No.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR A WRIT OF CERTIORARI

THEODORE V. WELLS, JR.
DANIEL J. TOAL
YAHONNES CLEARY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

HUGH QUAN GOTTSCHALK
ERIC L. ROBERTSON
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
JAKE L. KRAMER
EMMA R. WHITE
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

QUESTION PRESENTED

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.

CORPORATE DISCLOSURE STATEMENT

Petitioner Suncor Energy (U.S.A.) Inc. is a wholly owned indirect subsidiary of Suncor Energy Inc. Suncor Energy Inc. has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Petitioner Suncor Energy Sales Inc. is a wholly owned subsidiary of Suncor Energy (U.S.A.) Inc.

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D. Colo.):

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, Civ. No. 18-1672 (Sept. 5, 2019)

United States Court of Appeals (10th Cir.):

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (July 7, 2020)

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (Feb. 8, 2022)

United States Supreme Court:

Suncor Energy (U.S.A.) Inc., et al. v. *Board of County Commissioners of Boulder County, et al.*, No. 20-783 (May 24, 2021)

Suncor Energy (U.S.A.) Inc., et al. v. *Board of County Commissioners of Boulder County, et al.*, No. 21-1550 (Apr. 24, 2023)

Colorado District Court (Boulder County):

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 2018CV30349 (June 21, 2024)

Colorado Supreme Court:

County Commissioners of Boulder County, et al. v. *Suncor Energy USA, Inc., et al.*, No. 24SA206 (May 12, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Exxon Mobil Corporation respectfully petition for a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App., *infra*, 1a-47a) is not yet reported but is available at 2025 WL 1363355. The opinion of the trial court (App., *infra*, 48a-139a) is unreported but is available at 2024 WL 3204275.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 12, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

CONSTITUTIONAL PROVISION INVOLVED

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

STATEMENT

This case provides the Court with its best opportunity yet to resolve one of the most important questions currently pending in the lower courts. Energy companies that produce and sell fossil fuels are facing numerous lawsuits in state courts across the Nation seeking billions of dollars in damages for injuries allegedly caused by the contribution of greenhouse-gas emissions to global climate change. But as the Court has recognized for over a century, the structure of our constitutional system does not permit a State to provide relief under state law for injuries allegedly caused by pollution emanating from outside the State. This case presents the question whether that longstanding principle precludes the state-law claims in the nationwide climate-change litigation. The answer to that question is surely yes.

This Court has already recognized the importance of the question presented by calling for the views of the Solicitor General in *Sunoco LP* v. *City & County of Honolulu*, No. 23-947. Since the previous Administration filed its brief in that case, the new Administration has filed a brief in another climate-change case arguing that federal law precludes state-law claims seeking relief for similar climate-change claims. See U.S. Br. at 8-27, *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 11, Sept. Term 2025 (Md.) (July 15, 2025). The Colorado Supreme Court's divided decision below deepens a clear conflict on that question. Only this Court can resolve it.

Petitioners are energy companies that produce and sell fossil fuels; respondents are the city of Boulder, Colorado, and the surrounding county. Like numerous other state and local governments nationwide, respondents filed this action against petitioners in state court, asserting claims purportedly arising under state law to recover for alleged harms caused by the effects of global climate change.

The trial court denied petitioners' motion to dismiss, and a divided Colorado Supreme Court affirmed. The majority acknowledged this Court's precedents holding that claims seeking relief for injuries allegedly caused by interstate pollution constitute an inherently federal area exclusively governed by federal law. But the court concluded that, because Congress had displaced the preexisting federal common law in this area by enacting the Clean Air Act, state tort law presumptively could regulate interstate emissions. In so holding, the court expressly declined to follow the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), which held that it was "too strange to seriously contemplate" that

Congress's enactment of legislation in an inherently federal area would "suddenly" make state law "presumptively competent" to apply. *Id.* at 99.

The dissenting justices agreed with the Second Circuit's analysis. And in so doing, they expressed concern that the majority's decision gave Boulder and other Colorado municipalities "the green light to act as [their] own republic" by regulating on an interstate and international level. App., *infra*, 25a. That result could "interfere" with the federal government's policies and "contribute to a patchwork of inconsistent local standards that will beget regulatory chaos." *Id.* at 47a. The dissenting justices "respectfully urge[d]" this Court to "take up this issue." *Id.* at 46a.

There are few, if any, more consequential questions pending in the lower courts concerning the relationship between state and federal law. The Colorado Supreme Court's decision was incorrect, and it provides this Court with the opportunity definitively to address whether the state-law claims asserted by dozens of States and municipalities can even proceed—and to do so before the energy industry is threatened with potentially enormous judgments.

Boulder, Colorado, cannot make energy policy for the entire country. The Court should grant review and clarify that state law cannot impose the costs of global climate change on a subset of the world's energy producers chosen by a single municipality. At a minimum, the Court may wish to call for the views of the Solicitor General in order to receive the perspective of the new Administration on whether certiorari should be granted.

A. Background

1. As this Court has long explained, there are certain areas in which "our federal system does not permit the

controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981). Among those areas are ones where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Ibid.* (citation omitted). In those areas, "the Constitution implicitly forbids" States from "apply[ing] their own law," and disputes in those inherently federal areas must "turn on federal rules of law." *Franchise Tax Board* v. *Hyatt*, 587 U.S. 230, 247 (2019) (internal quotation marks and citation omitted). Put another way, "the basic scheme of the Constitution" "demands" a federal rule of decision in such inherently federal areas. *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011).

When Congress has not created a rule of decision for a particular question arising in an inherently federal area, federal courts have the power to prescribe a rule as a matter of federal common law. See, *e.g.*, *Texas Industries*, 451 U.S. at 640-641. Those court-created rules are subject to displacement by statute, however, because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *American Electric Power*, 564 U.S. at 423-424.

2. One established category of claims requiring a federal rule of decision is those seeking relief for injuries allegedly caused by interstate pollution. For more than a century, "a mostly unbroken string of cases has applied federal law to disputes involving" such claims. *City of New York*, 993 F.3d at 91 (collecting cases). As this Court has stated, federal law must govern such claims because they "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972).

In the absence of an applicable federal statute, courts previously applied federal common law to claims seeking relief for interstate air and water pollution. See, *e.g.*, *Milwaukee I*, 406 U.S. at 103; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). But Congress later enacted comprehensive legislation governing interstate air and water pollution—the Clean Air Act and the Clean Water Act.

This Court addressed the effect of the Clean Water Act on the preexisting federal common law in *City of Milwaukee* v. *Illinois* (*Milwaukee II*), 451 U.S. 304 (1981). There, the Court held that the Clean Water Act precluded federal-common-law claims seeking to abate a nuisance created by water pollution commencing in another State. *Id.* at 317. Then, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court addressed the role of state law in the wake of the Clean Water Act's enactment. The Court held that, in light of the Clean Water Act's "pervasive regulation" and "the fact that the control of interstate pollution is primarily a matter of federal law," the only permissible state-law actions seeking relief for interstate water pollution are "those specifically preserved by the Act." *Id.* at 492 (citation omitted). The Court then held that the Clean Water Act preserved only suits under the law of the State in which the source of pollution at issue was located. See *id.* at 487-498.

In *American Electric Power*, *supra*, the Court addressed the effect of the Clean Air Act on the federal common law governing air pollution. The Court held that the Act displaced nuisance claims under federal common law seeking the abatement of greenhouse-gas emissions from another State. See 564 U.S. at 424. The Court left open the question whether "the law of each State where the defendants operate powerplants" could be applied. *Id.* at 429.

3. Another established category of claims requiring a federal rule of decision is those that threaten to "impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968). As the Court has explained, numerous constitutional and statutory provisions "reflect[] a concern for uniformity" and "a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). The federal government accordingly has "exclusive authority in international relations," *Fuld* v. *Palestine Liberation Organization*, 145 S. Ct. 2090, 2104 (2025) (internal quotation marks and citation omitted), and "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted).

B. Facts And Procedural History

1. Since 2017, state and local governments across the country have filed lawsuits against private energy companies, alleging that the companies' worldwide production, promotion, and sale of fossil fuels have contributed to global climate change and thereby caused injury. Nearly 60 state and local governments have brought such suits, and more continue to be filed.

In 2021, the Second Circuit unanimously held in *City of New York* that federal law precludes state-law claims seeking relief for injuries allegedly caused by global climate change. The claims had to be brought under federal common law, the court explained, but the Clean Air Act displaced any such claims with respect to emissions in the United States, and "foreign policy concerns foreclose[d]" such claims with respect to international emissions. 993

F.3d at 101. The court rejected the notion that the displacement of federal common law allowed state-law claims to proceed, except to the extent a plaintiff is seeking relief for injuries caused by in-state emissions. See *id.* at 99-100. But the plaintiff in *City of New York* was "not seek[ing] to take advantage of this slim reservoir of state common law." *Id.* at 100. After the Second Circuit's decision, the plaintiff did not seek this Court's review.

Following that defeat in federal court, state and local governments are now bringing these cases in state court. Each case seeks billions of dollars in damages from the defendant energy companies.

2. Petitioners in this case are leading energy companies; their primary business is the production and sale of fossil fuels around the world. Respondents are the city of Boulder, Colorado, and the surrounding county.

On April 17, 2018, respondents brought this case in Colorado state court, alleging that petitioners' worldwide conduct has contributed to global climate change, which in turn has caused a variety of harms in Colorado. Respondents allege that "unchecked production, promotion, refining, marketing, and sale of fossil fuels" throughout the world has "led to unchecked fossil fuel use," resulting in an "unprecedented rapid rise in the concentration of [greenhouse gases] in the atmosphere." Am. Compl. 2. That increasing concentration of greenhouse gases, respondents allege, results in "warming [of] the atmosphere and oceans" and "alteration of the climate," including rising "global average temperatures." *Id.* at 2, 30-33. According to respondents, the effects of climate change manifest in "increases in extreme hot summer days and increases in minimum nighttime temperatures, precipitation changes, larger and more frequent wildfires, increased concentrations of ground-level ozone, higher transmission of viruses and disease from insects, altered

streamflows, bark beetle outbreaks, ecosystem damage, forest die-off, reduced snowpack, and drought." *Id.* at 34-35.

Respondents asserted state-law claims for public nuisance; private nuisance; trespass; unjust enrichment; violation of the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-105(1); and civil conspiracy. Am. Compl. 101-121. Each claim was premised on the same basic theory of liability: namely, that petitioners "altered the climate by selling fossil fuels at levels [it] knew would bring numerous and catastrophic injuries to Colorado." Resp. Colo. S. Ct. Br. 1. Respondents sought to recoup past and future projected climate-change costs from petitioners. Am Compl. 1-2, 121-122.*

3. Petitioners removed this case to federal court, and the district court granted a motion to remand. 405 F. Supp. 3d 947 (D. Colo. 2019). On appeal, the Tenth Circuit initially affirmed. 965 F.3d 792 (2020). After this Court's decision in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the Court granted certiorari, vacated the Tenth Circuit's decision, and remanded for further consideration of the jurisdictional question. 141 S. Ct. 2667 (2021). The Tenth Circuit again affirmed. 25 F.4th 1238 (2022). Petitioners sought review from this Court; the Court called for the views of the Solicitor General and then denied certiorari, with Justice Kavanaugh dissenting. 143 S. Ct. 78 (2022); 143 S. Ct. 1795 (2023).

4. Petitioners then moved to dismiss the amended complaint in state court, arguing in relevant part that federal law precludes state-law claims seeking relief for inju-

* Respondents also asserted claims against Suncor Energy Inc.; those claims were dismissed for lack of personal jurisdiction, and that entity is not a party before this Court. See App., *infra*, 75a-87a.

ries allegedly caused by the effects of interstate greenhouse-gas emissions on the global climate. The district court denied petitioners' motion, holding that federal law did not preclude respondents' claims. App., *infra*, 87a-115a.

5. Petitioner Exxon Mobil Corporation petitioned the Colorado Supreme Court for interlocutory review; the Suncor petitioners later joined in that request; and the court granted review. App., *infra*, 7a. Following briefing and oral argument, the court affirmed the district court's order by a 5-2 vote. *Id.* at 1a-47a.

a. The Colorado Supreme Court first concluded that, because the Clean Air Act displaced the federal common law that previously governed claims concerning interstate air pollution, federal common law played no role in assessing whether federal law precludes respondents' claims. App., *infra*, 9a-11a. The court acknowledged this Court's holding that federal common law governs disputes concerning "interstate and international disputes implicating the conflicting rights of states or the United States's relations with foreign nations." *Id.* at 9a (citing *American Electric Power*, 564 U.S. at 421). But it reasoned that the Clean Air Act displaced the federal common law of nuisance, and it thus "look[ed] to whether the [Clean Air Act] preempts [respondents'] claims." *Id.* at 11a. The Colorado Supreme Court thereby expressly departed from the decisions in *City of New York*, *supra*, and *Illinois* v. *City of Milwaukee*, 731 F.2d 403, 411 (7th Cir. 1984), in which federal courts of appeals held that the displacement of federal common law does not "resuscitate" state-law claims. App., *infra*, 18a-20a.

The Colorado Supreme Court further concluded that federal common law would not have applied even if it were not displaced. App., *infra*, 18a. The court reasoned that

respondents have not "brought an action against a pollution emitter to abate pollution" and instead "seek[] damages from upstream producers for harms stemming from the production and sale of fossil fuels." *Id.* at 17a. The court thus determined that respondents' claims "do not seek to regulate [greenhouse-gas] emissions." *Id.* at 21a.

After reasoning that ordinary preemption analysis applied, the Colorado Supreme Court concluded that the Clean Air Act did not alone preempt respondents' claims. App., *infra*, 11a-16a. Applying the presumption against preemption, the court concluded that respondents' claims were not subject to either field preemption or conflict preemption. *Id.* at 13a-15a.

Finally, the Colorado Supreme Court concluded that respondents' claims for injuries based on international emissions could also proceed. App., *infra*, 22a-24a. Because the court determined that respondents' claims "involve areas of traditional state responsibility" and do not seek to regulate greenhouse-gas emissions, it held that respondents' claims do not intrude on or conflict with any federal power over foreign policy and are accordingly not subject to foreign-affairs preemption. *Id.* at 24a.

b. Justice Samour, joined by Justice Boatright, dissented. App., *infra*, 25a-47a. In his view, the "majority arrive[d] at the wrong result because it applie[d] the wrong test." *Id.* at 27a. Rather than applying "ordinary statutory preemption," Justice Samour contended that "the appropriate inquiry with respect to the interstate aspect of [respondents'] claims is whether the [Clean Air Act] affirmatively authorize[d] them," which "it does not." *Id.* at 26a-27a. He rejected the majority's position that the presumption against preemption applied, explaining that "Congress's decision to displace federal common law and to take control of this area did not suddenly render

state law competent to regulate interstate and international air pollution." *Id.* at 26a. Justice Samour concluded by "urg[ing] [this Court] to take up this issue," "[g]iven the number of local municipalities throughout the country that have already brought claims like those advanced by Boulder, given that more and more municipalities are joining this trend, and given further that a number of courts have now ruled that such claims may be prosecuted." *Id.* at 46a.

6. The Colorado Supreme Court subsequently stayed its mandate in order to allow petitioners to seek review in this Court. App., *infra*, 140a-141a.

REASONS FOR GRANTING THE PETITION

This case presents a case-dispositive and recurring question of extraordinary importance to the energy industry, which is facing dozens of lawsuits seeking billions of dollars in damages for the alleged effects of global climate change. That question is whether federal law precludes the application of state law to claims seeking relief for injuries allegedly caused by interstate and international greenhouse-gas emissions. By allowing respondents' state-law claims to proceed, the Colorado Supreme Court's decision squarely conflicts with the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), and is inconsistent with the decisions of two other federal courts of appeals. The Colorado Supreme Court's decision also conflicts with this Court's precedents: regulation of interstate pollution is an inherently federal area necessarily governed by federal law, and Congress has not permitted, and indeed has preempted, resort to state law except for claims seeking relief for harms caused by in-state emissions.

In these cases, state and local governments are attempting to assert control over the Nation's energy policies by holding energy companies liable for worldwide conduct in ways that starkly conflict with our constitutional structure, as well as the policies and priorities of the federal government. That flouts the Court's precedents and basic principles of federalism. The petition for a writ of certiorari should be granted. At a minimum, the Court may wish to call for the views of the Solicitor General to obtain the perspective of the new Administration.

A. The Decision Below Deepens A Conflict On The Question Presented And Is At Odds With The Views of the United States

As the Colorado Supreme Court recognized, its decision squarely conflicts with the Second Circuit's decision in *City of New York*, which held that federal law precluded materially identical state-law claims. The decision below joins the Hawaii Supreme Court in a growing conflict, and it is also inconsistent with decisions of the Fourth and Seventh Circuits. As a result of that conflict, trial courts across the country are reaching divergent outcomes. This Court's review is warranted.

1. *City of New York* involved a suit brought by a municipal government against a group of energy companies in federal court, alleging that the defendants (including petitioner ExxonMobil) were liable for injuries allegedly caused by the contribution of interstate and international greenhouse-gas emissions to global climate change. As here, the plaintiff municipality asserted claims for public nuisance, private nuisance, and trespass, and sought relief in the form of damages. See 993 F.3d at 88. As here, the complaint alleged that the defendants had "known for decades that their fossil fuel products pose a severe risk to the planet's climate" but had "downplayed the risks and continued to sell massive quantities of fossil fuels, which

has caused and will continue to cause significant changes to the * * * climate." *Id.* at 86-87.

The question before the Second Circuit was "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." 993 F.3d at 85. The court unanimously held that "the answer is 'no.'" *Id.* at 85, 91.

The Second Circuit explained that, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." 993 F.3d at 91. "[S]uch quarrels," the court continued, "often implicate two federal interests that are incompatible with the application of state law": the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Id.* at 91-92 (alterations omitted) (quoting *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972)).

To the Second Circuit, claims seeking to hold defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" are far too "sprawling" for state law to govern. 993 F.3d at 92. The court reasoned that application of state law to the plaintiff's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93.

The Second Circuit rejected the plaintiff's argument that displacement by the Clean Air Act of any remedy under federal common law allows state law to govern. See 993 F.3d at 98. "[That] position is difficult to square with

the fact that federal common law governed this issue in the first place," the court reasoned, because "where 'federal common law exists, it is because state law cannot be used.'" *Ibid.* (quoting *City of Milwaukee* v. *Illinois* (*Milwaukee II*), 451 U.S. 304, 313 n.7 (1981)). The court thus concluded that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Ibid.* Such an outcome, the Second Circuit reasoned, is "too strange to seriously contemplate." *Id.* at 98-99.

The Second Circuit understood Congress to have the power to "grant [S]tates the authority to operate in an area of national concern," but "resorting to state law on a question previously governed by federal common law is permissible only to the extent authorized by federal statute." 993 F.3d at 99 (internal quotation marks, citations, and alterations omitted). The court concluded that the Clean Air Act "does not authorize the type of state-law claims" the plaintiff was pursuing. *Ibid.* In the Second Circuit's view, the Act permitted only actions brought under "the law of the [pollution's] *source* [S]tate," and the plaintiff was not proceeding under that "slim reservoir of state common law." *Id.* at 100 (first alteration in original) (citation omitted).

The Second Circuit further explained that the Clean Air Act did not displace federal common law with respect to claims for harms caused by international emissions, because the Act "does not regulate foreign emissions." 993 F.3d at 95 n.7, 101. But the court concluded that "condoning an extraterritorial nuisance action" for global climate change "would not only risk jeopardizing our [N]ation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced

scheme of international cooperation on a topic of global concern." *Id.* at 103.

2. The decision in *City of New York* squarely conflicts with the Colorado Supreme Court's decision in this case, as well as the Hawaii Supreme Court's decision in *City & County of Honolulu* v. *Sunoco LP*, 537 P.3d 1173 (2023), cert. denied, 145 S. Ct. 1111 (2025). Each of those cases involves tort claims asserted under state law seeking to hold fossil-fuel producers liable for injuries resulting from the cumulative effect of interstate and international greenhouse-gas emissions caused by the producers' worldwide production, sale, and promotion of fossil fuels. But unlike the Second Circuit, the Colorado Supreme Court and the Hawaii Supreme Court held that such claims could proceed under state law.

a. Like the Second Circuit, the Colorado Supreme Court recognized that the Clean Air Act displaced any "federal common law concerning air pollution." App., *infra*, 10a. But the court proceeded to hold that, after that displacement, state law was presumptively competent to govern such actions concerning interstate and international pollution, unless the Clean Air Act demonstrated Congress's "clear and manifest purpose" to "supersede[]" state law. *Id.* at 11a. The court acknowledged that the Second Circuit had reached a contrary result, but it expressly declined to follow the Second Circuit's decision, criticizing that court's analysis as "backwards reasoning." *Id.* at 19a (citation omitted).

Further disagreeing with the Second Circuit, the Colorado Supreme Court rejected the contention that claims like respondents' represent a de facto attempt to regulate greenhouse-gas emissions. App., *infra*, 20a-21a. The court instead distinguished between "claims against the pollution emitters themselves," which "implicat[e] the regulation of interstate pollution," and claims "seek[ing]

damages from upstream producers for harms stemming from the production and sale of fossil fuels." *Id.* at 17a. The Second Circuit had rejected that distinction, explaining that "[a]rtful pleading cannot transform the [plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions." 993 F.3d at 91. In the Second Circuit's view, the plaintiff was seeking relief "precisely *because* fossil fuels emit greenhouse gases" and thereby exacerbate climate change, and it thus declined to allow the plaintiff to "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Ibid.*

Because the Colorado Supreme Court determined that respondents' claims do not implicate a federal interest but instead "involve areas of traditional state responsibility," it concluded that they do not conflict with any express foreign policy of the federal government or intrude on any power over foreign policy reserved to the federal government. App., *infra*, 23a-24a. By contrast, the Second Circuit had concluded that condoning materially similar claims "would not only risk jeopardizing our [N]ation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern." 993 F.3d at 103.

b. Like the Colorado Supreme Court, the Hawaii Supreme Court held that state law was presumptively competent to govern actions concerning interstate and international pollution. See *City & County of Honolulu*, 537 P.3d at 1195-1202. The court reasoned that, because federal common law "no longer exists," the fact that it once governed could "play[] no part in th[e] court's preemption analysis." *Id.* at 1199 (citation omitted). Instead, the court concluded that the "correct preemption analysis requires an examination *only* of the [Clean Air Act]'s

preemptive effect." *Id.* at 1200. The court acknowledged that its decision conflicted with the Second Circuit's, which it said "rel[ied] on flawed reasoning." *Id.* at 1196, 1200.

The Hawaii Supreme Court additionally concluded that the plaintiffs' claims did not arise in an inherently federal area. See 537 F.3d at 1201. In the court's view, the inherently federal area of interstate pollution covers only claims where "the source of the injury * * * is pollution traveling from one state to another." *Ibid.* But the claims before it, the court continued, concerned only "allegedly tortious marketing conduct." *Ibid.* The court did not attempt to reconcile that characterization with its earlier recognition that the plaintiffs' theory of liability depended upon the defendant energy companies' conduct allegedly "dr[iving] consumption [of fossil fuels], and thus greenhouse gas pollution, and thus climate change," resulting in alleged physical and economic effects in Honolulu. *Id.* at 1187 (citation omitted). The court also drew no distinction between interstate and international emissions, holding that the plaintiffs' state-law claims could proceed as to both. See *id.* at 1195-1202. The Hawaii Supreme Court's decision, like the Colorado Supreme Court's decision in this case, is thus hopelessly irreconcilable with the Second Circuit's decision in *City of New York*.

3. The decision below is also inconsistent with the decisions of two other federal courts of appeals that have held that the law of one State cannot govern claims seeking relief for injuries emanating from pollution emitted in another state.

a. In *Illinois* v. *City of Milwaukee* (*Milwaukee III*), 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985), the State of Illinois filed nuisance claims under federal and state common law against a municipality for

allegedly polluting Lake Michigan. While the action was pending, Congress enacted comprehensive amendments to the Clean Water Act, and this Court held that those amendments had displaced the remedy previously available under federal common law. See *Milwaukee II*, 451 U.S. at 317-319.

On remand, the Seventh Circuit addressed whether Illinois's state-law claims could proceed in light of the displacement of federal common law. The Seventh Circuit held that they could not. See 731 F.2d at 406. As the Seventh Circuit explained, this Court's precedents provide that "the basic interests of federalism and the federal interest in a uniform rule of decision in interstate pollution disputes required the application of federal law." *Id.* at 407. Although Congress had displaced the federal common law, the court reasoned that the displacement "did nothing to undermine" the "reasons why the [S]tate claiming injury cannot apply its own state law to out-of-state discharges." *Id.* at 410. The court thus held that "federal law must govern * * * except to the extent that the [Clean Water Act] authorizes resort to state law." *Id.* at 411. Because Congress had not preserved state-law claims related to out-of-state sources, the Seventh Circuit determined that federal law precluded Illinois's claims. See *id.* at 413.

b. The Fourth Circuit reached a similar result in *North Carolina ex rel. Cooper* v. *Tennessee Valley Authority*, 615 F.3d 291 (2010). There, the State of North Carolina sued the Tennessee Valley Authority (TVA) over emissions from TVA plants in Alabama and Tennessee. See *id.* at 296. The district court found that the emissions created a public nuisance under North Carolina law and entered an injunction in the State's favor. See *ibid.*

The Fourth Circuit reversed. It reasoned that the "comprehensive" system of federal statutes and regulations governing air pollution left little room for nuisance actions under state law, and it concluded that North Carolina was improperly seeking to "appl[y] home state law extraterritorially." 615 F.3d at 296, 298. Applying this Court's decision in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Fourth Circuit concluded that the claims could proceed only under the law of the States in which the TVA plants were located. See 615 F.3d at 308-309; see also *Merrick* v. *Diageo Americas Supply, Inc.*, 805 F.3d 685, 692 (6th Cir. 2015) (agreeing that *Ouellette*'s interpretation of the Clean Water Act's saving clauses applies to the Clean Air Act's saving clauses); *Bell* v. *Cheswick Generating Station*, 734 F.3d 188, 196-197 (3d Cir. 2013) (same), cert. denied, 572 U.S. 1149 (2014); *Freeman* v. *Grain Processing Corp.*, 848 N.W.2d 58, 80 (Iowa) (same), cert. denied, 574 U.S. 1026 (2014); *Brown-Forman Corp.* v. *Miller*, 528 S.W.3d 886, 892-893 (Ky. 2017) (same).

c. Both *Milwaukee III* and *Cooper* reflect the broader principle that state law can govern claims seeking relief for interstate pollution only to the extent permitted by federal statute. Notably, the Colorado Supreme Court explicitly rejected petitioners' reliance on *Milwaukee III*, concluding instead that, when federal common law is displaced by statute, a court should look only to whether the statute affirmatively preempts state-law claims. App., *infra*, 20a.

4. The Colorado Supreme Court's decision is also contrary to the views of the United States. In an amicus brief recently submitted to the Maryland Supreme Court, the United States expressed the view that, "[u]nder our constitutional system, regulation of interstate pollution has always been primarily 'a matter of federal, not state

law.'" U.S. Br. at 1, *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 11, Sept. Term 2025 (Md.) (citation omitted). The United States thus argued that "[S]tates lack authority to decide how much greenhouse gas emissions in a neighboring state or foreign country are too much," and that "[a]ny attempt to do so would be preempted by federal law." *Ibid.*

The Administration has elsewhere made clear its view that claims seeking relief from energy companies for the effects of global climate change cannot proceed under state law. In an executive order, the President has criticized these lawsuits for attempting to "regulate energy beyond [the plaintiffs'] constitutional or statutory authorities," which "undermine[s] [f]ederalism by projecting the regulatory preferences of a few States into all States." Exec. Order No. 14,260 (Apr. 8, 2025). The United States has gone so far as to sue the States of Hawaii and Michigan to prevent additional climate-change actions from being filed. See *United States* v. *Michigan*, Civ. No. 25-496 (W.D. Mich. Apr. 30, 2025); *United States* v. *Hawaii*, Civ. No. 25-179 (D. Haw. Apr. 30, 2025).

This Administration may be more vocal than its predecessors, but the federal government's disquiet with the climate-change litigation is nothing new. In December 2024, the Biden Administration told the Court that the defendants in these suits "may ultimately prevail on their contention that respondents' claims are barred by the Constitution." U.S. Br. at 12, *Sunoco LP* v. *City & County of Honolulu*, 145 S. Ct. 1111 (2025) (No. 23-947). And the first Trump Administration argued that "[i]nterstate pollution claims" fall within "an inherently federal area in which state law does not apply." U.S. En Banc Br. at 4, *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020) (No. 18-16663).

The Colorado Supreme Court's decision thus not only deepens an existing conflict, but is contrary to the position of the United States. This Court's review is badly needed to resolve the conflict and to prevent dozens of climate-change cases from improperly barreling ahead in state court.

B. The Decision Below Is Incorrect

Respondents seek to impose damages on petitioners for injuries allegedly caused by the effect of interstate and international greenhouse-gas emissions on global climate change. As a result, respondents' claims fall squarely within the inherently federal areas of interstate pollution and foreign affairs. The Constitution precludes those claims from proceeding under state law. The Colorado Supreme Court's contrary holding was incorrect and conflicts with this Court's precedents.

1. Although state law is presumptively competent to govern a wide variety of issues in our federal system, there are certain areas in which "our federal system does not permit the controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). In such areas, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); see *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001).

For over a century, this Court has held that interstate pollution is an inherently federal area necessarily governed by federal law. For example, in *Ouellette*, the Court stated that "the regulation of interstate water pollution is a matter of federal, not state, law." 479 U.S. at 488 (citation omitted); see *id.* at 492. And in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), the Court

reiterated that "air and water in their ambient or interstate aspects" are "meet for federal law governance." *Id.* at 421, 422; see *City of New York*, 993 F.3d at 91 (citing additional cases).

