SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED October 9, 2024 5:27 PM FILING ID: DB2F6B12F502C CASE NUMBER: 2024SA206
Original Proceeding, District Court, Boulder County, 2018CV30349	
In Re: Plaintiffs: County Commissioners of Boulder County and City of Boulder, v. Defendants: Suncor Energy USA, Inc.; Suncor Energy Sales, Inc.; Suncor Energy, Inc.; and Exxon Mobil Corporation.	▲ **COURT USE ONLY** ▲ Case No. 2024SA206
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BOULDER COUNTY DISTRICT COURT'S RESPONSE TO THE PETITION FOR RULE TO SHOW CAUSE UNDER C.A.R. 21

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:

- The brief complies with the word limit in C.A.R. 28(g)(1).
    - It contains 5,810 words.
- The brief complies with the content and form requirements in C.A.R. 28.

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

/s/ Christopher J.L. Diedrich
CHRISTOPHER J.L. DIEDRICH

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STATEMENT OF THE CASE

A. Local Governments bring tort claims seeking climate-change related damages from the Energy Companies.

In 2018, the County of Boulder and City of Boulder ("Local Governments") sued ExxonMobil and Suncor Energy and some of their subsidiaries (the "Energy Companies") for climate-change related injuries. According to the Local Governments, they seek damages "for the substantial role that [the Energy Companies'] production, promotion, refining, marketing and sale of fossil fuels played and continues to play in causing, contributing to and exacerbating alteration of the climate." App. at 85.[1]

In the current amended complaint, the Local Governments seek damages as well as remediation and abatement of the hazards allegedly

[1] Citations in this brief are to the consecutively paginated appendix attached to the Petition for Order to Show Cause, filed July 16, 2024.

caused by the Energy Companies. *Id.* at 205–06. Stated simply, the Local Governments allege that (1) the climate has been altered, (2) the Energy Companies knew for decades that their fossil fuel activities were altering the climate, (3) the Energy Companies concealed and misrepresented the truth of the costs of unchecked fossil fuel use, and (4) Local Governments have suffered and will continue to suffer injuries caused by the Energy Companies in the form of increased extreme weather events and expenditures of money to remediate damage from and prevent future climate-related events. According to the amended complaint, Local Governments "do not seek to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." *Id.* at 207 (emphasis omitted).

The Local Governments asserted six claims for relief: Public Nuisance; Private Nuisance; Trespass; Unjust Enrichment; Violation of the Colorado Consumer Protection Act ("CCPA"); and Civil Conspiracy. *Id.* at 185–205.

B. The Energy Companies unsuccessfully attempt to remove the matter to federal court.

Shortly after the Local Governments filed the lawsuit, the Energy Companies removed the case to federal court. The federal district court disagreed that removal was proper and granted the Local Governments' motion to remand the case to the state courts. *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019). Ultimately, the Tenth Circuit affirmed. *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022).[2] Relevant here, the Tenth Circuit held that (1) the Local Governments' claims did not arise under federal common law and (2) the federal Clean Air Act (CAA), 42

[2] The Tenth Circuit initially affirmed based on one of the grounds for removal because it concluded it lacked jurisdiction over the entire remand order. *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020). But the United States Supreme Court vacated and remanded the case back to the Tenth Circuit. *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs*, 141 S. Ct. 2667 (2021). The Supreme Court's order followed on the heels of its decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230 (2021), a similar municipality-against-energy-companies lawsuit for climate-related injuries, in which the Supreme Court held that appellate courts, under certain circumstances, must review the entirety of a remand order.

U.S.C. § 7401, *et seq.*, did not completely preempt the state law claims. *Id.* at 1262–65. [3] Because only complete preemption, and not just ordinary preemption, can support removal, the Tenth Circuit left open the question of whether ordinary preemption applies to the Local Governments' claims. *See id.* at 1256–57. The United States Supreme Court denied certiorari review in a Fourth Circuit case addressing this preemption question at this time. *BP P.L.C. v. Mayor & City Council of Baltimore*, 143 S. Ct. 1795 (2023).

C. Back in state District Court, the Energy Companies attempt to dismiss the Local Governments' suit, but the Court denies their motions.

