No. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., et al.,
Petitioners,

v.

COUNTY COMMISSIONERS
OF BOULDER COUNTY, et al.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Colorado

BRIEF OF FORMER EPA ADMINISTRATORS, OFFICIALS, AND SENIOR CAREER STAFF, AND ENVIRONMENTAL PROTECTION NETWORK, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The individual amici are former Environmental Protection Agency ("EPA") administrators, officials, and senior career staff who have collectively served across several Republican and Democratic administrations. Together, they have decades of experience implementing the Clean Air Act and they each remain deeply committed to ensuring that the Act is properly interpreted and that the Agency's role in administering the Act remains consistent with congressional intent and historical practice.

Amicus Environmental Protection Network ("EPN") is a non-profit organization whose members include more than 750 former EPA officials and employees, political and non-political appointees alike, with experience dating back to at least the Carter administration. EPN harnesses the expertise of former EPA career staff and political appointees who volunteer their time to provide the unique perspective of former regulators with decades of historical knowledge and subject matter expertise.

Amici write to share their knowledge of the purpose, structure, and implementation of the Clean Air Act, the scope of the Agency's authority under the Act, and the important role the Act preserves for states in addressing air pollution. Informed by their deep expertise in EPA's processes and procedures, amici share the view that state court deceptive advertising and consumer protection lawsuits like Boulder's do

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[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity, other than the amici curiae, their counsel, and the Clean Break Fund, made a monetary contribution to the preparation or submission of this brief.

not in any way conflict with the purposes of the Act or EPA's administration of the Act. The stated purposes of the Act are to improve air quality and promote public health and welfare through a regime of cooperative federalism. At no time since the Act's enactment in 1970 has it been applied or construed as regulating the fields of truthful advertising or consumer protection that are at issue in this case.

The individual amici, listed alphabetically, are:

- Robert Brenner, who served as the Director for the Office of Policy Analysis and Review in EPA's Office of Air and Radiation from 1988 through 2011 and concurrently served as Deputy Assistant Administrator in the Office of Air and Radiation from 1999 through 2005. For his work implementing the Clean Air Act, Mr. Brenner received Presidential Rank Awards of Distinguished Executive in 2003 and Meritorious Senior Executive Service in 1993 and 1998.

- Phillip Brooks, who served as the Director of the Air Enforcement Division within the Office of Civil Enforcement in EPA's Office of Enforcement and Compliance Assurance from 2011 to 2020.

- Jonathan Cannon, who served as EPA's General Counsel from 1995 to 1998 and Assistant Administrator for EPA's Office of Administration and Resource Management from 1993 to 1995. Mr. Cannon also served in senior positions at EPA from 1986 to 1990.

- David Dickinson, who served as an Attorney-Advisor within EPA's Office of Air and Radiation from 1991 to 2025.

- Robert Dreher, who served as EPA's Deputy General Counsel from 1997 to 2000 and Senior Advisor to the General Counsel from 1996 to 1997.
- Susmita Dubey, who served as an Attorney in EPA's Office of General Counsel from 1993 to 2023, with 24 years of that time in the Air and Radiation Law Office.
- Alan Eckert, who served at EPA from 1970 to 2004, including as the Associate General Counsel for the Air and Radiation Law Office in EPA's Office of General Counsel from 1986 to 2002.
- Avi Garbow, who served as EPA's General Counsel from 2013 to 2017, as well as Deputy General Counsel from 2009 to 2013 and EPA Senior Counselor to the Administrator in 2021.
- Joseph Goffman, who served as Assistant Administrator for EPA's Office of Air and Radiation from 2024 to 2025, Principal Deputy Assistant Administrator in that office from late 2021 through 2024, and Acting Assistant Administrator for the remainder of 2021.
- John Hannon, who served as an Assistant General Counsel from 1995 to 2014 and as an Attorney from 1990 to 1995 in the Air and Radiation Law Office in EPA's Office of General Counsel, and as an Attorney-Advisor in EPA's Office of Air and Radiation from 1985 to 1990.
- Janet McCabe, who served as Deputy Administrator of EPA from 2021 to 2024, Acting Assistant Administrator for EPA's Office of Air and Radiation from 2013 to 2017, and Deputy Assistant Administrator of that office from 2009 to 2013.

- Gina McCarthy, who served as the EPA Administrator from 2013 to 2017, and as Assistant Administrator for EPA's Office of Air and Radiation from 2009 to 2013.
- Kevin McLean, who served as a Deputy Associate General Counsel from 2005 to 2013, as an Assistant General Counsel from 1995 to 2005, and as an Attorney from 1990 to 1995 in the Air and Radiation Law Office in EPA's Office of General Counsel.
- David Orlin, who served as an Assistant General Counsel from 2014 to 2022, and as an Attorney from 2004 to 2014 in the Air and Radiation Law Office in EPA's Office of General Counsel.
- Richard Ossias, who served as Associate General Counsel and Director of the Air and Radiation Law Office in EPA's Office of General Counsel from 2005 to 2011, and as Deputy Associate General Counsel in that office from 1995 to 2005. Mr. Ossias was also an Attorney with that office from 1980 to 1995.
- Bob Perciasepe, who served as EPA Deputy Administrator from 2009 to 2014 and as Assistant Administrator for EPA's Office of Air and Radiation from 1998 to 2001.
- William Reilly, who served as the EPA Administrator from 1989 to 1993.
- Eric Schaffer, who served as Director of the Office of Civil Enforcement within EPA's Office of Civil Enforcement and Compliance Assurance from 1997 to 2002, and Deputy Director of EPA's Office of Compliance from 1994 to 1997.

