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

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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. Boulder County's[1] lawsuit against Suncor Energy and Exxon Mobil Corporation, filed in state court in 2018, seeks to recover those costs from the companies whose products allegedly caused them.[2] 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. 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 islands of Puerto Rico—have filed similar suits in state courts across the country. Together, these cases constitute the most significant wave of climate 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

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[1] In addition to Boulder County, San Miguel County and City of Boulder also brought suit (hereinafter Boulder County).

[2] Boulder County's complaint identifies intensified wildfire risk among the climate-related harms for which it seeks compensation.

pay for the harms they cause, 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 are supported by the polluter-pays principle, aptly described as "a fundamental aspect of the public policy embodied in environmental law." An accepted norm of international environmental law, 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."

That form of cost internalization is precisely what the local governments in cases like *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County* are seeking. 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.

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 Office of the Solicitor General filed a brief in *Suncor* supporting dismissal of Boulder County's suit. Members of Congress have introduced legislation that would require immediate dismissal of any climate accountability suit brought by a state or local government. And prominent conservative legal scholars have published commentary urging the Court to extinguish these cases on constitutional grounds. The Court's decision to grant certiorari in *Suncor* confirms that the legal questions these cases raise are significant and require definitive resolution. 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 Essay 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, as 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 crucial compensatory role alongside federal regulation. And there is also no conflict preemption because 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 II, to the extent that there may be any overlap between federal regulation and state common law damages, there are redundancy benefits of overlapping regulation, particularly given the well-documented cost internalization limits of each regulatory regime.[3]

The constitutional foreign affairs preemption argument fares no better. The cases most commonly invoked in its support—*American Insurance Ass'n v. Garamendi* (2003) and *Zivotofsky ex rel. Zivotofsky v. Kerry* (2015)—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 case 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.[4] Most importantly, the core 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

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[3] *See, e.g.*, Sidney A. Shapiro & Robert L. Glicksman, 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 towards 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).

[4] *See infra* Part III.

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 Enterprises v. Raimondo* (2024), courts owe no deference to any agency theory that federal inaction preempts state law. This Essay proceeds in five parts. Part I traces the history of climate liability litigation. Part II examines the Clean Air Act preemption argument. Part III addresses the foreign affairs preemption argument. Part IV addresses the fraud and deception claims as a distinct and independently sufficient basis for liability. Part V examines the broader constitutional, governance, and cost-allocation dimensions. 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 them.

I. 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 nongovernmental plaintiffs sued major greenhouse gas emitters in federal district courts seeking injunctive relief. The plaintiffs 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* (1972) that federal courts may develop federal common law to resolve disputes affecting interstate waters and other matters of federal concern.

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 soon foreclosed this avenue. In *American Electric Power Co. v. Connecticut* (2011) (*AEP*), the Court held that the Clean Air Act and EPA action thereunder "displaced" the plaintiffs' federal common law nuisance claims. 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. The *AEP* Court concluded that because the Clean Air Act "speaks directly" to greenhouse gas emissions from power plants—building on the Court's finding in *Massachusetts v. EPA* (2007) that greenhouse gases are "air

pollutant[s]" under the Act—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 invoked, illogically, to argue that the Act also preempts state common law claims. But the *AEP* opinion contained a careful and underappreciated qualification: The displacement of federal common law did not resolve whether state common law claims are 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. That question is now squarely presented in *Suncor*.

In the wake of *AEP*, the Ninth Circuit applied its holding in *Native Village of Kivalina v. ExxonMobil Corp.* (9th Cir. 2012), confirming that public nuisance claims regarding greenhouse gas emissions brought under federal common law were displaced by the Clean Air Act. But the court framed its holding solely in terms of displacement, and a concurring opinion explained that the plaintiff "may pursue whatever remedies it may have under state law to the extent [its] claims are not preempted."[5] The displacement of federal common law, combined with the courts' refusal to reach the state law question, drove plaintiffs to state court. 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, filed suit in state courts, carefully pleading only state law claims to avoid 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 fossil fuel companies' alleged deception campaigns.[6] The filings

[5]As the *Kivalina* majority noted, "[t]he doctrine of displacement is an issue of separation of powers between the judicial and legislative branches" distinct from the federalism question of whether state common law survives.

