NO. 25-170

In the

Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the
Supreme Court of Colorado

BRIEF OF COLORADO, CALIFORNIA, AND 17 OTHER STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ROB BONTA
Attorney General of California

SAMUEL T. HARBOURT
Solicitor General

PHILIP J. WEISER
Attorney General of Colorado

RUSSELL D. JOHNSON
Deputy Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Russell.Johnson@coag.gov
(720) 508-6000

CARRIE E. NOTEBOOM
Assistant Deputy Attorney General

ROBYN WILLE
First Assistant Attorney General

CORY HALLER
Senior Assistant Attorney General

GABBY FALCON
Assistant Attorney General

CAMERON BONNELL
Assistant Attorney General Fellow

Counsel Continues on Signature Page

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INTERESTS OF AMICI

State courts and state common law claims play an important role in the resolution of disputes great and small. Anyone who has been harmed—whether a large corporation, a State or local government, or a private citizen—can bring state common law claims in state courts seeking redress. And defendants can rely on state courts to resolve claims fairly, consistent with the protections state law provides. Attempts to short circuit state court processes or preempt state law should be met with a healthy skepticism that respects our federal system.

Amici here, the States of Colorado, California, Arizona, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia (collectively, "Amici States"), including some that have brought their own actions against fossil fuel companies, have a strong interest in preserving the careful balance the Constitution struck between the States and the federal government. That interest is implicated here in two important ways.

First, consistent with the Constitution, Congress gave this Court limited jurisdiction to review final judgments rendered by state courts. *See* 28 U.S.C. § 1257. To avoid prematurely intervening in state court litigation, the Court should continue its long history of thoughtfully examining state court proceedings to determine whether it has statutory jurisdiction instead of relying on high-level comparisons and generalizations.

Second, Amici States also have an interest in the continuing availability of state common law claims absent a clear and textually grounded conflict with federal law. To hold otherwise could usher in a new and unjustified preemption regime that fundamentally undermines the viability of state common law remedies, leaving those who have been harmed without a path to being made whole.

SUMMARY OF THE ARGUMENT

I. As courts of limited jurisdiction, federal courts must closely scrutinize the basis for exercising their jurisdiction. This Court has a long history of carefully reviewing state court proceedings to ensure that it has jurisdiction under 28 U.S.C. § 1257, which both conserves the Court's resources and contributes to productive relationships between state and federal courts. Because state courts each have their own rules and processes, the Court must interrogate the specific state proceeding at issue to determine whether it has jurisdiction, as opposed to relying on broad generalizations based on other States' laws and processes, as Petitioners and certain amici argue is appropriate here. Performing that detailed review here, demonstrates the Court lacks jurisdiction.

II. Concerns regarding the merits of Boulder's suit are not a valid basis for preempting state common law tort claims. State common law provides not only remedies for injured parties, but also protections for alleged tortfeasors, such as proximate cause, allocation of fault, foreseeability, and others. State courts should be trusted to faithfully apply the law, and any suggestion that merits concerns justify preempting state common law claims should be rejected. If Boulder's claims are meritless, state courts can dismiss them on that basis. Preemption is not the answer.

III. There is nothing in this Court's preemption jurisprudence that would justify preempting state common law claims[1] based on little more than a brooding interest ambiguously arising out of the structure of the Constitution. Rather, a specific conflict between the Constitution and state common law claims must exist before injured parties are deprived of their day in court. Any other approach could create a significant imbalance between the States and the federal government inconsistent with the Constitution and allow courts to make policy judgments best left to the legislative branch.

[1] All that remains at issue in this case are state common law claims; Boulder's statutory claim under the Colorado Consumer Protection Act was dismissed by the state trial court on purely state law grounds. Pet. App. 138a. Accordingly, whether that statutory claim could be preempted by federal law under Petitioners' theory is a separate and distinct issue that was not considered by the Colorado Supreme Court and is thus not an issue before this Court. Pet. Br. at 9; U.S. Br. at 6 n.2. Further, state statutory claims form an important aspect of each State's exercise of its retained authority under the Tenth Amendment. It would be a significant invasion of state sovereignty to weigh in on such claims without the benefit of the full context in which those claims arise. Thus, despite discussions regarding state statutory regimes, *see* Br. of Am. Petroleum Inst. as Amici Curiae in Support of Petitioners at 12–15, this Court should focus only on the specific claims presently before it.

ARGUMENT

I. The Court's analysis of its jurisdiction under 28 U.S.C. § 1257 should continue to focus on the specific state proceedings at issue, not generalizations and high-level comparisons.

"Federal courts are courts of limited jurisdiction," *see, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994), and they may exercise jurisdiction only when so "authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173–80 (1803)). As such, federal appellate courts have "a special obligation" to ensure that they have jurisdiction to hear the merits of a dispute. *Id.* (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Their jurisdiction must be "carefully guarded against expansion by judicial interpretation." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).

