No. 25-170

In the Supreme Court of the United States

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

v.

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

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

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

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QUESTION PRESENTED

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

The question presented is:

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

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INTEREST OF *AMICI CURIAE*[1]

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

The **Independence Institute** is a 501(c)(3) public policy research organization in Denver, founded on the eternal truths of the Declaration of Independence. The briefs and scholarship of research director David Kopel have been cited in seven opinions of this Court and 89 opinions of lower courts. The Institute's senior fellow in constitutional studies, law professor Robert Natelson, has been cited in 11 opinions of this Court.

The **Pelican Institute for Public Policy** is a nonpartisan research and educational organization, the leading voice for free markets in Louisiana. Pelican's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

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

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[1] Rule 37 statement: Counsel for both parties were timely notified of *amici*'s intent to file this brief. No counsel for any party authored this brief in any part; nobody other than *amici* made a monetary contribution to fund its preparation or submission.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

- **Overreaching:** A state may not adjudicate, tax, regulate, or punish conduct that occurs beyond its borders, or is lawful in other states.

- **Exclusions:** States (especially commercially powerful ones) may not leverage their regulations to restrict other states' policymaking.
- **Favoritism:** The federal government may intervene when states regulate in favor of local interests ways that burden constitutional rights.
- **Externalities:** Federal law governs when a state pursues a policy that affects another, and both states have equal rights of action.

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

Horizontal federalism emerges from the rich scholarship and experience that informed the framers and the federal structure they established. The Colorado Supreme Court neglected that framework here.

ARGUMENT

I. HORIZONTAL FEDERALISM IS DEEPLY ROOTED IN CONSTITUTIONAL HISTORY

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

A. The History of Horizontal Federalism

In the introduction to his Commentaries, Blackstone explained the limitations on applying English law to colonies like America:

> For it is held, that if an uninhabited country be discovered and planted by English subjects, all

> the English laws are immediately there in force. For as the law is the birth right of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws, but until he does actually change them, the antient laws of the country remain…. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there, they being no part of the mother country, but distinct (though dependent) dominions.

William Blackstone, Commentaries on the Laws of England § 4 at 105 (1765). Even that early, the application of law to a person thus depended on (1) whose law they were born under, and (2) whether their land had been conquered and the law changed. Foreign laws, including the common law, are not self-executing; they must be deliberately imposed or adopted.

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

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

The idea consistently advanced in these writings is that the effect of the laws of a sovereign stop at its borders. Every court and country applies and fashions its own law but respects the statutes "carried with" the subjects of other sovereigns, and adopts the ones they deem persuasive or appropriate. Any further entanglement would lead to confusion about which law applies.

These principles had already seeped into early intercolonial governance. In 1643, for example, four British colonies in America formed a league for mutual defense, provided that each colony "shall have peculiar jurisdiction and government within their limits[.]" The Articles of Confederation of the United Colonies of New England; May 19, 1643 § 3, The Avalon Project, https://tinyurl.com/2p9ksh4d. The colonies also agreed to return fugitives and settle disputes through a shared council—an early recognition that while each was autonomous, cooperation under law was necessary for true order among equals. This early federal-style structure constituted the background by which America's government later formed.

European law-of-nations theorists also shaped early American understandings of comity and equal sovereignty. A treatise on the subject, widely read in Revolutionary America, maintained that nations are equal in rights and dignity, regardless of size or power—just like individuals. Emer de Vattel, *The Law of Nations* at I, § 18 (Joseph Chitty ed., 1834) (1758).

"A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." *Id*. This idea of sovereign equality posited that no state may subordinate another by force of law. Mutual recognition and voluntary respect were ideal, even necessary, when crafting a union of states.

