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THE POLLUTER-PAYS PRINCIPLE AND ITS ENEMIES: CORPORATE FRAUD, WEAPONIZING PREEMPTION, AND THE SURVIVAL OF CLIMATE ACCOUNTABILITY

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I. Introduction

On the morning of December 30, 2021, the Marshall Fire ignited in Boulder County, Colorado. Driven by hurricane-force winds and fueled by vegetation desiccated by years of drought, it burned more than six thousand acres and destroyed over one thousand homes in a matter of hours—the most destructive wildfire in Colorado history.[1] Boulder County's lawsuit against Suncor Energy and ExxonMobil Corporation, filed in state court in 2018, seeks to recover those costs from the companies whose products allegedly caused them. The suit rests not merely on the claim that fossil fuel combustion drives climate change, but on the more specific and more serious allegation that the defendant companies spent decades concealing the relationship between their products and climate harm while actively marketing those products to a public kept deliberately uninformed of the consequences.[2] The complaint alleges a sustained campaign of deception designed to allow the companies to continue profiting from fossil fuel sales while the climatic consequences they had long anticipated mounted.

Boulder County is not alone. Dozens of state and local governments—from Honolulu to Annapolis, from the shores of Rhode Island to the barrier islands of Louisiana—have filed similar suits in state courts across the country.[3] Together, these cases constitute the most significant wave of climate

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[1] The Marshall Fire of December 30, 2021, burned over 6,000 acres and destroyed more than 1,000 homes. Boulder County's complaint identifies intensified wildfire risk among the climate-related harms for which it seeks compensation.

[2] First Amended Complaint, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 2018CV030349 (Dist. Ct. Boulder Cnty. Colo.).

[3] *See* Manufacturers' Accountability Project, Municipal and State Driven Climate Change Litigation Against Manufacturers, https://mfgaccountabilityproject.org/wp-content/uploads/2026/05/MAP_Case_Tracker-5-May-2026.pdf.

accountability litigation in American history. They represent an attempt by subnational governments to deploy the centuries-old mechanisms of state tort law to ensure that corporations that caused harm pay for it, rather than shifting the costs entirely to taxpayers who had no part in the decisions that created them.

Such attempts to allocate to fossil fuel producers the costs subnational governments have incurred in responding to climate change is supported by the polluter-pays principle, aptly described as "a fundamental aspect of the public policy embodied in environmental law."[4] An accepted norm of international environmental law,[5] the polluter pays principle is "designed to achieve the 'internalization of environmental costs,' by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large."[6]

That form of cost internalization is precisely what the local governments in cases like *Suncor* are seeking.[7] The case for allocating the local governments' adaptation costs to oil companies is significantly strengthened in the event of corporate fraud through intentional suppression of data about the impacts on the global climate caused by their products. If proven, that concealment would have deprived the public, policymakers, and communities of the information necessary to respond to climate change in a timely and adequate way that would have reduced the costs of doing so.[8]

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[4].*See Louisiana Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.,*, 846 So. 2d 734, 739-40 (La. 2003).

The nature and scope of the damage caused by climate change linked to the production and use of fossil fuels lends added weight to application of the polluter pays principle. *See* Lingxi Chenyang, *A Lockean Theory of Coastal Climate Adaptation*, 30 OCEAN & COASTAL L.J. 139, 165 (2015) ("The irreversibility of climate destruction *demands* moral and legal accountability for those responsible").

[5] *Bd. of Water Works Trs. of City of Des Moines v. SAC Cnty. Bd. of Supervisors*, 890 N.W.2d 50, 91 (Iowa 2017).

[6] *Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d 752, 805 (Haw. 2018) (Wilson, J., dissenting) (quoting *Fishermen & Friends of the Sea v. the Minister of Planning, Hous. & Env't* [2017] UKPC 37 ¶ 2)).

[7] *See* Brandy Doyle, *Boulder v. Suncor and the Case for Judicial Climate Adaptation*, 48 ECOLOGY L.Q. 719 (2021) (describing *Suncor* "[a]s part of a larger legal mobilization for climate accountability").

[8] *See Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, 586 P.3d 161, 166 (Colo. 2025), *cert. granted*, 146 S. Ct. 1605 (2026) ("Boulder alleges that defendants and other, unnamed co-conspirators acted in concert to maintain or increase fossil fuel usage at levels

The suits by local governments against the oil companies have met a coordinated response. Fossil fuel companies and their supporters have mounted a sustained effort to move the cases out of state court and into federal court—where they hoped to obtain dismissal on the ground that federal law forecloses the claims—and to persuade the Supreme Court that state courts are categorically barred from entertaining them. The Trump administration's Solicitor General filed a brief in *Suncor* supporting dismissal of Boulder County's suit.[9] Members of Congress have introduced legislation that would require immediate dismissal of any climate accountability suit brought by a state or local government.[10] And prominent conservative legal scholars have published commentary urging the Court to extinguish these cases on constitutional grounds.[11] The Court's decision to grant certiorari in *Suncor Energy, Inc. v. Board of County Commissioners of Boulder County* confirms that the legal questions these cases raise are significant and require definitive resolution.[12] The Court will address, at a minimum, whether the Clean Air Act preempts state common law damage claims for climate-related harm, and possibly whether the Constitution's allocation of foreign affairs authority independently requires their dismissal.

This Article argues that both grounds for dismissal fail. The case for preemption under the Clean Air Act is weak at every level of analysis. There is no express preemption—the Act contains no language broadly foreclosing state tort suits, and its savings clauses affirmatively preserve state common law rights. There is no field preemption—federal law has never been understood to occupy the entire domain of climate-related liability, and the Act itself was built on the assumption that state tort law would continue to play a compensatory role alongside federal regulation. The functions of regulatory and tort law are fundamentally complementary, not duplicative: federal regulation creates *ex ante* incentives to avoid harm, while tort liability primarily focuses on *ex post* accountability when harm occurs despite those incentives. There is also no conflict preemption—suits seeking compensation for past harms do not conflict with the regulatory objectives of a statute designed to reduce future emissions. Moreover, as we argue in Part , to the

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they knew were sufficient to alter the climate, while misrepresenting and failing to disclose material information concerning these activities.").

9 Brief for the United States as Amicus Curiae, *Suncor Energy, Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 25-170 (U.S. Sept. 2025).

10 H.R. 8330, 119th Cong. (2025); S. 4340, 119th Cong. (2025).

11 See, e.g., John Yoo & Michael Toth, Opinion, *How Climate Lawsuits Threaten National Security*, WASH. POST, Apr. 7, 2026.

12 *Suncor Energy, Inc. v. Comm'rs Boulder Cnty.*, 224 L. Ed. 2d 3 (2026).

extent that there may be any overlap between federal regulation and state common law damages, there are benefits to having such overlap (including the redundancy benefits of overlapping regulation, particularly given the well documented cost internalization limits of each regulatory regime).[13]

The constitutional foreign affairs preemption argument fares no better. The cases most commonly invoked in its support—*American Insurance Ass'n v. Garamendi* and *Zivotofsky v. Kerry*—address entirely different questions: whether a state statute that directly regulates international commercial relations, or a congressional enactment that overrides the President's recognition policy, may coexist with federal foreign policy. Neither holds that a state court suit seeking money damages for harm occurring within the state's territory impermissibly intrudes on federal foreign affairs prerogatives. The argument has no limiting principle, and the courts that have considered it in the climate context have rejected it. Most importantly, the core of these cases—the allegation that fossil fuel companies engaged in deliberate fraud, concealing the known dangers of their products from the public and from policymakers—targets conduct that federal law has never regulated and certainly has never preempted from state law scrutiny.

We develop these points and add several that the parties' briefs do not reach: that damages and locally confined relief lack the extraterritorial reach that alone justifies centralizing authority over emissions; that the 2026 rescission of the greenhouse gas endangerment finding removes the regulatory predicate on which the "speaks directly" rationale, and hence the preemption argument, depends; and that, after *Loper Bright*, courts owe no deference to any agency theory that federal inaction preempts state law. This Article proceeds in six parts. Part II traces the history of climate liability litigation. Part III examines the Clean Air Act preemption argument. Part IV addresses the foreign affairs preemption argument. Part V addresses the fraud and deception claims as a

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[13] *See, e.g.*, SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, IN RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 5- 6 (2003) (describing "the impotence of tort law" in the 1960s at effectively internalizing the costs of environmental injuries); Daniel C. Esty, *Next Generation Environmental Law: A Response to Richard Stewart*, 29 CAP. U. L. REV. 183, 191 (2001) (referring to critiques concerning "the regressiveness of many cost-internalizing policies"); *id.* at 197 (explaining developments needed "to move toward a regulatory regime that imposes more complete cost internalization on industry"). *Cf.* Zygmunt J. B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 215 (1974) (referring to the perplexing "practical problems of cost internalization," using restrictions on floodplain development as an example).

distinct and independently sufficient basis for liability. Part VI examines the broader constitutional, governance, and cost-allocation dimensions. Part VII concludes. Polluters must pay—not only as a matter of fundamental fairness, but to maintain a robust and effective economy in which the costs of harmful conduct are borne by those who cause it.