In line with those principles, Congress granted this Court limited jurisdiction over state court proceedings, allowing review only of "[f]inal judgments or decrees rendered by the highest court of a State" under specific circumstances. 28 U.S.C. § 1257(a) ("Section 1257"). Section 1257's final judgment requirement preserves this Court's resources by ensuring the Court does not intervene in "state proceedings when the underlying dispute may be otherwise resolved." *See Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (per curiam). And "close observance of [the final judgment] limitation . . . is an important factor in securing harmonious State-federal relations." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67

(1948) (citation modified). Indeed, "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999).

The Court has recognized the importance of following Section 1257's requirements, analyzing state court processes in detail to ensure that it has jurisdiction when the issue arises. For example, in *Costarelli*, the Court examined the proceedings in Massachusetts state court and recent case law from the Supreme Judicial Court of Massachusetts to determine that the process involved had not resulted in the issuance of a final judgment sufficient to give this Court jurisdiction under Section 1257. *Costarelli*, 421 U.S. at 195 (citing *Whitmarsh v. Comm.*, 316 N.E. 610 (1974)).

Similarly, in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the Court considered proceedings before the Alabama Supreme Court. Even though the appeal to the Alabama Supreme Court was "avowedly interlocutory," the Court still analyzed the proceedings in Alabama state court—both those that had occurred and those that would follow the Alabama court's decision—and determined it lacked jurisdiction. 522 U.S. at 81–84. *See also O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) (dismissing a petition for certiorari from a decision of the Colorado Supreme Court remanding the case to the trial court for lack of jurisdiction because the decision was not final).

Other state processes have resulted in the Court finding it has jurisdiction. In fact, the Court has even split apart companion cases where its analysis of the specific state proceedings in each case resulted in one satisfying the final-judgment requirement but not the other. *Compare Gospel Army v. City of Los Angeles*, 331 U.S. 543, 546–48 (1947) (holding the final-judgment rule was not satisfied based on the processes and specific orders involved), *with Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 565 (1947) (holding the Court had jurisdiction because the judgment was final).

The approach in *Fisher v. District Court*, 424 U.S. 382 (1976), is of a piece with these other cases. There, the Court looked to the Montana Constitution, Montana's appellate rules, and Montana case law to determine that the Montana Supreme Court's writ of supervisory control was a final judgment sufficient to confer jurisdiction. *Id.* at 384 n.7 (citing, *inter alia*, Mont. Const. art. VII, § 2(1) & (2); Mont. R. App. Civ. P. 17(a), and *State ex rel. Amsterdam Lumber, Inc. v. Dist. Ct.*, 516 P.2d 378, 380–81 (Mont. 1973)). The Court then relied on that analysis for a similar matter also arising in Montana. *Atlantic Richfield Co. v. Christian*, 590 U.S. 1, 12 (2020).

But as Boulder notes, Colorado's Constitution, appellate rules, and case law—which are all that are at issue here—are not the same as Montana's. Resp. Br. 18–22. And consistent with how this Court has examined jurisdiction in other circumstances, it must engage in a rigorous analysis here. It should not base its jurisdictional determination in this case on generalizations or surface-level comparisons to cases examining how another State's highest court exercises its authority, as Petitioners and certain amici advocate. Pet. Br. 18; *see generally* Br. of Frmr. State Supreme

Court Justices in Support of Pet'rs. Indeed, as *City of Tarrant* shows, even the labels state courts apply do not obviate the need to scrutinize the state proceedings to assess jurisdiction. *City of Tarrant*, 522 U.S. at 81.

Individualized analysis is necessary because state courts are under no obligation to exercise their authority in the same way or to ensure that their procedures fit cleanly within Section 1257. Instead, each State creates its own rules and procedures based on its constitution and laws and taking into account the needs and desires of its institutions and their constituents. It is then incumbent on this Court to determine whether the process used resulted in a final judgment or decree that can support jurisdiction under the terms specified by Congress in Section 1257.

As with the cases discussed above, that analysis should not be cut short through broad generalizations about how state courts operate. Rather, this Court should focus on the specific procedure used to determine whether it has jurisdiction. As Boulder makes clear, doing so here demonstrates that the Court lacks jurisdiction under Section 1257. Resp. Br. 18–23.

II. The States have developed both common law claims and defenses, and state courts should be trusted to correctly apply the numerous doctrines and rules that protect defendants from meritless claims.

The essential element of a preemption claim is a conflict between federal and state law. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Yet, Petitioners and some amici suggest preemption is appropriate here because Boulder's claims lack merit. *See, e.g.*, Pet. Br. at 36–37; Br. of the United States at 16–17 ("U.S. Br."). These concerns ignore the basic principles of this Court's preemption jurisprudence. And they give short shrift to the very nature of tort law, which has evolved—and continues to evolve—to reflect and balance States' sovereign interests in protecting people who are harmed and in shielding defendants from meritless claims. The preemption analysis Petitioners propose does not justify usurping the States' role in resolving claims like those Boulder asserts here. State courts can and should be trusted to properly apply tort law to weed out meritless claims. Federal preemption is not the answer to merits concerns.