The Constitution's framers were acutely aware that unrestrained state action leads to interstate friction and conflict. Our first charter, the Articles of Confederation, viewed each state as its own sovereign, and provided "the free inhabitants" of each state with

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

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

It bears noting from the outset that the Constitution contains no explicit provision requiring blanket interstate equality. At the Constitutional Convention, Gouverneur Morris proposed striking a portion of what

is now Article IV, Section 3, that required new states to be admitted "on the same terms" as current states. 2 The Records of the Constitutional Convention of 1787 at 454 (Max Farrand ed., 1937). James Madison opposed Morris's motion, arguing that new states "neither would nor ought to submit to a Union which degraded them from an equal rank with the other States." *Id.* George Mason likewise argued that Morris's suggestion appeared intended to deter western emigration, but that this was impossible. *Id.* Mason continued that "the best policy" regarding these new states would be "to treat them with that equality which will make them friends not enemies." *Id.* Morris agreed that stopping western emigration was impossible, but "did not wish to throw the power into the[] hands" of newly admitted states. *Id.* Roger Sherman then notably stated that he was in favor of "fixing an equality of privileges by the Constitution," and therefore opposed the motion. John Langdon chimed in to support the motion because he wondered about circumstances "which would render it inconvenient" to admit new states on equal footing with established ones. *Id.* North Carolina's Hugh Williamson also clarified that while existing states "enjoy an equality now, and for that reason are admitted to [Congress] in the Senate," this reason did not apply to new states. *Id.* The body accepted Morris's edits by a 9–2 vote. *Id.*

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

thought it best to leave to Congress's judgment the exact admission terms for new states.

The Convention's view was *not* that states were unequal or lacked equal sovereignty. It was that the elected representatives of existing states should decide what privileges new states had when admitting them. Although the Convention did not settle this question, the Continental Congress in New York incorporated the Northwest Ordinance under the new Constitution, requiring that new states would enter the union "on equal footing" with existing states. *An Act to Provide for the Government of the Territory North-West of the River Ohio*, art. V § 8, 1 Stat. 50, 53 n.a (1789). Every state since has been admitted "with an express declaration of equality" with existing states. Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 Publius 53, 54 (1988).

B. The Constitutional Structure of Horizontal Federalism

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

The Interstate Compact Clause, U.S. Const. art. 1, §10, cl.3, allows states to resolve disagreements by "Agreement or Compact" with congressional approval. These agreements have been frequently employed to govern relations between states since the founding.

See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 3–4 nn.14–18 (1997) (listing compacts). While such arrangements are allowed, any "Treaty, Alliance, or Confederation" between states is prohibited. U.S. Const. art. 1, §10, cl.1. This language likely refers to unilateral contracts between states without Congress's say-so, or military or external-facing agreements. It was part of the Articles of Confederation and "for reasons which need no explanation, is copied into the new Constitution." The Federalist No. 44 (Madison), at 281 (Clinton Rossiter ed., 1961).

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

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

doctrine sets the boundaries for how states must treat the decisions and laws of other states.

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

At bottom, equality among the states is a due process concern. "[D]ue process primarily protects individuals from being unfairly subject to another state's laws." Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1137–38 (2010). Scholarship regarding extraterritoriality, has long noted that horizontal federalism "protect[s] persons against the unfair application of a law" outside proper borders while also "furthering other interstate … values[.]" Willis L.M. Reese, *Legislative Jurisdiction*, 78 Columbia L. Rev. 1587, 1589 (1978).

Together, these provisions provide the framework of horizontal federalism. The Constitution preserves

each state's authority to make laws and regulations that govern activity occurring within its bounds while restraining that power beyond a state's borders.

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

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

A. Overreaching

With narrow exceptions, states cannot tax or regulate beyond their borders, or punish conduct that was lawful where it occurred. Courts have long recognized this principle in the law of personal jurisdiction.

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

The Court eventually softened *Pennoyer*'s requirement that state jurisdiction screeches to a stop at its

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

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

Woodson, 444 U.S. at 294.

The strictures of personal jurisdiction are "a consequence of territorial limitations on the power of the respective States" that safeguard individual fairness and interstate sovereignty. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Every state's judicial power ends where another's authority begins, and no state can punish or regulate conduct lawful in another state if that conduct lacks a meaningful connection to the forum. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 407–408 (1930) (holding that Texas law "may not validly affect contracts which are neither made nor are to be performed in Texas").