II. Climate Liability Litigation: From Federal Common Law to State Courts

The first wave of climate liability litigation arose under federal common law. Beginning in the early 2000s, states, municipalities, and non-governmental plaintiffs brought suit in federal district courts against major greenhouse gas emitters, seeking injunctive relief. They relied on the theory that those emissions constituted a public nuisance under federal common law, drawing on the Supreme Court's recognition in *Illinois v. City of Milwaukee* that federal courts may develop federal common law to resolve disputes affecting interstate waters and other matters of federal concern.[14]

The prospect of federal courts shaping national climate policy through common law adjudication raised profound questions about institutional competence and constitutional structure, and the Supreme Court foreclosed this. In *American Electric Power Co. v. Connecticut* (*AEP*), the Court held that the Clean Air Act and EPA action thereunder had "displaced" the plaintiffs' federal common law nuisance claims.[15] The displacement doctrine provides that when Congress addresses a subject through federal statute, the need for judge-made federal common law on that subject disappears.[16] Because the Clean Air Act "speaks directly" to greenhouse gas emissions from power plants—building on *Massachusetts v. EPA*'s holding that greenhouse gases are "air pollutants" under the Act[17]—the federal common law remedy could no longer be pursued.

The *AEP* decision had a significant, if complex, effect on climate litigation. It confirmed that the federal statutory and regulatory regime addresses greenhouse gas emissions—a holding since invoked, illogically, to argue that

[14]*Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).
[15]*Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) [hereinafter *AEP*].
[16]See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (explaining why the Clean Water Act displaced federal common law nuisance claims for water pollution).
[17]*Massachusetts v. EPA*, 549 U.S. 497 (2007).

the Act also preempts state common law claims.[18] But the *AEP* opinion contained a careful and underappreciated qualification: the displacement of federal common law did not resolve whether state common law claims were preempted. The Court acknowledged that whether such claims are preempted "depends, *inter alia*, on the preemptive effect of the federal Act"—and expressly left that question open.[19] That question is now squarely presented in *Suncor*.

In the wake of *AEP*, the Ninth Circuit confirmed in *Native Village of Kivalina v. ExxonMobil Corp.* that federal common law climate claims had been displaced, but framed its holding solely in terms of displacement, explaining that it did not address the availability of state law remedies.[20] The displacement of federal common law, combined with the courts' refusal to reach the state law question, drove plaintiffs to state court.[21] The strategic logic was clear: state common law—tort law in particular—has long provided a source of liability independent of federal regulatory standards, and with the federal common law avenue closed, the state common law avenue remained open unless and until a court unambiguously held it preempted.

Beginning around 2017 and 2018, a cascade of state and local governments around the country, including Boulder County and the City of Boulder, filed suit in state courts, carefully pleading only state law claims to avoid

[18] *See* Brief for the Petitioners, Suncor Energy (U.S.A.), Inc. v. Cnty. Comm'rs of Boulder Cnty., No. 25-170, 2026 WL 1420093, at *22 (U.S. May 14, 2026).

[19] *AEP*, 564 U.S. at 429 (not addressing whether the Clean Air Act pre-empts state nuisance law).

[20] *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The doctrine of displacement is an issue of separation of powers—distinct from the federalism question of whether state common law survives.

[21] The Supreme Courts of Colorado and Hawaii ruled in favor of local government plaintiffs in these suits. *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, 586 P.3d 161 (Colo. 2025), *cert. granted*, 146 S. Ct. 1605 (2026); *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023), *cert. denied*, 145 S. Ct. 1111 (2025). One of the most recent decisions involved Minnesota suing fossil fuel companies and the American Petroleum Institute alleging climate deception. In 2025, the state trial court ruled that Minnesota's deception claims are not efforts to control emissions and therefore are not preempted by the Clean Air Act. *Minnesota v. Am. Petroleum Inst.*, No. 62-CV-20-3837, 2025 WL 562630 (Minn. Dist. Ct. Feb. 14, 2025). In 2026, the Minnesota Court of Appeals affirmed the denial of defendants' motions to dismiss. *State of Minnesota v. Am. Petroleum Inst.*, Nos. A25-0407, A25-0408, A25-0410 (Minn. Ct. App. Jan. 26, 2026). In April 2026, the Minnesota Supreme Court declined review, leaving in place the decision allowing the state's climate deception claims to proceed. *State of Minnesota v. Am. Petroleum Inst.*, Nos. A25-0407, A25-0408, A25-0410 (Minn. Apr. 15, 2026).

triggering *AEP*'s displacement holding: public and private nuisance, negligence, trespass, and—most significantly—consumer protection and fraud claims (some rooted in state statutory violations) premised on the companies' alleged deception campaigns. The filings triggered an extensive parallel battle over whether these cases belonged in state or federal court. Defendants sought removal to the federal courts on multiple grounds, and for years the litigation was consumed by these disputes. On remand, the circuit courts have trended toward returning the cases to state court, finding genuine state law claims not displaced by federal law.[22]

Understanding what these cases are actually about is essential to analyzing the preemption questions they raise. They are not, as sometimes characterized,[23] attempts by state courts to set national emissions policy; they do not seek injunctions requiring companies to reduce emissions or alter their operations. They seek money damages—compensation for harms already suffered and costs already incurred—even if such awards indirectly affect the losing defendants' future behavior in an effort to avoid further liability. A damage award is not tantamount to an injunction. The latter is public law regulates future private activity, while the former is retrospective, private law which compensates for past private conduct, even if it can have some effect on future conduct. In addition, regulatory law typically applies to all those engaged in the relevant conduct, while a tort action for damages demands payment only by the named defendants.[24]

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[22] The Court denied cert. in several cases in which the lower federal courts had refused to remove climate cases brought by state or local governments to federal court. *See, e.g.*, *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023).

[23] *See, e.g.*, Lindsay Whitehurst, Supreme Court agrees to hear from oil and gas companies trying to block climate change lawsuits, YALE CLIMATE CONNECTIONS (Feb. 26, 2026), https://yaleclimateconnections.org/2026/02/supreme-court-agrees-to-hear-from-oil-and-gas-companies-trying-to-block-climate-change-lawsuits/ (quoting attorneys for Suncor and ExxonMobil, who claimed "[t]he use of state law to address global climate change represents a serious threat to one of our Nation's most critical sectors.").

[24] *See also* Brief in Opposition, Suncor Energy (U.S.A.), Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 2022 WL 3284490, at *29-30 (U.S. Aug. 10, 2022) (arguing that the respondents in *Suncor* "seek only monetary relief, not any injunction or other remedy that would subject petitioners to conflicting directions regarding how to conduct their businesses. State courts routinely adjudicate cases where a company's deceptive marketing and sales of a dangerous product have caused harm within the State; that is not normally a reason for a uniform federal rule.").

The claims fall into two broad categories. The first encompasses claims premised on the causal contribution of the defendants' products to climate-driven harm: nuisance, negligence, and trespass. The second—and in many ways more legally significant—encompasses claims premised on the defendants' conduct independent of the emissions themselves: fraud, misrepresentation, consumer protection violations, and civil conspiracy, premised on the allegation that the companies knew for decades about the climate dangers of their products, concealed that knowledge, and mounted active deception campaigns to mislead the public and undermine policy responses. The Hawaii Supreme Court's decision in *City & County of Honolulu v. Sunoco LP* illustrates the significance of this distinction, characterizing the source of injury as the defendants' "alleged deceptive marketing and failure to warn about the dangers of using their products," with emissions serving as "a link in the causal chain" rather than the primary basis for liability.[25] This characterization has important implications: even if one concluded that the Clean Air Act somehow preempted liability premised on emissions, it would not follow that liability premised on fraud and deception was similarly foreclosed.[26]

III. The Clean Air Act Does Not Preempt State Common Law Climate Damage Claims

The Supremacy Clause makes federal law "the supreme Law of the Land."[27] The Supreme Court has identified three categories of federal preemption: express preemption (based on explicit statutory ousting of state law), field preemption (based on the complete occupation of a field of regulation due to the pervasiveness of a federal regulator scheme),[28] and conflict preemption (based on the "physical impossibility" of complying with both federal and state law or frustration of federal purposes."[29] In each of these categories, courts start in areas of traditional state regulation "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[30]

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[25] *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1196, 1207 (Hawai'i 2023), *cert. denied*, 145 S. Ct. 1111 (2025).
[26] *See infra* Part V.
[27] U.S. CONST. art. VI, cl. 2.
[28] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
[29] *Arizona v. United States*, 567 U.S. 387, 399-400 (2012).
[30] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). *But cf.* Catherine M. Sharkey, *The Perils of Pesticide Preemption*, 62 WAKE FOREST L. REV. ___ (forthcoming), manuscript version, at 10 (arguing that by the time the Supreme Court decided *Monsanto Co. v. Durnell*, 609 U.S.

Tort law—including the common law of nuisance, negligence, trespass, and fraud—is among the most traditional of state law domains, and the presumption against preemption applies with full force here.