A. State common law tort claims have long allowed plaintiffs to seek relief for their harms, evolving over time to reflect the complexity of modern life.

By compensating victims and vindicating public and private rights, tort law provides an important mechanism that empowers litigants to seek relief for their injuries. Tort law is rooted in the medieval English writ of trespass on the case, which recognized a societal interest in providing remedies for indirect or consequential harm. Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 17 (2d ed. 2016); *cf. Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (1928) (describing the origins of the law of negligence). "[S]ince the founding of the Republic, [tort law] has been an area almost exclusively reserved to the states." Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 Yale L. & Pol'y Rev. 429, 430 (1996)).

Petitioners and their amici suggest that the supposed novelty of Boulder's claims supports preemption. *See, e.g.*, Pet. Br. at 34–35 (describing the breadth of Boulder's claims). But what Petitioners and their amici see as a reason for preemption ignores one of tort law's defining characteristics. Building from its venerable origins, renewal and evolution are central aspects of tort law, which has repeatedly evolved to reflect changing societal interests and emerging technological developments while continuing to serve its compensatory purpose. *See* Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11 J. Tort L. 71, 142 (2018) (noting that "waves of technological change account for the most significant changes in American tort law").

Many scholars attribute the evolution of tort law to a desire to balance the need to provide compensation to injured parties with a desire to facilitate continued economic development. *See, e.g.*, Lawrence Friedman, *A History of American Law*, 444 (4th ed. 2019) (positing that judges reduced tort liability to a standard of ordinary care "to limit damages to some moderate measure" so that capital could "be spared for its necessary work"); *see also M. L. Stewart & Co. v. Marcus*, 207 N.Y.S. 685, 691 (Sup. Ct. 1924) ("the courts endeavor, wherever it can be done without too radical a departure from recognized legal rules, to harmonize the necessities of a competitive industrial system of business with the teachings of morality"). In accommodating these competing interests, tort law evolved to require injured parties to show that their injury was caused by a breach of a standard of care, and to incorporate a number of affirmative defenses to otherwise actionable conduct. Gifford, 11 J. Tort L. at 95.

Thus, the Industrial Revolution and the resultant development of increasingly complex technologies—along with the immense economic impacts and heightened risk of harm they created—presaged the development of modern tort law and its attendant guardrails that prevent abuse of tort claims. Friedman, *A History of American Law*, 283–84 (attributing the development of tort law and the doctrine of negligence to "the industrial revolution—the age of engines and machines [which] . . . have a marvelous capacity to cripple and maim.").

For example, the advent of the automobile led to the adoption of foreseeability in lieu of privity as a basis for product liability. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916). And recognizing the changes to the concept of "duty" wrought by a rapidly industrializing society, Judge Learned Hand developed his foundational test for claims involving the reasonableness of a defendant's conduct, which defined the nature and extent of a defendant's duty by comparing the burden of taking precautions to avoid harm to the probability of the harm and the magnitude or severity of the potential loss that would result. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); Patrick J. Kelley, *The Carrol Towing Company Case and the Teaching of Tort Law*, 45 St. Louis U. L.J. 731, 733 (2001). And, as the Industrial Revolution shifted society from direct, face-to-face interactions to complex, mechanized sequences of events, Justice Cardozo entrenched the concept of proximate cause, which limits a defendant's liability to harm that is a reasonably foreseeable consequence of their actions. *Palsgraf*, 162 N.E. at 103; G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. St. Thomas L.J. 463, 513 (2014).

The law of nuisance followed a similar arc. As the pollution caused by the rapid and unregulated growth of the Industrial Revolution darkened skies, soiled buildings, and caused significant personal harm, courts struggled to formulate workable standards to govern nuisance claims against existing and emerging sources of pollution. Kate Markey, *Air Pollution as Public Nuisance: Comparing Modern-Day Greenhouse Gas Abatement with Nineteenth-Century Smoke Abatement*, 120 Mich. L. Rev. 1535, 1552 (2022). Initially, courts largely rejected nuisance claims against emerging industries. *Id.* at 1554. But as courts' understanding of the risks of these new forms of pollution grew and evolved, the law of nuisance evolved in parallel, first incorporating a balancing regime before yielding to a prima facie nuisance for smoke pollution. *Id.* at 1554–56. That evolution in tort law helped ensure that the cost of carelessly engaging in an activity would be borne by the person who chooses to undertake it, as opposed to it being imposed on society at large. *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) ("One goal of the tort system . . . is to ensure that actors bear the costs of their activities.").

