COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED October 9, 2024 9:01 PM FILING ID: 818D60D594C1E CASE NUMBER: 2024SA206
Original Proceeding, District Court, Boulder County, 2018CV30349	
In Re: **Plaintiffs/Respondents:** COUNTY COMMISSIONERS OF BOULDER COUNTY AND CITY OF BOULDER, **v.** **Defendants/Petitioners:** SUNCOR ENERGY USA, INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY INC; AND EXXON MOBIL CORPORATION.	Supreme Court Case No: 2024SA206
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ANSWER BRIEF FOR PLAINTIFFS/RESPONDENTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(g) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this brief complies with the word limit in C.A.R. 28(g)(1) because it contains 9,469 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28(g) and C.A.R. 32.

/s/ Kevin S. Hannon
Kevin S. Hannon

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I. INTRODUCTION

Plaintiffs Boulder County and the City of Boulder sued Defendant fossil fuel companies for tortious acts that harmed their Colorado property and imperil their residents' safety. Plaintiffs allege that Defendants altered the climate by selling fossil fuels at levels they knew would bring numerous and catastrophic injuries to Colorado, and by misleading the public about the consequences of unfettered fossil fuel use to maintain demand for their products. Plaintiffs seek damages under Colorado tort law, which has traditionally governed the assignment of liability and awards of compensation, to remedy in-state injuries.

Defendants moved to dismiss – raising a bevy of federal defenses and questions of Colorado law – and the District Court carefully considered and rightly rejected each argument. Defendants now ask this Court to reverse. They do not argue that Plaintiffs' allegations are implausible, that they fail to meet the elements of Colorado tort law, nor that any act of Congress preempts these claims. Instead, they press the radical argument that unenacted federal common law broadly

preempts state law in any case that touches on interstate or international pollution in any way – even though they concede that Congress displaced that federal common law by enacting the Clean Air Act (CAA). As the District Court correctly held, Defendants' argument runs headlong into two lines of contrary U.S. Supreme Court precedent.

First, there is "no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). While narrow enclaves of federal common law survived *Erie*, the U.S. Supreme Court has *only* extended the federal common law of interstate pollution that Defendants invoke to cases where a sovereign State sought to enjoin an out-of-state polluter. But Plaintiffs are not suing Defendants to regulate their emissions, they are not seeking to enjoin Defendants' out-of-state conduct, and no State is a party. As Defendant Exxon Mobil Corporation (Exxon) itself once argued to the Ninth Circuit, "private damages claims [do not] raise 'uniquely federal interests' *of the type that justify applying federal common law*." Ex. A (Answering Br. for Defendants-Appellees, *Native Village of Kivalina v. Exxon Mobil Corp.*,

No. 09-17490 (9th Cir. June 30, 2010)) at 57 n.23.

Second, even if the federal common law of interstate pollution would have once governed this case, Congress' enactment of the CAA has now "displace[d] any federal common-law." *Am. Elec. Power Co., Inc. v. Conn.* (*"AEP"*), 564 U.S. 410, 424 (2011). Displaced federal common law cannot preempt; here, the "availability" of state law now turns "on the preemptive effect of the [Clean Air] Act." *Id.* at 429.

Defendants do not challenge the District Court's conclusion that the CAA does not preempt Plaintiffs' claims, but instead try to escape the ordinary preemption analysis that *AEP* and other U.S. Supreme Court precedent demand. Preemption always requires evidence of Congressional *intent* to preempt, usually through an express command. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). But Defendants argue that Congress must expressly authorize (instead of expressly preempt) state causes of action. This "rule" – which flips the presumption against preemption on its head – is contrary to both *AEP* and *International Paper Co. v. Ouellette*, 479 U.S. 481, 489, 491, 497 (1987), which make clear that where Congress displaces federal common law by statute,

ordinary preemption applies.

Defendants essentially seek a "climate exception" to ordinary preemption rules based on the notion that climate change is just too big for state law. But "invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (Gorsuch, J., three-justice opinion) (cleaned up).

The Constitution does not preclude state law simply because torts cause harm in another State. "The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it." *Young v. Masci*, 289 U.S. 253, 258-59 (1933). Indeed, companies whose products cause harms throughout the United States are routinely subject to the laws of each State, including Colorado, without offending the Constitution.

Congress has not immunized Defendants' conduct, but they nonetheless ask this Court to grant them immunity by judicial fiat

under the guise of federal common law. Their attempt to expand federal common law and preemption would upend the proper balance between state and federal authority and between the courts and the political branches. This Court should reject Defendants' request for extraordinary relief under C.A.R. 21 and discharge the petition or uphold the District Court's well-reasoned decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

"Defendants mischaracterize Plaintiffs' claims," *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.* ("*Suncor Energy I*"), 405 F. Supp. 3d 947, 969-70 (D. Colo. 2019), and they cannot prevail by "arguing against a case [Plaintiffs] did not plead." App. 37.

Contrary to Defendants' contention, this case is not an attempt to control fossil fuel use, limit greenhouse gas (GHG) emissions, or otherwise establish climate policy. Rather, Plaintiffs only ask Defendants to "'help remediate the harm caused by their intentional, reckless, and negligent conduct, specifically by paying their share of the costs [Plaintiffs] have incurred and will incur because of [their] contribution to the alteration of the climate.'" App. 38-39 (cleaned up)

(quoting *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.* ("*Suncor Energy II*"), 25 F. 4th 1238, 1248 (10th Cir. 2022)). This relief is both reasonable and necessary.

A. Defendants sold fossil fuels at levels they knew would alter the climate and lied about the dangers of unchecked fossil fuel use.

Liability in this case is based on Colorado's law of trespass, private and public nuisance, unjust enrichment, and civil conspiracy.[1] And that liability is not strict, *i.e.*, Defendants are not liable merely for selling fossil fuels. Instead, Plaintiffs will show fault based on the following key allegations.

