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Original Proceeding District Court, Boulder County, 2018CV30349	▲**COURT USE ONLY**▲
In re: **Plaintiffs:** BOARD OF 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.	Case No. 2024SA206
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REPLY BRIEF FOR PETITIONER/DEFENDANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32.

This brief complies with Rule 28(g):

- It contains 5,651 words.

I acknowledge that this brief may be stricken if it fails to comply with any of these Rules.

/s/ Colin G. Harris
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INTRODUCTION

Respondents assert unprecedented state-law tort claims for injuries allegedly caused by transboundary greenhouse-gas emissions. They allege that petitioner is liable in tort because it "sold fossil fuels at levels [it] knew would alter the climate," and "burning fossil fuel releases carbon dioxide that stays in the atmosphere for decades, trapping heat and altering the climate." Br. 6. Respondents assert those claims with respect not only to emissions in Colorado, but also to emissions discharged in every corner of the world.

The district court erred by allowing those claims to proceed under state law. The Federal Constitution has long precluded the application of state law to claims seeking redress for injuries allegedly caused by transboundary pollution. And here, respondents are plainly seeking such redress. When faced with similar climate-change claims, courts across the country have recognized that federal law precludes such claims from proceeding under state law. *See*, *e.g.*, *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021); *State ex rel. Jennings* v. *BP America, Inc.*, No. N20C-09-097, 2024 WL 98888, at *8-*9 (Del. Super. Ct. Jan. 9, 2024); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 24-C-18-004219, 2024 WL 3678699, at *4-*7 (Md. Cir. Ct. July 10, 2024). Those courts have reached the same common-sense conclusion: "state law cannot be used to resolve claims seeking redress for

injuries caused by out of state pollution." *Baltimore*, 2024 WL 3678699, at *6. The same principle applies here, and the district court erred by holding otherwise.

Respondents build their brief around the premise that federal common law does not govern claims like the ones they have alleged. But in so doing, respondents misunderstand the nature of petitioner's argument. Whether federal common law currently governs claims related to interstate pollution or whether federal courts recognized the particular cause of action respondents are asserting here is beside the point. Instead, the fact that federal common law ever governed in this area at all confirms the background constitutional principles that have always precluded the application of state law and preclude respondents' claims now. Those background principles also explain why respondents are incorrect that an ordinary preemption analysis applies to determine whether their state-law claims can proceed in light of the Clean Air Act's displacement of the preexisting federal common law. That argument ignores that there is no presumption against preemption in areas beyond traditional state control, such as interstate and international emissions. Respondents are additionally wrong that claims for international emissions can proceed even if claims for interstate emissions cannot. That distinction makes little doctrinal or practical sense, and it contravenes the Constitution's allocation of foreign-policy decision-making to the federal government.

The district court erred by denying petitioner's motion to dismiss respondents' state-law claims as precluded by federal law. The order and rule to show cause should be made absolute, and the case remanded to the district court with instructions to dismiss respondents' complaint.

ARGUMENT

As petitioner has explained (Pet. 27-37), federal law precludes the application of state law to claims seeking redress for injuries allegedly caused by interstate and international greenhouse-gas emissions. Respondents, supported by the district court in its brief, offer three responses. *First*, they argue that federal common law never would have applied to the claims alleged here. *Second*, they argue that, even if federal common law would previously have governed their claims, the Clean Air Act has since displaced any such federal common law, allowing state law to apply. *Third*, they argue that, even if state law cannot apply to claims based on interstate emissions, it can apply to claims based on international emissions. Each of those arguments fails.

A. Federal Law Precludes State-Law Claims Seeking Redress For Injuries Allegedly Caused By Interstate Greenhouse-Gas Emissions

Respondents first argue that the federal common law of interstate air and water pollution would never have applied to claims like theirs and that there is no basis

to extend it to such claims. Those arguments are premised on a misunderstanding of petitioner's position and are incorrect on their own terms.

