No. 25-170

IN THE

Supreme Court of the United States

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

Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has statutory jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

2. Whether this Court has Article III jurisdiction to review the interlocutory decision of the Colorado Supreme Court.

3. Whether the Clean Air Act impliedly preempts the state law tort claims advanced in this case.

4. Whether the structure of the Constitution impliedly preempts the state law tort claims advanced in this case without regard to whether Congress intended to preempt those claims.

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BRIEF IN OPPOSITION

Petitioners ask this Court to grant certiorari to review the interlocutory decision of a state supreme court in order to consider the latest version of their ever-evolving and mutually inconsistent preemption theories. At one time, petitioners insisted that respondents' state-law claims were unavailable because they were really federal common law claims in disguise and had been eliminated when Congress displaced that federal common law with the Clean Air Act, 42 U.S.C. § 7401-7626. Then they argued that even if the suit really brought state law claims, those claims were preempted by federal common law, even though that common law had been displaced by a federal statute. Now, their principal argument is that none of this matters because respondents' claims are impliedly preempted by the "structure of our constitutional system" itself. Pet. 2. No appellate court has accepted that argument. And this Court denied review of that theory earlier this year at the urging of the United States. *See Sunoco LP v. City & County of Honolulu*, 145 S. Ct. 1111 (2025) (No. 23-947); *Shell PLC v. City & County of Honolulu*, 145 S. Ct. 1111 (2025) (No. 23-952). The Court should do the same here.

As in the recent *Honolulu* case, granting interlocutory review would require the Court to wade into a thicket of preliminary questions that promise nothing but rabbit holes and dead ends. In addition to the same statutory jurisdictional problem presented in *Honolulu*, the Court would confront complex questions of Article III jurisdiction that left the Court deadlocked in one prior case and caused another to be dismissed as improvidently granted. *See Am. Elec.*

Power Co., Inc. v. Connecticut, 564 U.S. 410, 420 (2011); *Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens J., concurring in dismissal).

On the merits, petitioners' novel constitutional theory would vest judges—not legislators—with broad authority to decide in which policy areas "federal law must govern," and which subjects the states can be trusted to address. Pet. 5 (citation omitted). That would invert our constitutional order. There is no constitutional bar to states addressing in-state harms caused by out-of-state conduct, be it the negligent design of an automobile or sale of asbestos. While federal courts may sometimes decide that certain subjects are better addressed by a uniform rule of federal common law, that policy decision has always been subject to displacement by Congress. And when, as here, Congress retakes the legislative reins, preemption is a question of congressional intent, discerned through this Court's ordinary preemption doctrine.

There is no circuit conflict over petitioners' theory of preemption by "constitutional structure." Instead, petitioners attempt to get their foot in the door to press that novel theory by pointing to an alleged conflict with the Second Circuit over a *different* question—*i.e.*, whether federal common law itself, although now displaced by statute, continues to preempt certain claims relating to climate alteration unless Congress expressly revives state law. *See* Pet. 13 (citing *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021)). Petitioners barely attempt to defend the Second Circuit rule, which is both wrong and irreconcilable with petitioners' claim that "our federal system does not permit" such controversies "to be

resolved under state law." Pet. 4-5 (citation omitted). The Court should reject petitioners' attempt to leverage an alleged conflict on a different preemption question to force a decision on a constitutional theory they have yet to convince any appellate court to adopt.

STATEMENT OF THE CASE

1. Respondents, a Colorado county and municipality, brought this action in state court, seeking to require petitioners to share a portion of the financial burden their communities must bear in coping with an altered climate brought about in part by petitioners' tortious conduct. *See* Pet. App. 2a-3a. As relevant here, the complaint includes claims for public and private nuisance, unjust enrichment, trespass, and civil conspiracy. *See id*. 1a-2a. Those claims are based on two distinct theories of liability. First, respondents allege that "through their advertising, [petitioners] have for decades intentionally misled the public about the impacts of climate change and the role that [petitioners'] fossil fuel products have played in exacerbating those impacts." *Id*. 3a. Second, respondents further allege that petitioners "*knowingly* caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change." *Id*. 2a. Respondents do not "seek to enjoin any oil and gas operations or sales" or "seek to enforce emissions controls of any kind." *Id*. 4a. Instead, they seek damages for the in-state harm caused by petitioners' torts.

Petitioners initially attempted to remove the case to federal court, insisting that the asserted state-law torts "arise under federal common law." *Bd. of Cnty.*

Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.), Inc., 25 F.4th 1238, 1254 (10th Cir. 2022). The Tenth Circuit rejected that theory, remanding the case to state court. *See id*. at 1246. Petitioners sought review in this Court, arguing again that "federal common law necessarily and exclusively governs" respondents' claims. Pet. 23-24, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550 (2022). The Court denied the petition after calling for the views of the United States, *see* 143 S. Ct. 78 (2022) (No. 21-1550), with Justice Kavanaugh dissenting from the denial of certiorari and Justice Alito recusing, *see* 143 S. Ct. 1795 (2023) (No. 21-1550).

2. Back in state court, petitioners moved to dismiss, raising a host of state and federal defenses.

After rejecting several defendants' personal jurisdiction objections, *see* Pet. App. 56a-87a, the state trial court considered whether respondents' claims were preempted. In line with their removal theory, petitioners argued that respondents' "claims are based on federal common law" and "must be dismissed" because that federal common law was "displaced by federal legislation." *Id*. 92a. They also argued that even if respondents brought truly state-law claims, "federal common law survives" its displacement by the Clean Air Act "with enough force to preempt state common law claims involving interstate air pollution." *Id*. 95a. The trial court rejected both assertions. *See id*. 92a-99a.

The trial court was also unpersuaded by petitioners' argument that "the displacement of federal common law shifts the burden to the party contesting preemption," such that "the test is whether the [Clean Air Act] specifically preserves the

particular type of state law claim at issue." *Id*. 100a (citation omitted). Instead, the trial court applied this Court's traditional preemption analysis and concluded that the Act did not preempt respondents' claims. *Id*. 99a-108a.

