No. 25-170

IN THE

Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., *ET AL.*,

Petitioners,

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY, *ET AL.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of Colorado

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in preserving state-law damages remedies against unwarranted claims of preemption by federal law under the Constitution's Supremacy Clause. In that regard, Public Citizen opposes overbroad application of principles of implied conflict preemption that impair the operation of state law, including state damages remedies, based on courts' subjective perceptions of the unstated purposes and objectives of federal law. Accordingly, Public Citizen has frequently filed briefs in this Court and others addressing issues relating to preemption. *See*, *e.g.*, *Hencely v. Fluor Corp.*, 146 S. Ct. 1086 (2026).

Public Citizen also is actively involved in issues arising from excessive emissions of greenhouse gases that have contributed to and continue to accelerate global climate change. Through its Climate and Energy Program, Public Citizen advocates policies that will move our economy away from reliance on the fossil fuels that generate greenhouse-gas emissions, will build a resilient and equitable economy, and will hold industries that contribute to harmful emissions accountable.

These interests come together in this case, in which oil companies seek to avoid liability for climate-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

related injuries attributable to their commercial conduct by arguing that federal law preempts state common-law actions seeking damages for those injuries. Public Citizen submits this brief to address the oil companies' claim that the Clean Air Act—a law designed to *preserve* state authority to address air pollution harms—impliedly preempts states from exercising that authority to provide remedies for those injured by climate change resulting from the companies' wrongful promotion and marketing of fossil fuels.

SUMMARY OF ARGUMENT

In this case, respondents the County and City of Boulder, Colorado, brought suit in Colorado state courts seeking to impose damages on the oil companies Suncor and ExxonMobil for allegedly wrongful commercial conduct that caused injuries in Colorado. Asserting a number of state common-law rights of action, Boulder alleges that the oil companies produced fossil fuels and promoted use of those fuels while concealing their knowledge that the resulting atmospheric emissions of greenhouse gases would lead to global climate change and result in injuries, including those for which Boulder seeks to recover damages. Boulder does not claim that the emissions themselves exceeded standards applicable to their sources or were otherwise unlawful, but that the oil companies wrongfully caused emissions that they knew would, in the aggregate, cause injury even if each particular source of emissions operated lawfully.

The oil companies contend that Boulder's claims are preempted by federal law under the Constitution's Supremacy Clause because most of the climate-altering emissions that allegedly injured Boulder came from sources outside Colorado. According to the companies, imposition of liability under state common law for any damages resulting from the interstate effects of air pollution is contrary to federal law.

The oil companies' broad claims of preemption are wrong. Federal law does not broadly displace state common or statutory law in all matters relating to interstate air pollution. Rather, the terms of the Clean Air Act—the principal body of federal law addressing interstate air pollution and the only federal statute the oil companies invoke for their preemption defense—are fully consistent with Boulder's state-law damages claims.

The Clean Air Act's express terms acknowledge the primary role of state law in addressing air pollution, provide for preemption of state law only as to narrowly defined subjects not implicated by Boulder's claims, and otherwise express Congress's determination *not* to preempt state laws concerning air pollution. The Clean Air Act's terms thus foreclose any argument that it expressly preempts Boulder's claims or that it occupies the field of controlling and remedying harms from air pollution.

Because, under the Supremacy Clause, all forms of preemption must rest on conflict between a federal law and a contrary state law, the Clean Air Act's express limits on its own preemptive effect also weigh heavily against any claim of implied preemption. In any event, the rest of the Act's terms provide no support for implied preemption. The oil companies do not even argue that the Clean Air Act's commands conflict directly with the state common-law principles Boulder invokes, such that it is impossible to comply with or apply both.