First, beginning in the 1960s, Defendants knew that burning fossil fuel releases carbon dioxide that stays in the atmosphere for decades, trapping heat and altering the climate, App. 161-63 ¶¶334-43; that unchecked fossil fuel use risked "globally catastrophic effects," App. 164-65 ¶350, including "a northward migration of the desert areas of the United States," App. 166-67 ¶¶357-58, and "less of a winter snow

[1] Plaintiffs also pled claims under Colorado's Consumer Protection Act, which were dismissed with leave to re-plead. App. 76-79.

pack in the . . . Rockies, necessitating a major increase in storage reservoirs," App. 166 ¶357 n.24; that there was "no leeway" time to delay shifting away from fossil fuels, App. 169 ¶367; that "mitigation of the greenhouse effect would require major reductions in fossil fuel combustion," *id*. ¶368, and that if such reductions were "delayed until climate changes . . . are discernible," they would come "too late to be effective." *Id*. ¶369.

Second, instead of publicly disclosing these risks, Defendants conspired with other industry players to convince "a majority of the American public" "that significant uncertainties exist in climate science" and thus ensure "there are no further initiatives to thwart the threat of climate change" and threaten Defendants' sales and profits. App. 181 ¶427. To accomplish this, Exxon ran national advertisements downplaying the risks of warming and exaggerating the "uncertainties," App. 179-180 ¶¶419, 421, and funded false science suggesting that there was "no convincing scientific evidence" that climate change would be a problem and that instead more carbon dioxide would be beneficial, App. 180, 182 ¶¶424, 432. These efforts worked, blunting the public's

understanding about the consequences of fossil fuel overuse and an altered climate. App. 183-84 ¶¶436-443.

Third, Defendants profited from the fossil fuel overuse that their deception ensured, selling increasingly massive quantities of fossil fuels that, when burned as intended, released billions of tons of GHGs. App. 172, 175-76 ¶¶380-83, 396-400. Most of these sales came well after Defendants knew the harm that would result from fossil fuel overuse. App. 171 ¶377.

B. Plaintiffs sued Defendants for the costs they face from Defendants' conduct, not to regulate emissions.

Plaintiffs filed this suit in 2018 to recover the myriad costs they incur from Defendants' tortious contributions to the alteration of the climate. Boulder County and the City of Boulder face increased extreme heat waves and droughts; reduced snowpack and water availability, including for irrigation; larger and more frequent wildfires; and increased rainfall intensity and flood damage due to fossil fuel-induced warming – all of which threaten Plaintiffs' and their residents' property, infrastructure, livelihoods and health, and all of which Plaintiffs must try to address at substantial cost. App. 138-158 ¶¶234-

317.

As courts in this case have recognized, Plaintiffs are not seeking to limit the production, sale or use of fossil fuels by anyone "in Colorado or elsewhere," *Suncor Energy II*, 25 F.4th at 1248; or otherwise to regulate Defendants' fossil fuels production. App. 207 ¶542.

Plaintiffs likewise do not ask any "[c]ourt to consider whether the government's decision to permit fossil fuel use and sale are appropriate." *Suncor Energy I*, 405 F. Supp. 3d at 966. Moreover, no "federal officer" told Defendants "how much fossil fuel to sell or to conceal or misrepresent the dangers of its use" nor "directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment." *Id.* at 976-77.

Similarly, this case is not about limiting or regulating either direct emissions or the *users* of fossil fuel. App. 207 ¶542. As the Tenth Circuit held, the suit does not "concern [ ] emissions standards or limitations, government orders regarding those standards or limitations, or federal air pollution permits"; indeed, it "is not brought against emitters" at all. *Suncor Energy II*, 25 F.4th at 1264.

Imposing liability on Defendants for the harm they have caused in Colorado would not prevent their continued production and sale of fossil fuels. Nor would it affect any government's ability to regulate GHGs, to permit fossil fuel activities, or to negotiate international accords; nor would it prevent consumers from putting gasoline in their cars or power plants from burning natural gas. The remedies Plaintiffs seek would simply mean that Defendants pay their fair share for the climate harms they caused in these Colorado communities.

C. After state court jurisdiction was settled, the District Court denied Defendants' motion to dismiss.

For five years, the parties litigated Defendants' effort to remove this case from the Colorado courts. That effort ended in 2023 when the U.S. Supreme Court denied review of the Tenth Circuit's remand. *Suncor Energy II*, 25 F. 4th at 1275, *cert. denied*, 143 S. Ct. 1795 (2023).

Defendants had moved to dismiss in 2019, with oral argument in 2020; multiple rounds of supplemental briefing followed, as well as a supplemental oral argument in February 2024. The District Court largely denied Defendants' motions on June 21, 2024, in the order Defendants now challenge.

III. ARGUMENT

Defendants' argument that federal common law precludes Plaintiffs' claims fails for two equally powerful reasons. First, even prior to the Clean Air Act, federal common law would not have applied to Plaintiffs' claims. Defendants attempt to change the now-dead federal common law of interstate pollution from a narrow cause of action that *protected* injured *States* to a broad preemption rule that eliminates traditional state authority. That flies in the face not only of the doctrine they invoke, but also of core federalism principles; preemption must come from Congress.

Second, the CAA eliminated all federal common law that could even arguably have applied to Plaintiffs' claims. As a result, the "availability" of state law now turns "on the preemptive effect of the federal Act." *AEP*, 564 U.S at 429. Because the CAA neither expressly nor impliedly preempts Plaintiffs' claim, and Defendants do not argue it does, their bid for judicial review should be rejected.[2]

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[2] The Petition here was limited to "[w]hether federal law precludes the application of state law" to Plaintiffs' claims. Pet. 9. The amici brief of the Mountain States Legal Foundation (MSLF) and Profs. Epstein and

A. Federal common law never would have governed this case.

There is no looming body of federal common law that governs the rights and duties of private actors. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R.R. Co.*, 304 U.S. at 78. Thus, to displace state law, "a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Va. Uranium*, 587 U.S. at 767 (Gorsuch, J., three-justice opinion). This is no less true when controversies cross state and national borders. *Young*, 289 U.S. at 258-59.

Federal common law only exists in exceedingly narrow enclaves, subject to strict doctrinal limits. Defendants claim that this case falls within one of those enclaves, invoking the federal common law of interstate pollution, even though it has long since been displaced by statute. Pet. 28-31. But the U.S. Supreme Court only ever applied that

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Yoo mostly argues, instead, that Plaintiffs' claims are not cognizable under Colorado law, despite citing no Colorado cases. Plaintiffs will not address arguments irrelevant to the question presented.

body of federal common law when "one State [sought] to abate pollution emanating from another State." *AEP*, 564 U.S. at 421. It never covered a case like this, which involves only a request for damages by non-sovereign parties for the harms caused by Defendants' deception and sales. App. 43.