1. As the United States Supreme Court has long held, there are certain narrowly defined areas in which "our federal system does not permit the controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). In those inherently federal areas, "the Constitution implicitly forbids" States from "apply[ing] their own law." *Franchise Tax Board* v. *Hyatt*, 587 U.S. 230, 246 (2019). One established category of inherently federal claims is those seeking redress for injuries allegedly caused by interstate air and water pollution, including interstate greenhouse-gas emissions. *See American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 421-423 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*). In the area of interstate pollution, there is "an overriding federal interest in the need for a uniform rule of decision," and "basic interests of federalism" demand the application of federal law. *Milwaukee I*, 406 U.S. at 105 n.6.

The fact that federal common law formerly governed claims seeking redress for interstate pollution is important because it demonstrates that "the basic scheme of the Constitution," *American Electric Power*, 564 U.S. at 421, requires the application of federal law to such claims. In the absence of statutory law, the Supreme

Court has applied federal common law in areas where each State's "equal dignity and sovereignty" implies "certain constitutional limitations on the sovereignty of all of its sister States." *Franchise Tax Board*, 587 U.S. at 245 (citation and brackets omitted). Those limitations are "expressed in the very nature of our federal system" and are embedded in our "constitutional order." *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122, 154 (2023) (Alito, J., concurring). Federal common law has traditionally governed claims seeking redress for interstate pollution because the application of state law to those claims would contravene the constitutional structure. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91-92 (2d Cir. 2021); *Illinois* v. *City of Milwaukee*, 731 F.2d 403, 410-411 (7th Cir. 1984) (*Milwaukee III*). The fact that federal common law once governed claims for interstate pollution thus confirms that state law cannot apply in this area: "if federal common law exists, it is because state law cannot be used." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981).

Respondents' arguments that federal common law does not govern claims such as theirs (Br. 12-29) are thus largely beside the point. It matters not whether federal common law currently governs respondents' claims or whether federal courts recognized the precise cause of action they are asserting. Instead, the fact that

federal common law ever governed in this area demonstrates that the structure of the Federal Constitution precludes the application of state law in this context.

2. In any event, the displacement of state law in the area of interstate pollution is not nearly as limited as respondents suggest. Respondents repeatedly argue (Br. 14-17, 21-24, 26-27) that federal courts recognized federal-common-law causes of actions only for *States* to seek relief for interstate pollution. The district court's brief backs away from that argument (Br. 14 n.5), and rightly so. As the Supreme Court has explained, "it is not only the character of the parties that requires [courts] to apply federal law," but also the nature of the claims. *Milwaukee I*, 406 U.S. at 105 n.6. Accordingly, although the United States Supreme Court has noted that it has "not yet decided" whether "private citizens" or "political subdivisions" can "invoke the federal common law of nuisance to abate out-of-state pollution," the Court has never questioned that, if such a cause of action existed, federal law would govern it. *American Electric Power*, 564 U.S. at 422. And as respondents recognize (Br. 30-31), courts have applied federal common law to suits in which neither a State nor the federal government was a party. *See*, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 506-507 (1988); *Helfrich* v. *Blue Cross & Blue Shield Association*,

804 F.3d 1090, 1098-1100, 1104 (10th Cir. 2015); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 929 (5th Cir. 1997).[1]

Respondents themselves acknowledge (Br. 21-22) the constitutional principles that require the application of federal law in this context. But respondents draw an incorrect conclusion from those principles. In their view (Br. 22), the availability of a federal-common-law cause of action was necessary only because States needed the ability to "protect[]" themselves from out-of-state pollution. But as respondents admit, such protection was necessary precisely because "States could not impose their own pollution-control law on out-of-state sources." *Id.* In that way, federal law has always operated as both a "shield" and a "sword," Br. 23-24: it precludes the application of state law in a lawsuit concerning interstate pollution, and it previously provided an alternative remedy under federal common law. It is the constitutional principle of preclusion, not the availability of a federal-common-law cause of action, that prevents respondents from proceeding under state law.