That rule emanates from "the Constitution's structure and the principles of sovereignty and comity it embraces." *National Pork Producers Council* v. *Ross*, 143 S. Ct. 1142, 1156 (2023) (internal quotation marks and citation omitted). As this Court has explained, each State's "equal dignity and sovereignty" under the Constitution implies "certain constitutional limitations on the sovereignty of all of its sister States." *Franchise Tax Board* v. *Hyatt*, 587 U.S. 230, 245 (2019) (internal quotation marks, alterations, and citation omitted); see *Fuld* v. *Palestine Liberation Organization*, 145 S. Ct. 2090, 2104 (2025). One such limitation is that "[s]tate sovereign authority is bounded by the States' respective borders." *Fuld*, 145 S. Ct. at 2104; see *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882); *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336, 387 (1818). The equality of the States "implicitly forbids" States from applying their own laws to resolve "disputes implicating their conflicting rights." *Hyatt*, 587 U.S. at 246 (alteration and citations omitted).

Allowing the law of one State to govern disputes regarding pollution emanating from another would violate the "cardinal" principle that "[e]ach [S]tate stands on the same level with all the rest," by permitting one State to impose its law on another State and its citizens. *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). Federal law must govern such controversies because they "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. And because "borrowing the law of a particular State would be inappropriate" to

resolve such interstate disputes, federal law must govern. *American Electric Power*, 564 U.S. at 422.

2. In the absence of federal legislation governing issues of interstate pollution, this Court held that rules developed by the federal courts—federal common law—would govern lawsuits seeking relief for injuries allegedly caused by interstate pollution. See, *e.g.*, *American Electric Power*, 564 U.S. at 420-423; *Milwaukee I*, 406 U.S. at 103. But in the wake of the enactment of the Clean Air Act and Clean Water Act, this Court held that Congress has displaced any previously available causes of action under federal common law. See *American Electric Power*, 564 U.S. at 424; *Milwaukee II*, 451 U.S. at 313-314.

This Court's decision in *Ouellette* explains the limited role of state law after the displacement of federal common law by a comprehensive statutory scheme in an inherently federal area of regulation. There, the Court held that, in light of the "pervasive regulation" of the Clean Water Act and "the fact that the control of interstate pollution is primarily a matter of federal law," the only permissible state-law actions seeking relief for interstate water pollution are "those specifically preserved by the Act." 479 U.S. at 492 (citation omitted). The Court proceeded to conclude that the Clean Water Act preempts claims under any State's law other than the law of the State in which the source of the pollution was located. See *id.* at 487-498.

3. The foregoing precedents lead to a straightforward result here: federal law, including our constitutional structure and the Clean Air Act, precludes respondents' state-law claims seeking relief for interstate emissions.

Respondents' theory of liability is that petitioners have "caused billions of tons of excess CO_2 emissions" throughout the world by "producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change." Am.

Compl. 2, 87. Respondents are seeking "monetary relief to compensate" for "past and future damages and costs to mitigate the impacts of climate change," including wildfires, pests, droughts, extreme heat, and flooding. *Id.* at 104, 121-122. The "gravamen" of respondents' complaint, see *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 635 (2012) (citation omitted), is thus that petitioners' conduct increased the global use of fossil fuels, resulting in increased global greenhouse-gas emissions, which contributed to global climate change and resulted in localized physical effects in Boulder, Colorado. See *City of New York*, 993 F.3d at 91.

Those claims fall squarely within the principle that federal law governs claims seeking relief for interstate air and water pollution. Respondents allege that their injuries are caused by the interstate and international emissions of greenhouse gases over many decades. See Am. Compl. 2. Respondents' requested relief—including damages, see, *e.g.*, *Kurns*, 565 U.S. at 637—would have the effect of remedying injuries allegedly caused by emissions outside Colorado. Respondents are simply attempting to recover by moving up one step in the causal chain and suing the fuel producers rather than the emitters themselves.

The congressional displacement of federal common law does not open the door to state-law claims unless the Clean Air Act permits them. And the Clean Air Act does not permit state-law claims based on emissions emanating from another State. Instead, the Act provides the Environmental Protection Agency with authority to regulate greenhouse-gas emissions from stationary sources, see *American Electric Power*, 564 U.S. at 424-425; 42 U.S.C. 7411(b), (d), and to set greenhouse-gas emissions standards for cars, trains, airplanes, and other equipment. See 42 U.S.C. 7521(a)(1)-(2), (a)(3)(E), 7547(a)(1), (a)(5), 7571

(a)(2)(A). Accordingly, in light of the breadth of the Clean Air Act's governance of greenhouse-gas emissions, respondents' state-law claims would be foreclosed even if a presumption against preemption applied. Contra App., *infra*, 11a-16a.

4. Respondents' claims based on international emissions cannot proceed under state law either. The federal government has "exclusive authority in international relations." *Fuld*, 145 S. Ct. at 2104 (internal quotation marks, alterations, and citation omitted). There is "no question" that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 413 (2003). State laws must therefore "give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968).

Because respondents seek relief for climate-change-related harms, international emissions—which dwarf domestic emissions—are the primary causal mechanism underlying their alleged injuries. Foreign-policy principles thus preclude the application of state law to regulate international emissions. As the Second Circuit explained in *City of New York*, holding fuel producers such as petitioners liable for such emissions would "affect the price and production of fossil fuels abroad"; "bypass the various diplomatic channels that the United States uses to address this issue"; override "the United States' longstanding position" of "oppos[ing] the establishment of liability and compensation schemes at the international level"; and "sow confusion and needlessly complicate the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." 993 F.3d at 103 & n.11. Accordingly, respondents can no more seek relief under state law

for injuries allegedly caused by international emissions than for those allegedly caused by interstate emissions.

5. In the decision below, the Colorado Supreme Court fundamentally misunderstood both the ability of state law to operate in inherently federal areas and the nature of respondents' theory of liability.

The central premise of the decision below is that, when Congress enacts a statute that displaces federal common law, state law presumptively governs the issues previously governed by federal common law. See App., *infra*, 20a. But that logic ignores the reason why federal common law governed in the first place. In cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," only federal law can apply, because "our federal system does not permit the controversy to be resolved under state law" at all. *Texas Industries*, 451 U.S. at 641. In other words, where federal common law applies, it is precisely because "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

The displacement of federal common law by federal statutory law does "nothing to undermine" the "reasons why the [S]tate claiming injury cannot apply its own state law to out-of-state discharges." *Milwaukee III*, 731 F.2d at 410. State law could not govern interstate and international emissions before Congress acted, and the application of state law to such claims remains inconsistent with our constitutional structure after statutory displacement, even if federal law provides no remedy for the particular claim alleged. Were it otherwise, Congress's decision to address an inherently federal issue directly by statute, so as to displace *federal* common-law remedies, would result in *state* common-law remedies suddenly becoming available. As the Second Circuit put it, that result is "too

strange to seriously contemplate." *City of New York*, 993 F.3d at 98-99.

The Colorado Supreme Court concluded that this Court's instructions for the remand in *American Electric Power* supported its analysis. See App., *infra*, 10a-11a. That is exactly backwards. After holding that the Clean Air Act displaced any federal common-law claim seeking abatement of defendants' greenhouse-gas emissions, the Court remanded for the lower courts to consider the plaintiffs' parallel claims brought under the law of the state in which each defendant power plant was located. *American Electric Power*, 564 U.S. at 429. In so doing, the Court directed that, "[i]n light of [its] holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Ibid.* The Court cited *Ouellette* for the proposition that "the Clean Water Act does not preclude aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Ibid.* (citation omitted).

Those instructions support petitioners' position, not respondents'. As explained above, see p. 24, this Court held in *Ouellette* that, because the Clean Water Act is comprehensive in nature and "control of interstate pollution is primarily a matter of federal law," "the only state suits that remain available are those specifically preserved by the Act": namely, suits under the law of the source State. 479 U.S. at 492. In *American Electric Power*, the Court was thus directing the lower courts to apply the same analysis as in *Ouellette*—the same analysis petitioners are advancing here.

The Colorado Supreme Court separately concluded that respondents' claims did not fall within the inherently federal area of interstate pollution because respondents have "not brought an action against a pollution emitter to

abate pollution" but instead "seek[] damages from upstream producers for harms stemming from the production and sale of fossil fuels." App., *infra*, 17a. According to the court, therefore, respondents' claims "do not seek to regulate [greenhouse-gas] emissions." *Id.* at 21a. That is a false dichotomy. While respondents' theory of tort liability may attack upstream conduct, the source of injury is most certainly interstate and international emissions. As one judge has put it, "there is no hiding the obvious" that climate-change claims such as respondents' present "a clash over regulating worldwide greenhouse gas emissions and slowing global climate change." *Minnesota* v. *American Petroleum Institute*, 63 F.4th 703, 717 (8th Cir. 2023) (Stras, J., concurring) (citation omitted), cert. denied, 144 S. Ct. 620 (2024).

The complaint is candid on this point. Respondents repeatedly allege that defendants' conduct led to increased greenhouse-gas emissions worldwide, which caused or exacerbated global climate change and thereby caused localized harms in Colorado. See Am. Compl. 1-4, 30. Respondents nowhere allege harm from petitioners' conduct other than through the mechanisms of increased emissions and global climate change. When faced with the same argument, the Second Circuit rightly held that a plaintiff cannot "have it both ways" by "disavowing any intent to address emissions" while simultaneously "identifying such emissions as the singular source of the [alleged] harm." *City of New York*, 993 F.3d at 91.

The Colorado Supreme Court also erred by concluding that respondents' claims based on international emissions could proceed. The federal government has "exclusive authority in international relations and with respect to foreign intercourse and trade." *Fuld*, 145 S. Ct. at 2104 (internal quotation marks, alterations, and citation omitted). The court disregarded that principle and, in so doing,

"risk[ed] impeding our federal government's judgment as to how to approach air pollution in the international sphere." App., *infra*, 45a (Samour, J., dissenting). The Colorado Supreme Court erred by holding that respondents' claims, seeking relief for interstate and international greenhouse-gas emissions, could proceed under Colorado law.

The decision below paves the way for "all other Colorado municipalities" to bring such claims. App., *infra*, 25a (Samour, J., dissenting). Allowing those claims to proceed under state law will result in a "patchwork of standards formulated by local governments throughout the country" that is "not capable of effectively addressing interstate air pollution." *Id.* at 45a.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

This case presents a question of enormous legal and practical importance. The decision below perpetuates an unsustainable and chaotic patchwork of regulation of interstate and international emissions. And in doing so, it threatens one of this Nation's most critical industries. This case is an excellent vehicle to review the question presented in this case. The Court should therefore grant review.

1. The stakes in this case could not be higher. The Colorado Supreme Court itself explained that "this case presents substantial issues of global import." App., *infra*, 1a. And this is just one of over two dozen pending climate-tort cases brought by States and municipalities across the country seeking to impose untold damages on energy companies for the physical and economic effects of climate change. As more time passes, more governments are filing cases of their own. See, *e.g.*, *Hawaii* v. *BP p.l.c.*, No. 1CCV-25-717 (Haw. Cir. Ct. May 1, 2025); *Maine* v. *BP*

p.l.c., No. PORSC-CV-24-442 (Me. Super. Ct. Nov. 26, 2024). Individuals are now bringing their own cases. See *Leon* v. *Exxon Mobil Corp.*, No. 25-2-15986-8 (Wash. Super. Ct. May 29, 2025). And state legislatures are passing laws to create so-called "climate superfunds" based on the same theory of liability as the tort cases. See *United States* v. *New York*, Civ. No. 25-3656 (S.D.N.Y. May 1, 2025) (challenging New York's Climate Change Superfund Act); *Chamber of Commerce* v. *Moore*, Civ. No. 24-1513 (D. Vt. Dec. 30, 2024) (challenging Vermont's Climate Superfund Act).

This is complete chaos. And without this Court's intervention, the Nation will be left with a "patchwork of standards formulated by local governments throughout the country to regulate [greenhouse-gas] emissions," which will invite further disorder and will "not [be] capable of effectively addressing interstate air pollution." App., *infra*, 45a (Samour, J., dissenting). As the federal government explained in its brief in *American Electric Power*, "virtually every person, organization, company, or government across the globe * * * emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries," giving rise to claims from "almost unimaginably broad categories of both potential plaintiffs and potential defendants." TVA Br. at 11, 15 (No. 10-174).

The use of state law to address global climate change represents a serious threat to one of our Nation's most critical sectors. The current Administration has made clear that "American energy dominance is threatened when State and local governments seek to regulate energy beyond their constitutional and statutory authorities," and that the climate-change litigation in particular "weaken[s] our national security and devastate[s] Americans by driving up energy costs for families." Exec. Order

No. 14,260. The Administration has even gone so far as to sue States contemplating filing additional actions. See *United States* v. *Michigan*, *supra*; *United States* v. *Hawaii*, *supra*; *United States* v. *New York*, *supra*. Indeed, as the federal government previously stated in another climate-change case, "federal law and policy has long declared that fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." U.S. En Banc Br. at 10, *City of Oakland*, *supra* (internal quotation marks and citation omitted).

2. This case is a suitable vehicle for reviewing the question presented. The question was fully briefed in, and passed on by, the Colorado Supreme Court. And respondents' claims are representative of the claims being brought in parallel suits across the country, meaning that resolution of the question presented here will have immediate impact elsewhere.

Although this petition arises from a decision affirming the denial of a motion to dismiss in State court, this Court's jurisdiction over the decision is firmly established under 28 U.S.C. 1257(a) and the fourth category recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The question presented has been finally decided by the Colorado Supreme Court; this Court's review of the question would be prevented if petitioners prevail on the merits on nonfederal grounds; reversal of the decision below would terminate the litigation; and declining review now would seriously erode significant federal policies, as evidenced by the current Administration's stance on the climate litigation. See *Cox Broadcasting*, 420 U.S. at 482-483. This Court has routinely granted certiorari in a similar posture in cases presenting questions of federal preemption. See, *e.g.*, *Coventry Health Care of Missouri,*

Inc. v. *Nevils*, 581 U.S. 87, 92-94 (2017); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 259 (2013); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988).

This Court's guidance is urgently needed. The arguments on both sides of the question presented have been fully ventilated in lower-court opinions, including the dueling opinions below. Meanwhile, state courts and parties are devoting enormous resources to the litigation of these cases, and the energy industry is facing the threat of damages awards that could run into the billions of dollars. The Court should grant certiorari here and resolve whether climate-change claims are viable and may proceed on the merits in state courts across the country. At a minimum, in light of the substantial federal interest in the question presented and the change in Administration since the Court last considered the question presented, the Court may wish to call for the views of the Solicitor General.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HUGH QUAN GOTTSCHALK
ERIC L. ROBERTSON
WHEELER TRIGG
O'DONNELL LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202

Counsel for Petitioners
Suncor Energy (U.S.A.) Inc.
and Suncor Energy Sales Inc.

KANNON K. SHANMUGAM
WILLIAM T. MARKS
JAKE L. KRAMER
EMMA R. WHITE
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
YAHONNES CLEARY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

Counsel for Petitioner
Exxon Mobil Corporation

AUGUST 2025

APPENDIX

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APPENDIX A

THE SUPREME COURT
OF THE STATE OF COLORADO

No. 2025 CO 21

IN RE:

PLAINTIFFS: COUNTY COMMISSIONERS OF BOULDER COUNTY AND CITY OF BOULDER,

v.

DEFENDANTS: SUNCOR ENERGY USA, INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY INC.; AND EXXON MOBIL CORPORATION

Filed: May 12, 2025

OPINION OF THE COURT

JUSTICE GABRIEL delivered the opinion of the Court.

¶1 Although this case presents substantial issues of global import, the question before us is narrow: whether the district court erred in concluding that the common law tort claims brought by plaintiffs, the County Commissioners of Boulder County and the City of Boulder (collectively, "Boulder"), against defendants, Exxon Mobil Corporation, Suncor Energy USA, Inc., Suncor Energy Sales, Inc., and Suncor Energy Inc., may proceed under state law. Specifically, Boulder asserts claims for public

and private nuisance, trespass, unjust enrichment, and civil conspiracy, and it seeks damages for the role that defendants' production, promotion, refining, marketing, and sale of fossil fuels has allegedly played in exacerbating climate change, which, in turn, has purportedly caused harm to Boulder's property and residents. Defendants contend that these claims are preempted by federal law.

¶2 We now conclude that Boulder's claims are not preempted by federal law and, therefore, the district court did not err in declining to dismiss those claims. Accordingly, we discharge the order to show cause and remand this case to the district court for further proceedings consistent with this opinion. In doing so, we express no opinion on the ultimate viability of the merits of Boulder's claims.

I. Facts and Procedural History

¶3 Boulder brought the present action against defendants seeking damages for "the substantial role that their production, promotion, refining, marketing and sale of fossil fuels played and continues to play in causing, contributing to and exacerbating alteration of the climate, thus damaging Plaintiffs' property, and the health, safety and welfare of their residents." Specifically, in its amended complaint, Boulder alleges that it has incurred and will continue to incur millions of dollars in costs to protect its property and residents from the impacts of climate change. Boulder contends that these costs should be shared by defendants "because they *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, while concealing and/or misrepresenting the dangers associated with fossil fuels' intended use." Boulder

further alleges that defendants have engaged and continue to engage in these activities despite knowing that the burning of their fossil fuels would exacerbate climate change and its impacts. And Boulder alleges that, through their advertising, defendants have for decades intentionally misled the public about the impacts of climate change and the role that defendants' fossil fuel products have played in exacerbating those impacts.

¶4 Based on these factual allegations, Boulder asserts, as pertinent here, causes of action for public nuisance, private nuisance, trespass, unjust enrichment, and civil conspiracy. Because the precise nature of Boulder's allegations is important to our analysis, we discuss those allegations in some detail.

¶5 In its public nuisance claim, Boulder alleges that defendants' fossil fuel activities have contributed to climate change and have interfered with and will continue to threaten and interfere with public rights in Boulder's communities. These rights include the right to use and enjoy public property, spaces, parks, and ecosystems; the right to public health, safety, emergency management, comfort, and well-being; and the right to safe and unobstructed travel, transportation, commerce, and exchange.

¶6 In its private nuisance claim, Boulder alleges that defendants' actions have substantially and unreasonably interfered with, and will continue to substantially interfere with, Boulder's use and quiet enjoyment of its rights to and interests in its real property.

¶7 In its trespass claim, Boulder alleges that defendants' actions have caused invasions of its property in the form of floodwaters, fires, hail, rain, snow, wind, and invasive species, all of which have caused substantial damage to Boulder's real property.

¶8 In its unjust enrichment claim, Boulder alleges that defendants have "profited from the manufacture, distribution and/or sales of fossil fuel products at levels sufficient to alter the climate, including in Colorado," even after defendants were aware of the harms resulting from such actions. Boulder further contends that it has conferred a benefit on defendants by bearing the costs of the impacts of such climate change.

¶9 Finally, in its civil conspiracy claim, Boulder alleges that defendants and other, unnamed co-conspirators acted in concert to maintain or increase fossil fuel usage at levels they knew were sufficient to alter the climate, while misrepresenting and failing to disclose material information concerning these activities.

¶10 In connection with these causes of action, Boulder seeks monetary damages to compensate it for its past and future costs to mitigate the impacts of climate change, including the costs to analyze, evaluate, mitigate, abate, and otherwise remediate such impacts. These costs include, without limitation, costs associated with wildfire response, management, and mitigation; costs to repair and replace existing flood control and drainage measures and to repair flood damage; costs of managing and responding to increased drought conditions; and costs to repair physical damage to Boulder's buildings. Boulder does not, however, seek to enjoin any oil and gas operations or sales in Colorado or elsewhere. Nor does it seek to enforce emissions controls of any kind.

¶11 Boulder commenced its action in the Boulder County District Court. Shortly thereafter, however, defendants removed the case to federal district court, although, on Boulder's motion, the federal district court ordered the case remanded back to state court. Defendants appealed the federal court's remand order, and while their

appeal was pending, they moved to dismiss the state court action for lack of personal jurisdiction and failure to state a claim. The Boulder County District Court, however, stayed the proceedings before it pending the resolution of the federal appeal.

¶12 After substantial litigation in the Tenth Circuit and two certiorari petitions in the United States Supreme Court, the Tenth Circuit ultimately affirmed the federal district court's remand order, and this case resumed in the Boulder County District Court. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1246 (10th Cir. 2022).

¶13 The Boulder County District Court then considered defendants' pending motions to dismiss. As pertinent here, in their motion to dismiss for failure to state a claim, defendants argued that Boulder's claims were "displaced" or otherwise preempted by federal law.

¶14 Specifically, defendants contended that Boulder's claims were governed by the federal common law of interstate pollution. Because federal legislation had displaced any federal common law right to impose liability based on fossil fuel emissions and production, however, defendants asserted that Boulder could not circumvent such federal legislation, and, thus, Boulder's federal common law claims were preempted.

¶15 Next, defendants argued that the Clean Air Act ("CAA"), among other federal enactments, preempted Boulder's claims. On this point, defendants argued both field preemption (contending that Congress had occupied the field of emissions regulation) and conflict preemption (contending that Boulder's claims presented an obstacle to the enforcement of federal law because those claims

would interfere with the careful balance struck by Congress between promoting fossil fuel production, on the one hand, and environmental protection, on the other).

¶16 Finally, defendants contended that the federal foreign affairs power, which gives the federal government exclusive authority over foreign affairs, preempted Boulder's claims because, in defendants' view, those claims would impair the federal government's effective exercise of foreign policy.

¶17 The district court ultimately rejected each of these contentions and denied defendants' motion to dismiss.

¶18 With respect to defendants' federal common law preemption argument, the district court disagreed with defendants' position for five reasons. First, in the district court's view, the CAA displaced the federal common law of nuisance governing transboundary pollution actions and, thus, federal common law in this area no longer exists. Second, even if the federal common law persisted, that law, which governed transboundary pollution actions, is distinct from Boulder's claims in the present case. Third, even if the CAA did not displace federal common law, the district court perceived no basis to recognize new federal common law covering Boulder's state law damages claims. Fourth, defendants had not shown a uniquely federal interest justifying the invocation of federal common law. And lastly, defendants had not shown a significant conflict between federal interests and Colorado law.

¶19 As to defendants' contention that the CAA preempted Boulder's claims, the district court again was unpersuaded. In so ruling, the court observed that the CAA contains no language expressly preempting state common law tort claims. Nor, the court observed, does the

CAA completely occupy the field of greenhouse gas ("GHG") emissions, a necessary predicate to a claim of field preemption. And the court was unpersuaded that Boulder's claims would impede the CAA's goals, thus undermining any claim of conflict preemption. On this point, the court observed that Boulder's claims, which seek damages and not an injunction, did not pose an obstacle to the CAA's regulation of air pollution emissions. Moreover, the court deemed "notable" that the CAA does not provide a remedy to Boulder for the claims asserted here.

¶20 Finally, the court rejected defendants' assertion that the foreign affairs power preempted Boulder's claims because the court found no precedent supporting preemption of claims like those at issue here and defendants had not shown how Boulder's claims would compromise the federal government's ability to conduct foreign policy.

¶21 Defendants then petitioned this court for an order to show cause under C.A.R. 21, and we issued an order to show cause.

II. Analysis

¶22 We begin by addressing our jurisdiction under C.A.R. 21 and setting forth the applicable standard of review. We then turn to the question of whether Boulder's claims are preempted by federal law.

A. Jurisdiction and Standard of Review

¶23 The exercise of our original jurisdiction under C.A.R. 21 lies within our sole discretion. *People v. Tafoya*, 2019 CO 13, ¶ 13, 434 P.3d 1193, 1195. An original proceeding under C.A.R. 21 is an extraordinary remedy that is limited in its purpose and availability. *Id.* As pertinent here, we have exercised our discretion under C.A.R. 21 to

hear matters that present issues of significant public importance that we have not previously considered. *Id.*

¶24 To date, we have not addressed the preemptive effect of federal law on state common law tort claims for harms related to climate change. Whether these claims may proceed against defendants has important implications for Colorado and its citizens. Moreover, other courts that have addressed similar questions have reached differing conclusions. *Compare City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1181 (Haw. 2023) (concluding that claims like those at issue in this case were not preempted), *with City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d Cir. 2021) (concluding that claims like those at issue in this case were preempted). Thus, we believe that resolution of this issue warrants the exercise of our original jurisdiction under C.A.R. 21.

¶25 We review a district court's ruling on a motion to dismiss de novo, and in doing so, we apply the same standards as the district court. *Sch. Dist. No. 1 in City & Cnty. of Denver v. Masters*, 2018 CO 18, ¶ 13, 413 P.3d 723, 728. In conducting this review, we accept all allegations of material fact in the complaint as true, and we view the complaint's allegations in the light most favorable to the plaintiff. *Id.* To survive a motion to dismiss, a complaint must state a plausible claim for relief. *Warne v. Hall*, 2016 CO 50, ¶ 2, 373 P.3d 588, 590.

B. Preemption

¶26 Although the parties' briefs, in significant part, seem to talk past one another, the ultimate question before us is whether Boulder's claims are preempted by federal law. We conclude that they are not.

1. Federal Common Law

¶27 It is axiomatic that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has, however, recognized narrower, more specialized areas of federal common law addressing matters within national legislative power, as directed by Congress and when the basic constitutional scheme so demands. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). Such matters include disputes concerning the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or the United States's relations with foreign nations, and admiralty cases. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

¶28 One specific area of previously recognized federal common law that is pertinent to the matter now before us concerned "suits brought by one State to abate pollution emanating from another State." *AEP*, 564 U.S. at 421. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"), the Supreme Court explained, "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I* thus articulated a federal common law of "nuisance by water pollution" involving interstate or navigable waters. *Id.* at 99, 107. The Court noted, however, "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Id.* at 107.

¶29 Shortly after *Milwaukee I* was decided, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, which "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a

permit." *City of Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981) ("*Milwaukee II*"). In light of this legislation, in *Milwaukee II*, the Supreme Court concluded that Congress had displaced the federal common law in this area. *Id.* at 317-19. In so concluding, the Court explained that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314. The Court thus held that no federal common law remedy was available to respondents in the case before it. *Id.* at 332.

¶30 The question remained, however, whether any federal common law concerning *air* pollution still existed. The Supreme Court addressed this issue in *AEP*, 564 U.S. at 415. There, the plaintiffs sued several electric power companies, asserting federal common law public nuisance claims and seeking to abate defendants' carbon dioxide emissions. *Id.* The Court rejected such claims, holding that "the Clean Air Act and the EPA actions it authorizes displace[d] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.* at 424. The Court went on to explain, "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA]." *Id.* at 429. Because none of the parties had briefed that issue, however, the Court declined to address it. *Id.*

¶31 Since *AEP* was decided, courts have consistently reaffirmed its holding that the CAA displaced the federal common law of nuisance. *See, e.g.*, *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 55 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 206 (4th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25

F.4th at 1260-61; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012); *Honolulu*, 537 P.3d at 1181.

¶32 In line with this settled precedent, we, too, conclude that the CAA displaced the federal common law in this area, and, therefore, federal common law does not preempt Boulder's claims here. Instead, we must look to whether the CAA preempts Boulder's claims. *See Honolulu*, 537 P.3d at 1199 ("Simply put, displaced federal common law plays no part in this court's preemption analysis. Once federal common law is displaced, the federal courts' task is to 'interpret and apply statutory law.'") (quoting *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 n.34 (1981)); *accord Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1261. We turn to that issue next.

2. The CAA

¶33 The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, it has long been settled that Congress has the power to preempt state law. *Fuentes-Espinoza v. People*, 2017 CO 98, ¶ 21, 408 P.3d 445, 448.

¶34 In determining whether a state law is preempted, our analysis is guided by two tenets: (1) Congress's intent to preempt controls; and (2) courts will not presume that federal law supersedes the states' historic police powers unless the law reveals Congress's clear and manifest purpose to do so. *Id.* at ¶ 22, 408 P.3d at 448. This presumption against preemption applies with particular

force when, as here, the law alleged to be preempted concerns a field that states have traditionally occupied. *See Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009); *see also Rushing v. Kan. City S. Ry. Co.*, 185 F.3d 496, 510 (5th Cir. 1999) (noting that courts interpreting federal statutes pertaining to subjects traditionally governed by state law are reluctant to find preemption and that "state common law traditionally governs nuisances"). Case law has also suggested that "[t]he presence of a savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 450 (4th Cir. 2005).

¶35 Against this backdrop, our case law has observed that federal preemption can take three forms: express preemption, field preemption, and conflict preemption. *Fuentes-Espinoza*, ¶ 23, 408 P.3d at 448.

¶36 A state law is expressly preempted when a federal statute contains an express preemption provision. *Id.*

¶37 A state law is preempted under principles of field preemption when Congress intended the federal government to occupy a field of law exclusively. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Such an intent may be inferred when (1) Congress has adopted a framework of regulation that is so pervasive that Congress has left no room for states to supplement it or (2) a federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Fuentes-Espinoza*, ¶ 25, 408 P.3d at 448.

¶38 Finally, a state law is preempted under conflict preemption principles when a state law actually conflicts with federal law. *English*, 496 U.S. at 79. We have recognized two types of conflict preemption: impossibility preemption and obstacle preemption. *Fuentes-Espinoza*,

¶ 26, 408 P.3d at 449. Impossibility preemption applies when (1) compliance with both federal and state law is physically impossible, *id.*; (2) state law penalizes what federal law requires, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); or (3) state law directly conflicts with federal law, *see Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227-28 (1998). Obstacle preemption, in turn, applies when the state law at issue stands as an obstacle to the accomplishment and execution of Congress's purposes and objectives. *Fuentes-Espinoza*, ¶ 26, 408 P.3d at 449. Notably, the Supreme Court has found obstacle preemption to apply in only a small number of cases, namely, when (1) the federal legislation at issue involves a uniquely federal area of regulation (e.g., foreign affairs, sanctioning fraud on federal agencies, and regulating maritime vessels) or (2) Congress has deliberately chosen to preclude state regulation because a federal law struck a particular balance of interests that would be disturbed or impeded by state regulation (e.g., when federal safety regulations sought a gradual phase-in of airbags but a state law required the immediate installation of such airbags). *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1212-13 (9th Cir. 2020).