[6] The Supreme Courts of Colorado and Hawaii ruled in favor of local government plaintiffs in these suits. 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. In 2026, the Minnesota Court of Appeals

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. The circuit courts have trended toward returning the cases to state court, finding genuine state law claims not ousted by federal law.[7]

Understanding what these cases are actually about is essential to analyzing the preemption questions they raise. They are not, as sometimes characterized, 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 a public law remedy regulating future private activity, while the former is a retrospective, private law remedy 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.[8]

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 predicated on the defendants' conduct independent of the emissions themselves: fraud, misrepresentation, consumer protection violations, and civil conspiracy, all premised on the allegation that the companies knew for decades about the climate dangers of their products,

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affirmed the denial of defendants' motions to dismiss. The questions on which the defendants sought further review concerned personal jurisdiction, the dormant Commerce Clause, and the state's anti-SLAPP statute rather than preemption. In April 2026, the Minnesota Supreme Court declined review, leaving in place the decision allowing the state's climate deception claims to proceed.

[7] The Supreme 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.

[8] As the respondents in *Suncor* have pointed out, they do not seek "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."

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* (Haw. 2023) 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. 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 is similarly foreclosed.[9]

II. 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." 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), and conflict preemption (based on the "physical impossibility" of complying with both federal and state law or frustration of federal purposes). In each of these categories, courts start in areas of traditional state regulation "with the assumption that the historic[al] [sic] police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[10] 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.[11]

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

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[9] *See infra* Part IV.

[10] *But cf.* Catherine M. Sharkey, *The Perils of Pesticide Preemption,* 62 WAKE FOREST L. REV. (forthcoming 2027) (manuscript at 10) (available at SSRN) (arguing that by the time the Supreme Court decided *Monsanto Co. v. Durnell* (2026), "the death knell against the presumption ha[d] sounded").

[11] Commentators have argued that the Court's recent decisions have worn that presumption down. Even if they are right, it does not carry the preemption argument here. The presumption is a tiebreaker for genuinely ambiguous statutes, and the Clean Air Act is not ambiguous on this question. Its savings clauses affirmatively preserve common law remedies. As such, each of the arguments below stands without the presumption's help.

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. Next, when Congress "spoke[ ] directly" in authorizing regulation of greenhouse gas emissions under the Clean Air Act, the statute had displaced federal common law. 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. Petitioners and multiple amici have used the Second Circuit's decision to support their arguments for preemption.

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. Given longstanding congressional and judicial respect for state sovereignty in areas of traditional state activity, clear congressional intent to foreclose state remedies, evaluated in light of the presumption against preemption, is necessary. 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 distinct constitutional footing. That the Clean Air Act displaces a federal common law remedy has no bearing, as such, on whether it also preempts state law remedies. This question 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 § 209, which preempts state emission standards for motor vehicles, subject to California's authority to seek a waiver. 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 "any standard relating to the control of emissions from new motor vehicles" 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* (1996), for example, the Court held that the express preemption of state "requirements" in the Medical Device Amendments of 1976 did not reach all state tort claims, reading the clause narrowly in light of the presumption against preemption.

Not only does the Act fail to preempt state common law; it affirmatively preserves it. Section 304(e) provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." Proponents seize on the clause's opening words, reading it to preserve common law only against the preclusive effect of the citizen suit provision itself rather than against the Act as a whole. That was the reading a divided Court gave the Clean Water Act's nearly identical clause in *City of Milwaukee v. Illinois* (1981) (*Milwaukee II*), over a dissent that called such a reading "extremely strained." 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 as a whole to preempt state common law.[12]

Nothing elsewhere in the Clean Air Act supplies the clear statement that preemption of state common law demands, and § 116 points in the opposite direction. Proponents of preemption, including the Trump administration in its amicus brief in *Suncor*, argue that the Act preserves only states' authority to regulate in-state activity. But the *Suncor* plaintiffs *are* seeking to make the defendants responsible for in-state activity—the sale of harmful products in Colorado 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[es] not authorize affected states or localities to impose their own tort law on out-of-state sources for interstate and international emissions." But Boulder County's suit is not a suit seeking to limit the defendants'

[12] *See* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 163 (1985) ("If Congress intended [the CWA] as a whole to preempt federal common law, it is difficult to understand why it did not make an affirmative statement to that effect. It is hard to imagine a more cryptic way of expressing an intent to preempt 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 preemptive effect.").