3. Respondents and the district court argue (Resp. Br. 12, 14-15, 22-27; D. Ct. Br. 14) that federal common law is limited to suits for *abatement* of out-of-

[1] Respondents' reliance (Br. 2, 16, 23) on the Ninth Circuit's decision in *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (2012), is misguided. The Ninth Circuit declined to apply federal common law only because the Clean Air Act had displaced it. *See id.* at 858. Respondents cite arguments from the briefing in *Kivalina*, *see* Resp. Br. 2, 16, 23, but the Ninth Circuit did not endorse those arguments.

state emissions and not suits for *damages*. But as respondents recognize (Br. 25), the "obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012) (citation omitted). The United States Supreme Court has already declined to differentiate between forms of relief when determining the preemptive scope of the Clean Water Act, reasoning that a defendant subject to significant compensatory-damages awards "might be compelled to adopt different or additional means of pollution control." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 498 n.19 (1987); *see also Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 489 (2008). And regardless of the requested relief, most state-law causes of action are not purely compensatory; they also impose "affirmative duties" on parties. *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 480 (2013); *see Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 323-324 (2008); *cf.* Pet. App. 206 ("Plaintiffs seek remediation and/or abatement of the hazards discussed above by Defendants by any other practical means."). If state law were to impose liability for conduct that causes an increase in interstate emissions, state law would be regulating those emissions (whether directly or indirectly).

Respondents resist that conclusion, arguing that "[i]mposing liability on [d]efendants . . . would not prevent their continued production and sale of fossil fuels." Br. 10. That argument "ignores economic reality." *City of New York*, 993 F.3d at 92. Respondents' theory of liability—in their own words—is that petitioner "altered the climate by selling fossil fuels at levels they knew would bring numerous catastrophic injuries to Colorado." Br. 1; *see* Pet. 34 n.10. Indeed, respondents acknowledge that they are seeking to impose liability for "selling fossil fuels"; they say only that the liability is not "strict," and that defendants are at "fault" because of their alleged knowledge of climate change, their alleged statements concerning the state of climate science, and their alleged profit from "fossil fuel overuse." Br. 6-8. Respondents could not be clearer that they are seeking relief from petitioner because petitioner produces and markets a product that, when lawfully used, results in inter-state emissions that allegedly caused localized injuries.

If state law imposes liability on that basis, petitioner (and every other energy company doing business in Colorado) would need to reduce its production and sale of fossil fuels in order to avoid future liability. The intended consequence of re-spondents' action is to decrease the sale of fossil fuels and thereby reduce resulting greenhouse-gas emissions. That is a quintessential attempt to regulate emissions, just as regulation of the means of printing is regulation of the press. *See Minneapolis*

Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983). And it gives the lie to respondents' repeated suggestion that they are "not seeking to limit the production, sale or use of fossil fuels by anyone in Colorado or elsewhere." Br. 9 (internal quotation marks and citation omitted).[2]

The complaint is full of allegations illustrating that respondents' claims and requested relief are designed to reduce interstate and international greenhouse-gas emissions. For example, respondents fault petitioner for "continu[ing] fossil fuel activities in an unchecked manner" while allegedly knowing that greenhouse-gas emissions "had to be reduced" and that "the growth of fossil fuel use needed to be curtailed." Pet. App. 86, 160; *see also*, *e.g.*, Pet. App. 86, 159, 164, 171. And when assessing the preemptive force of federal law, courts look to the "gravamen" of the claims, not formal labels. *Kurns*, 565 U.S. at 634-635. It is the "substance, not the form, of [the] complaint" that matters. *City of Boulder* v. *Public Service Co.*, 420 P.3d 289, 294 (Colo. 2018). In light of the substance of the complaint and the nature of respondents' claims, any attempt by respondents to shift the focus of this case to

[2] Notably, despite suing petitioner for its production of fossil-fuel products, respondent Boulder County has received royalties pursuant to oil and gas leases on county property. *See Board of County Commissioners of Boulder County* v. *Crestone Peak Resources Operating LLC*, 538 P.3d 745, 748 (Colo. 2023).

defendants' marketing activities would "simply [be] a way to get in the back door what they cannot get in the front door." *Baltimore*, 2024 WL 3678699, at *5.

Respondents also rely on *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981), for the proposition that federal common law never applied in cases where private plaintiffs or political subdivisions were "seeking damages." Br. 15. In *Middlesex*, however, the Court concluded that it "need not decide" that question, because the Clean Water Act would have displaced any cause of action that existed. 453 U.S. at 21-22. Setting aside that the availability of a cause of action for damages under federal common law is irrelevant to the question before this Court, *see* pp. 4-6, *supra*, *Middlesex* does not support respondents even on respondents' own terms.