This Court's personal-jurisdiction jurisprudence, therefore, highlights an important facet of the doctrine: a state may regulate activity beyond its physical

borders *only if* that activity has a meaningful, substantial nexus with it—in this case, minimum contacts.

But the principle is more than jurisdictional. Due process constrains states from taxing or regulating in a way that "infring[es] on the policy choices of other States." *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (noting this in dicta); *see also Frick v. Pennsylvania*, 268 U.S. 473, 477–79 (1925) (holding Due Process Clause bars Pennsylvania from imposing transfer tax on art in New York owned by Pennsylvania decedent); *Nielson v. Oregon*, 212 U.S. 315, 321 (1909) (reversing criminal conviction in Oregon of Washington resident who fished in Washington using gear lawful in Washington). A robust body of law confirms that infringement on another state's policy is the line that another state may not cross when regulating.

B. Exclusions

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

The dormant Commerce Clause prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Ross*, 598 U.S. at 369 (cleaned up). Protectionist state action amounts to "discrimination against interstate commerce" in this telling. *Northwest Airlines Inc. v. County of Kent*, 510 U.S. 355, 373 n.18 (1994). But while states may not "build up" commerce by burdening industry and

"business of other states," so long as its goals are not protectionism, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" its own citizenry. *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

In *Ross*, petitioners argued that the dormant Commerce Clause operates as a near-blanket prohibition of "state laws that have the practical effect of controlling commerce outside the State," even unintentionally. *Id.* at 371 (quotation omitted). The Court disagreed, noting that its prior decisions prohibited only state statutes that "prevented out-of-state firms from undertaking competitive pricing or deprived businesses and consumers in other States of whatever competitive advantages they may possess." *Id.* at 374 (cleaned up). Inferring more would "invite endless litigation and inconsistent results" when any state made a law that influenced commerce outside its borders. *Id.* at 375. The Court noted that antidiscrimination under the dormant Commerce Clause "may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers," but it does not allow the Court to strike down *all* extraterritorial exercises of state power. *Id.* at 376.

The *Ross* petitioners advanced another argument premised on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which held that state statutes regulating to "effectuate a local public interest" with incidental interstate commerce effects will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Court fractured over how to handle this claim. The plurality held that the petitioners' claim that California's pork regulations flunk *Pike* fails because courts cannot

weigh a law's economic and non-economic effects, and that such policy choices "belong to the people and their elected representatives." *Ross*, 598 U.S. at 382. Congress may step in if a state law disrupts an industry given "its power to adopt federal legislation that may preempt conflicting state laws." *Id.* at 382–83.

But Chief Justice Roberts—joined by three others—would have vacated and remanded. *Id.* at 395. Roberts noted that most of the Court agreed that "it is possible to balance benefits and burdens[,]" even of various kinds, under *Pike*. *Id.* at 397. Accordingly, Roberts found that this Court's precedents distinguish "the costs of complying with a given state regulation from other economic harms to the interstate market." *Id.* Certain state regulations may not impose a cost immediately, or that cost may be "difficult to quantify," but it is not "noneconomic" cost. *Id.* at 399. The chief justice distinguishes his approach from a *per se* prohibition on extraterritorial state action by finding that regulations imposing "broad impact requiring . . . compliance even by producers who do not wish to sell in the regulated market" may fail under *Pike*. *Id.* at 402.

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

C. Favoritism

States also "have an incentive to favor local interests," but if they do so in a way that burdens the Privileges and Immunities or Full Faith and Credit

Clauses, federal courts must step in to referee the conflict. *See* Erbsen, 93 Minn. L. Rev. at 521.