The trial court then rejected petitioners' defenses under the "federal foreign affairs power" (*id*. 108a-09a), "separation of powers" (*id*. 109a-10a), the Commerce Clause (*id*. 111a-12a), the Due Process Clause (*id*. 112a-13a), and the First Amendment (*id*. 113a-15a).

3. Petitioner Exxon Mobil petitioned the Colorado Supreme Court for discretionary interlocutory review of the district court's rejection of its personal jurisdiction and preemption defenses. *See* Exxon Pet. 5. The court granted review of the preemption question and affirmed. *See* Pet. App. 1a-2a, 7a-8a.

Like the district court, the Colorado Supreme Court rejected petitioners' contention that respondents' claims were preempted because they "assert what were formerly federal common law claims." Pet. App. 16a. The court further disagreed with petitioner's contention that "federal common law . . . continue[d] to operate to bar" respondents' claims even after displacement by the Clean Air Act. *Ibid*.

The Colorado Supreme Court then turned aside petitioners' argument that "state law claims previously preempted by federal common law may proceed only to the extent authorized by federal statute." *Id*. 18a-20a. Instead, like the trial court, the Colorado Supreme Court applied this Court's established preemption rules to conclude that respondents' suit was not field or conflict preempted

by the Clean Air Act. *See id*. 20a-22a. Among other things, the Colorado Supreme Court recognized that respondents' suit was not "an attempt to regulate [greenhouse gas] emissions," but rather turned on petitioners' deceptive conduct and "upstream production activities," conduct the federal statute "does not address." *Id*. 20a-21a.

Finally, petitioners' foreign affairs defense failed because they did not "identify any express foreign policy of the federal government that conflicts with state tort law" or explain how respondents' "claims pose an obstacle to our federal government's dealings with any foreign nation." *Id*. 22a (citation omitted); *see id*. 22a-24a.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to decide the same question it declined to consider earlier this year in *Honolulu*. There is no reason for a different result now. As in *Honolulu*, multiple difficult jurisdictional questions stand between this Court and petitioners' Question Presented. Nor is there any circuit conflict on that question that warrants this Court's immediate attention. Indeed, petitioners' principal merits argument has not been accepted by any appellate court. Moreover, this case presents a poor vehicle for considering petitioners' constantly evolving theories of preemption. And none of those theories has merit in any event.

I. This Court Lacks Statutory Jurisdiction To Review The Colorado Supreme Court's Interlocutory Decision.

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review only the "[f]inal judgments" of

state courts. From the outset, this Court has understood that phrase to encompass only judgments that "terminate the litigation between the parties on the merits of the case," not decisions that merely resolve a federal question in an interlocutory appeal. *Bostwick v. Brinkerhoff*, 106 U.S. 3, 3 (1882). The Colorado Supreme Court's decision does not satisfy this requirement.

A. The Fourth *Cox* Exception Does Not Provide Jurisdiction.

Petitioners do not claim that the judgment here is "final" in the traditional sense. Instead, they invoke the fourth exception to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See* Pet. 32. That exception applies when: (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83.

1. In *Honolulu*, the United States explained why none of these requirements is met in a case like this. *See* U.S. *Honolulu* Br. 8-11. Although the United States' present brief backtracks on other positions the Government took in *Honolulu*, the brief notably does not support petitioner's *Cox* arguments. *See* U.S. Br. 12. That makes sense: it is clear that none of the requirements for the fourth *Cox* exception is met here.

First, this is not a case in which further proceedings present only the possibility that petitioners "might prevail on the merits on *nonfederal* grounds." *Cox,* 420 U.S. at 482 (emphasis added). As the United States explained in *Honolulu*, "this Court 'observed in *Cox* that in most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved.'" U.S. *Honolulu* Br. 9 (quoting *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (per curiam)).

Here, as in *Honolulu*, petitioners have raised a host of other federal defenses on which they could yet prevail. *See supra* p. 5. Granting immediate review of one of several federal questions in the case risks the kind of piecemeal appeals the final judgment rule was enacted to avoid.

Second, "reversal of the state court on the federal issue" would not be "preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-83. In *Honolulu*, the United States explained that "[e]ven under [the defendants'] own theory," the plaintiffs' claims would be preempted "only to the extent those claims 'seek to apply state law extraterritorially to regulate transboundary pollution.'" U.S. Br. 9 (quoting *Honolulu* Cert. Reply Br. 1). Accordingly, even if the *Honolulu* defendants had prevailed in this Court, the plaintiffs would not have been "precluded from pursuing claims involving in-state deceptive practices or in-state pollution." *Ibid*.

Again, the same is true here. Petitioners argue that the Clean Air Act and the Constitution prohibit

only claims for "injuries allegedly caused by pollution emanating from outside the State." Pet. 2. Even if accepted, that argument would not prevent this suit from continuing on the basis of deception, or for harms from in-state conduct. *Cf. State ex rel. Jennings v. BP Am., Inc.*, No. N20C-09-097, 2024 WL 98888, at *9, *11 (Del. Super. Ct. Jan. 9, 2024) (dismissing as preempted claims based on injuries arising from out-of-state emissions, but permitting claims for injuries "resulting from air pollution originating from sources in Delaware").

Third, denying immediate review would not "seriously erode federal policy." *Cox*, 420 U.S. at 483. The question is not whether federal policy would be eroded by a *final judgment* in respondents' favor; it is whether "a refusal *immediately to review* the state court decision" would have that effect, *ibid*. (emphasis added), as when a state court refuses to enforce an arbitration agreement, *see Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Here, petitioners identify no federal policy that is violated by simply requiring them to await final judgment to seek this Court's review of their preemption arguments, assuming the question even matters at that point. *See* U.S. *Honolulu* Br. 10-11.