The Supreme Court's decision in *AEP* is the indispensable starting point. Proponents of preemption argue that if the Act "speaks directly" to greenhouse gas emissions, it also forecloses state tort remedies premised on those emissions. The Second Circuit reasoned, for example, in affirming a district court's dismissal of New York City's state common law claims for damages against a group of fossil fuel producers, that the city's state law nuisance and trespass claims were preempted by federal common law. When Congress "spoke directly" in authorizing regulation of greenhouse gas emissions under the Clean Air Act, the statute had displaced federal common law.[31] Finally, it reasoned, the Clean Air Act's supplanting of federal common law did not leave any room for the city to pursue tort law claims under state law.[32]

This set of arguments is feeble for two independent reasons. First, *AEP* was explicit that the state law question was left open. The Court distinguished the displacement of federal common law—which was presented and resolved—from the preemption of state common law, which was not. The doctrines are analytically distinct: displacement of federal common law requires only a showing that Congress addressed the relevant subject in a federal statute; preemption of state law requires far more—clear congressional intent to foreclose state remedies, evaluated in light of the presumption against preemption. The *AEP* Court recognized this distinction and expressly reserved the state law question. Second, the argument misunderstands the displacement doctrine itself. Displacement reflects the principle that once Congress has acted, there is no longer a need for courts to fashion a federal common law remedy, because the federal statutory remedy fills the space. But displacement of federal common law has no logical implication for state common law. State common law operates independently of federal law, pursuant to state sovereignty, and has its own distinct constitutional footing. That the Clean Air Act displaces a federal common law remedy has no

___, No. 24-1068 (U.S. June 25, 2026), ""the death knell against the presumption against the presumption has sounded").

[31] *City of New York v. Chevron Corp.*, 993 F.3d 81, 96 (2d Cir. 2021) (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424-29 (2011)).

[32] *Id.* at 98-100.

bearing, as such, on whether it also preempts state law remedies—a question that requires an entirely different analysis.

Turning to that analysis, the Clean Air Act does not expressly preempt state common law tort suits for climate-related damage. It contains preemption provisions only in specific, limited contexts—most notably section 209, which preempts state emission standards for motor vehicles, subject to California's authority to seek a waiver.[33] That Congress expressly preempted state emission standards is powerful evidence that it knows how to preempt state law when it chooses, and that its decision not to include a comparable preemption of state tort suits reflects a deliberate choice to leave those remedies intact. The *expressio unius* principle has particular force in the preemption context: when Congress explicitly preempts "emission standards" but makes no mention of "common law suits" or "tort claims," the natural inference is that it did not intend to preempt the latter. Courts construing analogous provisions in other contexts have drawn exactly this inference; in *Medtronic, Inc. v. Lohr*, the Court held that the Medical Device Amendments' express preemption of state "requirements" did not reach all state tort claims, reading the clause narrowly in light of the presumption against preemption.[34]

Not only does the Act fail to preempt state common law; it affirmatively preserves it. Section 304(e) provides that nothing "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."[35] The United States, in its amicus brief in *Suncor*, argued that this savings clause only preserves states' authority to regulate in-state activity.[36] But the *Suncor* plaintiffs *are* seeking to make the defendants responsible for in-state activity—the sale of harmful products in Colorado

[33] 42 U.S.C. § 7543(a) (2018) (preempting state standards "relating to the control of emissions from new motor vehicles"); *id.* § 7543(b) (California waiver provision).

[34] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524 (1992) (federal statute expressly preempting state "requirement[s] or prohibition[s]" based on smoking and health did not reach state common law fraud claims).

[35] 42 U.S.C. § 7604(e) (2018) ("Nothing 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 . . . .").

[36] Brief for the United States as Amicus Curiae Supporting Petitioners, Suncor Energy (U.S.A.), Inc. v. Cnty. Comm'rs of Boulder Cnty., No. 25-170, 2026 WL 1483693, at *30 (U.S. May 21, 2026) (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987)); *see also* Brief for the Chamber of Com. Of the United States of Am as Amicus Curiae Supporting Petitioners, No. 25-170, 2026 WL 1497254, at *26 (U.S. May 21, 2026).

notwithstanding the knowledge of the havoc they could create. Another amicus brief claims that the savings clause "preserve[s] state authority within the [Clean Air] Act's cooperative federal framework and do not authorize affected states or localities to impose their own tort law on out-of-state sources for interstate and international emissions."[37] But Boulder County's suit is not a suit seeking to limit the defendants' emissions. It is a suit seeking to recover damages that resulted from tortious, fraudulent conduct that inflicted harm on the county and its residents by forcing expensive climate adaptation measures.[38]

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[37] Brief of the Fronter Inst. et al. as Amicus Curiae Supporting Petitioners, Suncor Energy (U.S.A.), Inc. v. Cnty. Comm'rs of Boulder Cnty., No. 25-170, 2026 WL 1454510, at *23 (U.S. May 19, 2026).

[38] *See* Nick Eberhart, *State Climate Suits: The Case for A Limited Remedy*, 48 Ecology L.Q. 311, 335 (2021) ("Courts may be less hesitant to issue statutory damages for fraud act violations than damages for tort claims that have not previously been applied to climate change.").

In *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*, the majority interpreted the analogous savings clause of the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365(e), to mean only that "this section"—the citizen suit provision—did not displace the federal common law of nuisance for water pollution, but it concluded that the rest of the Act did so. *Milwaukee II*, 451 U.S. at 328-29. Justice Blackmun, in dissent, characterized this reading of the savings clause as "extremely strained," amounting to reading the statute to say that "'this section' does not take away any pre-existing remedies, but the remainder of the statute does." *Id.* at 341-42 (Blackmun, J., dissenting)

One of us has previously argued that if Congress had intended for the statute as a whole to displace federal common law, "it is difficult to understand why it did not make an affirmative statement to that effect." Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 163 (1985) (also concluding that "[i]t is hard to imagine a more cryptic way of expressing an intent to [displace] federal common law than to expect the intent to be derived by negative implication from a statement that nothing in the very section creating a new statutory remedy has [displacing] effect").

Even if one accepts the *Milwaukee II* majority's tortured reading of the savings clause's language, there is no evidence anywhere else in the Clean Air Act that Congress intended for the regulatory program created by the Act to preempt state common law. Moreover, the presumption against *preemption* of state law (which does not apply when the issue involves alleged *displacement* of federal common law, as in *Milwaukee II*) requires a clear statement to support the ouster of state common law. No such clear statement appears in the Act, and the Act's provision preserving state authority, 42 U.S.C. § 7416, is directly to the contrary. Finally, when Congress wanted the Clean Air Act's provisions to preempt state law, it said so explicitly. *See id.* § 7543(a) (preempting the states from adopting or enforcing motor vehicle emission control standards). The absence of any similar provision explicitly preempting state common law claims of the kind asserted in *Suncor* would appear to amount to irrefutable evidence that Congress had no intention to preempt those claims.

The Clean Air Act citizen suit's savings clause is broad and explicit: it preserves "any" common law right to seek "any other relief"—a formulation that encompasses state common law damage claims. Section 116 similarly preserves the right of any State or political subdivision to "adopt or enforce . . . any requirement respecting control or abatement of air pollution,"[39] and courts have recognized that the phrase "any requirement" encompasses common law standards—a position the Hawaii Supreme Court adopted in the Honolulu litigation.[40] These provisions reflect a considered congressional judgment that federal air-quality regulation should coexist with, not replace, state common law—a statutory expression of the cooperative federalism framework that underlies the Act.

Field preemption fails as well. Even accepting that the Act comprehensively regulates greenhouse gas emissions, it does not follow that it occupies the field of liability for climate-related harms; the relevant field must be defined with specificity, not sweeping generality.[41] In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the Supreme Court defined the field the Atomic Energy Act occupied as "the radiological safety aspects" of nuclear plants—not the entire domain of nuclear energy—so a California moratorium grounded in economic concerns survived.[42] Likewise, even if the Act occupies the field of federal air-quality regulation—setting standards for emissions and requiring EPA to address greenhouse gases—it does not follow that the field of civil liability for climate harm has been occupied. No federal statute provides a damages remedy to communities harmed by climate change; Congress has never created a comprehensive compensation system for climate victims. The entire domain of climate-related compensation law—who may sue, for what,

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"[I]nsisting on explicit language to [preempt] state regulatory authority . . . ensures that Congress makes a conscious choice that has been approved through the constitutional process of bicameralism and presentment. This ensures in turn that the political safeguards of federalism are operative." Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 N.W. U. L. REV. 579, 590 (2008).

[39] 42 U.S.C. § 7416 (2018) (preserving state authority to "adopt or enforce" air-pollution requirements not less stringent than federal standards).

[40] *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d at 1181-82.

[41] *See Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 734 (9th Cir. 2016) (describing "the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry").

[42] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983) ("The Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.").

against whom, and on what theory—remains entirely in the hands of the states. That is not a regulatory field Congress has occupied; it is a gap Congress left for states to fill, consistent with the savings clauses discussed above. Barring subnational governments like the plaintiffs in *Suncor* from even litigating their claims conflicts with the longstanding principle that it is wrong to recognize a right while depriving the holder of a remedy to protect it.[43]

Conflict preemption fails for two reasons. First, the Act's purposes are served, not frustrated, by state tort remedies. Its purpose is to protect public health and welfare from air pollution; a parallel system of tort liability complements that objective by creating additional deterrence and ensuring that the costs of pollution are borne by those who cause it. The Court recognized this complementarity in *Wyeth*, emphasizing that federal drug regulation and state tort liability serve complementary purposes—federal regulation sets minimum standards while tort law provides additional protection and compensation.[44] The Court reasoned that the absence of a statutory damage remedy in the Food, Drug, and Cosmetic Act for consumers harmed by unsafe or ineffective drugs was evidence that Congress was relying on its determination that "widely available state rights of action provided appropriate relief for injured consumers."[45] It added that Congress "may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings."[46] The same analysis supports the conclusion that Congress meant to preserve state tort remedies for governments forced to implement expensive climate adaptation strategies and to motivate energy producers to both warn of the dangers of fossil fuel use and develop safer alternative energy sources.