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.[13]

The framing of the amicus quotes—affected states imposing their own tort law on out-of-state sources—borrows from *International Paper Co. v. Ouellette* (1987), in which the Court read the Clean Water Act to bar an affected state from applying its own nuisance law to an out-of-state discharger. But *Ouellette* cuts against preemption here. Its rationale was that the Act's permitting scheme fixes the effluent limitations governing each point source, so subjecting a discharger to the nuisance law of every affected jurisdiction would displace the standard the Act itself assigns. That concern is absent here, where these plaintiffs seek no emissions standard at all. More fundamentally, *Ouellette* preserved common law liability rather than extinguishing it, holding that the Vermont plaintiffs could proceed under the law of the source state—confirming that even a comprehensive federal permitting regime leaves tort remedies intact.

The Third Circuit applied that reasoning to the Clean Air Act in *Bell v. Cheswick Generating Station* (3d Cir. 2013), finding no meaningful difference between the two statutes' savings clauses and holding that source-state common law tort claims survive. The Fourth Circuit reached a less hospitable result in *North Carolina ex rel. Cooper v. Tennessee Valley Authority* (4th Cir. 2010), but that decision does not carry the preemption argument here. It reversed an injunction imposing emissions caps and control-technology requirements on generating stations in Alabama and Tennessee, premised on the law of the affected state—the paradigm of standard setting with extraterritorial reach, and the opposite of an award of damages. To the extent the court suggested more broadly that even source-state nuisance claims against permitted sources are foreclosed, the Third Circuit declined to follow it, and that suggestion cannot be squared with *Ouellette*'s preservation of source-state law. And even if the source-state limitation were imported wholesale, it would not reach claims resting on marketing, sale, and concealment within the forum state.[14]

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[13] Congress clearly expressed what aspects of the Clean Air Act preempted state law. *See, e.g.*, 42 U.S.C. § 7543(a). The absence of any similar provision expressly preempting state common law claims of the kind asserted in *Suncor* should be decisive evidence that Congress did not intend to preempt those claims.

[14] *Cf. Mayor & City Council of Baltimore v. B.P. P.L.C.*, 353 A.3d 1142, 1219 (Md. 2026). (Killough, J., concurring and dissenting) ("No federal

That answer, standing alone, would leave the nuisance, negligence, and trespass claims exposed, since those rest on the causal contribution of emissions that largely occur elsewhere. But *Ouellette* does not reach them either, for a reason internal to the decision. The affected-state bar presupposes an identifiable point source situated in an identifiable source state whose law governs instead. That structure is what allowed the Court to preserve a remedy: The Vermont plaintiffs lost their choice of law, not their cause of action. Greenhouse gas emissions have no such structure. They originate from innumerable sources in every state and every nation, and from consumers' combustion of the defendants' products rather than from the defendants' own facilities. Importing the affected-state bar into that setting would identify no source state, no governing law, and no forum—extinguishing the claims rather than channeling them. *Ouellette* declined to read a savings clause to leave injured parties without recourse; reading it to do so here would invert the decision.