Instead, they contend that state common law is contrary to the "purposes and objectives" of the Clean Air Act. As this Court has recently emphasized, the doctrine of implied purposes-and-objectives preemption provides no basis for the Court to attribute purposes to Congress that are not firmly grounded in statutory text. And the Clean Air Act's text provides no basis for concluding that its purposes include limiting state efforts to combat air pollution that do not frustrate the efficacy of the emissions limits and other anti-pollution requirements that the Act imposes. Instead, the purpose evident in the statute's text is to reduce air pollution by imposing minimum emissions standards for certain sources of some air pollutants. The liabilities that Boulder seeks to impose go beyond those that federal law would impose, but they do not impair the functioning of federal emissions standards, and (outside the limited scope of its express preemption provisions) the Act's terms embody no general purpose of putting a ceiling on states' ability to remedy air pollution. The state-law tort principles Boulder invokes are therefore not impliedly preempted.

ARGUMENT

I. Under the Supremacy Clause, federal statutes preempt state laws only when their text and structure reveal that they conflict with state law.

The Supremacy Clause does not provide for preemption of state laws that are not contrary to federal law. Instead, it states that the Constitution, and the laws and treaties of the United States made pursuant to it, "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. As this Court has repeatedly explained, the Clause "supplies a rule of decision when federal and state laws conflict"—the rule being that "the state law must yield" to conflicting federal law. *Martin v. United States*, 605 U.S. 395, 409 (2025).

When state law is not "contrary" to supreme federal law, the Supremacy Clause's rule of decision does not come into play. The Clause does not require state laws to yield merely because they are viewed as contrary to "some brooding federal interest or … judicial policy preference"; it declares only the requirements of the Constitution and the laws and treaties made under it to be supreme. *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (opinion of Gorsuch, J.). "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). "In all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020); *accord*, *Hencely*, 146 S. Ct. at 1093.

These principles apply to each of the forms of preemption this Court has recognized: express preemption, where the text of a federal statute explicitly identifies the kinds of state laws that are contrary to its terms; field preemption, where federal law occupies some area so comprehensively and exclusively that any application of state law is contrary to federal law; and implied conflict preemption, where state law is contrary to federal law in the sense that it is impossible to apply or comply with both federal and state law or, more controversially, where applying state law would defeat the purposes and objectives of federal law. *See Murphy v. NCAA*, 584 U.S. 453, 477–79 (2018); *Va. Uranium*, 587 U.S. at 767 (Gorsuch, J.). Whatever the form of preemption invoked, the answer to the question whether state law is contrary to federal law "must … be 'sought in the text and structure of the statute at issue.'" *Id.* at 778 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U. S. 658, 664 (1993).

II. The Clean Air Act's terms limit its preemptive effects and broadly affirm state authority to address air pollution.

The Clean Air Act's text and structure flatly contradict any claim that the Act preempts the imposition of damages under state law for climate-change-related injuries caused by emissions of greenhouse gases attributable to the oil companies' promotion of fossil-fuel consumption. The Act's terms require that sources of certain air pollutants must comply with technology-based limits, which for some sources and pollutants must be set forth in permits, and it requires states that are not in compliance with federally prescribed ambient air quality standards to establish plans to come into compliance with those standards through the use of more stringent limits on sources and other means chosen by the states.[2] But with a few specified exceptions not applicable here, the Act's text and structure reveal that state laws are not contrary to the Act when they address air pollution differently than the Act and do *more* to remedy harms resulting from air pollution than the Act requires.

[2] The Clean Air Act's provisions are summarized in Congressional Research Service, *Clean Air Act: A Summary of the Act and its Major Requirements* (2022), https://www.congress.gov/crs-product/RL30853?hl=RL30853&s=1&r=2.

To begin, the Act expressly recognizes the primacy of state law with respect to the prevention and control of air pollution. It provides "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). And it expressly states that its purposes include providing "assistance to State and local governments in connection with the development and execution of *their* air pollution prevention and control programs." *Id.* § 7401(b)(3) (emphasis added).

