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 THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTERESTS OF AMICUS CURIAE

Local governments have a responsibility to address the acute, localized harms wrought by climate change. Amicus curiae the City of New York packs over 8.5 million people into just over 300 square miles situated primarily on islands, with over 500 miles of coastline. The City and its residents are thus particularly vulnerable to the ongoing environmental crisis of climate change. From the increasing frequency of extreme weather events, severe heat waves, catastrophic flooding, shoreline erosion, and accelerating sea-level rises in the City that already exceed the global rate, climate-change impacts have been enormously damaging to New Yorkers. These worrying trends are projected to continue with increased severity into the future.

The present and future harms from climate change have forced the City to spend billions of dollars to protect itself and its residents. In recent decades, the City has undertaken tremendous efforts to enhance climate resiliency, including building sea walls and other coastal armament, implementing extensive public-health programs, and taking other measures to address the worsening environmental landscape. *See generally* City of New York, *PlaNYC: Getting Sustainability Done* (2023), *available at* https://perma.cc/2AHK-EWNJ. Studies have placed the total cost of climate-related infrastructure projects for the City alone at $387 billion. *See* Rebuild by Design, *The Scale of New York's Adaptation Costs* (2026), *available at* https://perma.cc/C4M4-PWHD.

In light of these extraordinary costs to keep New Yorkers healthy and safe and to protect city assets, the City has a strong interest in the proper resolution of this appeal to ensure that state tort law remains available to address these harms and prevent taxpayers from footing the bill. In 2018, the City attempted to serve those ends by bringing damages claims under state tort law against several fossil-fuel producers, but the Second Circuit held that federal common law preempted those claims. *See City of N.Y. v. Chevron Corp.*, 993 F.3d 81, 85–95 (2d Cir. 2021). The City continues to believe the Second Circuit was mistaken.

Respondents have now brought their own state tort claims based on traditional common-law principles that would require petitioners to pay for the localized injuries they have inflicted. As respondents have shown, the Court lacks jurisdiction to review the decision below allowing their claims to proceed. They have also demonstrated that none of their claims are preempted in any event. The City joins respondents' arguments in full.

In this brief, the City writes to highlight petitioners' misconceptions about the state tort claims at issue. None of those claims would regulate greenhouse-gas emissions, as petitioners' preemption theories assume. Instead, each of the claims seeks only to ensure that petitioners, as fossil-fuel producers, sellers, and marketers, bear their fair share of the expense to address the localized injuries to which their actions contribute. To be sure, those injuries flow from emissions. But, as we explain, the tort claims at issue here in no way seek to control those emissions or set emissions standards, belying a fundamental premise of petitioners' argument.

SUMMARY OF ARGUMENT

Respondents' common-law tort claims rank among the oldest in Anglo-American jurisprudence, as shifting the costs of remediating injuries to those responsible for them is a primary purpose of tort law. *See* C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 3–5 (1970); John P. Dawson, *Unjust Enrichment: A Comparative Analysis* (1951); George E. Woodbine, *The Origins of the Action of Trespass*, 33 Yale L.J. 799, 806–07 (1924). Yet according to petitioners, because the means through which they inflicted harm involved altering the climate, respondents' claims would "regulate the inherently interstate and international issue of global climate change," and any attempt to prove tort liability is barred (Brief for the Petitioners ("Pet. Br.") 2).

That view arises from petitioners' contention that constitutional structure prohibits states from "regulat[ing] air and water in their ambient aspects," leaving states with "no power to regulate interstate emissions" (*id.* at 21, 31). Likewise, petitioners assert, respondents' claims represent an effort "to set and enforce [their] own emissions standards against anyone emitting or causing another to emit greenhouse gases," which purportedly conflicts with the Clean Air Act's regulatory scheme directing EPA to set such standards (*id.* at 44–46).

But these core pillars of petitioners' preemption arguments are mistaken, as establishing liability on respondents' nuisance, trespass, and unjust enrichment claims doesn't require regulating climate change, controlling interstate emissions, or setting an emissions standard. Under prevailing tort principles, nuisance claims permit damages for harms for which it would be unreasonable not to require compensation, without regard to the propriety of the defendant's conduct in relation to a standard of care. Similarly, trespass claims require proof that the defendant caused a harmful invasion of land—again without requiring value judgments one way or the other about the social utility of doing so. And unjust-enrichment claims permit liability regardless of whether the defendant engaged in wrongdoing. Thus, for all of these claims, respondents may establish liability by showing that petitioners knowingly caused injuries, without a judicial determination of whether they did so by causing violation of any emissions standard. These claims therefore neither set any emissions standard nor try to force defendants to hew their conduct to such a standard.