Where a state has jurisdiction to rule on a case's merits, the judgment of its courts is entitled to full faith and credit. *See Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 705–06 (1982). Writing for the Court, Justice Blackmun emphasized that "the concept of full faith and credit is central to our system of jurisprudence[,]" as we are "a union of states" each with its own courts that sit in judgment over cases and controversies properly before them. *Id.* at 703–04. If two states could exercise jurisdiction over the same activity, "uncertainty, confusion, and delay" would ensue. *Id.* at 704. So, the final merits judgments of state courts have effect "in every other court of the United States, which it had in the State where it was pronounced." *Id.* (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)).

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

In short, states are obliged to give full respect to the valid judgments of another state respecting cases properly before it.

This Court has also emphasized the importance of the "equal sovereign powers" of states in other cases.

As evinced by its adoption of the Northwest Ordinance, *see supra* at I.1, Congress established early in the Nation's history that new states joined the Union on the same footing as current ones. This power was central to a state's sovereign authority, and "[e]quality of constitutional right and power is the condition of all the states of the Union, old and new." *Id.* at 575.

The Court recognized the federal system's mediating role again in *Franchise Tax Bd. of Cal. v. Hyatt*. There, a citizen of Nevada sued a California state agency for alleged torts committed in the course of a tax investigation. 587 U.S. at 234. The Court held that Nevada lacked jurisdiction, as a state could not "be sued by a private party without its consent in the courts of a different State." *Id.* at 233. The Constitution both "assumes that the States retain their sovereign immunity except as otherwise provided" and "fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at 237.

The Court has recognized an outer limit to the federal policing responsibility regarding favoritism, however. When addressing the Voting Rights Act's reliance on out-of-date data for its preclearance coverage formula, Chief Justice Roberts grounded his reasoning that the law as applied was unconstitutional in the "fundamental principle of equal sovereignty" of the states. *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (citation omitted). Because the VRA held some states to be more equal than others, requiring nine states to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own," its preclearance regime violated the Constitution. *Id.*

Even though the VRA was adopted when these states were "geographic areas where immediate action seemed necessary" to correct race-based voting discrimination, it was meant to expire after five years. *Id.* at 546 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)). Instead it was reauthorized and extended even after voter turnout equalized, removing any need for its "unprecedented authority" over an area reserved to the states under the Tenth Amendment. *Id.* at 546. As umpire over the situation, the Court held that this VRA provision, as it then stood, impermissibly favored some states over others.

The Court will not, therefore, sanction federal intervention that violates the equal power of states to govern their own affairs if there is no constitutional need to do so—no violation of privileges or immunities, full faith and credit, or due process. Anything else would represent an "extraordinary departure" from federalism. *Id.* at 557 (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 591, 500–01 (1992)).

D. Externalities

Finally, when states both have an equal right of action regarding use of a common resource but different regimes of law, the proper solution is a federal one.

In *Kansas v. Colorado*, Kansas filed an original action in this Court to enjoin the latter state's diversion of water from the Arkansas River, arguing that Colorado's upstream irrigation was harming its citizens. 206 U.S. 46, 47–48 (1907). Although the Court noted from the outset that the suit "involves no question of boundary or of the limits of territorial jurisdiction[,]" *id.* at 80, it held that the Supreme Court was still the proper court for such a question, as the Court "must be

held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation." *Id*. at 83. In settling the matter, the Court held:

> One cardinal rule underlying all the relations of the states to each other is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on none of the others, and is bound to yield its own views to none.

Id. at 97. In fact, no state may "legislate for, or impose its own policy upon the other" in a matter of interstate concern. *Id*. at 95. Kansas followed the common-law riparian doctrine while Colorado embraced the doctrine of public ownership. Neither state could impose its controlling regime on the other unilaterally. *Id*. It fell to this Court to settle the dispute "in such a way as will recognize the equal rights of both, and at the same time establish justice between them." *Id*. at 98.