Back in Colorado state District Court, the Energy Companies renewed and supplemented several motions to dismiss, asserting the

[3] "Complete preemption" means that a federal statute is so extraordinarily preemptive "that it converts an ordinary state common-law complaint into one stating a federal claim" for removal purposes, whereas "ordinary preemption … is a defense to the complaint and does not render a state-law claim removable." *Id.* at 1256, 1258.

District Court lacked personal jurisdiction and the complaint failed to state a valid claim. *See* App. at 209–670.[4]

The Energy Companies' motion to dismiss for failure to state a claim asserted that federal law preempted the Local Governments' state law claims. The Energy Companies presented two related preemption theories in support of their motion: (1) the Local Governments' claims should be dismissed because they were based on federal common law, which the CAA has displaced; and (2) the CAA, standing alone, preempts the claims.

The District Court held oral argument (*id.* at 671–775) before issuing its order on June 21, 2024. In the 81-page order, the District Court mostly denied the motions to dismiss and expressly rejected both preemption theories. *Id*. at 1-81.

As to federal common law, the District Court noted that the Tenth Circuit has held in this case that "the federal common law of nuisance

[4] While the District Court agreed that personal jurisdiction was lacking as to Suncor Canada, *see* App. at 25–35, and that the Local Governments failed to plead the CCPA claim with particularity, *see* App. at 76–79, those rulings are not at issue in this proceeding.

that formerly governed transboundary pollution suits no longer exists due to Congress's displacement of that law through the CAA." *Suncor*, 25 F.4th at 1260. Because "the Clean Air Act displaces federal common law," whether a state lawsuit is viable depends "on the preemptive effect of" the CAA, not federal common law. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*") (remanding to determine whether CAA, rather than federal common law, preempted state nuisance claim).

The District Court noted that the Energy Companies' theory would leave the Local Governments without a remedy for harms it suffered, as federal common law would first preempt its claims and then the CAA would extinguish that remedy by displacing federal common law. As the Hawai'i Supreme Court held when denying a similar argument, this effectively states that federal common law is both dead and alive: "dead in that the CAA has displaced it, but alive in that it still operates with enough force to preempt Plaintiffs' state law claims." *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1198 (Haw. 2023).

The District Court also rejected the applicability of federal common law because the Local Governments were not seeking to regulate emissions but instead is seeking damages. Most federal common law in this area arose in the context of emissions between states. But this lawsuit does not seek to regulate those emissions, nor does it implicate a discrete federal interest like state-to-state relations. The District Court thus held that federal common law does not preempt the Local Governments' state law tort claims. *See* App. at 40–46.

Having determined that federal common law did not preempt the Local Governments' state law claims, the District Court considered whether the CAA itself did. The Energy Companies argued that both field preemption and conflict preemption applied to preempt the Local Governments' claims. As to field preemption, the District Court noted that the CAA does not completely occupy the field of greenhouse gas (GHG) emissions, but instead leaves states with regulatory power under state implementation plans (SIPs) and the ability of states to adopt more stringent regulations than the CAA itself provides. App. at 49 (citing 42 U.S.C. §§ 7410(a)(1), 7416).

As to conflict preemption, the District Court rejected the Energy Companies' argument that state tort law interferes with accomplishing the objectives of federal law. Most notably, the District Court relied on a Ninth Circuit holding that "Congress intended [the CAA] to preserve state-law causes of action pursuant to a saving[s] clause," which "makes clear that states retain the right to 'adopt or enforce' common law standards that apply to emissions and preserves 'state common law standards against preemption.'" App. at 51 (quoting *City of Oakland v. BP PLC*, 969 F.3d 895, 907–08 (9th Cir. 2020)). And since the CAA does not authorize local governments to sue for damages, this further cuts against finding conflict preemption. App. at 52 (citing *Suncor*, 25 F.4th at 1267 (the fact that "state common law might provide redress for harm caused by certain private actors, and thereby created remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable")).

The Energy Companies' Petition followed.

