No. 25-170

Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
EXXON MOBIL CORPORATION,
Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY;
CITY OF BOULDER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF ALABAMA AND 25 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* STATES

Amici States are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.[1]

The City and County of Boulder, Colorado, assert a power with no analogue in our Nation's history and no place in our federalism: "the forcible abatement of outside nuisances." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Like disputes over borders, disputes over cross-border emissions cannot be settled by one State alone. Rather, as the Court has recognized for over a century, "suits brought by one State to abate pollution emanating from another State" are "meet for federal law governance." *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 421-22 (2011) (*AEP*). Whether Congress or federal courts supply the controlling law, there is no world in which Boulder, Colorado, gets to set global energy policy.

Suits like this one imperil the ability of *Amici* States to achieve their policy prerogatives on energy production and environmental protection. To be sure, States can assign liability for conduct outside their borders in some contexts. But the theory that *every* State can regulate *every* molecule that enters the atmosphere *anywhere* in the world is unlimited. When one State's power grows so far beyond its proper sphere, the rights of every other State wither.

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[1] Per this Court's Rule 37.2, *Amici* gave timely notice to counsel of record more than ten days prior to this brief's due date.

SUMMARY OF ARGUMENT

I. The reason a State cannot apply its home state law to interstate emissions has to do with the "basic interests of federalism." *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972) (*Milwaukee I*). The "cardinal rule, underlying all the relations of the states to each other, is that of equality of right." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). No State can "enforce its own policy" on the others, so either Congress or "interstate common law" must provide "the rule which shall control." *Id.* at 95, 98.

The court below erred in two ways. First, because applying state law is constitutionally "impossible," *Tenn. Copper Co.*, 206 U.S. at 237, any displacement of earlier federal law is irrelevant to the question presented. *Contra* App.9a-11a, 17a-20a. The Clean Air Act did not and could not alter the fact that "state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*). Second, the Constitution does not distinguish between "an action against a pollution emitter to abate pollution" and this action for "damages from upstream producers" for the alleged cost of pollution. App.17a. Boulder tries to dodge centuries of precedent, but there is no hiding the source of its alleged injury, the chain of causation it pleaded, and the likely effect of the drastic remedies it demands.

II. Cases like this one threaten the availability of affordable energy and the sovereignty of States. The time to intervene is now—before courts amenable to these lawsuits can do serious damage to the Nation's energy system. There is already a clear division of authority, and opportunities for review may be few and far between. This case is a perfect vehicle.

ARGUMENT

I. Federalism and Precedent Foreclose State-Law Claims Based on Interstate Emissions.

By declaring independence, the Colonies laid claim "to all the rights and powers of sovereign states." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237-38 (2019) (citing *McIlvaine v. Coxe's Lessee*, 8 U.S. 209, 212 (1808)). "A sovereign decides by his own will, which is the supreme law within his own boundary." *Rhode Island v. Massachusetts*, 37 U.S. 657, 737 (1838). When sovereign wills conflict, they may settle their differences by treaty or war. For example, if one creates a "nuisance" "upon a navigable river like the Danube, [it] would amount to a *casus belli* for a state lower down, unless removed." *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906).

But the Colonies joined the Union, and from the origins of our federal system flow several basic tenets of constitutional law. While the Constitution "did not abolish the sovereign powers of the States," it "limits [their] sovereignty in several ways." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018).

Unlike "absolutely independent nations," which may resort to force, no State "can impose its own legislation" or "enforce its own policy upon the other[s]." *Kansas*, 206 U.S. at 95, 98; *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). "[H]appily for our domestic harmony, the power of aggressive operation against each other is taken away." *Burton's Lessee v. Williams*, 16 U.S. 529, 538 (1818). Every State agreed to "stand[] on the same level with all the rest," *Kansas*, 206 U.S. at 97, to form "a union of states, equal in power, dignity and authority." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

Relinquishing the powers of diplomacy and war did not render the States defenseless. What would have been political fights among sovereigns became judicial questions with answers in federal law. *Rhode Island*, 37 U.S. at 737-38, 743. By ratifying the Supremacy Clause, the States "surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies." *Id.* at 737; *see Kansas*, 206 U.S. at 95; *Missouri*, 200 U.S. at 518-20; *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *see also Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). The Constitution thus provided a structural solution for "bickerings and animosities … that could not be foreseen." The Federalist No. 80 at 537 (Cooke ed. 1961). "Whatever practices" that "tend[] to disturb the harmony between the States are proper objects of federal superintendence and control." *Id.*