Ignoring that history, Petitioners and their amici suggest the supposed novelty of Boulder's claims renders them unfit for adjudication under state tort law and thus, somehow preempted. The United States speculates, for example, that Boulder's claims would require Petitioners to pay all "costs of abating all downstream effects in Boulder that Boulder attributes to climate change." U.S. Br. at 15. And it argues that there are too "many indirect steps separat[ing] petitioners' worldwide conduct from far-down-the-chain effects in Boulder." *Id.* at 24. Similarly, Alabama and its amici States posit that Boulder's claims are distinguishable from those in an "ordinary" suit, because Boulder "does not allege that any particular defendant's products caused any particular injury in Colorado." Br. of Alabama, et al. in support of Pet'rs. at 26 ("Ala. Br."). And Petitioners also contend that "the chain of causation between [Petitioners'] conduct and the asserted in-state injuries . . . is attenuated." Pet.' Br. at 36.

To the extent these concerns implicate novel issues, they fail to account for the "flexibility and capacity for growth" and "wise adaptation" at the heart of the common law and reflected in tort law's development.[2] *Funk v. U.S.*, 290 U.S. 371, 382–83 (1933) (citation omitted). Assuming tort law is incapable of addressing as-yet unlitigated injuries and causes of action would be antithetical to our legal system. "[A]s it was the characteristic principle of the common law to draw its inspiration from every fountation [sic] of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)). Indeed,

[2] As noted *infra* at 13–15, these concerns do not implicate novel issues; they are readily addressed by existing guardrails.

tort law has already developed tools that address the concerns Petitioners and their amici raise.

B. State common law tort claims are subject to multiple safeguards that protect against meritless claims.

State tort law does not operate in a vacuum. There are recognized legal doctrines—including reasonableness, foreseeability, causation, comparative fault, damages caps, and pro rata liability—that may ultimately limit Boulder's entitlement to relief in this case, if any. *See generally* Restatement (Third) of Torts: Apportionment Liab. § 26 (2000); Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (2010).[3] These tools—more specifically, their application by state courts to common law tort claims—undermine arguments that the merits of Boulder's claims justify inventing new federal preemption principles to preclude them.

Petitioners and their Amici attempt to justify preemption based on their concerns regarding the potential scope and breadth of Boulder's claims. Pet. Br. at 34–35 (describing the breadth of Boulder's claims); U.S. Br. at 25–26 (arguing that Boulder's theory would "invite suits targeting other nationwide or global phenomena with global (and thus local) effects"); Ala. Br. at 26 (arguing that Boulder's "case is *more* pernicious than an ordinary tort" that could impose "a levy on the

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[3] Amici States cite to the Restatement (Third) of Torts when discussing potential safeguards given Boulder's statements that choice of law remains unsettled with respect to its claims. *See* Resp. Br. 30–31.

aggregate output of a global industry”). But those concerns about the breadth of liability animate the doctrine of proximate cause, which limits Boulder’s recovery to those harms which it can prove are the reasonably foreseeable outcome of Petitioners’ actions, unbroken by superseding causes. *See generally* Restatement (Third) of Torts: Phys. & Emot. Harm §§ 29–36 (2010).

The United States also contends that Boulder’s claims must be preempted because Petitioners’ actions allegedly “played an infinitesimal role at most” in precipitating climate change, and Boulder’s claims fail to “disambiguate which sources of emissions caused alleged harms in Boulder.” U.S. Br. at 23. Again, tort law contemplates the apportionment of liability for both divisible and indivisible damages. Restatement (Third) of Torts: Apportionment Liab. § A18 (2000) (Liability of Multiple Tortfeasors for Indivisible Harm); Restatement (Third) of Torts: Apportionment Liab. § 26 (2000) (Apportionment of Liability When Damages Can be Divided by Causation). The answer to the United States’ concern is for Petitioners to advance arguments that take advantage of these doctrines. And it will be up to the factfinder to determine whether Petitioners’ conduct is more than a “trivial contribution” to Boulder’s harms. Restatement (Third) of Torts: Phys. & Emot. Harm § 36 (2010).

Ultimately, if Boulder’s claims lack merit for these reasons or others, Petitioners can raise those issues in Colorado state court to test and defend against Boulder’s claims. Every day, state courts assess merit, weigh evidence, and enforce limits even in the most complex cases. State courts are capable of requiring a plaintiff to prove harm, fault, causation, and the extent of any damages attributable to a defendant's actions. And States are free to develop and modify these doctrines to reflect their unique interests and concerns. This divergence does not implicate the Supremacy Clause or any constitutional infirmity; it is a feature of our federal system. To suggest otherwise would undermine state law and threaten the evolution of a liability regime reflecting a collective effort to balance and accommodate the interest in ensuring compensation for foreseeable harms with the desire to encourage and facilitate otherwise beneficial activities. In other words, preempting state law because of concerns about a claim's merits has no place in the structure of our federal system.

III. The Constitution's structure is not a valid basis on which to preempt state common law claims.

Petitioners urge this Court to conclude that Boulder's claims must be preempted because they undermine our federal system. *See* Pet. Br. at 22, 26–27. But what Petitioners advocate for is nothing less than a judicially crafted liability shield for the fossil fuel industry based on arguments conjured from implications they would read into the Constitution, not its text.

