No. 25-170

In the Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE FRONTIER INSTITUTE, INDEPENDENCE INSTITUTE, AND MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

Marcella Burke
Paul B. Simon
Connor Mighell
BURKE LAW GROUP PLLC
1000 Main Street,
Suite 2300
Houston, TX 77002
(832) 987-2214
marcella@burkegroup.law

Ilya Shapiro
Counsel of Record
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

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Additional counsel listed on signature page

QUESTION PRESENTED

The Colorado Supreme Court found that the Clean Air Act's framework did not preempt all state and local regulation of emissions and allowed Boulder County to bring tort claims under Colorado law against Suncor Energy and Exxon Mobil Corporation for damages from carbon emissions.

The question presented is:

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

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INTEREST OF *AMICI CURIAE*[1]

The **Frontier Institute** is an independent research and educational institution with the mission to keep the spirit of the western frontier alive with sound public policy and education programs that empower Montanans to be pioneers, innovators and risk takers. To those ends, the Frontier Institute is dedicated to upholding the separation-of-powers requirements of the United States and Montana Constitutions that foster democratic accountability and sound public policy.

The **Independence Institute** is a 501(c)(3) public policy research organization in Denver, founded on the eternal truths of the Declaration of Independence. The briefs and scholarship of research director David Kopel have been cited in seven opinions of this Court and over 130 lower-court opinions. The Institute's senior fellow in constitutional studies, law professor Robert Natelson, has been cited in 13 opinions of this Court.

The **Manhattan Institute** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility, to advance the flourishing of America's great cities.

This case interests *amici* because a proper understanding of federalism holds that federal law precludes contrary state law. The transaction of *actual* interstate commerce, such as energy production—and its attendant pollution—is a quintessentially federal area. Having one regulatory structure here allows for legal stability and the efficient allocation of resources.

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[1] No counsel for any party authored this brief in any part; nobody other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Constitutional federalism has two distinct dimensions: the federal government must interact with the states, and states must interact with each other." Allen Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 501 (2008). The former interactions are more familiar—and are the focus of constitutional-law classes—but other significant friction can occur from interactions among states or their inhabitants.

The principles governing these interactions have been called many things: "antidiscrimination," *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 (2023); "comity," *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 245 (2019); "interstate federalism," *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); and "horizontal federalism," *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 410 (6th Cir. 2021) (Donald, J., dissenting) (citation omitted).

We will use the last term, "horizontal federalism." This case implicates four recurring "sources of interstate friction" that this Court regularly analyzes, based on the following principles:

- **Overreaching:** A state may not adjudicate, tax, regulate, or punish conduct that occurs beyond its borders to deter conduct that is lawful in other states.
- **Exclusions:** States (especially commercially powerful ones) may not leverage their regulations to restrict other states' policymaking.
- **Favoritism:** The federal government may intervene when states regulate in favor of local

interests in ways that burden constitutional rights.

- **Externalities:** Federal law governs when a state pursues a policy that affects another, and both states have equal rights of action.

See Erbsen, 93 Minn. L. Rev. at 514.

Horizontal federalism emerges from the rich scholarship and experience that informed the framers and the federal structure they established. The Colorado Supreme Court neglected that framework here, so its judgment should be reversed.

Two developments since briefing on the cert. petition was completed have made the case for reversal stronger. First, the Maryland Supreme Court has now considered substantially similar climate-tort claims and reached the opposite result from its Colorado counterpart. In *Mayor & City Council of Baltimore v. B.P. P.L.C.*, 2026 WL 809501 (Md. Mar. 24, 2026) ("*Baltimore*"), the court affirmed dismissal of local-government state-law tort claims seeking damages for harms allegedly caused by global greenhouse-gas emissions. The majority agreed that those claims are displaced by federal common law, displaced in turn by the Clean Air Act, and not authorized by the Act's savings clauses. *Id.* at *23–25. The court expressly aligned itself with the dissent below, as well as with the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). *Baltimore*, 2026 WL 809501, at *20 n.18.

Second, the EPA has rescinded the 2009 endangerment finding for greenhouse gases under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), and repealed the implementing motor-vehicle

greenhouse-gas standards. *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act*, 91 Fed. Reg. 7686 (Feb. 18, 2026). That action underscores that greenhouse-gas policy requires national coordination and federal judgment, not tort rules that project one state's policy choices into other states.

Together, these developments confirm what was already true at cert: Colorado tort law is the wrong instrument for resolving injuries allegedly caused by interstate and international emissions.

ARGUMENT

I. HORIZONTAL FEDERALISM IS DEEPLY ROOTED IN CONSTITUTIONAL HISTORY

Horizontal federalism is "one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole." Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1885 (1987).