More pointedly, the Act precisely identifies the handful of areas where it preempts state laws by prohibiting states from going further than federal law in addressing air pollution: It expressly preempts states from adopting standards for emissions from new motor vehicles or from aircraft, 42 U.S.C. §§ 7543, 7573, and from adopting certain requirements regarding components or additives for motor vehicle fuels, *id.* § 7545(c)(4).[3] It hammers home the limits on its preemption of state law by providing that, except as provided in these sections,

> nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation

[3] Even as to these expressly preempted subjects, the Act provides for California and states adopting its standards to receive a waiver of preemption of standards for motor-vehicle emissions and fuel components and additives, and also for waiver of preemption of fuel standards when such standards are included in an approved state plan for achieving compliance with ambient air quality standards. 42 U.S.C. §§ 7543(b) & (e)(2); 7507; 7545(c)(4)(B) & (C).

> respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Id. § 7416.

The oil companies do not contend that the state-law tort principles underlying Boulder's claim fall within the Act's express preemption of standards limiting emissions from motor vehicles and aircraft, standards concerning the formulation of motor vehicle fuels, or standards or limitations *less* stringent than those imposed under the Act. Moreover, the Act expressly rules out any suggestion that it occupies the field of air-pollution regulation "so comprehensively that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 140 (1986). The Act's explicit acknowledgment of the primary role of state law within that field, and its affirmation of state authority to enforce laws that are more stringent than federal standards except in the few areas where state law is expressly preempted, directly contradict any such suggestion. The statute's unambiguous language thus forecloses both express and field preemption.

III. The Clean Air Act does not impliedly preempt state common-law principles that would impose liability on companies that cause harmful air pollution.

A. The Act's non-preemption clause strictly limits implied preemption.

The Act's language and structure are equally fatal to the oil companies' argument that it impliedly preempts state common-law damages actions against them for causing pollution. A court cannot determine whether state law conflicts with the requirements imposed by or the purposes and objectives implicit in federal law without considering the statutory language that determines what federal law requires and what purposes and objectives it reflects. *See Va. Uranium*, 587 U.S. at 767, 778 (Gorsuch, J.). And "[i]n this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Id.* at 765. Here, both considerations strongly cut against implied preemption.

In the Clean Air Act, Congress specified that a handful of particular types of state laws (including antipollution laws *less* stringent than federal laws) were preempted. But, as in *Virginia Uranium*, Congress "conspicuously chose to leave untouched" other exercises of state authority over pollution. 587 U.S. at 765 (Gorsuch, J.). Congress's narrowly defined express-preemption provisions cut against finding that the statute has a much broader preemptive sweep. *See*, *e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 575 (2009).

Moreover, Congress did more than narrowly define the Clean Air Act's preemptive sweep. Congress went on to provide that, except for state laws that would permit *more* air pollution than federal laws, the Clean Air Act does not preempt state-law standards, limitations, and requirements regarding air pollution (including emissions of pollutants and the control or abatement of air pollution). 42 U.S.C. § 7416. And Congress did so in very broad terms, insisting that except for the enumerated express-preemption provisions, "*nothing*" in the Act shall preclude "*any* State" from adopting or enforcing "*any*" air pollution standard, limitation, or requirement (unless the state standard is less stringent than a federal one on the same subject). *Id.* (emphasis added). In short, Congress wrote a sweeping "*non-preemption* clause," *Va. Uranium*, 587 U.S. at 769 (Gorsuch, J.), that serves as the flipside of the statute's narrow express preemption provisions.

When Congress explicitly and comprehensively delineates what a statute does and does not preempt, the statutory language "necessarily contains the best evidence of Congress' pre-emptive intent," *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citation omitted), and there is no basis for resorting to "infer[red] congressional intent to pre-empt," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (quoting *Calif. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (plurality)). Application of a state law that federal law expressly states is *not* preempted is *not* "contrary" to federal law within the meaning of the Supremacy Clause, and thus such a state law "cannot be preempted." *Guerra*, 479 U.S. at 296 (Scalia, J., concurring in the judgment).