This case does not implicate any of the concerns that justify the extraordinary exercise of federal power to wipe out state law without an act of Congress or clear constitutional command. State law only yields to a federal common-law rule where there is a significant conflict between the use of state law and "uniquely federal interests." *Rodriguez v. FDIC*, 589 U.S. 132, 135-36 (2020). The U.S. Supreme Court has never recognized such a conflict or seen need for federal common law simply because torts cause harm in another State, where damages are sought from a private defendant for private acts.[3]

Finally, Defendants' argument for new federal common law based on federal interests in setting national energy policy and foreign affairs

[3] Moreover, Defendants' in-state conduct contributed to Plaintiffs' harms. App. 110-111 ¶¶107-110; App. 113-14 ¶122; App. 200 ¶513; App. 203-04 ¶¶523-26.

also fails. Defendants fail to explain how their liability would interfere with any actual federal law or policy. In reality, Defendants are asking this Court to *make* federal policy by picking winners (Defendants) and losers (those harmed by Defendants). But federal policymaking is Congress' job and it has not enacted the policy Defendants urge.

1. As recognized by the U.S. Supreme Court, the federal common law of interstate pollution never applied to these claims.

The accepted federal common law of interstate pollution – even if it remains relevant after displacement by statute – never covered claims such as these. And no court has ever applied federal common law to international transboundary pollution.

In every case where the U.S. Supreme Court recognized federal common law, a State (suing in its sovereign capacity) sought to enjoin an out-of-state polluter. *AEP*, 564 U.S. at 421; *see Milwaukee v. Illinois ("Milwaukee I")*, 406 U.S. 91 (1972) (suit by Illinois to enjoin pollution of Lake Michigan emanating from Wisconsin).[4] Prior to enactment of the

[4] *See also Missouri v. Illinois*, 180 U.S. 208, 241-243 (1901) (suit to enjoin Chicago from polluting shared waters); *New Jersey v. City of New York*, 283 U.S. 473, 477 (1931) (suit to enjoin City of New York from

CAA and Clean Water Act (CWA), the Supreme Court recognized that federal common law was needed because *only one* sovereign could "have independent and plenary regulatory authority over a single discharge." *Illinois v. City of Milwaukee* (*"Milwaukee III"*), 731 F.2d 403, 414 (7th Cir. 1984).

The prior federal common law would not have governed this case. Plaintiffs are not sovereign States, do not sue an emitter and do not seek an injunction; and this federal common law was never applied to disputes between "private citizens" or "political subdivisions [ ] of a State," *AEP*, 564 U.S. at 421-22, or to cases where those plaintiffs were "seeking damages." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981). As the First Circuit held in a case similar to this one, this federal common law "[did] not address the type of acts [Plaintiffs] seek judicial redress for." *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44, 55-56 (1st Cir. 2022).

Although Defendants argue that this case involves international

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dumping garbage offshore); *Georgia v. Tennessee Copper Co.*, 240 U.S. 650 (1916) (suit to curtail air pollution discharged from Tennessee).

transboundary pollution as well, the federal common law of pollution has never been recognized in the transnational context. Indeed, in the *Kivalina* case, which sought "to impose liability for [Exxon's] *worldwide* emissions," Exxon argued that the case did not implicate "our relations with foreign nations," and thus did not justify application of federal common law. Ex. A at 31, 57. Likewise, Defendants' lead case – *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) – expressly *declined* to extend federal common-law claims to international transboundary pollution. Although the Second Circuit's initial discussion suggested that a "'federal rule of decision is necessary'" because the case implicated "'our relations with foreign nations,'" *id.* at 90, 92 (quoting *Tex. Indus., Inc., v. Radcliff Materials*, *Inc.*, 451 U.S. 630, 640-41 (1981)), the court ultimately did not recognize any federal common-law claim, *id.* at 101-03. Thus, there is no federal common law of international pollution that could preempt state law.

In sum, as the District Court properly found, this "is not a suit brought by a state to abate pollution emanating from another state." App. 43. "Therefore, the former federal common law pertaining to

transboundary pollution, even if it still existed, would not preempt the Local Governments' claims here." *Id.*

2. The federal common law of interstate pollution should not be extended to private claims for damages, which falls within traditional state authority.

If preemptive federal common law is to be extended beyond the bounds that the U.S. Supreme Court has recognized, that task should be undertaken by that court. *See Boulder Valley School Dist. R-2 v. Price*, 805 P.2d 1085, 1089 n.5 (Colo. 1991) (federal common law is "developed by the federal courts untrammeled by the state court decisions"). Regardless, there is no basis to do so here. The principles necessitating application of federal common law in cases such as *Milwaukee I* are absent. Instead, these claims fall under Colorado's traditional authority to award damages for private misconduct, including for out-of-state acts that cause harm in Colorado.

a. Traditional state authority covers the claims at issue here.

"[E]nsuring the availability of compensation for injured plaintiffs is predominately a matter of state concern and, in the absence of congressional enactments, state law . . . must apply." *Jackson v. Johns-*

Manville Sales Corp., 750 F.2d 1314, 1325 (5th Cir. 1985); *accord Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 248 (1984).

Defendants argue that there was no traditional state authority to regulate GHG emissions, Pet. 13, but this case is not about regulating emissions. *Supra* Part II(B). And traditional state "police powers" do include "combatting the adverse effects of climate change on their residents." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

The notion that tort damages impermissibly regulate Defendants' conduct outside Colorado, Pet. 33-35, would upend interstate tort law and traditional state authority. *City of New York* suggested that "a substantial damages award" in a similar case "would effectively regulate [Defendants'] behavior far beyond" the State's borders, 993 F.3d at 92, but the U.S. Supreme Court more recently rejected the assertion that state laws with the practical effect of controlling extraterritorial behavior are problematic. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 374-76 (2023). Numerous state laws have extraterritorial effects, but have been "long understood to represent

valid exercises of the States' constitutionally reserved powers." *Id.* at 375. Among these are state laws addressing traditional issues such as "detrimental effects within" state borders and "tort laws." *Id.* at 376 (cleaned up).