In areas ripe for interstate conflict, the Court has maintained State equality and harmony by declining to apply any one State's law. *See Kansas*, 206 U.S. at 95; *Missouri*, 200 U.S. at 520; *see also, e.g.*, *New Jersey v. New York*, 283 U.S. 336, 342 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931). Instead, only federal law can govern matters that implicate interstate relations. The doctrine extends even to cases involving private parties like this one. *See, e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Tenn. Copper Co.*, 206 U.S. at 237; *Lessee of Marlatt v. Silk*, 36 U.S. 1, 22-23 (1837).

The Court had these principles in mind when it decided *Milwaukee I*, which was also an interstate nuisance case. Illinois alleged that Milwaukee had polluted Lake Michigan, an interstate body of water. Invoking the logic of federalism, the Court held

unanimously that Illinois could not force Milwaukee to abate its activity, but neither could Illinois be asked "to submit to whatever might be done." 406 U.S. at 104. Pitting two sovereign wills against each other, the "nature of the problem" created an impasse that required a neutral arbiter, *i.e.*, federal law. *Id.* at 103 n.5. Congress can legislate, or federal courts can apply common law. Either way, state law cannot govern a controversy that "touches basic interests of federalism" or that needs "a uniform rule." *Id.* at 105 n.6. "Certainly," the pollution of Lake Michigan was such a controversy. *Id.*

Likewise, the claims here cannot proceed under state law. Boulder seeks to enact a global climate policy—one that would interfere with the sovereign power of every other State to regulate energy and the environment within its borders. "This is, in effect, an interstate dispute." *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 718 (8th Cir. 2023) (Stras, J., concurring) (*API*); *contra* App.18a. Colorado law cannot resolve an interstate dispute without breaking basic tenets of federalism.

A. State law can regulate emissions within state borders but not beyond them.

1. Cases involving interstate gas emissions implicate the conflicting rights of States. *Contra* App.18a ("No such issue of state sovereignty is presented in this case."). The federal judiciary has understood for well "over a century" the need for federal resolution of such disputes. *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (collecting cases). Where no federal statute governs, this Court has identified and applied principles of general law—"what may not improperly be called

interstate common law." *Kansas*, 206 U.S. at 98; *see API*, 63 F.4th at 718 (Stras, J., concurring) ("The rule of decision … has *always* been … what we now know as the federal common law.").[2]

For example, Missouri once sued to enjoin the dumping of sewage into an Illinois river, which it alleged would deposit downstream into Missouri riverbeds and poison Missouri water. *Missouri v. Illinois*, 200 U.S. at 517. Applying principles "known to the older common law," not state law, the Court found that Missouri's claim failed for want of injury and causation. *Id*. at 522.

Air pollution is no different. When Georgia sought to enjoin a Tennessee company from "discharging noxious gas" over state lines, Georgia law did not govern. *Tenn. Copper Co.*, 206 U.S. at 236. The Court identified common-law principles to determine that a State could be "entitled to specific relief" rather than "give up quasi-sovereign rights for pay." *Id*. at 237-38. And the Court rejected a defense of laches. *Id.* at 239. None of the analysis depended on state law but instead a federal equity jurisprudence built for interstate emissions cases.

In *Milwaukee I*, the Court recognized a general rule that claims to protect "ecological rights" against "impairment … from sources outside the State[]" have their "basis and standard in federal common law." 406 U.S. at 100. The dispositive fact was not that Lake

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[2] The Court has identified interstate common law as one of the "special" kinds that survived *Erie*. *See, e.g.*, *AEP*, 564 U.S. at 421; *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *Milwaukee I*, 406 U.S. at 105-06; *Hinderlider*, 304 U.S. at 110. Often, the rules of specialized common law are "just the old general-law doctrines in disguise." Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527, 558 (2019).

Michigan is "bounded … by four States," one of which was polluting. *Id.* at 104 n.6. When "deal[ing] with air and water in their … interstate aspects," the "basic interests of federalism" demand the application of federal law. *Id.* at 103 n.5, 104 n.6; *see also Iowa v. Illinois*, 147 U.S. 1, 7-8, 13 (1893) (rejecting the views of dueling state courts in favor of "equality" in river rights); *Connecticut*, 282 U.S. at 669-70 (rejecting "municipal law"); *Virginia v. Tennessee*, 148 U.S. 503, 523-24 (1893) (applying public law, international law, and moral law). Alleging liability for emissions from sources outside Colorado, the interstate dispute at hand cannot be resolved under state law and must be dismissed.