- Mike Thrift, who served as an Attorney in the Air and Radiation Law Office in EPA's Office of General Counsel from 1992 to 2025.
- Jan Tierney, who served as an Attorney in the Air and Radiation Law Office in EPA's Office of General Counsel from 1990 to 2020.

SUMMARY OF ARGUMENT

Nothing in the text or structure of the Clean Air Act preempts respondents' ("Boulder's") Colorado state law tort claims. Preemption of those deceptive advertising and consumer protection claims—which are firmly anchored in the state's traditional police powers—would seriously encroach upon state sovereignty. Petitioners ("Suncor") and their amici fall far short of establishing the requisite clear and manifest congressional purpose necessary to justify that intrusion.

In arguing otherwise, Suncor and its amici principally attack claims that Boulder *does not* assert: claims to "regulate" out-of-state emissions sources. Indeed, their reliance on *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), depends entirely on recasting Boulder's deception and other tort claims as efforts to impose emission controls. But Boulder's claims seek only to recover money damages for Suncor's misleading promotional and other tortious conduct relating to the sale of fossil fuel products. Even if successful, those claims do not seek to, and will not, impose any emissions controls or limitations on any sources. Boulder's claims thus fall far outside any sphere of regulation covered by the Act, and *Ouellette* is inapposite.

Suncor and its amici's arguments also badly misconstrue the text, structure, and purposes of the Clean Air Act. The central purpose of the Act is to reduce air pollution to protect public health and welfare. Far from vesting the EPA with exclusive federal control over all emissions, the Act expressly provides for a significant state role in devising additional mechanisms for helping to achieve that broad public policy goal. Indeed, every major program under the Act is structured to permit the EPA to set *minimum* emission standards or controls, while in most instances authorizing the states to regulate those same emissions more stringently. Boulder's claims, which principally target Suncor's allegedly deceptive and tortious sales conduct, pose no obstacle to the statutory goals and structure.

Essentially, Suncor argues that Boulder's claims must be found preempted, not because they actually conflict with the Act, but because they may indirectly or tangentially affect fossil fuel emissions through an "attenuated" chain of causation—that is, they may result in a judgment that encourages Suncor voluntarily to take steps that may lead to fewer emissions from its products. But a *reduction* in harmful emissions would not conflict with the Act's purposes. Nor would it conflict with EPA's administration of the Act. While Congress authorized the EPA to set and enforce minimum federal standards, Congress has never suggested that the Agency should encourage, let alone require, polluters to emit *up to* the ceiling set by those standards.

Any reduction in emissions resulting from Boulder's lawsuit would, in any event, be incidental: Suncor worries that imposing monetary liability against fossil fuel companies might affect its financial stability and impel it to reduce output of fossil fuel products, thereby resulting in lower emissions. But that same argument could be directed against many other types of lawsuits against fossil fuel companies, and many other traditional state regulations as well (such as imposing taxes or minimum wages). It would stretch conflict preemption far beyond any recognized limits to foreclose state action on that basis.

Suncor and its amici's final arguments are similarly unavailing. Suncor suggests, without any evidence, that a judgment in Boulder's favor could disrupt the fossil fuel market. But the Clean Air Act's purposes and objectives do not include protecting the fossil fuel energy market. Suncor also suggests that lawsuits like Boulder's will affect EPA's ability to set appropriate emissions standards. But the Agency has always applied the Act against the backdrop of market uncertainties in regulated industries (including the possibility that companies may be sued or otherwise endure financial setbacks) and parallel state regulation. To the extent the impacts of such lawsuits are in any way relevant to the statutory factors EPA considers when regulating, EPA is amply equipped to take those impacts into consideration, including through notice-and-comment rulemaking and its own internal expertise.

ARGUMENT

I. Implied Preemption is Disfavored and Narrowly Drawn

Although the Clean Air Act contains express preemption provisions, Suncor and its amici do not contend that anything in the Act expressly preempts Boulder's claims. Instead, they principally assert that the Act *implicitly* preempts Boulder's claims because those claims purportedly interfere with the Act's purposes and the methods by which EPA pursues them. Pet. Br. 45; U.S. Br. 28-29. Suncor also makes the perfunctory argument that the Clean Air Act preempts the entire field of emissions regulation, Pet. Br. 44, an argument that Suncor's amicus United States does not join.

"The preemption of state laws represents 'a serious intrusion into state sovereignty.'" *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 773 (2019) (plurality opinion) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996)). For that reason, "in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," the Court "start[s] 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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation omitted). The presumption against preemption "has greatest force … in an area traditionally governed by the States' police powers." *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (plurality opinion).

