No. 25-170

In the Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court has Article III jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

2. Whether this Court has statutory jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

3. Whether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

PARTIES TO THE PROCEEDING

Petitioners are Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; and Exxon Mobil Corporation (stock ticker: XOM).

Respondents are the County Commissioners of Boulder County and the City of Boulder.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

INTRODUCTION

In an interconnected society, conduct in one or more states can cause injury throughout the nation. The Constitution generally permits states to use their traditional authority to address harms arising within their own borders. Whether those harms are better addressed at the federal level is a decision the Constitution almost always assigns to Congress, which is uniquely structured to weigh state and national interests.

Petitioners believe it makes no sense for state tort law to assign liability for harms arising from climate alteration. Those harms arise from the accumulation of greenhouse gases from many sources over many years, which, they argue, makes attribution and causation difficult. Such problems, they say, are best addressed at the federal or international level. If those arguments are persuasive, that "perhaps makes this a good case for Congress to intervene." *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1098 (2026). Indeed, legislation providing petitioners the immunity they seek is pending in Congress. But those arguments "do[] not give courts a license to bar all such suits on their own authority." *Ibid*. (footnote omitted).

However, petitioners are impatient. Unwilling to let either the federal legislative or the state judicial process play out, they have run to this Court at the case's outset, claiming that something implicit in the Constitution resolves the debate. Article III and the final judgment rule guard against needless state-federal friction by delaying this Court's review until a final judgment injures a party. This case is far from final judgment, and the prospect that the decision below will someday injure petitioners is entirely speculative. Indeed, the Colorado Supreme Court has not yet even decided whether respondents state a claim under state law, an argument petitioners raised in the trial court but did not ask the state supreme court to consider.

Petitioners' preemption arguments also lack merit. They say applying state law here would violate the "equal sovereignty" of states by giving one state's law "extraterritorial[]" effect in the states where the injury-causing conduct occurred. Petrs. Br. 24. That argument, however, would "cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023). That includes state law imposing tort liability for defective products sold nationwide, multi-state antitrust conspiracies, international frauds, or internet-based defamation. Neither constitutional text nor original understanding supports that result. Since the Founding, courts have applied state law to such cases, including to remedy environmental harms. That exercise of traditional state power has never been thought unconstitutional. Instead, the extraterritorial effect of state law is constrained by constitutional limits on choice of law and personal jurisdiction and by the dormant Commerce Clause.

Petitioners and the Government insist that even if *none* of those "myriad constitutional provisions and doctrines" bars this suit, U.S. Br. 19, some overarching implication from constitutional structure does. But beyond their unfounded invocations of equal sovereignty and extraterritoriality, the most petitioners can muster is that this Court once allowed "suits brought by one State to abate pollution emanating from another State" to proceed under federal common law. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421-22 (2011) ("*AEP*") (citations omitted). This suit—brought by non-states against private parties, seeking damages (not abatement) for deceptive marketing and sales (rather than emissions)—falls far outside that description.

But even if respondents' claims fell within the scope of the prior federal common law, petitioners acknowledge that this body of law has since been displaced by the Clean Air Act, 42 U.S.C. §§ 7401-7671q. This Court has not held, as petitioners urge, that any previously preempted state law remained extinguished until Congress expressly revived it. Instead, it has held that the "availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id*. at 429 (citations omitted). And it pointed to *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which applied conventional preemption principles (including a presumption against preemption) to conclude that certain state-law nuisance claims *could* proceed, not that state law was uniformly barred by constitutional structure. *See id*. at 491-500.

Preemption is thus now a question of normal statutory construction. And here, nothing in the Clean Air Act preempts respondents' claims. The statute regulates point-source emissions, not the upstream production, sale, or marketing of products that later produce them. It certainly does not charge the EPA with regulating deceptive marketing of fossil fuels. Petitioners' theory—that the statute impliedly preempts any state law indirectly affecting emissions or national air quality—would condemn a host of unobjectionable laws, from state gasoline taxes to local energy-efficiency regulations.

Because petitioners have come to the wrong forum at the wrong time with the wrong arguments, the Court should dismiss or affirm.

STATEMENT OF THE CASE

1. Respondents, a Colorado county and municipality, brought this damages action in state court, seeking to require petitioners to share a portion of the costs their taxpayers face in coping with a climate altered in part by petitioners' tortious conduct. *See* Pet. App. 2a-3a. The complaint seeks damages for the in-state harm to respondents' property and the costs of protecting their residents' health and physical safety. *See, e.g.*, JA 42-53, 64-66.

The complaint includes claims for public and private nuisance, unjust enrichment, trespass, and civil conspiracy. *See* Pet. App. 3a. The claims raise two theories of liability. First, respondents allege that "through their advertising," petitioners "have for decades intentionally misled the public about the impacts of climate change and the role that [their] fossil fuel products have played in exacerbating those impacts." *Ibid*. ("deception claims"). Second, respondents allege that petitioners "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 change." *Id*. 2a ("sales and production claims"). Respondents request only damages and do not "seek to enjoin any oil and gas operations or sales" or "seek to enforce emissions controls of any kind." *Id*. 4a.

After a failed attempt to remove the case to federal court, petitioners moved to dismiss, raising a host of state grounds (e.g., failure to adequately allege causation) and federal defenses (e.g., under the First Amendment, Due Process and Commerce Clauses, and federal preemption principles). *See* Pet. App. 56a-125a. The trial court denied the motion in relevant part. *Ibid.*[1] Petitioners then sought interlocutory review in the Colorado Supreme Court, challenging the denial of their personal jurisdiction and federal preemption defenses.[2] The court granted review of the preemption question and affirmed. *See* Pet. App. 1a-2a, 7a-8a.

The Colorado Supreme Court first held that respondents' claims were not preempted by the Clean Air Act. *See* Pet. App. 11a-16a. The suit was not "an attempt to regulate" greenhouse-gas emissions but rather turned on petitioners' deceptive marketing and "upstream production activities," conduct the federal statute "does not address." *Id.* 20a-21a.

The court further rejected petitioners' contention that "the structure of the Constitution precludes the application of state law" because respondents' claims once would have been governed by federal common law. Pet. App. 17a. Federal common law had applied to "suits brought by one State to abate pollution

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[1] The court dismissed without prejudice respondents' claims under the state consumer protection act for failure to plead with sufficient particularity. Pet. App. 133a-36a. Those claims, which are more focused on in-state conduct, are not before the Court. *See* U.S. Br. 6 n.2.

[2] *See* C.A.R. 21 Pet. 9, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 24SA206 (Colo. July 16, 2024) ("Exxon Pet.").

emanating from another State." *Ibid*. (citation omitted). Here, respondents are not states and have "not brought an action against a pollution emitter to abate pollution." *Ibid*. In any event, the Clean Air Act displaced that federal common law and petitioners "cite no applicable authority supporting the proposition that once federal common law exists, the structure of the Constitution precludes the application of state law even when that common law no longer exists." *Ibid*.

Finally, petitioners' foreign affairs defense failed because they did not "identify any express foreign policy of the federal government that conflicts with state tort law" or show how respondents' "claims pose an obstacle to our federal government's dealings with any foreign nation." Pet. App. 22a (citation omitted); *see id*. 22a-24a.

SUMMARY OF ARGUMENT

I. Petitioners have failed to establish this Court's constitutional and statutory jurisdiction.

A. Petitioners assert constitutional jurisdiction on the theory that the Colorado Supreme Court's decision inflicted an Article III injury on petitioners. That might be sufficient if the decision were a final judgment altering tangible legal rights. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989). But the decision here merely declined to dismiss on the pleadings. Rejecting a federal defense may make an adverse judgment more likely, but any injury remains speculative: Respondents must still prove their claims and overcome numerous other defenses, and preemption will remain reviewable after final judgment. Continued litigation costs are a byproduct of the suit itself, not a cognizable injury.

B. Statutory jurisdiction is also absent. This Court may only review state courts' final judgments, not interlocutory rulings like this one. The fourth finality exception in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), does not apply: federal defenses remain, so petitioners are not relegated to defending on nonfederal grounds; reversal would not end the litigation on any claim because respondents could still proceed under source-state law or based on in-state emissions; and awaiting final judgment erodes no federal policy.

Nor is the decision reviewable as a final judgment in a "separate lawsuit" under *Atlantic Richfield Co. v. Christian*, 590 U.S. 1 (2020). The appeal here was not a writ proceeding against the trial court of the kind this Court has treated as a "self-contained case" for finality purposes. *Id*. at 12. Petitioners sought no writ of any kind, named no court as a respondent, requested "interlocutory review" and reversal, and obtained a remand. That the Colorado Supreme Court called the appeal an "original proceeding" does not change the outcome, which turns on the nature of the proceeding, not on labels.