More importantly, the Clean Air Act citizen suit savings clause is broad and explicit: it preserves "any" common law right to seek "any other relief"—a formulation that encompasses state common law damages 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," and courts have recognized that the phrase "any requirement" encompasses common law standards. 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. Courts have emphasized "the importance of delineating the pertinent area of regulation with specificity," rather than with sweeping generality, "before proceeding with the field preemption inquiry." In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* (1983), the Supreme Court defined the field that the Atomic Energy Act occupied as "the radiological safety aspects" of nuclear plants—not the entire domain of nuclear energy—so a California moratorium on new nuclear plants grounded in economic concerns survived. Likewise, even if the Clean Air Act occupies the field of federal air-quality regulation by setting standards for emissions and requiring

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court—not one—has ever preempted a state law deceptive marketing or consumer protection claim under the Clean Air Act.").

the 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, 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 long-standing principle that it is wrong to recognize a right while depriving the holder of a remedy to protect it.

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 v. Levine* (2009), 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.[15] 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." 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." The same analysis supports the conclusion that Congress meant to preserve state tort remedies for governments forced to implement expensive climate adaptation strategies, in order to motivate energy producers to both

[15] The Court noted that the FDA, too, had "long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation" before "dramatic[ally]" changing its position. *See also* Catherine M. Sharkey, *Tort Law in the Age of Regulations*, 76 U. TORONTO L.J. # 1 (2026) (arguing that "tort law can serve as a last recourse in deregulatory times," that it "can serve as a critical supplement or complement to federal regulatory regimes," and that the "notion that the enforcement of a public right can be pursued through multiple routes is well established").

warn of the dangers of fossil fuel use and develop safer alternative energy sources.[16]

Second, the suits do not seek to regulate future emissions at all; they seek money damages for past harm. We develop in Part III why that distinction, rather than the formal line between displacement and preemption, does the real work: A damages award sets no standard and reaches no conduct outside the forum, so multiplying such awards across states cannot generate the conflicting commands that preemption doctrine exists to prevent. 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.* (2000) 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. No analogous conflict exists here; the Clean Air 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.* (1984). 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. 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. The Court found implied congressional intent to preserve state remedies, reasoning that it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct" 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." The Court also

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[16] *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005) (noting that private law remedies may aid, not hinder, the functioning of regulatory statutes by "serv[ing] as a catalyst" for pesticide manufacturers to develop more informative product labels and that "the specter of damage actions may provide manufacturers with added dynamic incentives" to forestall injuries stemming from their products through product improvement).

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.* (1990) to hold that the Atomic Energy Act did not preempt a state tort claim arising from nuclear safety-related conduct.

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 in federal or state law. As the Court held in *Bates v. Dow Agrosciences LLC* (2005), "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[17] 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 rejects 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. Despite the relevance of *Silkwood*'s reasoning, neither the petitioners in *Suncor* nor any of the amici writing on their behalf even cite *Silkwood*, let alone make any effort to distinguish it.

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 the EPA's regulatory actions, "speaks directly" to greenhouse gas emissions—a premise that the *AEP* Court grounded in the EPA's Endangerment Finding, issued after *Massachusetts*. 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's, the current EPA concluded that it "lack[s] 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)." If the EPA's current position is that it lacks authority to regulate greenhouse gases—that they do not "endanger" health and welfare within the meaning of the Act—then the preemption argument has lost the premise its own proponents supply. That is not because the agency's legal position binds

[17] 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.

anyone. Whether the Act speaks directly to greenhouse gas emissions turns on whether the Act confers authority to address them—not on whether the EPA has exercised that authority, and not on what the EPA now says about it. Instead, the disavowal makes the field-occupation argument unavailable to those who advance it. 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 the EPA with no authority to regulate those emissions at all.

Two clarifications keep this argument within its proper bounds. The first is interpretive. The rescission does not alter what the Clean Air Act means; after *Loper Bright*, the EPA's view of its own authority commands no deference, and *Massachusetts* remains on the books. An agency can no more contract a statute's preemptive scope by fiat than enlarge it, as we explain in Part III. The point is one of consistency rather than interpretation: Those urging preemption cannot rest on the Act's comprehensive reach while supporting an agency that denies the Act confers any such reach. What is left of their position is the claim that a statute forecloses state tort remedies while generating no federal standard for a state damages award to obstruct. The second clarification is that nothing in our argument depends on the rescission surviving. It is subject to judicial review, and a reviewing court may set it aside. If it stands, the preemption argument loses the regulatory foundation its proponents invoke. If it falls, the savings clauses, the presumption against preemption, and the distinction between damages and regulation—each independently sufficient—continue to defeat preemption. The rescission strengthens the case for allowing state common law claims to proceed.