A. The History of Horizontal Federalism

A few years before the Revolution, British courts were articulating the doctrines of extraterritoriality and comity in jurisdictions that American lawyers like the Framers followed closely. One jurist, Lord Mansfield, held that a slave brought from America could not be detained in England because "[t]he state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law." *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (1772). So British jurists held that a law of one jurisdiction was not given effect in another if

repugnant to that jurisdiction's fundamental principles. Likewise, in *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (1779), Mansfield ruled that "one nation does not take notice of the revenue laws of another." There, a contract to evade French customs law could not be enforced in an English court, because English courts would not enforce French tax law.

European law-of-nations theorists also shaped early American understandings of comity and equal sovereignty. One popular treatise stated: "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." Emer de Vattel, *The Law of Nations* at I, § 18 (J. Chitty ed., 1834) (1758). This idea of sovereign equality posited that no state may subordinate another by force of law. Mutual recognition and voluntary respect were ideal, even necessary, when crafting a union of states.

The idea consistently advanced in these writings is that the authority of a sovereign stops at its borders. Every court and country applies and fashions its own law. They may respect the statutes "carried with" the subjects of other sovereigns as a matter of comity, but they only adopt the ones they deem persuasive or appropriate and disregard the rest. Any further entanglement would lead to confusion about which law applies and undermine individuals' reliance interest in their conduct's being governed by the law of the location where that conduct takes place.

Post-Revolution, the Constitution's framers demonstrated acute awareness that unrestrained state action leads to interstate friction and conflict. Our first charter, the Articles of Confederation, viewed

each state as its own sovereign, and provided "the free inhabitants" of each state with

> all privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . .

Art. of Confed. of 1781, art. IV, § 1. Yet under the Articles, states often "pursued conflicting self-interests at their collective expense," enacting protectionist measures and interfering with commerce. Erbsen, 93 Minn. L. Rev. at 511. They coined their own money, raised their own armies, and erected trade barriers, "creating systemic friction that left them collectively worse off." *Id.* at 533. The delegates to the Constitutional Convention emerged from a years-long battle with that problematic interstate construction, producing a system of government with a different approach.

It bears noting from the outset that the Constitution contains no explicit provision requiring blanket interstate equality. At the Constitutional Convention, the section that ultimately became Article IV, Section 3 initially included language providing that new states would be admitted "on the same terms" as current states. 2 The Records of the Constitutional Convention of 1787 at 454 (Max Farrand ed., 1937). Gouverneur Morris moved to strike this language. James Madison opposed Morris's motion, arguing that new states "neither would nor ought to submit to a Union which degraded them from an equal rank with the other States." *Id.* George Mason likewise argued that Morris's suggestion appeared intended to deter western

emigration, but that this was impossible. *Id.* Mason continued that "the best policy" regarding these new states would be "to treat them with that equality which will make them friends not enemies." *Id.* Morris agreed that stopping western emigration was impossible, but "did not wish to throw the power into the[] hands" of newly admitted states. *Id.* Roger Sherman notably stated that he was in favor of "fixing an equality of privileges by the Constitution," and therefore opposed the motion. John Langdon chimed in to support the motion because he wondered about circumstances "which would render it inconvenient" to admit new states on equal footing with established ones. *Id.* North Carolina's Hugh Williamson also clarified that while existing states "enjoy an equality now, and for that reason are admitted to [Congress] in the Senate," this reason did not apply to new states. *Id.* The body ultimately accepted Morris's edits by a 9–2 vote. *Id.*

This debate is highly instructive as to the Framers' perspective on interstate relations. Morris's edit provoked vocal debate from Madison, Mason, and Sherman—leading architects of the Constitution's framework—because it ran counter to their conviction that existing states should have equality of privileges. But Morris and his supporting delegates, who won the day, thought it best to leave to Congress's judgment the exact admission terms for new states.

The Convention's view was *not* that states were unequal or lacked equal sovereignty. It was that the elected representatives of existing states should decide what privileges new states had when admitting them. Although the Convention did not settle this question, the Continental Congress in New York incorporated the Northwest Ordinance under the new Constitution,

requiring that new states would enter the union "on equal footing" with existing states. *An Act to Provide for the Government of the Territory North-West of the River Ohio*, art. V § 8, 1 Stat. 50, 53 n.a (1789). This was based on a 1784 ordinance drafted by Thomas Jefferson proposing that the western states be incorporated on an equal basis with the original thirteen. Ordinance of April 23, 1784, 26 J. Cont'l Cong. 275 (1784). Every state since has been admitted "with an express declaration of equality" with existing states. Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 Publius 53, 54 (1988). And this Court later described the equal-footing principle as equality "in all respects whatsoever." *Coyle v. Smith*, 221 U.S. 559, 567, 569 (1911) (cleaned up) (discussing the admission of several states).