This Court has repeatedly denied theories of preemption that rest on abstract references to the Constitution's structure or brooding federal interests untethered to constitutional text. There is no reason for the Court to abandon that approach here.

A. The Court has repeatedly denied theories of preemption that are untethered to constitutional text.

Neither Petitioners nor their amici cite any constitutional text supporting their preemption theory. Instead, they rely on purported limitations implied from the Constitution's structure and the conflicting rights of States. Pet. Br. at 22–29; Ala. Br. at 3–6. Under this Court's precedent, that alone is fatal to their theory, and adopting their position would represent a radical reshaping of the preemption doctrine to allow the judicial branch to make policy decisions that are best left to Congress.

Theories of implied preemption, like those Petitioners advance, "undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy J., concurring in part and concurring in judgment)); *see also Kansas v. Garcia*, 589 U.S. 191, 212 (2020) (although "[f]ederal authorities played a role . . . the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption"). And while some constitutional doctrines can be derived from the Constitution's structure, *see Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 247–48 (2019) (collecting examples), preemption has never been implied solely from the structure of the Constitution. Instead, preemption occurs—if at all—through the combination of a specific textual basis and the Supremacy Clause.

Under the Constitution's structure, the States surrendered certain powers that they previously enjoyed as independent sovereigns. But they never surrendered the power of their residents to pursue state common law tort claims against a private entity, and Petitioners point to no authority that would support such a contention. "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (citing *South Carolina v. Katzenbach*, 282 U.S. 301, 328–29 (1966)).

The Tenth Amendment confirms that powers not specifically granted to the federal government remain with the States and the people. U.S. Const. amend. X; *see also Wyeth v. Levine*, 555 U.S. 555, 584–85 (2009) (Thomas, J., concurring) ("In accordance with the text and structure of the Constitution, '[t]he powers delegated by the proposed constitution to the federal government, are few and defined' and '[t]hose which are to remain in the state governments, are numerous and indefinite.'" (quoting The Federalist No. 45, at 237–38 (James Madison))). It would turn the system of federalism on its head to find that any tort claim that may touch on a matter of federal interest is preempted.

Where preemption is asserted, the federal restriction or right that is alleged to conflict with state law must stem from specific constitutional text or a valid statute enacted by Congress. *Garcia*, 589 U.S. at 202. "[T]here 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) (quoting *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

Here, Petitioners fail to identify any specific constitutional text with preemptive effect. Instead, Petitioners variously describe the federal interest at stake as the effect of interstate and international greenhouse gas emissions on the global climate (Pet. Br. at I – questions presented); interstate pollution and disputes arising from such pollution (Pet. Br. at 21–22); and regulation of air and water in their ambient aspects (Pet. Br. at 21). Petitioners then rely on cases involving suits brought to regulate pollution issuing from another State, for which the Court originally developed a body of federal common law, to argue that Boulder's claims are preempted. Pet. Br. at 24–25 (citing, among others, *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *New York v. New Jersey*, 256 U.S. 296 (1921)).

That reliance is misplaced. First, the early development of federal common law to regulate interstate pollution—which has since been displaced by statute, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011)—provides no constitutional basis to preempt Boulder's state common law claims. Second, the purpose of applying federal common law in these early cases was to substitute for "the forcible abatement of outside nuisances" by a sovereign, *see Tennessee Copper*, 206 U.S. at 237, which is not the purpose of Boulder's claims. Boulder is seeking compensation for harms the Petitioners caused in Boulder; it is not seeking to restrict their emissions or prevent them from engaging in their legitimate business activities.

Petitioners next suggest that Boulder's claims should be preempted based on the impact that those claims, if successful, *might* have on activity in other States. Pet. Br. at 28. But this Court recently rejected an "almost per se rule" that would forbid enforcement of state laws that have the practical effect of controlling commerce outside the State. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374–75 (2023) (noting that because "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior," an almost per se rule would "cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers" (citation omitted)); *see also Young v. Masci*, 289 U.S. 253, 259 (1933) ("[A] person acting outside the State may be held responsible according to the law of the State for injurious consequences within it.").

In addition, this Court has recognized that state claims may impose liability for out-of-state conduct that causes in-state injuries. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 490–94 (2003) (allowing intentional tort claim under Nevada common law to proceed against a California state agency for conduct that had occurred in California but caused injury in Nevada); *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 592 U.S. 351, 367, 371 (2021) (allowing claims under state tort law to proceed for injury caused by vehicles that had been originally sold and used in other states); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1983) (When a corporation "has continuously and deliberately exploited [a State's] market, it must reasonably anticipate being haled into [that State's] court[s]" to defend actions "based on" products causing injury there.). Petitioners' assertion of federal preemption by virtue of the structure of the Constitution is inconsistent with these precedents and should be rejected.

B. A vaguely described federal interest over interstate pollution and climate change cannot preempt Boulder's state common law claims.