By shifting costs to the responsible parties, respondents' claims would fulfill tort law's traditional purpose of providing compensation for injuries that a party causes. Such liability may affect petitioners' behavior in some ways, but it doesn't amount to a regulation of emissions. What's more, state courts are well versed in answering the questions that such suits may raise, including establishing causation and apportioning damages among parties according to their degree of responsibility. By providing redress for local, individualized injuries through the types of claims in this case, state courts can fulfill a well-established tort function without implicating the preemption concerns that petitioners invoke.

ARGUMENT

A. Nuisance, trespass, and unjust-enrichment claims against fossil-fuel producers, sellers, and marketers do not regulate greenhouse gases.

An analysis of the common-law basis for respondents' claims demonstrates that they do not regulate greenhouse-gas emissions or require establishing the appropriate standard for such emissions. Instead, these claims permit liability upon a showing of knowing or intentional infliction of harm, without regard to whether petitioners' activity was otherwise wrongful.

1. For nuisance claims, the prevailing view is found in the Restatement (Second) of Torts. *See, e.g.*, *Cox v. City of Dallas*, 256 F.3d 281, 290 (5th Cir. 2001) (nuisance principles described in Restatement formed "core doctrinal foundation" for modern environmental laws); *City of L.A. v. San Pedro Boat Works*, 635 F.3d 440, 452 (9th Cir. 2011) (observing that California follows Restatement); *Hoery v. United States*, 64 P.3d 214, 218 & n.5 (Colo. 2003) (following Restatement); *Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 568 (1977) (same). Under this standard, a private nuisance includes "intentional and unreasonable" invasions of another's interest in land. Restatement (Second) of Torts § 822. Liability for public nuisance is similar, except the interference impacts "a right common to the general public" instead of private land. *See id.* § 821B & cmt.h.

While both types of nuisance claims thus require showing unreasonableness, that inquiry differs based on the relief sought. For an injunction, "the question is whether the activity itself is so unreasonable that it must be stopped." *Id.* § 821B cmt.i. But respondents expressly disclaimed any effort to seek an injunction that would halt "any oil and gas operations or sales," or "to enforce emissions controls of any kind" (Joint

Appendix 139), and so the standard for injunctions based on nuisance is inapplicable here.

By contrast, nuisance claims seeking damages—like those respondents have brought—require showing that "it is unreasonable to engage in the conduct without paying for the harm done," not that the underlying activity itself is unreasonable or lacks social utility. Restatement (Second) of Torts § 821B cmt.i; *see id.* § 822 cmt.d (differentiating between claims requiring payment of damages and abatement). That is because a damages action "does not seek to stop the activity," and instead seeks only "to place on the activity the cost of compensating for the harm it causes." *Id.* § 826 cmt.f.

Liability for damages on a nuisance claim thus does not turn on a violation of a particular standard of care—such as contributing to a particular level of greenhouse-gas emissions. *See, e.g.*, *Cox*, 256 F.3d at 290 & nn.16–17 (plaintiffs need not show negligence or fault); *Pestey v. Cushman*, 788 A.2d 496, 506–07 (Conn. 2002) (nuisance available although defendant's conduct was "reasonable"); *State v. Lloyd A. Fry Roofing Co.*, 246 N.W.2d 692, 695 (Minn. 1976) (defendant's "failure to act reasonably … is simply not relevant" to nuisance claim). Instead, the prevailing factor in determining liability is "[t]he financial burden" that a defendant's conduct imposes on others. Restatement

(Second) of Torts § 826 cmt.f. In other words, "the focus is on the noisome condition, not on the actions or intentions of the defendant." Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 Yale L.J. 702, 758 (2023); *see also, e.g.*, *Crosstex N. Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 597–98 (Tex. 2016) (canvassing nuisance jurisprudence and holding that nuisance does not require that "defendant's conduct or land use was unreasonable"); *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) ("[P]laintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury.").

For damages claims on a nuisance theory, the unreasonableness inquiry also does not require the court to assess whether the injury outweighs the usefulness of the harmful activity, further belying petitioners' claim that a policy judgment about levels of greenhouse-gas emissions is required. The law differentiates between claims for injunctions and damages on this score too, with injunctions generally available only when the harms imposed are greater than the social value of the challenged conduct. Restatement (Second) of Torts § 826 cmt.f.