B. The Constitutional Structure of Horizontal Federalism

Despite disagreement at the drafting stage, the Constitution established a federal structure that treats states as equal sovereigns with limited authority to encroach on each other's respective domains. States may not, for example, coin money or lay duties without Congress's consent. U.S. Const. art. I, §10. In addition to these pointed restraints on interstate activity, the Constitution includes provisions designed to foster comity and equality between the several states.

The Interstate Compact Clause, U.S. Const. art. I, §10, cl.3, allows states to resolve disagreements by "Agreement or Compact" with congressional approval. These agreements have been frequently employed to govern relations between states since the founding. *See* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L.

Rev. 1, 3–4 nn.14–18 (1997) (listing compacts). While such arrangements are allowed, any "Treaty, Alliance, or Confederation" between states is prohibited. U.S. Const. art. I, §10, cl.1. This language likely refers to contracts between states without Congress's say-so, or military or external-facing agreements. It was part of the Articles of Confederation and "for reasons which need no explanation, is copied into the new Constitution." The Federalist No. 44 (Madison), at 281 (Clinton Rossiter ed., 1961). Those self-evident reasons included ensuring that the powers expressly given to the federal government would not be adulterated by states working at cross-purposes to the broader Union.

The Constitution also includes another clause similar to a provision in the Articles, providing that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl.1. While pared down from its earlier counterpart, the constitutional version has a wider sweep—preserving the legal and natural rights of American citizens in all contexts, not merely a commercial one. Based on its lineage and language, this clause governs state legislative power "in commercial matters where Congress has not yet acted." Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 448 (1982). And all the above does not obviate the dormant Commerce Clause, which speaks to relations between states that specifically concern commerce—addressed *infra* at II.B.

Another clause requires states to give "Full Faith and Credit" to the "public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, §1; *see also Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (clause prevents states from "adopting any policy of

hostility" to each other's acts). This extraterritoriality doctrine sets the boundaries for how states must treat the decisions and laws of other states.

Other constitutional provisions help complete the horizontal federalism framework. Five of the nine provisions in Article III addressing jurisdiction concern the interaction between states, emphasizing the framers' concern that courts should referee "bickering and animosities" between these co-equal sovereigns. The Federalist No. 80 (Hamilton) at 477. Hamilton specifically worried about this issue, warning that states exercising "distinctions, preferences, and exclusions . . . would beget discontent," causing "outrages," and then "reprisals and wars." Federalist No. 7 (Hamilton). Rather than addressing the externalities that activity legal in one state might cause in another, the Constitution sets this problem aside for judicial resolution—and the courts' solution has often been explicit federal control, to avoid the very kinds of problems in interstate relations that the Articles of Confederation failed adequately to address. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1368–98 (2006) (discussing federalization of areas traditionally under state control).

At bottom, equality among the states is a due process concern. "[D]ue process primarily protects individuals from being unfairly subject to another state's laws." Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1137–38 (2010). Scholarship regarding extraterritoriality has long noted that horizontal federalism "protect[s] persons against the unfair application of a law" outside proper borders while also "furthering other interstate

. . . values[.]" Willis L.M. Reese, *Legislative Jurisdiction*, 78 Columbia L. Rev. 1587, 1589 (1978).

This Court recognized that due process connection—and the idea that protecting it would be the job of the federal courts—four years after the Constitution's adoption. In *Chisholm v. Georgia*, 2 U.S. 419 (1793) (holding abrogated by 11th Amendment), in an opinion by Justice James Wilson, the Court explained that the Constitution's goal of domestic tranquility "is most likely to be disturbed by controversies between states," a consequence the Constitution seeks to avoid "by the establishment and by the exercise of a superintending judicial authority." *Id.* at 465.

Together, these provisions provide the framework of horizontal federalism. The Constitution preserves each state's authority to regulate activity occurring within its bounds while restraining that power beyond a state's borders. How that framework constrains state tort law in cases involving interstate and international emissions is the subject of Part II.

II. FOUR ASPECTS OF HORIZONTAL FEDERALISM ARE RELEVANT TO THIS CASE

Because horizontal federalism is a structural doctrine inferable from the Constitution, rather than delineated in an explicit clause, how may lower courts "weave wisps of structure into judicially enforceable standards"? Erbsen, 93 Minn. L. Rev. at 582. A robust body of the Court's case law has given shape to aspects of horizontal federalism, in a variety of contexts. All of it has in common the presupposition that state power is limited by the equal sovereignty of other states and by a common interest in preventing interstate friction—the "reprisals and wars" of Hamilton's warning.

A. Overreaching

With narrow exceptions, states cannot tax or regulate beyond their borders, or punish conduct that was lawful where it occurred.