The interstate emissions cases support dismissal for another reason: the "need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Only federal law, "not the varying common law of individual states," can serve as a "basis for dealing in uniform standard with the environmental rights of [each] State." *Id.* at 108 n.9. That rationale applies *a fortiori* to claims based on *global* emissions, which implicate *every* State, not just those with claims to a specific river or lake.

The logic of the decision below justifies a world in which the same production and sale of energy is subject to every State's regulatory and enforcement regime simultaneously, creating unpredictable and conflicting duties. *See Wisc. Dept. of Ind. v. Gould Inc.*, 475 U.S. 282, 286 (1986) ("Conflict is imminent whenever two separate remedies … bear on the same activity." (cleaned up)). Such "balkanization of clean air regulations and a confused patchwork of standards" would harm "industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley*

Auth., 615 F.3d 291, 296 (4th Cir. 2010); *see also City of New York*, 993 F.3d at 91; App.25a, 28a, 47a (Samour, J., dissenting). If every State regulates the same conduct, energy producers would face enormous "uncertainty," and States would risk "chaotic confrontation" with one another. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987).

Unfortunately, chaos is already unfolding. Dozens of States, localities, and even private parties are prosecuting actions like this one under the aegis of state and local law.[3] These suits threaten ruinous

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[3] *See Leon v. Exxon Mobil Corp.*, No. 25-2-15986-8 (Wash. Super. Ct.); *Hawaii v. BP p.l.c.*, No. 1CCV-25-717 (Haw. Cir. Ct.); *Maine v. BP p.l.c.*, No. PORSC-CV-24-442 (Me. Super. Ct.); *City of Chicago v. BP p.l.c.*, No. 2024CH01024 (Ill. Cir. Ct.); *Metro v. Exxon Mobil Corp.*, No. 3:24-cv-19 (Or. Cir. Ct.); *Municipality of San Juan v. Exxon Mobil Corp.*, No. 3:23-cv-1608 (D.P.R.); *California v. Exxon Mobil Corp.*, CGC-23-609134 (S.F. Super. Ct.) (coordinated with *County of San Mateo v. Chevron*, No. 17-CIV-3222 (San Mateo Super. Ct.); *County of Marin v. Chevron*, No. CIV-17-2586 (Marin Super. Ct.); *County of Santa Cruz v. Chevron*, No. 17-CV-3242 (Santa Cruz Super. Ct.); *City of Imperial Beach v. Chevron*, No. MSC17-1227 (Contra Costa Super. Ct.); *City of Richmond v. Chevron*, No. MSC18-55 (Contra Costa Super. Ct.)); *County of Multnomah v. Exxon Mobil Corp.*, No. 23CV25164 (Or. Cir. Ct.); *Municipalities of Puerto Rico v. Exxon Mobil Corp.*, No. 3:22-cv-1550 (D.P.R. 2022); *Platkin v. Exxon Mobil Corp.*, No. MER-L-1797-22 (Super. Ct. N.J.); *Vermont v. Exxon Mobil Corp.*, No. 21-CV-2778 (Vt. Super. Ct.); *County of Maui v. Chevron U.S.A. Inc.*, No. 2CCV-20-283 (Haw. Cir. Ct.); *Connecticut v. Exxon Mobil Corp.*, No. HHDCV 206132568S (Conn. Super. Ct.); *Delaware v. B.P. Am., Inc.*, No. N20C-09-97 (Del. Super. Ct.); *City of Hoboken v. Chevron Corp.*, No. HUD-L-3179-20 (N.J. Super. Ct.); *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 2892 (D.C. Super. Ct.); *Minnesota v. Am. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct.); *City of Honolulu v. Sunoco LP*, No. 1CCV-20-380 (Haw.

liability for the energy industry. As cases progress around the country, it becomes more and more likely that one state court, interpreting one State's law, would "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air." *North Carolina*, 615 F.3d at 296. As this Court has recognized, federal law "prescribe[s] [an] order of decisionmaking" because "*our Nation's* energy needs and the possibility of economic disruption must weigh in the balance." *Cf. AEP*, 564 U.S. at 427 (emphasis added). That balance can be struck—and disaster avoided—only if this Court puts a stop to the idea any one State can regulate interstate emissions.