II. Respondents' claims are not preempted by constitutional structure.

There is no preemption in vacuo, yet petitioners identify no constitutional text that preempts respondents' claims. They contend instead that because respondents' claims would have fallen within a long-displaced federal common law of interstate pollution, constitutional structure impliedly preempts them unless Congress expressly restores state law. That argument has no merit.

A. This Court's decisions in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), hold the opposite: Each recognized that the federal common law petitioners cite had been displaced by statute, then treated the availability of state-law claims as an ordinary question of statutory preemption. *Ouellette* applied a presumption *against* preemption and permitted nuisance claims under source-state law, even though the Clean Water Act did not expressly authorize them. *AEP* endorsed that analysis for greenhouse-gas claims.

Petitioners respond that the Court creates federal common law only where constitutional structure itself preempts state law. That position misconceives the basis for federal common lawmaking and cannot be reconciled with *AEP* or *Ouellette*. While petitioners insist that language in some opinions indicates that federal common law exists only where state law cannot apply, they concede that *Ouellette* demonstrates that state law *can* apply. That resolves the Question Presented, which asks not *which* state's law can apply (a choice of law question not pressed or passed upon below) but whether federal law bars application of *any* state law *at all*.

Regardless, these claims never fell within that federal common law, which was only ever applied to suits by one state to abate pollution emanating from another—sovereign disputes in which a federal injunction replaced the forcible abatement states surrendered on entering the Union. Respondents are not states, do not seek abatement, and have sued not emitters but fossil fuel producers for deceptive marketing and sales—never a subject of federal common law.

B. Rather than debate whether a now-displaced common law would have been *extended* to reach these claims, and what that might imply about constitutional preemption, the Court should decide the question directly: Does anything implicit in the Constitution bar this suit? Nothing does.

Petitioners say that principles of equal sovereignty prevent one state from applying its own law to remedy in-state harm arising from out-of-state conduct. But since the Founding, courts have applied state law (usually the law of the state of injury) to out-of-state torts causing in-state harm, including in environmental nuisance cases. That forecloses any claim that the Constitution silently forbids the practice. The Constitution polices interstate effects of such litigation instead through constraints on choice of law, limits on personal jurisdiction, and the dormant Commerce Clause—doctrines petitioners raised below but do not press here. Petitioners ask the Court to discard these well-developed, text-based doctrines in favor of a sweeping, standardless conception of "extraterritoriality" even more extreme than the one the Court recently rejected in *National Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023).

C. Petitioners identify various policy reasons why the Court should declare climate-related injuries "inherently federal" and therefore preempted. But countless torts cross state lines, including interstate environmental nuisances that have been subject to state law since the Founding. Respondents may face challenges in proving causation, but that is no reason to take the case out of state hands. Nor does the global nature of climate alteration disable states from redressing in-state harms. Most importantly, Congress is fully capable of deciding whether petitioners' objections warrant a uniform, preemptive federal rule.

III. Dormant foreign affairs preemption does not bar these claims against domestic corporations for domestic injuries. Incidental effects on foreign relations are not enough. Petitioners must show a clear conflict with an express federal foreign policy embodied in something fit to preempt—a statute, self-executing treaty, or executive agreement. They identify none, invoking only generalized diplomatic concerns and government officials' policy preferences, which cannot displace state law.

IV. Finally, the Clean Air Act does not impliedly preempt respondents' claims.

A. As *AEP* and *Ouellette* demonstrate, no presumption of preemption applies. Because the Supremacy Clause gives preemptive force only to laws made in pursuance of the Constitution, congressional silence is never enough.

B. The Act's saving clauses foreclose petitioners' claims of implied field preemption. And there is no conflict with the Act's purposes. The deception claims require only that petitioners stop misleading the public; they could avoid liability without reducing their contributions to emissions at all. And nothing in the Act charges EPA with setting the appropriate level of deceptive marketing. Nor does the Act's permitting scheme regulate upstream production and sale of petitioners' products. Even if respondents' claims might indirectly reduce demand for fossil fuels, that is no basis for preemption—taxes on coal extraction and gasoline sales do the same. The Act governs emissions, not conduct in upstream markets.

ARGUMENT

I. Petitioners Have Failed To Establish This Court's Jurisdiction.

This case should begin and end with jurisdiction.

A. Article III Jurisdiction

Article III "grants this Court authority to adjudicate legal disputes only in the context of 'Cases' or 'Controversies.'" *Camreta v. Greene*, 563 U.S. 692, 701 (2011). Petitioners have abandoned their cert-stage argument that this Court has Article III jurisdiction because "respondents have sufficiently alleged a cognizable injury" for this case to be heard in federal court. *Compare* Cert. Reply 5, *with* Petrs. Br. 19-21. Accordingly, the Court need not resolve the standing question that evenly divided it in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011).[3] Instead, petitioners argue only that *they* suffered an Article III injury when the Colorado Supreme Court declined to dismiss this case on the pleadings. Petrs. Br. 19-21. That argument has no merit.

1. The jurisdictional question here is controlled by *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). There, at the behest of general taxpayers, a state

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[3] Respondents believe that this case likely could have been filed in federal court, but because petitioners bear the burden of establishing jurisdiction, *see Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013), and have elected not to advance that ground, respondents do not address it.

court invalidated an Arizona statute under which the intervenor-defendants had been awarded mineral leases. *See id*. at 610. The leaseholders petitioned this Court, which held that even if the taxpayers lacked Article III standing, the leaseholders could seek review because they held leases "granted under the state law the Arizona Supreme Court invalidated." *Id*. at 618. That "final judgment altering tangible legal rights," *id*. at 619, inflicted a "direct, specific, and concrete injury" sufficient to create Article III jurisdiction in this Court, *id*. at 623-24.

That analysis leads to the opposite result here. The Colorado Supreme Court's decision was not a "final judgment altering tangible legal rights"; it simply declined to end the litigation at the pleading stage. *ASARCO*'s rationale does "not extend to this quite different case" where a state court "merely held that respondent's complaint was sufficient to survive [a] demurrer." *Nike, Inc. v. Kasky*, 539 U.S. 654, 662 (2003) (Stevens, J., concurring in dismissal of case as improvidently granted).

2. Petitioners claim that the decision below nonetheless inflicted an Article III injury by: (a) denying their federal defense, thereby increasing the "risk" of liability, and (b) forcing them to spend money on continued litigation. Br. 12, 20.

That is not enough under *ASARCO*. There, the "adjudication of legal rights" creating standing was not simply the disposition of a federal claim or defense; it was a "final judgment" that "alter[ed] tangible legal rights." 490 U.S. at 618-19; *see also Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003) (finding jurisdiction under *ASARCO* because the petitioner "ha[d] suffered, as a consequence of the Virginia Supreme Court's 'final judgment altering tangible legal rights,' an actual injury in fact" (quoting *ASARCO*, 490 U.S. at 619)).

While rejection of a federal defense may increase the likelihood of an adverse final judgment (which *would* be reviewable), that prospect remains entirely speculative. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (Article III injury must be "certainly impending," not "speculative"). Respondents must still prove their claims and overcome many state and federal defenses the Colorado Supreme Court has yet to review. And even the preemption defense will be reviewable by this Court after final judgment.

The Court rejected petitioners' "cost of litigation" theory in *Diamond v. Charles*, 476 U.S. 54 (1986). There, an intervenor who lacked Article III standing to sue claimed standing to appeal because, as the losing party, he had been assessed attorney's fees. *See id*. at 69-71. The Court explained that the "mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III." *Id*. at 70-71. *ASARCO* itself confirms the point: If litigation costs were enough, the Arizona Supreme Court's remand for further proceedings would have sufficed; instead, this Court analyzed the decision's *substantive* effect. *See* 490 U.S. at 610, 618-19.

Holding otherwise would yield inexplicable results. For example, this Court lacks appellate jurisdiction when a plaintiff loses a non-Article III case in state court. *See id.* at 623 n.2. On petitioners' view, however, the Court could review an *interlocutory* decision in such a case—say, denying the plaintiff's summary judgment motion—because it would inflict further litigation costs on the plaintiff. And an intervenor like the one in *Diamond*, though lacking standing to appeal a final judgment, could take an interlocutory appeal to avoid continued litigation costs.