4. In *City of New York*, the Second Circuit rejected an effort to avoid the effect of federal law similar to respondents' efforts here. There, the City of New York sued various energy companies to seek redress for the alleged local effects of global climate change. 993 F.3d at 86. Like respondents here, the City insisted that its claims did not concern "the regulation of emissions" because it was seeking "damages rather than abatement," because "emissions [were] only a link in the causal chain of [its] damages," and because it was "not seeking to directly penalize emitters." *Id.* at 91 (internal quotation marks and citation omitted). The Second

Circuit rejected that argument. It held that "[a]rtful pleading [could not] transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.* "[A] substantial damages award like the one requested by the City," the court reasoned, "would effectively regulate the [p]roducers' behavior far beyond New York's borders." *Id.* at 92.

Here too, respondents' artful pleading cannot transform their claims into anything other than an attempt to reduce interstate and international greenhouse-gas emissions. *See* Pet. App. 205-207. Respondents cannot avoid federal law merely by moving their claims up "the causal chain" to avoid suing emitters "directly." *City of New York*, 993 F.3d at 91; *contra* Resp. Br. 24.

The district court declined to follow *City of New York* and instead compared this case to *City & County of Honolulu* v. *Sunoco LP*, 537 P.3d 1173 (Haw. 2023).[3] *See* Br. 15-17. In *Honolulu*, the court held that the claims at issue did not seek to regulate emissions, because the plaintiff had alleged that "the source of [its] alleged injury" was "[d]efendants' allegedly tortious marketing conduct, not pollution traveling from one state to another." 537 P.3d at 1201. That characterization of the case

[3] Two petitions for certiorari have been filed with the United States Supreme Court seeking review of the judgment in *Honolulu*, and the Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States on the petitions. *See* Nos. 23-947 & 23-952, 144 S. Ct. 2627 (June 10, 2024).

was plainly incorrect, because the plaintiffs' marketing-related claims sought damages for injuries allegedly caused by increased interstate and international greenhouse-gas emissions and their effect on the global climate. *See id*. at 1183-1184. But even so, the allegations in this case even more clearly seek relief for interstate emissions. As already explained, respondents assert that "selling fossil fuels" at levels that would "alter[] the climate" is itself tortious. Br. 1; *see* pp. 9-11, *supra*. This case is thus materially identical to *City of New York*, even accepting the distinction respondents seek to draw.

5. Respondents also note (Br. 18-20) that state tort law can sometimes govern out-of-state conduct. That is true as far as it goes, but it does not go very far. In areas of traditional state regulation, state law can govern out-of-state conduct where there is a sufficient connection between the State, the defendant, and the conduct at issue. *See*, *e.g.*, *Young* v. *Masci*, 289 U.S. 253, 258-259 (1933). But the United States Supreme Court has long exclusively applied federal law to "air and water in their ambient or interstate aspects." *American Electric Power*, 564 U.S. at 421 (internal quotation marks and citation omitted). And that makes good sense: unlike cases involving specific conduct directed into another State, rather than interstate air or water pollution, *see* Resp. Br. 19 n.6, air and water pollution can cause harm in a neighboring State merely through the ordinary forces of nature (such as

wind and the flow of water). *Cf. Texas* v. *Pankey*, 441 F.2d 236, 237-238, 241-242 (10th Cir. 1971) (cited with approval in *Milwaukee I*, 406 U.S. at 99-100; holding that federal common law governed a claim seeking redress for harms in Texas caused by pesticide sprayed in New Mexico and carried by rainfall into a river flowing across state lines). Even if state law can apply to *some* conduct beyond state borders, it cannot apply to the inherently federal area of interstate air pollution.

Respondents insist that, "if [d]efendants are liable, sister States will retain the same policy discretion to permit fossil fuel production and sales," because "[d]etermining liability in this case does not require an assessment of what a reasonable level of economy-wide carbon dioxide emissions should be." Br. 28, 33 n.8. That argument glosses over the fact that petitioner is alleged to have acted tortiously by "producing and selling fossil fuels *in amounts* that cause harm." Br. 32 (emphasis added). As the district court acknowledged, resolution of respondents' nuisance claim will require "a balancing of the social utility of the action with the harm caused by the action" in order to "determine whether it is reasonable for [petitioner] to cause harm." Pet. App. 55, 70. If a Colorado court or jury determines that petitioner has produced and sold fossil fuels worldwide in unreasonably large amounts, petitioner could avoid future liability in Colorado only by reducing the amount of fuels it produces and sells everywhere.