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[43] *See United States v. Hathaway*, 26 F. Cas. 224, 225 (C.C.D. Me. 1824) (Story, J.); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."). *See also* Isaac Marcushamer, *Selling Your Torts: Creating A Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1589 (2005) (referring to "the fundamental principle of tort law, of allowing victims to seek compensation via the courts"); Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1170 (1992) ("Fault is the fundamental criterion by which both wrongdoing and the right to compensation are identified.").

[44] *Wyeth*, 555 U.S. at 573 ("The FDA has long acknowledged that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.").

[45] *Id.* at 574.

[46] *Id.*

Second, the suits do not seek to regulate future emissions at all; they seek money damages for past harm. A company facing a judgment to compensate Boulder County faces no obligation to change its future emissions practices; it must simply pay for the harm it has already caused. There is no physical impossibility of complying with both federal law and a state damages judgment. The contrast with *Geier v. American Honda Motor Co.* is instructive: there, a state tort duty to install airbags conflicted directly with a federal regulation that deliberately permitted manufacturers to choose among a range of passive-restraint systems.[47] No analogous conflict exists here; the Act neither requires nor endorses corporate deception, nor does it protect companies from compensating those harmed by their products.

Perhaps the most powerful precedent against preemption is *Silkwood v. Kerr-McGee Corp.* There the Court addressed whether the Atomic Energy Act—by any measure, a more comprehensive regime than the Clean Air Act—preempted state tort punitive damages against a nuclear licensee.[48] Kerr-McGee argued that Congress had so comprehensively regulated nuclear safety that state tort law had no role to play. The Court rejected that argument. It acknowledged that "the federal government has occupied the entire field of nuclear safety concerns," but held that field preemption of nuclear safety regulation did not automatically preempt state tort claims for damages suffered as a result of nuclear accidents.[49] The Court found implied congressional intent to preserve state remedies, reasoning that it would be "difficult to believe" that Congress intended to leave victims "with no remedy at all," and observing that "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible," nor would exposure to punitive damages "frustrate any purpose of the federal remedial scheme."[50] The Court also pointed to provisions of the Price-Anderson Act indicating that Congress expected state tort law to continue operating alongside federal nuclear regulation, and it later applied *Silkwood* in *English v. General Electric Co.* to hold that the Atomic Energy Act did not preempt a state tort claim arising from nuclear-safety-related

[47] *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding conflict preemption where a state tort rule would have required a result the federal agency deliberately allowed manufacturers to avoid).
[48] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 256 (1984) (Atomic Energy Act did not preempt state tort punitive damages against a nuclear licensee, notwithstanding comprehensive federal occupation of the field of nuclear safety).
[49] *Id.* at 249.
[50] *Id.* at 257.

conduct.[51] Neither the petitioners in *Suncor* nor any of the amicus briefs filed on their behalf made any effort to distinguish *Silkwood*. They do not even cite it.

This logic applies with full force here. The Clean Air Act provides no damages remedy to communities harmed by climate change; if its regulatory coverage sufficed to preempt state tort claims, victims would be left with no recourse whatsoever—no federal remedy, no state remedy. As the Court held in *Bates v. Dow Agrosciences LLC*, "If Congress had wanted to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[52] Here, Congress expressed its intent clearly—and in the opposite direction, through savings clauses. *Silkwood* is especially apt because it directly addresses the argument made in *Suncor*—that comprehensive federal safety regulation preempts state suits for compensation—and rejected it even for the most comprehensively regulated industry in America. There is no principled basis on which to reach a different result for the fossil fuel industry operating under the less comprehensive Clean Air Act.

There is a further, ironic dimension to the preemption argument that its proponents largely ignore. The argument rests on the premise that the Act, as implemented through EPA's regulatory actions, "speaks directly" to greenhouse gas emissions—a premise *AEP* grounded in EPA's Endangerment Finding, issued after *Massachusetts v. EPA*.[53] In early 2026, the Trump administration's EPA rescinded that finding for mobile sources. In contrast with every prior administration's EPA—including the first Trump administration—the current EPA concluded that "we lack statutory authority to maintain this novel and transformative regulatory program" and that "the Endangerment Finding and subsequent regulations exceeded the Agency's statutory authority under CAA section 202(a)(1)."[54] If EPA's current position

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[51] *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (distinguishing the federally occupied field of nuclear "safety regulation" from state tort claims arising from conduct causing physical harm).

[52] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). This conclusion reflects a background rule of statutory interpretation applicable to all preemption questions. See *Wyeth*, 555 U.S. at 565; *Medtronic*, 518 U.S. at 485.

[53] EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).

[54] EPA, Reconsideration of the 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026).

is that it lacks authority to regulate greenhouse gases—that they do not "endanger" health and welfare within the meaning of the Act[55]—then the statutory predicate for the preemption argument substantially weakens. The claim that the Act "speaks directly" to greenhouse gas emissions depends on EPA having authority under the Act to address them, whether or not it has actually exercised that authority. EPA's reversal and disavowal of that authority makes it significantly harder to argue that the Act comprehensively occupies the field of greenhouse gas regulation in a way that forecloses state tort remedies. Proponents cannot have it both ways: the claim that the Act preempts state tort suits because it comprehensively regulates greenhouse gas emissions is irreconcilable with the position that the Act provides EPA no authority to regulate those emissions at all. The rescission removes a significant portion of the regulatory foundation on which the preemption argument depends and strengthens the case for allowing state common law claims to proceed.

IV. Foreign Affairs Preemption Does Not Reach State Climate Tort Suits

A distinct set of preemption principles applies when state law allegedly infringes the federal government's constitutional authority over foreign affairs. But tort law damage remedies do not amount to direct regulation of foreign relations, and the local governments' efforts to require energy companies to reimburse them for climate adaptation costs are not precluded by the doctrine.

The foreign affairs preemption doctrine derives from the structural features of the Constitution that vest authority over foreign relations in the national government. The Constitution grants Congress the power to regulate foreign commerce, declare war, and implement international agreements, and grants the President authority over foreign affairs more broadly, including the power to make treaties and receive ambassadors. Together, these provisions have led the Court to find that some state laws are preempted when they conflict with federal foreign policy, in order to promote uniformity in the nation's dealings with foreign nations. But the doctrine has always been narrow and dependent on close examination of the specific conflict between state law and federal foreign policy. Courts have applied it when a state law directly engaged in foreign policy—imposing sanctions on foreign countries,

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[55] *Id.* at 7714 ("In contrast to the air pollution addressed expressly in CAA section 202 and elsewhere in the statute, GHGs do not endanger public health or welfare through local or regional exposure.").

regulating commercial relations with specific foreign governments, or otherwise intruding on areas of exclusive federal prerogative.[56] It has never been applied to preempt state tort suits seeking compensation for domestic harm merely because the defendants are multinational corporations or their activities have an international dimension.

The doctrine's key cases prove the point. In *Crosby v. National Foreign Trade Council*, the Court held that Massachusetts's law barring state agencies from contracting with companies doing business with Burma was preempted by a federal statute imposing sanctions on Burma—an independent state sanction against a specific foreign country, precisely the kind of foreign policy the Constitution reserves to the federal government.[57] In *American Insurance Association v. Garamendi*, the Court held California's Holocaust Victim Insurance Relief Act—which required insurers to disclose Holocaust-era policies—preempted by executive agreements establishing a negotiated mechanism for such claims; the state law conflicted with the executive's chosen approach to a sensitive matter of foreign policy.[58]

Proponents also invoke *Zivotofsky v. Kerry* for the proposition that the nation must "speak with one voice."[59] They claim that the case's takeaway is that "[w]hen a state imposes penalties on the energy industry for climate change, it is invading the province of the federal government to decide whether the benefits of greater energy production to our national economy, defense

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[56] *See* Zchernig v. Miller, 389 U.S. 429, 441 (1968) (striking down Oregon law that had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"); *see also* Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1878 (2006) ("Without a controlling law indicating that state GHG regulations constitute a 'matter of foreign policy' or some form of direct interaction between the states and foreigners, applying dormant foreign affairs preemption to state GHG regulations would dangerously expand a doctrine that already lacks clear limits.").

[57] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (Massachusetts's Burma sanctions law stood as "an obstacle to the accomplishment of Congress' full objectives under the federal Act").

[58] *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 420 (2003) (finding preemption where state law "implicates foreign policy matters with a degree of friction that would be incompatible with the President's constitutional authority," while disclaiming any broad rule that all state law touching executive agreements is preempted).

[59] *Zivotofsky v. Kerry*, 576 U.S. 1, 17–18, 20 (2015) (indicating that the "one voice" concept is tied to formal recognition of foreign sovereigns).

capabilities, and foreign policy outweigh the alleged cost of increasing global temperatures."[60]

But *Zivotofsky* is narrow in two respects. First, it concerns the relationship between the President and Congress—whether Congress can override the President's exclusive recognition authority—not the relationship between federal and state authority, and it therefore turns on separation-of-powers concerns rather than the federalism premises that protect state sovereignty.[61] And it concerns the specific and ancient power of formal diplomatic recognition.[62] Climate tort suits have nothing to do with recognizing foreign governments.