2. Even if there were not directly controlling caselaw that mandates dismissal, it is not hard to see how suits like this one undermine federalism. Simply put, they interfere with the right of "each State [to] make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). States have long pursued their interests in reducing pollution through regulation, litigation,

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Cir. Ct.); *Rhode Island v. Shell Oil Prods. Co.*, No. PC-2018-4716 (R.I. Super. Ct.); *City of Oakland v. BP p.l.c.*, No. CJC-24-5310 (S.F. Super. Ct.); *but see City of New York*, 993 F.3d 81 (dismissed); *City of Charleston v. Brabham Oil Co.*, 2020-CP-10-03975 (S.C. Ct. Com. Pl.) (dismissed); *Bucks County v. BP p.l.c.*, No. 2024-01836 (Pa. Ct. Com. Pl.) (same); *Anne Arundel County. v. BP p.l.c.*, No. C-02-CV-21-565 (M.D. Cir. Ct.) (dismissed; appeal pending); *City of Annapolis v. BP p.l.c.*, No. C-02-CV-21-250 (Md. Cir. Ct.) (same); *Mayor of Baltimore v. BP p.l.c.*, No. 24-C-18-4219 (Md. Cir. Ct.) (same); *Puerto Rico v. Exxon Mobil Corp.*, No. SJ2024CV06512 (T.P.I. San Juan) (voluntarily dismissed) *King County v. BP p.l.c.*, No. 18-2-11859 (Wash. Super. Ct.) (same).

and other means. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (a law "designed to free from pollution the very air that people breathe clearly falls within … the police power"); *Nw. Laundry v. City of Des Moines*, 239 U.S. 486, 490-92 (1916) ("no doubt" that "emission of smoke [was] within the regulatory power of the state"). For every State has "real and substantial interests" in the environment, *New Jersey*, 283 U.S. at 342, including "all the earth and air within its domain," *Tenn. Copper Co.*, 206 U.S. at 237.

But by "the law of nature these things are common to mankind." *Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 718 (Cal. 1983) (quoting the Code of Justinian). So it is no surprise that a sovereign might complain of "outside nuisances" and other "injuries [like] torts" emanating from beyond its borders. *Tenn. Copper Co.*, 206 U.S. at 237; *see also Missouri*, 200 U.S. at 520-21.

But the extraterritorial extension of state law (*i.e.*, the use of force) is not a constitutional option for dealing with outside nuisances. *See id.*; *Milwaukee I*, 406 U.S. at 103-05; *Kansas v. Colorado*, 185 U.S. 125, 140-41 (1902); *cf. Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881). Seizing that power diminishes the power of every other State "to promote the general welfare, or to guard the public health, the public morals, or the public safety" within its borders. *Lochner v. New York*, 198 U.S. 45, 67 (1905) (Harlan, J., dissenting).

Colorado cannot govern the global atmosphere because our federal system allows States to pursue their own divergent policies. And they do. *Compare, e.g.*, Utah Code Ann. §78B-4-515 (West) (limiting

liability for "greenhouse gas emissions"); Tex. Water Code Ann. §7.257 (West) (providing affirmative defenses to torts allegedly "arising from greenhouse gas emissions") *with* Cal. Gov't Code §7513.75(a)(3) (West) (noting "the state's broad[] efforts to decarbonize"); Cal. Pub. Res. Code §25000.5(a) (West) (declaring "overdependence on … petroleum based fuels" to be "a threat"). Such variety reflects the genius of American federalism, which lets "different communities" live by "different local standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015); *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Within its own domain, a State may "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

But the laboratory model does not work if one State can terminate another State's experiment. Alabama, for example, highly values the production and use of traditional energy. It is Alabama's policy "that the extraction of coal provides a major present and future source of energy and is an essential and necessary activity which contributes to the economic and material well-being of the state." Ala. Code §9-1-6(a); *see also id.* §9-17-1, *et seq.* (governing the development of oil and gas).

Alabama has also enacted laws to protect air quality, prevent water pollution, and conserve wildlife, *see id.* §§6-5-127, 9-2-2, 22-23-47, 22-28-3, but its views on how to achieve those ends diverge sharply from those of Boulder, Colorado. *See, e.g.*, Am. Compl. ¶325 (complaining that petitioners plan to "sell[] *more* fossil fuels"); *id.* ¶¶532-34 (seeking future damages

and "abatement of the hazards"). There can be no question that Boulder's billion-dollar carbon tax (*e.g.*, *id.* ¶450) would damage the efforts of other States to promote affordable and reliable energy.