'[T]he purpose of Congress is the ultimate touchstone" of preemption analysis. *Wyeth*, 555 U.S. at 565 (quotation omitted). That purpose must be evident in the statute itself, as it is settled that "[i]mplied preemption analysis does not justify a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quotation omitted). "Invoking some brooding federal interest" is "never … enough to win preemption of a state law." *Va. Uranium*, 587 U.S. at 767. Rather, "all preemption arguments[] must be grounded 'in the text and structure of the statute at issue.'" *Kansas v. Garcia*, 589

U.S. 191, 208 (2020) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U. S. 658, 664 (1993)).

A "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 563 U.S. at 607 (quotation omitted). Where, as here, Congress has enacted specific provisions that define the preemptive reach of a statute, that affirmative enactment "implies that matters beyond that reach are not preempted." *Cipollone v. Liggett Grp., Inc.*, 505 U. S. 504, 517 (1992). Additionally, field preemption may only be found when "Congress [has] legislated so comprehensively in a particular field that it left no room for supplementary state legislation." *Kansas*, 589 U.S. at 208 (quotation omitted).

Suncor does not meet the "high threshold" of establishing clear and manifest congressional intent to preempt Boulder's claims under field or obstacle preemption. Boulder's wrongful promotion and other tort claims are deeply rooted within its traditional state police powers. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (advertising); *CTS Corp.*, 573 U.S. at 19 (nuisance and other torts). The Clean Air Act regulates emissions of air pollutants, while Boulder's claims do not. Boulder's claims, even if successful, will not impose any emission controls on anyone; nor will they result in the state court enjoining petitioners from engaging in any emitting or fossil fuel activity. But even if Boulder's claims came close to regulating emissions, the state court's adjudication of those claims would still not conflict with the Act, which expressly allows for more stringent state regulation of many emissions, including greenhouse gases. Boulder's claims are plainly not field preempted either, especially given the Act's express savings clauses for state action.

II. The Clean Air Act Provides for Robust State Regulation of Emissions and Does Not Limit State Regulation of Other Fields

The central purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."42 U.S.C. §7401(b)(1); *see* S. Rep. No. 91-1196 at 1 (1970) (Clean Air Act's purpose is "to attack a critical and growing national problem of air pollution" due to "deep concern for protection of the health of the American people"); *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 256 (1976) (the Act was a "remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution"). The Act principally pursues that goal by "regulat[ing] pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 308 (2014).

Congress recognized that "air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. §7401(a)(3). Congress therefore made "the States and the Federal Government partners in the struggle against air pollution" under the Act. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990); *see also Ohio v. E.P.A.*, 603 U.S. 279, 283 (2024) ("The Clean Air Act regulates air quality through a federal-state collaboration.") (quotation omitted). As discussed below, the fundamental structure of every major program under the Act requires

EPA to set *minimum* federal emission standards or controls—that is, standards or controls that set a ceiling for emissions—while generally leaving states (and often local governments) free to regulate emissions more stringently. Indeed, another express purpose of the Act is "to encourage or otherwise promote reasonable … State[] and local governmental actions … for pollution prevention." 42 U.S.C. §7401(c).

While the Act preserves broad state authority over emissions in almost all instances, its plain terms do not reach beyond that. Nowhere does the Act purport to limit, or to authorize EPA to limit, traditional state authority in other areas besides emissions. A brief survey of the main pollution control programs under the Act demonstrates both the limited subject matter of the Act and the substantial role it reserves for the states.

A. National Ambient Air Quality Standards

The flagship program of the Clean Air Act—the national ambient air quality standards ("NAAQS") program—is a quintessential example of cooperative federalism. *See Sierra Club v. Korleski*, 681 F.3d 342, 343 (6th Cir. 2012). Under this program, EPA currently establishes nationwide air quality standards for six main pollutants that are emitted "from numerous or diverse mobile or stationary sources." *W. Virginia v. E.P.A*, 597 U.S. 697, 707 (2022); *see* 42 U.S.C. §§7408–7410. A NAAQS designates "the maximum airborne concentration of [the] pollutant that the public health can tolerate." *W. Virginia*, 597 U.S. at 707 (quotation omitted). EPA "does not choose which sources must reduce their pollution" or "by how much to meet the ambient pollution target." *Id.* That responsibility lies with the states, which must develop state implementation plans to attain the NAAQS within their state. *Id.*

States have "considerable latitude" in developing their plans, and EPA generally has "no authority to question the wisdom of a State's choices of emission limitations." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 86–87, 79 (1975)). In particular, states may impose regulations in their plans that are more stringent than required to meet the NAAQS, and EPA is statutorily required to approve those plans if they meet the minimum requirements of the federal program. *Union Elec.*, 427 U.S. at 265-66. EPA also cannot disapprove a state plan for being "economically … infeasible." *Id.* The weighing of economic factors is committed to the states. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 470 (2001) (citing *Union Elec.* 427 U.S. at 266).

State plans, once approved by EPA, are enforceable as federal law. *Union Elec.*, 427 U.S. at 268; 42 U.S.C. §7413. In addition, states retain authority to establish their own, state-law ambient standards with levels, timetables, and implementation requirements that differ from the federal program's. *See, e.g.*, Cal. Code Regs. tit. 17, §§70200, 70200.5 (California's ambient air quality standards).