¶39 None of these forms of preemption support a determination that the CAA preempts Boulder's claims in this case.

¶40 Express preemption is not implicated because the CAA contains no provision expressly preempting state common law tort claims. *Honolulu*, 537 P.3d at 1203.

¶41 Similarly, field preemption is not implicated because, even if Boulder's claims could be construed as seeking to regulate emissions, which, as we explain below, they do not, Congress has not completely occupied the field of

emissions regulation. *Id.* at 1204. To the contrary, under the CAA, states retain regulatory authority to implement, maintain, and enforce CAA emissions standards through state implementation plans. 42 U.S.C. § 7410; *Honolulu*, 537 P.3d at 1204. Moreover, "[t]he CAA contains two savings clauses that preserve state and local governments' legal right to impose standards and limitations on air pollution that are stricter than national requirements." *Baltimore*, 31 F.4th at 216 (citing 42 U.S.C. §§ 7416, 7604(e)). Section 7416 preserves "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution," as long as the standards are no less stringent than the CAA. Section 7604(e), in turn, preserves "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." Thus, the CAA does not completely occupy the field of emissions regulation, and Boulder's claims are not barred under field preemption principles.

¶42 Lastly, Boulder's claims are not barred under conflict preemption principles. Impossibility preemption is inapplicable because defendants have not cited, nor have we seen, any facts to indicate that it is impossible to comply with both the CAA and state tort law, that state tort law penalizes what the CAA requires, or that state tort law directly conflicts with the CAA. *Honolulu*, 537 P.3d at 1207 (concluding that impossibility preemption did not apply to claims similar to those presented here).

¶43 Obstacle preemption is likewise inapplicable. Defendants have not identified any way in which state tort liability would frustrate the CAA's purposes, and we perceive none. The CAA itself makes clear that "air pollution

prevention . . . and air pollution control at its source is [sic] the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Moreover, the CAA's legislative declaration provides that one of the CAA's principal purposes is to protect and enhance the quality of this country's air resources in order to promote the public health and welfare, as well as the productive capacity of our population. 42 U.S.C. § 7401(b). The CAA primarily achieves these goals by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014). Nothing in Boulder's damages claims would interfere with these purposes.

¶44 Nor do Boulder's claims involve uniquely federal areas of regulation. To the contrary, nuisance abatement issues and the other torts that Boulder has alleged in this case have been deemed traditional *state* law matters implicating important state interests. *See, e.g.*, *Lambeth v. Miller*, 363 F. App'x 565, 568 (10th Cir. 2010) (unpublished opinion) (addressing nuisance abatement issues); *Rushing*, 185 F.3d at 510 (addressing nuisance actions); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 76 (Iowa 2014) (addressing nuisance, negligence, and trespass claims). And litigating Boulder's claims would not upset any balance set by Congress because Boulder's claims do not seek to impose liability for activities that the CAA regulates. *See Baltimore*, 31 F.4th at 216 (concluding that tort claims similar to those presented here did not involve the regulation of emissions); *accord Honolulu*, 537 P.3d at 1205.

¶45 On each of these points, the Hawai'i Supreme Court's decision in *Honolulu*, 537 P.3d at 1195-1207, is

substantially on point. There, the City and County of Honolulu brought damages claims for public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass against a number of oil and gas producers. *Id.* at 1180. The defendants there made many of the same preemption arguments that defendants make here. *Id.* at 1181. The court rejected each of these arguments, however, concluding, first, that the CAA displaced federal common law governing interstate pollution damages suits and, thereafter, federal common law did not preempt state law. *Id.* at 1181, 1195-1202. The court then proceeded to address whether the CAA preempted the plaintiffs' claims and concluded, along the same lines discussed above, that it did not. *Id.* at 1181-82, 1202-07.

¶46 The Fourth Circuit reached the same conclusions on these preemption questions, albeit in a different procedural context, in *Baltimore*, 31 F.4th at 204-07, 215-17.

¶47 The analyses in these cases mirror our own, and we find the cases persuasive and thus follow them here.

¶48 Accordingly, we conclude that Boulder's claims are not preempted by either federal common law or the CAA. In so concluding, we are not persuaded by defendants' myriad arguments to the contrary. We end by addressing those arguments.

3. Defendants' Contentions

¶49 Defendants principally appear to contend that Boulder's state law claims assert what were formerly federal common law claims involving interstate pollution and although federal legislation has since displaced the federal common law in this area, federal common law or federalism concerns arising from the United States Constitution continue to operate to bar Boulder's claims. We disagree.

¶50 As an initial matter, it is unclear whether the essential premise of defendants' argument is correct. Specifically, although defendants assert that the federal common law would have governed Boulder's claims, that does not appear to be accurate. As discussed above, the federal common law applied to "suits brought by one State to *abate* pollution emanating from another State," and such actions involved claims against the pollution emitters themselves, thus implicating the regulation of interstate pollution. *AEP*, 564 U.S. at 418, 421 (emphasis added); *see also Milwaukee I*, 406 U.S. at 93, 104 (discussing "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters"). Boulder, however, has not brought an action against a pollution emitter to abate pollution. Rather, it seeks damages from upstream producers for harms stemming from the production and sale of fossil fuels. Defendants cite no Supreme Court case in which the Court applied the federal common law in this setting. Accordingly, even if the federal common law in this area still existed, it would not appear to apply here. *See Honolulu*, 537 P.3d at 1201.

¶51 Even accepting defendants' premise that the prior federal common law would have governed Boulder's claims, however, defendants cite no applicable authority supporting the proposition that once federal common law exists, the structure of the Constitution precludes the application of state law even when that common law no longer exists. The cases on which defendants rely for this theory do not support it. For example, defendants assert that *Franchise Tax Board v. Hyatt*, 587 U.S. 230, 246 (2019), where the Court said that the Constitution implicitly forbids states from applying their own laws in matters involving interstate controversies, supports their position. But in that case, the issue presented was "whether the Constitution permits a State to be sued by a private party

without its consent in the courts of a different State." *Id.* at 233. No such issue of state sovereignty is presented in this case. Nor does this case involve a state's applying its own law in an interstate controversy that is necessarily controlled by federal law.

¶52 At root, defendants appear to be arguing that a vague federal interest over interstate pollution, climate change, and energy policy must preempt Boulder's claims. As the Supreme Court explained in *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (plurality opinion), however, "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." (Quoting *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). Here, defendants point to no federal statute or constitutional text that preempts Boulder's state law claims, and "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affs.*, 485 U.S. at 503.

¶53 Nor are we persuaded by defendants' argument that state law claims previously preempted by federal common law may proceed only to the extent authorized by federal statute. For the reasons discussed above, we are not convinced that federal common law would have barred Boulder's claims here. Even accepting, for purposes of argument, the contrary premise, however, we are still unconvinced. In support of their position, defendants principally rely on *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), *City of New York*, 993 F.3d at 99, and *People of State of Illinois v. City of Milwaukee*, 731 F.2d

403, 411 (7th Cir. 1984) ("*Milwaukee III*"). These cases are either inapposite or unconvincing.

¶54 The question presented in *Ouellette*, 479 U.S. at 491, was whether the Clean Water Act preempted Vermont common law to the extent that that law might impose liability on a New York point source. In addressing this question, the Court began by noting the pervasive program of water pollution regulation set forth in the Clean Water Act and then turned to the preemption question presented. *Id.* at 492. It is in that context that the Court observed that "the only state suits that remain available are those specifically preserved by the Act," and the Court made this statement by way of introducing the very type of preemption analysis that we have conducted above. *Id.* at 492-97. Accordingly, when read in context, the Court's statement, on which defendants heavily rely, merely posed the question of whether the state nuisance action at issue was preempted by the Clean Water Act. The Court did not, as defendants suggest, require express authorization of a state common law action in the Act itself. Had it done so, it would have had no need to conduct the extensive preemption analysis that followed its statement.

¶55 In *City of New York*, 993 F.3d at 99, the Second Circuit opined that state common law tort claims similar to those at issue here were preempted because they would have been governed by the federal common law and "'resort[ing] to state law' on a question previously governed by federal common law is permissible only to the extent 'authorize[d]' by federal statute." (Alterations in original) (quoting *Milwaukee III*, 731 F.2d at 411.) As the Hawai'i Supreme Court stated in *Honolulu*, 537 P.3d at 1199, however, the Second Circuit's preemption analysis "engages in backwards reasoning."

¶56 The Second Circuit first analyzed whether federal common law would have preempted New York's state law claims, and the court concluded that it would have done so. *City of New York*, 993 F.3d at 90-95. The court then turned to the question of whether the CAA preempted the federal common law, and after concluding that it did, the court opined that the CAA's displacement of the federal common law did not resuscitate New York's state law claims. *Id.* at 95-99. Accordingly, in the Second Circuit's view, federal common law barred New York's state law claims, and although the CAA displaced that federal common law, the common law retained its preemptive force.

¶57 Unlike the Second Circuit, for the reasons set forth above, we believe that the proper analysis is for a court first to determine whether any federal common law exists at all because "displaced federal common law plays no part in this court's preemption analysis." *Honolulu*, 537 P.3d at 1199. If the court finds that federal legislation has displaced federal common law, then the court looks to whether the legislation preempted state law claims. Thus, contrary to the Second Circuit's conclusions, which mirrored those of the Seventh Circuit in *Milwaukee III*, 731 F.2d at 411, the Supreme Court explained in *AEP*, 564 U.S. at 429, that after displacement of federal common law by statute, "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." At no point did the Supreme Court suggest that the federal statute must specifically authorize claims under state law. *Id.* Thus, defendants' reliance on *City of New York* and *Milwaukee III* is likewise misplaced.

¶58 For similar reasons, we reject defendants' contention that Boulder's action is, in essence, an attempt to regulate GHG emissions and is therefore preempted. As

a factual matter, Boulder's claims do not seek to regulate GHG emissions (the claims do not seek compensation for any GHG emissions by defendants themselves but rather focus on defendants' upstream production activities). Rather, they seek compensation for allegedly tortious conduct that the CAA does not address. *See Baltimore*, 31 F.4th at 216 (concluding, in circumstances similar to those present here, that the plaintiffs' state law claims did not involve the regulation of emissions); *Honolulu*, 537 P.3d at 1205 (concluding that because the plaintiffs' state law claims did not seek to regulate emissions, those claims did not conflict with the CAA).

¶59 On this point, we are not persuaded by defendants' reliance on *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012). In *Kurns*, the Supreme Court observed that "'regulation can be . . . effectively exerted through an award of damages,' and '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* (omission and alteration in original) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The *Kurns* Court made this statement, however, in the context of rejecting the plaintiffs' assertion that although the Locomotive Inspection Act occupied the entire field of locomotive equipment regulation, that Act's preemptive scope did not extend to state common law claims, as opposed to state legislation or regulation. *Id.* The case before us presents no similar question as to whether Boulder may assert common law claims in an area in which Congress has chosen to occupy the field. Moreover, accepting defendants' argument that a large damages award is equivalent to regulation and thus must be preempted could lead to the preemption of many traditional state law tort claims simply because they *might* lead to a large damages award. *See Honolulu*, 537 P.3d at

1202. But a lawsuit does not amount to regulation merely because it *might* have an impact on how actors in a given field behave. *See id.*

¶60 Finally, we are unpersuaded by defendants' argument that the federal foreign affairs power bars Boulder's claims.

¶61 The Supreme Court has interpreted the United States Constitution to vest power over foreign affairs exclusively with the federal government. *United States v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). The foreign affairs power may thus preempt state laws that intrude on the federal government's exclusive power over foreign affairs. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

¶62 In this context, the Supreme Court has observed that the foreign affairs power may preempt state laws via either conflict preemption or field preemption. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-20, 419 n.11 (2003); *see also Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (relying on *Garamendi*). But neither applies here.

¶63 Boulder's claims are not barred by principles of conflict preemption because defendants do not identify any express foreign policy of the federal government that conflicts with state tort law, and we are not aware of any. Nor do defendants indicate how Boulder's claims pose an obstacle to our federal government's dealings with any foreign nation. *See Baltimore*, 31 F.4th at 213-14 (concluding that Baltimore's state law claims, which are similar to Boulder's claims in the present case, were not barred by foreign affairs conflict preemption because the defendants had not identified any express foreign policy that conflicted with Baltimore's state law claims, nor had the

defendants shown that Baltimore's claims posed an obstacle to the federal government's dealings with foreign nations).

¶64 As to field preemption, in the context of foreign affairs, courts have concluded that state laws may be barred if they "intrude[] on the field of foreign affairs without addressing a traditional state responsibility." *Movsesian*, 670 F.3d at 1072. Although the doctrine of foreign affairs field preemption is "rarely invoked," *id.* at 1075, the Supreme Court has observed that it applies in instances when a state effectively attempts to establish its own foreign policy or when a state law has more than some incidental effect on foreign affairs, *see Zschernig*, 389 U.S. at 434, 441.

¶65 In *Movsesian*, 670 F.3d at 1071-77, the Ninth Circuit applied a two-step analysis that it had articulated in its prior case law to determine whether the foreign affairs power preempted a state statute. Under this analysis, a court must first ask whether the state law "concerned an area of traditional state responsibility," which required the court to inquire into the statute's "real purpose." *Id.* at 1074. If the statute at issue did not address an area of traditional state responsibility, then the court must consider whether the statute "intruded on a power expressly or impliedly reserved by the Constitution to the federal government." *Id.* In the case before it, the court concluded that the state statute at issue did not concern an area of traditional state responsibility and that the statute intruded on the federal government's exclusive powers by having more than an incidental or indirect effect on foreign affairs. *Id.* at 1075-76. Accordingly, the statute was preempted. *Id.* at 1077.

¶66 Applying these principles here, we conclude that Boulder's claims are not barred by foreign affairs field

preemption. As discussed above, the torts alleged in this case involve areas of traditional state responsibility. Moreover, we perceive no manner in which, through its tort claims, Boulder is seeking to implement foreign policy. Nor have defendants demonstrated how Boulder's claims intrude on any power over foreign policy expressly or implicitly reserved to the federal government.

¶67 In so concluding, we are not persuaded by defendants' assertion that allowing this action to proceed would impair the effective exercise of this country's foreign policy by regulating global GHG emissions. As discussed above, Boulder's claims do not seek to regulate GHG emissions. *See Baltimore*, 31 F.4th at 214 (concluding that Baltimore's state law claims, which are similar to Boulder's claims in this case, were not field preempted by the foreign affairs power because those claims did not involve any allegations that developed foreign policies with other countries and did not undermine the federal government in the international arena but, at best, involved an intersection between state law and private, international companies).

¶68 In sum, defendants' arguments do not convince us that federal law preempts Boulder's state law claims in this case.

III. Conclusion

¶69 For these reasons, we conclude that the district court correctly concluded that federal law did not preempt Boulder's claims and that those claims could therefore proceed under state law.

¶70 Accordingly, we discharge the order to show cause and remand this case to the district court for further proceedings consistent with this opinion. In so ruling, we

express no opinion on the ultimate viability of the merits of Boulder's claims.

JUSTICE SAMOUR, joined by JUSTICE BOATRIGHT, dissenting.

¶71 The Pledge of Allegiance states that the United States of America is "one Nation under God, indivisible." 4 U.S.C. § 4. This language was particularly meaningful when it was initially conceived in 1892 because, prior to the Civil War, the question of whether a state could withdraw from the Union had been hotly debated and remained unresolved. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 n.1 (2004). Of course, in 2025, there is no dispute about our status: We are but one indivisible nation. Yet, the majority in this case gives Boulder, Colorado, the green light to act as its own republic.[1] More specifically, the majority concludes that Boulder may prosecute state-law claims that will both effectively regulate interstate air pollution and have more than an incidental effect on foreign affairs. And, alarmingly, the majority's decision isn't cabined to Boulder—all other Colorado municipalities may bring such claims. Indeed, at least one already has. *See Comm'rs of San Miguel Cnty. v. Suncor Energy*, No. 21CV150 (Dist. Ct., City & Cnty. of Denver).

¶72 Boulder's damages claims against Exxon Mobil Corporation and three Suncor Energy companies (collectively, "the energy companies") are based on harms the State of Colorado has allegedly suffered as a result of *global* climate change. According to Boulder, by producing, promoting, refining, marketing, and selling fossil

[1] I use "Boulder" to collectively refer to the plaintiffs, the City of Boulder and the County Commissioners of Boulder County.

fuels in the United States and globally, the energy companies have played and continue to play a substantial role in increasing the concentration of greenhouse gases ("GHGs") in the atmosphere, thereby inducing changes to the climate worldwide. The majority decides that, since any federal common law in this area was displaced by the Clean Air Act ("CAA"), the appropriate test to determine whether Boulder's state-law claims may proceed is one of ordinary statutory preemption. Maj. op. ¶ 32. After analyzing the claims under that ill- suited framework, the majority holds that the CAA does not preempt them. *Id.* at ¶ 2; *see also City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1199-1203 (Haw. 2023).

¶73 But ordinary preemption in this case fits like a shoe three sizes too small. State law has historically been incompetent to address claims seeking redress for interstate and international air pollution—for good reason: Such claims implicate "uniquely federal interests," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)), necessitating a "uniform rule of decision," *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*"). Had Boulder's state-law claims been raised prior to the CAA's enactment, they would have been precluded under federal common law.

¶74 And simply because federal common law relating to GHG emissions has been displaced by statute doesn't mean that the conditions that made state law inappropriate to govern these claims in the past have vanished into thin air. In other words, Congress's decision to displace federal common law and to take control of this area did not suddenly render state law competent to regulate interstate and international air pollution. Nothing in the

CAA reflects that Congress intended the result the majority reaches here.

¶75 Because state law remains incompetent to regulate interstate and international air pollution, I disagree that Boulder can prosecute its claims. Unlike the Blue Fairy that brought Pinocchio to life, the CAA did not magically breathe life into state-law tort claims that had been as lifeless as a wooden puppet.

¶76 Notably, an ordinary preemption analysis includes a presumption against preemption because it applies in cases in which state law has traditionally occupied the field. In such cases, I can understand why a presumption against preemption makes sense. In a case like this one, however, where state law has *not* traditionally occupied the field, the presumption is counterintuitive.

¶77 In the end, the majority arrives at the wrong result because it applies the wrong test. And, in doing so, the majority disregards the principles underlying federal common law that made state law incompetent to govern in this area in the first place. *See* Maj. op. ¶ 32. Indeed, the majority deems federal common law completely irrelevant to the analysis and thus treats it as though it never existed. *Id.* Unlike the majority, I don't read our Supreme Court's relevant jurisprudence as supporting that approach.

¶78 In my view, the appropriate inquiry with respect to the interstate aspect of Boulder's claims is whether the CAA affirmatively authorizes them. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 99 (2d Cir. 2021) (holding, in a similar case, that the CAA doesn't "authorize" state-law claims). I would conclude that it does not. And, as it relates to the international aspect of Boulder's claims, I would conclude that the federal government's primacy in

foreign affairs precludes them. I would thus dismiss all of Boulder's claims.

¶79 I am concerned that permitting Boulder to proceed with its claims will interfere with both our federal government's regulation of interstate air pollution and our federal government's foreign policies regarding air pollution. Because there are numerous other local governments within the United States doing just what Boulder has done (and yet others that will undoubtedly follow suit in the future), and because multiple out-of-state courts have now reached the conclusion my colleagues in the majority do in this case, I am worried that we are headed for regulatory chaos. Considering that ours is "one [indivisible] Nation," I don't believe that this free-for-all approach is what our Supreme Court intended in the cases cited by the majority.

¶80 I would make the order to show cause absolute and nip Boulder's state-law claims in the bud. Therefore, I respectfully dissent.

I. Federal Common Law Historically Governing Interstate Air Pollution Disputes Is Not Distinguishable

¶81 My jumping-off place is a discussion of federal common law because it remains relevant after its displacement by the CAA. There are compelling reasons why interstate air pollution has not historically been a state-law field, and those reasons remain true after the enactment of the CAA. The majority skips over this important step in the analysis because it mistakenly reviews the question before us under ordinary preemption. However, since interstate air pollution is a field the states have not tradi-

tionally occupied, ordinary preemption is a fish out of water. And, as I show in this section, the majority's attempt to otherwise distinguish federal common law is futile.

¶82 "There is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, federal courts have developed common law in limited, specialized areas involving "'uniquely federal interests'" that "are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle*, 487 U.S. at 504 (quoting *Tex. Indus., Inc.*, 451 U.S. at 640).

¶83 Where there is federal common law, the application of state law is precluded. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Disputes in these narrow categories cannot "be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc.*, 451 U.S. at 641. Accordingly, there "must be a conflict between [a] federal interest and . . . state law" to justify the development of federal common law. *City of New York*, 993 F.3d at 90. But that conflict need not be "as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field *which the [s]tates have traditionally occupied*.'" *Boyle*, 487 U.S. at 507 (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¶84 The control of "ambient or interstate" air and water pollution was, historically, one of those inherently federal categories that was governed by federal common law and where state law could not apply. *Milwaukee I*, 406

U.S. at 103; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) ("[T]he control of interstate pollution is primarily a matter of federal law."). In fact, the Supreme Court has recognized that "[e]nvironmental protection," in general, "is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (quoting Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-22 (1964)). Fashioning federal common law was certainly necessary to address transboundary pollution. *See Milwaukee I*, 406 U.S. at 105 n.6.

¶85 Prior to the enactment of the CAA and the Clean Water Act ("CWA"), federal courts employed federal common law to resolve numerous suits brought by one state to abate pollution originating from another state. *See, e.g.*, *id.* at 107-08 (remitting to the district court, with instructions to apply federal common law, a public nuisance suit brought by Illinois to abate pollution discharges into Lake Michigan); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650, 650-51 (1916) (ordering a private copper company in Tennessee to limit sulfur emissions that caused harm in Georgia); *Missouri v. Illinois*, 180 U.S. 208, 241-43 (1901) (allowing Missouri to sue to enjoin Chicago from discharging sewage into interstate waters); *see also City of New York*, 993 F.3d at 91 (listing "a mostly unbroken string of cases [that] applied federal law to disputes involving interstate air or water pollution"). They did so based on "an overriding federal interest in the need for a uniform rule of decision" or because the controversy in question "touche[d] basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6.

¶86 The interstate nature of the alleged pollution in the above-referenced cases constituted an overriding federal interest necessitating "a uniform rule of decision." *See id.* (explaining that "the pollution of a body of water such as Lake Michigan bounded, as it is, by four States" presents "demands for applying federal law"); *Tex. Indus., Inc.*, 451 U.S. at 641 (noting that "the interstate or international nature of [a] controversy [can] make[] it inappropriate for state law to control"). Air pollution and water pollution both can move across state boundaries without difficulty and are not always easy to track, making their governance by different local standards difficult, if not downright impossible.

¶87 Before the CAA saw the light of day, federal common law conflicted with, and precluded, state-law claims to redress interstate air pollution. For that reason, Boulder could not have brought its claims under federal common law.

¶88 But Boulder whistles past the federal-common-law graveyard, maintaining that its claims are distinguishable from those which federal common law historically dealt with in the interstate pollution arena. I disagree.

¶89 True, the historical interstate air pollution case law developed by federal courts did not focus on GHG emissions specifically. But GHG emissions certainly possess the "ambient" and "interstate" character that would have necessitated, and still does necessitate, "a uniform rule of decision." *Milwaukee I*, 406 U.S. at 103, 105 n.6. In fact, GHG emissions may be the most "interstate" type of air pollution there is, given the emissions' ubiquitous nature, sources, and harms. *See California v. BP P.L.C.*, Nos. C 17-06011-WHA & C 17-06012-WHA, 2018 WL

1064293, at *3 (N.D. Cal. Feb. 27, 2018) ("If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem [of climate change], a problem centuries in the making . . . ."), *vacated and remanded*, *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020).

¶90 Like the district court, however, my colleagues in the majority try to sideline federal common law by concluding that Boulder is not seeking to "abate" or regulate out-of-state GHG emissions. Maj. op. ¶ 50. I beg to differ. The majority's attempt to differentiate between what it perceives as the scope of historical federal common law—abatement suits that regulate interstate air pollution—and Boulder's suit—which the majority perceives as a modest tort action for monetary remediation—falls short. *See id.* The thrust of this contention is that a tort suit for damages does not implicate the distinctive federal interests that a suit more explicitly regulating out-of-state air pollution does. And therefore, the argument goes, there is no need for a "uniform rule of decision" in this area. *Milwaukee I*, 406 U.S. at 105 n.6.

¶91 While Boulder's state-law claims masquerade as tort claims for damages, a closer look at the substance of those claims' allegations reveals that Boulder seeks to effectively abate or regulate interstate emissions. *See City of Boulder v. Pub. Serv. Co. of Colo.*, 2018 CO 59, ¶ 20, 420 P.3d 289, 294 ("[W]e must look to the substance, not the form, of [the] complaint."). To start, Boulder's allegations undoubtably concern interstate GHG emissions. I recognize that Boulder emphasizes in its amended complaint that it "do[es] not seek to . . . enforce emissions controls of any kind." But in the next breath, Boulder acknowledges, as it must, that its alleged damages stem directly from such emissions. Boulder has sued the energy companies for the role their fossil fuel production and sales allegedly

"played and continue[] to play *in causing . . . alteration of the climate*." (Emphasis added.) The causal link between the energy companies' actions and Boulder's alleged damages is global GHG emissions. As the Second Circuit observed, "Artful pleading cannot transform the . . . complaint into anything other than a suit over global [GHG] emissions. It is precisely *because* fossil fuels emit [GHGs]—which collectively 'exacerbate global warming'—that the City is seeking damages." *City of New York*, 993 F.3d at 91. This applies with equal force to Boulder's suit here.

¶92 In yet another attempt to treat federal common law as chopped liver, the majority, Maj. op. ¶ 50, and Boulder characterize the claims as not being against *emitters*, to which federal common law has applied in the past, but rather against companies higher in the chain of production. However, that distinction is neither here nor there—the bottom line is that this suit is about the *alleged GHG emissions from the energy companies*, even if the energy companies are actually a few steps removed from the physical release of the pollutants.

¶93 Further stripping away the amended complaint's clever language confirms that this case is about abating and regulating global emissions. The amended complaint explicitly states that the energy companies "*continue* to conduct their fossil fuel activities at levels that contribute to alteration of the climate, including in Colorado, and *do not plan to stop or substantially reduce* those activities." (Emphases added.) It then requests, among other things, "remediation and/or *abatement of the hazards* discussed above by [the energy companies] by any other practical means." (Emphasis added.)

¶94 Boulder's requested relief will inevitably impose a limitation on GHG emissions. An award of damages, just

like abatement, can "effectively exert[]" regulation, no matter how the relief is framed or viewed. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The "obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (quoting *Garmon*, 359 U.S. at 247); *see also Ouellette*, 479 U.S. at 498 n.19 (declining "to draw a line" between different types of relief in evaluating the preemptive scope of the CWA because, as a result of the assessed damages, a party "might be compelled to adopt different or additional means of pollution control from those required by the [CWA], regardless of whether the purpose of the relief was compensatory or regulatory"). Make no mistake: Boulder looks to curb the energy companies' conduct by hitting them where it hurts—their wallets.

¶95 In short, Boulder's claims target GHG emissions from the energy companies with a goal that's beyond compensatory. Therefore, I disagree with the majority that "Boulder . . . has not brought an action . . . to abate pollution" and that this case is not similar, in relevant ways, to cases historically governed by federal common law. Maj. op. ¶ 50. Try as it might, the majority cannot distance this case from federal common law.[2] And, as I explain next, federal common law remains relevant to the analysis after the enactment of the CAA. The majority's failure to apprehend this is what ultimately leads it astray: It forces a square peg in a round hole by applying an ordinary preemption analysis.

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[2] This suit cannot be construed to be regulating only *in-state* conduct, which has not been historically covered by federal common law.

II. The Appropriate Analysis Is Whether the CAA Authorizes Boulder's Claims Relating to Interstate GHG Emissions

¶96 I agree with my colleagues in the majority that federal common law in this area has been displaced by the CAA. See Maj. op. ¶¶ 31-32; AEP, 564 U.S. at 424-25; *Native Vill. of Kivalina v. ExxonMobil Corp.,* 696 F.3d 849, 857-58 (9th Cir. 2012). But I part ways with them on their view that the relevance of federal common law to matters covered by the CAA has taken its last breath. *See* Maj. op. ¶32. Following Congress's passage of the CAA, the logic that sparked federal common law continues to be alive and kicking.

¶97 That rationale was not abruptly rendered irrelevant when Congress passed the CAA, and the majority points to no binding authority that dictates otherwise. After all, where "federal common law exists, it is because state law cannot be used," *Milwaukee II*, 451 U.S. at 313 n.7, and displacement of federal common law by a statute does "nothing to undermine that result," *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984) ("*Milwaukee III*"). In the words of the Second Circuit, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one . . . ." *City of New York*, 993 F.3d at 98.

¶98 Consequently, the question before us now is not whether federal law *preempts* state law, as the majority concludes, but rather whether federal law "*authorizes* resort to state law." *Milwaukee III*, 731 F.2d at 411 (emphasis added).