Our constitutional structure can happily tolerate such irreconcilable differences among States—but not if every State is "bound to yield its own views" on interstate gas emissions to those of Colorado. *Kansas*, 206 U.S. at 97.

B. The displacement of federal common law does not permit state law to regulate interstate emissions.

The court below and others around the country have resisted *Milwaukee*'s application on the ground that the federal common law governing interstate emissions "no longer exists" after the Clean Air Act and Clean Water Act. App.17a; s*ee also, e.g.*, *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 55 (1st Cir. 2022); *Mayor of Baltimore v. BP p.l.c.*, 31 F.4th 178, 206 (4th Cir. 2022). On this view, displacement of federal common law allows "state law … [to] snap back into action unless specifically preempted by statute." *City of New York*, 993 F.3d at 98. The "snap back" approach is misguided for several reasons.

First, federal common law "exists … because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7. In the "enclaves" of federal common law, States are not "free to develop their own doctrines." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). After displacement, "the need" for federal common law "disappears," App.10a, but only because a *different federal rule* took its place. And whatever form the federal law takes, it remains equally "inappropriate for state law to control." *Texas Indus.*,

451 U.S. at 641; *see also AEP*, 564 U.S. at 422. As the Second Circuit held, "state law does not suddenly become competent to address issues that demand a unified federal standard simply because Congress … displace[d] a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98; *accord* App.26a (Samour, J., dissenting).

The Court addressed a similar issue in *United States v. Standard Oil*, a damages action arising from the collision of a truck with a U.S. Army soldier. 332 U.S. 301, 302 (1947). The truck owner's liability could not "be determined by state law" because the matter "vitally affect[ed] [federal] interests, powers, and relations … as to require uniform national disposition rather than diversified state rulings." *Id.* at 305, 307. "The only question" was "which organ of the Government is to make the determination [of] liability." *Id.* at 316. Finding that decision best left for "Congress, not for the courts," the Court effectively barred a remedy—much like *AEP* in the emissions context. But the Court did not *revisit* its choice-of-law holding as if state law might "snap back" in the absence of federal common law.

Each of these cases is an "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." *Contra* App.17a. More precisely, federal common law has supplied a rule of decision in cases where state law cannot. Repeating that federal common law "in this area" no longer exists (App.6a, 10a, 11a, 16a, 17a), the court below blinded itself to decisive precedent. What does the work is not the preemptive effect of federal common law today, but the constitutional need for its creation.

The law of interstate emissions was developed because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why … federal law must govern" even after any displacement. *Illinois v. City of Milwaukee*, 731 F.2d 403, 410-11 (7th Cir. 1984) (*Milwaukee III*). Resolving an interstate controversy under a single State's law is a violation of state sovereignty, *see supra* §I.A; *Kansas*, 206 U.S. at 95, which no federal statute could permit.

Likewise, because "uniquely federal" interests demand "uniform federal standards," state law can never be conclusive. *Milwaukee III*, 731 F.2d at 410. "[T]he state claiming injury cannot apply its own state law to out-of-state discharges." *Id.* Illinois squarely argued in *Milwaukee III* that if federal common law were "dissipated" by statute, then "Illinois law must again control." *Id.* at 406. But the Seventh Circuit understood that under "the logic of *Milwaukee I*," state law could *never* apply to interstate pollution. *Id.* at 411. Whether common law or statute, "federal law must govern." *Id.*

So it must govern here. The federal interests are the same or even stronger. As explained in *AEP*, trial courts "issuing ad hoc, case-by-case injunctions" are not well "suited to serve as primary regulator of greenhouse gas emissions." 564 U.S. at 428. If the Clean Air Act was meant to be a better and more uniform solution, it would make no sense for state law to "snap back" and recreate the problem that *better* federal law tried to solve.

Put differently, "displacement of a federal common law right of action" is a "displacement of remedies."

Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857 (9th Cir. 2012). Whether a "federal common law remedy [is] available" (App.10a) has no bearing on the availability of another remedy under state law. Nor can state law govern just because the claim "may fail at a later stage" under federal law. *Oneida Indian Nation of N.Y. v. Oneida County*, 414 U.S. 661, 675 (1974); *cf. Ouellette*, 479 U.S. at 499-500.