Put another way, applying state law in such circumstances does not present the conflict between state and federal law that is the premise of implied conflict preemption. A non-preemption provision avoids situations in which compliance with both state and federal law is impossible by providing that application or enforcement of state law complies with federal law. Likewise, when a federal law expressly states that nothing in it preempts a state law, the application of that state law cannot conflict with the purposes or objectives of the federal law. Congress has expressly stated, and enacted into law, its purpose of *not* preempting the state law, and courts should not ascribe purposes and objectives to Congress that the plain language of a statute disclaims. Doing so would disregard the principle that a statute's supposed "purpose … cannot be used to contradict [its] text" and that "the limitations of a text—what a text chooses *not* to do—are as much a part of its 'purpose' as its affirmative dispositions." A. Scalia & B. Garner, *Reading Law* 57 (2012).

For these reasons, the Court has repeatedly held that broad non-preemption or anti-preemption provisions such as the one in the Clean Air Act preclude implied preemption of state laws that fall within their scope. *See*, *e.g.*, *Guerra*, 479 U.S. at 282 (plurality) & 295–96 (Scalia, J., concurring in the judgment) (relying on anti-preemption provisions to hold that a California statute requiring pregnancy leave not required under federal law was not impliedly preempted by Title VII); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (holding that McCarran-Ferguson Act's anti-preemption provision forecloses "implied preemption" of state laws regulating the business of insurance); *Dep't of Treas. v. Fabe*, 508 U.S. 491, 502 (1993) (same); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (holding that anti-preemption provisions in effect before passage of ERISA precluded implied preemption of state pension laws under the

NLRA); *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (holding that an NLRA provision stating that nothing in the Act shall be construed to authorize agency shop agreements that are contrary to state law precluded implied preemption of state laws forbidding agency shops).

By contrast, the Court has held that "savings clauses" that preserve state laws to a more limited extent do not foreclose implied preemption of state laws outside their scope, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–70 (2000), and it has resisted construing ambiguous savings clauses in a way that would effectively cause a federal statute to "destroy itself," *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Nonetheless, where a statute includes a savings clause, courts must consider any implied preemption claim with due recognition that a savings clause contemplates "a continued meaningful role for state … law." *Williamson v. Mazda Motor of Am.*, 562 U.S. 323, 335 (2011); *see also id.* at 338 (Sotomayor, J., concurring) (same); *cf. id.* at 339 (Thomas, J., concurring in the judgment) (stating that savings clause should be construed to preclude implied preemption altogether).

Applying these established principles, the Clean Air Act's non-preemption provision forecloses implied preemption of the common-law duties that Boulder invokes. The language of 42 U.S.C. § 7416 is comparable to that of other provisions to which this Court has given broad anti-preemptive effect in that it provides that "nothing" in the Act shall preclude adoption or enforcement of the state laws it describes. Given that implied preemption must necessarily be tied to *something* in a federal law, *see Va. Uranium*, 587 U.S. at 767 (Gorsuch, J.), Congress's insistence that *nothing* in a law has preemptive effect necessarily forbids implied preemption. The scope of non-preemption under § 7416, moreover, is easily broad enough to encompass the state common-law principles Boulder invokes: The statute protects the right of "any State" to enforce "any requirement respecting control … of air pollution." Boulder's claims do not seek remedies that impose direct controls on emissions of air pollutants, but they posit common-law duties not to produce and market pollution-causing fuels in excessive quantities while concealing that their use will lead to harmful air pollution. Those duties are, in normal parlance, requirements, *see Monsanto Co. v. Durnell*, 146 S. Ct. 2001, 2010 (2026), and they relate to control of air pollution. The Act's *explicit* protection of such state laws against preemption is irreconcilable with the claim that the Act *implicitly* preempts them.