¶99 Critically, our Supreme Court has explained that when courts deal with an area traditionally governed by federal law, "*there is no beginning assumption* that concurrent regulation by the [s]tate is a valid exercise of its police powers"; instead, "we must ask whether the local laws in question are consistent with the federal statutory structure." *United States v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added). This alteration of the typical ordinary preemption analysis (from preemption of state law to authorization of state law) makes sense because the presumption that a state-law cause of action is not preempted is only warranted in "a field which the [s]tates have traditionally occupied." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (quoting *Rice*, 331 U.S. at 230).

¶100 In arguing that the correct analysis is one of ordinary statutory preemption, the majority points to a sentence from *AEP*: "In light of our holding that the [CAA] displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the [CAA]." Maj. op. ¶ 30 (alterations in original) (quoting *AEP*, 564 U.S. at 429). However, not only did the Supreme Court never actually conduct such an analysis in *AEP* (because the parties had not briefed the issue), *id.*, it seemed to use the term "preemptive effect" in a more general sense than the majority perceives, i.e., merely to make the unremarkable observation that the CAA, not federal common law, would determine the availability of state-law claims.

¶101 The Supreme Court in *Ouellette* used the idea of preemption in a similarly general sense. In fairness, the majority, Maj. op. ¶ 54, correctly notes that the *Ouellette* Court framed the question presented as "whether the [CWA] *pre-empts* a common-law nuisance suit filed in a

Vermont court under Vermont law, when the source of the alleged injury is located in New York." *Ouellette*, 479 U.S. at 483 (emphasis added). Significantly, however, when it actually analyzed the effect of the CWA, the Supreme Court concluded that, "[i]n light of [the] pervasive regulation [of the CWA] 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*." *Id.* at 492 (emphases added) (citing *Milwaukee I*, 406 U.S. at 107).

¶102 In other words, while reviewing the CWA's "regulation of water pollution," which is similar in comprehensiveness to the CAA's regulation of air pollution, the Supreme Court considered federal law's preeminent role in controlling interstate pollution. *Id.* at 500; *see also Bell v. Cheswick Generating Station*, 734 F.3d 188, 196-97 (3d Cir. 2013) (describing the similarities between the CWA and CAA and applying *Ouellette*'s holding in the CAA context). And the Court ultimately considered whether the CWA expressly "allow[ed] [s]tates" to impose effluent standards on their own point sources after the CWA displaced federal common law. *Ouellette*, 479 U.S. at 497 (answering the question in the affirmative). Thus, regardless of the label placed on *Ouellette*'s analysis, in practice it read more like an authorization analysis than one of ordinary preemption. If it looks like an authorization analysis, swims like an authorization analysis, and quacks like an authorization analysis, then it probably is an authorization analysis.

¶103 I'm not alone in this reading of *Ouellette*. I have good company: The Second Circuit came to the same conclusion when the City of New York brought state-law tort claims similar to those raised by Boulder here. *City of New York*, 993 F.3d at 99. After determining that the

claims "would regulate cross-border emissions" and that federal common law had been displaced by the CAA, the court looked to whether the CAA "*authorize[d]* the type of state-law claims the City [sought] to prosecute." *Id.* at 93, 95, 99 (emphasis added); *see also Mayor & City of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Cir. Ct. for Baltimore City, Md. July 10, 2024) (unpublished order) (following the reasoning of *City of New York*). The Second Circuit was spot-on.

¶104 Still, as additional support for their position, the majority, Maj. op. ¶¶ 31, 46, and Boulder cite several federal appellate cases that have conducted a complete preemption inquiry and held that "state-law claim[s] for public nuisance do[] not arise under federal law" for purposes of federal-question jurisdiction. *City of Oakland*, 969 F.3d at 901, 907-08; *see, e.g.*, *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 57-58 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 206 (4th Cir. 2022). But these cases are inapposite: The question before those courts was whether they had federal-question jurisdiction in the removal context given the well-pleaded complaint rule. They did not conduct an ordinary preemption analysis, much less determine whether or how ordinary preemption applies in the non-removal context. *See, e.g.*, *City of Oakland*, 969 F.3d at 907 n.6 ("We do not address whether [federal] interests may give rise to an affirmative federal defense because such a defense is not grounds for federal jurisdiction.").

¶105 Accordingly, federal case law does not support the majority's application of an ordinary preemption analysis that treats historical federal common law as though it

never existed.[3] In my view, the majority errs in asking whether the CAA preempts Boulder's state-law claims instead of whether the CAA affirmatively authorizes those claims.

III. The CAA Does Not Affirmatively Authorize Boulder's Claims Pertaining to Interstate Emissions

¶106 Like the district court, the majority fails to identify a single provision within the CAA that affirmatively authorizes state-law claims. None exists.

¶107 The CAA is a complex, comprehensive statutory scheme with a "cooperative federalis[t]" framework: The Environmental Protection Agency ("EPA") has primary *regulatory* responsibility, but states have substantial *implementation and enforcement* roles. *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982); *see also City of New York*, 993 F.3d at 99. So, while states have important parts to play in the statutory scheme, injecting themselves into the *regulatory* work Congress has exclusively assigned to the EPA isn't one of them.

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[3] The majority, Maj. op. ¶ 52, quotes *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019), for the proposition that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law" because "a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." (Quoting *Puerto Rico Dep't of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 503 (1988)). But *Virginia Uranium* was a plurality opinion. Of course, a "plurality opinion . . . [does] not represent the views of a majority of the Court." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987). As such, it is not binding precedent. *Id.* At most, it is a "point of reference for further discussion." *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion). Besides, as mentioned, the ordinary preemption analysis employed by the Court in *Virginia Uranium* is not the appropriate test here.

¶108 The majority nevertheless posits that states retain regulatory authority through state implementation plans ("SIPs"). Maj. op. ¶ 41. But that's a stretch. Any role the states have vis-à-vis SIPs is clearly delineated, supervised, and overseen by the EPA. As part of its responsibility over the public's health and welfare, Congress has designated the EPA—and only the EPA—to promulgate national ambient air quality standards for the EPA's selected pollutants. 42 U.S.C. §§ 7408(a), 7409. The EPA has several other roles under the CAA, including promulgating standards related to motor vehicle emissions. 42 U.S.C. § 7521.

¶109 Nowhere does the CAA give states national regulatory authority. Indeed, under the CAA, states have zero responsibility for the promulgation of national environmental standards. Instead, each state is required to submit SIPs "provid[ing] for implementation, maintenance, and enforcement" of the *EPA's federal standards within that state*. 42 U.S.C. § 7410(a)(1).[4]

¶110 The CAA's two savings clauses offer no safe harbor to Boulder's state-law claims. The first savings clause (the CAA's citizen-suit provision), 42 U.S.C. § 7604(e), provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any

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[4] SIPs must include, among other things, "enforceable emission limitations and other control measures," as well as provisions prohibiting any emissions that significantly contribute to the air pollution problems of a downwind state. 42 U.S.C. § 7410(a)(2)(A), (D). If a given SIP submission or proposed revision "meets all of the applicable requirements" of the CAA, the EPA must approve it. 42 U.S.C. § 7410(k)(3). But if a state fails to submit or implement an adequate SIP, the EPA must create a Federal Implementation Plan. 42 U.S.C. § 7410(c).

emission standard or limitation or to seek any other relief." The second savings clause states that, "[e]xcept as otherwise provided, . . . nothing in this chapter shall preclude or deny the right of any [s]tate or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. There is a caveat accompanying the latter clause: A state or subdivision "may not adopt or enforce any emission standard or limitation which is less stringent than the [federal] standard or limitation." *Id.*

¶111 Nearly identical provisions in the CWA have been narrowly interpreted to only allow aggrieved individuals to bring "a nuisance claim pursuant to the law of the *source* [s]tate," thereby barring a nuisance claim "under an affected [s]tate's law." *Ouellette*, 479 U.S. at 495, 497. The Supreme Court in *Ouellette* reasoned that interpreting the savings clauses in this way "would not frustrate the goals of the CWA" because (1) it would not "disturb the [CWA's] balance among federal, source-state, and affected-state interests," and (2) it would "prevent[] a source from being subject to an indeterminate number of potential regulations." *Id.* at 498-99. Because this suit is an attempt to apply Colorado law to activities in *other* states allegedly creating pollution, *Ouellette*'s reasoning is applicable.[5] *See Bell*, 734 F.3d at 196-97 (finding "no

[5] I would not rule out the possibility that Boulder could bring suit under Colorado law to recover damages allegedly caused by emissions resulting from the energy companies' activities *in Colorado*. *See Milwaukee II*, 451 U.S. at 328 (contemplating that states may be able to adopt more stringent limitations than the CWA "through state nuisance law" and "apply them to in-state discharges"). But that's a far, far cry from what Boulder is seeking to do here—with the majority's blessing, no less.

meaningful difference between the [CWA] and the [CAA] for the purposes of [a] preemption analysis"). Thus, the savings clauses cannot confer the requisite authority on Boulder to proceed with this litigation. *See City of New York*, 993 F.3d at 99-100 (similarly concluding that the CAA savings clauses did not authorize the state-law claims at issue there).

¶112 Lastly, I am aware of the provision in the CAA stating "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of [s]tates and local governments." 42 U.S.C. § 7401(a)(3). But this is simply part of the congressional findings and purpose, which cannot bestow binding, affirmative authorization on Boulder to pursue its claims. Moreover, this provision is nothing more than an acknowledgment of a state's traditional responsibility to control sources of pollution in its own jurisdiction. *Cf. Ouellette*, 479 U.S. at 497. The structure of the statutory scheme supports this interpretation. *See Charnes v. Boom*, 766 P.2d 665, 667 (Colo. 1988) ("[W]e must read and consider *the statutory scheme as a whole* to give consistent, harmonious and sensible effect to all its parts." (emphasis added)). While states have significant implementation and enforcement roles as to in-state sources of pollution, nowhere does the CAA authorize them to independently regulate or otherwise control out-of-state sources of pollution.

¶113 In short, Boulder has not identified any adequate source of authority in the CAA to permit the claims as they relate to interstate pollution. My colleagues in the majority have not either. That's because there is none. Thus, these claims should not be allowed to proceed.

IV. State Law Is Similarly Incompetent to Address Claims Pertaining to International Emissions

¶114 Boulder's broad claims extend to conduct outside of the United States. But state law is no more competent to address this aspect of the claims. State law is preempted by federal law when it comes to international emissions under both foreign affairs field preemption and conflict preemption. I discuss each in turn.[6]

¶115 Due to "the supremacy of the national power in the general field of foreign affairs, . . . [o]ur system of government . . . *imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference*." *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (emphasis added). Therefore, "[state] regulations must give way if they impair the effective exercise of the Nation's foreign policy," "disturb foreign relations," or "establish [a state's] own foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). It follows that, under foreign affairs field preemption, "state action with more than [an] incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law"—i.e., "without any showing of conflict." *Am. Ins. Ass'n v. Garamendi*, 539 U.S.

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[6] To the extent that Boulder's claims pertain to international emissions, they require review under a different methodology than interstate emissions. First, of course, preemption related to international matters and ordinary preemption implicate different analytical frameworks. Second, the CAA did not displace federal common law in the international arena. Apart from one minor provision allowing reciprocal arrangements with foreign countries, *see* 42 U.S.C. § 7415, the CAA is virtually silent about its extraterritorial reach, and "unless a contrary intent appears, [a statute] is meant to apply only within the territorial jurisdiction of the United States." *City of New York*, 993 F.3d at 100 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

396, 398 (2003) (relying on *Zschernig*, 389 U.S. at 432). This is true notwithstanding "the absence of any treaty, federal statute, or executive order." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012) (relying on *Zschernig*, 389 U.S. at 440-41).

¶116 State claims seeking to impose damages on parties for their emissions outside of the United States necessarily "disturb foreign relations," *Zschernig*, 389 U.S. at 441, or, at minimum, impact foreign affairs in more than an incidental way, *Garamendi*, 539 U.S. at 398, because they effectively regulate extraterritorial activities, potentially upset the United States government's current or future "carefully balanced scheme of international cooperation on a topic of global concern," and "risk jeopard[y] [to] our nation's foreign policy goals," *City of New York*, 993 F.3d at 103. Thus, "even absent any [current] affirmative federal activity" related to climate change, Boulder's claims will impermissibly result in "more than [an] incidental effect on foreign affairs." *Garamendi*, 539 U.S. at 398.

¶117 The majority suggests that preemption of a state law under the foreign affairs field preemption doctrine may only occur when the state is not "addressing a traditional state responsibility." Maj. op. ¶ 64 (quoting *Movsesian*, 670 F.3d at 1072). Be that as it may, this case does not involve an area of traditional state responsibility. *Movsesian*, 670 F.3d at 1072; Maj. op. ¶¶ 65-66. As discussed above, redress of interstate and international air pollution has traditionally been governed by federal common law.

¶118 Regardless, conflict preemption also applies because this is not an area of foreign affairs where there has been a complete absence of federal activity. As mentioned,

the CAA itself touches on the issue of international pollution with one minor provision allowing the EPA to prevent pollution emanating from the United States from endangering the public health and welfare of a foreign country if that country provides reciprocal rights to the United States. 42 U.S.C. § 7415. This provision evinces our federal government's consideration of international air pollution, as well as its concomitant judgment as to how much extraterritorial regulation was advisable in light of the complex economic, environmental, and political tradeoffs involved. Further evidence of that judgment can be found in international agreements pertaining to climate change that our federal government has, at various points in time, either joined or refrained from joining. *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (rejoining the Paris Agreement under the United Nations Framework Convention on Climate Change); Exec. Order No. 14,162, 90 Fed. Reg. 8455 (Jan. 20, 2025) (ordering withdrawal from the Paris Agreement).

¶119 In sum, because our federal government has clearly balanced many different interests in formulating its foreign policy on air pollution, it makes little sense to allow international regulation through the types of state claims Boulder has brought. By giving Boulder the nod to proceed with its claims, the majority risks impeding our federal government's judgment as to how to approach air pollution in the international sphere.

V. Allowing These and Similar Claims to Proceed Will Create a Chaotic Patchwork of Local Standards

¶120 A patchwork of standards formulated by local governments throughout the country to regulate GHG emissions is not capable of effectively addressing interstate air pollution. Such local regulation will invite chaos.

Fossil fuel companies will potentially face many suits based on numerous standards, which will cause "vagueness" and "uncertainty," *Ouellette*, 479 U.S. at 496, and make it "virtually impossible to predict the standard" for a lawful interstate emission, *Milwaukee III*, 731 F.2d at 414. Think of how difficult it will be to administer such a system: How will courts isolate each company's contribution to each alleged climate harm? The federal government's interest in avoiding regulatory chaos through a uniform standard is why federal common law existed in the first place, and that interest is even more prominent today. The legislature, in crafting the CAA, certainly didn't intend to downplay it.

VI. Conclusion

¶121 Boulder is not its own republic; it is part of Colorado and, by extension, of the United States of America. Consequently, while it has every right to be environmentally conscious, it has absolutely no right to file claims that will both effectively regulate interstate air pollution and have more than an incidental effect on foreign affairs. And because Boulder has brought just such claims in this case, I cannot join the majority. I would instead dismiss Boulder's claims.

¶122 Given the number of local municipalities throughout the country that have already brought claims like those advanced by Boulder, given that more and more municipalities are joining this trend, and given further that a number of courts have now ruled that such claims may be prosecuted, I respectfully urge the Supreme Court to take up this issue—whether in this case or another one. My colleagues in the majority, like other courts, interpret Supreme Court precedent as permitting Boulder's claims. Respectfully, I believe that they misread those cases.

¶123 I'm concerned that this decision will contribute to a patchwork of inconsistent local standards that will beget regulatory chaos. To borrow from Fleetwood Mac's old hit song, the message our court conveys to Boulder and other Colorado municipalities today is that "you can go your own way" to regulate interstate and international air pollution. Fleetwood Mac, *Go Your Own Way*, *on* Rumours (Warner Bros. Records Inc. 1977). In our indivisible nation, that just can't be right. I respectfully dissent.

APPENDIX B

DISTRICT COURT, BOULDER COUNTY,
STATE OF COLORADO

No. 2018CV30349

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER,
PLAINTIFFS

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY, INC.; EXXONMOBIL CORPORATION,
DEFENDANTS

Filed: June 21, 2024

ORDER RE DEFENDANTS' MOTIONS TO DISMISS

Through this litigation, Plaintiffs seek compensation from Defendants for climate change related impacts within Plaintiffs' jurisdictions. Plaintiffs maintain that they have experienced substantial and rising costs to mitigate the impacts of Defendants' alteration of the climate. According to the Amended Complaint, Plaintiffs have

spent and will continue to spend millions of dollars to mitigate these impacts.

Defendants have filed several Motions to Dismiss. Based on the Court's review of the Amended Complaint, extensive core briefing and supplemental briefing on the Motions to Dismiss, the file herein, the arguments advanced by counsel at the oral arguments, and the pertinent legal authorities, the Court issues the following ruling:

I. PARTIES & RELIEF SOUGHT

Plaintiffs are two[1] local governments—the City of Boulder ("City"), a home rule municipality, and Boulder County, a subdivision of the State of Colorado ("County"). Plaintiffs will collectively be referred to as the "Local Governments."

Defendant ExxonMobil Corporation is a New Jersey corporation, with its principal place of business in Texas ("ExxonMobil"). The Amended Complaint has named three Suncor entities. Defendant Suncor Energy, Inc. is a Canadian corporation, with its principal place of business in Calgary, Alberta ("Suncor Canada"). Amended Complaint, ¶¶ 47, 89. Suncor Energy (U.S.A.), Inc. ("Suncor Energy") is a subsidiary of Suncor Canada, and operates the oil and gas refinery in Commerce City, Colorado. Amended Complaint, ¶ 57. Suncor Energy Sales, Inc. ("Suncor Sales") is a subsidiary of Suncor Canada, and op-

[1] At the outset of the litigation, the list of Plaintiffs also included the Board of County Commissioners of San Miguel County. By Order dated January 25, 2021, the Court granted the Suncor Defendants' Motion to Dismiss or Transfer Venue. San Miguel County's claims are currently pending in Denver County District Court, Case No. 21CV150.

erates 47 retail gasoline and/or diesel fuel stations in Colorado. Amended Complaint, ¶ 58. Defendants will collectively be referred to as the "Energy Companies."

Through the Amended Complaint, the Local Governments have brought six causes of action against the Energy Companies:

First Cause of Action: Public Nuisance

Second Cause of Action: Private Nuisance

Third Cause of Action: Trespass

Fourth Cause of Action: Unjust Enrichment

Fifth Cause of Action: Violation of the Colorado Consumer Protection Act

Sixth Cause of Action: Civil Conspiracy

As relief, the Local Governments primarily seek money damages to compensate the Local Governments for their past and future damages and costs to mitigate the impact of climate change. They also seek remediation and/or abatement of the hazards by any other practical means. In accordance with C.R.S. § 6-1-113(2) (Colorado Consumer Protection Act), the Local Governments seek treble damages, and recovery of reasonable attorney fees. The Local Governments also request the Energy Companies to be held jointly liable under C.R.S. § 13-21-111.5(4) based on the conspiracy claim.

II. PROCEDURAL HISTORY

This long-running litigation has journeyed through the state and federal court system, including two brief layovers at the U.S. Supreme Court. The Local Governments commenced this action in April 2018. In June 2018, the Energy Companies filed a Notice of Removal in the U.S. District Court of Colorado, asserting seven grounds for

removal to federal court. The Local Governments responded by filing a Motion to Remand. Rejecting all seven asserted grounds for removal, the U.S. District Court remanded the action back to this Court. The Energy Companies appealed the remand order on six grounds.

On plenary review, the Tenth Circuit Court of Appeals held that its jurisdiction was limited to one of the grounds, federal officer removal, and affirmed the remand order without considering the other grounds for removal. The Energy Companies sought review in the U.S. Supreme Court. While that petition was pending, in a similar proceeding, the U.S. Supreme Court clarified that the entire order of remand was reviewable on appeal. The Supreme Court therefore vacated the Tenth Circuit's opinion and remanded for reconsideration. On remand, the Tenth Circuit held that none of the six grounds relied upon by the Energy Companies supported federal removal jurisdiction, and affirmed the remand order. *Board of County Commissioners of Boulder County v. Suncor*, 25 F.4th 1238, 1246, 1249 (10th Cir. 2022).

The Energy Companies then filed a petition for certiorari with the U.S. Supreme Court. On April 24, 2023, the Court denied the petition. Thereafter, the litigation landed back in this Court, to issue rulings on the pending Motions to Dismiss filed by the Energy Companies. In particular, the following Motions to Dismiss were pending before this action moved to the federal court system:

(1) ExxonMobil's Motion to Dismiss for Lack of Subject Matter Jurisdiction, under C.R.C.P. 12(b)(2).

(2) Suncor Canada's Motion to Dismiss for Lack of Subject Matter Jurisdiction, under C.R.C.P. 12(b)(2).

(3) The Energy Companies' Motion to Dismiss the Amended Complaint for Failure to State a Claim, under C.R.C.P. 12(b)(5).

Given the passage of time and significant developments in the law, the parties submitted supplemental briefing from June 2023 to December 2023, along with a copy of the transcript of the oral argument conducted before the Honorable Judge LaBuda on June 1, 2020. Due to the extensive relevant legal developments that occurred after June 2020, the Court conducted a supplemental oral argument on February 1, 2024, and took the matter under advisement. The parties have since filed several notices of supplemental authority.

III. AMENDED COMPLAINT ALLEGATIONS

As set forth below, for purposes of evaluating the Motions to Dismiss for failure to state a claim under C.R.C.P. 12(b)(5), the Court must accept the factual allegations of the Amended Complaint as true, and draw all inferences in favor of the Local Governments, as the non-moving parties. The lengthy Amended Complaint ("AC"), filed June 11, 2018, contains extensive factual allegations, including the following:

The Local Governments allege that Colorado's climate has been altered. In particular, they assert that the combustion of fossil fuels has increased the atmospheric concentration of greenhouse gases ("GHGs"), mostly carbon dioxide, to levels unseen in human history. AC, ¶¶ 127-31. Temperatures in Colorado have risen 2 degrees Fahrenheit since 1983 and are projected to rise an additional 2.5 to 5 degrees Fahrenheit by 2050, with a "five-to ten-fold

increase in heat waves." *Id.*, ¶¶ 145-49. The altered climate is affecting communities, ecosystems, and public health, including prolonged periods of excessively high temperatures, more heavy downpours, increase in wildfires, and more severe droughts; resulting in loss of snowpack, precipitation changes, worsened air quality, and insect and disease outbreaks. *Id.*, ¶¶ 155-67, 183-96.

The Amended Complaint next alleges that the Energy Companies knew their fossil fuel activities were altering the climate and profited from unchecked fossil fuel sales. The Local Governments assert that as early as the 1960s, the Energy Companies knew fossil fuel use was increasing GHGs in the atmosphere, which would alter the climate. *Id.*, ¶¶ 337-61. By 1968, the American Petroleum Institute ("API") warned that "significant temperature changes are almost certain to occur by the year 2000," and API reports from the 1980s forecast a 4.5-degree Fahrenheit rise by 2038, bringing "major economic consequences," a 9-degree Fahrenheit rise by 2067 with "catastrophic effects," and "serious consequences for man's comfort and survival since patterns of aridity and rainfall can change." *Id.*, ¶¶ 345, 350, 353. The Amended Complaint further alleges that the Energy Companies knew adapting to these changes would be costly. *Id.*, ¶ 358. Additionally, the Local Governments allege that despite this knowledge, the Energy Companies sold "trillions of cubic feet of natural gas, billions of barrels of oil and millions of tons of coal and petroleum coke," and that when burned by consumers, the fossil fuels emitted billions of tons of GHGs. *Id.*, ¶¶ 61-62, 380-83, 396-99. ExxonMobil earned hundreds of billions of dollars and the Suncor entities earned tens of billions of dollars in profits from fossil fuel sales. *Id.*, ¶¶ 69, 84.

The Local Governments also allege that despite knowing the dangers of unchecked fossil fuel use, the Energy Companies concealed and misrepresented the truth to their consumers in Colorado and elsewhere. According to the Amended Complaint, the Energy Companies knew in the 1980s that mitigation of global climate change would require major reductions in fossil fuel combustion, and that "there was no leeway for a transition away from fossil fuels because it would take time for other energy sources to penetrate the market." *Id.*, ¶¶ 367-68. The Energy Companies were warned that if action to reduce carbon dioxide emissions was delayed until impacts "are discernible, then it is likely that [it] will occur too late to be effective." *Id.*, ¶ 369. Despite this knowledge, the Amended Complaint alleges that the Energy Companies spent decades concealing and misrepresenting the dangers of unchecked fossil fuel use from the public and consumers. *Id.*, ¶¶ 415-16. While recognizing that "contrarian theories" were not credible, the Local Governments assert that the Energy Companies set out to get "a majority of the American public" to recognize that "uncertainties exist in climate science." *Id.*, ¶¶ 425-27.

Based on these and similar factual allegations and the six claims for relief, the Local Governments seek monetary relief from the Energy Companies to cover their damages and the cost of mitigating the hazards of an altered climate. The Local Governments assert that their communities have suffered from discrete and local injuries, and that their property has been damaged by fires, floods, extreme precipitation, drought, pest infestations, and other climate impacts. *Id.*, ¶¶ 222-23. Plaintiffs allege they currently face enormous expenses to lessen the hazards posed by climate change. *Id.*, ¶¶ 243-48, 250-92, 300-17. The Local Governments have brought claims for relief under Colorado's common law (public nuisance, private

nuisance, trespass, unjust enrichment, and conspiracy) and the Colorado Consumer Protection Act, seeking monetary relief to compensate for their damages and abatement efforts.

IV. STANDARD OF REVIEW

A court may address a C.R.C.P. 12(b)(2) motion either solely upon documentary evidence, or it may require the parties to appear for a contested evidentiary hearing. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005). The plaintiff's burden of proof on the question of personal jurisdiction depends on the method the court employs to decide the motion. *Id.* If the court decides the motion based solely on documentary evidence, only a prima facie showing is required by the plaintiff to defeat the motion. *Id.* A prima facie showing exists where the plaintiff raises a reasonable inference that the court has jurisdiction over the defendant. *Id.* Documentary evidence includes allegations in the complaint, as well as affidavits and any other evidence submitted by the parties. *Id.; Martinez v. Farmington Motors, Inc.*, 931 P.2d 546, 547 (Colo. App. 1996).

Similar to a court's role in addressing a motion for summary judgment, a court addressing a Rule 12(b)(2) motion based on documentary evidence acts as a "data collector" and not a factfinder. *Archangel*, 123 P.3d at 1192 (citing *Leidy's Inc. v. H20 Engineering, Inc.* 811 P.2d 38, 40 (Colo. 1991)). Therefore, the allegations in the complaint must be accepted as true to the extent they are not contradicted by the defendant's competent evidence, and where the parties' competent evidence presents conflicting facts, these discrepancies must be resolved in the plaintiff's favor. *Id.* The light prima facie burden of proof is intended to screen out cases in which personal jurisdiction is obviously lacking. *Id.*

C.R.C.P. 12(b)(5) provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. The purpose of a motion under Rule 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc.*, 914 909, 911 (Colo. 1996). When reviewing a motion to dismiss, the Court must accept the material allegations of the complaint as true and draw all inferences in favor of the plaintiff. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). To survive a C.R.C.P. 12(b)(5) motion to dismiss, the complaint must state a plausible claim for relief by alleging facts sufficient "to raise the right to relief above the speculative level." *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). The plaintiff has the burden to frame a complaint with "sufficient factual matter, accepted as true" to suggest that the plaintiff is entitled to relief. *Id.* Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).

V. ANALYSIS

A. ExxonMobil's Motion to Dismiss for Lack of Personal Jurisdiction

To invoke a Colorado court's jurisdiction over a nonresident defendant, plaintiffs must comply with Colorado's long-arm statute (C.R.S. § 13-1-124) and constitutional due process. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.,* 40 P.3d 1267, 1270-72 (Colo. 2002). Because Colorado's long-arm statute "extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and Colorado Constitutions," the jurisdictional analysis under federal and state law is the same. *Goettman v. North Fork Valley Restaurant*, 176 P.3d 60, 66 (Colo. 2007). Colorado state courts may therefore look to federal precedent for guidance. *Archangel*, 123 P.3d at 1194.

The Due Process Clause (U.S. Constitution, 14th Amendment) "sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). These outer boundaries have generated two categories of personal jurisdiction: "general jurisdiction" and "specific jurisdiction." *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351, 358 (2021).

General personal jurisdiction, often referred to as "all-purpose" jurisdiction, allows a court to exercise jurisdiction over a defendant for any claim or cause of action arising from any of a defendant's activities, even if they did not occur in the forum state. *Id.*; *Magill v. Ford Motor Company*, 379 P.3d 1033, 1037 (Colo. 2016). However, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction" in a particular forum. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). In contrast, specific jurisdiction permits adjudication of only those claims arising out of the defendant's in-state activities, and thus requires a substantial connection between the forum and the specific claims asserted. *Magill*, 379 P.3d at 1039.

1. General Jurisdiction

Due process permits courts to exercise general jurisdiction over a defendant only when it is "at home" in the forum state. *Magill*, 379 P.3d at 1037. A corporate defendant is "at home" in the forum state if it: (1) is incorporated in the forum; (2) has its principal place of business in the forum; or (3) in the "exceptional case," has operations that are "so substantial and of such a nature as to render the corporation at home." *Daimler*, 571 U.S. at 137, 139, n.19; *Clean Energy Collective, LLC v. Borrego Solar Systems,*

Inc., 394 P.3d 1114, 1117 (Colo. 2017). In *Magill*, the Colorado Supreme Court observed:

> [d]etermining that a corporation is at home simply because it does business in Colorado would be unacceptably grasping. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.

Magill, 379 P.3d at 1039.

Based on this standard, a nonresident defendant's contacts with a state will rarely justify exercising general jurisdiction. *Id.* at 1037.