2. Even if it applied, the fourth *Cox* exception should be overruled. *Cox* does not pretend that cases falling within the fourth exception can plausibly be described as "final" within any normal or historic sense of the term. Instead, *Cox* pointed to the "pragmatic approach" the Court had sometimes taken to construing the limits on its jurisdiction, mostly in cases from the 1960s and 1970s. 420 U.S. at 486; *see id*. at 483-84. But the fourth exception is "pragmatic"

only in the sense of providing policy justifications for simply refusing to adhere to the statute's plain text and historic meaning. *See id.* at 484-85 (explaining that exception applied where "it would be intolerable to leave unanswered" the question addressed in a non-final state court decision). In doing so, the exception sweeps aside the principles of federalism and judicial restraint at the core of Congress's final judgment rule. *See id*. at 502-05 (Rehnquist, J., dissenting). Rather than extend the exception to apply here, the Court should repudiate it.

B. The Court Does Not Have Statutory Jurisdiction Under *Atlantic Richfield*.

Having declined to support petitioner's *Cox* theory, the United States advances an argument that petitioners in turn forgo: that the decision below was final because it supposedly resolved a "self-contained case, not an interlocutory appeal." U.S. Br. 10 (quoting *Atl. Richfield Co. v. Christian*, 590 U.S. 1, 12 (2020)). That argument has no merit either.

In *Atlantic Richfield*, this Court found jurisdiction to review a Montana Supreme Court decision issued on a "writ of supervisory control" because Montana law treats such cases as "self-contained" original proceedings, not interlocutory appeals. 590 U.S. at 12 (citing *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 385 n.7 (1976) (per curiam)). That conclusion rested on Montana's constitution, which grants the supreme court original jurisdiction over such writs. *See Fisher*, 424 U.S. at 385 n.7.

Colorado is different. In that state, the supreme court's supervisory control over the lower courts is conferred by Section 2 of Article VI of the Colorado constitution. *See* Colo. Const. art. VI, § 2(1). Section

2 is entitled "Appellate jurisdiction" and provides that the "supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only . . . and shall have a general superintending control over all inferior courts." *Ibid*. The Colorado Supreme Court's original jurisdiction, in contrast, is created in Section 3 (entitled "Original jurisdiction") and is limited to issuing certain prerogative writs that petitioners neither sought nor would qualify for in this case. *See id*. art. VI, § 3; Exxon Colo. Pet. 5-6; Colo. App. R. 21(e)(1); U.S. Br. 7, 11 (recognizing state court was exercising "general superintending authority" in this case).[1]

To be sure, the Colorado Supreme Court's opinion referred to exercising "original jurisdiction under CAR 21." Pet. App. 7a-8a. That shorthand is consistent

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[1] Section 3 grants the Colorado Supreme Court original jurisdiction to "issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court." Colo. Const. art. 6, § 3. Early on, the Colorado Supreme Court held that these writs are not available for general supervision of lower courts, but rather only in "cases involv[ing] questions of *publici juris*," such as "where the interest of the state at large is directly involved; where its sovereignty is violated, or the liberty of its citizens menaced; where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral, question." *Wheeler v. N. Colo. Irrigation Co*., 11 P. 103, 105 (Colo. 1886); *see also id*. at 104 (explaining that original jurisdiction need not extend further because the "appellate jurisdiction and the superintending control . . . carries with it authority to issue all writs appropriately connected with the proper performance of the duties imposed"); *Leonhart v. Dist. Ct. of 13th Jud. Dist*., 329 P.2d 781, 783 (Colo. 1958) (discussing limitations on original writs of prohibition).

with the title of that Rule, which is an artifact of the time of its enactment, when the Rule covered only original jurisdiction cases. *See* Colo. App. R. 21 (1998). But the current rule now also governs "the exercise of the supreme court's general superintending authority over all courts as provided in Section 2 of Article VI of the Colorado Constitution," Colo. App. R. 21 (2025), which, as discussed, defines the court's appellate jurisdiction. Particularly because the precise nature of the Colorado Supreme Court's jurisdiction made no difference in this case (it almost never does), the label cannot be given controlling significance for purposes of this Court's jurisdiction. *See In re Summers*, 325 U.S. 561, 567 (1945).

This proceeding also bears other markings of a discretionary, interlocutory appeal. The Colorado Supreme Court reviewed denial of a motion to dismiss, *see* Pet. App. 1a-2a, a quintessential question for interlocutory appeal. The court further decided that question de novo, without the heightened standard typical in original litigation seeking collateral writs. *See id*. 8a. The decision furthermore ended in a "remand . . . to the district court for further proceedings consistent with this opinion," as one would expect from any other discretionary interlocutory appeal—a "remand" makes no sense if the proceeding were distinct from the underlying litigation. *Id*. 24a.

The Colorado Supreme Court also treats Rule 21 proceedings as interlocutory appeals in other settings. *See People ex rel. Gallagher v. Dist. Ct. for Cnty. of Arapahoe*, 933 P.2d 583, 592 (Colo. 1997) (en banc) (holding Rule 21 proceedings "qualify for interlocutory

appeal treatment" under the state speedy trial act, which excludes "[d]elay occasioned by an interlocutory appeal brought in good faith") (citing Colo. Rev. Stat. § 18-1-405(6)(b)); *see also, e.g.*, *People v. Cortes-Gonzalez*, 506 P.3d 835, 839 (Colo. 2022) (referring to Rule 21 proceeding as "interlocutory appeal"); *Ronquillo v. EcoClean Home Servs., Inc.*, 500 P.3d 1130, 1132 (Colo. 2021) (same); *In re 2015-2016 Jefferson Cty. Grand Jury*, 410 P.3d 53, 57 n.4 (Colo. 2018) (same).

II. Even If The Judgment Here Were Final, The Court Could Not Reach The Merits Without First Resolving Complex Questions Of Article III Jurisdiction.