But for damages claims, "[i]t may be reasonable to continue an important activity if payment is made for the harm it is causing but unreasonable to initiate or continue it without paying." *Id.* § 822 cmt.d. That is so even for activities that have "great utility" and comparatively smaller harms. *Id.* § 821B cmt.i; *see id.*

§ 822 cmt.d (invasion may be unreasonable although "utility of the conduct is great and the amount of harm is relatively small"). Unlike for injunctions, comparing general utility with the harm suffered is "incomplete and therefore inappropriate" for assessing damages. *Id.* § 826 cmt.f. For that reason too, damages on a nuisance theory do not require establishing an appropriate "baseline" level for greenhouse-gas emissions (Pet. Br. 36) given that activity that is socially useful and reasonable may still require compensation.

Many jurisdictions have applied this approach to nuisance claims, focusing on the harm caused by a defendant's conduct and whether compensation is required as opposed to the reasonableness or value of the defendant's conduct on its own. For example, under Colorado law, courts may award damages on a nuisance claim although equity does not support an injunction, which may include circumstances where the underlying conduct is legislatively authorized. *See Hobbs v. Smith*, 493 P.2d 1352, 302–04 (Colo. 1972) (citing *Robinson Brick Co. v. Luthi*, 169 P.2d 171 (Colo. 1946)). And in the well-known case of *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222, 225–26 (1970), New York's highest court held that while a defendant's cement plant was too valuable for its operations to be enjoined, damages were still appropriate to shift the environmental costs of the plant's operation onto those causing the injury. As *Boomer* recognized, apportioning such costs merely settled the rights of the parties before it and was not a means to achieve "broad public objectives" or implement a pollution-control policy. *Id.* at 222–23.

Many other courts, including this one, have applied similar principles when plaintiffs seek compensation for a defendant's harmful conduct on a nuisance theory. For example, in *City of Harrisonville v. W. S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 336–39 (1933), the Court applied Missouri law in determining that damages should be awarded for the "discharge of the effluent into [a] creek," even though an injunction shutting down the defendant city's sewage system would be "grossly disproportionate." Awarding such damages did not require assessing whether the city's conduct was reasonable, and the Court instead focused on the plaintiff's monetary loss. *Id.*[1]

Similarly, respondents' claims here do not require determining whether petitioners' conduct contributes

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[1] Other jurisdictions apply similar principles for damages claims on a nuisance theory. *See Galipeau v. Bixby ex rel. Tr. of Fong*, 476 P.3d 1129, 1137 (Alaska 2020); *Haynes v. Haas*, 463 P.3d 1109, 1118 (Haw. 2020); *City of Monticello v. Rankin*, 521 S.W.2d 79, 81 (Ky. 1975); *Baldwin v. McClendon*, 288 So.2d 761, 766–67 (Ala. 1974); *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605, 613 (Or. 1970); *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 653–654 (Wis. 1969); *Riter v. Keokuk Electro-Metals Co.*, 82 N.W.2d 151, 159 (Iowa 1957); *City of Phoenix v. Johnson*, 75 P.2d 30, 36–37 (Ariz. 1938); *Owen v. Phillips*, 73 Ind. 284, 287 (1881); *Mayes v. Tabor*, 334 S.E.2d 489, 490–91 (N.C. Ct. App. 1985).

to a reasonable level of greenhouse gases. The claims therefore do not seek to force—or even incentivize—petitioners to conform their conduct to any state-law emissions standard or other standard of care. Instead, damages liability would rest on the finding that petitioners' conduct has caused injury that respondents should not have to bear.

2. Nor would respondents' trespass claims require setting an emissions standard. For example, the prevailing view is that "liability for trespass exists whether or not the trespass was done in good faith and with reasonable care." 75 Am. Jur. 2d Trespass § 9; *see, e.g.*, 104 N.Y. Jur. 2d Trespass § 8 ("[T]respass is actionable notwithstanding that the trespassing conduct was not unlawful."); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 933 (Colo. 1997) (trespass "does not require a plaintiff to prove the existence of a legal duty and present evidence of an applicable standard of care"). This claim instead would require respondents to establish only that petitioners acted intentionally or with knowledge that the conduct would, with "substantial certainty," result in intrusion. Restatement (Second) of Torts § 158 cmt.i; *see Hoery*, 64 P.3d at 217 (defendant liable in trespass for "set[ting] in motion a force which, in the usual course of events, will damage property of another"). But that has nothing to do with establishing an appropriate level of emissions, and such a claim is viable regardless of any judgment

about what those levels should be. *See* Dan B. Dobbs et al., *The Law of Torts* § 50 (2026) (acting with knowledge that intrusion is "substantially" certain to result is sufficient for trespass).

