [other] nations." *Id.* at 435, 440. The Court therefore sustained an as-applied challenge to the Oregon statute while expressly declining to disturb its prior ruling in *Clark v. Allen*, 331 U.S. 503, 516 (1947), which had sustained a materially identical California statute over a facial challenge. *See Zschernig*, 389 U.S. at 434. *Zschernig*'s narrow holding certainly did not announce the principle that any state law, made by any state court to redress in-state injuries, contravenes the Constitution.

Not only is *Zschernig* inapposite here, but its continuing vitality is also in doubt. The case is inconsistent with constitutional text and structure. Although the Framers delegated certain foreign-relations powers to the federal government, *see, e.g.*, U.S. Const. art. II, § 2, cl. 2 (power to make treaties); U.S. Const. art. I, § 8, cl. 3 (Congress's power "[t]o regulate Commerce with foreign Nations"), they disfavored nullifying state powers by mere negative implication: as Hamilton explained, the Constitution denied power to the States only "where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." The Federalist No. 32, at 200 (Alexander Hamilton) (J. Cooke ed., 1961) (emphasis in original). All originalist and textual evidence "strongly suggests that . . . a state law inconsistent with national foreign policy not reflected in a treaty (or statute) was not thought unconstitutional," because "the framers made clear during the ratification debates that limitation of state power by negative implication was disfavored and reserved for extreme cases." Michael D. Ramsey, *Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341, 406–12 (1999). *Zschernig*'s generalized preemption "does not appear to have been in anyone's contemplation" at the Founding. *Id.* at 418.

In the nearly six decades since *Zschernig*, this Court has never again applied its preemption theory to invalidate a state law. *See, e.g., Crosby*, 530 U.S. at 374 n.8 (explicitly declining to "pass on" foreign-affairs power preemption and ruling on conflict-preemption grounds instead). Indeed, in *Garamendi*, the Court pointedly declined to endorse the *Zschernig* majority's broad theory of field foreign-relations preemption. 539 U.S. at 419 & n.11. Instead, the Court explained that field preemption is reserved for a State taking a "position on a matter of foreign policy *with no serious claim to be addressing a traditional state responsibility*" (emphasis added), which hardly describes state tort law. *Id.* at 419 n.11. Where the State acts within its "traditional competence," field preemption has no role to play and only conflict preemption remains. *Id.* The Court thus resolved *Garamendi* solely on conflict preemption grounds—that is, "on Justice Harlan's view" that "in the absence of positive federal action 'the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.'" *Id*. at 418, 420 (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in result)).

Unlike the Oregon law in *Zschernig*, the California law in *Garamendi*, and the Massachusetts law in *Crosby*, Boulder's suit could hardly exercise a more traditional local power. Nuisance and trespass law lie at the heart of traditional state competence. *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Atl. Richfield Co. v. Christian,* 590 U.S. 1, 36 (2020) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he regulation of real property and the protection of natural resources is a traditional and central responsibility of state governments. States have long allowed landowners to seek redress for the pollution of their lands through ancient common law causes of action like nuisance and trespass."). Boulder does not seek to regulate the sale of fossil fuels globally—only to receive compensation for injuries sustained to local property. *See* J.A. 58–83 (describing damage and costs incurred within the State and City). "In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *Wos*, 568 U.S. at 639–40 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). Far from having "no serious claim" to a history of state and local control, *Garamendi*, 539 U.S. at 419 n.11, Colorado's imposition of tort liability falls within the historic heartland of state police powers. *See Martinez v. California*, 444 U.S. 277, 282 (1980) ("[A] State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest.").

In today's interconnected economy, to hold that a state court's power to issue common-law tort rulings is preempted because it might have incidental effects on private actors' conduct abroad would sweep in most state lawmaking and judicial activity.[9] For that reason, this Court unanimously "disavow[ed]" an "'almost per se' rule against laws with extraterritorial effects." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 n.4 (2023). The Court declared that "virtually all state laws create ripple effects beyond their borders," *id.* at 390, and as a result, such a rule "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." *Id.* at 374–75.