Lamps Plus, Inc. v. Varela, 587 U.S. 176 (2019), *Camreta*, 563 U.S. 692, and cases this Court has reviewed on interlocutory appeal, such as *Atlantic Richfield Co. v. Christian*, 590 U.S. 1 (2020), are not to the contrary. *Contra* Petrs. Br. 20. In those cases, an Article III case-or-controversy existed between the parties—a sufficient basis for this Court's review at any stage. *See ASARCO*, 490 U.S. at 612. In that context, the only Article III question on appeal is whether the appealing "litigant retains the necessary personal stake in the appeal" to keep that case-or-controversy alive—a question that may arise when the defendant arguably prevailed and the plaintiff is no longer pursuing the case. *Camreta*, 563 U.S. at 702 (citations omitted); *see also Lamps Plus*, 587 U.S. at 182.

B. Statutory Jurisdiction

The Court lacks statutory jurisdiction as well. Under 28 U.S.C. § 1257(a), this Court may review only state courts' "[f]inal judgments," not their "merely interlocutory" decisions. *Mkt. St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945). This case is interlocutory in every way.

1. This Case Does Not Fall Within Cox's *Fourth Exception.*

For the reasons the United States explained in a parallel case, petitioners cannot satisfy any—much less all—of the three requirements under the fourth exception to the final judgment rule in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See* U.S. Br. 8-11, *Sunoco LP v. City & Cnty. of Honolulu*, 145 S. Ct. 1111 (2025) (No. 23-947).

First, the Colorado Supreme Court's decision does not limit petitioners to defending themselves in state court "on *nonfederal* grounds," given the multiple remaining federal defenses. *Cox*, 420 U.S. at 482-83 (emphasis added); *see Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (per curiam). Petitioners note this Court reviewed a First Amendment defense in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-57 (1989), even though additional federal defenses remained available on remand. *See* Petrs. Br. 19. But denying a plaintiff "rights protected by the First Amendment during the period of appellate review" causes its own constitutional harm. *See Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam). Requiring petitioners to litigate to final judgment here inflicts no comparable constitutional injury.

Second, reversal here would not "preclu[d]e … further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-83. As explained below, even if this Court were to hold that "Colorado law" cannot "redress harms caused by out-of-state emissions," Petrs. Br. 15, respondents could still pursue their claims under source-state law, *see infra* pp. 30-31, or based on in-state emissions.

Third, petitioners do not substantiate their assertion that "failure to review the decision now would seriously erode federal policies." Br. 19 (citing *Cox*, 420 U.S. at 482-83). Unlike the Double Jeopardy Clause or the federal policy favoring arbitration, no federal policy is violated by requiring petitioners to wait for final judgment. *Cf. Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam). Petitioners cite two cases considering preemption questions on review of interlocutory state court decisions. Br. 19 (citing *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87 (2017); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013)). But neither opinion addressed jurisdiction. And when "questions of jurisdiction have been passed on in prior decisions sub silentio," this Court "has never considered itself bound." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 119 (1984).

If *Cox* allows jurisdiction in an otherwise interlocutory case merely because policy reasons favor immediate review, it should be overruled as a relic of an era when the Court felt free to depart from the plain text and historic meaning of jurisdictional statutes on policy grounds.

2. This Interlocutory Appeal Was Not A Separate Lawsuit.

Petitioners' argument (Br. 16) that the appeal below was a "separate lawsuit" reviewable under *Atlantic Richfield Co. v. Christian*, 590 U.S. 1 (2020), also fails.

a. *Atlantic Richfield* distinguished between (1) a "writ proceeding" in state court and (2) "an interlocutory appeal." 590 U.S. at 12. The former is a "self-contained case" whose resolution produces a final judgment; the latter is an exercise of appellate jurisdiction over a preexisting case. *See ibid*. This case is the latter.

When parties ask a state high court to "review and reverse" a lower court's decision, they are "seeking an exercise of appellate jurisdiction." *T.M. v. Univ. of Md. Med. Sys. Corp.*, 146 S. Ct. 1739, 1747 (2026) (citation omitted); *accord id.* at 1755 (Thomas, J., concurring) ("The power to revise or modify another court's judgment has been recognized as an exercise of appellate jurisdiction from before the ratification of the Constitution."). As early as *Marbury v. Madison*, 5 U.S. 137 (1803), this Court made clear that "appellate jurisdiction … revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.* at 175; *see also T.M.*, 146 S. Ct. at 1755-56 (Thomas, J., concurring) (collecting other authorities).

In aid of their appellate jurisdiction, courts sometimes also issue writs of mandamus or prohibition against lower courts. This Court originally deemed such proceedings "appellate." *Marbury*, 5 U.S. at 175-76; *see also T.M.*, 146 S. Ct. at 1757-59 (Thomas, J., concurring). In certain settings, however, the Court has subsequently conceived of such writs as requests for "collateral prospective relief … against judges." *Pulliam v. Allen*, 466 U.S. 522, 529, 536 (1984). And for purposes of the final judgment rule, the Court has treated a "collateral attack" of this type as an independent lawsuit, not an appeal. *T.M.*, 146 S. Ct. at 1749; *see also id.* at 1762-63 (Barrett, J., dissenting) (same).

Thus, in *Atlantic Richfield*, the Court reasoned that when "the Montana Supreme Court issues a writ of supervisory control, it initiates a separate lawsuit." 590 U.S. at 12. Just like a writ of mandamus or prohibition, Montana's writ of supervisory control constitutes collateral relief directly *against the trial court*. Indeed, the case in the Montana Supreme Court was captioned *Atlantic Richfield Co. v. Montana Second Judicial District Court*, 408 P.3d 515 (Mont. 2017).

b. This case falls on the "interlocutory appeal" side of *Atlantic Richfield*'s dichotomy.

Petitioners did not seek a "writ of supervision" because Colorado has no such writ. Montana's "writ of supervisory control" is "unique in the United States."[4] Indeed, petitioners did not seek a writ against *anyone* and sought relief only against respondents. *Compare* Colo. App. R. 21(e)(1) ("When a petition seeks a writ of mandamus or prohibition directed to a court or tribunal, the proposed respondents" must include "the lower court or tribunal"), *with* Exxon Pet. 5 ("The entities against whom relief is sought are the Board of County Commissioners of Boulder County and the City of Boulder."). Instead, (in their own words) petitioners "petitioned the Colorado Supreme Court for *interlocutory review*," Cert. Pet. 10 (emphasis added),

[4] 1 *Montana Constitutional Convention Proceedings, 1971-1972*, at 493 (Margaret S. Warden et al. eds., Mont. Legislature 1979), *available at* https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1037&context=montanaconstitution.

and requested "revers[al]" of the decision below, Exxon Pet. 5.[5]

The Colorado Supreme Court then agreed to "review" the "district court's ruling." Pet. App. 8a. And when it later held "that the district court correctly concluded that federal law did not preempt Boulder's claims," the court "*remand[ed] th[e] case* to the district court for *further* proceedings." *Id*. 24a (emphasis added).

c. Petitioners' assertion that the appeal was nonetheless a "self-contained proceeding" has no merit.

First, petitioners emphasize (Br. 18) that the Colorado Supreme Court said it was exercising "original jurisdiction." *See* Pet. App. 7a-8a. But that simply reflects that Colorado Appellate Rule 21, which governs review of all non-final judgments, is entitled "Original Proceedings in the Supreme Court," an artifact from when the Rule extended only to original actions. *See* Colo. App. R. 21 (1998). Rule 21 now also governs "the supreme court's general superintending authority over all courts as provided in Section 2 of Article VI of the Colorado Constitution," Colo. App. R. 21(a)(1), which defines the court's "Appellate jurisdiction," *see* Colo. Const.