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

A distinct set of preemption principles applies when state law allegedly infringes on the federal government's constitutional authority over foreign affairs. But tort law damages 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 foreign affairs preemption doctrine.

That 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—for example, imposing sanctions on foreign countries, regulating commercial relations with specific foreign governments, or otherwise intruding on areas of exclusive federal prerogative. It has never been applied to preempt state tort suits seeking compensation for domestic harm merely because the defendants are multinational corporations or because their activities have an international dimension.[18]

The doctrine's key cases prove the point. In *Crosby v. National Foreign Trade Council* (2000), 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 is precisely the kind of foreign policy the Constitution reserves to the federal government. Allowing the state law to operate would "blunt the consequences of discretionary Presidential action" in imposing sanctions on the Burmese government and weaken the President's diplomatic leverage. And in *Garamendi*, the Court held that California's Holocaust Victim Insurance Relief Act, which required insurers to disclose Holocaust-era policies, was 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.[19] In doing so, the Court emphasized that invocation of the foreign affairs preemption doctrine turns on "something more than incidental effect in conflict with express foreign policy of the National Government."

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[18] *See* 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.").

[19] *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420, 424 (2003) (finding "a sufficiently clear conflict to require finding preemption" where the state statute "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments" (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

Proponents of foreign affairs preemption also invoke *Zivotofsky* for the proposition that the nation must "speak with one voice." 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 capabilities and foreign policy outweigh the alleged cost of increasing global temperatures."[20]

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 in *Crosby* was a state sanction against a specific foreign country that was more onerous than anything the federal government had imposed. The California Holocaust law in *Garamendi* 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—legislating directly about relations with, or obligations arising from, specific foreign countries.

Climate tort suits are fundamentally different from any of the state laws that the Court has found preempted in these cases. These suits are state court adjudications of state common law tort claims, in which the plaintiffs seek compensation from corporations for harm done within the state's territory. As such, these suits do not implicate diplomatic or intergovernmental recognition concerns. Boulder County's suit against Suncor, a Canadian corporation, does not purport to determine which foreign governments merit recognition or otherwise determine U.S. foreign policy toward Canada. Instead, it seeks compensation for harms allegedly caused within Boulder County by the sale of Suncor's U.S. subsidiary's products. 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 foreign affairs preemption doctrine simply does not apply to adjudicative proceedings

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[20] 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. The other cites the case to support the assertion that "[t]he President alone may recognize nations, governments, and diplomats. Congress and the States may not."

that resolve disputes between specific parties under state law.[21] That concern animates doctrines that create the potential for interfering with federal legislative or executive action—state laws that impose sanctions or trade restrictions or create diplomatic protocols—and should not be applied to preempt state court adjudication of private law claims. As the Court explained in a case involving state efforts to tax foreign commerce, the "one voice" principle reflects the "overriding concern" that the federal government be allowed to "'speak with one voice when regulating commercial relations *with foreign governments*'" (emphasis added).That concern is not at issue, for example, when private, local tort litigation seeks compensation from private actors, even if those actors are multinational corporations.

Moreover, the precise constitutional basis for the application of the foreign affairs preemption doctrine 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 Trump administration's brief invokes general foreign affairs concerns but points to no specific executive agreement or policy directive that the suits contradict.[22] No such agreement or directive immunizes multinational corporations from liability for the harms they cause by marketing products whose use generates greenhouse gases that contribute to climate change. 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.

Indeed, that absence of a limiting principle is the most telling objection to the preemption of state common law in this context. If the global operation of fossil fuel companies and the international

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[21] 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; *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" under the Alien Tort Statute).

[22] At most, the brief suggests that "[t]he federal government 'has long opposed the establishment of liability and compensation schemes at the international level for alleged climate change.'"