B. Stationary Sources

The two main programs by which EPA governs stationary sources are the new source performance standards program, 42 U.S.C. §7411, and the hazardous air pollutants program, *id.* §7412. *See W. Virginia,* 597 U.S. at 707. While EPA performs the primary initial role in developing standards under both programs, the Act explicitly allows states to adopt more stringent standards.

1. The new source performance program is the program through which EPA directly regulates stationary source emissions of NAAQS pollutants and their precursors, as well as certain other pollutants. This is the primary program EPA has used to regulate greenhouse gas emissions from stationary sources. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"). Under this program, EPA identifies categories of stationary sources that "'caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" and it then promulgates federal standards of performance for new or modified sources in each category. *Id.* (alterations in original) (quoting 42 U.S.C. §7411(b)(1)(A)). EPA's standards must reflect, after considering a variety of factors including cost, the amount of emissions limitation "achievable through the application of the best system of emission reduction" that EPA determines has been "adequately demonstrated." *W. Virginia*, 597 U.S. at 709 (quoting 42 U.S.C. §7411(a)(1).

This section of the Act also establishes a companion program for existing sources. Once EPA "'has set *new* source standards addressing emissions of a particular pollutant,' 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or [hazardous air pollutant] programs." *W. Virginia*, 597 U.S. at 710. "For existing sources, EPA issues emissions guidelines, *see* 40 C.F.R. §§60.22, 60.23 …; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, §7411(d)(1)." *AEP*, 564 U.S. at 424.

2. The hazardous air pollutant program targets toxic pollutants, including substances known or anticipated to be "carcinogenic, …. neurotoxic," or otherwise "acutely or chronically toxic." *W. Virginia*, 597 U.S. at 708 (quoting 42 U.S.C. §7412(b)(2)). For these pollutants, EPA sets standards that "directly require all covered sources to reduce their emissions to a certain level." *W. Virginia*, 597 U.S. at 708. For major sources, EPA sets that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. *Id.* (quoting 42 U.S.C. §7412(d)(3)). EPA is required to tighten the standard if necessary to address residual health risks remaining after the technology-based level is implemented. 42 U.S.C. §7412(f)(2). States may submit plans for implementing and enforcing the federal standards, *id.* §7412(*l*), and, upon approval, those states become authorized to administer the federal standards, 40 C.F.R. §63.90.

3. Although EPA sets minimum emissions standards for stationary sources under these two programs, state and local governments retain broad authority to further regulate those emissions and sources. The Act's saving clause expressly provides that state and local governments may impose stricter regulations on stationary sources, stating that except as otherwise provided with respect to certain mobile sources, "nothing … shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. §7416. Only less stringent standards are preempted: "[I]f an emission standard or limitation is in effect under an applicable implementation plan or under [the

hazardous air pollutant or new source performance standards program], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." *Id.*[2]

C. Mobile Sources

EPA establishes emission standards for new motor vehicles with respect to pollutants that EPA has determined "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Massachusetts v. E.P.A.,* 549 U.S. 497, 506 (2007) (quoting 42 U.S.C. §7521(a)(1)).

The Act generally preempts state standards "relating to the control of emissions from new motor vehicles," 42 U.S.C §7543(a), with one major exception: The Act permits California to adopt more stringent emissions standards for new motor vehicles, *id.* §7543(b)(1)(B), and allows other states to adopt California's stricter limits, *id.* §7507. *See Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A.,* 627 F.2d 1095, 1095 (D.C. Cir. 1979). Specifically, this exception requires EPA to waive preemption for California's motor vehicle standards unless it makes certain findings under a highly deferential standard of review. *Motor & Equip. Mfrs. Ass'n,* 627 F.2d at 1095, 1105-12, 1120, 1124. Congress's intent in creating this exception was to "'afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and

[2] In a different savings clause, the Act provides that "[n]othing in this section [regarding federal citizen suits] 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.*" 42 U.S.C. §7604(e) (emphasis added).

the public welfare.'" *Id.* at 1110 (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977), U.S. Code Cong. & Admin. News 1977, p.1380).

As a result of this exception, large swaths of the country had motor vehicle emissions standards that were more stringent than EPA's and for which EPA had issued waivers to California.[3] For example, as of May 2025, 17 states and the District of Columbia had adopted some subset of California's standards. *See* Cong. Rsch. Serv., R48168, *California and the Clean Air Act (CAA) Waiver: Frequently Asked Questions* (May 9, 2025) at 7, *available at* https://www.congress.gov/crs-product/R48168. Along with California, those states accounted for almost 40% of new light-duty vehicle registrations and 25% of new heavy-duty vehicle registrations in the United States in 2023. *Id.*

Although this Court held that EPA may regulate greenhouse gases under the Act's mobile source program, *see Massachusetts,* 549 U.S. at 527–35, EPA recently determined that it does not have statutory authority to do so. *See* 91 Fed. Reg. 7686 (Feb. 18, 2026).

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[3] For the current status of waivers, see EPA, *Vehicle Emissions California Waivers and Authorizations,* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (last visited July 27, 2026).

