ADVANCE SHEET HEADNOTE
May 12, 2025

2025 CO 21

No. 24SA206, ***County Commissioners of Boulder County and City of Boulder v. Suncor Energy USA, Inc.; Suncor Energy Sales, Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation*** **—Federal Preemption—Clean Air Act.**

In this original proceeding under C.A.R. 21, the supreme court considers whether the district court erred in concluding that the state law tort claims brought by respondents against petitioners are not preempted under federal law and may therefore proceed.

The court now concludes that respondents' claims are not preempted by federal law and, therefore, the district court did not err in declining to dismiss them. Accordingly, the court discharges its order to show cause and remands this case to the district court for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 21

Supreme Court Case No. 24SA206
Original Proceeding Pursuant to C.A.R. 21
Boulder County District Court Case No. 18CV30349
Honorable Robert R. Gunning, Judge

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.

Order Discharged
en banc
May 12, 2025

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE SAMOUR, joined by **JUSTICE BOATRIGHT**, dissented.

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**, dissented.

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

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

change. According to Boulder, by producing, promoting, refining, marketing, and selling fossil 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 traditionally 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 pre-empted 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.

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.

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

¶ 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.

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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.

¶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.

¶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 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.*

[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).

¶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 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).

[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.

¶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

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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)).

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. 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.