In the absence of any Constitutional text that preempts Boulder's claims, Petitioners instead rely on a general federal interest over interstate pollution and climate change. This is not sufficient to preempt claims in an area traditionally occupied by the States. *Contra* Pet. Br. at 24–29. A theory of preemption that depends on a "brooding federal interest" and an "appeal[] to a judicial policy preference should never be enough to win preemption of a state law." *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019).

When a field has traditionally been occupied by the States, as it has here, there is a strong presumption—grounded in state sovereignty—that the exercise of historic state authority is not preempted. *Altria Grp.*, 555 U.S. at 76–77; *Wyeth*, 555 U.S. at 565 n.3. Thus, courts will not find that federal law preempts state laws that are within the field of the States' traditional powers without a clear and manifest expression to do so grounded in the text of the Constitution or a federal statute. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973). The Supremacy Clause may not be used "to elevate abstract and unenacted legislative desires above state law." *Virginia Uranium, Inc.*, 587 U.S. at 778.

Here, Boulder's specific claims of public nuisance, private nuisance, and trespass are state law mechanisms that serve to "protect the health and safety of their citizens," *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), which are "primarily, and historically . . . matter[s] of local concern." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *see also Smith v. Turner*, 48 U.S. 283, 357–58 (1849) (finding that protecting people from items injurious to their health is universally within the States' authority, not the federal government's).

There is no "uniquely federal interest" in the state common law of nuisance and trespass, even when that law might be applied to address harms related to climate change. Boulder's claims do not attempt to "regulate interstate emissions," Pet. Br. at 31, or "govern the global atmosphere," Ala. Br. at 16. Rather, Boulder's common law claims focus on Petitioners allegedly misleading the public about the role of fossil fuels in contributing to climate change and the specific harms they assert Petitioners knowingly caused to Boulder through their sale and production of fossil fuels. Pet. App. 2a, 3a. Thus, Boulder's claims of nuisance and trespass are firmly in the realm of traditional state authority. And generally, "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest." *PruneYard Shopping Centers v. Robbins*, 447 U.S. 74, 92 (1980) (Marshall, J., concurring) (citation omitted).

Next, there are only "a few areas, involving 'uniquely federal interests' [that] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Hencely,* 146 S. Ct. at 1094 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). This Court has noted that these areas of uniquely federal interest are "rare," and emphasized the "narrowness of this doctrine." *Id.* Examples of uniquely federal interests this Court has recognized include civil liability arising out of the performance of federal procurement contracts, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), fraud on a federal agency, *Buckman Co. v. Plantiffs' Legal Comm.*, 531 U.S. 341 (2001), certain regulation of maritime vessels, *United States v. Locke*, 529 U.S. 89 (2000), and patent law, *Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141 (1989).

While Petitioners and several amici have posited that interstate pollution is a unique area of federal concern, there is no recognized area of federal common law for claims like Boulder's. Before the Clean Air Act and the Clean Water Act displaced the federal common law of interstate pollution, federal courts recognized "federal common-law suits brought by one State to abate pollution emanating from another State." *Am. Elec. Power Co.*, 564 U.S. at 421. Boulder's claims for compensation do not fit within that line of precedent.

Petitioners are also incorrect that the Clean Air Act preempts Boulder's claims. Even if Boulder's claims sought to regulate air pollution (which they do not), the Clean Air Act has never been understood to comprehensively occupy the field of emissions regulation for any pollutant. *See North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) ("We need not hold flatly that Congress has entirely preempted the field of emissions regulation."). In the Clean Air Act, Congress addressed the federal interests in interstate pollution through a system of cooperative federalism that reserves a robust role for the States. This Court has determined, when interpreting the materially identical savings clauses of the Clean Water Act, that those clauses "negate[] the inference that Congress 'left no room' for state causes of action," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); *see also Am. Elec. Power Co.*, 564 U.S. at 429 (recognizing that state tort remedies may be available if not preempted by the Clean Air Act). Indeed, instead of boxing States out, the Clean Air Act makes "the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).[4] Petitioners have given this Court no reason to believe that Congress' judgment as to the nature and scope of the federal interests in interstate air pollution, and the impact of state common law on those interests, was incorrect. And thus, Petitioners have provided no reason for the Court to rule that Boulder's claims are constitutionally preempted.

But even if the Constitution required the Court to second-guess Congress's judgment as to the federal interests in interstate pollution, Petitioners would need to establish a significant conflict between that interest and Boulder's claims. *Hencely,* 146 S. Ct. at 1094 ("the identification of a uniquely federal interest 'does not . . . end the inquiry' . . . this Court's precedents require

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[4] The United States' thin assurance of comprehensive, and exclusive, federal regulation, U.S. Br. 34, n.4, flouts the cooperative federalism framework and cannot be squared with the U.S. Environmental Protection Agency's recent efforts to disclaim legal authority or intent to regulate the vast majority of domestic greenhouse gas emissions from both mobile and stationary sources, 91 Fed. Reg. 7686 (Feb. 18, 2026); 90 Fed. Reg. 25784, 25792 (June 17, 2025).