Even if this Court found that it had statutory jurisdiction under *Cox* or *Atlantic Richfield*, it would still be confronted with the complicated question whether it has Article III jurisdiction to consider this case at this time.

This Court, of course, may consider only cases involving an Article III case or controversy. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 611 (1989). Article III jurisdiction to review the decision in this case would exist only if (1) respondents would have had Article III standing to bring this suit in federal court in the first instance, or (2) the Colorado Supreme Court's refusal to dismiss the case inflicted an Article III injury on petitioners. *See id.* at 612. Granting the petition would require the Court to decide one or both questions, neither of which is straightforward.

In *American Electric Power Co., Inc. v. Connecticut* (*AEP*), 564 U.S. 410, 420 (2011), this Court deadlocked over whether the federal courts have Article III jurisdiction to consider a suit for public

nuisance arising from climate-change injuries. *Id*. at 415, 420. The Court explained that "[f]our members of the Court . . . would hold that none of the plaintiffs have Article III standing," while four others would have found constitutional standing established. *AEP*, 564 U.S. at 420.[2]

Any Justice who concluded that respondents could not have brought this case in federal court would then have to decide whether there is nonetheless Article III jurisdiction to review the decision in this case based on some injury inflicted on petitioners by the Colorado Supreme Court's refusal to order the case dismissed on the pleadings. This Court addressed that theory of jurisdiction in *ASARCO*, where it held that a state supreme court's "final judgment altering tangible legal rights" can inflict an Article III injury sufficient to support review in this Court even if federal courts could not have entertained the suit initially. 490 U.S. at 619.

That theory, however, does not apply in this case. The Colorado Supreme Court merely declined to reverse denial of a motion to dismiss—a decision that had no more effect on petitioners' "tangible legal rights" than if the court had denied interlocutory review altogether. Whether petitioners will ever suffer any alteration of their "tangible legal rights" is entirely speculative at this point. *See supra* p. 5

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[2] Petitioners did not ask the Colorado Supreme Court to rule on respondents' standing under state law, which is more capacious than Article III in any event, *see* Pet. App. 115a ("Colorado plaintiffs benefit from relatively broad individual standing.") (citation omitted).

(describing petitioners' multiple unreviewed alternative defenses).

Importantly, this Article III question is independent of whether the judgment is "final" within the meaning of 28 U.S.C. § 1257(a). For example, even if this Court held that the Colorado Supreme Court's decision finally resolved a self-contained proceeding under *Atlantic Richfield*, there would still be no argument that the final judgment in that collateral proceeding altered petitioners' legal rights sufficient to create an Article III injury for this Court to redress.

The Court confronted a similar circumstance in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). There, a state supreme court refused to dismiss state law claims on federal grounds, then remanded for further proceedings. *Id*. at 657 (Stevens, J., concurring). After this Court granted certiorari, much of the briefing and argument centered on whether the Court had jurisdiction to reach the merits, given that the suit was brought by plaintiffs with only a marginal interest in the subject matter, using a California "private attorney general" statute. *See id.* at 661 (Stevens, J., concurring). After oral argument, the Court dismissed the writ of certiorari as improvidently granted. *Id*. at 655. Justice Stevens explained that the plaintiff would not have had Article III standing to bring the suit in federal court, given that he "failed to allege any injury to himself." *Id*. at 661. Moreover, "[u]nlike *ASARCO*, in which the state-court proceedings ended in a declaratory judgment invalidating a state law, no 'final judgment altering tangible legal rights' ha[d] been entered." *Id*. at 662. "Rather, the California Supreme Court merely held that respondent's complaint was sufficient to survive Nike's demurrer

and to allow the case to go forward." *Ibid*. "To apply *ASARCO* to this case," Justice Stevens explained, "would effect a drastic expansion of *ASARCO*'s reasoning, extending it to cover an interlocutory ruling that merely allows a trial to proceed." *Ibid*. (footnote omitted).

Any Justice who concluded that this case could not have been brought in an Article III court would have to decide whether to embrace the extension of *ASARCO* Justice Stevens rejected, and the Court avoided, in *Nike*. And unless a majority of the Court found *both* Article III jurisdiction *and* statutory jurisdiction to review the decision below, the Court would not reach petitioners' Question Presented.[3]

* * *

Even if the Court believed that the Question Presented might warrant review in an appropriate case, there is no need to confront these vexing jurisdictional issues to do so. As petitioners emphasize, a number of similar cases are working their way through the state and federal systems. *See* Pet. 7. For example, the Supreme Court of Maryland recently heard argument in an appeal from dismissal of a similar suit. *See* Pet. 20 (citing *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 11, Sept. Term 2025 (Md.)). Should that court affirm the dismissal, any resulting petition would arise from an

[3] Any recusals in this case could create the possibility of the Court evenly dividing on jurisdiction, as in *AEP*. In that case, the Court was nonetheless able to proceed to the merits because its even division resulted in affirmance of the lower court's holding that there was Article III jurisdiction. 564 U.S. at 420. But here, the Colorado Supreme Court made no Article III determination this Court could affirm. *See supra* n.2.

indisputably final judgment, removing at least that complicating factor from the case. Moreover, the United States itself is presently litigating the same preemption theories in affirmative cases against Hawaii and Michigan in federal court. *See* Pet. 21 (citing *United States v. Michigan*, Civ. No. 25-496 (W.D. Mich. Apr. 30, 2025) and *United States v. Hawaii*, Civ. No. 25-179 (D. Haw. Apr. 30, 2025)). That litigation does not present the kind of standing question arising here.

III. This Is Not The Right Time Or The Right Case For Deciding The Question Presented.

There are also several other reasons to await a better time and case before addressing any preemption questions that may warrant review in this context.