[9] For similar reasons, Boulder's claims present no problem under the Foreign Commerce Clause. As noted above, in *Barclays Bank*, this Court upheld California's worldwide combined reporting tax notwithstanding the opposition both of foreign governments and the Executive Branch. 512 U.S. at 303. As this Court explained, the risk of foreign retaliation "is directed to the wrong forum," for "[t]he judiciary is not vested with power to decide how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please," *id.* at 327–28 (internal quotation marks omitted), or in this case, to find tort liability as they please.

D. Boulder's claims apply state law domestically, and do not constitute extraterritorial regulation.

Petitioners' related invocation of the "extraterritoriality principle," Pet'rs' Br. 24, confuses a canon of federal statutory interpretation with a rule about the reach of state common law. *See dmarcian, Inc. v. DMARC Advisor BV,* No. 25-1084, 2026 U.S. App. LEXIS 20255, at *17 (4th Cir. July 10, 2026) (observing that "[t]he presumption against extraterritoriality is a federal canon of statutory construction, so it is inapplicable where there is no federal statute at issue"); *Armada (Singapore) Pte Ltd. v. Amcol Int'l Corp.*, 244 F. Supp. 3d 750, 758 (N.D. Ill. 2017), aff'd, 885 F.3d 1090 (7th Cir. 2018) ("The presumption is, after all, a canon of statutory construction. . . . [N]o authority . . . suggest[s] that the principle should apply to claims fashioned through common-law adjudication." (citation omitted) (citing *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 335 (2016))); *see also* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 Geo. L.J. 301, 334 (2014) ("To date, the presumption against extraterritoriality has been applied to curb geographical extension of statutes but not the common law.").[10] To be sure, States may not

[10] *Accord, e.g.*, *Goodwin v. Raytheon Co.*, No. 13-CV-10231-MLW, 2016 WL 11826492, at *5 (D. Mass. Sept. 6, 2016) ("[T]he presumption against extraterritorial application does not apply to common law claims."); *Leibman v. Prupes*, No. 14-CV-09003-CAS, 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015) ("[T]he presumption is limited to statutes by its terms."); *A.O.A. v.*

directly "punish a defendant for conduct that may have been lawful where it occurred" through their tort law. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). But this precept of due process is distinct from foreign-affairs preemption—and limits liability only for "conduct that b[ears] no relation to the [plaintiff's] harm." *State Farm*, 538 U.S. at 422–23. Activities that inflict in-state injuries do not qualify: the harms Boulder seeks to redress are "supported by the State's interest in protecting its own consumers and its own economy," an interest this Court recognizes as legitimate. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

As experts in foreign policy, *amici* recognize the distinction between regulating conduct on a global scale, on the one hand, and incidentally affecting out-of-state behavior through domestic litigation, on the other. State tort law concerns itself primarily with conduct within a state's borders, as well as conduct outside of that state insofar as it causes in-state harm. In the statutory interpretation context, if the "conduct relevant to the statute's focus occurred in the United

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Rennert, No. 11-CV-44-CDP, 2023 WL 346001, at *27 (E.D. Mo. Jan. 20, 2023) (rejecting the argument that the presumption against extraterritoriality applies to state common-law claims). The Second Circuit in *City of New York v. Chevron Corp*. stated that the question is "unsettled." 993 F.3d 81, 101 (2d Cir. 2021). There, the court applied the presumption only because it construed the plaintiffs' actions as grounded in *federal* common law, which implicates unique "concerns over separation of powers" and "judicial caution with respect to creating (or extending) federal common law causes of action," *id*. at 102—concerns that Boulder's state lawsuit does not raise.