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. Pharmaceutical injury litigation involves global companies whose products are sold and regulated internationally, and whose marketing and labeling decisions have international dimensions. 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. 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. The candidate most readily available to them is that climate harm is distinctive because it flows from the aggregate emissions of innumerable sources worldwide, with no traceable link between any defendant's conduct and any plaintiff's injury. But that is an objection to causation, to be resolved on the merits under state law, and not a principle of foreign affairs preemption at all. It would also sweep in every diffuse-harm tort, including the transboundary pollution suits state courts have adjudicated for more than a century. And it has no purchase on the fraud claims, where the injury is traced to concealment rather than to emissions. 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. 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 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.[23] Even in *Garamendi*, where executive

[23] *Garamendi* is the closest the Court has come in the executive-agreement context, and it does not establish such a rule. There the Executive had concluded agreements with Germany, Austria, and France addressing the very subject matter of the state statute, yet the Court still required a demonstrated conflict, concluding that petitioners and the Government had "demonstrated a sufficiently clear conflict to require finding preemption here." The Court added that "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." If preemption was not automatic in *Garamendi*—where executive agreements spoke directly to the subject and the Court, in any event, assessed

agreements addressed the precise subject matter of the challenged law, the Court required a demonstrated conflict rather than presuming one from the agreement's existence.

Finally, *Zivotofsky* is inapposite for two reasons. First, it concerned the relationship between the President and Congress—whether Congress can override the President's exclusive authority to decide which foreign governments to recognize. It had nothing to do with the relationship between federal and state authority, and it therefore turned on separation of powers concerns, not the federalism considerations at issue in *Suncor*, which implicate the Court's consistent recognition of the respect for state sovereignty that is baked into our constitutional structure. Second, it concerned the specific and ancient power of formal diplomatic recognition.[24] Climate tort suits have nothing to do with recognizing foreign governments.

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 [did] not identify any express foreign policy of the federal government that conflicts with state tort law, and [the court was] 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. The Hawaii Supreme Court reached the same result, finding no showing that damages actions would conflict with federal authority over foreign affairs or national security. 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 damages suits.

One outlier, the Maryland Supreme Court, reached the opposite result in March 2026. In *Mayor & City Council of Baltimore v. BP P.L.C.*

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the state interest as weak—it cannot be automatic here, where no executive agreement or treaty addresses state-court liability for climate harm and the state interest lies at the core of traditional state competence. The preemptive scope of executive agreements is itself disputed and has never been extended to reach state tort adjudication in domestic-harm cases.

[24] *See Zivotofsky*, 576 U.S. at 15, 17 (emphasis added) (referring to the Court's prior endorsement of the President's "unilateral power to recognize new states" and stating that "the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that *Congress* may not qualify"). Indeed, the Court noted that previous cases that had "address[ed] the division of recognition power between the Federal Government and the States" provided limited precedential value, even if they provided important instruction on the scope of the President's "exclusive recognition authority." *Id.* at 17.

(Md. 2026), it held that the local governments' state tort claims were in substance efforts to regulate interstate and international emissions, that any such claims therefore arise under federal common law, and that, applying *Ouellette*, the Clean Air Act's savings clause does not authorize them; in the alternative, it held the claims not cognizable under Maryland tort law. Two justices concurred in part and dissented in part, pointing out, among other things, that the majority conflated displacement and preemption doctrines,[25] and the dissent would have treated the suits as fraud cases governed by *Altria Group, Inc. v. Good* (2008) and *Cipollone v. Liggett Group, Inc.* (1992). Whatever the force of that decision on Clean Air Act preemption, it lends no support to foreign affairs preemption of state law. The court's foreign policy discussion went only to whether federal common law should be extended to reach harms caused by emissions abroad, following the Second Circuit in *City of New York v. Chevron Corp.* (2d Cir. 2021). The court did not hold that the Constitution's allocation of foreign affairs authority preempts state tort remedies. And the Court's grant of certiorari does not validate the theory either; it reflects only that a definitive answer is warranted to a question the Colorado and Hawaii Supreme Courts have answered correctly against preemption of state law, as has a Minnesota trial court whose denial of the defendants' motions to dismiss has since been affirmed.[26]

The deepest reason the doctrine does not reach these suits is that preemption principles apply differently to adjudication yielding

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[25] One of the concurring justices also criticized the majority's "uncritical adoption" of the Second Circuit's "snap-back reasoning" in *Chevron*. *Mayor & City Council of Baltimore*, 353 A.3d at 1218 (Killough, J., concurring and dissenting).