1. Even aside from the jurisdictional implications, the interlocutory posture of the case counsels against review in this case at this time. *See* U.S. *Honolulu* Br. 11. Petitioners have raised multiple state and federal defenses that may moot any need for this Court's review. Further proceedings could also clarify whether Colorado law recognizes torts based only on deceptive marketing or also on broader conduct knowingly contributing to climate alteration—a distinction that may affect the preemption analysis. *See id*. 16-17. Additionally, future choice-of-law determinations may affect whether respondents' claims will be governed uniformly by Colorado law or by the law of the jurisdictions where products were marketed or caused emissions, which may also be relevant to preemption. *See id.* 18.

2. The Court would also benefit from further percolation of petitioners' constantly evolving theory

of preemption, the present incarnation of which received limited briefing and consideration below.

Until recently, petitioners' principal argument was that the alleged state law torts were "necessarily and exclusively federal common law claims" and should be dismissed because that federal common law had been displaced by the Clean Air Act. *See supra* p. 4 (quoting prior certiorari petition); *see also* Motion to Dismiss §IV.A (heading: "Plaintiffs Claims Should Be Dismissed Under Federal Common Law"); Pet. App. 16a. Then, after the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), petitioners began arguing that even if respondents raised truly state-law claims, those claims extinguished by federal common law and not revived by the Clean Air Act. *See* Pet. App. 18a-20a.

In their current petition, petitioners and the United States focus on yet a third, even more recent and less tested, variation: that the federal Constitution *itself* preempts the claims because "the structure of our constitutional system does not permit a State to provide relief under state law for injuries allegedly caused by" climate alteration, regardless of the existence of any federal common law or statute. Pet. 2. This theory appeared for the first time in petitioners' reply brief in the Colorado Supreme Court,[4] and received limited attention as a result, *see* Pet. App. 17a-18a. For that reason, and because no other appellate court has considered this novel argument, *see infra* pp. 20-22, further percolation is warranted.

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[4] *Compare* Exxon Pet. 27-37 *with* Exxon Pet. Reply 2, 4-6, 18.

3. Finally, legislative and regulatory developments may eliminate the need to address the Question Presented or materially change the analysis.

Earlier this year, the President issued an executive order directing the Department of Justice to "recommend any . . . legislative action necessary to stop" climate-alteration litigation. Exec. Order No. 14,260, 70 Fed. Reg. 15513, 15514 (Apr. 8, 2025). Sixteen state attorneys general have since urged the Department to propose a legislative "liability shield" to end these cases.[5]

Meanwhile, in August, the EPA proposed repealing its regulation of greenhouse gases on the theory that it lacks statutory authority to regulate those emissions. *See* Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards § IV.A.2, 90 Fed. Reg. 36288, 36299 (proposed Aug. 1, 2025). The EPA recognized that this could significantly affect the preemption arguments raised in this case, soliciting "comment on the continued preemptive effect of the [Clean Air Act] in the event that the EPA finalizes the proposed rescission or otherwise concludes that it lacks authority to regulate [greenhouse gas] emissions." 90 Fed. Reg. at 36325; *see also, e.g.*, Editorial Board, Trump's Biggest Climate Decision, Wall St. J. (Mar. 13, 2025, 5:24 PM), https://www.wsj.com/opinion/trumps-biggest-climate-decision-81c4e067 ("Some

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[5] Letter from Mike Hilgers, Nebraska Attorney General, and fifteen other Attorneys General to Pamela Bondi, United States Attorney General, 3-4 (June 12, 2025), https://www.ag.ky.gov/Press%20Release%20Attachments/Letter%20to%20Dep%27t%20of%20Justice%20on%20Energy%20Actions%20%28corrected%29.pdf.

energy companies warn that withdrawing the endangerment finding could make [fossil fuel companies] vulnerable to lawsuits by states and localities alleging that their emissions cause a public nuisance by contributing to climate change.").[6] Were the EPA to finalize its proposed rule after this Court rendered a decision in this case, questions would arise whether the Court's disposition remained good law in the aftermath of any regulatory change.

IV. Petitioners Identify No Conflict That Justifies Review Of This Petition.

Petitioners assert the same shallow conflict alleged in the *Honolulu* petition this Court denied. That alleged conflict provides no basis to grant this petition either.

1. As the United States has explained, *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), did not consider whether the deceptive-marketing claims at the core of this case would be preempted. *See* U.S. *Honolulu* Br. 20-21. The United States correctly observed that "whereas the companies in *City of New York* could have avoided further liability only by ceasing global production of fossil-fuel products altogether," liability for deception could be avoided simply by "refraining from deceptive conduct." *Id.* 20 (cleaned up).

Even though the complaint here includes theories beyond deception, at most that means there may be a shallow split on the viability of *one* of multiple liability theories. Resolving that conflict would not end this

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[6] *Available at* https://www.epa.gov/newsreleases/icymi-wall-street-journal-editorial-lauds-reconsideration-epas-endangerment-finding

litigation or avoid the harms petitioners say make this Court's immediate review necessary. Nor would it meaningfully impact the larger body of climate tort litigation, which generally involves *only* deception claims.[7] And this Court has already determined that the viability of deception claims does not warrant review, at least not in the absence of an on-point circuit conflict that has yet to emerge.[8]

2. More fundamentally, petitioners appear to be using the alleged *City of New York* conflict as a stalking horse for their constitutional-structural preemption theory—a theory no appellate court has

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[7] *See* Margaret Barry, Climate Deception Cases Abound: They Aren't All the Same, https://blogs.law.columbia.edu/climatechange/2025/11/05/climate-deception-cases-abound-they-arent-all-the-same/.