States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco, Inc. v. European Community,* 579 U.S. 325, 337 (2016). The focus of state trespass and nuisance law is remedying the plaintiff's injury at the place where the injury occurred, not extraterritorial regulation of the defendant's conduct wherever it may arise. *See Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 387, 391 (Colo. 2001) (explaining that nuisance is "predicated upon a substantial invasion of a plaintiff's interest in the use and enjoyment of his property"). The courts of a sovereign may apply local injury law to remedy effects felt within its territory. Petitioners do not contest that Boulder was injured by their conduct—they only claim that because their global harm "dwarfs" their particular harm to Boulder, the law's cause of action must be narrowed. Pet'rs' Br. 39. But state tort law routinely applies to harms that are both local and widespread. Petitioners' contrary rule would perversely prescribe that the more universal harm a defendant inflicts, the less any State could redress its portion of the injury.[11] Where, as here, the federal government has not acted to preempt state law, the Constitution clearly does not compel preemption. Finding preemption here would not only lack constitutional footing but also come with "underappreciated perils," as scholars of foreign-relations law have observed. *See* Ashley Deeks &

[11] Nor does the situs of Petitioners' "general corporate activity" and "operational decisions" convert a suit over in-state injury into regulation of out-of-state conduct. *Cf. Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 634 (2021) (holding that "general corporate activity" does not make conduct domestic).

Kristen Eichensehr, *Federalism and the New National Security*, 139 Harv. L. Rev. 472, 475 (2025). In the face of emergent foreign threats, States can and have relied upon their traditional police powers "to protect their citizens" from harm. *Id.* at 476, 484–89.

Amici recognize that States' ability to do so is a virtue of our federalist system. States can step into a "gap" that the federal government has not filled, *id.* at 507, and thereby bolster the collective security and welfare of the United States, even through measures, like Colorado's, that focus only on in-state harms. Embracing Petitioners' preemption-by-inaction theory would risk disabling States from exercising their traditional powers to respond to emerging dangers, thereby extinguishing the "salutary roles" that States can play. *Id.*

III. Federal Common Law-Making by Federal Judges Cannot Constitutionally Displace Colorado's Police Power to Protect Its Residents and Lands.

This case starts with an ordinary exercise of traditional state authority: Boulder invokes state tort law to recover for injuries to its people and property. Petitioners would convert that ordinary case into an extraordinary one, arguing that state law is unavailable "unless Congress affirmatively authorizes its application." Pet'rs' Br. 4. Petitioners thus invert the constitutional baseline long settled by *Erie* for nearly ninety years: "[t]here is no general federal common law. . . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."

Erie, 304 U.S. at 78. Petitioners would overrule *Erie*, *sub silentio*, to say that there is a general federal common law of climate change and that the law to be applied in any case raising climate-change issues is federal common law, created by federal courts. But state law (like Colorado's) pre-existed federal law and can be applied to redress Colorado injuries caused to Colorado property and residents without requiring congressional permission. As this Court has made clear, "matters left unaddressed in . . . a [federal] scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Federal courts displace that default rule in only a "few and restricted [instances]," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), involving "uniquely federal interests," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks omitted)—always subject to the judgment of Congress. *See Rodriguez v. FDIC*, 589 U.S. 132, 136–37 (2020) ("[The] Constitution . . . vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." (quoting U.S. Const., art. I, § 1)).

Petitioners would have this Court dramatically expand the scope of federal common law announced in *Boyle*. There, Justice Scalia, writing for the Court, made clear that an activity's connection to "an area of uniquely federal interest . . . merely establishes a necessary, not a sufficient, condition for the displacement of state law." *Boyle*, 487 U.S. at 507. To justify federal common lawmaking, "there must be" a "conflict" between state and federal law—and state law is displaced only to the extent of the conflict. *Id.*

at 507–08. *Boyle* makes clear that federal common law is a scalpel, displacing state law only on a case-specific, conflict-driven basis. *Id*. But Petitioners would instead transmute federal common law into a roving federal power to eliminate state common law remedies by judicial decree, untethered to any identified conflict with any identified federal law.

To be sure, this Court once fashioned federal common law for certain controversies over interstate pollution—typically suits between sovereigns to abate transboundary nuisances. *See, e.g.*, *Illinois v. City of Milwaukee,* 406 U.S. 91, 93, 103 (1972) (holding that federal common law applies in dispute between a city and state over pollution in interstate body of water), *superseded by statute*, Clean Water Act, as amended, Pub. L. No. 92–500, 86 Stat. 816, as recognized in *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 423 (2011). But this narrow enclave of federal judge-made law was justified by the absence of congressional action. This Court has held that when Congress legislates, "the need for such an unusual exercise of lawmaking by federal courts disappears," and whether state law is preempted is measured against the words of the contrary federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 316 (1981) (*Milwaukee II*).