B. Boulder's theories of liability do not conflict with the Clean Air Act's terms or its "purposes and objectives."

Even if the non-preemption provision were not enough to foreclose implied preemption of state law by the Clean Air Act, the oil companies' claims of implied preemption would fail. Implied preemption is most readily found when, despite the absence or inapplicability of an express preemption provision, there is a clear contradiction between state and federal law, such that it is impossible for a person to comply with both or for a judge to apply both. "So, for example, when a regulated party cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield." *Martin*, 605 U.S. at 409. Likewise, if federal law confers on someone a *right* to do something or an *immunity* from liability for some action, such that it would be impossible both to enforce that federal right and to apply a state law that would deny it, the Supremacy Clause directs that state law yield to federal law. *See Kansas v. Garcia*, 589 U.S. 191, 211 (2020); *see also*, *e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31–33 (1996) (holding that federal law authorizing national banks to sell insurance preempts state law forbidding them to do so).

The state tort law Boulder invokes does not conflict with the Clean Air Act in either sense. Anyone regulated under the Clean Air Act can comply with all the Act's limits on emissions while also fulfilling state tort-law duties not to wrongfully promote use of pollution-causing fossil fuels. And nothing in the Clean Air Act confers on the oil companies (or anyone else) a *right or immunity* that would be infringed by the imposition of damages liability for the commercial conduct that Boulder alleges caused climate-altering greenhouse gas emissions.

The oil companies do not contest either of these points: They identify no respect in which the requirements that the Clean Air Act imposes on sources of air emissions are in direct conflict with the duties that Boulder would impose on producers and sellers of fuels whose use has caused excessive greenhouse gas emissions. Instead, the oil companies contend that Boulder's tort claims are preempted because they conflict with what the oil companies claim are the "purposes and objectives" of the Act's requirements. The companies' invocation of this Court's past holdings that implied preemption may occur where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941), fails not only because it cannot be squared with § 7416, but also because the Clean Air Act does not embody purposes and objectives that conflict with Boulder's theories of liability under state law.

1. "Purposes and objectives" preempt state law, if at all, only in limited circumstances.

"Purposes-and-objectives preemption" is unusual among the Court's doctrines in that it seems to give legal effect to a court's assessment, not of what a federal statute provides, but of the purposes that Congress intended the statute to serve. Treating a statute's purpose, as opposed to its enacted text, as part of "the Laws of the United States" that displace state law under the Supremacy Clause is in tension with the Court's usual recognition that "the ordinary meaning of [statutory] language accurately expresses the legislative purpose," *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 252 (2004), and its rejection of the view "that *whatever* furthers [a] statute's primary objective must be the law," *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Put another way, "[r]ather than augmenting statutes" to make "the congressional purpose" more "effective," courts must "interpret them." *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, 146 S. Ct. 1546, 1553 (2026). For this reason, some members of the Court have disavowed "purposes and objectives" preemption and urged that the Court "explicitly abandon" it. *Garcia*, 589 U.S. at 213 (Thomas J., joined by Gorsuch, J., concurring).

Nonetheless, the Court has in a few instances continued to recognize frustration of federal law's "purposes and objectives" as a basis for implied preemption of state law. *See*, *e.g.*, *Howell v. Howell*, 581 U.S. 214, 222 (2017). At the same time, however, the Court has made clear that preemption is never a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," and that, "[i]n all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Garcia*, 589 U.S. at 202. It follows that, in the first instance, " '[e]vidence of pre-emptive purpose,' whether express or implied, must … be 'sought in the text and structure of the statute at issue.' " *Va. Uranium*, 587 U.S. at 778 (Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Thus, a litigant claiming preemption based on conflict between state law and the requirements, purposes, or objectives of federal law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* at 767 (citation omitted). The inquiry turns on "what can be found in the law itself," *id.* at 779, not on "abstract and unenacted legislative desires," *id.* at 778. As in other matters of statutory construction, an understanding of a federal statute's purpose must generally be sought in its text, structure, and context. *See* Scalia & Garner 56.