[5] Petitioners' insinuation (Br. 17) that the "trial court itself" was "named as a respondent" is misleading. While Rule 21(e)(1) requires naming the trial court when the petitioner seeks a writ of prohibition or mandamus, petitioners sought no such relief and named no court as a respondent. *See* Exxon Pet. 4. The Colorado Supreme Court's request that the court file a brief pursuant to Rule 21(k)(1), *see* JA 141-42, may have treated the district court as a respondent in that sense, but it did not make that court the object of any writ.

art. VI, § 2. The court thus uses "original jurisdiction" and "interlocutory appeal" interchangeably to describe Rule 21 proceedings.[6]

The distinction almost never matters in Colorado practice—both original and supervisory jurisdiction are exercised under the same standards. *See* Colo. App. R. 21(a)(2). And although this Court will defer to a state court's considered judgment about matters of state law, it does not allow mere off-hand labels to determine federal jurisdiction; for that purpose, it is "the nature of the [state court] proceeding" that controls, not mere nomenclature. *Atl. Richfield*, 590 U.S. at 12. After all, state courts do not necessarily use "original jurisdiction" as federal courts do, or only for self-contained proceedings yielding final judgments under Section 1257(a). Utah, for example, refers to its "original jurisdiction" to issue both "extraordinary writs" and to hear an "interlocutory appeal" from a trial court. *See* Utah Code Ann. §§ 78A-3-102(2), 102(3)(a) (West 2026); *see also, e.g.*, Ala. R. App. P. 5(a) (2026) (granting supreme court "original appellate jurisdiction"); N.M. Stat. Ann. § 34-5-14(B), (D) (West 2026) (same); Wyo. Const. art. V, § 3 (placing "appellate and revisory jurisdiction" under constitutional provision labeled "original jurisdiction"). The nature of the proceedings

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[6] *See, e.g.*, *Ronquillo v. EcoClean Home Servs., Inc.*, 500 P.3d 1130, 1132 (Colo. 2021) ("This interlocutory appeal [is] brought under C.A.R. 21 …."); *People v. Scott*, 227 P.3d 894, 895, 897 (Colo. 2010) (similar); *People v. Villapando*, 984 P.2d 51, 53 (Colo. 1999) (similar); *see also People ex rel. Gallagher v. Dist. Ct. for Cnty. of Arapahoe*, 933 P.2d 583, 592 (Colo. 1997) (Rule 21 proceedings "qualify for interlocutory appeal treatment" under the state speedy trial act).

and relief sought here render this an interlocutory appeal under Section 1257(a), and that ends the matter.[7]

Second, petitioners' assertion that Rule 21 "is available only when an 'appeal' is not," Br. 18 (quoting Colo. App. R. 21(a)(2)), is incorrect. The Rule is satisfied "when an appellate remedy would be inadequate … *or* when a petition *raises issues of significant public importance* that [the court] ha[s] not yet considered." *Brown v. Long Romero*, 495 P.3d 955, 958 (Colo. 2021) (emphasis added). The latter was the ground for review here. *See* Exxon Pet. 6.

Third, petitioners note that the Colorado Supreme Court issued an "order to show cause" and "discharge[d] the order" when issuing its decision. Petrs. Br. 18. But that is just a way of ordering a response and "effectively affirm[ing] the lower court." Justice Brian D. Boatright & Will Hauptman, *Practical Considerations for Rule 21 Proceedings in the Colorado Supreme Court*, 96 Denv. L. Rev. 203,

[7] Even if jurisdiction turned on whether this appeal fell within the Colorado Supreme Court's original jurisdiction, the Colorado Constitution makes clear it did not. Article VI, Section 3, entitled "Original Jurisdiction," grants the court "the power to issue" certain enumerated writs. Colo. Const. art. VI, § 3. From early on, the court confined such actions to "cases involv[ing] questions of *publici juris*" (public rights), holding them unavailable to support its "appellate jurisdiction" or "superintending control." *Wheeler v. N. Colo. Irrigation Co.*, 11 P. 103, 104-05 (Colo. 1886). Those powers are instead conferred by Section 2, entitled "Appellate jurisdiction," under which the court "shall have appellate jurisdiction only" and "a general superintending control over all inferior courts." Colo. Const. art. VI, § 2. And here, as the United States acknowledges (Br. 12), petitioners sought an exercise of the "superintending control" conferred by Section 2.

208 (2018). In other indistinguishable Rule 21 proceedings, the Colorado Supreme Court often simply "affirms" or "reverses" the trial court's decision.[8]

Finally, petitioners stress that many features marking this case as an interlocutory appeal were shared by the proceeding in *Atlantic Richfield*. That is all the more reason to strictly observe the only real remaining distinction between interlocutory appeals and "self-contained" proceedings—that the latter seek writs against the trial court. Otherwise, there would be no principled basis to deny jurisdiction in cases from the many states that allow interlocutory review in materially indistinguishable proceedings.[9]

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The final judgment rule minimizes "potential conflict[s] between the courts of two different governments" by allowing this Court's intervention only where truly necessary to prevent a judgment in contravention of federal law. *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). Accordingly, "any doubts" about whether petitioners have satisfied their "burden of affirmatively establishing this Court's jurisdiction" must "be resolved against jurisdiction."

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[8] *See, e.g.*, *People v. Seymour*, 536 P.3d 1260, 1269 (Colo. 2023) ("We discharge the rule to show cause (and thus, essentially affirm the trial court's order) …."); *Scott*, 227 P.3d at 897 ("The People appealed … pursuant to C.A.R. 21 and we now reverse.").

[9] *See, e.g.*, Ala. R. App. P. 5(a); Ky. R. App. P. 17(A), (C); Tenn. R. App. P. 10; Okla. Stat. tit. 12, § 952(b)(2) (2025); Utah Code Ann. § 78A-3-102(3)(a)(iii) (West 2026); Wis. Stat. §§ 808.05, 809.60 (2025).

Republic Nat. Gas Co. v. Oklahoma, 334 U.S. 62, 70-71 (1948) (citations omitted).

Here, there are nothing *but* doubts and no reason to think federal intervention is required at this early stage. Petitioners face no liability unless respondents prove the elements of their claims (which, petitioners' amici argue, will be no small task, *see* Epstein & Yoo Amici Br. § III) and surmount petitioners' personal jurisdiction, Commerce Clause, Due Process, First Amendment, and state law defenses. This Court lacks statutory and constitutional jurisdiction to decide whether that hypothetical judgment would contravene federal law.

II. Respondents' Claims Are Not Impliedly Preempted By The Structure Of The Constitution.

If this Court reaches the merits, it should reject petitioners' preemption defenses, starting with their novel claim that respondents' suit is impliedly preempted by the "structure of the Constitution." Petrs. Br. 21.

The Constitution bestows only limited powers on the federal government; "all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 584 U.S. 453, 471 (2018). While federal law may preempt state law, respect for the basic constitutional structure sharply limits when courts will declare state law preempted. Thus, as the Court has repeatedly declared, there "is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it." *Hencely v. Fluor Corp.*, 146 S. Ct. 1086, 1093 (2026) (citation omitted). Here, however, petitioners point to no "constitutional text" and strain to avoid this Court deciding whether respondents' claims are preempted by any statute.

Instead, petitioners assert preemption by implications emanating from the Constitution's structure. Respondents' claims, they assert, fall within a former federal common law of interstate pollution. *See* Br. 22. And although this common law has been displaced by statute, they say this Court creates federal common law only when the Constitution implicitly preempts state law. *See ibid*. Here, they argue, the Court created federal common law because principles of "equal sovereignty" preclude a state from applying its tort law "extraterritorial[ly]" to conduct occurring outside its borders, *ibid*., even when that conduct causes injury within the state, *id*. 23-24. Petitioners hold out that Congress may authorize this alleged invasion of equal sovereignty if it does so clearly and expressly, *see id*. 30, but the United States is notably silent about that prospect, *see* U.S. Br. 17-26.

Petitioners' argument lacks support in constitutional text, conflicts with original meaning, misconceives federal common law, and invites a standardless judicial invasion of states' traditional authority to protect their citizens from in-state harms.

A. Petitioners Misconceive The Scope And Implications Of The Former Federal Common Law Of Interstate Pollution.

Today, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374 (2023). This includes "tort laws," *ibid*., which often address conduct in one state that causes injury in another. An automobile may be negligently designed in Michigan, defectively manufactured in Canada, and cause injury in Minnesota. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 355-57 (2021). Asbestos, defective medical products, defamatory articles, and internet fraud may originate in one or several states, or even from abroad, and cause injury across the nation.

Such cases may prompt calls for a uniform federal rule. But under our Constitution, the "decision whether to displace state law" is "generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*") (citation omitted).

Congress's preemption power is thus the Constitution's principal safeguard against state laws with undesirable extraterritorial effects. But other constitutional provisions provide additional protection. The Constitution has long addressed competing state interests in multi-state tort suits through constraints on state choice-of-law decisions. *See Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494-95 (2003). The Due Process and Full Faith and Credit Clauses require "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Ibid*. (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)). That rule "undoubtedly" allows a state to apply its own law when tortious conduct has "injured one of its citizens within its borders." *Id*. at 494. And where applying one state's law would contravene those limits, the remedy is to apply another state's law, not to declare all state law preempted. *See Shutts*, 472 U.S. at 799, 816, 823 (addressing choice of law in case involving 28,000 royalty owners in fifty states and several foreign countries).