SUMMARY OF THE ARGUMENT

Neither federal common law nor the CAA preempts the Local Governments' claims. Regarding federal common law, the parties do not dispute that the CAA displaced federal common law in the area of air quality emission control. The Energy Companies contend that federal common law nonetheless can preempt the Local Governments' claims. This is not so—even if federal common law had not been displaced in this area—because the claims sound in state tort law and do not seek to reduce the Energy Companies' emissions.

Further, the CAA does not preempt Local Governments' claims. The CAA preserves the states' police powers (including those of local governments) and invites them to share in emissions regulation. A state retains the power to protect its own environment. The District Court correctly held that the proper analysis for determining preemption under the CAA is ordinary preemption and this case does not satisfy the standard for ordinary preemption.

ARGUMENT

The Energy Companies advance two main arguments: first, that federal common law preempts the Local Governments' claims despite its displacement in the area of air quality control, and second, that the CAA preempts Local Government's claims. The District Court correctly rejected both of these arguments.

I. The District Court properly analyzed the Local Governments' claims and concluded they are not preempted by federal common law.

The Energy Companies argue that the Local Governments' claims are preempted by federal common law even though the CAA displaced federal common law in the air quality regulation field. Pet. at 28–30. The District Court properly rejected this argument and held that federal common law did not preempt the Local Governments' claims. App. at 40–46.

A. The District Court correctly framed the Local Governments' claims as sounding in state tort law, not emissions control.

The District Court, analyzing the Local Governments' surviving claims, correctly determined that they sounded in Colorado tort law and

were not an attempt to regulate emissions. App. at 36–40. This reasoning tracks the rulings in this case from the U.S. District of Colorado and the Tenth Circuit, concluding that the Local Governments are not asking the District Court to stop or limit emissions of fossil fuels, nor are the Local Governments seeking to change federal government policy. App. at 38 (citing *Suncor*, 405 F. Supp. 3d at 955). The District Court characterized this case as an attempt to monetarily remediate damage related to climate change, not an attempt to regulate emissions. *Id.*; *see also Suncor,* 25 F.4th at 1247. Further, the Local Governments seek damages, not injunctive relief. App. at 40.

The District Court, citing the amended complaint, correctly found that the Local Governments' complaint concerned the costs to the municipalities from an altered climate and whether a jury could find the Energy Companies liable for those damages. *Id.* at 37 (citing App. at 136, 141–53, 154–58). The Energy Companies' characterization of the amended complaint as seeking to control global emissions is not borne out by the amended complaint itself. *Id*. The District Court, following the two federal courts that have considered the issue in this very case

and the Hawai'i Supreme Court's reasoning in *Honolulu*, properly characterized the claims as state-law tort claims. *Id.*; *see also City & Cnty. of Honolulu*, 537 P.3d at 1187 (concluding that plaintiff's claims do not seek to regulate global greenhouse gas emissions); *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44, 55 n.8 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023) (same).

B. Federal common law does not preempt the local governments' state law tort claims.

Regarding federal common-law preemption, the Energy Companies concede that there is no general federal common law left after *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 78 (1938). But they then argue that interstate air and water issues are an area where federal common law still applies. Pet. at 27–28. It cannot be both.

The Energy Companies' argument ignores the Supreme Court's ruling that the CAA displaced federal common law. *AEP*, 564 U.S. at 424 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions."). The *AEP* plaintiffs sought injunctive relief that

would have required each defendant power company to reduce its carbon dioxide emissions. *Id*. at 419. The Court in *AEP* held that the plaintiffs' claims were creatures of federal common law which Congress had displaced with the CAA. Thus, plaintiffs failed to state a claim. *Id.* at 426.

The District Court rejected the Energy Companies' federal common law argument for five different reasons. *First*, the CAA displaced federal common law regarding "transboundary emissions" as acknowledged in *AEP* and several other cases. App. at 41; *see also Native Vill. of Kivalina v. ExxonMobil Corp*., 696 F.3d 849, 856 (9th Cir. 2012) ("[w]e need not engage in that complex issue and fact-specific analysis in this case, because we have direct Supreme Court guidance"); *Rhode Island*, 35 F.4th at 55; *Suncor*, 25 F.4th at 1260. The District Court characterized the Energy Companies' invitation to engage in a two-step analysis as a "road to nowhere"—if the CAA displaced federal common law, then it is dead. Yet, under the Energy Companies' theory, it is somehow alive enough to preempt the Local Governments' claims. App. at 42; *City & Cnty. of Honolulu*, 537 P.3d at 1198. The District

Court declined to follow an internally inconsistent approach that would leave the Local Governments "without a remedy." App. at 42.