The Local Governments contend that this Court has both general and specific jurisdiction over ExxonMobil. Plaintiffs base the general jurisdiction argument on the theory of consent by registration (section A(1)(a) below), and have not argued that the Court has general jurisdiction over ExxonMobil by virtue of it being "at home" in Colorado.

Nor could they plausibly do so. ExxonMobil is incorporated in New Jersey, and has its principal place of business in Texas. AC, ¶ 105. Thus, the first two bases for general jurisdiction are plainly not satisfied. Likewise, the jurisdictional allegations in the Amended Complaint do not meet the rigorous requirements for the third potential basis (operations are so substantial and of such a nature as to render the corporation at home) to be satisfied. The Local Governments allege that ExxonMobil is a "multinational, vertically integrated, fossil fuel company." *Id.*, ¶ 73. There are no allegations that ExxonMobil's contacts with Colorado are more substantial than its contacts with other

states or nations. In the absence of any allegations or evidence that ExxonMobil's contacts with Colorado are significantly more substantial than its contacts and operations elsewhere, the Local Governments have not and cannot establish that the Court has general jurisdiction over ExxonMobil under the traditional three-part test for general jurisdiction. *See Magill*, 379 P.3d at 1035 (trial court erred in exercising general jurisdiction over Ford Motor Company, because although Ford conducts business throughout the country, there was no evidence that Ford's contacts with Colorado were different or more substantial than its contacts with other states where it sells cars).

a. General Jurisdiction by Consent

In support of their argument that the Court has general jurisdiction over ExxonMobil, the Local Governments posit that ExxonMobil consented to general jurisdiction in this forum by registering as a foreign corporation with the Colorado Secretary of State. The prime mover for this argument is *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). In *Mallory*, the U.S. Supreme Court held that Pennsylvania's consent statute requiring an out-of-state corporation to consent to personal jurisdiction as a condition of registering to do business within the state did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 146.[2] The Court further explained that personal jurisdiction can arise from "express or implied consent" and consent may be manifested in various ways by word or deed. *Id*. at 138.

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[2] Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation[.]") 42 Pa. Cons. Stat. § 5301(a)(2)(i).

The Supreme Court clarified that *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), with its progeny, "sit comfortably side by side." *Mallory*, 600 U.S. at 137. As explained by the *Mallory* plurality:

> *Pennsylvania Fire* held that an out-of-state corporation that has consented to in- state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that has not consented to in-state suits may also be susceptible to claims in the forum State based on "the quality and nature of [its] activity" in the forum. Consistent with all this, our precedents applying *International Shoe* have long spoken of the decision as asking whether a state court may exercise jurisdiction over a corporate defendant "'that *has not consented* to suit in the forum.'" Our precedents have recognized, too, that "express or implied consent" can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed.

Id. at 138 (emphasis in original and citations omitted).

In other words, *Mallory* recognizes that the jurisdictional due process "minimum contacts" or "at home" analysis is not applicable where a party consents to a state's jurisdiction. *Id.* The *Mallory* Court therefore concluded that the Pennsylvania statute which required foreign entities to register to do business in the state and, simultaneously, provided that such registration amounted to the entity's consent to personal jurisdiction in the state, did not violate the Due Process Clause. *Id.* at 145-46.

As applied here, the question is whether ExxonMobil, by registering to do business in and designating a registered agent in Colorado, consented to the personal jurisdiction of Colorado courts for all purposes. The Local Governments argue that in accordance with *Mallory*, ExxonMobil consented to general personal jurisdiction in Colorado state courts when the corporation appointed an in-state registered agent. They assert that *Packaging Store, Inc. v. Kwan Leung*, 917 P.2d 361, 363 (Colo. App. 1996), is "the most on-point and only Colorado precedent on consent" and argue Colorado law is clear that "one of the most solidly established ways of giving such consent is to designate an agent for service of process within the state." Response to ExxonMobil's *Lumen* Supplemental Authority Notice, p. 1 (October 3, 2023). The Local Governments additionally point to *Budde v. Kentron Hawaii, Limited*, 565 F.2d 1145, 1149 (10th Cir. 1977), to assert that compliance with Colorado business-registration statutes results in consent to personal jurisdiction. Supplemental Brief, p. 3 (August 23, 2023).

ExxonMobil counters that the Court should follow the reasoning of *Lumen Technologies Service Group, LLC* v. *CEC Group, LLC*, 2023 WL 5822503 (D. Colo. Sept. 8, 2023), and conclude that complying with the Colorado business-registration statutes does not equate to consent for general personal jurisdiction. In particular, ExxonMobil argues that this case is distinguishable from *Mallory*. Supplemental Reply Brief, p. 4 (October 24, 2023). ExxonMobil maintains that none of Colorado's business-registration statutes purport to have jurisdictional consequences, either explicitly or implicitly. *Id.* at 3. Because Colorado business-registration statutes do not evince any indication of general personal jurisdiction consent, *Mallory* is inapplicable. *Id.*

Here, the U.S. District Court's analysis in *Lumen* is compelling. In *Lumen*, a third-party plaintiff brought a diversity action against a defendant, asserting claims for breach of contract, breach of warranty, and breach of express indemnity, in connection with a business dispute. 2023 WL 5822503, at *1. The third-party defendant moved to dismiss the lawsuit due to lack of personal jurisdiction. *Id.* The defendant's principal place of business was in Ohio and the alleged injury occurred in Florida. *Id.* The third-party plaintiff argued that the defendant, by registering in Colorado and designating an in-state agent, consented to general jurisdiction. *Id.* at *3. The *Lumen* Court ultimately declined to find general jurisdiction over a defendant registered to do business in Colorado because "unlike *Mallory*, Colorado law is not explicit that qualification as a foreign corporation shall permit state courts to exercise general personal jurisdiction over a registered foreign corporation, just as they can over domestic corporations." *Id.* at *6 (citation and internal quotation marks omitted). In reaching its conclusion, the *Lumen* Court conducted a lengthy analysis explaining whether Colorado's business-registration statutes supported express or implied consent to general jurisdiction.

First, *Lumen* determined that Colorado's business-registration statutes do not explicitly permit state courts to exercise general personal jurisdiction over a registered foreign corporation. *Id.* at *6. In reaching the conclusion, the Court compared the business-registration statute at issue in *Mallory*, (42 Pa. Cons. Stat. § 5301(a)(2)(i)), to Colorado's statutes (C.R.S. §§ 7-90-801 & 7- 90-805). Unlike the Pennsylvania statute, neither C.R.S. § 7-90-801 nor § 7-90-805 expressly informs foreign entities that by registering to do business in Colorado, or by designating a Colorado registered agent, they are consenting to the

personal jurisdiction of Colorado courts. *Id.* In the absence of explicit consent to general personal jurisdiction, the Court next determined whether Colorado law supports implied consent to general personal jurisdiction. *Id.* at *7.

Lumen examined the third-party plaintiff's argument that *Packaging Store* provides that a foreign corporation consents to general personal jurisdiction when designating an agent for service of process within the state. *Id.* In *Packaging Store,* the parties entered into a contract in which the defendant agreed to appoint a registered agent in Colorado for service of process and agreed all disputes arising under the contract would be resolved in Colorado. *Id.* Specifically, *Packaging Store* holds that parties can contractually agree to consent to general personal jurisdiction, but no state laws imply such consent. *Id.*

Lumen next examined *Budde v. Kentron Hawaii, Limited*, 565 F.2d 1145 (10th Cir. 1977), determining that *Budde* likewise does not support implied general personal consent. *Id.* at *8-10. First, the business-registration statutes at issue in *Budde* were repealed with no corresponding statutory citation currently in effect and applicable. *Id.* at *8. Second, *Budde* did not constitute a "local construction" of state law. *Id.* at * 10. Therefore, *Lumen* concluded there are no Colorado laws to support the conclusion that Colorado business-registration statutes provide for implied consent to general personal jurisdiction. *Id.* at *11.

Based in large part on the *Lumen* analysis, this Court concludes that Colorado business- registration statutes do not explicitly grant state courts with general personal jurisdiction over all foreign entities that comply with the statutes. The registration statute specifies that before a foreign corporation can conduct business in Colorado, it

must file a "statement of foreign entity authority" with the secretary of state. C.R.S. § 7-90-801(1). Furthermore, the corporation must designate an agent in Colorado for service of process. C.R.S. § 7-90-701. Once the corporation is authorized to conduct business in Colorado, it enjoys "the same rights and privileges as, but no greater rights or privileges than, and . . . is subject to the same duties, restrictions, penalties, and liabilities imposed upon, a functionally equivalent domestic entity." C.R.S. § 7-90-805(2).

By their plain terms, these statutes do not explicitly require foreign entities to consent to personal jurisdiction as a condition of registering to do business here. Indeed, the statutes do not mention general jurisdiction and, instead, only require a corporation to file a statement of foreign authority and maintain a state registered agent. C.R.S. § 7-90-801(1). Thus, unlike in *Mallory*, neither C.R.S. § 7-90-801 nor § 7-90-805 expressly informs foreign entities that by registering to do business in Colorado, or by designating a Colorado registered agent, they are consenting to the personal jurisdiction of Colorado courts. Furthermore, neither statute could have alerted ExxonMobil that its compliance could be construed as consent to general personal jurisdiction to Colorado courts. *See Pennsylvania Fire*, 243 U.S. at 95.

Second, as set forth in *Lumen*, the Local Governments' reliance on *Packaging Store* and *Budde* for implied consent to general personal jurisdiction is unavailing.

Packaging Store does not support implied consent to general personal jurisdiction by merely having a registered agent in the state of Colorado. In *Packaging Store*, the parties entered into a contract in which the defendant contractually agreed to appoint an agent for service of

process in Colorado and to litigate claims in Colorado arising under the parties' contract. 917 P.2d at 363. The Court held "a nonresident's contractual consent to the jurisdiction of Colorado courts will be enforced if the terms of the consent are clear, and such consent can confer jurisdiction even if the minimal contacts test is not met." *Id.* (citations omitted).

The Local Governments assert that *Packaging Store* relied upon precedents where consent was predicated on registration statutes. Response to Supplemental Authority Notice, p. 1 (October 3, 2023). However, the precedent relied upon is unpersuasive for several reasons. First, some of the cases cited by *Packaging Store* held that the business-registration statutes at issue created implied consent based on legislative intent. *See generally Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1393 (8th Cir.1993), *cert. denied*, 510 U.S. 814 (1993); *Werner v. Wal-Mart Stores, Inc.,* 861 P.2d 270, 273 (N.M. App. 1993). Second, other cases relied on in *Packaging Store* held state courts can obtain personal jurisdiction over nonresident defendants when they consent to it. *See generally Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir.1984); *Rykoff-Sexton v. American Appraisal*, 469 N.W.2d 88, 90 (Minn.1991); *Green Mountain College v. Levine*, 139 A.2d 822, 825 (Vt. 1958). Accordingly, many of the cases relied on in *Packaging Store* follow the *Mallory* analysis. Lastly, none of the cases relied upon in *Packaging Store* are based on Colorado law, nor decided in the Tenth Circuit.

In short, absent a contractual agreement, *Packaging Store* does not support the Local Governments' implied consent to general personal jurisdiction argument.

The Local Governments' reliance on *Budde* is also unavailing. In *Budde,* the Tenth Circuit held that under Colorado law, a foreign corporation's registration to do business in Colorado constituted consent to general personal jurisdiction. However, as noted in *Lumen*, C.R.S. § 7-9-119 was repealed. As set forth above, Colorado's current business-registration statutes do not provide that a foreign business entity consents to personal jurisdiction by registering to do business in the state and appointing an agent.

In conclusion, the Court concludes that ExxonMobil did not consent to general jurisdiction in Colorado courts by registering as a foreign corporation.

2. Specific Jurisdiction

Due process permits courts to exercise specific jurisdiction over non-resident defendants when there is a substantial connection between the forum and the specific claims asserted. *Magill*, 379 P.3d at 1039. To exercise jurisdiction over a non-resident defendant, a plaintiff must also show that jurisdiction is appropriate under the state's long-arm statute. Colorado's long-arm statute is set forth at C.R.S. § 13-1-124.[3]

a. Long-Arm Statute

As set forth above, the Colorado Supreme Court has held on numerous occasions that C.R.S. § 13-1-124 "extends the jurisdiction of Colorado courts to the maximum

[3] C.R.S. § 13-1-124 provides in relevant part that "[e]ngaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person . . . to the jurisdiction of the courts of this state concerning any cause of action arising from: (a) the transaction of any business within this state; (b) the commission of a tortious act within this state; . . ."

limit permitted by the due process clauses of the United States and Colorado Constitutions," and that the jurisdictional analysis under federal and state law is the same. *Goettman v. North Fork Valley Restaurant,* 176 P.3d 60, 66 (Colo. 2007). When it filed its C.R.C.P. 12(b)(2) Motion to Dismiss on December 9, 2019, ExxonMobil acknowledged that satisfying due process requirements would also satisfy the requirements of Colorado's long-arm statute. Motion to Dismiss, p. 5, (December 19, 2019).

After the U.S. Supreme Court announced its decision in *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), however, ExxonMobil contended that the limitations imposed by Colorado's long-arm statute may be more stringent than those imposed by the Due Process Clause, at least as the Clause was recently interpreted by the U.S. Supreme Court. In particular, ExxonMobil asserts that the long-arm statute confers jurisdiction over any cause of action "arising from" the transaction of any business within the state or the commission of a tortious act within the state, and therefore independently requires a causal connection for specific jurisdiction. ExxonMobil's Supplemental Briefing, pp. 6-7 (May 3, 2021); *see Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014) (the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury).

The Local Governments disagree, maintaining that the Colorado Supreme Court has repeatedly held that the jurisdictional analysis is the same for both the long-arm statute and constitutional due process. Local Governments' Supplemental Briefing, pp. 6-7 (May 17, 2021). Moreover, even if the long-arm statute imposes a distinct requirement, the inquiry looks at the "totality of conduct"

by the defendant. *Parocha v. Parocha*, 418 P.3d 523, 527 (Colo. 2018). The legislative purpose of the long-arm statute "was the expansion of our court's jurisdiction within constitutional limitations in order to provide a local forum for Colorado residents who suffer damages in Colorado as a result of tortious acts of non-residents." *Vandermee v. District Court*, 433 P.2d 335, 337 (Colo. 1967). Even if the long-arm statute imposes heightened requirements, the Local Governments maintain that the requirements of the long-arm statute have been satisfied.

Critically, the Colorado Supreme Court has held, on multiple occasions, that Colorado's long-arm statute "extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and Colorado Constitutions," and therefore, the jurisdictional analysis under federal and state law is the same. *Goettman*, 176 P.3d at 66; *Foundation for Knowledge in Development v. Interactive Design Consultants, LLC*, 234 P.3d 673, 677-78 (Colo. 2010); *Magill*, 379 P.3d at 1037; *Keefe*, 40 P.3d at 1270; *Cf. Parocha*, 418 P.3d at 527 (because compliance with the long-arm statute "is a threshold matter that is not necessarily subsumed in a due process analysis, we consider each in turn."). Therefore, based on this precedent, it is unnecessary for the Court to separately assess whether it has jurisdiction over ExxonMobil under the long-arm statute. If exercising jurisdiction comports with the Due Process Clause, the requirements of the long-arm statute will necessarily have been satisfied in accordance with Colorado law.

Moreover, even if the jurisdictional limitations imposed by the long-arm statute and the Due Process Clause are no longer coterminous, the Local Governments have made a sufficient showing that the long-arm statute's requirements have been satisfied (see analysis in

section A(2)(b), below). ExxonMobil has been transacting business in Colorado for decades, including by placing its products within the stream of commerce. The Amended Complaint has alleged that the company's intentional torts outside Colorado have had harmful effects in Colorado. Additionally, the Local Governments have alleged that ExxonMobil's misrepresentations were received by consumers in Colorado. The Local Governments have therefore met their burden to show that the claims arise from ExxonMobil's transaction of business within the state and/or the commission of alleged tortious acts within the state, sufficient to satisfy the requirements of the long-arm statute.

b. Due Process Clause—Specific Jurisdiction

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. *International Shoe Co.*, 326 U.S. at 316. In the seminal *International Shoe* opinion, the U.S. Supreme Court held that a trial court's authority depends on the defendant having such contacts with the forum state such that maintenance of the suit is reasonable and does not offend traditional notions of fair play and substantial justice. *Id.* at 316-17.

Specific personal jurisdiction exists where a defendant has sufficient "minimum contacts" with the forum state, looking first to whether the defendant purposefully availed itself of the forum through activities in or affecting the forum and second whether there is sufficient nexus such that the plaintiff's claims "arise out of or relate to the defendant's contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 475 (1985); *Keefe*, 40 P.3d at 1271. The contacts must show that the defendant deliberately "reached out beyond" its home, by for example, exploiting

a market in the forum state or entering a contractual relationship centered there. *Walden v. Fiore*, 571 U.S. 277, 285 (2014). Additionally, defendants must have "fair warning" or "knowledge that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Ford Motor Company*, 592 U.S. at 360 (citations omitted).

i. Purposeful Availment

In its Rule 12(b)(2) Motion to Dismiss, filed in December 2019, ExxonMobil acknowledged that the first part of the minimum contacts test—purposeful availment, was satisfied. Based on the allegations in the Amended Complaint, it is undisputed that the purposeful availment requirement has been satisfied.

ii. Substantial Nexus

In support of its Rule 12(b)(2) Motion, ExxonMobil argued that the second requirement for specific jurisdiction—sufficient nexus—requires a showing of "but for" causation, which it contended, was not met here. In 2021, however, the U.S. Supreme Court explicitly rejected this causation standard. *Ford Motor Company*, 592 U.S. at 361. The "but for" requirement had been viewed as arising from *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 262 (2017). *Ford Motor* put that notion to rest, concluding that strict causation is not required so long as there is a meaningful relationship between the alleged forum contacts and the plaintiff's claims. 592 U.S. at 361-62.[4]

[4] In its initial briefing, ExxonMobil relied heavily on several decisions that had applied the "but- for" causation test to claims brought against fossil fuel companies in climate change litigation, including *City of Oakland v. BP P.L.C*, 2018 WL 3609055, at *3 (N.D. CA 2018). This U.S. District Court decision was vacated by the Ninth Circuit in *City of Oakland v. BP, P.L.C.*, 969 F.3d 895 (9th Cir. 2020), and the

Eschewing the but-for causation test espoused by ExxonMobil in its core briefing, the U.S. Supreme Court held that a sufficient nexus exists where there are either related activities or an occurrence in the forum. *Id.* at 360. The *Ford Motor* Court emphasized the importance of a global company's extensive forum contacts in showing nexus and reasonableness. In particular, the Court noted that Ford had advertised its cars and engaged with franchises to sell cars, parts, and maintenance services in Montana. *Id.* at 355-56, 365. Even though Ford did not sell the particular vehicle that injured plaintiffs in Montana, a unanimous Supreme Court held that Ford's extensive contacts with the forum state satisfied the nexus and reasonableness prong for specific jurisdiction. *Id.* at 364-65.

Here, if anything, ExxonMobil's contacts with Colorado are more extensive than Ford's contacts with Montana. ExxonMobil has advertised its products in Colorado. AC, ¶¶ 107, 412-29. The company has engaged with Colorado franchises to sell its products in Colorado. AC, ¶¶ 74-80, 112-19. Further, ExxonMobil has produced, sold, and transported fossil fuels in Colorado. AC, ¶¶ 107-08, 110, 121-22. These actions amply demonstrate that ExxonMobil has "reached out beyond its home" and has had extensive contacts with Colorado.

Ford Motor also foreclosed ExxonMobil's argument that it conducts so much business globally that it cannot be sued in a local jurisdiction that does not have general jurisdiction over the company. The U.S. Supreme Court noted that Ford was a global company that markets, sells, and services its products across the United States and overseas, and to enhance its brand and increase its sales,

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determination that plaintiffs failed to adequately plead "but for" causation conflicts with *Ford Motor*.

the company engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. *Id.* at 355. "No matter where you live, you've seen them." *Id.* Despite this global presence, Ford could be haled into court in Montana for contacts that related to plaintiffs' harm. The same can be said for ExxonMobil here. AC, ¶¶ 74-80, 107-22, 412-29. ExxonMobil's "too big to be sued in Colorado" argument therefore fails.

Ford Motor also establishes that ExxonMobil's extensive forum contacts relate to the harms alleged in the Amended Complaint, as ExxonMobil's sales and marketing contacts are of the same type recognized as sufficient in *Ford Motor*. 592 U.S. at 355-56, 365. The Amended Complaint alleges that "activities" such as the company's sales and advertisements have contributed to "occurrences" such as fires, droughts, and beetle infestations. AC, ¶¶ 222-23, 415-16. According to the Amended Complaint, ExxonMobil's extensive activities therefore have a relationship or connection with the harms facing the Local Governments' communities. *Ford Motor*, 592 U.S. at 376 (Gorsuch, J., concurring). *See also Archangel*, 123 P.3d at 1194 (for specific jurisdiction, the actions of the defendant giving rise to the litigation created a substantial connection with the forum state); *Etchieson v. Central Purchasing, LLC*, 232 P.3d 301, 308 (Colo. App. 2010) (finding specific jurisdiction reasonable when company had extensive forum contacts).

To be sure, *Ford Motor* clarified that there are "real limits" to specific jurisdiction. 592 U.S. at 362. For instance, where there is no connection between the forum and the plaintiff, or where the defendant's forum contacts are "isolated and sporadic," jurisdiction over the defendant is unreasonable. *Id.* at 366, n.4. Here, however, the Local Governments are Colorado communities, and as set

forth above, according to the Amended Complaint, ExxonMobil's contacts are far more than isolated or sporadic—they are extensive.

iii. Reasonableness and Fair Notice

In its briefing, ExxonMobil contends that it could not anticipate that in producing and selling fossil fuels it could be sued for harms in Colorado. Supplemental Briefing, p. 4 (October 24, 2023). In *Ford Motor*, the U.S. Supreme Court rejected a similar argument advanced by Ford. Ford argued that it was surprised at being brought into court in the forum where the injuries occurred because some of the conduct also occurred outside Montana. 592 U.S. at 366-67. The U.S. Supreme Court held that only an activity or an occurrence in the forum state is required, and because Ford was regularly marketing its products in the forum, it had "clear notice" that it would be subject to jurisdiction. *Id.* at 368.

Here, ExxonMobil has "done business in Colorado since at least the 1930s." AC, ¶ 105. There is no dispute that the company purposefully availed itself of the Colorado market. Further, according to the Amended Complaint, ExxonMobil knew that the production and sale of fossil fuels was altering the climate and causing damages like those allegedly suffered by the Local Governments. *Id*. at ¶¶ 344-45, 353, 356-62. *Ford Motor* clarified that the fact that a multi- national company sold a product in other states does not impair the plaintiffs' ability to sue in the forum where they were injured. 592 U.S. at 360. The federalism concerns animating the Due Process Clause do not require the Colorado Local Governments to pursue ExxonMobil in New Jersey or Texas state courts. Rather, *Ford Motor* and due process jurisprudence establishes that the Local Governments may bring their claims in the

forum in which they reside and in which harm has occurred. Colorado has an interest in providing a convenient forum and remedying local harms relating to alleged misconduct.

iv. *City and County of Honolulu*

City and County of Honolulu v. Sunoco LP, 537 P.3d 1173 (Haw. 2023), *cert. petition docketed*, No. 23-947 (U.S. Mar. 1, 2024), bolsters the conclusion that ExxonMobil is subject to specific jurisdiction in Colorado for the claims alleged in the Amended Complaint. Similar to this case, in *City and County of Honolulu*, the local governments brought suit against a number of oil and gas producers alleging several tort claims under state law: public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. In affirming the denial of the motions to dismiss, the Hawaii Supreme Court held that the defendants were subject to specific jurisdiction in Hawaii state court. *Id.* at 1189.

The Hawaii Supreme Court observed that specific jurisdiction over the defendant oil and gas companies was more apparent than Montana's exercise of specific jurisdiction over Ford. *Id.* at 1191. In particular, the Court held that the defendants, which had sold and marketed fossil fuel products in Hawaii, had availed themselves of Hawaii's markets and laws and were therefore subject to specific jurisdiction for both in-state and out-of-state tortious acts that arose out of or related to those contacts. *Id.* Citing *Ford Motor*, the Hawaii Supreme Court determined that the plaintiffs did not need to allege that their injuries were caused by defendants' fossil fuels being burned in the forum state; rather, specific jurisdiction for climate change injuries attached for both in-state and out-of-state tortious conduct when those claims arise out of, or relate, to "Defendants sale and promotion of oil and

gas" in the forum state. *Id.* Additionally, when the three prongs of the minimum contacts test are met, the defendant has fair warning it could be subject to specific jurisdiction, and the exercise of specific jurisdiction comports with due process. *Id.* at 1193. Lastly, the Court concluded that it was reasonable for Hawaii trial courts to exercise specific jurisdiction over the defendants, and that the exercise of jurisdiction did not conflict with interstate federalism principles because Hawaii had a "significant interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 1194 (internal quotation marks omitted).

While not binding on this court, the Hawaii Supreme Court's analysis of specific jurisdiction in a similar action is persuasive authority.

For the foregoing reasons, the Court concludes that the Local Governments have met their burden to show that specific jurisdiction over ExxonMobil is present here. The Local Governments have established a strong relationship between ExxonMobil, this forum, and the litigation. *See City and County of Honolulu,* 537 P.3d at 1194. Indeed, this relationship and ExxonMobil's contacts with Colorado are more extensive and stronger than Ford's contacts with Montana in *Ford Motor.*

B. Suncor Canada's Motion to Dismiss for Lack of Personal Jurisdiction

Suncor Canada has moved to dismiss the claims against it for lack of personal jurisdiction under C.R.C.P. 12(b)(2). This entity does not own the oil and gas refinery in Commerce City. The Court indisputably has personal jurisdiction over Suncor Energy, which owns and operates the Commerce City refinery (AC, ¶ 57) and Suncor Sales, which operates 47 retail gas stations in Colorado

(AC, ¶ 58). Suncor Canada is the parent entity, and maintains that it has no substantial connection to Colorado to support the exercise of personal jurisdiction. The Local Governments counter that the Court has general jurisdiction over Suncor Canada and specific jurisdiction by virtue of Suncor Canada's activities and through its subsidiaries' contacts with and activities in Colorado.

Courts may decide a Rule 12(b)(2) motion either by holding a hearing or based solely on documentary evidence and the allegations in the complaint. *Foundation for Knowledge*, 234 P.3d at 677. In the absence of a hearing,[5] the Local Governments have the burden to establish a prima facie case of personal jurisdiction. *Archangel*, 123 P.3d at 1192. The Local Governments may make a prima facie showing by raising "a reasonable inference that the court has jurisdiction over the defendant." *Foundation for Knowledge*, 234 P.3d at 677. This "light burden" is intended to "screen out cases in which personal jurisdiction is obviously lacking." *Id.* Unlike a motion to dismiss under C.R.C.P. 12(b)(5), the allegations in the complaint must be accepted as true only to the extent they are not contradicted by the defendant's competent evidence. *Id.; Archangel,* 123 P.3d at 1192. When plaintiffs submit competent

[5] Neither party requested an evidentiary hearing. Plaintiffs' Response, p. 6 (filed March 19, 2020); June 2, 2023 Minute Order (Plaintiffs' Motion for Conditional Discovery, filed December 30, 2019, is moot because the Court did not hold an evidentiary hearing. In support of its Rule 12(b)(2) Motion to Dismiss, Suncor produced the Affidavit of Greg Freidin as Exhibit A. In Response, the Local Governments attached the Declaration of Naomi Glassman-Majara and 26 exhibits (Exhibits A-Z). In Reply, the Energy Companies attached the Declaration of Nancy Thonen, with Exhibits 1-18, and the Declaration of Patricia O'Reilly, with Exhibits 1-2.

rebuttal evidence, the parties' competent evidence presents conflicting facts, and discrepancies are to be resolved in plaintiff's favor. *Id.*

1. General Jurisdiction

Suncor Canada is a Canadian corporation with its principal place of business and corporate headquarters in Calgary, Alberta. AC, ¶¶ 47, 89. Unlike ExxonMobil, this entity is not registered to do business in Colorado. Suncor Canada has no offices in Colorado, has no operations in Colorado, has not produced or refined any fossil fuels in Colorado, and has not marketed or sold any fossil fuels to customers in Colorado. Motion to Dismiss for Lack of Personal Jurisdiction, Exhibit A, ¶¶ 5-6, 8, 11, 15-16 (December 19, 2019).

The Local Governments' conclusory allegation that Suncor Canada is "at home" in Colorado and therefore subject to general jurisdiction is not supported by specific factual allegations or any evidence in the record. Because Suncor Canada's place of incorporation and principal place of business are both located in Canada, under federal and Colorado case law, Suncor Canada is not "at home" in Colorado for jurisdictional purposes. *Daimler*, 571 U.S. at 137; *Magill*, 379 P.3d at 1037. Because general jurisdiction subjects the entity to all lawsuits in the jurisdiction of every nature, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Magill*, 379 P.3d at 1037 (*quoting Daimler*, 571 U.S. at 137). As the place of incorporation and principal place of business are easily ascertainable, "a corporation may reasonably anticipate being haled into court in either place." *Magill*, 379 P.3d at 1037; *Daimler*, 571 U.S. at 137.