The Due Process Clause also constrains personal jurisdiction over out-of-state defendants. *See Fuld v. PLO*, 606 U.S. 1, 13-14 (2025). And the dormant Commerce Clause "mediate[s] competing claims of sovereign authority under our horizontal separation of powers" by prohibiting laws that impose discriminatory or unjustified burdens on interstate commerce. *See Nat'l Pork Producers*, 598 U.S. at 376-77.

Petitioners raised Due Process, personal jurisdiction, and dormant Commerce Clause defenses below, but do not reprise them here. *See* Pet. App. 56a, 111a-13a. And none provides the blanket immunity petitioners seek. Indeed, petitioners' argument here is a more extreme version of the atextual "extraterritoriality" rule this Court rejected in *National Pork Producers* as contrary to original understanding and precedent. *See* 598 U.S. at 371 (rejecting "'almost per se' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State'").

Petitioners and the United States ask this Court to sweep aside these "myriad constitutional provisions and doctrines," U.S. Br. 19, and create an entirely new rule of implied constitutional preemption—one that would apply even where state law satisfies every existing constitutional requirement, offends no dormant Commerce Clause principle, and survives traditional preemption analysis.

In support, petitioners point to federal common law. Br. 24-26. In a few restricted contexts, federal courts have created federal rules of decision, which, like any federal law, preempt state law covering the same subject. *See Milwaukee II*, 451 U.S. at 313 n.7. Petitioners' reliance on this common law is misplaced. As discussed next, that law has been displaced by statute and respondents' claims never fell within that common law in the first place.

1. In *AEP*, the Court considered whether plaintiffs could "maintain federal common-law public nuisance claims against carbon-dioxide emitters" to cap greenhouse-gas emissions at out-of-state power plants. 564 U.S. at 415. The Court explained that it had previously applied a federal common law of interstate pollution to "suits brought by one State to abate pollution emanating from another State." *Id*. at 421 (collecting cases). But any applicable federal common law had been "displaced by" the Clean Air Act, which "authoriz[ed] EPA to regulate carbon-dioxide emissions" and other air pollution. *Id*. at 423.

As for the plaintiffs' state-law claims, the Court held that because the "Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id*. at 429. The Court then cited *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which it described as holding that "the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State.'" *AEP*, 564 U.S. at 429.

In *Ouellette*, the Clean Water Act had displaced the prior federal common law of interstate water pollution. *See* 479 U.S. at 487-89. Whether the plaintiffs could pursue state nuisance claims thus turned on "whether the Act preempts" state law. *Id*. at 491. The Court answered that question by applying standard statutory preemption analysis. *See id*. at 491-97 & n.11. Given the Act's broad saving clauses, the Court found no field preemption. *Id*. at 492-93. But it concluded that applying Vermont nuisance law to New York discharges would interfere with the "purposes and objectives" of the Act's discharge permitting scheme. *Id*. at 493-94 (cleaned up). The Court emphasized, however, that "nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id*. at 497.

Petitioners' constitutional theory conflicts with these decisions. Both explained that any relevant federal common law had been displaced by statute. On petitioners' view, that means the Constitution's structure should have preempted any state-law nuisance claims unless the statutes expressly authorized them. But neither case even suggested such a rule. Indeed, *Ouellette* applied the presumption *against* preemption. *See* 479 U.S. at 491 & n.11. And although the Court later stated that "the only state suits that remain" after enactment of the Clean Water Act are "those specifically preserved by the Act," *id*. at 492, it determined whether Congress "preserved" state law by applying ordinary field and conflict preemption tests, *see id*. at 491-97. Through those familiar inquiries, the Court determined that the tort law of the emitting state was not preempted, even though nothing in the Act expressly authorized such claims. *Id*. at 497. *AEP* endorsed that holding in identifying the preemption analysis for greenhouse-gas nuisance claims. 564 U.S. at 429.

Petitioners point to language in some decisions suggesting that courts create federal common law because "state law cannot be used." Petrs. Br. 26 (quoting *Milwaukee II*, 451 U.S. at 313 n.7); *see also id*. 22. Those passages reflect that, "when Congress has not spoken," the Constitution *authorizes* federal courts to decide that a "federal rule" rather than state law should apply in certain circumstances. *Milwaukee II*, 451 U.S. at 315 n.8. When the Court has made that decision, "state law cannot be used." *Id*. at 313 n.7. But the question here is what happens when Congress *has* spoken, displacing that judge-made law. That question did not arise in the cases petitioners cite. *See, e.g.*, *id*. at 310 n.4. It *was*, however, presented in *Ouellette* and *AEP*. And the Court held that, at least in the interstate pollution context, displacement rendered preemption a question of statutory interpretation under ordinary preemption standards.

Petitioners' attempt to reconcile their constitutional theory with *AEP* and *Ouellette* fails. They repeatedly insist this Court has held that "our federal system does not permit the controversy to be resolved under state law." Br. 22 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)); *see also id*. 12 ("state law cannot apply"); *id*. 21 ("state law cannot govern"). But petitioners ultimately admit that state law *can* apply, although they insist Congress must "clearly express its intention" to allow it. *Id.* 30. *Ouellette*, they argue, applied that clear statement rule and found it satisfied with respect to state-law claims under the law of the state of emission. *See id*. 31-32. Not so. The Clean Water Act "did not speak directly to the issue," which is why the Court applied ordinary preemption analysis to decide whether state law was preempted. *See Ouellette*, 479 U.S. at 493.

Petitioners' rule (which the United States notably does not endorse) is also internally incoherent. Petitioners insist that "federal law necessarily and exclusively governs interstate-pollution disputes" because allowing any state's law to apply would violate the "equal sovereignty" of other states. Br. 26-27. If that is so, it is hard to see how Congress could then authorize the violation of state rights. Surely, for example, Congress could not authorize Nevada to violate California's equal sovereignty by allowing it to subject California to private suit in Nevada courts. *See Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 245 (2019). Nor would the offense be eliminated by Congress adopting, as a "federal rule of decision," each state's law on whether to allow suits against sister states in its courts. *Contra* Cert. Reply 9.

But even if petitioners' position were coherent and their interpretation of *AEP* and *Ouellette* correct, this Court would still have to affirm. The only question pressed or passed upon below, and presented here, is whether *any* state law can apply, not *which* state's law can govern. *See* Cert. Pet. i. Petitioners moved to dismiss the case entirely, on the ground that "federal law precludes the application of state law" to this case, full stop. *See* Exxon Pet. 9; *see also id*. 27-37 (never mentioning Colorado law in particular). Respondents' complaint did not identify which states' common law would apply either.[10] If, as petitioners seem to acknowledge, some state law may constitutionally apply to greenhouse-gas suits under *AEP* and *Ouellette*, then the only option is to affirm and allow the Colorado courts to decide choice of law in due course.

2. Even if the former federal common law defined the scope of preemption today, respondents' claims fall far outside it.

"[F]ederal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020) (citations omitted). Given the serious separation-of-powers and federalism concerns judicial lawmaking raises, the Court "has emphasized the narrowness of this doctrine, which will rarely apply when litigation is purely between private parties and does not touch the rights and duties of the United States." *Hencely*, 146 S. Ct. at 1094 (cleaned up).

Contrary to petitioners' claims, the Court did not apply federal common law to all "disputes arising from injuries caused by interstate pollution." Br. 22. Instead, this Court only "approved federal common-law suits brought by one State to abate pollution

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[10] *See* JA 112-23, 127-36. Respondents invoked (*e.g.*, JA 130) a Colorado statute imposing joint liability on conspirators who "pursue a common plan or design to commit a tortious act." Colo. Rev. Stat. § 13-21-111.5(4) (2018). But on its face, that provision is not limited to a "tortious act" under Colorado law. And petitioners have never argued that this joint-liability provision violates the equal sovereignty of states or is otherwise preempted.

emanating from another State." *AEP*, 564 U.S. at 421 (collecting cases); *see id*. at 422 ("We have not yet decided whether private citizens … or political subdivisions … may invoke the federal common law of nuisance to abate out-of-state pollution."); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981) (noting open question whether federal common law applied to action "by a private plaintiff, seeking damages"). For that reason, petitioner Exxon itself once argued that climate tort claims "asserted by non-sovereigns" "seek[ing] damages" do not fall within the federal common law.[11]

Instead, the federal common law has been limited to litigation that "implicates the conflicting rights of States" as sovereigns, akin to border disputes and conflicts over water apportionment. *Tex. Indus.*, 451 U.S. at 641 & n.13. To resolve such conflicts, states exchanged resort to "forcible abatement" for "a suit in this court" capable of achieving the same result: an injunction ending the polluting conduct. *Georgia v. Tenn. Copper Co*., 206 U.S. 230, 237 (1907). Unlike "private parties," this Court reasoned, states "should not be left to an action at law." *Id*. at 238. So the Court provided a special cause of action under federal law for a state to enjoin emissions from across its border. *Ibid*.