III. Boulder's State Law Tort Claims Do Not Interfere with the Clean Air Act's Regulation of Emissions.

A. Boulder's deceptive advertising and consumer protection claims are not field preempted

Suncor's assertion that the Clean Air Act preempts the entire field of "interstate pollution regulation," Pet. Br. 44, rests on the flawed premise that Boulder's claims for deceptively advertising and knowingly selling harmful fossil fuel products regulate within that field. That vast overstatement does not withstand scrutiny. *See infra* at 18-20; *Kansas*, 589 U.S. at 209-10 (no field preemption where challenged state law regulated outside the field of the federal law). Even if Boulder's claims could be construed as somehow regulating some aspect of the field of interstate emission controls (which they do not), it is clear that Congress has not "legislated so comprehensively" under the Act that it "left no room for supplementary state" regulation. *Kansas*, 589 U.S. at 208 (quotation omitted). Far from retaining exclusive federal control, the Act expressly contemplates and authorizes additional state regulation beyond EPA's. *See, e.g.*, 42 U.S.C. §§7416, 7543(b) (savings clauses); *supra* at 12-16.

Suncor's reliance on *Ouellette*, 479 U.S. 481, to contend otherwise is misplaced. *Ouellette rejected* field preemption, holding that similar savings clause language in the Clean Water Act "negates the inference that Congress left no room for state causes of action" to address interstate water pollution. *Id.* at 492. Even under a conflict preemption analysis, *Ouellette* held that states affected by out-of-state discharges *may* regulate interstate water pollution by enforcing the law of the source state against the discharger—further dooming Suncor's attempt to rely on *Ouellette* to assert field preemption of all interstate pollution. *See id.* at 497–98.

B. Boulder's claims do not conflict with the Clean Air Act because they do not regulate emissions

The text and structure of the Act do not demonstrate any congressional intent to foreclose tort claims like Boulder's, because there is no conflict between those claims and the Act's language and scope. State tort laws that prohibit defendants from misleading the public about the dangers of emissions caused by their products, or from engaging in the knowing production and sale of products on a scale that causes harmful levels of emissions, clearly do not pose any obstacle to the Clean Air Act's central purpose of reducing air pollution in furtherance of promoting public health and welfare.

Nor does state tort law pose any obstacle to the Act's statutory methods of achieving that goal by controlling or limiting emissions from sources. Boulder's claims target different conduct from the emitting activities regulated by the Clean Air Act. One set of Boulder's claims seeks to hold Suncor liable for deceptively marketing its fossil fuel products, including by failing to warn and intentionally misleading the public about its fossil-fuel products' role in contributing to the impacts of climate change. Resp. Br. 4. The second seeks to hold Suncor liable for "knowingly caus[ing] and contribut[ing] to the alteration of the climate" through its production, refining, promotion, and sale of fossil fuels. *Id.* Neither set seeks to impose liability for Suncor's emissions or emitting activities that are regulated by the Act.

Boulder's requested remedies do not seek to impose limits on Suncor's or anyone else's emissions either. Boulder seeks only monetary relief. JA 137-38. A favorable verdict would not mandate or require Suncor (or any source regulated by the Act) to reduce emissions, would not impose any emission controls or standards, would not modify or affect any permit issued under the Act, would not change any regulations issued under the Act, and would not require anyone to produce, sell, use, or consume fewer fossil fuel products.

Boulder's deceptive marketing claims are particularly far afield from any authority EPA exercises, or any tasks EPA or states perform, to implement the Act. *See* Resp. Br. 49. The Act does not contain any provisions that enable or require EPA to regulate product marketing generally, whether with respect to emissions or otherwise. *See supra* at 10-17; 42 U.S.C. §§7401 *et seq*. The only labeling requirements imposed by the Act—which are at best a distant cousin to marketing regulation—obligate motor vehicle manufacturers to permanently affix under-hood tags or labels to new cars or engines certifying compliance with EPA's mobile vehicle emissions standards, 42 U.S.C. §7541(c), and require products containing or manufactured with certain ozone depleting substances to include a label specifying the substance and that it depletes ozone, *id*. §7671j. Congress plainly knew how to direct EPA to regulate disclosures and warnings but generally chose not to do so in the Clean Air Act—let alone to provide EPA exclusive authority over the broader arena of marketing. *Cf. Monsanto Co. v. Durnell*, 609 U.S. ___, 2026 WL 1825691, *2, *5 (U.S. June

25, 2026) (Congress vested EPA with exclusive labeling authority under FIFRA by expressly "prohibit[ing] States from imposing 'any requirements for labeling or packaging in addition to or different from those required'" by EPA) (quoting 7 U.S.C. §136v(b)). The promotional conduct at issue in Boulder's claims falls far outside the scope of the Act.