Such a result would constitute Colorado effectively "legislat[ing] for, [and] impos[ing] its own policy upon," other States—which the Federal Constitution prohibits. *Kansas* v. *Colorado*, 206 U.S. 46, 95 (1907); *see also BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 571-573 (1996). That explains why nineteen States are currently suing five other States for "asserting the power to dictate the future of the American energy industry . . . by imposing ruinous liability and coercive remedies on energy companies through state tort actions governed by state law in state court." Bill of Complaint 1-2, *Alabama* v. *California*, Orig. No. 158 (U.S. May 22, 2024).

To be sure, States have some authority to address air pollution, because they can regulate *in-state* emissions. *See* Resp. Br. 18; D. Ct. Br. 9, 21. But none of the cases respondents and the district court cite permit the regulation of *interstate* emissions. *See Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 441-442 (1960); *Rocky Mountain Farmers Union* v. *Corey*, 913 F.3d 940, 953 (9th Cir. 2019); *American Fuel & Petrochemical Manufacturers* v. *O'Keeffe*, 903 F.3d 903, 907-908 (9th Cir. 2018); *Merrick* v. *Diageo Americas Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015). Petitioners' position would thus not "wipe out the traditional authority of States" to provide a remedy for "in-State injuries," Br. 28; it would allow lawsuits to proceed where they are properly limited to in-state emissions.

The Supreme Court's decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), is also inapposite. There, the field of nuclear safety was preempted by federal statute, not precluded by the Federal Constitution, and Congress had intended to preserve state-law damages claims for injuries caused by nuclear radiation. *Id.* at 249, 256; *see* Resp. Br. 27. *Silkwood* thus says nothing about the scope of state law where the Constitution precludes its application.

6. Respondents and the district court cite several cases (Resp. Br. 15, 32-33, 37-38; D. Ct. Br. 16-17) in which federal courts have held that they lack federal subject-matter jurisdiction over claims analogous to respondents' claims. Those cases are irrelevant, however, because they turned on the rule that a federal defense is insufficient to establish federal subject-matter jurisdiction. *See*, *e.g.*, *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1261 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023). By contrast, a federal-preemption defense is sufficient to support dismissal on the merits. *See*, *e.g.*, *City of New York*, 993 F.3d at 93-94. Indeed, in *Baltimore*, *supra*, the state trial court dismissed the plaintiff's climate-change claims on federal-preemption grounds after the Fourth Circuit affirmed the federal district court's remand of the case to state court due to lack of jurisdiction. *See* 2024 WL 3678699, at *6. The same result is warranted here.

B. The Clean Air Act Does Not Authorize State-Law Claims For Relief From Interstate Emissions

Respondents separately argue (Br. 35-42) that, even if federal common law previously would have governed their claims, the Clean Air Act has since displaced federal common law and allowed state law to govern. *See also* D. Ct. Br. 12-14. In light of the federal structure of our constitutional system, however, the Clean Air Act's displacement of federal common law does not allow state law to operate. That is because, in areas traditionally governed by federal law, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers," *United States* v. *Locke*, 529 U.S. 89, 108 (2000), and "no presumption against pre-emption obtains," *Buckman Co.* v. *Respondents' Legal Committee*, 531 U.S. 341, 348 (2001) (citation omitted). *See also Boyle*, 487 U.S. at 507-508.

The district court therefore erred in resting its analysis on the premise that "[t]here is a presumption that state laws are not preempted." Pet. App. 46. In areas traditionally governed by federal law, the availability of a state-law cause of action depends on whether Congress has permissibly "authorize[d] resort to state law." *Milwaukee III*, 731 F.2d at 410-411; *see Ouellette*, 479 U.S. at 489, 491. Congress has not, through the Clean Air Act, authorized state suits for claims based on interstate or international greenhouse-gas emissions. *See* Pet. 32-33.