Respondents' claims here are fundamentally different; they do not seek abatement of emissions by anyone. Their deception theory is premised on

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[11] Answering Br. for Defs.-Appellees at 56, 60, *Native Vill. of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) (No. 09-17490).

petitioners' misleading marketing, a subject squarely within traditional state authority. *See, e.g.*, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). Under this theory, petitioners "can sell as much fossil fuel as they wish without fear of incurring further liability." *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1186 (Haw. 2023). They need only refrain from misleading the public, which can then make informed consumption decisions. The federal common law has never extended to such claims. Indeed, this Court has never developed a federal common law of fraud in any field, even though state law has long applied to deceptive nationwide marketing and publications. *See, e.g*., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 81 (2008); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776-77 (1984). As the United States has put it: "To establish that federal common law governs respondents' claims, this Court would have to fashion a new body of federal common law." *See* U.S. Br. 17, *Sunoco LP v. City & Cnty. of Honolulu*, 145 S. Ct. 1111 (2025) (No. 23-947).

Reaching respondents' sales and production claims would likewise require expanding the prior federal common law. Respondents are not states, petitioners are not sued as emitters, and the claims do not seek to abate emissions. Instead, like the private parties contemplated in *Tennessee Copper*, respondents seek to make private defendants share the financial burden their tortious conduct has inflicted. This litigation simply does not implicate the "conflicting rights of States" *qua* states in the same way as a suit seeking to redraw state boundaries or reallocate sovereign ownership over shared waters. Rather, as discussed next, such claims have long been resolved under state law even when they involve cross-boundary harm.

B. Applying State Law To Respondents' Claims Does Not Violate Principles Of Equal Sovereignty Or Extraterritoriality.

Rather than triangulate an answer from debates about the scope and implications of long-displaced federal common law, the Court should just decide the question directly: Does some implicit constitutional principle preclude state law from applying to this case? The answer is no.

1. Petitioners point to principles of "equal sovereignty," which they say strip a state of the "power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." Br. 24 (citations omitted). The "ambient nature of air and water," they argue, "gives rise to equal-sovereignty and extraterritoriality problems" because the injury suffered in one state will inevitably be caused by conduct in another. *Id*. 27. In that circumstance, petitioners insist, no state's law can apply. The state "where the alleged injury occurred … cannot apply its law beyond its borders to regulate a source of pollution in the 'upwind' state." *Ibid*. And, they say, applying the law of the states of emission "would infringe the downwind State's legitimate sovereign interests." *Ibid*. Thus, according to petitioners, unless Congress intervenes, the Constitution protects downwind states' sovereignty by stripping those states of any remedy at all.

That argument fails as a matter of precedent and original understanding. To be sure, there are important constitutional limits on the reach of each state's law. For example, a state may not impose punitive damages "to punish [a defendant] for conduct" outside its borders that "had no impact on [the state] or its residents." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996) (footnote omitted). But since the Founding, state law has constitutionally applied to countless cases in which conduct in one state *did* have impacts in another—including environmental nuisance litigation.

a. This Court has long affirmed the state's "power … to impose responsibility for injuries within its borders" under its own tort law. *Young v. Masci*, 289 U.S. 253, 258 (1933). Indeed, "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939).

Thus, the "cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it." *Young*, 289 U.S. at 258-59. Indeed, for much of the nation's history, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004) (citations omitted); *see also* Restatement (First) of Conflict of Laws §§ 65, 378 (1934). That choice remains permissible to this day even in cases involving international conduct. *See id*. § 44; Restatement (Second) of Conflict of Laws § 145 (1971); Restatement (Fourth) of the Foreign Relations Law of the United States § 409 (2018) ("International law recognizes a state's jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory.”).

Under these principles, states have applied their law to out-of-state conduct causing in-state injury since the early years of the Republic, in all kinds of cases, including transboundary environmental nuisance disputes. *See, e.g.*, *Young*, 289 U.S. at 259 (citing *State v. Lord*, 16 N.H. 357, 359 (1844) (applying New Hampshire law to flood damage caused by dam in Maine)); *Rundle v. Del. & Raritan Canal Co.*, 55 U.S. 80, 88-89, 91 (1852) (where defendant’s water diversion in New Jersey harmed plaintiff’s mill in Pennsylvania, “plaintiff’s rights … depend on the laws and customs of Pennsylvania, as expounded by her own courts,” even though Pennsylvania law “differs materially” from that of “most” other states); *Slack v. Walcott*, 22 F. Cas. 309, 312-13 (C.C.D.R.I. 1825) (No. 12,932) (Story, Circuit Justice) (observing that Massachusetts mill owner injured by river obstruction in Rhode Island entitled to remedy “by the laws of” Massachusetts); *Stillman v. White Rock Mfg. Co.*, 23 F. Cas. 83, 86 (C.C.D.R.I. 1847) (No. 13,446) (Woodbury, Circuit Justice) (same, holding law of state of injury governs damages actions); *see also, e.g.*, *Commonwealth v. Macloon*, 101 Mass. 1, 6 (1869) (collecting authorities).

In fact, the “logical soundness and necessity” of subjecting tortfeasors to suit in the jurisdiction of injury “received early recognition in the common law.” *See Ford v. United States*, 273 U.S. 593, 623 (1927) (citing *Bulwer’s Case*, 77 Eng. Rep. 411 (K.B. 1583)); *see also Rundle v. Delaware & R. Canal*, 21 F. Cas. 6, 10-11 (C.C.E.D. Pa. 1849) (Grier, Circuit Justice)

(*Bulwer's Case* has always applied in "this country" and extends to actions involving two states).[12]

This long tradition of applying state law (even the law of the injured state) to multi-state torts (including environmental nuisances) precludes any contention that the Constitution implicitly forbids the practice. *See Hencely*, 146 S. Ct. at 1098. And it defeats the notion that there is something about interstate air and water that places it within a uniquely federal realm.

b. Petitioners simply ignore this history. The United States grudgingly acknowledges it but urges the Court to impose a new constitutional limitation: The state of injury's law may only apply when the "effects of a person's out-of-state conduct are sufficiently proximate" that the person "can be treated as constructively, if not actually, present in the State where the effects occur, and thus subject to that State's regulatory authority." U.S. Br. 21. That proposal has no merit.

To start, the rule would make no difference here. It might restrain *which* state's law can apply, but it would not support holding that *no* state's law is permitted (e.g., even the law of the state of emissions), the only question presented here.

Nor did the Colorado Supreme Court hold that petitioners can be liable for conduct that did not proximately cause respondents' injuries. Petitioners moved to dismiss on proximate causation grounds in

[12] *Nielsen v. Oregon*, 212 U.S. 315 (1909), cited by the United States (Br. 18), interpreted a special federal statute that gave two states concurrent jurisdiction over a river. *See* 212 U.S. at 319.

the trial court, *see* Pet. App. 122a-25a, but did not ask the state supreme court to address the issue. The only question before, and decided by, that court was whether federal law preempts state-law claims that require proof of proximate causation.

In any event, the constitutional test for choice of law turns on state interests, not a defendant's "constructive presence" or proximate causation. *See supra* p. 25; *see also*, *e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305-06, 320 (1981) (plurality opinion) (Minnesota law constitutionally applied to insurance dispute over Wisconsin contract's application to Wisconsin accident). The Government provides no basis for overturning that precedent in favor of a new "constructive presence" test that would constitutionalize a traditional state tort element.[13]

C. Petitioners' Other Policy Arguments Do Not Support Constitutional Preemption.

Petitioners' remaining efforts to identify features of this case justifying implied constitutional preemption fail as well.

Petitioners say state law cannot apply because interstate pollution is an "inherently federal area." Br. 21. But that is a legal conclusion, not an argument or a test. Certainly, it is not enough that respondents' claims involve interstate conduct or events. Many state tort claims do—a company might

[13] The two criminal cases the United States cites (Br. 21) are inapposite. *See Hyde v. United States*, 225 U.S. 347, 357 (1912) (addressing "venue in conspiracy cases" under the Sixth Amendment); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (rejecting challenge to Michigan prosecuting defendant who committed fraud on Michigan residents from out-of-state).

mine asbestos in one state, process it in several others, then sell and market it nationally for use in pipe insulation in buildings nationwide. But that does not mean the Constitution implicitly bars state asbestos tort suits.