Suncor and its amici are unable to identify any specific provision of the Act, or any specific implementation of the Act by EPA, as to which Boulder's claims would conflict or pose an obstacle to achieving. Petitioners refer to the new source performance standard program for stationary sources. Pet. Br. 45; U.S. Br. 29. But even if Boulder's state law claims actually sought to regulate a facility's emissions or emitting activity (which they do not), the Act's saving clause expressly authorizes states to regulate emissions from stationary sources more stringently than EPA does. 42 U.S.C. §7416. And clearly, whatever obligations state law imposes on Suncor with respect to truthful advertising or consumer protection will not prevent any regulated stationary sources from achieving compliance with any emissions limitations EPA has set.[4]

Contrary to the United States' contention, U.S. Br. 29, 33-34, the fact that Boulder's claims address "upstream" fossil fuel products does not mean that they conflict with EPA's regulation of "downstream" emissions. *See Va. Uranium*, 587 U.S. at 777–78 (rejecting argument that state regulation of mining would conflict with Act's regulation of "later stages of the

[4] Amicus United States concedes that the logical consequence of its position that EPA lacks statutory authority to regulate greenhouse gas emissions from motor vehicles is that there can be no conflict with those aspects of the Act. U.S. Br. 34.

nuclear fuel life cycle": "A sound preemption analysis cannot be as simplistic as that."). The United States' argument is not furthered by its citation to *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012), *see* U.S. Br. 33, because that case dealt with field preemption: the federal statute occupying "the entire field of regulating locomotive equipment," including the "design [and] construction … of every part of the locomotive" plainly applied to state law claims against both manufacturers and railroads. *See Kurns*, 565 U.S. at 631-32, 636. There is no field preemption issue here.

Suncor and its amici also rely on *Ouellette* to contend that Boulder's claims conflict with what they view as the Act's implicit preclusion of state regulation of interstate emissions. Pet. Br. 45-46; U.S. Br. 30. *Ouellette* involved a defendant whose discharges of pollutants into the waters of one state (the source state, New York) affected the waters of another (the affected state, Vermont). 479 U.S. at 483-484. The plaintiff sued, alleging that those discharges violated Vermont law. *Id.* at 484. The Court held that the Clean Water Act precluded "applying the law of an affected State" to restrict the pollution discharges of "an out-of-state source." *Id.* at 494. The Court reasoned that holding a New York source liable for violations of Vermont's pollution law would "effectively override" the terms of the Clean Water Act permit that New York had issued and thus "would undermine the [Act's] important goals of efficiency and predictability in the permit system" by subjecting every source "to a variety of common-law rules established by the different States along the interstate waterways." *Id.* at 495-96.

That reasoning is entirely inapplicable. Boulder's deceptive advertising and other tort claims do not seek to impose liability on any out-of-state emissions source for any polluting activities. A judgment in Boulder's favor would not override the terms of any Clean Air Act permit under which any out-of-state source is operating, nor would it impose any emissions limitation in any other state. To the contrary, out-of-state sources would remain subject to the emissions requirements of their respective states and EPA only. Thus, even if the Clean Air Act precluded direct state regulation of interstate emissions, Boulder's claims would not implicate that concern.

Even under *Ouellette*'s reasoning, the Clean Air Act would not preempt all state regulation of interstate emissions. *Ouellette* held that the plaintiff remained free to assert claims against the defendant in Vermont state court under the law of the source state (New York). 479 U.S. at 498-99. Thus, even if Boulder's claims regulated interstate emissions, Boulder would remain free to assert claims under source state law. Suncor and its amici do not argue that such claims should be preempted; the Colorado Supreme Court did not address the issue below; and there has been no showing or explanation of how any such preemption argument might or might not appropriately apply to Boulder's case. Thus, even if *Ouellette*'s reasoning were applicable, it would not foreclose Boulder's case.

C. Any indirect effect that Boulder's claims may have on emissions or emitting activity does not conflict with the Clean Air Act

What Suncor and its amici really mean when they assert that Boulder's claims "regulate" emissions is that they believe that Boulder's lawsuit, if successful, could indirectly and through what they describe as a very "attenuated" chain of causation eventually result in less fossil fuel production and sales by Suncor and others and, therefore, correspondingly reduced emissions of some of the pollutants EPA regulates. Pet. Br. 31, 36; U.S. Br. 32. That possibility—even if later borne out—provides no basis for finding that the Act preempts these state tort claims.

1. Suncor and its amici do not identify a single provision of the Act pertaining to EPA's regulation of greenhouse gases with which a *reduction* in emissions would conflict. Under the Act, EPA sets and enforces standards that set a ceiling for emissions. *Supra* at 10-16. EPA has no interest in—and certainly is not charged with—ensuring or encouraging polluters to emit *up to* the full extent of that ceiling. The purpose of the Act, after all, is to reduce emissions to protect public health. 42 U.S.C. §7401(b)(1). States and local governments are therefore expressly authorized to require reductions in emissions below the ceiling set by EPA. *Id.* §7416. Any reduction that may be a collateral consequence of Boulder's lawsuit would be fully consistent with the purposes, objectives, and EPA's administration of the Act. *See Whiting*, 563 U.S. at 606 (rejecting argument that stricter state regulation was implicitly preempted because it would upset the "balance" struck by federal regulation).