State tort law can extend to tortious activity that occurred outside the State. *Young*, 289 U.S. at 258-59. Cases involving national marketing, global distribution, and nationally dispersed harm are ubiquitous.[5] Indeed, Colorado courts regularly apply Colorado common law to such suits, and Colorado law is fully capable of handling liability for in-state harms for conduct that originates outside Colorado.[6] The

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[5] *E.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985); *MTBE*, 725 F.3d 65 (2d Cir. 2013); *City of N.Y. v. Bob Moates' Sports Shop, Inc.*, 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017).

[6] *E.g.*, *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 196 (Colo. 1984) (harm from nationally-sold Dalkon Shield contraceptive device); *Coale v. Dow Chem. Co.*, 701 P.2d 885, 887 (Colo. App. 1985) (harm to cattle by Dursban chemical). *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1241-42 (Colo. 1987) (damages from defectively designed motorcycle); *Roberts v. May*, 41 Colo. App. 82, 84 (1978) (injuries suffered by passenger in Datsun vehicle); *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 985 (Colo. 1975) (economic losses from GM motorhome); *Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1170 (Colo. 1993) (injury from exposure to manufacturer's asbestos); *Ortho Pharm. Corp. v. Heath,* 722 P.2d 410,

Constitution may limit States from applying their law where they have "an insignificant contact with the parties and the occurrence or transaction," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981), but that is not the case here.

Since *Young* and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the U.S. Supreme Court has repeatedly recognized that States have a manifest interest in "providing their residents with a convenient forum for redressing injuries inflicted by out-of-state actors as well as enforcing their own [laws]" where out-of-state acts cause in-state harm. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 592 U.S. 351, 368 (2021).

b. Federal common law applied to some interstate pollution cases because they implicated competing sovereign rights.

"[F]ederal common law plays a necessarily modest role under a constitution that vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States."

411 (Colo. 1986)*, overruled by Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (personal injuries from oral contraceptives).

Rodriguez, 589 U.S. at 136. Federal common law therefore exists "only in such narrow areas as those concerned with the rights and obligations of the United States, [and] interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus.*, 451 U.S. at 641. The federal common law of interstate pollution developed not merely because such cases crossed borders, but because they implicated the sovereign rights of States.

Interstate disputes require federal common law only when they would have been cause for war (among full sovereigns), or if submitting to another State's law would result in a serious derogation of one State's rights. Federal common law is needed there because "[t]he Constitution [ ] reflects implicit alterations to the States' relationships with each other" and denies them the "raw power" to impose their will on neighboring States. *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 246-47 (2019). In other words, federal common law mediates otherwise intractable conflicts between the States that threaten the peace the Constitution promised. The quintessential examples are border disputes, *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838), and the

apportionment of interstate waters, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

As noted above, in pollution cases, federal common law was needed *only* where a State sought to enjoin out-of-state emissions. Affected States could not impose their own pollution-control law on out-of-state sources, as "the States by their union made the forcible abatement of outside nuisances impossible to each;" nor could affected States be forced to accept damages (like a private party), *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), or "be compelled to resort to the tribunals of other States for redress," *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971). Federal law was thus obliged to provide "protection" to States injured by out-of-state pollution as "a consequence of each State's entry into the Union and its commitment to the Constitution." *Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 335 (1981). This was done by *providing* the affected State with a federal common law *cause of action* for extraterritorial injunctive relief, not by preempting affected state law that was otherwise competent to redress the controversy as Defendants ask here.

Tellingly, Exxon told the Ninth Circuit as much when the Native Village of Kivalina sued Exxon seeking damages for land lost to climate-driven sea-level rise under the federal common law of nuisance. *Native Village of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012). There, Exxon recognized that it was "quite wrong" to overread Supreme Court precedent and extend federal common law to all interstate pollution disputes or cases "dealing with air and water in their ambient or interstate aspects;" instead, it was only needed where a sovereign State – "the *sine qua non* of access to the federal common law of public nuisance" – sought to shut down an out-of-state polluter. *Compare* Ex. A at 59-61 *with* Pet. 27. Indeed, addressing the same cases both Parties cite here, Exxon rightly recognized that even if "global climate change is predominantly a matter of federal concern," that "has nothing to do with whether private damages claims raise uniquely federal interests of the type that justify applying federal common law." *Id.* at 57 n.23.

Federal common law was never a shield for private parties; rather, it was a cause of action for *injunctive* relief, a sword for a

sovereign plaintiff to remedy a problem it could not effectively address under its own law. That is nothing like this case.

c. This case does not implicate the concerns that gave rise to the federal common law of interstate pollution.

The States' rights concerns that birthed the federal common law of interstate pollution are absent here. This case involves different types of parties, different conduct, and different remedies, and Colorado law is perfectly competent to evaluate liability and to provide the remedies Plaintiffs seek; indeed, doing so is a traditional state function.

First, while Defendants discount the importance of a State as litigant, Pet. 33, that element is essential for a dispute to implicate "the conflicting rights of States." *Tex. Indus.*, 451 U.S. at 641. A State "is not lightly to be required to give up quasi-sovereign rights for pay," – *i.e.*, to forego a claim for an injunction – unlike "private owners." *Tennessee Copper*, 206 U.S. at 237-38. Thus, the U.S. Supreme Court has rarely applied federal common law to private suits.

Second, the conduct at issue and the remedy matter enormously to whether there is a federal interest that empowers judges to take the

dramatic step of preempting state law without congressional authorization. Thus, while Defendants say that "'regulation can be effectively exerted through an award of damages,'" Pet. 35 (quoting *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012)), this says nothing of *who* and *what* is being regulated, or *whether* that regulation implicates uniquely federal interests.

The federal common law of interstate pollution applied to emitters. Liability here attaches only to Defendants for selling fossil fuels at levels they knew would cause harm, and for deceptive marketing to maintain those sales. *Supra* Part II(A). While fossil fuels sold and burned outside Colorado are part of the chain of causation linking Defendants' tortious conduct to Plaintiffs' injuries, this case does not regulate the emitters, *i.e.*, the people who burn the fuel, either within or outside Colorado. *Supra* Part (II)(B); *Suncor Energy II*, 25 F.4th at 1264. Liability for companies that manufacture, market and distribute products is simply not a regulation of those that use those products.

When States sued tobacco companies for deceptively promoting

cigarettes, those cases did not regulate *smokers*. Indeed, it was irrelevant whether the smokers smoked outside the State; the relevant question was where they got sick and caused the State harm. Likewise, this case does not regulate those who burn fossil fuels.