Second, as discussed above, the Local Governments do not seek to regulate transboundary emissions. The body of federal general common law displaced by the CAA governed emissions that crossed state borders and claims that were brought to require a polluter in one state to stop emitting gases that crossed into another state. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

Here, the Local Governments do not seek to abate pollution coming from another state.[5] The claims thus do not implicate the body of federal common law that existed prior to the CAA's enactment. App. at 43.

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[5] The Energy Companies' contention that federal common law can apply where a municipality rather than state brings a lawsuit is beside the point here. Pet. at 33. The District Court correctly found that this lawsuit did not seek to regulate emissions at all, and while it stated that the displaced body of federal common law governed suits where emissions crossed state lines, it did not base its decision on the Local Governments not being a state but on the nature of the claims, which do not seek to alter activity in another state. App. at 43.

Third, there was no basis for creating new federal common law that would apply to a state-law claim for damages, as the displacement of state law is a decision for Congress. App. at 44. The Energy Companies appear to concede that they are not seeking to create new federal common law. Pet. at 37 (stating that the Energy Companies "need not satisfy" the test for creating new federal common law).

Fourth, the Energy Companies "have not shown a uniquely federal interest to justify the invocation of federal common law." App. at 44. "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so" is made by Congress, not the courts. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985). The Local Governments' state law tort claims do not implicate a "uniquely federal concern."

Fifth, the Energy Companies do not identify any conflict between federal and state law or identify a federal policy implicated by the application of state law to damages claims. App. at 45. The Energy Companies relied heavily on a Second Circuit case for their argument that the Local Governments' complaint implicated federal policy. App.

at 501–02. The District Court declined to follow that case, *City of New York v. Chevron Corporation*, 993 F.3d 81 (2d Cir. 2021), finding its reasoning and analysis unpersuasive and concluding *City of New York* was wrongly decided. App. at 45.

In *City of New York*, the Second Circuit held—in conflict with a host of other federal cases—that federal common law preempted New York's state-law claims and that in turn, federal common law was displaced by the CAA. 993 F.3d at 93–94, 97–98. The Second Circuit distinguished these other cases by concluding that it was uniquely positioned as the first court asked to analyze the federal preemption issue in the first instance instead of within the context of a removal proceeding. *Id.* at 94. But as applied to state-law tort claims, *City of New York* erred because it followed "U.S. Supreme Court precedent governing interstate air or water pollution, which as noted above, is distinguishable from the claims advanced … in this litigation." App. at 46. Because Local Governments do not seek to govern interstate air or water pollution, the District Court properly followed the analysis in *City and County of Honolulu* and other cases. *Id.* (citing *Rhode Island*, 35

F.4th at 54; *City of Hoboken v. Chevron Corp.,* 45 F.4th 699, 708 (3d. Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 204 (4th Cir. 2022); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 709–12 (8th Cir. 2023); *Cnty. of San Mateo v. Chevron Corp.,* 32 F.4th 733, 746–48 (9th Cir. 2022); *Suncor*, 25 F.4th at 1261; *City of Oakland,* 969 F.3d at 906–09; *City & Cnty. of Honolulu*, 537 P.3d at 1201). The precedent "governing interstate air or water pollution" was "distinguishable from the claims advanced by the Local Governments in this litigation." App. at 46.

The Energy Companies rely on two 2024 cases from state lower courts, neither of which is binding on this Court and both of which follow the same flawed reasoning as *City of New York*. Pet. at 31. *See State ex rel. Jennings v. BP Am., Inc.*, No. N20C-09-097 MMJ CCLD, 2024 WL 98888 at *9 (Del. Super. Ct. Jan. 9, 2024); *Mayor & City Council of Baltimore v. B.P. P.L.C.*, No. 24-C-18-004219 (Md. Cir. Ct. July 10, 2024) (slip op.). Nothing in either of these cases contradicts the District Court's reasoning and distinguishing of *City of New York* here.