[8] Petitioners (but not the United States) argue that the decision below also conflicts with two decisions considering requests to abate point-source emissions. *See* Pet. 18-20. But neither decision is on-point or in conflict, for the reasons the United States has previously given. *See* U.S. *Honolulu* Br. 21-22; *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 296 (4th Cir. 2010) (addressing suit by state government to "require immediate installation of emissions controls at four TVA electricity generating plants"); *id.* at 302 (disclaiming holding that "Congress has entirely preempted the field of emissions regulation," including because the court "cannot anticipate every circumstance that may arise in every future nuisance action."); *Illinois v. City of Milwaukee*, 731 F.2d 403, 404 (7th Cir. 1984) (considering suits to require abatement of discharges into Lake Michigan); *id.* at 410 n.2 ("Our decision here is limited to the context of these cases . . . ."). Notably, both cases were decided before this Court held in *AEP* that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." 564 U.S. at 429 (citation omitted).

accepted and that contradicts the Second Circuit's holding.

Petitioners' and the United States' lead argument is that "the structure of our constitutional system does not permit a State to provide relief under state law" for injuries arising from climate alteration. Pet. 2. The Second Circuit did not consider that argument. Instead, it addressed only the theory fossil fuel companies were peddling at the time—*i.e.*, that the "City's state-law tort claims are displaced by federal common law," 993 F.3d at 89 (heading, capitalization altered), and that the "Clean Air Act, in turn, displaces the City's federal common law claims," unless Congress expressly revived the relevant state tort law, *id.* at 95 (heading, capitalization altered).

Petitioners' constitutional structure argument cannot be reconciled with the Second Circuit's holding. Under petitioners' view, the Constitution flatly "precludes [such] claims from proceeding under state law." Pet. 22; *see also id.* 23-24 (arguing that "borrowing the law of a particular State would be inappropriate" and therefore "federal law must govern"). This leaves no room for Congress to permit state law to apply—whether by directly authorizing suits (as the Second Circuit contemplated) or by declining to preempt them (the ordinary preemption question). Petitioners attempt to maintain consistency by stating that respondents' claims are preempted "*unless* the Clean Air Act permits them," Pet. 25, but this contradicts their emphatic contention that the "Constitution precludes those claims from proceeding under state law." *Id.* at 22.

The Court should decline to intervene until the industry defendants settle on a coherent theory and convince an appellate court to accept it.

V. The Decision Below Is Correct.

Certiorari is also unwarranted because the decision below is correct.

A. The Clean Air Act Does Not Preempt Respondents' Claims.

Respondents' claims are not preempted by the Clean Air Act under the Second Circuit's rationale in *City of New York* or this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

1. Even in the context of interstate pollution claims, "courts should not lightly infer pre-emption." *Ouellette*, 479 U.S. at 491. Instead, 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." *Id*. at 491 n.11 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *City of New York*, the Second Circuit reversed these presumptions, holding that claims once governed by federal common law are presumed preempted unless Congress specifically authorizes them. 993 F.3d at 99. That is wrong for multiple reasons.

First, in *AEP* this Court recited the same federal common law history before holding that the availability of state law pollution claims turned on "the preemptive effect of the federal act" without suggesting any modification of the Court's traditional

preemption analysis. *See* 564 U.S. at 429. To the contrary, the Court cited the preemption analysis in *Ouellette*, *see ibid*., which applied the traditional presumption against preemption, *see* 479 U.S. at 491 & n.11.

Petitioners point (Pet. 24) to *Ouellette*'s statement that "[i]n light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." 479 U.S. at 492 (citation omitted). But the Court decided what was "specifically preserved by the Act" by applying standard conflict preemption principles—including the presumption against preemption, *see supra* p. 23—not the Second Circuit's express authorization requirement. *Id*. at 491-92. And that analysis led this Court to find that some state law claims were preserved even though the statute did not expressly authorize them. *See id*. at 497-98.

Second, more broadly, even when a case involves an issue "inherently federal in character," the Court has not reversed the presumption against preemption such that a state law is deemed preempted unless explicitly authorized by Congress. *Buckman Comm. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001). Instead, in the cases petitioners cite (Pet. 22), the Court simply declined to apply any presumption at all. *See Buckman*, 531 U.S. at 348; *United States v. Locke*, 529 U.S. 89, 108 (2000).

Third, the Second Circuit's presumption of preemption does violence to the division of powers between the elected and judicial branches of the federal government. This Court has "always

recognized that federal common law is subject to the paramount authority of Congress," such that "courts have no power to substitute their own notions" of sound public policy when Congress legislates on a question previously addressed by federal common law. *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 313, 315 (1981) (cleaned up). For that reason, "legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law." *AEP*, 546 U.S. at 423 (cleaned up). *City of New York* defies these teachings by refusing to recognize full legislative displacement of federal common law unless Congress expressly displaces both the substance *and* the preemptive effect of judge-made law.

Finally, as petitioner Exxon itself once insisted to the Ninth Circuit,[9] claims like respondents' do not fall within the scope of the former federal common law of interstate pollution. *See* Pet. App. 17a; U.S. *Honolulu* Br. 16-17; *see also AEP*, 564 U.S. at 422 ("We have not yet decided whether . . . political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution."); *Suncor*, 25 F.4th at 1260 n.5 ("It is also unsettled whether the federal common law of interstate pollution covers suits brought against product sellers rather than emitters . . . ."). This is particularly true of respondents' false-marketing claims, which address

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[9] *See* Answering Br. for Defendants-Appellees at 56-61, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (No. 09-17490);

conduct never subject to the federal rule of decision created for interstate pollution nuisance litigation.

2. Respondents' claims are not precluded by the Clean Air Act under the ordinary preemption principles applied in *Ouellette* either. *Contra* Pet. 24-26; U.S. Br. 16-19.

In *Ouellette*, the Court held that the Clean Water Act's regulatory structure for discharges from point sources "precludes a court from applying the law of an affected State against an out-of-state source." 479 U.S. at 494. The Court reasoned that because the Clean Water Act includes extensive procedures for setting discharge limits on point sources, applying a sister state's law to impose different point-source restrictions would conflict with the objects and purposes of the statute. *Id*. at 494-97. However, because the Act permits a source state to impose higher standards than federal law, the Court allowed suits against out-of-state dischargers based on the nuisance law of the discharging state. *See id*. at 498-99.