Damages liability for Defendants' private acts also does not interfere with other States' rights. As noted above, federal common law was needed where two States both wanted "plenary regulatory authority" over a "single" source of pollution. *Milwaukee III*, 731 F.2d at 414. Such a situation threatens to violate the sovereignty of the affected State, if the source State has authority to allow unlimited pollution regardless of injury; conversely, if the injured State can enjoin emissions at a stricter level than the source State allowed by permit; the source State's sovereignty is diminished.

This situation is materially different in ways that Defendants ignore. No State authorized how much fuel Defendants sell or granted them permission to lie to the public. And Plaintiffs do not seek an injunction or other form of plenary control over any conduct, including Defendants.'

The U.S. Supreme Court has recognized that state law may control damages even where it is not appropriate for injunctions. In *Silkwood*, the Court noted that federal law controlled nuclear safety regulations, such that state law could not enjoin the operation of a nuclear plant. 464 U.S. at 250-51; *see also id.* at 271 (Blackmun, J., dissenting). But the Court nonetheless allowed "the imposition of a state standard in a damages action." 464 U.S. at 257.

History and practice show why damages do not present the same concerns of extraterritorial overreach that injunctions might. For example, fifty different States' tort laws, including Colorado's, are often used to award damages in cases involving products sold nationwide. *See supra* Part III(A)(2)(a). There are no cases where state law was used to shut down a product manufacturing plant in another State.

* * *

Federal common law is about mediating direct conflicts between sovereign States. This case is quite different. Assigning liability to Defendants would not impact any specific authority or decision by another State akin to what was at issue in *Milwaukee III* and similar

cases, or threaten the sovereignty of the States where they do business. Rather, if Defendants are liable, sister States will retain the same policy discretion to permit fossil fuel production and sales. There will simply be "no interference with the sovereignty of another nation" or another State. *Cf. Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952).

And far from protecting States' rights, Defendants' federal common law preemption argument would do great harm to them; the preemption Defendants seek would wipe out the traditional authority of the States where they have caused harm to provide remedies for in-State injuries. Nothing in the Constitution, or the Supreme Court's federal common law doctrine, supports this dramatic curtailment of state authority.

3. No other federal interests warrant federal preemption.

Much of Defendants' argument about purported federal interests – "in setting national and international energy, environmental, and security policies, such as balancing what amount of carbon dioxide is unreasonable," Pet. 27-28 – has nothing to do with the federal common law of interstate pollution they purport to apply. Defendants point to no

preemptive federal statute reflecting these interests; in the absence of such action by Congress, these interests do not justify the creation of new preemptive federal common law. "[N]ational interests, no matter their significance, cannot by themselves give federal courts the authority to supersede state [law]," instead the dispute must "directly implicate the authority and duties of the United States as sovereign." *Jackson*, 750 F.2d at 1324-25 (cleaned up).

a. Federal common law preemption requires a clear conflict with an identifiable federal policy and a uniquely federal interest.

The U.S. Supreme Court has routinely rejected efforts to apply federal common law based on abstract, "speculative" or "remote" impacts on federal interests, requiring a direct and tangible conflict between state law and a uniquely federal interest instead. *Bank of Am. Nat't Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956); *see also Miree v. Dekalb County*, 433 U.S. 25, 29-32 (1977) (federal interest in air travel insufficient in action between private parties with no direct effect on the United States); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69-71 (1966) (federal common law not needed to govern "the

right *inter se* of private parties dealing in [federal oil and gas] leases").

To justify preemption, the conflict must be so significant as to directly implicate core constitutional values. *See Collins v. Virginia*, 584 U.S. 586, 608 (2018) (Thomas, J., concurring) ("To the extent [federal common law is] not rooted in the Constitution or a statute, [its] preemptive force is questionable.").

Given that federal common law requires direct effects on concrete, uniquely federal interests, it is almost always inappropriate where a suit seeks liability from a private defendant for private acts, because "no substantial rights or duties of the government hinge on its outcome." *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 993-95 (2d Cir. 1980). In such cases, there is typically no "identifiable federal policy" that sets out the respective rights and duties of the private litigants, and federal common law is inappropriate because balancing those competing private interests "in the first instance" is for Congress. *Id.* at 994-95; *accord Jackson*, 750 F.2d at 1325; *Northrop Corp. v. AIL Sys., Inc.*, 959 F.2d 1424, 1427-28 (7th Cir. 1992).

The rare exceptions, such as *Boyle v. United Technologies Corp.*,

487 U.S. 500 (1988), highlight that uniquely federal interests and a significant conflict with state law are indispensable to preemption. There, the father of a Marine who died after his helicopter crashed brought defective design claims under Virginia law against the private contractor that built the helicopter. *Id.* at 502-03. The uniquely federal interest and significant conflict with state law were obvious: the case involved the procurement of equipment that met the military's particular specifications and a state law duty – to design a different escape hatch – that was "precisely contrary" to the Government's needs. *Id.* at 509.

b. Imposing liability on Defendants for their private acts will not interfere with the federal government's ability to set energy policy.

Defendants have not identified a uniquely federal interest, let alone a significant conflict between that interest and the application of state law. They assert vague federal interests in energy policy, which look nothing like the clear and uniquely federal interest in *Boyle*, and are "never . . . enough to win preemption of a state law." *Va. Uranium, Inc.*, 587 U.S. at 767 (Gorsuch, J., three-justice opinion).

Defendants cite nothing in federal law that touches on the conduct or harm at issue in this case, much less specifically so. The federal government does not set the level of Defendants' sales, nor tell them how to market. Federal law regulates emissions from specific sources, but this case does not involve emission limits or challenge any emission policies or regulation.[7] Assigning liability to conduct that is not regulated by the government (here, producing and selling fossil fuels in amounts that cause harm, and deceptively marketing them) does not interfere with federal regulation of entirely different conduct by different actors (here, burning fossil fuels). *Va. Uranium, Inc.*, 587 U.S. at 790-91 (Ginsburg, J., three-justice opinion). It "is entirely unremarkable" for "state common law [to] provide[ ] additional redress for harm caused by certain private actors, and thereby create remedies unavailable to a plaintiff through the federal legislative or regulatory process." *Suncor II*, 25 F.4th at 1267.