To reach a contrary view, the court below misread *AEP v. Connecticut*. There, the Court left open the possibility of certain state-law claims, 564 U.S. at 429, but not the claims here. The Court noted in *dicta* (because it was not briefed) that after the Clean Water Act, a plaintiff could still bring a "nuisance claim pursuant to the law of the *source* State." *Id.* (quoting *Ouelette*, 479 U.S. at 489). That fact does not help Boulder, which brings claims under Colorado law, not that of any source State. *See Ouelette*, 479 U.S. at 495. The type of claim *AEP* left open (intrastate) never had to be governed by federal common law in the first place. By contrast, the type of claim here (interstate) has never been resolved by state law alone.

In fact, *AEP* reaffirmed that "suits brought by one State to abate pollution emanating from another State" are "meet for federal law governance." 564 U.S. at 421-22. In such suits, "borrowing the law of a particular State would be inappropriate." *Id.* The court below ignored these lines in *AEP*, App.9a-11a, as well as this Court's doubt that "a State may sue to abate any and all manner of [interstate] pollution," 564 U.S. at 421-22. If federal law, despite its virtues in this area, does not provide a judicial remedy, *id.* at 422-23, the *AEP* Court surely did not invite state law to fill the void.

Finally, the lower court mistook petitioners to be advancing a "brooding" and "vague federal interest." App.18a. But the horizontal separation of powers is fundamental tenet of constitutional law. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 (2023). One does not need "text" (App.18a) to know what is "so obviously the necessary result of the Constitution." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). For example, States lack the "raw power to apply their own law" to "disputes over borders, water rights, or the interpretation of interstate compacts." *Franchise Tax Bd.*, 587 U.S. at 246 (citations omitted). So too the fact that States may not regulate the global atmosphere is "not spelled out in the Constitution" but nonetheless "implicit in its structure and supported by historical practice." *Id.* at 247. Anything else is "ahistorical literalism." *Id.*

C. This case is about interstate emissions.

If a state statute imposed massive fines for oil and gas sold in a neighboring State, no one would doubt the violation of the neighbor's sovereignty. *Cf. Louisiana v. Texas*, 176 U.S. 1, 27-28 (1900) (Brown, J., concurring). This attempt to impose tort liability to the same end is no different, for "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW*, 517 U.S. at 573 n.17.

Styling a State's effort "to impose its own policy choice" as a tort action does not shield it from the basic "principles of state sovereignty and comity." *Id.* at 572. Those principles would be "meaningless" if a State could do indirectly what it could not do directly. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012); *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 & n.13

(1989). Thus, whether Colorado law regulates emissions through the "power to give damages rather than to enjoin," the result is still "a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also Cipollone v. Liggett Grp.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring).

The court below asserted that Boulder does "not seek to regulate [greenhouse gas] emissions." App.21a. But taxing emissions—*i.e.*, regulating them—is the heart of the suit. Boulder complains that petitioners "continue to conduct their fossil fuel activities" and "produce a substantial amount of [greenhouse gas] emissions." Am. Compl. ¶¶325, 451. Boulder claims this is a nuisance precisely because of the emissions. For the alleged harms caused by emissions, Boulder seeks billions of dollars in damages, *id.* ¶¶222, 450, and disgorgement, *id.* ¶¶69, 84, 488. Boulder also demands "future damages and costs" to "mitigate, abate, and/or remediate the impacts of climate change." *Id.* ¶532. In what way *doesn't* this case "implicat[e] the regulation of interstate pollution"? App.17a.

There is no way Boulder can succeed without impacting "any oil and gas operations or sales in Colorado or elsewhere." App.4a. It is "common sense and basic economics" that raising the "cost of conduct will make that conduct less common." *City of New York*, 993 F.3d at 93 (cleaned up). Any relief would be "a *de facto* regulation on greenhouse gas emissions." *Id.* at 96. Boulder cannot "hid[e] the obvious"; it seeks "a global remedy for a global issue." *API,* 63 F.4th at 719 (Stras, J., concurring). While not every lawsuit against the energy industry is an attempt to regulate

emissions, that's what "this case is about." App.33a (Samour, J., dissenting).