Petitioners try to suggest that there is something uniquely "inherently federal" about "interstate emissions," pointing to their "ambient aspects." Br. 21. But much interstate activity flows freely between states. *See, e.g.*, Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 803-05 (2001) (discussing state law's application to conduct on the internet). And for generations after the Founding, transboundary environmental nuisance claims were regularly decided under state law without any suggestion that the Constitution forbade it. *See supra* pp. 36-37.

Petitioners emphasize that greenhouse-gas emissions from many sources mix and linger in the atmosphere, altering climate collectively over time. That may create difficulties in proving proximate causation or other elements of respondents' tort claims.[14] But the possibility that plaintiffs may be unable to prove their state-law claims has never been a basis for federal preemption. The Constitution does not preempt hard cases for being hard.[15]

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[14] *But see, e.g.*, Natural Resources Defense Council Amicus Br. §§ II-V.

[15] Identifying contributors and allocating responsibility for harm is necessary in many pollution cases (e.g., where many sources contribute to pollution of a lake or ground water). *See,*

That climate change is a global problem does not disempower states from redressing its local harms either. This litigation is not an attempt to solve climate change; it merely asks that petitioners bear their fair share of local costs incurred in part because of their tortious conduct. Litigation often addresses the local effects of problems amenable to international solutions—from food contamination and the fentanyl crisis to human trafficking and global internet scams. Any statutes or self-executing treaties enacted as part of a global solution could preempt state law. But the bare desirability of a broader solution or national uniformity is insufficient to preempt. *See Nat'l Pork Producers*, 598 U.S. at 382-83 (Gorsuch, J., joined by Thomas & Barrett, JJ.).

In the end, *AEP* acknowledged these features of climate nuisance claims but held that preemption was governed by the Clean Air Act, not that state law was presumptively or entirely extinguished. *See* 564 U.S. at 421-23, 429. That was clearly right. Petitioners' "inherently federal" arguments rely on the kind of "brooding federal interest" or "judicial policy preference" that "should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion). Holding that the Constitution implicitly preempts state laws on topics courts deem uniquely suited to a uniform federal rule would invite endless debate over what other subjects should be declared "inherently federal." Such a "flabby test is a standing invitation to judicial arbitrariness and policy-driven

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e.g., *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 591 (Colo. App. 2007).

decisionmaking." *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 44 (2012) (Scalia, J., concurring in the judgment) (internal quotation marks and citation omitted).

III. Respondents' Claims Are Not Subject To Dormant Foreign Affairs Preemption.

Petitioners also argue that the Constitution implicitly preempts respondents' claims because they "infringe on the federal government's exclusive authority over foreign affairs." Br. 39. That too is wrong.

Some matters—like treaty negotiations—are subject to a kind of field preemption that leaves no room for state law. *See, e.g.*, *Clark v. Allen*, 331 U.S. 503, 517 (1947). But respondents' claims against U.S. corporations for domestic, in-state harms fall squarely within traditional state authority. *See supra* pp. 35-37. In that context, the fact that state law may "affect[] … foreign policy" or "will have some incidental or indirect effect in foreign countries" is not enough. *Clark*, 331 U.S. at 517; *accord Medellin v. Texas*, 552 U.S. 491, 523-32 (2008). Instead, petitioners must show a "clear conflict" with an "express foreign policy," that is "fit to preempt," i.e., that has the force of law, such as "valid executive agreements" or "treaties." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416-17, 419-21 & n.11 (2003). Preemption thus "must stem either from an Act of Congress or from the Constitution itself," *see Medellin*, 552 U.S. at 524, not merely the "priorities or preferences of federal officers," *Kansas v. Garcia*, 589 U.S. 191, 212 (2020) (citation omitted).

Petitioners and the United States identify no executive agreement and do not claim that the two treaties they cite are self-executing or have been implemented by preemptive legislation. *See* Petrs. Br. 41; U.S. Br. 26-28. They are thus left to rattle off various ways in which state tort law allegedly could complicate diplomatic efforts, offend foreign companies or nations, or contradict the present Administration's policy objectives. *See* Petrs. Br. 40-43; U.S. Br. 26-28. Even if those assertions were factually supported, that would not be enough. In *Medellin*, for example, this Court held that the President has no power to displace state law even to avoid international outrage over a state's planned execution of a foreign national in alleged violation of a Senate-ratified treaty. *See* 552 U.S. at 498-99.

The President and Congress may displace state laws that impede foreign policy, but only through laws, treaties, or executive agreements with the force of law. Courts cannot resolve alleged tensions between state law and federal foreign policy objectives by deciding for themselves whether a state law unduly inconveniences U.S. foreign policy.

IV. The Clean Air Act Does Not Impliedly Preempt Respondents' Claims.

Only at the end of their briefs do petitioners and the United States reach the real question: whether the Clean Air Act preempts respondents' claims. It does not. As discussed, even if respondents' claims were indistinguishable from the suits against emitters in *AEP* and *Ouellette*, those cases would establish that not all state law is preempted—the only question before the Court—because source-state law would apply. *See supra* pp. 30-31. But this case is different. *Ouellette* held that applying the downstream state's law to another state's emissions would interfere with Congress's permit scheme. Respondents sue not for emissions but for deceptive marketing and upstream production the Act does not regulate.

Nothing prevents respondents from pursuing such claims even under Colorado law if that is the choice of law the courts below eventually make.

A. There Is No Presumption Of Preemption.

Petitioners insist that claims once preempted by the federal common law should remain preempted unless Congress expressly revives them. Br. 31 (citing *City of New York v. Chevron Corp.*, 993 F.3d 81, 98-99 (2d Cir. 2021)). As discussed, that assertion has no constitutional basis and cannot be reconciled with *AEP* or *Ouellette*, which applied ordinary preemption analysis including a presumption against preemption.[16]

City of New York's presumption of preemption also runs counter to our constitutional structure. State law is only preempted by the "Constitution and the Laws of the United States *which shall be made* in Pursuance thereof." U.S. Const. art. VI, cl. 2 (emphasis added). Congress's *failure* to make law, therefore, cannot preempt. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting) (a "'pre-emption-by-silence' rationale … has long since been rejected by this Court in virtually every analogous area of the law").

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[16] Moreover, even if accepted, such a rule would not apply here because respondents' claims fall outside the former federal common law. *See supra* pp. 31-34.

Petitioners note that the Court has sometimes refused to apply a strong presumption *against* preemption in areas of concurrent state and federal jurisdiction where federal interests predominate. Br. 34. But here, redressing in-state harms to residents' property, health, and safety arising from deceptive marketing and other torts is a traditional state function. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens."); *supra* pp. 35-37. In any event, even when federal interests predominate, the Court applies no presumption one way or the other. *See United States v. Locke*, 529 U.S. 89, 108 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347-48 (2001). Petitioners cite no comparable case applying a presumption *of* preemption, much less to a state's traditional tort law authority.[17]

The Court has rejected such a rule even when federal law once occupied the field. In *Puerto Rico Department of Consumer Affairs v. Isla Petroleum*

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[17] The Court applied no presumption of preemption in *United States v. Standard Oil Co*., 332 U.S. 301 (1947). *Contra* Petrs. Br. 30. Instead, it simply exercised its normal authority to create federal common law in "the absence of an applicable Act of Congress." 332 U.S. at 305. In *Parker Drilling Management Services, Ltd. v. Newton*, 587 U.S. 601 (2019), Congress expressly preempted the field, leaving no question of implied preemption. *See id*. at 604, 607-08. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Court held only that when state law is impliedly preempted under ordinary preemption principles, Congress's failure to expressly preempt is immaterial. *See id*. at 386-88.

Corp., 485 U.S. 495 (1988), federal law preempted state regulation of gasoline prices in Puerto Rico for a time. Congress then repealed that preemptive law and enacted a new statute, raising the question whether Puerto Rico was now free to regulate fuel prices. *Id.* at 498-99. As here, it was argued that the Court should set aside normal preemption principles in favor of a "new rule of burden-shifting whenever the Federal Government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to pre-empt with a need to find a federal intent to retransfer authority to the States." *Id.* at 503. The Court demurred. The repeal of the former federal law "did not leave behind a pre-emptive grin without a statutory cat." *Id.* at 504.

The result is no different here simply because the lingering preemptive grin attaches to displaced judge-made law rather than a repealed statute, or because this Court rather than Congress first regulated the field. Once Congress steps in, ordinary statutory preemption analysis applies.[18]

B. Respondents' Claims Are Not Field Or Conflict Preempted.

Petitioners argue that the Act implicitly preempts the field of "regulation of air quality across

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[18] The rule requiring Congress to speak clearly before it "significantly alter[s] the balance between federal and state power" applies when Congress acts to *impinge* on traditional state authority. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621-22 (2020); *contra* Petrs. Br. 30. It does not require Congress to speak clearly to *forgo* preempting state law. *See Isla Petroleum*, 485 U.S. at 503.

the United States" and that respondents' claims conflict with the Act's "objectives" by interfering with EPA's "authority to decide whether and how to regulate" greenhouse gases. Br. 44-45 (cleaned up).