The cases that found foreign affairs preemption share a common feature that distinguishes them from climate tort suits: each involved a state law that directly regulated foreign relations. The Massachusetts Burma law was a state sanction against a specific foreign country. The California Holocaust law imposed state regulation on insurance claims arising from events abroad, which executive agreements with foreign governments had addressed. In each case, the state was doing something that resembled foreign policy—

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[60] Yoo & Toth, *supra* note __. The petitioners' brief does not cite *Zivotofsky*, and only two amicus briefs in support of the petitioners do so. One, submitted by the state of Tennessee, merely provides a "*see also*" cite to the Court's endorsement of Emer de Vattel as a "prominent international scholar" at the time of the founding. Brief of Tennessee as Amicus Curiae in Support of Petitioners, Suncor Energy (U.S.A.), Inc. v. Cnty. Comm'rs of Boulder Cnty., No. 25-170, 2026 WL 1483696, at *4 n.1 (U.S. May 21, 2026). The other cites the case to support the assertion that "The President alone may recognize nations, governments, and diplomats. Congress and the States may not." Brief of Professor Saikrishna B. Prakash as Amicus Curiae in Support of Petitioners, Suncor Energy (U.S.A.), Inc. v. Cnty. Comm'rs of Boulder Cnty., No. 25-170, 2026 WL 1497260, at *13-14 (U.S. May 21, 2026) (quoting *Zitofsky*, 576 U.S. at 21).

[61] *See* Laurence H. Tribe, *Transcending the* Youngstown *Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. FORUM 86, 89 (2016) (describing *Zivotofsky* as a "significant separation-of-powers case[ ]"); *Leading Cases*, 126 HARV. L. REV. 307, 313 (2012) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)) (*Zivotofsky* instructs the judiciary to give effect to valid constraints on executive power, helping to preserve 'the equilibrium established by our constitutional system'").

[62] *See* Julian G. Ku, *Considering the Consequences of an Unchecked Presidential Recognition Power for U.S. Taiwan Policy*, 13 GEORGE MASON INT'L L.J. 55 (2022) (footnotes omitted) (stating that in *Zivotofsky* the Court "held that Congress could not limit or interfere with the President's power of diplomatic recognition. Rather than avoiding the question as non-justiciable1 or setting up a framework for analyzing shared powers, the Court held . . . that the President has the exclusive power to recognize a state (and the scope of its territory) under Article II of the Constitution").

legislating directly about relations with, or obligations arising from, specific foreign countries.

Climate tort suits are fundamentally different. They are state court adjudications of state tort claims, seeking compensation from corporations for harm done within the state's territory. As such, these suits do not implicate diplomatic or inter-governmental recognition concerns. Boulder County's suit against *Suncor*, a Canadian corporation, does not purport to determine United States foreign policy toward Canada; it seeks compensation for harms allegedly caused by Suncor's products and conduct within Boulder County. Honolulu's suit against Sunoco does not regulate American relations with any foreign country; it seeks reimbursement for coastal adaptation costs the city has been forced to bear. These are ordinary tort suits, prosecuted in ordinary state courts, under ordinary state common law. The "one voice" concern that animates the doctrine simply does not apply to adjudicative proceedings that resolve disputes between specific parties under state law.[63] That concern animates doctrines that limit state legislative and executive action—sanctions laws, trade restrictions, diplomatic protocols—and should not be applied to preempt state court adjudication of private law claims.[64] As the Court made clear in the commerce context, the "one voice" principle applies when "the objects of state taxation are instruments of foreign commerce"—not to private tort litigation touching multinational actors.[65] Moreover, the precise constitutional basis for the argument in climate cases has never been clearly articulated. If it rests on executive foreign policy—the *Garamendi* theory—there must be an identifiable executive policy that the state suits disrupt; the Solicitor General's brief invokes general foreign affairs

[63] Such suits would not "lead to the possibility of embarrassment by inhibiting the ability of the US to speak with one voice." Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 234 (2012); *id.* at 238 (arguing that the political questions doctrine invoked in *Zivotofsky* "requires the courts to make a threshold foreign affairs determination, namely, whether adjudication of the issue would cause the US embarrassment or create foreign affairs problems"). *Cf.* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights,* 98 B.U. L. REV. 397, 421 (2018) (stating that "the First Congress expressly anticipated that state courts would have jurisdiction to adjudicate tortious wrongs that might be brought to federal court" even under the Alien Tort Statute).

[64] *See, e.g.*, Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1423 (1999) ("The 'structural' preemption argument is especially illegitimate when applied to issues that, despite the foreign affairs patina, involve traditional state prerogatives such as criminal law, private law, health and social issues, and the like.").

[65] *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 449 (1979) (the "one voice" principle applies when "the objects of state taxation are instruments of foreign commerce").

concerns but points to no specific executive agreement or policy directive that the suits contradict. If the argument is structural—that climate change is inherently a matter of federal foreign policy because it is internationally negotiated—then there is no limiting principle, and the consequences, as discussed below, would be extraordinary.

That absence of a limiting principle is the most telling objection. If the global operation of fossil fuel companies and the international dimension of emissions sufficed to trigger foreign affairs preemption, there would be no principled basis for distinguishing these suits from any other state tort litigation involving a multinational corporation and transboundary harm. Asbestos litigation, which has proceeded for decades in state courts across the country, involves multinational mining and manufacturing companies whose products were used internationally.[66] Pharmaceutical injury litigation involves global companies whose products are sold and regulated internationally, and whose marketing and labeling decisions have international dimensions.[67] Toxic tort suits routinely involve pollutants that cross state and national boundaries. None of these suits has been held to constitute "state foreign policy" warranting preemption.[68] The argument for foreign affairs preemption in climate cases, if accepted, would provide the template for preempting all of them. Proponents have not articulated a limiting principle that would prevent this result, nor have they explained why climate tort suits are distinctive in a way that asbestos, pharmaceutical, or chemical-pollution suits are not. The implicit assumption appears to be that climate change is uniquely a matter of federal foreign policy concern because international climate agreements address it at the diplomatic level.[69] But the existence of an international agreement on a subject does not automatically preempt all state law touching that subject; if it did, international trade

[66] *See* John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENV'T L.J. 1 (2002).
[67] *See* Bryan L. Walser, *Shared Technical Decisionmaking and the Disaggregation of Sovereignty: International Regulatory Policy, Expert Communities, and the Multinational Pharmaceutical Industry*, 72 TUL. L. REV. 1597 (1998).
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[69] *See* Brief for the Petitioners, *supra* note __, 2026 WL 1420093, at *41 (stating that "for decades, the federal government has coordinated and refined its foreign-policy strategy with respect to climate change"); *id.* at *42 (quoting *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 15 (2025)) ("Allowing state and local governments to seek liability for greenhouse-gas emissions released abroad would interfere with the United States' foreign policy on climate and energy issues and thus undermine the federal government's 'exclusive authority in international relations'").

agreements would preempt all state commercial law, and international environmental agreements would preempt all state environmental regulation. The Supreme Court has never adopted this view.[70]

The foreign affairs preemption argument has been considered and rejected by the state supreme courts that examined it most closely. The Colorado Supreme Court held Boulder's claims not barred by 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," and not barred by field preemption because the county's traditional tort claims did not intrude on any power reserved to the federal government.[71] The Hawaii Supreme Court reached the same result, finding no showing that damage actions would conflict with federal authority over foreign affairs or national security.[72] Scholarly commentary has characterized the foreign affairs theory as resting on a "controversial and mostly moribund" doctrine and as "a real stretch" when applied to in-state damage suits.[73] One outlier, the Maryland Supreme Court, accepted a version of the argument in 2026—but its holding addressed only displacement of federal common law, not preemption of state common law, and thus provides no support for preemption in *Suncor*.[74] The Court's grant of certiorari does not validate the theory; it reflects only that a definitive answer is warranted to a question the lower courts have answered—correctly—against preemption.

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[70] In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court explicitly disclaimed any intention to establish a broad rule that any state law touching on the subject of foreign executive agreements is preempted. It stated that a court must "consider the strength of the state interest and the degree to which federal policy is disrupted" when applying executive-agreement-based preemption. *Id.* at 420. Climate tort suits present neither a weak state interest nor significant disruption of any coherent federal foreign policy on climate liability.

The preemptive scope of executive agreements is itself disputed and has never been extended to reach state tort adjudication in domestic-harm cases. *See* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). The absence of any executive agreement or treaty specifically addressing liability in a state court based on the application of state law for climate change makes the executive-preemption theory in the climate context even less tenable than the one rejected in *Garamendi*.

[71]See *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 P.3d 1204 (Colo. 2019)..

[72] *City & Cnty. of Honolulu*, 537 P.3d at 1200. *See also Minnesota v. Am. Petroleum Inst.*, No. 62-CV-20-3837, 2025 WL 562630 (Minn. Dist. Ct. Feb. 14, 2025) (rejecting applicability of the foreign affairs preemption).

[73]Cert-Grant in Climate Case—A New Front on the Preemption War, Transnational Litig. Blog (2026).

[74] *Mayor & City Council of Baltimore v. B.P. P.L.C.*, 353 A.3d 1142, 1180-83 (Md. 2026).