1. Personal jurisdiction

Courts have long recognized the limits this principle imposes in the law of personal jurisdiction.

In the post-Civil War period, this Court found in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), that "no State can exercise direct jurisdiction and authority over persons or property without its territory." Because "the several States are of equal dignity and authority," one state extending its reach to conduct beyond its borders is "an encroachment upon the independence" of the state where the affected persons or property are actually located. *Id*. at 722–23.

The Court eventually softened *Pennoyer*'s requirement that state jurisdiction screeches to a stop at its borders. It allowed jurisdiction where contacts existed with the forum state, but affirmed that such jurisdiction must not transgress "traditional notions of fair play and substantial justice." *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted). The federal system does not permit states to hale every outsider with whom they have contact into court:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of

> interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen, 444 U.S. at 294.

The strictures of personal jurisdiction are "a consequence of territorial limitations on the power of the respective States" that safeguard individual fairness and interstate sovereignty. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Every state's judicial power ends where another's authority begins, and no state can punish or regulate conduct lawful in another state if that conduct lacks a meaningful connection to the forum. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930) (holding that Texas law "may not validly affect contracts which are neither made nor are to be performed in Texas"); *World-Wide Volkswagen*, 444 U.S. at 292 (explaining that the personal-jurisdiction requirement of minimum contacts "acts to ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."); *id.* at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

This Court's jurisprudence thus highlights an important doctrinal facet: a state may regulate activity beyond its physical borders *only if* that activity has a meaningful, substantial nexus with it.

2. Due process

But the relevant principle is about more than personal jurisdiction and the requirement of minimum contacts. Due process constrains states from taxing or

regulating in a way that "infring[es] on the policy choices of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); *see also Frick v. Pennsylvania*, 268 U.S. 473, 477–79 (1925) (holding that the Due Process Clause bars Pennsylvania from imposing transfer tax on art in New York owned by Pennsylvania decedent); *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909) (reversing criminal conviction in Oregon of Washington resident who fished in Washington using gear lawful in Washington).

A state may not "impose sanctions . . . in order to deter conduct that is lawful in other jurisdictions." *BMW*, 517 U.S. at 573. This extraterritorial limitation applies regardless of whether a state acts through statute, regulation, or a damages award entered under a common-law tort. "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." *Id.* at 572 n.17; *id.* at 572 ("[I]t follows from principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

Because this limitation sounds in due process, the fact that Boulder County is trying to regulate conduct via an *ex post facto* lawsuit—not even an ordinance or regulation—makes its action even more damning and worthy of more stringent review by this Court. Such a lawsuit regulates out-of-state conduct by punishing parties retroactively and without notice for conduct that was permissible at the time both where it occurred *and in Colorado*—meaning that the parties could not have reasonably foreseen this liability or adjusted their conduct. Boulder's action violates a fundamental limitation on state power protecting an

individual's right to rely on the law governing his conduct at the time and place that he acts. *See BMW*, 517 U.S. at 572 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978))). Allowing a state to penalize such conduct *ex post facto* ignores the coequal sovereignty of the state where the conduct took place, in violation of due process.

This constitutional problem does not disappear merely because Boulder seeks compensatory damages rather than an injunction. "Regulation can be as effectively exerted through an award of damages as through some form of preventive relief," while "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *accord Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quoting that passage of *Garmon*). Damages and injunctions are functional equivalents in their effect on regulating and altering out-of-state conduct. A state cannot avoid territorial strictures merely by labeling the cause of action "tort" and the remedy "damages."

Boulder County's claims squarely implicate the overreaching prohibition. The conduct on which Boulder seeks damages—the production, refining, sale, and promotion of fossil fuels over decades—occurred overwhelmingly outside Colorado, in other states and in foreign nations whose laws permit—and in many cases affirmatively encourage—that conduct. A Colorado-law damages judgment would impose substantial economic consequences on lawful out-of-state conduct with the practical effect of changing that conduct.

The structural-federalism objection here is not a technicality of preemption doctrine but the very constitutional premise on which *Pennoyer*, *BMW*, *Garmon*, and *Kurns* all rest.

B. Exclusions

Despite the general prohibition against overreach, as a practical matter, a large state's in-state bans on certain activity may lead to *de facto* nationwide rules, especially in the commercial realm. But even these rules are limited: states may not leverage their restrictive regulations to prevent more permissive policymaking elsewhere.