Ouellette does not preclude respondents' claims here. Respondents do not seek to impose emissions standards on any point source and choice of law has not yet been resolved. Indeed, respondents have not sued emitters at all. Petitioners and the United States nonetheless insist that *Ouelette* should be extended to preempt tort claims against industries supplying inputs to emitting facilities. But this Court considered and rejected a similar argument in *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761 (2019).[10]

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[10] Even under petitioners' proposed extension, respondents' deception claims would not be preempted.

In that case, federal law pervasively regulated "the milling, transfer, use and disposal of uranium." *Id*. at 765 (lead opinion). The petitioner argued that although the federal law did not directly regulate upstream mining activities, Virginia's complete ban on uranium mining "disrupts the delicate 'balance' Congress sought to achieve between th[e] benefits and costs" of nuclear energy. *Id*. at 777. This Court rejected the argument. Justice Gorsuch's lead opinion explained that a "sound preemption analysis cannot be as simplistic as that." *Id*. at 778. "[I]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Id*. at 767. Instead, "only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect." *Id*. at 778 (citations omitted). The challengers could cite no such law. And a majority of the Court agreed that federal regulation of an activity does not preempt state regulation of upstream "activities antecedent to those federally regulated." *Id*. at 793 (Ginsburg, J., concurring in the judgment); *see also id*. at 777-80 (lead opinion).

In this case, as in *Virginia Uranium*, the federal statute does not regulate upstream activity. And petitioners point to nothing in the "the text and structure of the statute" demonstrating congressional intent to leave petitioners' deceptive marketing and other tortious activities entirely unregulated by either state or federal law. *Id.* at 778 (lead opinion) (citation omitted); *cf. id.* at 791 (Ginsburg, J., concurring in the judgment) ("[T]he Federal Government does not regulate the radiological safety of conventional

uranium mining on private land, so federal law struck no balance in this area.").

Petitioners may think that it makes no sense to prohibit one state's regulation of point-source emissions in another state, yet not preempt claims regarding the marketing and production of upstream inputs into those emissions. But that is a judgment for Congress to make. Simply stating that state-law claims have an indirect effect on federally regulated activities can never be sufficient for preemption. State gasoline taxes, for example, have an undeniable impact on emissions (including emissions in other states), yet no one would claim that they are impliedly preempted by the Clean Air Act, even when set at rates intended to reduce emissions and climate change. The question whether to extend the Clean Air Act or its preemptive effect to a distinct, related field is one for Congress, not the courts. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("In answering the central question of displacement of [state] law," Court would not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." (citations omitted)).[11]

[11] To the extent the Court's existing "purposes and objectives" preemption decisions would extend as far as petitioners must argue, they should be reconsidered. *See Kansas v. Garcia*, 589 U.S. 191, 213 (2020) (Thomas, J., concurring).

B. The Structure Of The Constitution Does Not Preempt Respondents' Claims.

Petitioners spent years arguing that federal common law or the Clean Air Act preempted respondents' claims. Now they say none of that mattered. Even if courts had never created that common law and Congress had never passed any statute, the Constitution itself would preempt respondents' claims. *See* Pet. 2. Notably, if the Clean Air Act already preempts those claims, it makes no difference whether the Constitution would do so independently. The constitutional structure argument thus matters only if this Court would otherwise conclude that the Act does not preempt this suit. And that reveals petitioners' real aim: to give courts a constitutional license to override Congress's choices about preemption. Nothing in the text or history of the Constitution, or in this Court's decisions, supports that remarkable request.

1. Petitioners argue that because courts once created federal common law for interstate air pollution, the Constitution requires such questions to be governed exclusively by a uniform rule of federal law. *See* Pet. 5. But none of their cited cases addresses what happens when Congress displaces federal common law with a statute. In that situation, as the Colorado Supreme Court correctly held, the scope of any preemption turns on congressional intent and the usual preemption analysis. *See* Pet. App. 20a.

Petitioners' constitutional theory builds on cases in which this Court declined to apply *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and instead adopted a federal common law rule pending congressional action. *See* Pet. 23-24. While the choice to establish a

federal common law rule is informed by considerations of the constitutional structure, the decision is not tantamount to a determination that the Constitution requires creation of a federal rule and displacement of state law. On that view, the Constitution commands Congress to legislate a federal rule for some subjects, with the courts to take Congress's place if the elected branches default on that implicit obligation. That would be anomalous. While the Constitution gives Congress *authority* to legislate in enumerated fields, it never *requires* it to exercise that power. *See, e.g.*, U.S. Const. art. I, § 8.

State law gives way to federal common law not because of some implicit constitutional preemption, but because federal common law counts as part of the "Laws of the United States" under the Supremacy Clause. U.S. Const. art. VI, cl. 2. However, as noted earlier, the Court has always been emphatic that this judge-made law is purely interstitial and subject to displacement by Congress. *See AEP*, 564 U.S. at 423-24; *Milwaukee II*, 451 U.S. at 313-14. Congress's prerogatives include the right to decide for itself the extent to which federal law should preempt state law. *See AEP*, 564 U.S. at 429; *Ouellette*, 479 U.S. at 491-97. Thus, when Congress displaces federal common law, "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 (citation omitted).