The deepest reason the doctrine does not reach these suits is that preemption principles apply differently to adjudication yielding damages than to direct regulation. Because efforts to mitigate climate change have universally undifferentiated effects on atmospheric greenhouse gas concentrations worldwide, and because emissions produce cross-jurisdictional spillovers regardless of where the emitting activity occurs, centralized authority to regulate emissions may be more effective than decentralized regulation. A single state's imposition of a regulatory cap on a multinational defendant's global emissions amounts to standard-setting with extraterritorial reach; so does a judicially decreed injunction imposing an emissions cap—and if issued by a state court rather than a federal court, the potential for conflicting decrees is multiplied by fifty.[75] For that reason, the foreign affairs preemption doctrine reflected in *Crosby* and *Garamendi* properly applies to state action that directly regulates international commercial relations, whatever doctrinal label it wears. But an award of damages under state nuisance, trespass, or fraud law has no extraterritorial reach. It does not dictate how many products a defendant may sell within the awarding jurisdiction or seek to cap the defendant's emissions anywhere in the world. Even equitable relief may escape preemption if crafted to avoid extraterritorial impacts: an injunction confined to in-state conduct—for example, one requiring in-state consumer disclosures about the links between fuel use, emissions, and climate impacts, or one requiring remediation of locally damaged infrastructure in lieu of damages—is geographically local in the same sense that damages are.[76] The paradigm case for centralization fits equitable relief that functions as an emissions cap; indeed, that rationale explains *AEP*'s centralization of federal climate-mitigation authority in EPA's administration of the Clean Air Act through statutory displacement of federal common law. It does not justify preemption of relief whose impact is local in scope.

This distinction also answers EPA's new preemption theory. *AEP*'s displacement holding rested on the mere existence of EPA's regulatory authority, not its exercise. Now that EPA disclaims any authority to regulate greenhouse gases, it nonetheless asserted in the 2026 rescission that the Act "continues to preempt state common-law claims and statutes that seek to

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[75] *Cf.* N. Carolina, ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291, 304 (4th Cir. 2010) (reversing issuance of an injunction in a public nuisance action brought by North Carolina against the TVA in part due to concerns about "the prospect of multiplicitous decrees"); *id.* at 305 ("Injunctive decrees, of course, are rulemakings of a sort.").

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regulate out-of-state emissions."[77] But the claims here do not "regulate out-of-state emissions." The damages sought are not regulatory and have no extraterritorial reach; plaintiffs seek compensation for the defendants' in-state marketing and sale of fossil products whose use resulted in emissions that contributed to the climatic changes requiring costly local adaptation.[78] And the Act's savings clauses confirm that it does not preempt state common law aside from its narrow preemption of state tailpipe standards. Finally, the disappearance of EPA's asserted authority cuts against preemption. As one of us has explained, if a court finds that federal legislative or administrative failure to act preempts state regulation, then the activities that prompted the state to create a protective liability mechanism will of necessity become completely unregulated—an implausible attribution of congressional intent, with significant adverse consequences for the health, safety, welfare, and environmental interests that are the traditional focus of the states' police powers.[79] State regulation in the absence of federal regulatory authority should not be construed as creating a conflict with federal law absent an explicit statutory determination that Congress intended the field to be governed only by free-market activity.

Indeed, the terms of the Constitution cut against any determination that the absence of federal regulatory authority preempts state law: under the Supremacy Clause, only federal law "made in Pursuance" of the Constitution is supreme, and in the absence of any federal "Law," there is nothing to preempt. As the Court has recognized, "There is no federal pre-emption in vacuo, without a constitutional text or a federal statute to assert it."[80] And after *Loper Bright*, courts must interpret a statute's preemptive effect using their own independent judgment; an agency's view controls only where the statute delegates interpretive authority to it.[81] Accordingly, a court should not

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[77] Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emissions Under the Clean Air Act, 91 Fed. Reg. 7686, 7739 (Feb. 18, 2026).
[78] *See* First Amended Complaint, *supra* note __, at ¶ 2, 5, 14, 415, 424, 445, 541.
[79] Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENV'T L.J. 5, 8 (2008); *see also id.* at 32-33 (arguing that "preemption in the face of federal inaction leaves the state whose law is preempted at the mercy of the market failure that prompted it to regulate in the first place because no substitute federal regulatory regime exists," and that "[c]ourts should be reluctant to conclude that Congress chose to divest the states of their traditional authority to protect the health, safety, and welfare of their citizens without providing some assurance that it was taking alternative steps to address the states' concerns").
[80] *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).
[81] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (courts must exercise independent judgment in interpreting statutes absent delegation of interpretive authority).

find preemption based on frustration of federal objectives absent an explicit congressional delegation to the agency of authority to preempt state law not otherwise ousted by statute.

V. The Fraud and Deception Claims Are Not Preempted

The Clean Air Act preemption argument, however flawed, at least has a surface logic as to emissions-based claims: the Act regulates greenhouse gas emissions, and some of the suits are premised in part on the harm those emissions cause. It has no such logic as to the fraud and deception claims at the heart of these suits. The factual allegations are, by now, extensively documented. Internal documents show that major oil companies developed a sophisticated scientific understanding of the relationship between fossil fuel combustion and climate change beginning in the 1970s and 1980s.[82] Company scientists accurately predicted the trajectory of climate change and its consequences for sea levels, extreme weather, and infrastructure—decades before these consequences entered mainstream public debate.[83] As this internal knowledge accumulated, the companies made a strategic decision to conceal it and to fund public relations campaigns designed to sow doubt about

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[82] *See* Chenyang, *supra* note __, at 145-46 (citing NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO CLIMATE CHANGE 169-215 (2010)):

> Despite long-standing scientific consensus, fossil fuel companies responsible for producing the bulk of anthropogenic greenhouse gases disseminated the fiction that rising temperatures were caused by natural fluctuations in the Earth's climate. They did this through an expensive and highly organized campaign beginning in the 1970s to thwart regulatory liability. Tactics varied, but a shared goal was to sow public doubt in climate science to prevent regulatory liability.

See also Michael Byers et. al., T*he Internationalization of Climate Damages Litigation*, 7 WASH. J. ENV'T L. & POL'Y 264, 308 (2017) (referring to revelations that Exxon and other fossil fuel companies knew, possibly as early as the 1960s, that fossil fuels were disrupting the global atmosphere, and yet the companies spread and funded misinformation campaigns, apparently to stifle public action on climate change"); Ashley Poon, *An Examination of New York's Martin Act As A Tool to Combat Climate Change*, 44 B.C. ENV'T AFF. L. REV. 115, 116-18 (2017) (citing Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/; Neela Banerjee et al., *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS, http://insideclimatenews.org/content/Exxon-The-Road-Not-Taken).

[83] *See* Alice McCarthy, *Exxon disputed climate findings for years. Its scientists knew better.*, THE HARVARD GAZETTE (Jan. 12, 2023), https://news.harvard.edu/gazette/story/2023/01/harvard-led-analysis-finds-exxonmobil-internal-research-accurately-predicted-climate-change/.

the scientific consensus, influence policymakers against climate regulation, and protect their profits.[84]

These allegations are not merely background to the emissions claims; they are, in the plaintiffs' theory, the primary basis for liability. As the Hawaii Supreme Court recognized, the complained-of conduct—the marketing, the concealment, the deliberate creation and maintenance of public doubt about climate science—is what gives rise to the plaintiffs' claims.[85] Emissions are a link in the causal chain, but the proximate cause of the harm, in this theory, is corporate fraud that deprived the public, policymakers, and communities of the information necessary to provide a timely response to climate change. Boulder County's complaint does not rest solely on the physics of greenhouse gas warming; it rests on the allegation that companies that knew what they were doing and hid that knowledge to profit from the harm they were causing.[86]

No provision of the Clean Air Act regulates this conduct. The Act establishes ambient air quality standards, emission standards for stationary sources, emission standards for motor vehicles, requirements for state implementation plans, permitting requirements, and enforcement mechanisms.[87] The Petitioners in *Suncor* frame the issue in the case as "[w]hether 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."[88] But none of the statute's provisions, individually or collectively, addresses corporate communications about climate science, the concealment of internally generated scientific findings, or the funding of public disinformation campaigns. As the Respondents put it, they "expressly "expressly do *not* seek to . . . enjoin any oil and gas operations or sales ... or to enforce emissions controls of any kind."[89]

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[84] *Id.*
[85]*City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d at 1187
[86] First Amended Complaint, *supra* note __, at ¶ 18, 70, 85, 324, 327, 330, 333, 369, 375, 377, 382, 399-400, 407, 411, 414, 418, 425, 428, 452-453, 465, 475, 494, 504-507, 514-517, 525-527.
[87]*See* 42 U.S.C. §§ 7408–7410, 7411, 7521, 7475.
[88] Brief for the Petitioners, *supra* note __, 2026 WL 1420093, at *1; *see also id.* at *3 ("The question presented in this case is whether state law is competent within our federal system to impose potentially crushing monetary liability on a subset of energy producers for localized harms allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate. The answer to that question is no.").
[89] Brief in Opposition, *supra* note __, at *1.

This difference in how the two sides frame the issue is not merely technical. It reflects a fundamental distinction between two different types of regulatory authority. The Clean Air Act is an emissions statute; it governs what companies put into the air. The fraud and deception claims address what companies said and concealed about what they knew—a wholly different domain of corporate conduct, governed by state tort law, consumer protection law, and common law or statutory fraud principles. The statute that regulates the one has no natural claim to preempt the law governing the other.