Respondents' and the district court's front-line response continues to evince a misunderstanding of petitioner's arguments. Petitioner's position is not that federal common law is "dead" and yet "alive enough to preempt." D. Ct. Br. 13; *see* Resp. Br. 11, 38, 45. Petitioner acknowledges that the federal common law that previously governed claims seeking redress for transboundary pollution has been displaced by the Clean Air Act. But the constitutional principles that necessitated federal common law in the first instance preclude the application of state law. That also explains why respondents are incorrect when they say that "preemption must come from Congress," Br. 11; as even the authorities cited by respondents recognize, the Federal Constitution itself can preclude state law. *See* Br. 12 (citing *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. 761, 767 (2019)).

Turning to the case law, respondents argue (Br. 35-39, 40, 42) that the United States Supreme Court's decisions in *Ouellette* and *American Electric Power* undermine petitioner's position. That is exactly backwards. In *Ouellette*, the Court held that, after the displacement of federal common law by the Clean Water Act, "the only state suits that remain available are those specifically preserved by the Act." 479 U.S. at 492. The Court then proceeded to hold that, in light of the Clean Water Act's "pervasive regulation" and "the fact that the control of interstate pollution is primarily a matter of federal law," the Act "precludes a court from applying the law

of an affected State against an out-of-state source" of pollution. *Id*. at 492, 494 (citation omitted). That is petitioners' position here with respect to the Clean Air Act. *See* Pet. 32.

As for *American Electric Power*: the Supreme Court stated that, in light of the Clean Air Act's displacement of federal common law, "the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act." 564 U.S. at 429. And in remanding the case for consideration of the remaining state-law claims, the Court cited *Ouellette* for the proposition that "the Clean Water Act does not preclude aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id.* (internal quotation marks and citation omitted). That is also consistent with petitioner's position. *See* Pet. 32.

Respondents insist that petitioner's argument "runs counter to every U.S. Supreme Court preemption case" because it does not apply a presumption in favor of state law. Resp. Br. 39-40. But that presumption applies only in fields that are "traditionally occupied" by the States. *Buckman*, 531 U.S. at 347. "[A]n assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence"; instead, the proper question is "whether the local laws in question are consistent with the federal statutory structure." *Locke*, 529 U.S. at 108. As a result, in "an area of uniquely federal interest,"

the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Boyle*, 487 U.S. at 507 (internal quotation marks and citation omitted). Respondents' repeated invocations of *Virginia Uranium*, *supra*, and *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), are thus misplaced: both cases involved state regulation in areas that States traditionally occupied. *See*, *e.g.*, Resp. Br. 31-32, 39, 43-44; D. Ct. Br. 22.

Respondents further contend, echoing the district court, that petitioner's position would effectively "immunize" it from liability. Resp. Br. 33; Pet. App. 42; *accord* D. Ct. Br. 13-14. That is incorrect on multiple fronts. To begin with, state law is permitted to regulate *in-state* emissions; the problem with respondents' claims is that they seek to impose liability for petitioner's contribution to, and injury allegedly caused by, *worldwide* greenhouse-gas emissions. *See* pp. 9-11, *supra*. In addition, state law can regulate false or misleading commercial speech consistent with the First Amendment, as long as that regulation does not serve as an impermissible "back door" for the regulation of interstate and international emissions. *See Baltimore*, 2024 WL 3678699, at *5. And of course, Congress and the federal Environmental Protection Agency are free to act on a national level. In any event,

respondents' concerns about under-regulation cannot override the basic scheme of the Federal Constitution.

C. Federal Law Precludes State-Law Claims Seeking Redress For International Emissions

Respondents do not contest that their claims implicate conduct outside of the United States. *See* Br. 34-35. And as with respondents' claims seeking redress for interstate emissions, federal law similarly precludes claims seeking redress for international emissions. As the Supreme Court has explained, state law must "give way" to federal law where state law "impair[s] the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968). That is because "the Constitution's allocation of the foreign relations power to the National Government" is animated by a "concern for uniformity in this country's dealings with foreign nations." *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted). As several courts have recognized, claims seeking redress for international greenhouse-gas emissions implicate serious questions of foreign affairs and thus cannot proceed under state law. *See City of New York*, 993 F.3d at 95 n.7; *see also Baltimore*, 2024 WL 3678699, at *7; *Delaware*, 2024 WL 98888, at *9. The district court erred by declining to dismiss these claims.