In sum, the Energy Companies advance a circular argument that seeks to resurrect federal common law when the U.S. Supreme Court has expressly ruled that it was displaced by the CAA. *AEP*, 564 U.S. at 424. Federal common law that no longer exists cannot—and does not—preempt the Local Governments' claims.

II. The District Court properly determined the Local Governments' claims are not preempted by the Clean Air Act.

The Energy Companies argue that the CAA preempts state law claims based on in-state impacts of their GHG emissions. Their primary argument about CAA preemption is that because federal common law preempts the Local Governments' claims and the CAA displaced federal common law, the state law claims cannot proceed. As shown above, federal common law does not preempt the state law claims, so this primary argument necessarily fails. But the Energy Companies also argue that the CAA, standing alone, completely preempts the Local Governments' claims. Pet. at 30–31. Because the CAA invites states to participate in the regulation of emissions rather than excludes them from it, complete preemption does not apply to the Local Governments'

claims. The District Court then analyzed whether any form of ordinary preemption applied to exclude state law claims. The District Court correctly determined that none of the three types of ordinary preemption (express preemption, field preemption, and conflict preemption) barred the Local Governments' claims. App. at 47–50.

A. The Clean Air Act preserves the states' police powers.

In any preemption analysis, courts "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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotations omitted). Thus, in determining whether the CAA preempts state law claims, courts first look to what the CAA says.

Far from excluding states from playing a role, the CAA saves them a seat right up front. Congress expressly found "that air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Congress acted to protect state-law claims in the CAA, stating that nothing "shall restrict any right which any person (or class of persons)

may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Each state retains regulatory power through SIPs. 42 U.S.C. § 7410(a)(1). And finally, the CAA expressly provides for a state's right to adopt or enforce a standard regarding emissions, and only preempts a state-specific standard that is less stringent than the CAA. 42 U.S.C. § 7416. Thus, as an example of a "carefully constructed cooperative federalism framework," *see, e.g.*, *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 (3d Cir. 2013), the CAA generally preserves state regulatory and common law authority over emissions. 42 U.S.C. §§ 7401(a)(3), 7604(e); *see also Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015) ("There is no evidence that Congress intended that all emissions regulation occur through the [CAA's] framework, such that any state law approach to emissions regulation would stand as an obstacle to Congress's objectives.").

B. Remediating environmental harms is an area traditionally within the states' police powers.

States have long exercised their authority to regulate emissions under the police power: "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *see also Merrick*, 805 F.3d at 694 (holding the CAA does not bar state common law claims against in-state emitters because "[e]nvironmental regulation is a field that the states have traditionally occupied"); *City & Cnty. of Honolulu*, 537 P.3d at 1204 (same); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 953 (9th Cir. 2019) (holding that state regulation of greenhouse gas emissions was "a classic exercise of police power"). Numerous other courts have thus held that state law is available to plaintiffs challenging pollution. *See, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Merrick*, 805 F.3d at 694; *City & Cnty. of Honolulu*, 537 P.3d at 1204–07.

C. Foreign policy concerns do not impact state-law claims for in-state harms.

The Petition suggests that only federal law can apply because "foreign policy concerns foreclose" the application of state law. Pet. at 29 (citing *City of New York*, 993 F.3d at 101). This framing is contrary to relevant Supreme Court precedent in *Virginia Uranium*, where the Supreme Court held "invoking some brooding federal interest" is not enough to win preemption of a state law and that a litigant "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (plurality opinion). The Energy Companies argue the District Court improperly relied on an ordinary preemption analysis to determine whether the CAA preempted Respondents' claims because the Energy Companies assert it is well-settled that state law claims are completely preempted by claims involving interstate or international GHG emissions. Pet. at 31. Thus, Energy Companies contend the relevant question after the

displacement of federal common law is whether the CAA authorizes the suit to proceed under state law. *Id*. at 32.