There is no precedent for the proposition that a federal statute regulating a particular industry's products preempts state common law fraud claims arising from that industry's deceptive conduct, and directly contrary authority controls. The Supreme Court's decision in *Altria Group, Inc. v. Good* is directly on point. In *Altria*, plaintiffs in Maine alleged that Philip Morris had committed common law fraud by marketing "light" cigarettes as safer than regular cigarettes, when the company knew that smokers would compensate for lower tar yields by drawing more deeply on each cigarette.[90] Philip Morris argued that the Federal Cigarette Labeling and Advertising Act (FCLAA) — which regulated cigarette advertising and expressly preempted state requirements "based on smoking and health"—preempted the state fraud claim.[91] The Court held, in a five-Justice majority, that it did not. It reasoned that Maine's fraud claim imposed a general duty not to deceive which was independent of the Act's regulatory scheme, not a "requirement or prohibition based on smoking and health."[92] Philip Morris was potentially liable not because of what cigarettes do to health, but because it lied about those consequences. State common law fraud claims, the Court emphasized, rest on a general obligation—the duty not to deceive—that is independent of, and not regulated by, federal statutes governing the underlying product.[93]

That reasoning applies directly to climate fraud claims. The Clean Air Act imposes regulatory limits on emissions that affect air quality and public health. State fraud claims premised on oil companies' concealment of climate science are not based on those regulatory requirements; they rest on a general duty of honesty that applies to all corporations in all industries. Federal

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[90] *Altria Grp., Inc. v. Good*, 555 U.S. 70, 83 (2009) (state fraud claim imposed "a general obligation—the duty not to deceive—that is not based on smoking and health" and therefore was not preempted).

[91] *Id.* at 81-82.

[92] *Id.* at 87.

[93] *Id.* at 84 (finding that the FCLAA "creates a general rule that creates a duty not to deceive").

statutes governing emissions have no more claim to preempt state fraud law than the Cigarette Labeling Act had to preempt the Maine fraud claim in *Altria*.

The fraud basis carries independent significance that extends beyond doctrinal analysis. Even if a court were to conclude—incorrectly, as we have argued—that the Clean Air Act preempts the claims rooted in environmental tort theories such as nuisance and trespass, the fraud-based component would survive. A ruling for the defendants on Clean Air Act preemption would not, if properly analyzed, result in dismissal of the cases in their entirety. At most, it might require plaintiffs to refocus their claims on the deception conduct, which—as the Hawaii Supreme Court's analysis demonstrates—they can do. That court reasoned that *American Electric Power* had held that the Clean Air Act displaced common law claims based on injury arising from interstate pollution. The source of Honolulu's alleged injury in that case, however, was the oil companies' conduct in concealing from the public the harms their products caused. "Numerous courts," it reasoned, "have rejected similar attempts by oil and gas companies to reframe complaints alleging those companies knew about the dangers of their products and failed to warn the public or misled the public about those dangers."[94] As a result, Honolulu's claims were preserved.[95]

From the plaintiffs' perspective, the fraud theory may ultimately be the stronger one on the merits. It addresses corporate conduct that is difficult to defend: companies that allegedly knew about climate risks, concealed that knowledge, and profited from the concealment. The legal framework for fraud and conspiracy liability—causation, reliance, and damages—is well established in state common law, and the documentary record that has emerged through investigative journalism and prior litigation provides a factual foundation that plaintiffs will be able to develop effectively. The deception theory is not a backup position; it is, in the plaintiffs' theory of the case, the primary basis for liability, and one that no federal preemption doctrine can foreclose.

VI. Constitutional Values, Federalism, and the Distribution of Climate Costs

[94] *City and Cnty. of Honolulu*, 537 P.3d at 1201.
[95] *Id.* (concluding that "even if federal common law had not been displaced, Plaintiffs' claims would not be preempted by it").

Preservation of the ability of state and local governments to pursue state common law theories of liability is supported by fundamental constitutional and equitable principles: the traditional role of state tort law in the federal system, the unfairness of foisting costs on the taxpaying public, the constitutional value of a damages avenue where federal law provides none, and the politically neutral valence of preserving state law remedies.

The Court has consistently recognized that state tort law plays a distinct and important role in the constitutional order that cannot be displaced without clear congressional intent.[96] This recognition reflects both a structural and a functional judgment. Structurally, tort law has been a core exercise of state sovereignty since before the founding; the states' authority to provide remedies to those injured within their territories is among the oldest and most deeply rooted exercises of the police power.[97] Functionally, state tort law serves compensatory and deterrence functions that are independent of, and complementary to, federal regulatory law.[98] Federal environmental statutes protect diffuse public interests through prospective regulatory standards; state tort law compensates specific victims for specific harm already caused. Because deterrence and compensation are distinct aims, the two regimes are genuinely complementary rather than duplicative: neither can perform the other's function, and to eliminate one is not to cure a redundancy but to lose

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[96] *Wyeth*, 555 U.S. at 565 & n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (explaining that "respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action' and that courts should accordingly presume that federal statutes do not supersede the historic police powers of the states"); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotations omitted) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.").

[97] *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (noting the "great latitude" states have traditionally had "under their police powers to legislate" to protect "lives, limbs, health, comfort, and quiet of all persons").

[98] *See* Lindsey K. Peterson, *Evading Preemption: The State's Search for Recovery for the Masses*, 9 CHARLESTON L. REV. 403, 422 (2015) (footnote omitted) ("There are a number of reasons why federal preemption of state tort law is detrimental: (1) federal preemption expels states from an area of law where they have historically exercised police powers, (2) preemption leaves the public exposed to unknown risks of injury from dangerous products if federal safety laws are inadequate, and (3) preemption denies injured parties the right to compensation."). *Cf. Wyeth*, 555 U.S. at 573–74 (noting that "Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers").

a function.[99]Their coexistence is thus a structural feature of the constitutional order, not an anomaly to be eliminated.

Nor was it accidental. Congress built the modern federal environmental framework—including the Clean Air Act—fully aware of the preexisting common law of nuisance, trespass, and negligence that had long governed disputes between polluters and those affected by pollution.[100] Federal environmental law was superimposed on a common law foundation, not enacted in replacement of it, and the savings clauses are the statutory expression of that design.

Stripped to their essentials, the preemption arguments are arguments about who should bear the costs of climate harm. Boulder County and dozens of similar plaintiffs are governments that have been required to spend public money—taxpayer money—to repair climate-damaged infrastructure, respond to climate-driven emergencies, and adapt their communities to a changing climate.[101] They are asking courts to determine whether the

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[99] *See* Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 103 (2007) ("One can view statutes and common law as complementary. Statutes provide a comprehensive, preventative, regulatory regime, while the common law continues to provide pollution victims with a remedy for their injuries."). *Cf.* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs: Recognizing Wrongs. by John C.P. Goldberg & Benjamin C. Zipursky. Cambridge, Mass.: Belknap Press of Harvard University Press. 2020. Pp. 380. $45.00*, 134 HARV. L. REV. 1423, 1428 (2021) (noting that John Locke, John Rawls, and other prominent philosophers have recognized that "a just society has a responsibility to provide victims with an avenue by which they, acting in their capacity as private citizens, can hold their victimizers accountable").

[100] *See* Stephen M. Johnson, *From Climate Change and Hurricanes to Ecological Nuisances: Common Law Remedies for Public Law Failures?*, 27 GA. ST. U. L. REV. 565, 568 (2011) (arguing that, in adopting modern environmental legislation, "neither Congress nor the states sought to fully displace common law remedies by adopting environmental protection statutes and regulations. Indeed, most of the federal environmental statutes include provisions that explicitly preserve more stringent state and local remedies."); Kevin A. Gaynor, Benjamin S. Lippard & Margaret E. Peloso, *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENV'T L. REP. (ELI) 10845, 10852 (2010) (stating that "most major environmental statutes have an express savings clause that preserves the rights of parties to bring claims under state common law and for matters not covered by the regulatory scheme").

[101] *See, e.g.*, Susan Crawford & Daeven Mangalmurti, Managing Climate Risk: Implications for Local Governments, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 20, 2025), https://carnegieendowment.org/research/2025/08/managing-climate-risk-implications-for-local-governments. *See also* Stephanie M. Stern & Cherie Metcalf, *Rise of the Machines: Algorithmic Zoning for Climate Risk*, 85 MD. L. REV. 301, 313–14 (2026) (footnote omitted)

companies whose products allegedly caused that harm should contribute to those costs. If preemption arguments succeed and these suits are dismissed, the answer is simple and stark: the public bears all the costs. The taxpayers of Boulder County pay for the infrastructure damage caused by climate-intensified wildfires; the residents of Honolulu pay for the coastal adaptation costs attributable to sea-level rise; the people of Rhode Island bear the public health costs attributable to climate-driven extreme weather. The oil and gas companies—which earned substantial profits from the very activities that plaintiffs allege caused these harms—pay nothing. This is not an incidental or unintended consequence of the preemption argument; it is its necessary result. Federal law provides no damages remedy; state common law is the only avenue for compensation. If state common law is preempted, there is no remedy. The effect would be to socialize the costs of corporate conduct while privatizing the profits—precisely the moral hazard that tort law has always been designed to prevent.

There is a distinct constitutional value in preserving the parallel availability of federal regulation and state tort remedies, which the Court has recognized repeatedly. In *Silkwood*, it found implicit congressional intent to preserve state remedies even in the most comprehensively regulated industry in America, reasoning that it would be "difficult to believe" Congress intended to leave victims without recourse.[102] In *Bates*, it held that Congress would have "expressed that intent more clearly" had it meant to deprive injured parties of a long-available form of compensation.[103] These cases collectively reflect a principle that should govern *Suncor*: where federal law provides regulatory standards but no compensation mechanism, the absence of a federal remedy signals Congress's choice to preserve state tort law as the avenue for injured plaintiffs, not a decision to create a compensatory vacuum through preemption. Congress enacted the Clean Air Act to protect public health through regulatory standards; it did not enact a compensation statute for climate victims. State tort law fills that gap, as it has filled similar gaps across the regulatory landscape for generations.