Because Boulder deems "altering the climate" to be a public nuisance, Am. Compl. ¶447, the cloak of consumer protection is not available. It is clear that the only way for energy companies to avoid liability altogether, according to the complaint, would be to halt the production, sale, and use of their products *everywhere*. And regardless of the label, forcing global energy companies to cease doing business everywhere is not among a State's constitutional powers. Colorado law can reach "persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880). But virtually *all* the conduct Boulder targets occurred outside of Colorado, well beyond the proper regulatory sphere of state law. *See City of New York*, 993 F.3d at 92; *cf. BMW*, 517 U.S. at 573 n.20. There is no historical analogue for what Boulder is trying to do. The court below was wrong to cast this suit as a matter "of traditional state responsibility." App.23a-24a; *see* App.27a (Samour, J., dissenting).

II. This Case is an Ideal Vehicle to Address an Issue of Great Constitutional and Economic Consequence.

A. This case may be a rare opportunity for the Court to intervene before *Amici* States, their citizens, and our Nation's energy sector suffer serious damage. Boulder alone demands billions of dollars, and every decision like the one below is a green light for future plaintiffs. At least one county in Colorado already has a copycat lawsuit. App.25a (Samour, J., dissenting). The Court might consider the enormous costs and uncertainty of litigation in dozens of state courts around the country. *See supra* n.3. Some courts

appreciate the grave constitutional problems with these suits; others do not. The Court may not have another chance to consider the question presented before a state court imposes devastating preliminary relief or entertains enormously wasteful discovery.

B. The issue has percolated, and a clear split of authority has emerged. In the Second Circuit, a "nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions" may not proceed under state law. *City of New York*, 993 F.3d at 91. That court did not credit the City's narrative that its suit concerned only "production, promotion, and sale," rather than the regulation of emissions. *Id.* The court held that such claims "must be brought under federal common law," but the Clean Air Act "barred" them by displacing the common-law remedy. *Id.* at 95, 100. Likewise, the Seventh Circuit decided decades ago that the plaintiff's own state law cannot govern "out-of-state discharges." *Milwaukee III*, 731 F.2d at 410. It did not matter whether federal common law had been "dissipated" by statute. *Id.* at 406. Regardless, "federal law must govern." *Id.* at 411.

The Colorado Supreme Court expressly departed from both decisions. Relying heavily on a decision from the Hawaii Supreme Court, the court gave no weight to the reasons of constitutional structure that motivated interstate common law. *Id.* at 17a-18a. Second, the court held that federal common law never governed this type of suit because Boulder sues "upstream producers," not a "pollution emitter." App.17a. The court found no preemption.

This is one of few cases on appeal to raise the central issues outside of the context of removal to federal court. Whether the federal law governing

interstate emissions precludes the application of state law is a better question than whether it does so in a way that supports removal. If this Court grants review, it would be "free to consider the [] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *New York*, 993 F.3d at 94 (collecting cases acknowledging the distinction); *accord Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122, 138 n.4 (2d Cir. 2023).

C. The grave threat these suits pose to equal sovereignty and our Nation's energy infrastructure are reason enough for this Court to grant review. But the theory used against energy producers here can be expanded to target *any* extraterritorial activity that purportedly "exacerbate[s] climate change." App.2a.

Last year, New York sued "the world's largest producer of beef products, for misleading the public about its environmental impact."[4] The beef producer's pledge to reach "Net Zero by 2040" was allegedly misleading because the company "plans to grow global demand for its product," rather than "reduce production of and demand for" it. Complaint, ¶¶143-44, *New York v. JBS USA Food Co.*, No. 450682/2024 (N.Y. Super. Ct. filed Feb. 28, 2024). That case was tossed, but a similar (albeit less ambitious) suit against the second largest meat company is ongoing. *See Envtl. Working Grp. v. Tyson Foods, Inc.*, No. 2024-CAB-005935 (D.C. Super. Ct.). Given the ease of pleading that deep-pocketed companies have "exacerbate[d] climate change," App.2a, one can only expect to see more suits like these.

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[4] Office of N.Y. Att'y Gen., *Attorney General James Sues World's Largest Beef Producer for Misrepresenting Environmental Impact of Their Products*, Feb. 28, 2024, tinyurl.com/28udz5pa.

The States, upon entering the Union, gave up the right to use their laws to wage this sort of interstate conflict. They gave up the right to impose their policy choices on other States and activities entirely outside the home State's jurisdiction. The Court should grant review here before any further damage is done to our national economy and to our federal scheme.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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