In contending otherwise, Suncor and its amici misconstrue the Act as charging EPA with the responsibility to determine the optimum level of pollution for society in general, such that the purposes and administration of the Act are hindered whenever state action results in fewer fossil fuel product sales or in fewer emissions than the maximum allowed by EPA. But this Court recently rejected the argument that under the Clean Air Act "Congress implicitly tasked

[EPA], and [EPA] alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." *W. Virginia*, 597 U.S. at 729–30 (rejecting argument that *AEP*, 564 U.S. 410, confers that power on EPA). Then as now, "[t]here is little reason to think Congress assigned such decisions to the Agency." *Id.*

Suncor's arguments, if accepted, would also preempt many state laws and lawsuits that have never before been thought to conflict with the Act, even though the elements of those claims involve air pollution emissions—including, for instance, false advertising claims for misrepresenting emissions from cars or for claiming a fuel product burns cleaner and does not contribute to traditional air pollution. *See, e.g.*, *AG Paxton: Texas to Receive $50 Million in Judgment against Volkswagen* (Nov. 18, 2016) (Texas obtained $50 million in penalties and permanent injunction under Texas Deceptive Trade Practices Act prohibiting car manufacturer from "misrepresenting car emissions" or "falsely representing its cars are environmentally friendly").[5]

2. Any reduction in interstate emissions tied to Boulder's claims would be highly indirect, as a secondary or tertiary effect of the lawsuit (if any). Suncor's insistence that Boulder's lawsuit will "limit interstate greenhouse gas emissions" is predicated on the notion that imposing monetary liability on petitioner

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[5] *Available at* https://www.texasattorneygeneral.gov/news/-releases/ag-paxton-texas-receive-50-million-judgment-against-volkswagen (linking to *In re Volkswagen Clean Diesel Litigation: Consumer Cases*, No. D-1-GN-16-000449 (353 Dist. Ct., Travis County, Tex. Nov. 17, 2016), Agreed Final Judgment and Permanent Injunction)).

companies will affect their financial bottom lines, to which they may respond by producing fewer fossil fuel products, which may in turn result in fewer greenhouse gas emissions (assuming other fossil fuel companies do not fill the gap). Pet. Br. 37-38.

But there are many ways in which states can exercise their traditional police power that will affect fossil fuel companies' operations or finances and thus induce the companies to make business decisions that could reduce the output of products produced or sold. For instance, state or local governments can impose taxes or minimum wages that directly affect fossil fuel refineries, powerplants, and companies' fiscal outlook. Lawsuits under state law can impose significant monetary liability on fossil fuel companies under personal injury or workplace safety claims, shareholder suits, consumer protection or fraud claims, or environmental claims. States and local governments can provide incentives for wind and solar energy development or impose renewable portfolio standards on utilities that reduce demand for fossil fuel companies' fossil fuels. The potential or even intention that such state law actions might have some effect on fossil fuel companies' choices to market, produce, and sell fossil-fuel emitting products (including in *other* states) does not transform them into obstacles to the Act's regulation of greenhouse gases or other emissions. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1206 (9th Cir. 2020) (rejecting argument that conflict preemption applied because state penalties for car dealers installing devices that tampered with emissions systems "may result in the imposition of unexpected (and enormous) liability on [the company]"), *cert denied*, 142 S.Ct. 521 (2021); *see also Commonwealth Edison Co. v.*

Montana, 453 U.S. 609, 636 n.22 (1981) (state tax on coal not preempted because the "Clean Air Act does not mandate the use of coal; it merely prescribes standards governing the emission[s] … when coal is used).

This Court has rejected arguments that indirect economic effects on regulated or even preempted subjects are sufficient to establish federal preemption, even under statutes like ERISA that have broad express preemption clauses. *See, e.g.*, *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 659–60 (1995) (state statute that had an "indirect economic effect on choices made by insurance buyers, including ERISA plans" was not preempted, even though ERISA preempts all state laws that "relate to any employee benefit plan") (quotation omitted); *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 334 (1997) (no ERISA preemption where the challenged statute "alters the incentives, but does not dictate the choices, facing ERISA plans").

The deceptive marketing and products liability conduct at issue in Boulder's claims is similarly remote from any regulation of emissions that the Clean Air Act vests in EPA or the states. While Suncor and its amici rely on *Ouellette* to contend that direct state regulation of out-of-state sources should be preempted, nothing in *Ouellette*—or, more importantly, in the Clean Air Act—indicates that such preemption should reach so broadly as to sweep in state activities that merely indirectly affect emissions in other states. Quite the opposite is true. The Act's express preemption provisions are narrowly focused on direct emission controls—for example, in the case of stationary sources, applying only to "any [state] standard or limitation respecting emissions" that is "less stringent" than EPA's, 42 U.S.C. §7416—thereby indicating that state action outside that scope is not preempted. *Cipollone*, 505 U.S. at 517; *see also Lorillard*, 533 U.S. at 541 ("an express definition of the pre-emptive reach of a statute ... supports a reasonable inference ... that Congress did not intend to preempt other matters") (quotation omitted).