Ironically, Petitioners press their expansive conception of federal common law while simultaneously embracing its demise. When earlier plaintiffs brought climate claims under federal common law, energy companies successfully argued that the Clean Air Act had displaced any such judge-made remedies. *Am. Elec. Power Co.,* 564 U.S. at 424. But having persuaded this Court that the Clean Air Act "speaks directly" to the question and leaves no room for federal judicial lawmaking, *id.*, Petitioners now reverse course and contend that the federal common law nonetheless retains the power to extinguish the tort law of all fifty States. *American Electric Power* forecloses Petitioners' attempt to extend federal common law in this way. Having found that the statute "displaces federal common law," *id.* at 425–26, 429, the Court in *American Electric Power* did not read the Clean Air Act as precluding States from providing tort remedies for in-state injuries suffered within their borders. Rather, the Court remanded for the lower courts to resolve "the availability *vel non* of a state lawsuit," expressly leaving open the possibility of claims like Boulder's. *Id.* at 429.

Boulder does *not* suggest that congressional legislation like the Clean Air Act "could potentially give birth to new state-law claims—claims that could not have existed in the absence of Congress's intervention." *City of New York v. Chevron Corp.*, 993 F.3d 81, 98 (2d Cir. 2021); *see* Pet'rs' Br. 31 (citing *Chevron*, 993 F.3d at 98–99).[12] On the contrary,

[12] In *Chevron*, the City of New York brought state-law nuisance and trespass claims against oil producers, and the Second Circuit determined that the claims could not go forward. 993 F.3d at 85. The court reasoned that "the City's claims must be brought under federal common law," *id.* at 95, because the mitigation of "global" greenhouse-gas emissions—which "*collectively* exacerbate global warming," *id.* at 91 (emphasis added) (internal quotation marks omitted)—is not "'a field which the [s]tates have traditionally

Boulder files state-law claims falling within its "historic police powers," *Wyeth*, 555 U.S. at 565, to redress in-state environmental harms—an area that the federal common law has not controlled and could not control. *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 (1981) ("[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 372 (1977) (holding that ownership of riverbed lands along an intrastate river "should be decided solely as a matter of Oregon law" and not by federal common law, "[s]ince application of federal common law is [not] required"); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (holding that federal courts "start with the assumption that the historic police powers of the States were not to be superseded by" federal law absent "the clear and manifest purpose of Congress"). "Public safety" and "public health . . . are some of the more conspicuous

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occupied.'" *Id*. at 90 (quoting *Boyle*, 487 U.S. at 507). But addressing in-state damage to persons and property *is* a field that States have traditionally occupied. Ecological interconnectedness no more divests States of their traditional police powers than does economic interconnectedness. *See Lewis v. BT Inv. Managers, Inc*., 447 U.S. 27, 36 (1980) ("[T]he States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." (internal quotation marks omitted)). By seeking redress for injuries experienced within its local jurisdiction, Boulder's suit does not implicate the "uniquely federal interests" that justify application of federal common law. *Boyle*, 487 U.S. at 504.

examples of the traditional application of the police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Environmental harm that affects both public safety and public health has always been the province of state tort law.[13]

Petitioners' theory cannot be squared with that settled allocation of authority. As Justice Brandeis made unambiguously clear in *Erie*:

> Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or 'general,' be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie, 304 U.S. at 78 (emphasis added). If Congress itself lacks the power to displace state tort law by fiat, then surely, federal judges may not do so amid Congress's silence, through a supposed general federal common lawmaking power in the area of climate change.

[13] *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("[T]o free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."). Tort claims for environmental pollution can be traced back to at least *Aldred's Case*, (1610) 77 Eng. Rep. 816, 9 Co. Rep. 57b (K.B.), where the court held that odor from the defendant's hog lot was a nuisance.