[26] The court in *Chevron* refused to allow *federal* common law nuisance claims against multinational oil companies to proceed. But it did so on the basis of separation of powers concerns, not federalism principles. The court also rested its holding on its characterization of the suit as one that "target[ed] [greenhouse gas] emissions emanating from beyond our national borders." Boulder's suit is not directed at abating greenhouse gas emissions, and its fraud claims do not even seek to impose damage liability stemming from the defendants' emissions. Instead, those claims are premised on the defendants' failure to disclose what they knew about the harmful effects on the climate of fossil fuel combustion. In a subsequent case, the Second Circuit held that Connecticut's claims regarding multinational oil companies' deceptions of Connecticut consumers about the negative effects of fossil fuels in violation of the state's Unfair Trade Practices Act were not removable to federal court because they did not arise under federal law by triggering the federal common law of transboundary pollution, and "[t]he fact that the alleged lies were *about* the impacts of fossil fuels on the Earth's climate is immaterial."

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, a 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, as 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.

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. Courts finding preemption have answered that damages regulate too, invoking the Supreme Court's recognition that an obligation to pay compensation can govern conduct. That is true as far as it goes, and we do not claim that tort judgments leave behavior untouched; deterrence is one of tort law's acknowledged functions. But if incidental deterrent effect sufficed, no state tort remedy could coexist with any federal regulatory program, and *Silkwood* would have come out the other way—the Court there sustained an award of punitive damages, a remedy whose avowed purpose is to deter, in a field it had just described as entirely occupied by federal regulation. What matters is not whether a judgment influences conduct but whether it sets a standard that binds conduct beyond the forum. A damages award does not. 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.[27] 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

[27] No court has addressed whether narrowly drawn equitable relief of this kind would survive preemption analysis. We claim only that the extraterritoriality rationale that justifies centralizing authority over emissions standards does not extend to relief whose operative effect is confined to the forum state.

authority in the 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 the EPA's new preemption theory. *AEP*'s displacement holding rested on the mere existence of the EPA's regulatory authority, not its exercise. Although the EPA now disclaims any authority to regulate greenhouse gases, it nonetheless asserted in its 2026 rescission that the Act "continues to preempt state common-law claims and statutes that seek to regulate out-of-state emissions." Even if that were so, 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 fuel products whose use resulted in emissions that contributed to the climatic changes requiring costly local adaptation. And the Act's savings clauses confirm that it does not preempt state common law aside from its narrow preemption of state tailpipe emission standards. Finally, the disappearance of the 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. 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, "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." 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. Accordingly, a court should not 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.

IV. 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 climate tort suits are premised in part on the harm those emissions cause. But the argument 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.[28] 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. 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 the scientific consensus, influence policymakers against climate regulation, and protect their profits.

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—

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[28] *See* Lingxi Chenyang, *A Lockean Theory of Coastal Climate Adaptation*, 30 OCEAN & COASTAL L.J. 139, 145–46 (2025) (citing NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 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, Kelsey Franks, & Andrew Gage, *The 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, Note, *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); Neela Banerjee et al., *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS)).

the marketing, the concealment, the deliberate creation and maintenance of public doubt about climate science—is what gives rise to the plaintiffs' claims. 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 defendant companies knew what they were doing and hid that knowledge to profit from the harm they were causing.

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. The petitioners in *Suncor* framed 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." But none of the statute's provisions, individually or collectively, address 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 do *not* seek to . . . enjoin any oil and gas operations or sales . . . or to enforce emissions controls of any kind."