("The pressure points on local governments to reduce climate risk are numerous and severe, with local costs from climate damage a particularly sore and salient issue. For example, the City of Miami has spent one billion dollars on the phased installation of pumps and the elevation of roads in the past ten years.").

[102] *Silkwood*, 464 U.S. at 251.

[103] *Bates*, 544 U.S. at 459

Preserving state remedies is also politically neutral. Proponents of preemption frequently frame their arguments as defenses of federal supremacy against what they characterize as "activist" local governments.[104] But the preemption doctrine they advocate is not limited to any particular political valence. Louisiana's efforts to hold energy companies accountable for decades of coastal land loss—brought by Republican-led parishes and supported by a Republican governor—would be equally foreclosed by the theory advanced in *Suncor*.[105] The doctrine urged upon the Court is not tailored to prevent any particular political or environmental agenda. It would categorically immunize fossil fuel companies from state court accountability for the harms their products cause, regardless of which state or community brings the suit, regardless of the political valence of the claim, and regardless of whether the plaintiff is San Francisco or New Orleans. It is, in the final analysis, a doctrine of corporate immunity dressed in constitutional language—one that conservative states seeking compensation for energy-industry harm would find just as confining as the progressive jurisdictions that have been its primary targets.

Beyond these considerations, allocating decentralized, overlapping authority to address climate harms—through common law remedies as a state judicial supplement to federal regulation—also carries structural governance advantages. As we have developed at length elsewhere, the structure of governmental responses to social problems can be analyzed along distinct dimensions, including whether authority is centralized or decentralized and whether the authority of multiple bodies with concurrent jurisdiction is overlapping or distinct.[106] The arguments for exclusively centralizing authority in a federal agency do not fit this context. Centralization is sometimes justified by economies of scale, but those cannot be realized here, because judicial and administrative functions operate separately and cannot

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[104] *See* Andrew Rice, *Climate activists v. the U.S. energy industry: Cases to watch in 2026*, THE CTR. SQUARE (Dec. 28, 2025), https://www.thecentersquare.com/national/article_a939cbd4-79d1-46a1-99d5-1386f179bcc2.html (quoting the executive director of Alliance for Consumers); Yoo and Toth, *supra* note __.

[105]See Docket, *Chevron U.S.A. Inc. v. Plaquemines Parish*, Louisiana; Louisiana's Republican governor has supported the state's coastal land-loss claims, see Docket, Chevron USA Inc. v. Plaquemines Parish, available at https://www.scotusblog.com/cases/case-files/chevron-usa-inc-v-plaquemines-parish-louisiana-2/.

[106]ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK ch. 2 (2019)

be consolidated.[107] Centralization is sometimes appropriate to achieve national uniformity, but protection of public health and safety is a core component of the states' traditional police powers.[108] The fact that the defendants are multinational corporations does not diminish the states' interest, as each state has a recognized stake in protecting resources within its domain even when the threatening activity occurs elsewhere. Centralization is sometimes justified to prevent a regulatory "race to the bottom," but that concern is implicated only where states adopt standards weaker than federal law; these suits seek to impose liability that the Clean Air Act does not provide—an effort to go beyond, not undercut, federal law. The benefits ordinarily associated with decentralization, by contrast, favor preserving state common law here: decentralized lawmaking can leverage local knowledge, be tailored to local conditions, and promote diversity in the development of legal rules. Because compensatory relief for climate harm is itself an adaptation function—and adaptation needs are highly variable and contextual—decentralized state authority is a particularly appropriate default.

The case for preemption is weaker still along the dimension that asks whether the authority of multiple actors should be overlapping or distinct. Two entities have overlapping authority if both may regulate—including through the imposition of liability—the same activity; authority is distinct if only one may do so. Various benefits may flow from distinct allocations of authority: avoiding the waste and inefficiency that duplicative regulation can impose on both regulators and regulated entities; preventing the adoption of conflicting standards by different regulators; and reducing the risk of under-regulation from a "regulatory commons," in which each co-regulator declines to act in the hope that another will.[109] None of these benefits, however, is apt to flow from precluding common law remedies that supplement statutory climate programs. Courts in different jurisdictions rarely exercise authority over the same allegedly tortious conduct, and where they do—as when suits against the same defendant are filed in multiple fora—consolidation is often available. Critically, whatever cross-jurisdictional concern might attach to the standard-setting function of equitable relief is irrelevant to money damages: multiple damages awards cannot impose conflicting primary-conduct obligations, because a defendant found liable in several suits simply

[107] *Id.* at 35.

[108] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens.").

[109] *Id.* at 50 (Figure 2.5).

pays all the plaintiffs who have prevailed against it. Nor do damages awards conflict with affirmative regulation by EPA or an authorized state regulator, since the Clean Air Act authorizes no damages remedy for personal injury, property damage, or local adaptation costs. And the regulatory-commons concern is inapt because courts must adjudicate the cases properly brought before them; strategic inaction designed to foist a problem onto others is not a possibility for an adjudicative body.

Whereas the arguments for distinct authority are weak, the case for overlapping authority—in which courts supplement regulatory standards by adjudicating common law claims—is compelling. Although overlapping authority sometimes creates redundancy, concurrent jurisdiction also provides a valuable safety net when one regulator fails to act effectively to promote statutory goals—a benefit whose value is highest where the costs of under-regulation are high or irreversible, an apt description of unabated climate harm and the millions in infrastructure costs the *Suncor* plaintiffs have incurred. That risk is not theoretical: the current administration maintains that the Clean Air Act gives EPA no authority to regulate greenhouse gas emissions at all. It is simultaneously seeking to foreclose state-law avenues, suing to block state legislation—modeled on the federal Superfund statute—that would compel the energy industry to reimburse subnational governments for climate adaptation costs.[110] Where the federal government has withdrawn from managing climate change, decentralized cost internalization through state tort law is plainly preferable to no internalization at all.

Fundamental common law principles and longstanding constitutional doctrine support a broad conception of state tort law—one that gives those harmed by others a meaningful opportunity to seek redress. The Clean Air Act's savings clauses embody that conception: Section 304(e) preserves the right of "any person (or class of persons)" to pursue "any other relief" under statute or common law, and Section 116 preserves state authority more generally. Congress thus built the modern environmental framework to operate alongside—not in place of—a system of complementary and overlapping federal and state authority, an allocation that leverages local knowledge, tailors relief to highly variable local conditions, and harnesses the redundancy of concurrent jurisdiction as a safety net for cost

[110]*See* Kristina McKean, *The Pending Fate of Climate Superfund Statutes*, GEO. ENV'T L. REV. (Jan. 29, 2026), https://www.law.georgetown.edu/environmental-law-review/blog/the-pending-fate-of-climate-superfund-statutes/#_ftn12

internalization when federal regulation falls short. Both doctrine and federalist structure therefore support allowing state courts to hear not only a case like *Suncor*—a subnational government's common law fraud claim—but a considerably broader swath of suits. The same savings clauses that preserve Boulder County's action preserve the claims of nongovernmental plaintiffs, and the same structural logic that supports fraud liability supports the full range of state common law theories—nuisance, negligence, and trespass among them—by which the injured may seek compensation for significant harms caused by polluters. The polluter-pays principle does not turn on the identity of the plaintiff or the label affixed to the claim.

Finally, the industry's legislative contingency plan confirms that current law does not preempt these suits. Representative Hageman and Senator Cruz have introduced bills that would require immediate dismissal of any climate suit brought by a state or local government seeking compensation for climate-related costs.[111] These proposals are relevant to the preemption analysis in one important respect: if the Clean Air Act already preempted this litigation, no such legislation would be needed. The introduction of these bills is an implicit concession that the existing statutory and constitutional framework does not foreclose the suits—and that foreclosing them requires new affirmative action by Congress. That is precisely the kind of clear congressional statement that preemption doctrine demands before courts will find that state remedies have been displaced.

VII. Conclusion

The preemption arguments advanced in *Suncor* are the latest, and perhaps most ambitious, effort to weaponize federal law to prevent polluters and fraudsters from paying for the harms they cause. They are without legal merit. The Clean Air Act does not expressly preempt state common law climate damage claims; its savings clauses affirmatively preserve them. The *Suncor* petitioners' foreign affairs preemption argument fares no better. Rather than directly engaging in the conduct of foreign relations, climate tort suits are private law adjudications seeking compensation for domestic harm, with no extraterritorial reach. The *Suncor* plaintiffs' fraud and deception claims are further still from any plausible basis for preemption: no federal statute has been held to preempt state common law fraud claims, and the Clean Air Act

[111] H.R. 8330, 119th Cong. (2025); S. 4340, 119th Cong. (2025). The bills invoke national-security and foreign-affairs rationales—the same arguments the courts rejected in the Colorado and Hawaii cases.

regulates what companies emit; it does not immunize them for what they concealed.

At stake in *Suncor* is not merely a technical question of preemption doctrine but the fundamental structure of accountability in the American legal system. Boulder County and dozens of similar plaintiffs seek reimbursement for the real costs (ultimately borne by their taxpayers) for harm allegedly caused by corporations that knew the consequences of their conduct and concealed them. The common law of tort, one of the oldest and most established expressions of state sovereignty, provides those governments with a path to compensation, and federal preemption doctrine, properly understood, does not foreclose it. Communities that have suffered real harm deserve the opportunity to make their case before a court of law; the corporations that allegedly caused that harm deserve the opportunity to defend themselves. The Constitution does not—and should not—shield energy companies from paying for the harms they cause.