CONCLUSION

Amici have devoted their careers to building the Nation's climate policy through the channels the Constitution prescribes—statutes enacted by Congress, regulations promulgated through lawful process, treaties and executive agreements, and diplomacy sustained across administrations of both parties. That experience confirms what this Court's precedents require: that displacement of state law requires an affirmative act of federal lawmaking, not the absence of coherent policy. Petitioners and the United States identify no treaty, statute, executive agreement, or exercise of the foreign-affairs power with which Boulder's claims actually conflict. And their request that federal common law be stretched to extinguish state tort remedies would arrogate to federal judges a displacing power that *American Electric Power* refused to supply and that *Erie* denies even to Congress. A Colorado court applying state tort law to redress Colorado injuries to Colorado property and residents does nothing more than what our federal system has always entrusted state courts to do.

For the foregoing reasons, *amici* respectfully submit that the judgment of the Supreme Court of Colorado should be affirmed.

Respectfully submitted,

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[14] This brief sets forth the position of the signatories, as represented by counsel and law student members of the Peter Gruber Rule of Law Clinic, but does not purport to state the views of Yale Law School or Yale University.

APPENDIX

TABLE OF APPENDICES

APPENDIX A—LIST OF *AMICI CURIAE*

Susan Biniaz served in the Legal Adviser's office at the State Department from 1984 to 2017, was Deputy Legal Adviser, and was the principal U.S. government lawyer on the climate change negotiations from 1989 through early 2017.

Gillian Caldwell served as the Chief Climate Officer and Deputy Assistant Administrator of the Resilience, Environment and Food Security Bureau for USAID from 2021 to 2024.

Rick Duke served as Deputy Special Envoy for Climate from 2022 to 2025 and Senior Director and White House Liaison for the Special Presidential Envoy for Climate from 2021 to 2022.

Stephanie Epner served as Senior Advisor to the Special Presidential Envoy for Climate at the State Department from 2021 to 2022 and as Special Advisor and Acting Senior Director for Climate and Energy at the National Security Council from 2022 to 2023.

Daniel C. Esty, Hillhouse Professor of Environmental Law and Policy at Yale University, served at the U.S. Environmental Protection Agency in such senior roles as Deputy Chief of Staff and Deputy Assistant Administrator for Policy (1989-1993), as well as Commissioner of the Connecticut Department of Energy and Environmental Protection (2011-2014).

David J. Hayes served as Special Assistant to the President for Climate Policy from 2021 to 2022 and as Deputy Secretary of the Interior from 1999 to 2001 and from 2009 to 2013.

Gina McCarthy served as the first White House National Climate Advisor from 2021 to 2022, and as Administrator of the Environmental Protection Agency from 2013 to 2017.

Monica Medina served as Principal Deputy Under Secretary of Commerce for Oceans and Atmosphere from 2009 to 2012 and Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs from 2021 to 2023.

Jonathan Pershing served as United States Special Envoy for Climate Change from 2016 to early 2017.

Thomas R. Pickering served as United States Ambassador to the United Nations from 1989 to 1992 and as Under Secretary of State for Political Affairs from 1997 to 2000.

John Podesta served as Senior Advisor to the President for International Climate Policy from 2024 to 2025, White House Chief of Staff from 1998 to 2001 and Counselor to the President with respect to matters of climate change from 2014 to 2015.

William K. Reilly served as Administrator of the Environmental Protection Agency from 1989 to 1993.

David Sandalow served as the Assistant Secretary of State for Oceans, Environment and Science from 1999 to 2001, Assistant Secretary of Energy for Policy and International Affairs from 2009 to 2013 and Under Secretary of Energy (Acting) from 2012 to 2013.

Wendy R. Sherman served as Deputy Secretary of State from 2021 to 2023 and Under Secretary of State for Political Affairs from 2011 to 2015.

Todd D. Stern served as United States Special Envoy for Climate Change from 2009 to 2016.

Robert Sussman served as Deputy Administrator of the Environmental Protection Agency from 1993 to 1995 and Senior Policy Counsel to the Environmental Protection Agency Administrator from 2009 to 2014.

Christine Todd Whitman served as Administrator of the Environmental Protection Agency from 2001 to 2003 and as Governor of New Jersey from 1994 to 2001.