To be sure, respondents would have to prove a chain of causation linking petitioners' fossil-fuel production, sale, or marketing to the intrusion. *See* Restatement (Second) of Torts § 158 (no trespass liability where intrusion was "not caused by any act of [defendant's]"); *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001) ("intangible intrusion" supports trespass claim if plaintiff can prove causation). But so long as petitioners' conduct was intentional—i.e., "done with knowledge that it will to a substantial certainty result in the entry of the foreign matter"—the claim would not purport to assess whether petitioners' actions were otherwise unlawful or unreasonable. *Hoery*, 64 P.3d at 218 (quoting Restatement (Second) of Torts § 158(a) cmt.i); *see In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 119 (2d Cir 2013) (trespasser liable if he "intend[s] the act which amounts to or produces the unlawful invasion," even if "damaging consequence[s]" were unexpected). In other words, like a nuisance claim, it is the intentional act resulting in an invasion that determines liability, not the violation of a particular standard of care, regarding emissions or otherwise.

3. Adjudicating respondents' unjust-enrichment claim also would not require courts to weigh in on the

acceptable level of emissions. Such claims generally require showing that a defendant received a benefit at a plaintiff's expense under circumstances where the enrichment was "unjust." 66 Am. Jur. 2d Restitution and Implied Contracts § 11; *see, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 1 (enrichment is unjust to the extent it lacks "adequate legal basis"); *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1007 (Colo. 2008) (claim established upon showing that it would be "unjust" for defendant to retain benefit without paying). While determining whether injustice exists may vary from case to case, such a claim typically does not require showing "malfeasance." *Lewis v. Lewis*, 189 P.3d 1134, 1142 (Colo. 2008); *see* 66 Am. Jur. 2d Restitution and Implied Contracts § 11 (unjust enrichment does not require showing "a wrongful or unlawful act"); *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978) (unjust enrichment "does not require the performance of any wrongful act by the one enriched," and liability possible even against "[i]nnocent parties"). Such claims can also be premised upon "common-law tort[s]," like trespass, which as noted do not require establishing a violation of a particular standard of care. *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1205 (Colo. App. 2009).

Accordingly, none of respondents' claims require showing that petitioners' conduct caused emissions deviating from a particular standard of care or emissions standard. Perforce, the claims would not seek to compel or influence petitioners to hew to any emissions standard.

4. In arguing otherwise, petitioners ignore the requirements of these common-law claims. They point to the requirement for nuisance claims to assess reasonableness (Pet. Br. 36), but they look past the hornbook law that reasonableness for respondents' nuisance claims focuses on the reasonableness of compensation (or lack thereof), not of petitioners' conduct. *See* William L. Prosser & W. Page Keeton, The Law of Torts § 88 (5th ed. 1984 & Supp. 1988) ("[I]nterference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable."). Petitioners further observe that trespass requires a "physical intrusion," but they cite nothing for the proposition that demonstrating such an intrusion would require a judgment on "the appropriate level of greenhouse-gas emissions" (Pet. Br. 36). And while they also argue that unjust enrichment requires demonstrating circumstances that are "unjust" (*id.*), there too they ignore that satisfying this element does not require demonstrating that their conduct deviated from some standard of care. Because petitioners cannot establish that respondents' claims regulate greenhouse gases in a way that conflicts with federal law, their preemption theories fall short.

B. Requiring defendants to bear the costs of their activities is a well-established function of state tort law.

Compensating local governments for the costs of addressing climate change would advance the primary purpose of state tort law. As Justice Holmes described it, "[t]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms." Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DePaul L. Rev. 383, 395 (2012) (quoting Oliver Wendell Holmes, The Common Law 115 (Mark DeWolfe Howe ed. Harvard Univ. Press 1963) (1881)). And so, it is hornbook law that damages in tort are meant "to give compensation, indemnity or restitution for harms." Restatement (Second) of Torts § 901; *see, e.g.*, *MTBE*, 725 F.3d at 126 (purpose of compensatory damages is "to compensate the victim for injuries actually suffered or expected to be suffered"). That is precisely what is accomplished by shifting liability to petitioners for the consequences of their actions, without regard to levels of greenhouse-gas emissions.