Petitioners seek to short-circuit that analysis and shoulder Congress aside. In their view, the only question is whether courts once thought the subject fit

for federal common law.[12] And under the logic of their position, Congress should not be permitted to disagree with the judicial sense that a question should be addressed at the federal level. *See, e.g.*, Pet. 23 ("Federal law *must* govern such controversies because they 'touch upon basic interests of federalism' and implicate the 'overriding federal interest in the need for a uniform rule of decision.'") (cleaned up, emphasis added)); *id*. 23-24 ("[B]ecause 'borrowing the law of a particular State would be inappropriate' to resolve such interstate disputes, federal law *must* govern.") (cleaned up, emphasis added). That position calls into question the constitutionality of savings clauses and other provisions of federal law implementing schemes of "cooperative federalism" in any area a court might deem to implicate uniquely federal interests. *Atlantic Richfield*, 590 U.S. at 24.[13]

Just as bad, the task of identifying state laws implicitly preempted by constitutional structure would be guided by nothing more than a judicial sense of what counts as "areas of special federal interest" or whether there is an "overriding federal interest in the need for a uniform rule of decision." Pet. 5 (cleaned up). That is exactly the kind of "brooding federal interest" and "appeal[] to a judicial policy preference"

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[12] As noted above, petitioners' argument would fail even if that *were* the only question. *See supra* pp. 25-26.

[13] As noted earlier, petitioners sometimes say Congress could expressly authorize state law to apply. But that position conflicts with their general account of constitutional preemption and its rationale. *See supra* p. 22. If petitioners are just arguing for a presumption favoring preemption when a statute displaces federal common law (along the lines of *City of New York)*, that argument is irreconcilable with this Court's precedents for the reasons described above. *See supra* pp. 23-26.

that "should never be enough to win preemption of a state law." *Va. Uranium*, 587 U.S. at 767 (lead opinion). Petitioners' elastic test would unavoidably risk courts mistaking their own policy intuitions for what the structure of the Constitution supposedly demands.

None of this Court's cases claims such a power for the judiciary. Instead, petitioners rely on language used in a handful of decisions discussing federal common law in general terms or other matters far afield from the context of this case. *See* Pet. 4-5, 22-23.[14] In *AEP*, for example, the Court took from the "basic scheme of the Constitution" only that courts have the power to "fill in statutory interstices, and, if necessary, even fashion federal law." 564 U.S. at 421 (cleaned up). The Court then emphasized that any such common law is subject to congressional displacement at will. *Id*. at 423-24. Even if some areas exist where "the Constitution implicitly forbids" States from "apply[ing] their own law," *Franchise Tax Bd.*, 587 U.S. at 246, that category does not extend to the subject matter here, much less to every matter judges have deemed suitable for federal common law.

Finally, petitioners' theory is that constitutional preemption arises because "inherently federal areas must turn on federal rules of law." Pet. 5 (cleaned up). Yet they do not claim that Congress has enacted any

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[14] *See* Pet. 4-5, 22-23 (citing, *e.g.*, *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230 (2019) (state sovereign immunity); *Tex. Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630 (1981) (antitrust statute); *Fuld v. Palestine Liberation Org.*, 606 U.S. 1 (2025) (constitutional limits on personal jurisdiction); *Bonaparte v. Tax Ct.*, 104 U.S. 592 (1881) (taxation); *United States v. Bevans*, 16 U.S. 336 (1818) (criminal jurisdiction)).

such federal rule to govern this case, or that this Court should create one. Rather than seek a uniform rule of decision, they ask for a sweeping preemption of state law that leaves a legal void—where neither state nor federal law provides a rule of decision. This Court has previously refused to recognize that kind of "pre-emptive grin without a statutory cat." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp*., 485 U.S. 495, 504 (1988). "'There is no federal preemption in vacuo,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Isla Petroleum*, 485 U.S. at 503). At the very least, this is not a context in which the Constitution implicitly field preempts all state law without providing any federal rule of decision and without regard to the preemptive intent expressed in the statute Congress enacted to replace prior federal common law.

2. Petitioners' reliance on the territorial limits of state power (Pet. 23) is also misplaced. "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). And this Court recently rejected the sort of sweeping "extraterritoriality doctrine" petitioners invoke. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371, 374-75 (2023). "In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id*. at 374.

Accordingly, states have always had the authority to provide remedies for in-state injuries arising from out-of-state conduct, subject to Due Process limitations on personal jurisdiction and the

restrictions of other specific constitutional provisions (*e.g.*, the Commerce Clause). Such litigation is commonplace. *See, e.g.*, *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 210-11 (2024) (describing nationwide state tort litigation against opioids maker); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997) (asbestos litigation); *cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (in considering state court's personal jurisdiction to hear libel claim arising from nationwide publication, stating that "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State"). Whether to displace that state law, and how best to balance the inevitable competing interests, is a policy question for Congress, not one to which the Constitution provides an implicit answer for courts to divine on their own.

C. Respondents' Claims Are Not Barred By "Foreign-Policy Principles."

For similar reasons, respondents' suit is not precluded by "foreign-policy principles," Pet. 26, an argument no appellate court has accepted.

As discussed, petitioners' premise that respondents seek to regulate "international greenhouse-gas emissions," *id.* 16, is false, *see supra* pp. 26-28. More broadly, the federal government's authority to conduct foreign policy does not displace states' sovereign power to protect their citizens from in-state harm arising from the extraterritorial conduct of U.S. corporations simply because state law may have "some incidental or indirect effect in foreign countries"—something that is "true of many" unobjectionable state laws. *Clark v. Allen*, 331 U.S. 503, 517 (1947). And just as state law cannot be

preempted by "some brooding federal interest" in domestic matters, *Va. Uranium*, 587 U.S. at 767 (lead opinion), it cannot be displaced by petitioners' hodge-podge of concerns about the indirect effects respondents' suit supposedly might have on some foreign industries and unidentified "various diplomatic channels," Pet. 26. Certainly, the President's bare policy preference for avoiding international agreements that impose liability for carbon emissions, *see ibid*., can have no preemptive effect on state law absent congressional agreement. *See Garcia*, 589 U.S. at 212 ("The Supremacy Clause gives priority to 'the Laws of the United States,'" not the "priorities or preferences of federal officers." (quoting U.S. Const. art. VI, cl. 2)); *Medellín v. Texas*, 552 U.S. 491, 524-25, 530-32 (2008); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416-17 (2003).

CONCLUSION

The petition for a writ of certiorari should be denied.

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