'a significant conflict . . . between an identifiable federal policy or interest and the operation of state law.'" (quoting *Boyle*, 487 U.S. at 507)). Mere overlap between state and federal law is not enough. *Boyle*, 487 U.S. at 509 ("the state-imposed duty of care that is the asserted basis of [] liability . . . is precisely contrary to the duty imposed by the Government contract . . . . Even in this sort of situation, it would be unreasonable to say that there is always a 'significant conflict' between the state law and a federal policy or interest." (internal quotations omitted)).

Rather, the Court has found state law impliedly preempted only where "it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quotations omitted). This is a high threshold to clear. *See Wyeth*, 555 U.S. at 581 (in the context of both state and federal laws about the contents of drug labels, finding that state law was not preempted because it was possible for the company to label their drugs in a way that complied with both federal and state laws).[5]

[5] This Court's recent decision in *Monsanto Company v. Durnell,* 146 S. Ct. 2001 (2026), found that a common law failure to warn claim was preempted because the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") *expressly* preempts States from imposing labeling requirements that are in addition to or different from those under FIFRA, and the common law claims at issue were directly premised on such requirements. Because that matter involved express preemption, it has no bearing on Petitioners' argument for preemption based on the Constitution's structure.

None of the traditional preemption tests can be satisfied simply by examining the structure of the Constitution. Accordingly, the Constitution's structure alone does not provide a concrete federal interest sufficient to overcome the presumption against preemption of traditional state authority embodied in tort law.

C. Petitioners' theory would usurp the role of state legislatures and state courts in policing the bounds of common law claims to protect both businesses and state residents.

Tort law has developed via case law and statutory changes. The give-and-take between state legislatures and state courts reflects policy judgments made within local communities—guided by local courts, local norms, and local expectations. Dobbs et al., *The Law of Torts*, § 19. Boulder's attempt to hold fossil fuel companies accountable in tort for their alleged harms is in line with that tradition.

Emphasizing the primacy of their sovereign authority in this area, States have historically determined whether to shield or prosecute corporate actors who commit torts against their residents or territory. *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 652 (2013) (Roberts, C.J., dissenting) (recognizing that "States define the contours of their own tort law all the time, setting rules about who may recover in particular circumstances, what claims may be alleged, which parties are liable, what defenses may be asserted, what damages are recoverable, and so on.").

In that tradition, state elected officials charged with balancing economic interests and the public welfare can shield entities from state tort liability when they deem it appropriate. *See* Heidi L. Feldman, *From Liability Shields to Democratic Theory: What We Need from Tort Theory Now*, 14 J. Tort L. 373, 383–84 (2021) (listing many different types of protections States have created that limit or eliminate a defendant's potential liability, such as restrictions on grounds of liability for nonmanufacturer sellers, caps on punitive damages and restrictions on medical malpractice liability).[6]

Conversely, state common law tort claims serve an important role in protecting States and their residents from harmful behavior, including by holding private businesses accountable for injuries inflicted within those States. For example, since the early 2000s, thousands of lawsuits have been brought against pharmaceutical corporations operating in various parts of the opioid supply chain under common law theories like public nuisance and negligence.[7]

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[6] State laws protecting defendants who complied with public health guidance during the COVID-19 pandemic are a recent example. *See, e.g.*, Ala. Code § 6-5-792(a)–(b) (2021); H.B. 76, 32d Leg. (Alaska 2021); Fla. Stat. Ann. § 768.38(3)(c)2 (2021); Iowa Code Ann. § 686D.5 (2020); Kan. Stat. Ann. § 60-5504 (2020); La. Stat. Ann. § 9:2800.25 (2020); Mich. Comp. Laws § 691.1455 (2020); Miss. Code Ann. § 11-71-5 (2020); Legis. B. 39(3), 107th Leg., 1st Sess. (Neb. 2021); Nev. Rev. Stat. § 41.835(1)(b)(1) (2020); Okla. Stat. tit. 76, § 111(B) (2021).

[7] *See* Valerie Bauman, *States, Cities Eye $26 Billion Deal: Opioid Litigation Explained*, Bloomberg L. (July 26, 2021), https://news.bloomberglaw.com/health-law-and-business/states-

These lawsuits alleged specific conduct regarding the industry's distribution scheme that caused sales of opioids to skyrocket, resulting in devastating harm in communities around the country.[8]

Similarly, state public nuisance claims were at the "heart of litigation against tobacco companies in the 1990s, resulting in . . . one of the most significant settlement agreements in American product liability jurisprudence." Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 Colum. J.L. & Soc. Probs. 135, 136 (2018)).[9] The scope of potential liability and the size of the potential monetary award in those cases was not a basis to bar litigants from the courthouse door. Ra-

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cities-eye-26-billion-deal-opioid-litigation-explained (on file with the Colorado Attorney General's Office).