Preemption should not be immediately inferred when looking to a federal regulatory scheme. However, the court may presume preemption applies when federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Ouellette*, 479 U.S. at 491 (quotations omitted). The CAA is the primary federal statutory scheme regulating air pollution nationwide; however, the CAA recognizes pollution control is in the domain of a state government's traditional police powers. Thus, the CAA reserves a significant amount of authority for the states through its cooperative federalism structure, indicating that Congress did not intend to preempt the states from exercising their independent police-powers authority.

D. The District Court correctly held that ordinary preemption is the proper analysis, and it is not satisfied here.

The District Court analyzed whether ordinary preemption or complete preemption applies to the Local Governments' claims

pursuant to the CAA. App. at 46–50. "Federal law completely preempts state law only when there is (1) a federal statute that (2) authorizes federal claims vindicating the same interest as the state claim." *City of Hoboken*, 45 F.4th at 707 (internal citations omitted). The District Court found complete preemption only applies in the context of federal removal jurisdiction, which did not apply in the present case. App. at 46. The District Court's finding that complete preemption does not apply aligns with the Third Circuit's analysis and determination in *City of Hoboken*, which recognizes the applicability of complete preemption is rare and inapplicable when analyzing the CAA. 45 F.4th at 707 (recognizing only three federal statutes meet the two-part test).

The District Court then concluded ordinary preemption applied and the Energy Companies bore the burden to demonstrate the CAA preempts the Local Governments' state law claims. App. at 47. Turning to the three types of ordinary preemption, the court analyzed "(1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no

room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of a federal objective." App. at 47–48.

The Energy Companies did not argue that express preemption applied. Still, the District Court found express preemption did not apply because the CAA does not contain an express preemption clause barring the state law claims at issue and in contrast, contains savings clauses explicitly allowing for redressability under state law. See 42 U.S.C. §§ 7604(e) and 7416. This comports with other state and federal courts' application of express preemption analyses to both the CAA and Clean Water Act (CWA). *Ouellette*, 479 U.S. at 503 (concurrence); *City & Cnty. of Honolulu*, 537 P.3d at 1203. Further, the Supreme Court requires that any evidence of preemptive purpose, whether express or implied, be sought in the applicable statute's text and structure. *Virginia Uranium*, 587 U.S. at 762. In short, it is the duty of the court "to respect not only what Congress wrote, but as importantly what it didn't write."

Id. at 765. The District Court correctly concluded that express preemption did not apply.

Next, the District Court found field preemption did not apply to the Local Governments' claims. It is well-settled that state law is preempted where it regulates conduct in a field that Congress intended the federal government to exclusively occupy. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 401 (2012). The Energy Companies disagree, arguing that "regulation of GHG emissions 'is hardly a field which the States have traditionally occupied … such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.'" Pet. at 31 (citing *Buckman Co. v. Respondents' Legal Comm.*, 531 U.S. 341, 347–48 (2001)). This mischaracterization of the Local Governments' claims attempts to undermine the field preemption analysis.

Congress's intent to preempt state authority may be inferred from a "scheme of federal regulation … so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest

is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Jennings*, 2024 WL 98888, at *10 (internal citations omitted), *interlocutory appeal denied by State ex rel. Jennings v. BP Am. Inc.*, No. N20C-09-097 MMJ CCLD, 2024 WL 1281507 (Del. Super. Ct. Mar. 26, 2024).

The Energy Companies' argument ignores that the CAA does not occupy the entire field of emissions reductions based on its cooperative federalism framework. States retain regulatory power through their individual SIPs, which provides for state-level implementation, maintenance, and enforcement of CAA emissions standards with federal oversight. 42 U.S.C. § 7410(a)(1). The District Court correctly ascertained that the CAA generally preserves state regulatory and common law authority over environmental regulation. App. at 49; 42 U.S.C. §§ 7401(a)(3), 7604(e).

The Energy Companies attempt to narrow the field where state authority would be preempted to regulation of GHG emissions because those emissions are not historically regulated by states and GHG emissions implicate a field where the Energy Companies claim federal

interest is so dominant to preclude enforcement of state laws. Pet. at 31–32. Even if this narrower field could apply, the Local Governments are not seeking to regulate GHG emissions through any means. This is analogous to the arguments presented to the Hawai'i Supreme Court in *City of Honolulu*. Like those of Honolulu, the Local Governments' claims do not seek to regulate emissions and do not seek injunctive relief. Rather, both sought just compensation for past and future harms caused by climate change, not additional emissions reductions. The *City of Honolulu* court found Honolulu's claims "do not seek to regulate emissions, and so a claim of field preemption in the field of emissions regulation is inapposite." 537 P.3d at 1204. The same is true here.