Courts have repeatedly rebuffed Defendants' invocation of ill-

[7] Even if it did, the only question then would be whether the *statute* preempts, and Defendants do not claim that it does. *Infra* Part III(B)(2).

defined federal interests and their inability to articulate a conflict. As the Tenth Circuit observed, "it is difficult to comprehend how the suit's resolution could have controlling effect across the federal system regarding [energy or emissions policy] when the [Defendants] fail to adequately tether their [ ] argument to any specific federal law or laws." *Id.* at 1268; *accord Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 203 (4th Cir. 2022); *Rhode Island*, 35 F.4th at 54.

As in most private disputes, the federal government does not have an identifiable policy for how to reconcile Defendants' conduct with the harms it causes, nor does it provide a remedy. Federal law certainly does not immunize Defendants, or require Plaintiffs to bear the harm alone. Whose interest should be "deemed paramount . . . is preeminently a policy determination of the sort reserved in the first instance for Congress," and not courts. *Agent Orange*, 635. F.2d at 994.[8]

[8] Determining liability in this case does not require an assessment of what a reasonable level of economy-wide carbon dioxide emissions should be. *Contra* Pet. 34 n.10. A court may consider the social utility of Defendants' deception (which is zero) or whether it is reasonable for them to continue their conduct without compensating for the harm. App. 70. But Plaintiffs have not asked any court to limit fossil fuel sale or use, *Suncor Energy II*, 25 F.4th at 1248, so any balancing is different

Thus, unless Congress prescribes a federal policy solution, it is for the States to decide.

c. Federal common law is not needed simply because some conduct outside the United States may be at issue.

As noted above, Defendants do not argue, and no court has held, that federal common law supplies the rules of decision for international pollution cases. The U.S. Supreme Court has recently rejected the notion that federal common law displaces state law simply because actions cross international borders – even where the defendant is a *foreign sovereign*. In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022), a case involving art stolen by the Nazis in Germany and later purchased by a Spanish governmental museum, *id.* at 107, the Court dismissed out of hand the notion that federal common law must provide the rule, noting state rules pose no threat to foreign relations and "[n]o one would think federal law

(in both scale and kind) from what the federal government does with respect to emissions regulation or energy policy generally. Balancing the benefits and harms of Defendants' private decisions does not interfere with federal government prerogatives. App. 37-39.

displaces the substantive rule of decision." *Id*. at 116. Given this, there is no basis to think that a suit concerning damages for *private* conduct abroad requires a federal common-law rule.

B. The Clean Air Act eliminated the federal common law that Defendants contend governs Plaintiffs' claims.

Even if federal common law would have once governed this case, Defendants' argument would still fail, because, as Defendants concede, the Clean Air Act displaced federal common with respect to interstate air pollution. Pet. 28. Displaced federal common law cannot preempt. As *AEP* held, the question now is whether the CAA itself preempts. Defendants' argument that Congress must expressly *authorize* (rather than preempt) state law causes of action if federal common law previously governed, Pet. 31-32, is foreclosed by U.S. Supreme Court precedent.

1. Displaced federal common law cannot preempt.

The U.S. Supreme Court has long recognized that when Congress addresses a subject previously governed by federal common law, courts simply apply the statute. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981). In *AEP*, the Court applied

that principle to GHG emissions. Neither the Petition nor *City of New York* discusses *AEP*'s holding, but it is fatal to their analysis.

Now that federal common law has been displaced by the Clean Air Act, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429 (citing *Ouellette*, 479 U.S. at 489, 491, 497). This forecloses Defendants' argument that state law cannot apply to transboundary emissions, and makes clear that the prior federal common law has no preemptive force. Since the District Court correctly held that the Clean Air Act does not preempt – and since Defendants do not challenge that finding on appeal – there is no preemption.[9]

In *AEP*, several States sued under federal common law to limit

[9] The displacement of federal common law poses a very different question than the preemption of state law. To protect state prerogatives, preemption of state law requires "evidence of a clear and manifest congressional purpose" to preempt. *AEP*, 564 U.S. at 423 (cleaned up). Thus, courts start with the assumption that state law is *not* preempted. *Infra* Part III(B)(2). By contrast, "[l]egislative displacement of federal common law does not require the same sort of evidence" of congressional purpose. *AEP*, 564 U.S. at 423 (cleaned up). Rather, courts "start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." *Milwaukee II*, 451 U.S. at 316-17 (cleaned up).

GHG emissions from out-of-state power plants. 564 U.S. at 415. Although the case thus fell within the historic contours of federal common-law claims for interstate pollution, the Supreme Court dismissed the claim as displaced by the Clean Air Act, holding that "'the need for such an unusual exercise of [common] law-making by federal courts disappears'" when Congress acts; any preemption must come from the statute. *Id.* at 423 (quoting *Milwaukee II,* 451 U.S. at 314), 429.

Thus, courts have repeatedly rejected Defendants' argument in this and similar cases: "The federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA." *Suncor Energy II*, 25 F.4th at 1260. The only preemption "question is whether the federal act that displaced the federal common law [also] preempted the state law-claims." *Id.* at 1261. "[D]isplaced federal common law plays no part in [the] preemption analysis." *City & Cnty. of Honolulu v. Sunoco LP*, 153 Haw. 326, 352-53 (Haw. 2023); *see also Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 205 (4th Cir. 2022); *Rhode Island*,

35 F.4th at 55-56.

Indeed, if Defendants are correct that federal common law would have applied to claims brought by non-State plaintiffs, then its argument is further foreclosed by the U.S. Supreme Court's decision in *Ouellette*. That case involved transboundary water pollution claims by Vermont property owners against a New York polluter. 479 U.S. at 484-85. The Court never expressly decided whether the claims would have been governed by federal common law – because the Clean Water Act had displaced that law, *see Milwaukee II*, 451 U.S. at 317, the only question was whether the CWA prohibited the plaintiffs from proceeding under state law. The Court ruled that the plaintiffs could proceed under New York law, 479 U.S. at 498, a conclusion that would have been impossible if the displaced federal common law continued to preempt state-law claims. *Ouellette* thus necessarily rejected Defendants' argument that federal common law can be dead as a source of rights, but still preempt state law, and its argument that state law cannot apply to any case involving transboundary pollution.

Defendants' argument that federal common law preempts state

law even after being displaced by statute conflicts with the "modest role" of federal common law in a system where powers are entrusted to Congress or reserved to the States. *Rodriguez*, 589 U.S. at 136. It must be rejected.