The dormant Commerce Clause prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Ross*, 598 U.S. at 369 (cleaned up). Protectionist state action amounts to "discrimination against interstate commerce" in this telling. *Northwest Airlines Inc. v. County of Kent*, 510 U.S. 355, 373 n.18 (1994). But while states may not "build up" commerce by burdening industry and "business of other states," so long as its goals are not protectionism, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" its own citizenry. *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

In *Ross*, petitioners argued that the dormant Commerce Clause operates as a near-blanket prohibition of "state laws that have the practical effect of controlling commerce outside the State," even unintentionally. 598 U.S. at 371 (quotation omitted). The Court disagreed, noting that its prior decisions prohibited only state statutes that "prevented out-of-state firms from

undertaking competitive pricing or deprived businesses and consumers in other States of whatever competitive advantages they may possess." *Id.* at 374 (cleaned up). Inferring more would "invite endless litigation and inconsistent results" when any state made a law that influenced commerce outside its borders. *Id.* at 375. The Court noted that antidiscrimination under the dormant Commerce Clause "may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers," but it does not allow the Court to strike down *all* extraterritorial exercises of state power. *Id.* at 376.

The *Ross* petitioners advanced another argument, premised on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which held that state statutes regulating to "effectuate a local public interest" with incidental interstate commerce effects will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Court fractured over how to handle this claim. The plurality held that the petitioners' claim that California's pork regulations flunk *Pike* failed because courts cannot weigh a law's economic and non-economic effects, and that such policy choices "belong to the people and their elected representatives." *Ross*, 598 U.S. at 382. Congress may thus step in if a state law disrupts an industry given "its power to adopt federal legislation that may preempt conflicting state laws." *Id.* at 382–83.

But Chief Justice Roberts would have vacated and remanded. *Id.* at 395. He noted that most of the Court agreed that "it is possible to balance benefits and burdens," even of various kinds, under *Pike*. *Id.* at 397. Accordingly, Chief Justice Roberts—joined by three others—found that the Court's precedents distinguish

"the costs of complying with a given state regulation from other economic harms to the interstate market." *Id*. Certain regulations may not impose a cost immediately, or that cost may be "difficult to quantify," but it is not "noneconomic" cost. *Id*. at 399. The chief justice distinguished his approach from a *per se* prohibition on extraterritorial state action by finding that regulations imposing "broad impact requiring . . . compliance even by producers who do not wish to sell in the regulated market" may fail under *Pike*. *Id*. at 402.

It cannot be that the Constitution, without exceptions, prohibits a state from regulating activity *wholly within its bounds* in a way that affects commerce beyond them. But when one state makes a law that burdens commercial activity that occurs *in another state*, such laws are suspect under horizontal federalism.

C. Favoritism

States also "have an incentive to favor local interests," but if they do so in a way that burdens the Privileges and Immunities or Full Faith and Credit Clauses, federal courts must step in to referee the conflict. *See* Erbsen, 93 Minn. L. Rev. at 521.

Where a state has jurisdiction to rule on a case's merits, the judgment of its courts is entitled to full faith and credit. *See Underwriters Nat. Assur. Co. v. N.C. Life & Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 705–06 (1982). Writing for the Court, Justice Blackmun emphasized that "the concept of full faith and credit is central to our system of jurisprudence[,]" as we are "a union of states," each with its own courts that sit in judgment over cases and controversies properly before them. *Id.* at 703–04. If two states could exercise jurisdiction over the same activity,

"uncertainty, confusion, and delay" would ensue. *Id.* at 704. The final merits judgments of state courts thus have effect "in every other court of the United States, which it had in the State where it was pronounced." *Id.* (quoting *Hampton v. McConnell*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)).

Yet, as noted above, these judgments only have authority "if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Durfee v. Duke*, 375 U.S. 106, 110 (1963). Although the united nature of America's several states implies full faith and credit, "the structure of our Nation as a union of States, each possessing equal sovereign powers," limits the faith and credit any state must provide to another. *Underwriters*, 455 U.S. at 704.

This Court has also emphasized the importance of the "equal sovereign powers" of states in other cases. As evinced by the Northwest Ordinance, *see supra* at I.A, Congress established early in the Nation's history that new states joined the Union on equal footing with existing ones. "Equality of constitutional right and power is the condition of all the states of the Union, old and new." *Id.* at 575.

The Court recognized the federal system's mediating role again in *Franchise Tax Bd. of Cal. v. Hyatt*. There, a citizen of Nevada sued a California state agency for alleged torts committed in the course of a tax investigation. 587 U.S. at 234. The Court held that Nevada lacked jurisdiction, as a state could not "be sued by a private party without its consent in the courts of a different State." *Id.* at 233. The Constitution both "assumes that the States retain their sovereign immunity except as otherwise provided" and "fundamentally adjusts the States' relationship with each

other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at 237.