E. Neither type of conflict preemption applies here.

Finally, the District Court analyzed the two types of conflict preemption: impossibility and obstacle preemption. It is unclear if the Energy Companies now intend to only rely on field preemption or continue to argue that impossibility or obstacle preemption bar the

Local Governments' claims. Pet. at 31–35.[6] Regardless, the District Court correctly determined that neither impossibility nor conflict preemption applies and performed its analyses based on the precedents relied upon in *City of Honolulu*. App. at 50–51; 537 P.3d at 1204–07.

Obstacle preemption applies when state law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399. It is a high bar given that the Supreme Court has found obstacle preemption applied "in only two scenarios: (1) where a federal legislation involved a uniquely federal area of regulation and state law directly conflicted with the federal program's operation, and (2) where Congress has clearly chosen to preclude state regulation because the federal legislation struck a delicate balance of interests at risk of disturbance by state regulation." *City & Cnty. of Honolulu*, 537 P.3d at 1205 (internal citations omitted).

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[6] In the December 2019 Motion to Dismiss, the Energy Companies argued that conflict preemption applies by contending that "adjudication of the state law claims would 'interfere with the careful balance struck by Congress' through numerous statutes and regulations related to fossil fuel production and emissions, and environmental protection." App. at 318.

As previously established, the CAA is a prime example of cooperative federalism, and the CAA does not involve a uniquely federal area of regulation because states historically regulated environmental matters through their police powers. *See* §§ II.A and II.B, *supra*. By its express terms, the CAA allows states to impose stricter emissions standards, and this authority includes the right to impose higher common-law causes of action as well as higher statutory restrictions. *See Ouellette*, 479 U.S. at 497; 42 U.S.C. § 7416. The Supreme Court has already held as much in *Ouellette*, which concluded that the lawsuits alleging violations of the laws of the polluting, or "source," state are not preempted. 479 U.S. at 499 (holding "[b]ecause the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership.").

The Energy Companies claim the District Court identified no provision of the CAA that could be interpreted to authorize application of state law to claims involving interstate or international GHG emissions. Pet. at 32. This once again mischaracterizes the Local

Governments' claims and is also incorrect. First, the Local Governments are not attempting to apply state law to interstate or international GHG emissions. Instead, the Local Governments focused their claims on the assertion that the Energy Companies' actions "have tortiously caused harm to *local communities* and the Energy Companies have misled the public about the dangers of fossil fuels." App. at 40 (emphasis added).

Second, the CAA includes two main savings clauses that expressly preserve state-law rights of action for in-state harms. App. at 51. The Supreme Court held the CWA's saving clause—which is the same as those in the CAA—"preserves actions to redress interstate water pollution under the law of the State in which the injury occurred." *Ouellette*, 479 U.S. at 481. These types of savings clauses do not "purport to preclude pre-emption of state law by other provisions of the Act." *Id*. at 493; *see* 42 U.S.C. § 7604(e). The CAA contains an additional savings clause stating that nothing in the CAA, other than explicitly enumerated exceptions, "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or

limitation respecting emissions of air pollutants or," most relevant to the present case, "(2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Given Congress's inclusion of this language in the CAA, the CAA does not preempt the Local Governments' claims.

CONCLUSION

Because neither federal common law nor the CAA preempts the Local Governments' claims, the District Court correctly denied the Energy Companies' motion to dismiss. For the reasons above, the District Court respectfully requests that this Court discharge the rule and remand the case for further proceedings.

Respectfully submitted this 9th day of October, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies that she duly served **BOULDER COUNTY DISTRICT COURT'S RESPONSE TO THE PETITION FOR RULE TO SHOW CAUSE UNDER C.A.R. 21** upon all counsel of record for the parties to Case No. 2024SA206 electronically via the Colorado Courts E-filing System on October 9, 2024.

/s/ Carmen Van Pelt