2. The U.S. Supreme Court foreclosed Defendants' argument that Congress must authorize rather than preempt these claims.

Defendants seek to evade the ordinary statutory preemption analysis *AEP* commands. Instead, they assert that their (erroneous) argument that state law cannot apply to claims formerly governed by federal common law means that the Clean Air Act must "authorize" these claims. Pet. 32. Even putting aside *AEP*'s clear holding, that argument runs counter to every U.S. Supreme Court preemption case.

"In all pre-emption cases . . . [courts must] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal quotation marks omitted). Whether preemption is express or implied (under field or conflict principles), an intent to preempt must be found "in the text

and structure of the statute at issue." *CSX Transp.*, *Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The U.S. Supreme Court employed this hornbook principle in *Ouellette,* applying a standard statutory preemption analysis to conclude that affected-state law could not apply to regulate pollution discharges in another State (although source-state law could). 479 U.S. at 493-99. The Court asked whether the use of state law "actually conflicts" with the Clean Water Act, *id.* at 491 (cleaned up), analyzing potential interference with the comprehensive regulation of point-source pollution Congress enacted. *Id.* at 493-97. The Court did not assume, as Defendants would, that state law could not apply to issues previously governed by federal common law, or ask whether the CWA "authorized" state-law claims.

Inverting this well-established framework, Defendants instead rely on *City of New York*, which held that if federal common law once governed, the CAA must affirmatively "authorize" such claims under state law. 993 F.3d at 99. The Second Circuit thus avoided the *sine qua non* of statutory preemption – whether Congress *intended* to preempt

state law.

In so doing, the Second Circuit misapplied the Seventh Circuit's decision in *Milwaukee III*. That case arose after the enactment of the CWA displaced federal common-law remedies, and Illinois attempted to assert its own law to abate out-of-state discharges. The question was "the choice of applicable law in interstate water pollution litigation," 731 F.2d at 410 n.2, not whether federal common law displaced by the CWA would preclude all remedy. Like the Supreme Court in *Ouellette*, the Seventh Circuit ultimately concluded that the CWA's statutory scheme did not permit application of the affected State's law to enjoin out-of-state discharges, but found that source-state law could apply. *Id.* at 410 n.2, 414. Its discussion of whether the CWA "authorize[d]" this use of state law, *id.* at 411, was shorthand for whether state law would interfere with the statutory scheme, *see id.* at 414. *Milwaukee III* did not address damages actions, did not hold that state law could never apply, and did not leave the plaintiffs without a remedy.

Defendants and *City of New York* claim that *Milwaukee III* inverted the preemption test, requiring affirmative authorization to

allow use of state law – but if so, it was "implicitly overruled" by the contrary statement in *AEP. Honolulu*, 153 Haw. at 350 n.9.

Such an approach would also not survive the U.S. Supreme Court's analysis of the *same* question in *Ouellette* – which applied the ordinary conflict preemption test. *Id.* at 498. Indeed, as in *Milwaukee III*, *Ouellette* emphasized that it was not leaving affected parties "without a remedy." *Id.* at 497; *accord Kivalina*, 696 F.3d at 866 (Pro J., concurring) ("Displacement of the federal common law does not leave those injured by air pollution without a remedy . . . state nuisance law becomes an available option to the extent it is not preempted by federal law."). *Ouellette* further refutes the proposition that Congress must "authorize" state law in this context.

Defendants' plea to ignore "the federalism canon," which "tells courts to presume federal statutes do not preempt state laws," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2286 n.5 (2024)(Gorsuch, J., concurring) must be rejected. Because preemption *always* flows from congressional intent, Congress would have no way of knowing that it needed to expressly "authorize" state law to avoid leaving plaintiffs

without a remedy.

3. Plaintiffs' Colorado law claims do not conflict with the Clean Air Act.

Defendants do not challenge the District Court's conclusion that the Clean Air Act does not preempt these claims.[10] Because this is the only relevant preemption question, however, Plaintiffs briefly address it.

The CAA regulates direct emissions, including emissions control technologies. *E.g.*, *Baltimore*, 31 F.4th at 215. Plaintiffs, however, are not using Colorado law to regulate direct emitters, and "[t]he CAA does not directly regulate [Defendants'] upstream levels of enterprise-wide fossil fuel production, sale and promotion." App. 49. The wrongful conduct in this case falls completely outside the Act's regulatory field.

Unlike in *Ouellette*, where application of out-of-state nuisance law would conflict with specific CWA discharge standards, tort liability here would not conflict with any aspect of the CAA. "A state law regulating an upstream activity . . . is not preempted simply because a

[10] One of Defendants' amici does make this argument. *See* Amici Curiae Br. for MSLF, Epstein, and Yoo at 4-8.

downstream activity falls within a federally occupied field." *Va. Uranium, Inc.*, 587 U.S. at 790-91 (Ginsburg, J., three-justice opinion). And that is certainly so where "Exxon engaged in additional tortious conduct" by selling fuels at a level they knew would cause harm, and by lying about the dangers of fossil fuel overuse. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. ("MTBE")*, 725 F.3d 65, 103-04 (2d Cir. 2013) (rejecting preemption of state claims for MTBE pollution even where federal law encouraged adding MTBE to gasoline, in part because Exxon engaged in "related tortious acts, such as failing to exercise reasonable care when storing gasoline that contained MTBE"). Imposing liability on those defendant-specific acts does not interfere with EPA's ability to set emission targets or standards for stationary or mobile sources.

In *Ouellette*, the U.S. Supreme Court held that allowing an affected State's law to govern a regulated point-source in another State would conflict with the CWA's comprehensive regulation of discharges and its specific allocation of standard-setting responsibility (to EPA and the source State) because it would "effectively override both the permit

requirements and the policy choices made by the source State" and "compel the source to adopt different control standards and a different compliance schedule from those approved by EPA." *Id.* at 495. Here, by contrast, Defendants' sales and marketing are not subject to any permitting scheme or other Clean Air Act regulation, and thus there is no potential conflict with the Act.

* * *

Defendants' argument that federal common law is entirely dead as a cause of action, but alive enough to categorically bar state law from compensating in transboundary pollution cases, leads to results Congress could not have intended. As the District Court noted, if Defendants were right, people injured by transboundary pollution would have no claims and companies would enjoy effective immunity for anything not specifically covered by the CAA. App. 42, 52. There is no support for this in *AEP*, *Ouellette*, or any statute.