General jurisdiction may be exercised over a corporation outside its principal place of business or its place of incorporation only in an "exceptional case." *Magill*, 379 P.3d at 1039, *Daimler*, 571 U.S. at 139, n.19. More specifically, an entity that conducts continuous and systematic activities of a general business nature in the forum may be subject to general jurisdiction in the forum. *Giduck v. Niblett*, 408 P.3d 856, 863 (Colo. App. 2014). These activities must be extensive and deep to meet the high bar set for exceptional circumstances. *See Daimler*, 571 U.S. at 123 (having a regional office and other facilities, being the largest supplier of luxury vehicles, and having 2.4% of worldwide sales attributable to California does not constitute continuous and systematic activities); *Magill*, 379 P.3d at 1038 (Ford's contacts with Colorado did not meet the continuous and systematic test where Ford had a registered agent in Colorado, Ford conducted aggressive marketing, Ford sold cars through 30 franchised Colorado dealerships, Ford maintained several offices and businesses in the state, Ford trained and certified mechanics to work with Colorado consumers, and Ford had actively litigated cases in Colorado). Here, the Local Governments have not alleged any set of exceptional facts supporting general jurisdiction in Colorado, and the record does not contain any. *See* Motion to Dismiss for Lack of Personal Jurisdiction, Exhibit A, ¶¶ 7-16 (December 19, 2019) (Suncor Canada does not have any direct contacts with Colorado).

In Response, the Local Governments seek to distinguish *Daimler* and *Magill* and argue that unlike the defendants in those cases, Suncor Canada's U.S.-based contacts are primarily with Colorado. AC, ¶ 90. The Local Governments therefore reason that there is only one U.S. state where Suncor Canada could be considered essentially at home and subject to suit—Colorado. Response,

pp. 22-23 (March 19, 2020). However, the alleged fact that Suncor Canada has more connection to Colorado than any other U.S. state is not relevant in determining whether Suncor Canada is essentially at home in Colorado. The Local Governments have not cited to legal authority establishing that a foreign business entity must have general jurisdiction with the U.S. state for which it has the most connection.

The Court therefore concludes that Suncor Canada is not "at home" in Colorado, and therefore, general jurisdiction over this foreign corporation does not exist.

2. Specific Jurisdiction

The legal standards for assessing specific personal jurisdiction set forth above in section (A)(2) apply here.

First, for specific jurisdiction to apply, the defendant must purposefully avail itself of the privilege of conducting business in the forum state. *Keefe*, 40 P.3d at 1271; *Burger King*, 471 U.S. at 472; *Archangel*, 123 P.3d at 1198-1200. In *Archangel*, the Colorado Supreme Court held that a Russian company that was not authorized to do business in Colorado, had no registered agent in Colorado, had no property interests in Colorado, had no financial transactions in Colorado, and had no assets in Colorado did not purposefully avail itself of the privilege of doing business in Colorado. *Id.* at 1196-98. The 70 communications with plaintiff, a Colorado resident, were deemed fortuitous and insufficient to trigger purposeful availment. *Id.* at 1197.

Here, like in *Archangel*, Suncor Canada is a corporation organized under a foreign nation's laws with its principal place of business located outside the United States. Motion, Exhibit A, ¶¶ 5-6 (December 19, 2019). Suncor Canada is not authorized to do business in Colorado, has

no registered agent in Colorado, and has no facilities in Colorado. *Id.* at ¶¶ 8, 10-11, 13, 15. Its operations, including its employees and sales, are outside Colorado. *Id.* at ¶¶ 12, 14-16. The Court therefore concludes that the Local Governments have not established a prima facie case that Suncor Canada has availed itself of the privilege of doing business in Colorado.

Second, there is not a substantial nexus between the Local Governments' claims and Suncor Canada's activities in Colorado. As set forth above, in *Ford Motor,* the U.S. Supreme Court held that a sufficient nexus exists where there is a meaningful relationship between the alleged forum contacts and a plaintiff's claims. 592 U.S. at 359. This prong of the specific jurisdiction test requires that "the actions of the defendant giving rise to the litigation must have created a 'substantial connection' with the forum state." *Archangel*, 123 P.3d at 1194.

Here, the Local Governments have not pled facts alleging a substantial connection between their claims and Suncor Canada's Colorado-related contacts. The allegations specific to Suncor Canada relate to its history and general background. AC, ¶¶ 47-51. The Amended Complaint does not allege that Suncor Canada itself took any actions in Colorado to purposefully direct harm at Colorado residents. Indeed, as set forth above in section (B)(1), there are no allegations or competent evidence in the record that Suncor Canada conducts any operations or business in Colorado.

In support of specific jurisdiction, the Local Governments contend that Suncor Canada's actions in contributing to global climate change satisfy the requirements of specific jurisdiction in Colorado. AC, ¶¶ 7-9, 15-17, 123-38. Unlike the allegations against ExxonMobil and Suncor

Energy and Suncor Sales, however, the Amended Complaint does not identify any Colorado business activity conducted by Suncor Canada itself. In short, there is no alleged substantial connection between Suncor Canada and Colorado sufficient for specific personal jurisdiction to attach to Suncor Canada.

In Response, the Local Governments place extensive reliance on *Calder v. Jones*, 465 U.S. 783 (1984) for the proposition that Suncor Canada is subject to jurisdiction for the in-state effects of its tortious out-of-state acts. Response, pp. 9-10 (March 19, 2020). In *Calder*, the U.S. Supreme Court held that California had specific jurisdiction over two out-of-state defendants where the writing and editing of an allegedly libelous article was expressly aimed at California. *Id*. at 786-87. Based on the facts of the case, the Court concluded that California was the focal point for both the story and the harm suffered. *Id.* at 789-91. Here, for *Calder* to apply, the conduct at issue must have been expressly aimed at Colorado in particular. Instead, while harm is alleged to Colorado, there are no allegations that Suncor Canada expressly aimed the harm at Colorado. *See* AC, ¶¶ 134, 137.

Likewise, the fact that the Local Governments are located in Colorado and suffer injuries from global climate change (AC, ¶ 89) is in and of itself insufficient to confer specific jurisdiction over Suncor Canada. *See Walden v. Fiore*, 571 U.S. 277, 291 (2014) (the mere fact that defendant's conduct affected plaintiffs with connections with the forum state, in and of itself, does not authorize specific jurisdiction). This injury-based theory of personal jurisdiction would conceivably confer jurisdiction on every court to exercise limitless jurisdiction over every entity and individual generating emissions in the world.

In their Response, the Local Governments also rely on a stream of commerce argument, contending that Suncor Canada delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in Colorado, and is therefore subject to specific jurisdiction for the fossil fuels that were sold and burned in Colorado. Response, p. 9 (March 19, 2019). The stream of commerce theory of jurisdiction arose in the products liability context, *Avocent Huntsville Corp. v. Aten International Co., Ltd.*, 552 F.3d 1324, 1331 (Fed. Cir. 2008), and courts have been "reluctant to extend the stream of commerce principle outside the context of products liability cases." *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 472 (5th Cir. 2006). Critically, Colorado courts have not applied this theory outside the products liability context. In the absence of precedential authority applying the theory outside the products liability context, the Court declines the invitation to apply it here.

The Local Governments also contend that Suncor Canada participated in a conspiracy, and the forum-related acts of the co-conspirators may be imputed to Suncor Canada for jurisdictional purposes. Response, p. 14 (March 19, 2020). As acknowledged by the Local Governments, however, Colorado has not recognized a conspiracy theory of personal jurisdiction. *See First Horizon Merchant Services v. Wellspring Capital Management, LLC*, 166 P.3d 166, 178 (Colo. App. 2007) (some courts outside of Colorado have recognized this theory).

The Court therefore concludes that the Local Governments have not made a prima facie showing that Court has specific personal jurisdiction over Suncor Canada, itself.

3. Jurisdiction Through Subsidiary Companies as Agents

In support of their personal jurisdiction argument, the Local Governments primarily contend that the Court has personal jurisdiction over Suncor Canada based on the Colorado contacts of six subsidiary companies.[6] Plaintiffs allege that these subsidiaries are agents of Suncor Canada and that Suncor Canada is a "single enterprise." AC, ¶¶ 50-51. Further, the Local Governments allege that Suncor Canada "directs the operations of its subsidiaries through a common design." *Id.* at ¶¶ 52, 90. In particular, the Local Governments allege that through its subsidiaries, Suncor Canada promotes fossil fuel use in Colorado, sells fossil fuels in Colorado, operates a petroleum refinery in Colorado, and operates pipeline systems that transport crude oil to a refinery in Colorado. *Id.* at ¶ 91. They also allege that through the subsidiaries, Suncor Canada emitted GHGs through transportation, production, and refinery activities. *Id.* at ¶ 92. While this argument holds superficial appeal, as set forth below, Colorado law does not support this personal jurisdiction through subsidiary theory.

In 2016, the Colorado Supreme Court issued a pair of decisions addressing whether a court may impute the contacts of subsidiary companies to a parent entity. *Griffith v. SSC Pueblo Belmont Operating Co.*, 381 P.3d 308, 310 (Colo. 2016); *Meeks v. SSC Colorado Springs Colonial Columns Operating Co.*, 380 P.3d 126, 128 (Colo. 2016).

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[6] The six subsidiary companies are Defendant Suncor Energy (U.S.A.) Inc., Defendant Suncor Energy Sales, Inc., Suncor Energy (U.S.A.) Pipeline Company, Suncor Energy (U.S.A.) Marketing, Inc., Petro-Canada Resources (U.S.A.), Inc., and Suncor Energy Services, Inc. AC, ¶¶ 94-104.

Under the *Griffith* test, to impute the contacts to the parent to establish jurisdiction, the corporate veil of the subsidiary must be pierced. Under the veil piercing test, a plaintiff must show (1) the entity is merely the alter ego of the member, (2) the corporate form is used to perpetuate a wrong, and (3) disregarding the legal entity would achieve an equitable result. 381 P.3d at 313. Unless the corporate veil is pierced, the trial court is to "treat each entity separately and analyze only the contacts that each parent company has with the state when performing the personal jurisdiction analysis." *Id.* at 311. Parental control of subsidiary entities or even operating as a single enterprise is insufficient to justify the imputation of a subsidiary's forum contacts to the parent.

In *Griffith*, the trial court found that the parent entities and their in-state affiliates operated as one business, that the non-resident affiliates "collectively controlled the operations, planning management, and budget" of the in-state resident affiliate, and the non-resident entities financially benefited from the resident company. *Id.* at 314. The Colorado Supreme Court held that these findings were inadequate to impute the in-state subsidiary's contacts to the parent. *Id.* In *Meeks*, the Court clarified that trial courts must apply the *Griffith* veil piercing test "to determine whether nonresident parent companies may be haled into court in Colorado based on the actions of their resident subsidiaries." 380 P.3d at 128.

The authorities relied on by the Local Governments in support of the agency through subsidiary argument predated *Griffith* and *Meeks*. *See, e.g., Goettman v. North Fork Valley Restaurant*, 176 P.3d 60, 67 (Colo. 2007); *SGI Air Holdings II, LLC v. Novartis International AG*, 239 F.Supp.2d 1161, 1166 (D. Colo. 2003); *Horizon Merchant*

Services v. Wellspring Capital Management, LLC, 166 P.3d 166, 177-78 (Colo. App. 2007).

Here, the Amended Complaint does not allege that the corporate veil of the Suncor entities should be pierced, nor does it contain factual allegations supporting veil piercing. Instead, the Local Governments generally allege that the subsidiaries are agents within a single enterprise, such as Suncor Canada exercising control of its corporate family. AC, ¶¶ 50-51. More detailed allegations include an allegation that a 2017 Suncor Canada annual report used the words "we" and "Suncor" to refer to Suncor Canada and its affiliates, that Suncor Canada announced plans for maintenance of two refineries run by affiliates, that Suncor Canada controls and directs fossil fuel activities across its corporate family, that Suncor Canada prepares consolidated financial statements that include its subsidiaries, that the 2017 annual report referred to the Commerce City refinery as "our" refinery, that Suncor Canada backs the business of its subsidiaries, and that members of the corporate family cannot refuse to participate in fossil-fuel commerce. *Id.*, ¶¶ 50-53, 56, 60; *see also* Response, Exhibits A-Z (webpages and articles referencing "Suncor Energy"). These agency-based allegations and information are irrelevant to the veil piercing test pronounced by *Griffith* and *Meeks*. At the very least, they are insufficient to meet the high bar imposed by the alter ego test.

Additionally, the Amended Complaint does not contain factual allegations to meet the 3-part veil piercing test. First, the Amended Complaint does not contain allegations or facts that could establish that Suncor Canada and its subsidiaries are alter egos. *See In re Phillips*, 139 P.3d 639, 644 (Colo. 2006) (courts should examine 11 alter-ego factors to pierce the corporate veil of a parent company). Second, the Amended Complaint does not allege

that the subsidiary entities' corporate structure is merely a fiction used to perpetuate a fraud or defeat a rightful claim. Third, the Amended Complaint does not contain allegations that disregarding the corporate structure would achieve an equitable result.

The Court therefore concludes that the Local Governments have not made a prima facie showing that the Court has specific jurisdiction over Suncor Canada by virtue of the actions of its subsidiaries and affiliate companies.

4. Fair Play and Substantial Justice

Lastly, to establish personal jurisdiction over Suncor Canada, assuming that Suncor Canada has any minimum contacts with Colorado, the Court would also need to consider whether exercising personal jurisdiction would offend traditional notions of fair play and substantial justice.[7] *Archangel*, 123 P.3d at 1194-95. Factors to consider are the burden on the defendant, the forum state's interest in resolving the controversy, and the plaintiff's interest in attaining effective and convenient relief. *Id.* at 1195. Where, as here, a defendant's minimum contacts with Colorado are weak, the less a defendant needs to show unreasonableness. *Id.*

First, in assessing burden, courts are to consider the unique burdens on business entities defending against litigation in a foreign country. *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102, 114-15 (1987); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1078-79 (10th Cir. 2004). That said, the Court notes that Suncor

[7] Based on the analysis above, it is unnecessary to address this prong, but the Court does so for the sake of completeness for review purposes.

Canada has extensive resources and has been ably represented in this litigation by experienced local counsel. Second, this ruling does not affect the claims against Defendants Suncor Energy or Suncor Sales. Given the presence of these Defendants and their Colorado assets, Colorado appears to have minimal interest in adding a third Suncor entity, particularly one that has no operations, property, or personnel in Colorado. Third, subject to a ruling on the C.R.C.P. 12(b)(5) Motion, the Local Governments may pursue their claims in this litigation against Suncor Energy and Suncor Sales.

The Court therefore concludes that, on balance, exercising specific personal jurisdiction over Suncor Canada would offend traditional notions of fair play and substantial justice.

Suncor Canada's Motion to Dismiss under C.R.C.P. 12(b)(2) is therefore granted. There are no issues of disputed jurisdictional fact, and the Local Governments have not made a prima facie case that the Court has either general or specific personal jurisdiction over Suncor Canada. Based on the Amended Complaint's allegations and evidence attached to the Response, there is no reasonable inference that the Court has personal jurisdiction over Suncor Canada.

C. The Energy Companies' Motions to Dismiss for Failure To State a Claim Under C.R.C.P. 12(b)(5)

The Energy Companies initially contend that the Local Governments' claims are preempted by federal law. First, they maintain that the claims are governed by federal common law, and not state common law, and should therefore be dismissed. Second, the Energy Companies assert that if not displaced by federal common law, the claims are preempted by the federal Clean Air Act and

other federal statutes. Third, the Motion to Dismiss contends that the claims are precluded based on five other federal law theories.

Next, if the claims are not preempted by federal law, the Energy Companies maintain that they are not viable claims under state law, because (1) the Local Governments lack standing; (2) the claims are barred by the applicable statutes of limitations, and (3) the Local Governments cannot plausibly allege causation. Then, if the claims survive, the Energy Companies argue that each claim should be dismissed for failure to state a claim under Colorado law.

Each of these arguments is addressed in turn.

1. Federal Preemption—Framing the Issues in this Litigation

As a threshold matter, before delving into the federal preemption claims, the Court must determine and clarify the claims made by, and the relief sought, by the Local Governments. The Energy Companies frame the issue as the Local Governments' "attempt to use this state's tort law to control the worldwide activity of companies that play a crucial role in virtually every sector of the global economy." Motion to Dismiss for Failure to State a Claim, p. 1 (December 19, 2019). They further posit that the claims "raise federal statutory, regulatory, and constitutional concerns; threaten to upset bedrock federal-state divisions of responsibility; and have profound implications for the global economy, international relations, and America's national security." *Id.* The Energy Companies characterize the Local Governments' claims as asking the court "to disregard well- established boundaries of tort law, hold select Defendants liable for the actions of billions of third parties, and adjudicate whether Plaintiffs' alleged

harms outweigh the massive and undeniable social utility of fossil fuels—not just in Colorado, but around the world." Motion to Dismiss for Failure to State a Claim, pp. 2-3 (December 19, 2019).

Conversely, the Local Governments frame the issue as seeking compensation for harms caused in their jurisdictions. They represent that they are not asking the Court to weigh the costs and benefits of fossil fuels nor revisit federal government decisions. Response, p. 1 (February 6, 2020). Rather, the Local Governments allege that the Energy Companies have altered the climate by producing, selling, and promoting fossil fuels at levels they knew would bring catastrophic harm to Colorado. They further allege that the Energy Companies accelerated the pace and exacerbated the harm by concealing and misrepresenting the dangers of unchecked fossil fuel consumption to increase their sales. The consequences of these actions have led to an altered climate with concomitant costs in the Local Governments' jurisdictions. AC, ¶¶ 222-23, 243-48, 250-92, 300-17. Therefore, at issue in the motion to dismiss for failure to state a claim is whether, under established Colorado law, a jury can consider whether the Energy Companies bear any liability for the Local Governments' damages.

Resolution of this framing issue is important as it significantly impacts the federal preemption analysis, and to a lesser extent, the analysis pertaining to the viability of the state law claims.

Critically, the U.S. District Court of Colorado and the Tenth Circuit have both weighed in on this issue—in this very case. As the Local Governments aptly put it in their Response, the Energy Companies are arguing against a case the Local Governments did not plead. Through this

action, the Local Governments are not attempting to litigate a policy solution to global climate change, limit fossil fuel use or production, or control greenhouse gas emissions. *See Board of County Commissioners v. Suncor Energy (U.S.A.), Inc.*, 405 F.Supp.3d 947, 955 (D. Colo. 2019) (the Local Governments "do not ask the Court to stop or regulate Defendants' emissions of fossil fuels"). The Local Governments are not asking this Court to weigh the costs and benefits of fossil fuels nor revisit policy decisions made by the federal government for purposes of controlling or regulating emissions.

In remanding this action back to state court, the U.S. District Court of Colorado observed that the Local Governments "do not allege that any federal regulation or decision is unlawful," nor do they ask "the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate," nor do they "challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters." *Id.* at 969-71. The U.S. District Court therefore concluded that the Energy Companies did not present "an accurate characterization of the Plaintiffs' claims." *Id.* at 971.

On remand from the United States Supreme Court, the Tenth Circuit held that none of the six grounds asserted by the Energy Companies supported federal removal jurisdiction, and affirmed the district court's order remanding this action to state court. *Board of County Commissioners of Boulder County v. Suncor Energy (USA), Inc.*, 25 F.4th 1238, 1275 (10th Cir. 2022). Like the U.S. District Court, the Tenth Circuit characterized this lawsuit as "about damages related to climate change." *Id.* at 1247. According to the Tenth Circuit, the Local Governments "do not ask the court 'to stop or regulate' fossil-fuel production or emissions 'in Colorado or elsewhere.'" *Id.* at

1248. They instead request that the Energy Companies "help remediate the harm caused by their intentional, reckless and negligent conduct, specifically by paying their share of the costs [the Local Governments] have incurred and will incur because of [the Energy Companies'] contribution to alteration of the climate." *Id.* (internal citations omitted).

In addressing similar climate-change related litigation, courts from other jurisdictions have likewise concluded that the litigation is not aimed at controlling fossil fuel emissions or amending federal energy policy, but rather the claims concern defendants' "fossil fuel products and extravagant misinformation campaign that contributed to its injuries." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 217 (4th Cir. 2022); *see also City and County of Honolulu*, 537 P.3d at 1187 (plaintiffs are not seeking to set regulatory standards for how, whether, or how much fossil fuels defendants produce or sell). In *City & County of Honolulu*, the Hawaii Supreme Court framed the plaintiffs' complaint as seeking to "challenge the promotion and sale of fossil-fuel productions without warning and abetted by a sophisticated disinformation campaign." *Id.* at 1187 (citing *Baltimore*, 31 F.4th at 233). In short, the Hawaii Supreme Court determined the complaint concerned torts committed in Hawaii that caused alleged injuries in Hawaii. *Id.*

The Court notes that at least one other decision, *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021), rejected the conclusion that the lawsuit was about production, sales, and misleading marketing; instead characterizing the complaint as "artful pleading," and determining that the claims were really about regulating emissions. As the Local Governments point out, this fram-

ing appears to be at odds with U.S. Supreme Court precedent. In *Virginia Uranium v. Warren*, 587 U.S. 761, 772-73 (2019) (Gorsuch, J.), in a 3-Justice plurality opinion, the Court rejected the parallel argument that Virginia's mining ban was really a means of regulating radiation, regardless of whether the regulation had the purpose of addressing nuclear hazards.

Here, as in *City and County of Honolulu*, a major focus of the litigation is the claim that the Energy Companies' actions have tortiously caused harm to local communities and the Energy Companies have misled the public about the dangers of fossil fuels. The lawsuit is not seeking injunctive relief, or asking the Court to regulate or limit fossil fuel emissions. Instead, the Local Governments seek damages under Colorado tort law for harms and costs caused by the Energy Companies' alleged tortious actions.

2. Federal Common Law

As part of their federal preemption argument, the Energy Companies argue that the Local Governments' claims are based on federal common law. Next, applying federal common law, the Energy Companies maintain that the claims must be dismissed because they are displaced by federal legislation. Additionally, even if the claims were not displaced by legislation, the Energy Companies assert that the Amended Complaint fails to assert a plausible claim under federal common law.

The Local Governments counter that their claims are not properly based on federal common law. Therefore, there is no displacement.

There is no federal general common law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, there remain limited areas of "specialized federal common

law." *American Electrical Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). Federal common law applies where the subject matter of the claims implicates "uniquely federal interests." *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981). The United State Supreme Court has held that federal common law applies to cases addressing "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *American Electrical Power*, 564 U.S. at 421 ("Environmental protection is undoubtedly an area within national legislative power").[8] In *American Electrical Power*, plaintiffs brought claims against several electric utilities, contending that GHG emissions created a substantial and unreasonable interference with public rights in violation of federal and state tort law. *Id.* at 418. The U.S. Supreme Court held that the plaintiffs' claims were governed by federal common law, but were displaced by the Clean Air Act ("CAA"), and therefore failed to state a claim. *Id.*

The Court concludes the Energy Companies' federal common law preemption argument fails for no less than five independent reasons.

First, "the federal common law of nuisance that formerly governed transboundary pollution suits no longer exists due to Congress's displacement of that law through the CAA." *Suncor*, 25 F.4th at 1260; *American Electrical Power*, 564 U.S. at 421; *City and County of Honolulu*, 537 P.3d at 1195. *American Electrical Power*, relied on by the Energy Companies, "extinguished federal common law

[8] Federal common law is disfavored because "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *American Electrical Power*, 564 U.S. at 423-24.

public nuisance damage action[s], along with the federal common law public nuisance abatement actions." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (*Kivalina II*); *Suncor*, 25 F.4th at 1259 (in *American Electrical Power*, the CAA displaced the federal common law of air pollution). Several federal appellate courts have recently confirmed in climate change litigation that the federal common law which once governed interstate pollution damage and abatement actions was displaced. *See Rhode Island v. Shell Oil Production Co.*, 35 F.4th 44, 55 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023) (the Clean Water Act and the CAA have statutorily displaced any federal common law that previously existed, and therefore the court could not rule that any federal common law controlled the state's claims); *Baltimore*, 31 F.4th at 204 (federal common law did not control the city's state law claims because "federal common law in this area cease[d] to exist due to statutory displacement, Baltimore [did] not invoke[] the federal statute displacing federal common law, and . . . the CAA does not completely preempt Baltimore's claims); *City and County of Honolulu*, 537 P.3d at 1196 ("Because the CAA displaced federal common law, we cannot accept Defendants' argument that the federal common law governs here").[9]

[9] The position advanced by the Energy Companies also conflicts with the position ExxonMobil advocated for in *Kivalina II*, wherein ExxonMobil argued against application of federal common law in global climate change litigation—stating that even if "global climate change is predominately a matter of federal concern" it "has nothing to do with whether private damages claims raise uniquely federal interests of the type that justify applying federal common law." Response, Exhibit A, p. 57, n.23 (February 6, 2020).

In short, numerous courts have held that the federal common law that once governed interstate pollution damages and abatement suits was displaced by the CAA.

Despite this displacement, the Energy Companies argue that federal common law survives with enough force to preempt state common law claims involving interstate air pollution. As the Hawaii Supreme Court characterized it in *City and County of Honolulu*, this argument amounts to an argument that federal common law is both dead and alive—"dead in that the CAA has displaced it, but alive in that it still operates with enough force to preempt Plaintiffs' state law claims." *Id.* at 1198. Under this two-step approach, plaintiffs would be left without a remedy. Federal common law would preempt state common law, and the CAA would then displace federal common law. There is, however, no federal statutory cause of action under the CAA for these claims. *See* 42 U.S.C. § 7401, *et seq*. Without a federal statutory remedy, federal common law remedy, or state law remedy, plaintiffs are left without legal recourse.

In *City and County of Honolulu*, the Hawaii Supreme Court declined to follow this two-step approach "because it engages in backwards reasoning." 537 P.3d at 1199. This Court likewise declines the Energy Companies' invitation to go down this road to nowhere. Federal common law pertaining to transboundary air pollution has been displaced by the CAA. The issue therefore becomes whether the state law claims advanced by the Local Governments are preempted by the CAA. *See Suncor*, 5 F.4th at 1261.

Second, as set forth above, the Local Governments' claims do not seek to regulate emissions. The federal common law relied on by the Energy Companies formerly governed transboundary pollution and damages suits, which are distinguishable from the claims brought by the

Local Governments in this litigation. The claims governed by federal common law in the air pollution context were brought against polluting entities which sought to enjoin further pollution. *See, e.g., Milwaukee*, 406 U.S. at 93. This area of specialized federal common law governed "suits brought by one State to abate pollution emanating from another State." *American Electrical Power*, 564 U.S. at 421. Federal common law applied to such actions because states have conflicting interests in applying their state's law where one state seeks to enjoin conduct authorized in another state. *Milwaukee*, 406 U.S. at 104-07.

Here, the Local Governments' claims do not seek to regulate or enjoin GHG emissions. Moreover, the plaintiffs are local governments within Colorado, and this is not a suit brought by a state to abate pollution emanating from another state. Therefore, the former federal common law pertaining to transboundary pollution, even if it still existed, would not preempt the Local Governments' claims here.

This conclusion is in accord with a host of other courts that have considered this argument. *See, e.g., City and County of Honolulu*, 537 P.3d at 1200; *Rhode Island*, 35 F.4th at 55-56; *Suncor*, 425 F.4th at 1260, n.5; *Baltimore*, 31 F.4th at 204, 217; *City of Oakland*, 969 F.3d at 906 (state law claims for public nuisance did not raise a substantial federal question).

Third, even if federal common law was not displaced by the CAA, there is no basis for recognizing new federal common law to apply to the Local Governments' state law claims for damages.[10] First, displacement of state law is

[10] From the Supplemental Briefing filed June 12, 2023, it appears that the Energy Companies now concede that they are not seeking to

primarily a decision for Congress, rather than courts creating common law. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985). Second, this litigation does not involve adverse states, which could necessitate federal common law as an alternative to having one state's law apply to the disadvantage of the other. Third, the Local Governments are not attempting to regulate the conduct of out-of-state pollution sources. *Suncor*, 25 F.4th at 971.

Fourth, the Energy Companies have not shown a uniquely federal interest to justify the invocation of federal common law. A uniquely federal interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign. *Rhode Island*, 35 F.4th at 54; *Baltimore*, 31 F.4th at 200-01; *Jackson*, 750 F.2d at 1325. The Energy Companies have not shown how this case directly implicates these federal concerns. In the briefing, the Energy Companies tout abstract federal interests such as national energy and security policy. However, they do not specify concrete interests or identify how they are implicated by the state law damages claims brought in this case. *Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 71 (1966). Unlike in *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987), in which there was a detailed federal permitting scheme that would have been disrupted if an affected state law applied to discharges, there is no comprehensive federal scheme governing the Energy Companies' sales of fossil fuels or marketing activities.

Fifth, and relatedly, the Energy Companies have not shown a significant conflict between federal interests and

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create new federal common law, as they rely on the federal common law pertaining to interstate air pollution.

Colorado law. To invoke federal common law, "state law must pose a threat to an identifiable federal policy." *In re Agent Orange Products Liability Litigation*, 635 F.2d 987, 995 (2d Cir. 1980). Here, the Energy Companies have not identified a federal policy pertaining to their liability for damages, let alone how state law conflicts with any such federal interest. *Baltimore*, 31 F.4th at 200-04 (holding that the defendants' argument failed to establish either a uniquely federal interest in compensating local communities for climate injuries and redressing defendants' misleading promotional activities, or a significant conflict between any such federal interests and the application of state law to the conduct at issue).

In the supplemental briefing, the Energy Companies rely heavily on the Second Circuit's ruling in *City of New York*, 993 F.3d 81 (2d Cir. 2021). In supplemental briefing, they posited that *City of New York* "remains the only case-dispositive decision addressing the merits of Plaintiffs' claims." Supplemental Brief, p. 1 (June 12, 2023). *City of New York* affirmed the dismissal of a climate change-related tort action brought by the City of New York against certain energy companies, including ExxonMobil. *Id.* at 85. The Second Circuit agreed with the energy companies that federal common law preempted the state tort claims, and further, that the CAA displaced federal common law with respect to those claims. *Id.* at 91-92, 95-96.

The Local Governments contend that *City of New York*, which is not binding on this Court, was wrongly decided and distinguishable. In the Supplemental Briefing, the Local Governments cite a host of appellate decisions that disagree with the *City of New York's* analysis on the applicability of federal common law and CAA preemption.