Contrary to petitioners' contentions (Pet. Br. 38–39), requiring them to pay the costs to remediate harms from their conduct is not equivalent to a "general purpose regulatory device" governing greenhouse-gas emissions. *See* Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 Eur. J. Risk Reg. 48, 57 (2018) (analyzing tort suits over climate alteration). Claims like respondents' merely seek to hold petitioners accountable for their injury-causing conduct according to state-common-law principles. State courts have resolved these types of inter-party disputes for centuries, and adjudicating "traditional issues of right and responsibility that are raised by climate change tort suits as *tort* suits" does not transform them into "regulatory actions that demand judicial forbearance." *Id.* at 65.

Petitioners argue that preemption is necessary because otherwise a plaintiff "will be able to set and enforce its own emissions standards" (Pet. Br. 46). As we have shown, they are mistaken as to the common-law claims at issue here. Their point is also inapt for a second reason: because respondents' claims do not target defendants as emitters, but as fossil-fuel producers, sellers, and marketers. This Court has never suggested that tort liability operates as regulation of an activity downstream from the conduct that the suit addresses. Petitioners cite *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625 (2012) (Pet. Br. 38–39), but the preempted state-law claims there sought liability for conduct that was directly regulated by federal law. *See Kurns*, 565 U.S. at 632–34 (statute directed at "equipment of locomotives" preempted claims against manufacturer of locomotive parts).

As respondents have also shown (*id*. at 49–50), the fact that petitioners may choose to modify their conduct in response to tort liability in ways that may bear on emissions doesn't mean that such liability would regulate emissions. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (Clean Water Act precludes only state suits that require incompatible "standards of effluent control" and not other claims). Petitioners can decide for themselves how to allocate any increased costs imposed upon them, including by accepting reduced profits, increasing prices, or making production-side changes. Even if some of those modifications could theoretically impact greenhouse-gas emissions, leaving that decision in petitioners' hands cannot be construed as a regulation of downstream emissions subject to preemption. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987) (regulations are those laws "specifically directed" at industry, not merely those with an "impact"); *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1202 (Haw. 2023) (same).[2]

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[2] This point applies only more plainly to deception-based claims. As respondents demonstrated, liability for deception has nothing to do with the regulation of emissions, and petitioners could avoid liability merely by "telling the truth" (Resp. Br. 47).

Nor would such suits amount to regulation of greenhouse-gas emissions if, as petitioners assume, successful tort claims lead to significant financial liability (Pet. Br. 3, 37–38). While tort liability would shift the costs of petitioners' conduct back to them, that is true of any damages claim and is not grounds for preempting tort's traditional function of adjudicating parties' individual rights, including determining who should bear the costs of injuries. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 & n.7 (2008) (damages claim did not call for new environmental standards or threaten "federal regulatory goals"). And, if necessary, state law is also capable of calibrating damages awards to avoid stifling useful activity, including by considering the burdens that compensation may impose. *See* Restatement (Second) of Torts § 826 cmt.f.

Respondents' state tort claims also don't amount to a regulation of greenhouse gases merely because those claims may "implicate" emissions that are not attributable to petitioners' products (Pet. Br. 35–36). Respondents seek to hold petitioners responsible only for their own conduct, not global emissions worldwide. And as noted, while establishing the causal chain linking petitioners to respondents' injuries may prove to be complex, state courts are well versed in considering issues of causation. *See* Dobbs, *supra*, § 26 (observing that states have "plenary power except as limited by the Constitution" while federal courts have "almost no admitted common law work to do"). That includes apportioning damages attributable to a particular defendant's conduct, particularly where respondents, as here, do not seek an injunction ending the harmful conduct entirely. *See* Kendrick, *supra*, at 766 (assessing degree of responsibility among multiple actors "much simpler" for damages than injunctions).

Respondents' claims thus fall well within the standard bounds of state tort law assigning the cost of injuries to those properly responsible for shouldering them. Allowing those claims to proceed does not introduce competing regulations of emissions that are preempted by structural constitutional principles or the Clean Air Act, as petitioners argue.

CONCLUSION

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

Respectfully submitted,

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