C. Federal foreign affairs powers do not preempt tort liability for private acts.

Defendants argue that "State law is . . . incompetent to address claims involving international GHG emissions," Pet. 29; although its

argument here is distinct from its federal common law preemption argument, it is no more compelling.

Defendants' primary preemption argument – that state law cannot apply where federal common law governs – does not apply to this context. That proposition derives from *Milwaukee II*, where the U.S. Supreme Court held that where federal common law supplies a nuisance cause of action for transboundary pollution, "state law cannot be used." 451 U.S. at 313 n.7; *accord* Pet. 28-29. But Defendants do not argue that federal common law provides a claim for international transboundary pollution, and therefore the *Milwaukee II* basis for federal common law preemption cannot apply. Instead, Defendants appear to argue that federal foreign affairs powers simply preempt state-law claims concerning activities in other countries, even where that conduct causes injury in Colorado.

Defendants cannot meet the requirements for foreign affairs preemption. "[S]ome incidental or indirect effect in foreign countries" is insufficient to preempt, since that would be "true of many" unobjectionable state laws. *Clark v. Allen*, 331 U.S. 503, 517 (1947).

Indeed, Defendants cite no case "holding that the foreign affairs power preempts state tort law claims for injuries incurred in the state." App. 54.

Foreign policy concerns may only preempt state law based on notions of either "field" or "conflict preemption," *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 416, 419 n.11 (2003) – but neither applies here. *Baltimore*, 31 F.4th at 213-15.

Field preemption only applies where a State "direct[ly]" affects foreign affairs by "establish[ing] its own foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). But as with the similar claims in *Baltimore*, Defendants have "not articulated how [these] common law claims serve as [Colorado's] assertion of its own foreign policy." 31 F.4th at 214. States can apply generally-applicable law that "address[es] a traditional state responsibility," even if doing so "affects foreign relations." *Garamendi*, 539 U.S. at 416, 418-20 & n.11. Colorado tort law is generally applicable, not directed at foreign policy, and is part of traditional state authority. *Silkwood*, 464 U.S. at 248; *see also supra* Part III(A)(2)(a) & n.5. There is no field preemption.

Where a State acts in a traditional sphere of authority, preemption requires a "clear conflict" with foreign policy that is "fit to preempt," *i.e.*, with the force of law. *Garamendi*, 539 U.S. at 416, 419 n.11. Foreign policy lacking legal force cannot preempt, even if applying state law harms foreign relations. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008). Defendants point to no "express foreign policy from the federal government that conflicts with [these] state-law claims," *Baltimore*, 31 F.4th at 213, nor tie any claim of foreign policy interference to "any specific federal law." *Suncor Energy II*, 25 F.4th at 1268.

Even putting that requirement aside, it has not demonstrated *any* conflict even with foreign *policy*. As the District Court found, Defendants "have not shown how the state law claims here, which seek monetary damages for domestic harms, compromise the President's ability to pursue foreign policy . . . [or] conflict with international obligations." App. 54. Indeed, now-Secretary of State Antony Blinken, along with other now-current high-ranking officials, agree that these claims against private companies "will not disrupt" U.S. foreign policy.

Br. of Former U.S. Government Officials as *Amici Curiae*, *State of Rhode Island v. Shell Oil Products Co., LLC.*, *et al.*, No-19-1818, 2019 WL 7565366, at *4-5, 7-9 (1st Cir. Dec. 23, 2019). Defendants provide no basis to find that the architects of U.S. policy are wrong.

Defendants cite *City of New York*, Pet. 29, but that decision failed to apply a foreign affairs preemption analysis. There, the Second Circuit initially seemed to conclude that a federal rule of decision was necessary, incorrectly assuming the case implicated "'our relations with foreign nations,'" 993 F.3d at 92 – but later concluded that the federal nuisance common law did not apply extraterritorially, rejecting "any federal common law claim" arising out of conduct outside the United States. *Id.* at 103. By contrast, *state* law can apply to extraterritorial conduct, *e.g.*, *Cassirer*, 596 U.S. at 116, especially where there are in-state injuries. *Young*, 289 U.S. at 258-59; *see supra* n.6. But *City of New York* never applied the U.S. Supreme Court's framework for foreign affairs preemption, neither holding that the entire field was preempted, nor that the claims conflicted with specific federal law.

Defendants also cite *Banco Nacional de Cuba v. Sabbatino*, 376

U.S. 398 (1964), but that case further refutes its argument that a mere effect on foreign relations suffices for preemption. *Sabbatino* addressed the act of state doctrine, which determines when a court may invalidate a foreign government's official act; federal common law provides the rule because invalidating a foreign official act creates "uniquely federal" "problems." *Id.* at 424. But if a sovereign act's validity is not at issue, or if it is but a balancing test does not favor abstention, the case proceeds, even if it affects U.S. foreign affairs. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 402, 405, 409 (1990) (allowing claims regarding wrongdoing abroad, including under the New Jersey Anti-Racketeering Act, to proceed). No acts of state, only Defendants' private acts, are at issue here.

IV. CONCLUSION

Defendants' real objection is not about whether state or federal law controls this case. They do not urge federal rules of decision for Plaintiffs' claims, arguing that such claims do not exist under federal law. Instead, they ask this Court to rule that unenacted federal common law, which has been displaced by Congress, nonetheless prevents

Colorado from providing a state remedy for in-state harms. Thus, they seek a *new* federal common law "get out of jail free" card that displaces state damage remedies but, unlike the federal common law they invoke, offers no federal remedy in exchange. Neither the Constitution, nor U.S. Supreme Court precedent, nor any Act of Congress provides this federal immunity. Defendants' appeal to policy concerns should be made to Congress, which has not granted the immunity Defendants seek.

This Court should discharge the Petition or uphold the District Court's order.

Dated: October 9, 2024.

Respectfully submitted,

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LIST OF SUPPORTING DOCUMENTS

Exhibit A - Answering Brief for Defendants-Appellees, *Native Village of Kivalina, et al. v. ExxonMobil Corp., et al.*, No. 09-17490 (9th Cir. June 30, 2010).

CERTIFICATE OF SERVICE

I certify that on October 9, 2024, a copy of this **Answer Brief for Plaintiffs/Respondents** was filed with the Clerk of this Court and served via the manner listed below:

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