Indeed, *City of New York's* holdings that federal common law governs claims seeking damages for injuries sustained due to interstate GHG emissions and that the CAA displaces federal common law with respect to those emissions conflicts with several other appellate courts that have considered these issues. *See, e.g.*, *Rhode Island*, 35 F.4th at 54; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 708 (3d. Cir. 2022); *Baltimore*, 31 F.4th at 204; *Minnesota v. American Petroleum Institute*, 63 F.4th 703, 709-12 (8th Cir. 2023); *County of San Mateo v. Chevron Corp.,* 32 F.4th 733, 746-48 (9th Cir. 2022); *Suncor*, 25 F.4th at 1261; *City of Oakland*, 969 F.3d at 906-09; *City and County of Honolulu*, 537 P.3d at 1201. This Court joins the vast majority of courts who have considered this issue, concluding the reasoning and analysis in these cases is considerably more persuasive than the Second Circuit's *City of New York* analysis. In particular, *City of New York* relied on U.S. Supreme Court precedent governing interstate air or water pollution, which as noted above, is distinguishable from the claims advanced by the Local Governments in this litigation.

The motion to dismiss based on federal common law preemption principles is therefore denied.

3. Whether the Clean Air Act Preempts the Claims

Federal common law does not displace or preempt the Local Governments' claims. Because the CAA displaced federal common law, the analysis now turns to whether the CAA preempts the state tort claims brought in this action. For the reasons set forth below, the Court concludes that the Local Governments' claims are not preempted by the CAA.

The doctrine of preemption is rooted in the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2; *see*

also City and County of Honolulu, 537 P.3d at 1203. There are two general types of preemption—complete preemption and ordinary preemption. *City of Hoboken*, 45 F.4th at 707; *City and County of Honolulu*, 537 P.3d at 1203. Complete preemption applies in the context of federal removal jurisdiction. *Id.* Thus, ordinary preemption applies here. There is a presumption that state laws are not preempted. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The parties offer competing federal preemption legal frameworks. The Energy Companies assert that the displacement of federal common law shifts the burden to the party contesting preemption, and the test is whether the CAA specifically preserves the particular type of state law claim at issue. *See City of New York*, 993 F.3d at 98. Because the CAA does not authorize a suit for injuries caused by interstate GHG emissions, the CAA does not preserve the state law claims here, and thereby preempts the claims. *Id.* at 100.

The Local Governments counter that ordinary preemption applies. Under this test, there is a presumption against the preemption of state laws and claims. *City and County of Honolulu*, 537 P.3d at 1203 (citing *Wyeth*, 555 U.S. at 565). When determining whether a statute is preempted, courts primarily evaluate whether Congress intended to preempt state law. *Id.* at 1203.

The Court concludes that ordinary preemption principles apply here, placing the burden on the Energy Companies to show the state law claims have been preempted. As set forth above, U.S. Supreme Court precedent provides that there is a presumption against federal preemption of state law claims. The U.S. Supreme Court has held that the availability of state suits "depends, *inter alia*, on the preemptive effect of the [Clean Air] Act." *American Electrical Power*, 564 U.S. at 429; *see also Ouellette*, 479

U.S. at 492 (Court applied an ordinary conflict preemption analysis under the CWA). Indeed, in considering the removal issue in this litigation, the Tenth Circuit relied on *American Electrical Power* and *Kivalina II*, and determined that "we look to the federal act that displaced the federal common law to determine whether the state claims are preempted." *Suncor*, 25 F.4th at 1261.

In general, there are three types of ordinary, or substantive, preemption: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of a federal objective. *City and County of Honolulu*, 537 P.3d at 1203 (citations omitted); *Ouellette*, 479 U.S. at 491-92; *see also Middleton v. Hartman*, 45 P.3d 721, 731 (Colo. 2002) (state law tort claims are preempted where Congress has occupied the field through legislation or when they conflict with federal law).

The Energy Companies assert that the Local Governments' claims are preempted under the latter two theories. Motion to Dismiss for Failure to State a Claim, pp. 14-15 (December 9, 2019). The Court disagrees, concluding that the claims are not preempted under any preemption theory.

First, to be clear, express preemption does not apply. Federal law expressly preempts state law only where the federal statute contains an express preemption clause barring state law claims in certain areas. *City and County of Honolulu*, 537 P.3d at 1203 (citing *Oneok, Inc. v. Lear-*

jet, Inc., 575 U.S. 373, 376 (2015)). The CAA does not contain express language preempting state common law tort claims, and the Energy Companies do not contend that it does. Indeed, the CAA does just the opposite by preserving "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e).

Second, field preemption does not apply. Field preemption applies where (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement the regulation, or (2) the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *City and County of Honolulu*, 537 P.3d at 1204; *see also In re MacAnally*, 20 P.3d 1197, 1201 (Colo. App. 2007) (field preemption occurs where a federal law "so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it.") Even complementary state regulation is impermissible when Congress occupies an entire field. *Id.*; *Arizona v. United States*, 567 U.S. 387, 401 (2012).

The Energy Companies maintain that Congress's delegation to the EPA of broad authority over "whether and how to regulate carbon-dioxide emissions" reflects a clear occupation of this legislative area. Motion to Dismiss for Failure to State a Claim, p. 16 (December 9, 2019).

Under the legal standards for field preemption, the CAA does not completely occupy the field of GHG emissions. *City and County of Honolulu*, 537 P.3d at 1204; *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015) (the CAA does not bar state common

law claims against in-state emitters because "environmental regulation is a field that the states have traditionally occupied"). Most critically, under the CAA, each state retains regulatory power through state implementation plans. 42 U.S.C. § 7410(a)(1). Further, the CAA expressly provides for a state's right to adopt or enforce a standard or limitation regarding emissions unless the state policy would be less stringent than the CAA. 42 U.S.C. § 7416. In general, the CAA preserves state regulatory and common law authority in this area. 42 U.S.C. §§ 7401(a)(3), 7604(e). The CAA therefore does not reflect a "congressional decision to foreclose any state regulation in the area." *City and County of Honolulu*, 537 P.3d at 1204 (quoting *Arizona*, 567 U.S. at 401)*; see also Ouellette*, 479 U.S. at 492 (the savings clause in the CWA defeats field preemption).

Moreover, the CAA provides the EPA with authority to regulate emission sources. 42 U.S.C. § 7411. The CAA does not directly regulate the Energy Companies' upstream levels of enterprise-wide fossil fuel production, sale and promotion. *See Baltimore*, 31 F.4th at 215 (the EPA "regulates air pollution from stationary sources, emission standards for moving sources, noise pollution, acid rain, and stratospheric ozone protection."). As set forth above, the Local Governments' claims do not seek to regulate emissions. Therefore, field preemption would not preclude their claims even if Congress intended to occupy the field relating to GHG emissions.

Third, the Court concludes that conflict preemption does not apply. In general, conflict preemption exists when state law "stands as an obstacle to accomplishing the purposes and objectives of federal law." *In re Drexler & Bruce*, 315 P.3d 179, 182 (Colo. App. 2013). Conflict

preemption consists of (1) obstacle preemption and (2) impossibility preemption. *City and County of Honolulu*, 537 P.3d at 1204. Obstacle preemption applies when state law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.* (quoting *Arizona*, 567 U.S. at 399). Impossibility preemption is a "demanding defense" that applies when state law claims directly conflict with federal law or penalize behavior that federal law requires. *Id.* (quoting *Wyeth*, 555 U.S. at 573).

On this front, the Energy Companies argue that obstacle preemption applies by contending that adjudication of the state law claims would "interfere with the careful balance struck by Congress" through numerous statutes and regulations related to fossil fuel production, emissions, and environmental protection. Motion to Dismiss for Failure to State a Claim, p. 15 (December 19, 2019) (citing *Arizona*, 567 U.S. at 406). They posit that the approach taken by the Local Governments amounts to an "avalanche of litigation based on overlapping application of every state's common law" which will present a significant obstacle to federal regulation of air pollution and Congress's objective of increasing fossil fuel extraction. *Id.*

The Court first concludes that the claims advanced here are not an obstacle to the CAA's regulation of air pollution emissions. Congress has stated that the overarching goal of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). The Energy Companies have not shown how the state law claims at issue here, which seek damages and not an injunction, interfere with the CAA's regulation of air pollution, and in particular, source emissions.

Second, in support of the obstacle preemption theory, the Energy Companies cite several federal laws relating to federal lands and leasing and assert there is a preemptive federal interest in promoting domestic oil production. Motion to Dismiss for Failure to State a Claim, pp. 10-11 (December 19, 2019). The Local Governments do not, however, seek to enjoin or restrain domestic oil production. Additionally, broadly invoking a federal interest "should never be enough to win preemption of a state law." *Virginia Uranium*, 587 U.S. at 767 (plurality opinion). A federal interest in promoting domestic oil production does not prohibit states or localities from seeking to remedy harm arising from domestic oil production activities. *See* 42 U.S.C. §§ 13401, 15927(b)(2)-(3) (oil production should not compromise the environment or harm local communities).

The Energy Companies' preemption argument conflicts with several recent appellate decisions. As set forth above, the claims in this case address conduct different from what the CAA regulates—this case is not about regulating emissions. *Suncor*, 25 F.4th at 1264. In *City of Oakland*, the Ninth Circuit held that "Congress intended [the CAA] to preserve state-law causes of action pursuant to a saving clause." 969 F.3d at 907-08. In short, the CAA preserves state tort claims. *Suncor*, 25 F.4th at 1263; *Baltimore*, 31 F.4th at 216-17. Significantly, the CAA contains two savings clauses which expressly preserve state law. 42 U.S.C. § 7604(e); § 7416. *See City of Oakland*, 969 F.3d at 907-08 (the savings clause in § 7416 "'makes clear that states retain the right to 'adopt or enforce' common law standards that apply to emissions' and preserves '[s]tate common law standards . . . against preemption.'" (quoting *Merrick*, 805 F.3d at 690-91).

Moreover, it is notable that the CAA does not provide a remedy to the Local Governments for the claims brought herein. *See Suncor*, 25 F.4th at 1267 (the fact that "state common law might provide redress for harm caused by certain private actors, and thereby created remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable"). As set forth above, under the Energy Companies' theory, federal common law is displaced by the CAA, which in turn preempts the state law claims. The absence of a remedy in the CAA for the Local Governments to seek redress for the harms and injuries alleged in the Amended Complaint would leave them entirely without a remedy. This result further supports the conclusion that the CAA does not preempt the state law claims advanced in this litigation.

In support of their preemption theory, the Energy Companies rely heavily on *City of New York*.[11] The overarching question in preemption analyses is whether Congress intended to preempt state law. *City and County of Honolulu*, 537 P.3d at 1203 (citations omitted). *City of New York* does not expressly hold that Congress intended the CAA to preempt state tort law. The *City of New York's* determination that even where a federal statute does not directly preempt state law, it can do so indirectly

[11] The Court also notes the Energy Companies' reliance on the Delaware Superior Court's decision in *Delaware v. BP America Inc.*, *et al.*, 2024 WL 98888 (Del. Super. Ct. Jan. 9, 2024), interlocutory review denied May 8, 2024, 2024 WL 2044799, submitted as supplemental authority on January 18, 2024 (Exhibit A). In *Delaware*, the Superior Court held that the CAA preempts state law to the extent a state attempts to regulate air pollution originating in other states. With regard to federal preemption, this authority is not persuasive for the same reasons that the *City of New York* is not compelling.

by displacing federal common law, conflicts with U.S. Supreme Court precedent. *See American Electrical Power*, 564 U.S. at 429 ("[i]n light of our holding that the Clean Air Act displaces federal common law, the availability . . . of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.").

The Energy Companies also place reliance on *Ouellette*, which held that in a suit by Vermont landowners against a New York paper mill, plaintiffs' Vermont state law claims were preempted by the CWA. 479 U.S. at 498. In reaching this conclusion under a conflict preemption analysis, the U.S. Supreme Court held that application of Vermont law would circumvent the CWA's extensive permitting system, and Vermont law was therefore preempted due to the conflict with federal statutory law. *Id.* at 494. In so holding, however, the Court observed that application of New York law would not be preempted. *Id.* As noted above, the claims advanced in this litigation are not an obstacle to or in conflict with the CAA's regulation of air pollution emissions. *Ouellette's* conflict preemption analysis is therefore distinguishable.

The Energy Companies also seek to distinguish several of the cases relied on by the Local Governments because they addressed preemption in the context of federal removal. This argument fails for three reasons. First, *City and County of Honolulu* holds that, outside of the removal context, the CAA did not preempt state law claims similar to those made here. Second, although the appellate courts addressing preemption in the removal context applied the well pleaded complaint rule, these cases still provide guidance in assessing whether the CAA preempts the Local Governments' state law claims brought in this

litigation.[12] Third, U.S. Supreme Court preemption precedent arising from other contexts supports application of the ordinary preemption principles applied above.

4. Whether Other Federal Doctrines Preempt the Claims

The Energy Companies contend that the claims at issue violate a handful of other federal doctrines: federal foreign affairs power, separation of powers, the Commerce Clause, due process, and free speech. Each is addressed in turn.

a. Foreign Affairs Power

State law claims "must give way if they impair the effective exercise of the Nation's foreign policy." *American Insurance Association v. Garamendi*, 539 U.S. 396, 419 (2003). In *Garamendi*, the U.S. Supreme Court invalidated a California law encouraging Holocaust reparations by European insurance carriers because of the likelihood it would "conflict with express foreign policy of the National Government." *Id.* at 420.

The Energy Companies claim that in seeking damages for their lawful worldwide fossil fuel production activities, the Local Governments are asking the Court to interfere with the federal government's ability to negotiate and implement comprehensive international agreements related to climate change, infringe upon foreign-policy decisions, and undercut the President's diplomatic discretion. Motion to Dismiss, pp. 16-17 (December 19, 2019).

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[12] *See, e.g., Suncor* 45 F.4th at 1261; *Baltimore*, 31 F.4th at 215; *City of Hoboken*, 45 F.4th at 707.

This argument fails for several reasons. First, the Court is unaware of any cases holding that the foreign affairs power preempts state tort law claims for injuries incurred in the state. Second, foreign policy lacking the force of a specific law cannot preempt, even when state law has serious foreign policy implications. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008). Third, and perhaps most critically, the Energy Companies have not shown how the state law claims here, which seek monetary damages for domestic harms, compromise the President's ability to pursue foreign policy. Nor do they show how the claims conflict with international obligations.

b. Separation of Powers

The Energy Companies next maintain that adjudicating the Local Governments' claims would violate separation of powers and federalism principles. They suggest that a state court judgment on the legality of the Energy Companies' extraction and production of fossil fuels is beyond the role of the courts. Further, courts should refrain "from reviewing controversies concerning policy choices and value determinations." *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003) (citations omitted). They further urge that decisions pertaining to appropriate and reasonable fossil fuel production and emission levels are to be resolved by the legislative or executive branches. *Moss v. Board of County Commissioners*, 411 P.3d 918, 921 (Colo. App. 2015) (addressing whether bows are firearms).

The Local Governments counter that this argument essentially invokes the federal political question doctrine, which the Colorado Supreme Court has rejected. *Lobato v. People*, 218 P.3d 358, 370 (Colo. 2009). Further, even if it applies, they maintain that the argument does not satisfy the factors set forth in *Baker v. Carr*, 369 U.S. 186,

222 (1962). They also note that federal courts of appeal have universally rejected the theory's applicability to climate change tort cases. *See Connecticut v. American Electrical Power Co.*, 582 F.3d 309, 321-22 (2d Cir. 2009); *rev'd on other grounds*; *Comer v. Murphy Oil USA*, 585 F.3d 855, 869-79 (5th Cir. 2009), *vacated* 598 F.3d 208 (5th Cir. 2010) (vacated upon agreement to hear *en banc*, but quorum lost).

The Local Governments overstate the *Lobato* holding. In *Lobato*, the Colorado Supreme Court held that the political question doctrine did not preclude judicial review of the statute in that case. 218 P.3d at 374. The separation of powers and political question doctrines may therefore be considered. However, the Court concludes that adjudication of the claims here does not violate either separation of powers or political question principles. These claims are to be resolved in accordance with Colorado common law (tort claims) and statutory law (CCPA claim). Adjudication involves more than policy determinations reserved for the legislative and executive branches. Rather, it requires the jury to evaluate and weigh the evidence and apply Colorado law, through jury instructions, in deciding the claims. To the extent the public nuisance claim requires a balancing of the social utility of the action with the harm caused by the action, this balancing is performed in any public nuisance action, and tort law provides the standards for the jury to apply. *See Cook v. Rockwell International Corp.*, 580 F.Supp.2d 1071, 1141-42 (D. Colo. Dec. 7, 2006); Restatement (Second) of Torts § 821B, cmt. (i) (in public nuisance suit for damages, court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done).

c. Commerce Clause

The Energy Companies next urge that the claims violate the extraterritoriality doctrine of the Commerce Clause. The U.S. Constitution's dormant Commerce Clause invalidates state laws that have the "'practical effect' of regulating commerce occurring wholly outside that State's border," or "control[ling] conduct beyond the boundaries of the State." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). A "[s]tate may not impos[e] economic sanctions on violators of its laws with the intent of changing tortfeasors' lawful conduct in other States." *BMW of North America v. Gore*, 517 U.S. 559, 572 (1996). Although state legislation is not at issue here, the Energy Companies assert that common law environmental tort claims are tantamount to state regulation, as they can cause a defendant to "change its methods of doing business and contributing pollution to avoid the threat of ongoing liability." *Ouellette*, 479 U.S. at 495. Here, the Energy Companies suggest that adjudication of the claims in this litigation could have the practical effect of controlling the Energy Companies' conduct beyond the boundaries of Colorado, and the undifferentiated nature of GHG emissions would result in Colorado tort law being used to impose policy choices on neighboring states. Motion to Dismiss, pp. 18-19 (December 19, 2019).

The Court concludes that the claims are not precluded by the dormant Commerce Clause. Extraterritoriality is the "most dormant" dormant Commerce Clause doctrine, and *Healy* and its progeny are limited to statutes "tying the price of . . . in-state products to out-of-state prices." *Energy & Environmental Legal Institute v. Epel*, 793 F.3d 1169, 1172, 1174-75 (10th Cir. 2015) (quoting *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 669 (2003)). This *Healy* line of cases

involve discrimination against out-of-state products. This action involves neither state legislation nor price discrimination. Likewise, *BMW* is distinguishable. It did not include a Commerce Clause challenge, rather, it addressed whether disproportionate punitive damages may be used to punish out-of-state conduct. In contrast, this case involves a request for compensatory damages for conduct causing in-state injuries.

Moreover, the U.S. Supreme Court recently rejected a general "extraterritoriality" doctrine under the dormant Commerce Clause. In *National Pork Producers v. Ross*, 598 U.S. 356 (2023), the Court clarified that *Healy* does not support an extraterritoriality doctrine, and observed that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id.* at 374.

d. Due Process Clause

Next, the Energy Companies contend that the Local Governments' claims violate the Due Process Clause of the U.S. Constitution in two ways. First, due process precludes states from "punish[ing] a defendant for conduct that may have been lawful where it occurred." *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 421 (2003). The Energy Companies' exploration and production activities are lawful in all states and nations, and thus they assert that the Local Governments may not seek to punish them for lawful conduct. Second, due process prohibits states from imposing disproportionate and retroactive liability for lawful conduct. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549 (1998). Here, the Amended Complaint seeks past and future damages, trebled, relating to conduct dating back more than 100 years. AC, ¶¶ 532-35.

Like the Commerce Clause argument, the case law relied on by the Energy Companies (*State Farm* & *BMW*) regarding lawful conduct addresses punitive damages, rather than liability. With regards to retroactivity, the Local Governments plausibly contend that this type of argument has been rejected in analogous lead paint, asbestos, and tobacco cases. Liability may still attach for prior conduct that, while not criminal, is tortious. *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 599 (Cal. App. 2017) (lead paint), *cert. denied*, 139 S. Ct. 377 (2018); *Air & Liquid Systems Corp. v. DeVries*, 586 U.S. 446, 457 (2019) (asbestos); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 395-96 (Cal. App. 2011) (tobacco). Here, the Local Governments have alleged that the Energy Companies sold, marketed, and misrepresented the dangers of fossil fuels while knowing they would cause catastrophic climate change. This action does not seek to impose criminal sanctions on conduct that was lawful when it occurred. Rather, the Local Governments seek compensatory damages for conduct they contend was tortious at the time it occurred. The issue of whether liability will attach, and if so, how far back, go to the merits of the action.

The claims therefore do not violate the Due Process Clause.

e. First Amendment

Lastly on the federal doctrine front, the Energy Companies seek dismissal of the claims because they seek to punish the Energy Companies for protected speech. For instance, the Amended Complaint alleges that ExxonMobil ran advertisements "claim[ing] that climate science was unsettled," "criticiz[ing] the unrealistic and economically damaging Kyoto process," and "emphasiz[ing] scientific uncertainties about the human role in climate

change." AC, ¶ 421. The Energy Companies maintain that punishing these alleged advertisements would violate the First Amendment, which protects the essential "free flow of commercial information." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995).

Additionally, the Energy Companies urge that the claims are barred by the Noerr-Pennington doctrine, which immunizes various forms of administrative and judicial petitioning activity from legal liability in later litigation. *General Steel Domestic Sales, LLC v. Bacheller*, 291 P.3d 1, 7 (Colo. 2012). On this issue, the Energy Companies assert that the Amended Complaint's reference to industry groups refers to lobbying organizations, which they suggest are immunized by the Noerr-Pennington doctrine. The Motion also notes that some of the Amended Complaint's allegations go to communications regarding the International Panel on Climate Change ("IPCC"), whose principal audience was policymakers. Motion to Dismiss, p. 21 (December 19, 2019).

As an initial matter, the First Amendment argument pertains only to the CCPA claim, as the other claims do not involve speech. With regard to the CCPA claim, as pointed out by the Local Governments, the Energy Companies' First Amendment argument would eviscerate the CCPA by rendering it unconstitutional as applied to commercial speech. The First Amendment "accords a lesser protection to commercial speech." *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). To be protected, the commercial speech "must concern lawful activity and not be misleading." *Id.* at 566. Here, the Local Governments allege that the speech in question was misleading. Therefore, the CCPA claim is not prohibited by the First Amendment.

Likewise, the claim is not barred by the Noerr-Pennington doctrine. Petitioning activity is not protected by this doctrine if the activity involved "fraud, or some other legally cognizable harm associated with a false statement." *United States v. Alvarez*, 567 U.S. 709, 718-19 (2012); *see also United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (Noerr-Pennington "does not protect deliberately false or misleading statements."). Here, the Amended Complaint alleges that the statements were falsely made. Additionally, the doctrine does not apply if the subject activity "was not genuinely intended to influence government action." *Philip Morris*, 566 F.3d at 1123. Here, the allegations of misleading speech are far broader than speech aimed at policymakers, and the allegations disclaimed relief based on petitioning activities. AC, ¶ 542.

The claims therefore do not violate the First Amendment.

5. Whether the Claims are Viable Under State Law

a. Standing

Standing is a threshold issue that must be resolved before a decision on the merits. *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). Colorado plaintiffs benefit from relatively broad individual standing. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (Colorado's test "has traditionally been relatively easy to satisfy"). A plaintiff's injury may be intangible, such as the deprivation of civil liberties. *Id.* To establish standing, a plaintiff must show both that (1) plaintiff suffered an injury in fact, and (2) that the injury was to a legally protected interest. *Reeves-Toney v. School District No. 1 in the City and County of Denver*,

442 P.3d 81, 86 (Colo. 2019); *Wimberly v. Ettenberg*, 570 P.2d 535, 537-39 (Colo. 1977). Present or threatened economic harm is a sufficient injury in fact. *City of Northglenn v. Board of County Commissioners*, 411 P.3d 1139, 1143 (Colo. App. 2016).

The Energy Companies first assert that the Local Governments lack standing because they do not and cannot allege that the Defendants' fossil fuel activities are directly responsible for their alleged injuries. Rather, the Amended Complaint includes allegations that the Energy Companies made it possible for billions of consumers to consume fossil fuels, which caused the alleged injuries. AC, ¶¶ 10, 128, 322. In competitor standing cases, a defendant having "merely encourage[d] or permit[ted] a third party to engage in conduct that affects a plaintiff's legally protected interest" does not create an injury in fact. *1405 Hotel, LLC v. Colorado Economic Development Commission*, 370 P.3d 309, 318 (Colo. App. 2015).

This argument is similar to the Energy Companies' causation argument (Section 5(c) below). In general, causation is an issue of fact. More particularly, whether an injury resulted from a defendant's actions is a merits question, "reserved for the trier of fact." *Wimberly*, 570 P.2d at 539. Here, the Local Governments have alleged that the Energy Companies knew consumers would use the fossil fuels they produced, and that this would substantially contribute to global climate change and concomitant harm, including to the Local Governments. AC, ¶¶ 327-30, 337-75. Generally, a third party's act "is not a superseding cause immunizing the defendant from liability, if it is reasonably foreseeable." *Ekberg v. Greene*, 588 P.2d 375, 376 (Colo. 1978). The Local Governments have therefore sufficiently alleged that the Energy Companies' activities are responsible for their damages.

Second, the Motion to Dismiss argues that the nature and extent of the claimed damages will not be known until a remote time in the future, and such factual allegations are insufficient to support the standing claim. *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002). In particular, the Amended Complaint alleges that damages are "expected," "projected," "anticipated," or "predicted" to manifest at some point in the future. AC, ¶¶ 161-63, 165-66, 172-73, 178-79, 244, 255, 288, 311.

The Energy Companies' speculative injury argument is similarly unavailing. The Amended Complaint includes allegations that the Local Governments have already incurred damages due to an altered climate and are presently "expending considerable taxpayer dollars" to protect residents from climate impacts. *Id.* at ¶¶ 221-320, 454. The fact that some of the alleged damages may arise in the future does not defeat standing for alleged injuries that have occurred in the past and are presently occurring. *Cf. Olson*, 53 P.3d at 752 (it would not be known until a remote time whether there would be an injury at all). Indeed, Colorado courts have also permitted claims for threatened injury, such as loss of future sales, if the claims are not speculative. *Syfrett v. Pullen*, 209 P.3d 1167, 1170 (Colo. App. 2008); *Colorado Manufactured Housing Association v. Pueblo County*, 857 P.2d 507, 511 (Colo. App. 1993).

In short, the Local Governments have adequately alleged an injury in fact to a legally protected interest, and therefore have standing.

b. Statute of Limitations

The Energy Companies contend that all of the claims are time-barred because, from the face of the Amended Complaint, the Local Governments were on notice of the

claims more than four years before they were filed. *See* C.R.S. §§ 13-80-102(1) (the statute of limitations for trespass and nuisance claims is 2 years); § 13-80-101(1)(a) (the statute of limitations for unjust enrichment claims is 3 years); § 6-1-115 (the statute of limitations for CCPA claims is 3 years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within 3 years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice, and may be extended for one year if certain elements are proven); *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (the statute of limitations for civil conspiracy claims is in the 2-4 year range because they share the statute of limitations of the underlying tort).

In particular, the Amended Complaint includes allegations that by "the late 1980s, the reality of climate change was increasingly identified in public settings," and a "scientific consensus around the existence and causes of climate change" had emerged by the 1990s. AC, ¶¶ 417, 436. The allegations regarding misrepresentations date to the 1990s and were made publicly. *Id.*, ¶¶ 324, 416, 419-21. The Amended Complaint also includes allegations that there have been local impacts dating back to the 1990s and early 2000s, and that the Local Governments have undertaken efforts to combat these effects. *Id.*, ¶¶ 32, 206, 214, 226, 229, 259, 268, 314. Based on these allegations, the Energy Companies reason that the Local Governments were aware of their claims before 2014, and that the claims are therefore all time barred.

The Local Governments counter that the Energy Companies do not show that the Local Governments knew, or should have known, "all material facts essential

to show the elements" of their claims before this action was initiated in 2018. *Miller v. Armstrong World Industries, Inc.*, 817 P.2d 111, 113 (Colo. 1991). Further, the accrual of a claim is typically "a question of fact for the jury." *Keller Cattle Co. v. Allison*, 55 P.3d 257, 261 (Colo. App. 2018). The issue of when the Local Governments knew of the Energy Companies alleged tortious acts and knew of the injuries the altered climate was causing in their jurisdictions is therefore a matter of proof. As an alternative response, the Local Governments maintain that their claims are timely because the torts are continuing torts. AC, ¶¶ 379, 406, 446, 467, 505, 515, 525. The Colorado Supreme Court has held that where pollution was both still present and migrating onto a plaintiff's property, it was a continuing trespass and nuisance even "where the cause of the contamination has ceased." *Hoery v. United States*, 64 P.3d 214, 221-22 (Colo. 2003). Because the tortious conduct has not ceased, the nuisance and trespass claims have not yet accrued.

The Court first concludes that the nuisance and trespass claims, and by extension the civil conspiracy claim, are subject to the continuing tort doctrine, and therefore not barred by the statute of limitations. The Amended Complaint alleges that the Energy Companies' actions have caused injuries that occurred in the past, are occurring in the present, and will occur in the future. AC, ¶¶ 379, 406, 446, 467, 505, 515, 525. Further, the alleged tortious activity, along with an ongoing increase in GHG emissions, is continuing to occur. *Id.*, ¶¶ 380-406. The nuisance and trespass claims are therefore not barred by C.R.S. § 13-80-102(1). Additionally, although the Amended Complaint alleges that there was a scientific consensus in the 1990s, the issue of when the Local Governments knew or should have known all material facts supporting their claims, or when the claims accrued even

in the absence of the continuing tort doctrine, is an issue of fact which precludes dismissal when the Court accepts the factual allegations as true and makes all reasonable inferences in the Local Governments' favor.