3. Suncor also suggests that a judgment in Boulder's favor could disrupt the fossil fuel market. Pet. Br. 38. That is conjecture at best, fearmongering at worst. At any rate, Suncor offers no support for its implicit assertion that the Clean Air Act's purposes and objectives include ensuring a smoothly functioning fossil fuel market and cheap fossil fuel products—or protecting the fossil fuel energy market over others. *See Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003) (state ban of fuel additive MTBE not preempted, despite alleged effect on gasoline prices, because "a smoothly functioning market and cheap gasoline" are not a "goal" of the Clean Air Act).[6] The central, stated purpose of the Act is to reduce air pollution. 42 U.S.C. §7401(b). Merely assuming, as Suncor does, "that Congress might not have wanted to cause a substantial increase in … prices is not the same as saying that assuring inexpensive gasoline was a goal of the Act." *Oxygenated Fuels Ass'n*, 331 F.3d at 673. The Supremacy Clause cannot "be deployed … to elevate abstract and unenacted legislative

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[6] *See also* S. Rep. No. 91-1196 at 2 ("The protection of public health … will require major action throughout the Nation. Many facilities will require major investments in new technology and new processes. Some facilities will need altered operating procedures or a change of fuels. Some facilities may be closed.").

desires above state law." *Va. Uranium*, 587 U.S. at 777–78.

4. Suncor and its amici contend that Boulder's lawsuit will disrupt EPA's ability to set emissions standards for greenhouse gases and may result in standards that are somehow "miscalibrated." U.S. Br. 29, 34. But EPA's regulations are intended to achieve emissions reductions that protect public health and welfare while considering numerous factors specified in the statute. *See supra* at 10-16. The Agency has always been required to apply those statutory factors against the backdrop of market uncertainties in regulated industries—including the complexities of technological innovation; new information and understanding; the prospect that regulated entities may be sued, may endure financial challenges, may be surpassed by others, may go bankrupt; or be subject to other vicissitudes of business—as well as the impacts of parallel state regulation. To the extent such uncertainty has any relevance to EPA's statutory duties, the Agency can account for it through the rulemaking process, which operates to gather the information relevant to its decision-making. For example, notice and comment procedures allow stakeholders to identify any information they believe may bear on the factors Congress has directed EPA to consider. The Agency also has considerable information-gathering and analytical capabilities of its own. EPA is well equipped to address any real-world uncertainty or impacts caused by Boulder's lawsuit, to the extent they bear on EPA's statutory charges. EPA can also conduct a new notice and comment rulemaking if facts or circumstances change in substantial, legally relevant ways.

Boulder's lawsuit is unlikely to have any relevance to the factors that EPA is directed to consider, let alone to interfere with EPA's ability to consider those factors when regulating emissions. For instance, with respect to new source performance standards, EPA is directed to consider, among other factors, the cost to affected sources of achieving the emission reduction. *See* 42 U.S.C. §7411(a)(1). The technology and cost to achieve an emission standard are unrelated to the potential for legal damages for misleading consumers. While, as explained above, EPA has the capability, in an appropriate situation, to consider market uncertainties or economic conditions in an industry when issuing emission regulations, that does not mean every external factor that may affect an applicable market (let alone individual companies) is relevant to rulemaking—let alone that such external factors, whether due to a lawsuit or otherwise, interfere with EPA's ability to regulate for preemption purposes. Even if Boulder's lawsuit were eventually decided against Suncor, EPA's duty and ability to consider the technology and costs of achieving certain standards (and, to the extent appropriate, any relevant market conditions) would be unaffected.

The history of EPA's actions bears this out. During the pendency of Boulder's lawsuit, EPA has issued many regulations in which it had no reason to consider Boulder's lawsuit and accordingly did not consider it—or any similar lawsuit or potential legal liability for affected industries—in exercising its statutory duty to consider the costs of a proposed emission reduction. For example, in May 2024, EPA promulgated final rules that imposed greenhouse gas emissions reductions on new and existing fossil-fuel-fired electric generating units. *See* 89 Fed. Reg. 39798 (May 7, 2024). Despite these rules' obvious regulatory effects on the oil and gas industry in addition to the electric power generation industry, EPA appropriately did not mention or consider Boulder's lawsuit (or any other potential legal liability facing an affected industry) when it reported the costs and benefits of the rules. *See id.* at 40004–20.

Similarly, in January 2026, EPA promulgated revised emission standards for stationary combustion and gas turbines. *See* 91 Fed. Reg. 1910 (Jan. 15, 2026). Although EPA acknowledged that the rule would apply to entities in the oil and gas extraction, electric power generation, and natural gas distribution sectors, *see id.* at 1911, EPA appropriately did not mention or consider the Boulder lawsuit (or any other potential legal liability facing an affected industry) when it balanced the rule's costs and benefits. *See id.* at 1962–65.

In April 2024, EPA issued a final rule regulating greenhouse gas emissions from heavy duty vehicles (such as trucks and buses), in which EPA considered best estimates of future fuel costs, future costs of electricity, and the cost of State excise taxes. *See* 89 Fed. Reg. 29440, 29461 (Apr. 22, 2024). Despite extended consideration of potentially relevant direct and indirect costs, there was no consideration of costs that might result from pending lawsuits. *See id.* at 29631–54.

In sum, in amici's many years of experience, they are not aware of any EPA regulation under the Clean Air Act that has turned on the potential extrinsic legal liability of individual regulated entities that arose from an unrelated area of law—or of any reason to think that EPA could not consider and address the impacts of claims like Boulder's if appropriate to do so. Extending preemption to foreclose such state lawsuits would go far beyond anything contemplated by Congress or the Act.

CONCLUSION

The Colorado Supreme Court's judgment should be affirmed.

Respectfully submitted,

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