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 fraud claims arising from that industry's deceptive conduct, and directly contrary authority controls. The Supreme Court's decision in *Altria* is on point. In *Altria*, plaintiffs in Maine alleged under the state's unfair trade practices statute that Philip Morris had committed 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. Philip Morris argued that the Federal Cigarette Labeling and Advertising Act (FCLAA)—which regulates

cigarette advertising and expressly preempts state requirements "based on smoking and health"—preempted the state fraud claim. 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 that was independent of the Act's regulatory scheme, not a "requirement or prohibition based on smoking and health." Philip Morris was potentially liable not because of what cigarettes do to health, but because it lied about those consequences. Deception-based claims, the Court emphasized, rest on a general "duty not to deceive" that is independent of, and not regulated by, federal statutes governing the underlying product.

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 statutes governing emissions have no more claim to preempt state fraud law than the FCLAA had to preempt the Maine fraud claim in *Altria*. That conclusion reaches the *Suncor* plaintiffs' statutory consumer protection claims as well as their common law fraud claims, since *Altria* itself involved a state deceptive-practices statute.

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 the Hawaii Supreme Court's analysis demonstrates that they can do. That court acknowledged that *AEP* 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," the court 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." As a result, Honolulu's claims were preserved.

The Maryland Supreme Court took the opposite view, and its reasoning deserves a direct answer. That court declined to accept the local governments' description of their own claims, concluding that no amount of creative pleading could disguise what it saw as an effort to

use state law to regulate global conduct causing global harm. But the authority to look past a plaintiff's labels is an authority to characterize what a complaint alleges, not a license to substitute a different complaint. What these complaints allege is that the defendants knew what their products would do, concealed it, and marketed them anyway; the duty invoked is the duty not to deceive, which exists whether or not the product is federally regulated. *Altria* and *Cipollone* establish precisely that, and the Maryland majority distinguished them in a single clause—that they did not involve interstate pollution. That is a distinction about subject matter rather than about the source of the duty, and it proves too much: On its logic a state deception claim would fail whenever the product lied about happens to be federally regulated, which is the proposition *Altria* rejected.

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 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.

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

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. 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. Functionally, state tort law serves compensatory and deterrence functions that are independent of, and complementary to, federal regulatory law. 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 a function. Their coexistence is thus a structural feature of the constitutional order, not an anomaly to be eliminated.

Nor was their coexistence 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. 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 to repair climate-damaged infrastructure, respond to climate-driven emergencies, and adapt their communities to a changing climate. They are asking courts to determine whether the 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 that 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. 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. 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.

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. 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*. 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. 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. That is a claim about statutory design rather than policy preference. The savings clauses, as we have seen, preserve state authority and common law remedies alongside a comprehensive federal regulatory program. What follows describes the allocation Congress made in doing so and explains why it was a sensible one. Reading the Act to preempt state common law would not tidy up a redundancy Congress overlooked; it would undo an allocation Congress chose. 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.[29] 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 be consolidated.[30] 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.[31] 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.[32] None of these benefits, however, are apt to flow from precluding common law remedies that supplement statutory

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

[30] *Id.* at 35.

[31] *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.").

[32] *See* CAMACHO AND GLICKSMAN, *supra* note 29, at 50 fig. 2.5.

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 pays all the plaintiffs who have prevailed against it. Nor do damages awards conflict with affirmative regulation by the 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. The value of this benefit 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 that the *Suncor* plaintiffs have incurred. That risk is not theoretical: The current administration maintains that the Clean Air Act gives the 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 CERCLA superfund statute—that would compel the energy industry to reimburse subnational governments for climate adaptation costs. 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 long-standing 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 § 116 preserves state authority more generally. Congress thus chose that allocation deliberately, one that leverages local knowledge, tailors relief to highly variable local conditions, and harnesses the redundancy of concurrent jurisdiction as a safety net for cost 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 Harriet Hageman and Senator Ted 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.[33] 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.

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

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[33] The bills invoke national security and foreign affairs rationales—the same arguments the state supreme courts rejected in the Colorado and Hawaii cases.

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) of 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.

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