The continuing tort doctrine does not, however, apply to the CCPA claim, as there is no allegation that the conduct (concealment and misrepresentations) is continuing. Rather, the Amended Complaint includes allegations that the Energy Companies concealed the known risks and, separately, jointly, and in coordination with others, "directed, participated in and benefitted from efforts to misleadingly cast doubt about the causes and consequences of climate change, including: (1) making affirmative and misleading statements suggesting that continued and unabated fossil fuel use was safe (in spite of internal knowledge to the contrary); and (2) attacking climate science and scientists who tried to report truthfully about the dangers of climate change." AC, ¶ 408.

The Amended Complaint identifies several alleged specific misleading and deceptive communications to the public. AC, ¶¶ 409 (1996 statement by Exxon CEO); 419 (1997 Mobil advertisement in New York Times); 421 (2000, 2001, and 2004 Exxon advertisements); 424 (Global Climate Coalitions' marketing efforts in 1990s and early 2000s); 430 (SEPP scientists intending to create doubt in public mind in 1990s); 432 (1998 sham SEPP petition). These specific communications pre-date 2014.

The issue is therefore whether the Energy Companies have established as a matter of law that these claims accrued before 2014. C.R.S. § 6-1-115 (more than four years before the action was filed). Here, the specific communications identified above all occurred before 2014. Under the CCPA statutory limitation, however, the claims are still timely if the Amended Complaint was filed within

"three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice." *Id.*

The Amended Complaint provides insufficient factual allegations on this issue. While it includes the allegation that a large number of Colorado consumers, including in the Local Governments' communities, "were and continue to be directly affected by Defendants' deceptive trade practices." (AC, ¶ 496), there is insufficient factual content for the Court to determine when the cause of action accrued. As noted below, the CCPA allegations lack the particularity required by C.R.C.P. 9(b). In short, the Local Governments have not sufficiently alleged sufficient factual allegations for the Court to conclude or infer when the CCPA claim accrued.

The motion to dismiss the common law tort claims is therefore denied, and the motion to dismiss the CCPA claim as time-barred by C.R.S. § 6-1-115 is granted.

c. Causation

To prevail on the majority of their claims, the Local Governments must prove both causation-in-fact and legal causation. *Reigel v. SavaSeniorCare, LLC*, 292 P.3d 977, 985 (Colo. App. 2011). Causation is "a question of fact that is properly decided by a fact finder." *Id.* at 985-86; *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. App. 2001). In *Reigel*, within the context of causation requirements for negligence claims, the Colorado Court of Appeals affirmed that causation is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them. *Id.* at 985-86. The Court held that to establish causation under Colorado law, a plaintiff must

show either that (1) but for the defendant's alleged negligence, the claimed injury would not have occurred, or (2) the defendant's alleged negligence was a necessary component of a causal set that would have caused the injury. *Id.* at 987. The Court confirmed that though "the court has spoken in terms of the defendant's negligence being a 'substantial factor' where other potential causes may be at play, the court has not retreated from the requirement that the defendant's conduct be a cause without which the injury would not have occurred." *Id.*

The Energy Companies maintain that as to causation-in-fact, the Local Governments do not, and cannot, allege that the claimed injuries would not have occurred "but for" the Energy Companies' activities. *Smith v. State Compensation Insurance Fund*, 749 P.2d 462, 464 (Colo. App. 1987). The Amended Complaint alleges that the Energy Companies supplied only a fraction of global oil demand. AC, ¶¶ 61, 81 n.7, 397. They contend that it is simply not plausible to state which emissions caused the alleged climate change injuries alleged here. Thus, the Energy Companies posit that the Local Governments cannot plausibly allege that the climate change consequences at issue here would not have happened "but for" the Energy Companies' activities.

As to legal causation, the Energy Companies urge that the Local Governments cannot plausibly allege that the damages were a "reasonably foreseeable" consequence of the Energy Companies' conduct. *Boulders at Escalante, LLC v. Otten, Johnson, Robinson, Neff & Ragonetti, P.C.*, 412 P.3d 751, 762 (Colo. App. 2015). Because the alleged damages have arisen due to fossil fuel production and consumption around the planet over many decades, the Energy Companies suggest that the causal chain is too attenuated for the companies to be deemed legally responsible

for the alleged harms to the Local Governments' communities. *Id.* at 766.

The Court concludes that the Local Governments have plausibly alleged causation. For purposes of the Motion to Dismiss, the factual allegations must be accepted as true, with all reasonable inferences being drawn in Plaintiffs' favor. As noted above, causation is typically an issue of fact to be determined by the factfinder. Here, the Local Governments have pled that the Energy Companies are two of the largest sources of GHG emissions globally and historically, responsible for "billions of tons." AC, ¶¶ 15, 62, 82 n.8, 383, 399. When viewed in the light most favorable to the non-moving party, these allegations are sufficient to plausibly allege causation-in-fact.

Moreover, under the Energy Companies' causation-in-fact theory, no one is legally responsible for harm caused by multiple actors. This position is contrary to Colorado law, including model Jury Instructions governing causation, which recognize that more than one person may be responsible for causing damages, and it is not a complete defense that another person may have contributed to the damages. CJI-Civ. 9:19; *see also* C.R.S. § 13-21-111.5 (allocation of fault in tort cases).

The Energy Companies also rely on the U.S. District Court's decision in *Kivalina*. This reliance is misplaced, as the decision was not affirmed on those grounds, *Kivalina II*, 696 F.3d 849, and its analysis on this issue is contrary to U.S. Supreme Court precedent. *American Electrical Power*, 582 F.3d at 347 (defendants' argument that "many others contribute to global warming in a variety of ways . . . does not defeat the causation requirement"); *see also Amigos Bravos v. United States BLM*, 816 F.Supp.2d 1118, 1135 (D. N.M. 2011) (plaintiffs need

not trace their injuries directly to defendants' emissions, but rather must show a "meaningful contribution").

Further, according to the Restatement of Torts, where defendants "contribute[] to a nuisance to a relatively slight extent" such "that [their] contribution taken by itself would not be an unreasonable one," they may be liable if "the contributions of all is a substantial interference, which becomes an unreasonable one." Restatement (Second) of Torts § 840E cmt. b. In the context of opioid litigation, where a manufacturer was responsible for "less than one percent" of the market, a U.S. District Court concluded it is "for the jury to decide" whether the defendants were liable, denying summary judgment. *In re National Prescription Opiate Litigation*, 2019 WL 4178617, at *4 (N.D. Ohio Sept. 4, 2019). Similarly, it is unnecessary for the Local Governments to prove that the Energy Companies' particular GHG emissions caused the specific injuries alleged here. Rather, in a multiple contributor tort case, there is no need to tie specific injuries to the actions of defendants. *See Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997) (causation shown where defendant "was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or defendant inhaled or ingested"). Further, the Local Governments have adequately alleged causation-in-fact relating to the Energy Companies alleged promotional acts. AC, ¶¶ 323-24, 407-43; *see also ConAgra*, 227 Cal. Rptr. 3d at 548 ("promotions were a substantial factor in leading to the [unchecked] use of [fossil fuel].")

The Local Governments have thus plausibly pled causation-in-fact.

The Amended Complaint has also plausibly pled legal, or proximate causation. The touchstone of proximate causation is foreseeability. *Boulders at Escalante*, 412 P.3d

at 762. The Local Governments have alleged the Energy Companies knew for decades that their fossil fuels, when used as intended as promoted, were substantially certain to significantly contribute to climate change. AC, ¶¶ 363-69. Further, the Amended Complaint includes allegations that the Energy Companies knew decades ago that time lags would mask "much more significant effects in the future." *Id.* at ¶¶ 347, 360-61. In short, they allege that the Energy Companies foresaw the climate crisis and yet promoted their product and misrepresented the dangers. These allegations are sufficient to plausibly plead proximate causation.

d. Claims for Public and Private Nuisance

A public nuisance is "the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public." *State, Department of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994). Under Colorado common law, land uses that cause pollution constitute a nuisance. *Id.* (citation omitted).

A private nuisance is a "substantial invasion of a plaintiff's interest in the use and enjoyment" of property. *Public Service Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). To prove a private nuisance claim, a plaintiff must establish that (1) the defendant's conduct unreasonably interfered with the use and enjoyment of the plaintiff's property, (2) the interference was so substantial that it would have been offensive or caused inconvenience or annoyance to a reasonable person in the community, and (3) the interference was either negligent or intentional. *Id.*

To prevail on either the public or private nuisance claims, the Local Governments will be required to prove that the Energy Companies' conduct was unreasonable.

Saint John's Church in Wilderness v. Scott, 194 P.3d 475, 479 (Colo. App. 2008); Restatement (Second) of Torts §§ 826-32. To do so, they must show that the gravity of the harm outweighs the utility of the actor's conduct, or that the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible. Restatement (Second) of Torts § 826.

The Energy Companies advance three arguments in support of dismissal of the nuisance claims. First, they contend that any allegation that the Energy Companies' conduct was unreasonable is facially implausible. The Energy Companies note the obvious benefits of fossil fuels and the industrial and economic progress spurred by fossil fuels.

In Response, the Local Governments argue they are not required to show that that costs of fossil fuel consumption outweigh its benefits. Rather, they must show that it is unreasonable for the Energy Companies to knowingly cause harm to the local communities without compensation. Restatement (Second) of Torts §§ 821B cmt. i, 826, 829A. The Local Governments have alleged that the Energy Companies' actions have caused serious harm to public health and property, while they have earned hundreds of billions of dollars in profits by contributing to the harm. AC, ¶¶ 15, 69, 84. Additionally, they have alleged that the Energy Companies benefited from concealing the dangers of fossil fuel consumption from the public. *Id.* at ¶¶ 5, 323, 407-08, 412-16, 443. There are no plausible social benefits associated with this particular conduct. Restatement (Second) of Torts § 829(b), cmt. d; *People v. ConAgra Grocery Products Co.*, 17 Cal.App.5th 31, 84 (Cal. App. 2017) (nuisance liability applies for promotion of "lead paint for interior use with knowledge of the hazard

that such use would create"). Like causation, reasonableness is typically an issue of fact to be left to the determination of the trier of fact. *Van Wyk*, 27 P.3d at 391; Restatement (Second) of Torts § 826, cmt. b.

The Court concludes that when the factual allegations of the Amended Complaint are accepted as true, in the light most favorable to the Local Governments, the Amended Complaint has plausibly alleged causes of action for both private and public nuisance. Under the nuisance principles set forth in the Restatement, if interference with property is found, the fact finder must determine whether it is reasonable for the Energy Companies to cause harm in the local communities without compensating the communities for the harms caused. Restatement (Second) of Torts §§ 821B cmt. i, 826, 829A. In determining the utility of conduct that causes the intentional invasion, the fact finder may consider the impracticability of preventing or avoiding the invasion. *Id.* at § 828. Additionally, in a public nuisance action for damages, although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. *Id.* at § 821B cmt. i. Based on the extensive factual allegations noted above, the Amended Complaint plausibly states claims for both private and public nuisance.

Second, the Energy Companies argue that a defendant's conduct cannot constitute a public nuisance when it has been sanctioned by statute. Restatement (Second) of Torts § 821B cmt. f. They cite several Colorado statutes which authorize or encourage fossil fuel development and use. Motion to Dismiss, p. 26 (December 19, 2019).

The Local Governments respond that the "authorized by statute" defense does not apply in this context, however. They posit that Colorado courts have limited this rule to enjoining public nuisances permitted by zoning

regulations. *Green v. Castle Concrete Co.*, 509 P.2d 588, 590 (Colo. 1973). Nor does the defense limit damages claims. *Hobbs v. Smith*, 493 P.2d 1352, 1354 (Colo. 1972). Moreover, even if it did apply, the conduct at issue in this litigation was not all authorized by Colorado statute. Restatement (Second) of Torts § 821B, cmt. f. *See* C.R.S. §§ 8-20-204, 232.5, 233 (statutes prohibiting and regulating certain practices in motor fuels sales).

In the Reply, filed March 5, 2020, the Energy Companies rely on case law from the late 19th century and early 20th century to show that the authorized by statute defense applies outside the zoning injunction context. *See, e.g., Ft. Lyon Canal Co. v. Bennett*, 156 P. 604, 609 (Colo. 1916); *Platte & Denver Ditch Co. v. Anderson*, 6 P. 515, 520-21 (Colo. 1885).

The Court concludes that, assuming without deciding that the "authorized by statute" defense applies to nuisance actions for damages outside the zoning context, the defense does not defeat the nuisance claims under Rule 12(b)(5) standards. In particular, there is no showing that the statutes cited by the Energy Companies authorize sales that jeopardize the climate or sanction deceptive marketing practices.

Relatedly, in supplemental briefing, the Energy Companies argue that no Colorado court has yet recognized a public nuisance claim based on the production, promotion, or sale of a lawful consumer product. They note that in *State v. Juul Labs, Inc.*, 2020 WL 8257333, at *3 (Colo. Dist. Ct. Dec. 14, 2020), a state Colorado District Court rejected a public nuisance claim against an e- cigarette manufacturer. In *Juul Labs*, the plaintiffs alleged that the manufacturer engaged in an intentional campaign of misleading advertisements that resulted in nicotine addiction. The Court determined that the sale and marketing of e-

cigarettes was not a public nuisance because it did not interfere with a public right. *Id.* at *3, 5. The Court then distinguished public nuisance claims from product liability claims. *Id.*

Juul Labs, which is not binding appellate authority, did not hold that Colorado law categorically forecloses nuisance liability for promoting or selling lawful products. The Denver District Court expressed concern about conflating public nuisance and products liability law. The Colorado Supreme Court has held that a nuisance may include "indirect or physical conditions created by defendants that cause harm." *Hoery*, 64 P.3d at 218. No Colorado appellate decision establishes an exception for public nuisances involving lawful products. Additionally, the Amended Complaint alleges that the Energy Companies did more than sell lawful products—it alleges that they sold fossil fuels at levels they knew would cause significant harm and misrepresented the dangers to boost sales. Lastly, unlike *Juul Labs* and other case law relied on by the Energy Companies, this action involves rights common to the public.

Additionally, the Energy Companies assert that the Local Governments' leading case on this issue, *State ex rel. Hunter v. Purdue Pharma L.P.*, 2019 WL 4019929 (Okla. Dist. Ct. August 26, 2019) was reversed by the Oklahoma Supreme Court. *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021). In *Hunter*, the Oklahoma Supreme Court held that a plaintiff did not state a viable public nuisance claim based on the manufacturing, marketing, and selling of a lawful product. *Id.* at 723-31.

Hunter interprets Oklahoma nuisance law and is not binding on this Court. Further, like other authorities, *Hunter* expressed concern that permitting the nuisance

claim in the products liability context would allow plaintiffs to convert products liability actions into public nuisance claims. 499 P.3d at 729-30. That concern is not present here. Moreover, there does not appear to be unanimity among cases from other jurisdictions on this issue, as other out-of-state authorities have permitted public nuisance claims pertaining to the production, promotion, and sale of lawful products. *See, e.g., MTBE Litigation*, 725 F.3d 65, 121 (2d Cir. 2013); *In re National Prescription Opiate Litigation*, 2021 WL 4952468, at *5-7 (N.D. Ohio Oct. 25, 2021); *State v. Purdue Pharma, LP*, 2018 WL 4566129, at *13-14 (D. N.H., Sept. 18, 2018).

Third, the Energy Companies cite case law from other jurisdictions in which courts have required the defendant to have "control over the instrumentality causing the alleged nuisance at the time the damage occurs." *State v. Lead Industrial Association, Inc.*, 951 A.2d 428, 449 (R.I. 2008); *Tioga Public School District No. 115 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993); *In re Paraquat Products Liability Litigation*, 2022 WL 451898, at *11 (S.D. Ill., Feb. 14, 2022). The Amended Complaint alleges that fossil fuel combustion is responsible for the majority of emissions that have caused GHG concentrations to reach hazardous levels, thus implicitly acknowledging it is use of fossil fuels by third parties that has caused the alleged damage. AC, ¶¶ 128, 445.

Colorado has yet to impose a "control over the instrumentality" element in nuisance cases. Moreover, such an element appears inconsistent with Colorado law and the Restatement. *See Hoery*, 64 P.3d at 218 ("a nuisance can include indirect or physical conditions created by defendant that cause harm"); Restatement of Torts (Second) § 834 ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but

also when he participates to a substantial extent in carrying it on"); *see also MTBE*, 725 F.3d at 121-22, n.43 (liability for selling MTBE-laden gasoline even when it was spilled by independent third parties). In the absence of Colorado law imposing "control over the instrumentality" as an indispensable element of a public nuisance claim, the Energy Companies' motion to dismiss on this basis is denied.

The motion to dismiss the nuisance claims under C.R.C.P. 12(b)(5) is therefore denied.

e. Trespass Claim

In general, civil trespass is an uninvited physical intrusion upon real property. *Hoery*, 64 P.3d at 217. To be liable for trespass, a defendant must have intended to do the act that constitutes, or inevitably causes, the intrusion. *Antlovich v. Brown Group Retail, Inc.*, 183 P.3d 582, 603 (Colo. App. 2007). The act must be done with knowledge that it would to a substantial certainty result in the entry of the foreign matter, *Hoery*, 64 P.3d at 218, or in the usual course of events, would damage property of another. *Burt v. Beautiful Savior Lutheran Church*, 809 P.2d 1064, 1067 (Colo. App. 1990). A defendant is liable if the defendant sets "in motion a force which, in the usual course of events, will damage" the plaintiff's property. *Hoery*, 64 P.3d at 217.

The Energy Companies first contend that the Local Governments cannot plausibly allege that the Energy Companies intended to cause "flood waters, fire, hail, rain, snow, wind and invasive species" to enter Boulder County. AC, ¶ 474. Second, they assert that the Local Governments cannot allege that any intrusion was nonconsensual. Motion to Dismiss, p. 28, (December 19, 2019) (citing *Jones v. Lehmkuhl*, 2013 WL 6728951, at *23 (D. Colo.

2013); *Wal-Mart Stores, Inc. v. UFCW Int'l Union*, 382 P.3d 1249, 1258 (Colo. App. 2016)). Despite a factual allegation that the Local Governments "did not give Defendants permission" for the alleged invasions, AC, ¶ 477, the Energy Companies characterize the Amended Complaint as acknowledging the Local Governments are also responsible for fossil fuel emissions (*Id.*, ¶¶ 10, 202, 208, 215), thus impliedly consenting to the conduct at issue here. Third, because an action for trespass is not viable if the entry is authorized by legislative enactment (Restatement of Torts (Second) § 211), based on the "authorized by statute" theory discussed above for nuisance claims, they argue the trespass claim should similarly be dismissed.

The Court concludes that the Amended Complaint plausibly states a claim for trespass. Contrary to the Energy Companies' suggestion, the Local Governments do not need to allege that Defendants intended to cause the particular hazards identified in the Amended Complaint. Rather, to succeed on the trespass claim, the Local Governments must show that the Energy Companies intended to perform the acts that caused the harmful intrusion, and that they knew the intrusion would likely result. *Hoery*, 64 P.3d at 217; *Burt*, 809 P.2d at 1067. The Amended Complaint alleges that the Energy Companies produced, promoted, and sold fossil fuels, and that they knew that unchecked fossil fuel use would cause harm wrought by climate change. These allegations adequately state a claim for trespass.

The Energy Companies' implied consent argument is unavailing. Under Colorado law, "consent" is an agreement, approval, or permission as to some act or purpose." *Corder v. Folds*, 292 P.3d 1177, 1180 (Colo. App. 2012). "Permission" is in turn defined as "conduct that justified the other in believing that the possessor of property is

willing to have them enter." *Id.* (quoting Black's Law Dictionary). The Amended Complaint does not allege or concede that the Local Governments, by using fossil fuels themselves, agreed, approved, or granted permission to the Energy Companies to put in motion a force that would cause harm in the Local Governments' communities.

Likewise, the "authorized by statute" argument fails for the reasons set forth in section (5)(d) above.

In a footnote in the supplemental briefing, the Energy Companies cite *4455 Jason St., LLC v. McKesson Corp.*, 2021 WL 130655, at *3 (D. Colo. Jan. 14, 2021) for declining to expand trespass law. *McKesson* is distinguishable. In *McKesson*, plaintiff property owners sued a former owner who polluted the same property.

The motion to dismiss the trespass claim under C.R.C.P. 12(b)(5) is therefore denied.

f. Colorado Consumer Protection Act Claim

The Local Governments allege that the Energy Companies engaged in deceptive practices in violation of the Colorado Consumer Protection Act ("CCPA") by falsely representing, or omitting, material information regarding climate change. In support of their Motion to Dismiss, the Energy Companies contend that as a threshold matter, because the CCPA claim sounds in fraud, the Amended Complaint must allege with particularity the statements that were false or misleading, the particulars as to why they contend the statements were fraudulent, when and where the statements were made, and identify those responsible. *Faulhaber v. Petzl America, Inc.*, 656 F. Supp. 3d 1257, 1266-67 (D. Colo. Feb. 14, 2023) (under F.R.C.P. 9(b), a CCPA claimant must specify with particularity the "time, place and contents" of allegedly false representa-

tions, the identity of the party making the false representation, and the consequences thereof); *State Farm Mutual Automobile Insurance Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994) (a complaint alleging fraud must specify the statements that the plaintiff claims were false or misleading, provide particulars regarding the respect in which the statements were fraudulent, allege when and where the statements were made, and identify who made such statements); C.R.C.P. 9(b).[13] They further assert that the alleged misrepresentations each lack at least one of the required elements. AC, ¶¶ 407-35.

On this front, the Local Governments respond that they have pled the CCPA claims with sufficient particularity. First, Colorado state courts have not yet determined whether the heightened pleading requirements in C.R.C.P. 9(b) apply to claims under the CCPA. *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 13 (Colo. App. 2009). Second, they have pled that the Energy Companies knew fossil fuel use alters the climate and concealed and misrepresented those dangers, which allegations constitute the main facts of fraud. AC, ¶¶ 408, 410, 415; *Heller v. Lexton-Ancira Real Estate Fund, Ltd.*, 809 P.2d 1016, 1022 (Colo. App. 1990).

The Court concludes that the heightened pleading requirements of C.R.C.P. 9(b) apply to the CCPA claim. Although the Court is unaware of any Colorado appellate authority determining that C.R.C.P. 9(b)'s requirements apply to CCPA claims, in *Faulhaber*, the U.S. District Court of Colorado concluded that the federal counterpart, F.R.C.P. 9(b), which is substantively identical to C.R.C.P.

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[13] C.R.C.P. 9(b) provides "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

9(b), applies to CCPA claims. Moreover, the CCPA claim advanced in this case sounds in fraud, as there are factual allegations that the Energy Companies engaged in deceptive marketing practices.

The Amended Complaint identifies several specific public statements made by ExxonMobil. AC, ¶¶ 409, 419, 421. However, these allegations do not contain all of the required elements required by Rule 9(b) and Colorado law pertaining to fraud claims. By way of example, ¶ 409 alleges that Exxon's CEO made a particular statement "in 1996." Additionally, ¶ 419 alleges that Mobil ran a particular advertisement "in 1997." And the Exxon advertisements referenced in ¶ 421 were issued in 2000, 2001, and 2004.

Although a plaintiff need not plead all of the evidence it might present to prove the claim, "the complaint must at least state the main facts or incidents which constitute the fraud so that the defendant is provided with sufficient information to frame a responsive pleading and defend against the claim." *Schaden v. DIA Brewing Co., LLC*, 478 P.3d 1264, 1275, *as modified on denial of rehearing* (Feb. 1, 2021) (citing *Parrish*, 899 P.2d at 289) (holding that the amended complaint contained very detailed factual allegations meeting Rule 9(b)'s requirements). For instance, the CCPA allegations, including those referenced above, do not specify the date on which the representations were made, the audience they were directed to, or where they were published. It is unclear which representations, if any, were directed to Colorado.

Likewise, the factual allegations pertaining to omissions do not disclose "the particular information that should have been disclosed, the reason the information should have been disclosed, the person who should have disclosed it, and the approximate time or circumstances in

which the information should have been disclosed." *Faulhaber,* 656 F.Supp.3d at 1268. The factual content of the CCPA allegations does not meet the requisite pleading particularity threshold. Further, given the Energy Companies' statute of limitations defense, it is critical that the factual allegations are sufficiently detailed to permit the court to make a more definitive determination of whether the claims are time-barred.

The Energy Companies maintain that the Amended Complaint fails to allege a plausible CCPA claim for several other reasons. As the CCPA allegations do not meet Rule 9(b)'s heightened pleading standards, it is unnecessary to address these additional arguments.

Because *Faulhaber* was announced after the Amended Complaint was filed, the dismissal of the CCPA claim is without prejudice. *See Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo. App. 1985) (where there is a possibility that the complaint can be amended to set forth a claim upon which relief may be granted, permission to amend should be freely granted). Any motion to further amend the Complaint shall be filed by August 8, 2024, unless otherwise extended by court order.

g. Civil Conspiracy

A civil conspiracy requires (1) two or more persons, (2) a goal, (3) a meeting of the minds, and (4) an unlawful overt act, and (5) resulting damages. *Nelson v. Elway*, 908 P.2d 102, 1006 (Colo. 1995). Additionally, civil conspiracy may lie where "only lawful acts were performed if the purpose or goal is unlawful." *Magin v. DVCO Fuel Systems, Inc.*, 981 P.2d 673, 675 (Colo. App. 1995).

The Energy Companies contend the civil conspiracy claim fails for three reasons: (1) the acts alleged to constitute the underlying wrong provide no cause of action, (2)

Colorado courts require greater detail in pleading conspiracy claims, and (3) the Amended Complaint fails to allege an "unlawful act or unlawful means."

These arguments are unavailing. First, the Amended Complaint alleges a conspiracy between the Energy Companies and others, including API, to promote and sustain unchecked fossil fuel sales at levels they knew were sufficient to alter the climate, and failed to disclose material information concerning the activities to maintain and increase their profits. AC, ¶¶ 504-07, 515-17. As set forth above, the "underlying wrongs" required for civil conspiracy are alleged through the other claims for relief, which provide causes of action. *Double Oak Construction, LLC v. Cornerstone Development, Int'l, LLC*, 97 P.3d 140, 146 (Colo. App. 2003) (the acts alleged to constitute the underlying wrong must provide a cause of action). Second, the conspiracy claim is not limited to fraud allegations, and C.R.C.P. 9(b)'s heightened pleading standard therefore does not apply. Moreover, the Amended Complaint includes factual allegations that the Energy Companies produced, promoted, and sold fossil fuels together (AC, ¶¶ 49, 51, 74-75, 91, 326); were part of associations for decades where information about fossil fuel use was shared (*Id.*, ¶¶ 71, 80, 335-42, 349); and created a specific plan to sow doubt in the public's mind (*Id.*, ¶¶ 4-8, 93, 412-14). Third, the Local Governments have alleged unlawful overt acts, in the form of alleging the Energy Companies made deliberately misleading statements to the public and consumers. (*Id.*, ¶¶ 506, 516).

The motion to dismiss the conspiracy claim is therefore denied.

h. Unjust Enrichment

The Motion to Dismiss did not include a separate section challenging the unjust enrichment claim. The Response notes that the Energy Companies made "no specific challenge to unjust enrichment." Response, p. 30 (February 6, 2020). In Reply, the Energy Companies cite to footnote 9 in the Motion to Dismiss, in which they contend the unjust enrichment claim fails for the same reason as the other claims, and because the Local Governments do not allege that purchasers of the products did not receive "a valuable product for which they bargained and which they intend to keep." (citing *Van Zanen v. Qwest Wireless, LLC*, 550 F.Supp.2d 1261, 1266-67 (D. Colo. 2007), *aff'd*, 522 F.3d 1127 (10th Cir. 2008)). Reply, p. 15 (March 5, 2020).

The Court declines to grant a motion to dismiss limited to a portion of a footnote in the Motion to Dismiss. Because the challenge was not made apparent until the Reply, the motion to dismiss the unjust enrichment claim is denied.

VI. CONCLUSION

For the foregoing reasons, the Court **DENIES** ExxonMobil's Motion to Dismiss for Lack of Jurisdiction, and **GRANTS** Suncor Canada's Motion to Dismiss for Lack of Jurisdiction. The Court **DENIES** the Energy Companies' Motion to Dismiss for Failure to State a Claim under C.R.C.P. 12(b)(5), with one exception—the motion to dismiss the CCPA claim is **GRANTED**. The CCPA claim is dismissed without prejudice, and the Local Governments are granted leave to amend the Complaint to more particularly plead this claim.

The public nuisance, private nuisance, trespass, conspiracy, and unjust enrichment claims may proceed against ExxonMobil, Suncor Energy and Suncor Sales.

SO ORDERED this 21st day of June, 2024.

BY THE COURT:

/s/ Robert R. Gunning
Robert R. Gunning
District Court Judge

APPENDIX C

THE SUPREME COURT
OF THE STATE OF COLORADO

No. 2024SA206

IN RE:

PLAINTIFFS: COUNTY OF COMMISSIONERS OF BOULDER COUNTY AND CITY OF BOULDER

v.

DEFENDANTS: SUNCOR ENERGY USA, INC.; SUNCOR ENERGY SALES, INC.; SUNCOR ENERGY INC.; AND EXXON MOBIL CORPORATION

Filed: May 27, 2025

ORDER OF COURT

Upon consideration of the motion to stay appellate mandate filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said motion is **GRANTED UP TO AND INCLUDING AUGUST 25, 2025** pursuant to C.A.R. 41(c)(3)(B).

IT IS FURTHER ORDERED that petitioner ExxonMobil Corporation must notify this court upon the filing

of a petition for writ of certiorari or file a status update in writing on or before **AUGUST 25, 2025**.

BY THE COURT, MAY 27, 2025.