EPA seemingly disagrees. The United States explains that a recent EPA rule "concluded that [EPA] lacks authority … to prescribe greenhouse-gas emissions standards for new motor vehicles and engines based on climate-change concerns" although it has not yet extended that rationale to its power to regulate "stationary sources." U.S. Br. 34 n.4 (citing 91 Fed. Reg. 7686 (Feb. 18, 2026)). The United States does not explain why EPA would have broader authority over stationary sources, or how the Clean Air Act can preempt claims relating to emissions the Government cannot regulate. Instead, both the United States and petitioners simply say that "[r]egardless of what authority the Act delegates to EPA, Boulder's claims are *constitutionally* barred." *Ibid*. (emphasis added); *see* Petrs. Br. 33 n.* (similar). But that is just to fall back on their separate constitutional preemption argument. It does not explain how the Court can hold that the Clean Air Act preempts claims indirectly relating to greenhouse-gas emissions when EPA maintains that the Act does not allow it to directly regulate some (perhaps any) greenhouse-gas emissions.

The Court need not resolve this question, however, to reject petitioners' preemption defense because respondents' claims do not interfere with anything within EPA's authority on *any* view of the statute's scope.

1. The Deception Claims Are Not Preempted.

Start with the deception theory. Congress enacted the Act to "protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To that end, the Act directs EPA and states to undertake a variety of actions to limit emissions and pollution levels. *See AEP*, 564 U.S. at 424-25. Nothing in the Act charges EPA with determining the appropriate level of deception in marketing fossil fuels. Nor does state regulation of deceptive marketing interfere with EPA's "establishing nation-wide air quality standards." *Contra* Petrs. Br. 45. The claims do not require "a policy determination of the appropriate level of green-house gas emissions." *Contra id*. 36. Indeed, avoiding liability would not require reducing emissions at all—only telling the truth, so the public can make informed consumption decisions free of the distorting effect of petitioners' misrepresentations.

Even when federal law regulates a product in some respects, this Court has allowed state-law deceptive marketing claims. For example, in *Altria Group*, this Court held that the express preemption provisions of federal cigarette labeling laws did not preempt state claims alleging tobacco companies misled consumers about the safety of "light" cigarettes. 555 U.S. at 72. Although the statute prohibited states from imposing requirements relating to the "advertising or promotion" of tobacco "based on smoking and health," 15 U.S.C. § 1334(b), this Court held that the Act "does not pre-empt state-law claims like respondents' that are predicated on the duty not to deceive," 555 U.S. at 81. The same is even more obviously true here, where the Clean Air Act does not regulate marketing at all.

Petitioners stress that the deception harmed respondents by affecting emissions and, thereby, the climate. But the Clean Air Act does not empower EPA to regulate every activity that could indirectly affect air quality. EPA sets certain emissions limits considering a variety of factors, *see AEP*, 564 U.S. at 426-27, but Congress did not charge it with pursuing some optimal minimum pollution level in service of broader economic and energy policy goals. The Act does not regulate, much less encourage, fossil fuel sales.

Thus, the Act says nothing about a wide range of conduct and state laws that may affect the "air quality across the United States," *contra* Petrs. Br. 44, by reducing the supply of, or demand for, products whose consumption generates emissions. The Act surely does not preempt the many state laws that reduce emissions by decreasing energy demand—e.g., energy-efficiency standards for new construction or subsidies for electric vehicles or renewables—even when openly intended to reduce greenhouse-gas emissions. Laws regulating deceptive marketing may likewise reduce demand for fossil fuels, and thereby pollution, but that hardly conflicts with the Act's purposes and objectives.

2. *The Sales And Production Claims Are Not Preempted.*

Respondents' claims based on their sales and production theory are not impliedly preempted either.

Ouellette held that the Clean Water Act's substantial saving clauses precluded field preemption because they "negate[d] the inference that Congress 'left no room' for state causes of action." 479 U.S. at 492; *see* 33 U.S.C. §§ 1370, 1365(e). The same is true of the Clean Air Act's "materially identical" saving clauses. Petrs. Br. 33; *see* 42 U.S.C. §§ 7416, 7604(e).

Nor do any of respondents' claims conflict with the Act's objectives or administrative scheme. Unlike in *AEP* and *Ouellette*, respondents have not sued polluters or sought injunctions that would "compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA." *Ouellette*, 479 U.S. at 495.[19] Emitters can continue to emit as much as they like, up to the limits set by state and federal law. And petitioners' production levels are not subject to any Clean Air Act permitting scheme.[20]

Petitioners speculate that respondents' claims will reduce emissions from the supply side, e.g., by raising the price or reducing the availability of fossil fuels. But the Clean Air Act is, at best, indifferent to the mix of renewable and fossil fuels in the economy. Accordingly, in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the claim that the Clean Air Act preempted a state tax on coal "merit[ed] little discussion" because the "Clean Air Act does not mandate the use of coal; it merely prescribes standards governing the emission of sulfur dioxide when coal is used." *Id*. at 636 n.22. Indeed, a number

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[19] For that reason, the Act's procedure for downwind states to request EPA action against upwind point sources has no bearing on preemption of state-law claims against non-emitters who are not subject to that regime. *Contra* Petrs. Br. 33.

[20] These claims do not require assessing a "reasonable" level of emissions. *Contra* Petrs. Br. 36. Instead, the question is "whether it is unreasonable to engage in the conduct *without paying for the harm done*." Restatement (Second) of Torts § 821B cmt. i (1979) (emphasis added).

of states directly regulate the fuel mix their utilities must use. *See, e.g.*, *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170-71 (10th Cir. 2015) (Gorsuch, J.) (upholding Colorado renewable energy mandate against dormant Commerce Clause challenge). Gasoline taxes, too, may have the indirect (sometimes intended) effect of reducing emissions. But that does not mean they are preempted.

Kurns v. Railroad Friction Products Corp., 565 U.S. 625 (2012), is not to the contrary. *Contra* Petrs. Br. 38. There, a federal statute broadly preempted the "entire field of regulating locomotive equipment," including equipment design. *Kurns*, 565 U.S. at 631 (citation omitted). The Court rejected an exception for failure-to-warn claims, reasoning that such claims "impose[] liability on a particular design of locomotive equipment unless warnings" are "deemed sufficient" and therefore "will inevitably influence a manufacturer's choice whether to use that particular design." *Id*. at 635 n.4. This case is hardly comparable. The Clean Air Act does not preempt any field, much less one that covers choices about what energy sources to use or in what quantities. *See Commonwealth Edison*, 453 U.S. at 636 n.22.

The more apt precedent is *Virginia Uranium*. There, federal law pervasively regulated "the milling, transfer, use and disposal of uranium." 587 U.S. at 765 (lead opinion). Although the federal law did not reach upstream mining, the petitioner argued that Virginia's complete mining ban "disrupts the delicate 'balance' Congress sought to achieve between th[e] benefits and costs" of nuclear energy. *Id*. at 777 (lead opinion). This Court rejected the argument, despite evidence that the ban was enacted to protect "the public from nuclear safety hazards." *Id*. at 776 (lead opinion); *see also id*. at 780-81, 789 (Ginsburg, J., concurring in the judgment). Congress had not extended the federal statute all the way up the supply chain to mining. And it is the Court's "duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Id*. at 765 (lead opinion). Here, respecting what Congress did not write precludes extending its preemption to producers and conduct it does not regulate.

* * *

How to allocate the cost of climate alteration is a matter of genuine debate. The structure of our Constitution assigns responsibility for resolving that debate to the states and the political branches of the federal government. Congress is considering whether to preempt state law with federal legislation. The role of the Clean Air Act in regulating greenhouse-gas emissions is being reconsidered within the Executive Branch and evaluated in the courts. And the Colorado Supreme Court has yet to resolve petitioners' contention that respondents fail to state a claim, or even which state's law answers that question.

Petitioners may prefer not to wait for this process to work itself out. But that is the necessary consequence of a constitutional structure that protects liberty by dividing powers between the states and the United States, and among the branches of the federal government.

CONCLUSION

The petition should be dismissed for lack of jurisdiction. In the alternative, the judgment should be affirmed.

Respectfully submitted,

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