The Court has recognized an outer limit to the federal policing responsibility regarding favoritism, however. When addressing the Voting Rights Act's reliance on out-of-date data for its preclearance coverage formula, Chief Justice Roberts grounded his reasoning that the law as applied was unconstitutional in the "fundamental principle of equal sovereignty" of the states. *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (citation omitted). Because the VRA held some states to be "more equal than others," requiring nine less-equal states to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own," its preclearance regime violated the Constitution. *Id.* Even though the VRA was adopted when these states were "geographic areas where immediate action seemed necessary" to correct race-based voting discrimination, it was meant to expire after five years. *Id.* at 546 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)). Instead it was reauthorized and extended even after voter turnout equalized, removing any need for its "unprecedented authority" over an area reserved to the states under the Tenth Amendment. *Id.* at 546. As umpire over the situation, the Court held that this VRA provision, as it then stood, impermissibly favored some states over others.

The Court will not, therefore, sanction federal intervention that violates the equal power of states to govern their own affairs if there is no constitutional need to do so—no violation of privileges or immunities, full faith and credit, or due process. Anything else would represent an "extraordinary departure" from

federalism. *Id.* at 557 (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500–01 (1992)).

That equal-sovereignty principle is both older and broader than the modern voting-rights cases. It is the same principle the Court has applied to questions of admission and statehood: "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle*, 221 U.S. at 580. Each state enters and remains in the Union "on an equal footing with the original States in all respects whatsoever." *Id.* at 567.

Shelby County recognized the equal-sovereignty principle in the vertical dimension—as a limit on unjustified federal differential treatment of the states. 570 U.S. at 544. But the same structural premise operates horizontally—as a constraint on what one state may impose on another. *Kansas v. Colorado* stated the horizontal rule directly:

> One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

206 U.S. 46, 97 (1907). *Shelby County* and *Kansas* thus reflect the same constitutional commitment, and both illuminate why Colorado may not project its law into the territory of coequal sovereigns.

D. Externalities

Finally, when states with different regimes of law have an equal right of action regarding use of a common resource, the proper solution is a federal one. In the aforementioned *Kansas v. Colorado*, Kansas filed

an original action to enjoin Colorado's diversion of water from the Arkansas River, arguing that Colorado's upstream irrigation was harming Kansans. 206 U.S. 46, 47–48 (1907). Although the Court noted from the outset that the suit "involves no question of boundary or of the limits of territorial jurisdiction[,]" *id.* at 80, it held that the Supreme Court was still the proper forum for such a question, as the Court "must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation." *Id.* at 83. In settling the matter, the Court held that no state may "legislate for, or impose its own policy upon the other" in a matter of interstate concern. *Id.* at 95. Kansas followed the common-law riparian doctrine while Colorado embraced the doctrine of public ownership. Neither state could impose its controlling regime on the other unilaterally. *Id.* It fell to this Court to settle the dispute "in such a way as will recognize the equal rights of both, and at the same time establish justice between them." *Id.* at 98.

That structural premise—that disputes over transboundary environmental harms are governed by federal law—runs through this Court's interstate-pollution jurisprudence. "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). When Congress comprehensively legislates in an area in which federal common law has operated, federal common law is displaced. *City of Milwaukee v. Illinois*, 451 U.S. 304, 316–17 (1981). And once federal common law is displaced, "the availability vel non of a state lawsuit depends, inter alia, on the preemptive effect of" the displacing federal statute. *AEP*, 564 U.S. at

429. *AEP* applied that framework to greenhouse-gas emissions specifically, holding that the Clean Air Act displaces federal common-law abatement claims for carbon-dioxide emissions. *Id.* at 424. The Ninth Circuit then applied *AEP*'s displacement rule to damages claims. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856–58 (9th Cir. 2012).

Ouellette completes the chain. There, the Court held that the Clean Water Act's savings clauses did not authorize affected-state tort suits seeking to apply the affected state's own law to out-of-state sources. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987). Otherwise, a regulated source could be subjected to "a variety of common-law rules established by the different States," making it "virtually impossible to predict the standard for a lawful discharge." *Id.* at 496–97. The Clean Air Act's savings clauses, 42 U.S.C. §§ 7416 and 7604(e), are materially parallel to the Clean Water Act savings clauses at issue in *Ouellette*. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 99–100 (2d Cir. 2021). Like those provisions, they preserve state authority within the Act's cooperative federal framework and do not authorize affected states or localities to impose their own tort law on out-of-state sources for interstate and international emissions. *See Mayor & City Council of Baltimore v. B.P. P.L.C.*, 2026 WL 809501, at *24–25 (Md. Mar. 24, 2026).