Respondents argue (Br. 16) that the Second Circuit's decision in *City of New York* supports their position on international emissions, because the court there

declined to recognize a federal-common-law cause of action for redress for international emissions. Respondents thus conclude that "there is no federal common law of international pollution that could preempt state law." *Id.* But respondents neglect to mention that the Second Circuit also declined to allow the plaintiff to proceed under state law with respect to international emissions. *See* 993 F.3d at 95 n.7.

The Second Circuit's reasoning in declining to recognize a federal-common-law cause of action also demonstrates precisely why state law cannot govern international emissions. The court cited a "need for judicial caution in the face of delicate foreign policy considerations," concluding that a finding of liability for international emissions would "affect the price and production of fossil fuels abroad"; "bypass the various diplomatic channels that the United States uses to address this issue"; and "sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *Id.* at 103. More concretely, the Second Circuit noted that the availability of state-law claims for international emissions would undermine "the United States' longstanding position in international climate-change negotiations" of opposing "the establishment of liability and compensation schemes at the international level." *Id.* at 103 n.11 (citation omitted). It would also be "out of place" with the "comprehensive scheme designed to address greenhouse-gas emissions—the Clean Air Act—which [Congress] declined

to extend beyond our borders." *Id.* at 103. And it would be inconsistent with the cooperative scheme of reciprocal international legislation that the Clean Air Act contemplates to redress foreign emissions through established diplomatic mechanisms. *Id.* (citing 42 U.S.C. § 7415(c)). Respondents' alternative scheme of emissions regulation by state tort litigation is flatly inconsistent with that approach.

Respondents' argument that foreign-affairs preemption does not apply here thus misses the mark. Whether viewed as a matter of field or conflict preemption, a state law is preempted by the federal government's foreign-affairs power when the law has "more than some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434 (internal quotation marks omitted); *see Garamendi*, 539 U.S. at 419-420. That remains so "even in the absence of any treaty, federal statute, or executive order," *Movsesian* v. *Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012), such as where a state law gives the President "less to offer and less economic and diplomatic leverage as a consequence," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 377 (2000), thus "adversely affect[ing] the power of the central government to deal with [the] problem[]," *Zschernig*, 389 U.S. at 441. Here, imposing liability for greenhouse-gas emissions released abroad would conflict with United States foreign policies that seek to create a cooperative scheme to

resolve disputes over international greenhouse-gas emissions through diplomacy, rather than through newly created schemes of liability and compensation.

The cases cited by respondents do not support its position. For example, the United States Supreme Court's decision in *Garamendi* makes clear that the preemptive force of the federal government's exclusive foreign-affairs power is at its zenith where, as here, there is no traditional state responsibility for regulating the underlying conduct. *See* 539 U.S. at 419 n.11; Resp. Br. 48. And even when a State does regulate in an area of its traditional responsibility, the intrusion into the government's foreign-affairs power is assessed in light of "the strength of the state interest, judged by the standards of traditional practice." *Garamendi*, 539 U.S. at 420. It goes without saying that regulating worldwide greenhouse-gas emissions is not a traditional practice for any State. The United States Supreme Court's decision in *Medellín* v. *Texas*, 552 U.S. 491 (2008), is also inapposite; it addresses the circumstances under which a non-self-executing treaty has the force of domestic law so as to preempt a state procedural rule "deep into the heart of the State's police power." *Id.* at 523-532; *see* Resp. Br. 48. And in *Cassirer* v. *Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022), the Court did not apply federal common law because the Court interpreted the relevant statute to require the application of state law. *Id.* at 114-115. That is not the case here.

If litigated under state law, respondents' claims related to international emissions would "not only risk jeopardizing our nation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." *City of New York*, 993 F.3d at 103. Such claims should be dismissed along with the claims seeking redress for interstate emissions.

CONCLUSION

The order and rule to show cause should be made absolute, and the case remanded to the district court with instructions to dismiss respondents' complaint.

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Respectfully submitted,

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