Kansas v. Colorado confirmed that this Court's body of law governing interstate disputes—not the laws or judgments of one state regime over another—governs state-to-state relations in the realm of nuisances. The Court has also recognized the applicability of interstate compacts to regulate such situations. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 24 (1951). "[S]tatutory or dormant federal preemption … and diversity litigation" may also apply. Erbsen, 93 Minn. L. Rev. at 524.

* * *

In sum, horizontal federalism is the doctrine that State A generally may not directly regulate activity that occurs in State B, unless that activity has a substantial connection with State A. Even in such an

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

III. THE COLORADO SUPREME COURT IGNORED HORIZONTAL FEDERALISM

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

The Colorado Supreme Court found that these state-law claims could proceed and were not preempted by the Clean Air Act because of a savings

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

clause in the federal statute. It stated that federal common-law claims for pollution abatement only applied to "suits brought by one State to *abate* pollution emanating from another state," *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, 2025 WL 1363355 at *9 (Colo. May 12, 2025) (paraphrasing *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 419 (2011)) (emphasis in original). By the Colorado high court's telling, this case is different, because no form of preemption supports the idea that the Clean Air Act preempts state tort claims.

The Court addressed a similar fact pattern in the Clean Water Act context in a case replete with horizontal federalism principles. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Recognizing an externality problem, the Court held that "it is not necessary for a federal statute to provide explicitly that particular state laws are pre-empted." *Id*. at 491. Put another way, a savings clause does not mean that Federal law fails to preempt state regulation. *See id*. at 493. States may not impose their own regulations against out-of-state water pollution sources. *See id.* at 495. Subjecting a company to potentially 50 different state nuisance standards for a single course of conduct would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id*. at 497 (quoting *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)).

The majority below distinguished *Ouellette* on the ground that Boulder County was not trying to regulate emissions but seeking compensation for local harms. In its telling, the Court in *Ouellette* was just performing "the very type of preemption analysis that we have conducted above" to determine whether a suit under

state law could proceed. *Boulder County* at *25. But there is no meaningful difference, in this instance, between direct regulation via state law and indirect regulation via state tort. Requiring damages is "a potent method of governing conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quotation omitted). In fact, in *Ouellette* this Court recognized that it ought not "draw a line" between different types of relief when evaluating preemption, because then a state might try to control out-of-state activity via another form of punishment. 479 U.S. at 498 n.19. Again, per this Court's horizontal federalism jurisprudence, externalities suggest a potential opportunity for federal preemption.

But far broader concerns than preemption militate against this unwise state court ruling. To allow the long-arm application of state torts in a manner that effectively prohibits not only legal activity occurring in other American states, but legal activity *throughout the world*, violates horizontal federalism's chief tenet regarding overreaching: One state may not, via its own law, penalize conduct that is legal in another state and occurs within that state's boundaries.

If Colorado's tort law were used to judge the activities of other states in allowing oil extraction and promotion, Colorado could override the policy judgments of those other jurisdictions. That could lead to the interstate tyranny that horizontal federalism seeks to prevent—the export of state standards for behavior in a manner that governs activity throughout the nation. Ignoring the damage that extraterritorial application of tort law here performs to the nation as a whole, as the majority below does, is willful blindness.

Every state may redress action that occurs within or has sufficient contacts with its territory. *See, e.g. Underwriters*, 455 U.S. at 705–06. But a state may not apply its own law to settle an injury caused by action in another state. *See Kansas*, 206 U.S. at 95. Such controversies fall to the federal courts—and federal law—to settle. *See Ouellette*, 479 U.S. at 495. And a state (or locality) certainly may not apply its law in a manner that conflicts with another state's sovereignty. *Ross*, 598 U.S. at 388. Boulder County residents have the opportunity to affect national policymaking, but nobody outside the county has any role in electing the local officials pushing here to drive national energy policy through tort suits brought at the local courthouse. In cases like these, horizontal federalism's delicate balance can only be preserved by a federal umpire.

CONCLUSION

This case presents an important issue regarding whether horizontal federalism bars the application of one state's tort law to restrict activity in another. The Court should grant certiorari.

Respectfully submitted,

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