The Second Circuit applied that framework to climate-change tort claims in *City of New York*. There, the city sought damages for climate-related harms allegedly caused by the defendants' global production, promotion, and sale of fossil fuels. The court rejected the idea that damages claims avoid federal-law limits merely because they do not expressly seek emissions

standards or injunctive relief. Such a lawsuit, the court explained, "would regulate cross-border emissions in an indirect and roundabout manner, [but] it would regulate them nonetheless." 993 F.3d at 93. And because the Clean Air Act did not affirmatively authorize that form of affected-state regulation, the state-law claims could not proceed. *Id.* at 99. Maryland has now adopted the same logic. *Baltimore*, 2026 WL 809501, at *18–25.

The doctrinal line from *Kansas* to *Milwaukee I*, *Milwaukee II*, *AEP*, *Ouellette*, *Kivalina*, *City of New York,* and *Baltimore* points in one direction: affected-state climate-tort claims seeking relief for global emissions are precluded by federal law.

* * *

In sum, horizontal federalism is the doctrine that State A generally may not directly regulate activity that occurs in State B, unless that activity has a substantial connection with State A. Even in such an instance, the Constitution requires State A to give full faith and credit to State B's decisions about the activity, and to regulate in a manner that does not prevent State B from regulating the activity as *it* sees fit. A federal solution may be required to settle secondary effects of differing state policies. To "fuse into one Nation" coequal states, *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), capacity-and-constraint analysis should guide the result when state priorities clash.

Horizontal federalism thus acts as a structural "instrument of interstate federalism" that cabins a state's ability to reach across borders. *World-Wide Volkswagen*, 444 U.S. at 294. As the Court has repeatedly held, a state lacks the constitutional power to punish a defendant for conduct that was "lawful where it

occurred." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (citing *BMW*, 517 U.S. at 572, and *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975)). Boulder's claims seek to impose liability on out-of-state actors for activities that were (and are) expressly permitted by their home sovereigns and the federal government—and in Colorado when the conduct at issue occurred. These claims violate the basic principle that no state may "impose its own policy choice on neighboring States" as well as the due-process reliance interests of the citizens of those States and should be dismissed with prejudice. *BMW*, 517 U.S. at 571.

III. THE COLORADO SUPREME COURT IGNORED HORIZONTAL FEDERALISM

The court below ignored horizontal federalism principles. Boulder County, a political subdivision of Colorado, *see* Colo. Const. art. XIV §1, sued out-of-state oil companies—affiliates of Suncor Energy, headquartered in Canada, and ExxonMobil Corporation, headquartered in Texas—for alleged violations of state tort law based on the companies' production and promotion of fossil fuels throughout the world. Boulder County alleged that these companies' activities led to the emission of greenhouse gases that contributed to climate change that caused harms within Colorado—increased wildfires, floods, heat, and the like—based on attribution modeling.[2]

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[2] Ironically, when Rep. Harriet Hageman (R-Wyo.) challenged Boulder to abandon its use of fossil-fuel energy sources given its professed fear of their alleged effects, city leaders cursorily rejected the suggestion because of the city's admitted reliance on them. *See* Angus Thuermer, "Hageman Proposes a Boulder, Colorado, Fossil-Fuel-Free Experiment," Cap City News, Aug. 8, 2024, https://tinyurl.com/nd95cu6b.

The court below found that these state-law claims could proceed and were not preempted by the Clean Air Act because of a savings clause in the federal statute. It stated that federal common-law claims for pollution abatement only applied to "suits brought by one State to *abate* pollution emanating from another state," *Cnty. Comm'rs of Boulder County v. Suncor Energy USA, Inc.*, 586 P.3d 161, 171 (Colo. 2025) (paraphrasing *AEP*, 564 U.S. at 419) (emphasis in original), and that Boulder's claims were different because they sought damages from upstream producers rather than abatement from emitters. That analysis treats the displacement of federal common law as though it revives affected-state law.

The Court addressed a similar fact pattern in the Clean Water Act context in *Ouellette*, a case replete with horizontal federalism principles. Recognizing an externality problem, the Court held that "it is not necessary for a federal statute to provide explicitly that particular state laws are pre-empted." 479 U.S. at 491. Put another way, a savings clause does not mean that federal law fails to preempt state regulation. *See id.* at 493. States may not impose their own regulations against out-of-state water pollution sources. *See id.* at 495. Subjecting a company to potentially 50 different state nuisance standards for a single course of conduct would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id.* at 497 (quoting *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)).

The majority below distinguished *Ouellette* on the ground that Boulder County was not trying to regulate emissions but seeking compensation for local harms. In its telling, the Court in *Ouellette* was just

performing "the very type of preemption analysis that we have conducted above" to determine whether a suit under state law could proceed. *Boulder County*, 586 P.3d at 172. But there is no meaningful difference, in this instance, between direct regulation via state law and indirect regulation via state tort. Requiring damages is "a potent method of governing conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quotation omitted). In fact, in *Ouellette* this Court recognized that it ought not "draw a line" between different types of relief when evaluating preemption, because then a state might try to control out-of-state activity via another form of punishment. 479 U.S. at 498 n.19. Again, per this Court's horizontal federalism jurisprudence, externalities suggest a potential opportunity for federal preemption.