[8] *See e.g., In re Nat'l Prescription Opiate Litigation*, 477 F. Supp. 3d 613, 617 (N.D. Ohio 2020); Geoff Mulvihill & John Seewer, *Purdue Pharma, US States Agree to New Opioid Settlement*, Assoc. Press (Mar. 3, 2022), https://apnews.com/article/purdue-pharma-opioid-settlement9482fa0389f68de6844d13ea2ebefe5a; Jan Hoffman, *Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. Times (Nov. 11, 2021),https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html#:~:text=After%20nearly%20two%20years%20of,health%20crisis%20that%20has%20killed (both on file with the Colorado Attorney General's Office).

[9] Many such cases involved claims that the tobacco industry withheld data showing the health risks posed to consumers of their products. *See In re Tobacco II Cases*, 207 P.3d 20, 27 (Cal. 2009) (reviewing allegations that defendants misled consumers about health risks of smoking through deceptive advertising).

ther, arguments from the tobacco industry that employment and economic consequences would follow if tort liability was imposed were expressly rejected. *See Cipollone v. Liggett Group, Inc.*, 644 F. Supp. 283, 289 (D.N.J. 1986) ("[W]hile it may be the case that the legislative branch has formulated some policies which favor the cigarette industry, defendants have identified no other provision in the federal law which so favors that industry that it directly prohibit[s] states from enforcing those laws which protect the health and safety of their citizens in any way which might affect the profitability of cigarette sales.").

Other notable examples of state tort laws' integral role in holding national and international corporations accountable include state common law tort claims against the asbestos and lead-based paint industries. *See, e.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1103 (5th Cir. 1973) (affirming finding that manufacturers of insulation materials containing asbestos were liable for damages under Texas tort law); *Lockwood v. AC & S, Inc.*, 744 P.2d 605 (Wash. 1987) (affirming that asbestos manufacturers were liable under negligence and strict liability theories); *Beraglia v. Owens-Corning Fiberglass Corp.*, 606 So. 2d 1213, 1215 (Fla. Ct. App. 1992) (allowing plaintiffs to proceed with strict liability claim under state common law against asbestos manufacturer.); *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 65, 161 (Ct. App. 2017) (allowing public nuisance action under state common law against manufacturers of lead-based paint for affirmatively promoting lead paint for interior use with knowledge of the hazard that such use would create).

These examples underscore the traditional role of state tort law in holding large corporations accountable when they inflict broad-based harms on States and their residents. State legislatures and courts, who represent and are directly accountable to those experiencing such harms, are best positioned to regulate the bounds of state tort law. Yet here, Petitioners ask to be excused from potential liability for their actions based on implications they would read into the Constitution, not its text. Such a sweeping, judge-made policy is inconsistent with this Court's jurisprudence, intrudes on state sovereignty, and would permit large tortfeasors to escape state tort liability when their actions cause tangible harm. The Court should not countenance such an expansive invasion of traditional state authority based on nothing more than the vague and brooding federal interest Petitioners purport to find in the Constitution's structure.

CONCLUSION

Amici States respectfully request that the Court dismiss this case for lack of jurisdiction or, alternatively, affirm the Colorado Supreme Court's decision.

Respectfully submitted,

PHILIP J. WEISER
Attorney General
State of Colorado

RUSSELL D. JOHNSON
Deputy Solicitor General
Counsel of Record

CARRIE E. NOTEBOOM
Assistant Deputy Attorney General
ROBYN WILLE
First Assistant Attorney General
CORY HALLER
Senior Assistant Attorney General
GABBY FALCON
Assistant Attorney General
CAMERON BONNELL
Assistant Attorney General Fellow

1300 Broadway, 10th Floor
Denver, Colorado 80203
Russell.Johnson@coag.gov
(720) 508-6000

ROB BONTA
Attorney General
State of California

SAMUEL T. HARBOURT
Solicitor General

LAURA J. ZUCKERMAN
Supervising Deputy Attorney General
IAN FEIN
Deputy Solicitor General
HEATHER M. LEWIS
BRIAN CALAVAN
Deputy Attorneys General

1300 I St.
Sacramento, CA 95814

(counsel continues on next page)

KRIS MAYES
Attorney General
State of Arizona
2005 N. Central Ave.
Phoenix, AZ 85004

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Ave.
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th St. NW
Washington, DC 20001

ANNE E. LOPEZ
Attorney General
State of Hawaiʻi
425 Queen St.
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
115 S. LaSalle St.
Chicago, IL 60602

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

AARON D. FORD
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701

JENNIFER DAVENPORT
Attorney General
State of New Jersey
25 Market St., 8th Fl.
Trenton, NJ 08625

LETITIA A. JAMES
Attorney General
State of New York
28 Liberty St.
New York, NY 10005

DAN RAYFIELD
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

PETER F. NERONHA
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

CHARITY R. CLARK
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

NICHOLAS W. BROWN
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

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