Respondents' attempt to reframe this litigation as a "deception" or "failure-to-warn" case is a transparent effort to plead around horizontal federalism. This Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), makes clear that a state may not, "under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 824–25. Because the production, sale, and promotion of fossil fuels are lawful activities in the jurisdictions where Petitioners operate, Colorado cannot use its consumer-protection or tort laws to effectively "veto" out-of-state speech concerning those activities. If a state cannot directly regulate out-of-state emissions or the interstate commerce of energy, it cannot do so indirectly by penalizing the promotion of that commerce in other states. Allowing such a theory would enable any locality to bypass the displacement of federal common law

simply by alleging that out-of-state producers misled consumers about their products.

A recent Maryland Supreme Court decision confirms the point. Addressing substantially similar claims by local Maryland governments—public and private nuisance, trespass, and failure-to-warn theories pleaded as deception-driven harm to local property—the court affirmed dismissal of the claims. The majority agreed that the claims are displaced by federal common law, that any federal common law is in turn displaced by the Clean Air Act under *AEP*, and that the Clean Air Act's savings clauses do not authorize affected-locality suits against out-of-state sources for global emissions under the *Ouellette* framework. *Baltimore*, 2026 WL 809501, at *18–25. The Maryland court expressly disagreed with its Colorado counterpart; it aligned instead with the dissent below and the Second Circuit's decision in *City of New York*. *Id.* at *20 n.18; *see also id.* at *1 (determining that "the local governments, through their various state law claims, are seeking to regulate air emissions beyond their jurisdictional boundaries"). It also rejected the precise argument on which the Colorado court relied: "No amount of creative pleading can masquerade the fact that the local governments are attempting to utilize state law to regulate global conduct that is purportedly causing global harm." *Id.* at *20.

But the problem with the judgment below is broader than statutory preemption alone.[3] To allow

[3] As mentioned above, the EPA recently rescinded the 2009 endangerment finding for greenhouse gases under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), and repealed the implementing motor-vehicle greenhouse-gas standards. *Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle*

the long-arm application of state torts in a manner that effectively prohibits not only legal activity occurring in other American states, but legal activity *throughout the world*, violates horizontal federalism's chief tenet regarding overreaching: One state may not, via its own law, penalize conduct that is legal in another state and occurs within that state's boundaries.

If Colorado's tort law were used to judge conduct that other states permit, regulate, or encourage, Colorado could override the policy judgments of those jurisdictions. That is the horizontal-federalism problem *amici* have identified throughout this brief: the export of one state's standards in a manner that governs conduct beyond its borders. That is the kind of interstate tyranny horizontal federalism exists to prevent. The court below failed to account for that structural injury, and its failure to do so is a form of willful blindness to the constitutional consequences of its rule.

Every state may redress action that occurs within or has sufficient contacts with its territory. *See, e.g., Underwriters*, 455 U.S. at 705–06. But a state may not apply its own law to settle an injury caused by action in another state. *See Kansas*, 206 U.S. at 95. Such controversies fall to the federal courts—and federal law—to settle. *See Ouellette*, 479 U.S. at 495. And a state (or

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Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026). Whatever the ultimate fate of that rulemaking—petitions challenging it have been filed in the D.C. Circuit—the analysis above does not depend on it. The horizontal-federalism objection to one state's applying its tort law to interstate and international emissions does not turn on the precise scope of federal regulation at any given moment, but on the constitutional principle that regulation of activity occurring across multiple states and abroad must proceed through the federal framework Congress enacted, not through state tort verdicts.

locality) certainly may not apply its law in a manner that conflicts with another state's sovereignty. *Ross*, 598 U.S. at 388.

If this case is allowed to proceed, Boulder County residents will be able to affect national policymaking, but nobody outside the county will have any role in electing the officials pushing here to drive national energy policy through tort suits at the local courthouse. In cases like these, horizontal federalism's delicate balance can only be preserved by a federal umpire.

CONCLUSION

The judgment below should be reversed because horizontal federalism bars the application of one state's tort law to restrict activity in another.

Respectfully submitted,

Marcella Burke
Paul B. Simon
Connor Mighell
BURKE LAW GROUP PLLC
1000 Main Street,
Suite 2300
Houston, TX 77002
(832) 987-2214
marcella@burkegroup.law

Ilya Shapiro
Counsel of Record
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

David B. Kopel
INDEPENDENCE INSTITUTE
727 East 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

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