Courts considering claims that state law frustrates a federal statute's purposes and objectives, moreover, must remain mindful of the general principles that "no legislation pursues its purposes at all costs," *Rodriguez*, 480 U.S. at 525–26, and that a statute's purpose is "not only to achieve certain ends, but also to achieve them by particular means," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012). Thus, courts should be hesitant, at least, to infer an unstated purpose to preempt state laws addressing matters that a federal statute conspicuously does not touch. *Va. Uranium*, 587 U.S. at 765 (Gorsuch, J.). With respect to "purposes and objectives" preemption, as in other matters of statutory construction, when Congress has enacted "a statute going so far and no further," courts have no "roving license" to conclude that "Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). Similarly, courts should not articulate the purposes of a federal statute at such a high "level of generality" that the statute's preemptive reach extends further than the text enacted by Congress warrants. *CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014). Extending a statute to preempt state laws that affect matters the statute's text does not address is rarely if ever necessary to avoid "an unacceptable obstacle to the attainment of [the statute's] purposes." *Id.*

For these reasons, where the Court has found state laws preempted based on a "purposes and objectives" analysis, it has generally done so in circumstances where state law would effectively nullify or circumvent explicit requirements or commands of a federal statute—not simply because the Court concluded that the legislative purpose would be better or more fully served by extending the law's preemptive reach more broadly. *See*, *e.g.*, *Howell v. Howell*, 581 U.S. at 222 (holding that federal law preempted state court orders that effectively "displace[d] the federal rule" against treating waived military retirement pay as divisible community property); *Hillman v. Maretta*, 569 U.S. 483, 494 (2013) (holding preempted a state law that "displace[d]" a federal statute's designation of the beneficiary of a federal employee's life insurance benefits).[4]

2. Boulder's theories of liability are fully consistent with the purposes and objectives evident in the Clean Air Act's terms.

The terms of the Clean Air Act fall far short of demonstrating that Congress's objectives would be thwarted unless the Act were construed to incorporate an unstated purpose of preempting state laws that would impose liability on companies whose deceptive marketing causes or has caused harmful emissions of air pollutants. Nothing in the Act's *enacted* purposes and objectives demonstrates that Congress designed the Act to thwart, as opposed to assist, states in their efforts to control air pollution and remedy harms it has caused. *See* 42 U.S.C. §§ 7401, 7470. The Act's operative terms, moreover, embody Congress's evident purpose to reduce air pollution through specifically stated means. Those means include the imposition of technology-based limits on some sources of pollutants, and the promulgation of air quality standards for certain pollutants, the failure to meet which may require the imposition of additional controls on emissions from sources as well as other measures to reduce pollution. The purposes those provisions embody, however, are not frustrated by state efforts to take other

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[4] Although the Court articulated its holding in those two cases in terms of "purposes and objectives" preemption, Justice Thomas concurred based on his view that the contradiction between the requirements of federal and state law created a direct conflict. *See Howell*, 581 U.S. at 223 (Thomas, J., concurring in part and in the judgment); *Hillman*, 569 U.S. at 499–501 (Thomas, J., concurring in the judgment).

measures to prevent or remedy pollution. To the contrary, the Act expressly recognizes that, with only a few exceptions, states have the "right" to enforce more stringent standards, limitations, and requirements relating to air pollution. 42 U.S.C. § 7416.

To be sure, the Clean Air Act requires that the emissions standards it imposes on pollution sources of various types be limited by consideration of such factors as availability of control technology, its practicability, and in some instances, its cost. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466–68 (2001) (describing examples of such provisions). But by simultaneously providing that states may impose more stringent standards, *see* 42 U.S.C. § 7416, the Act forecloses any suggestion that Congress's purpose in imposing limitations on federal emissions standards would be thwarted by more demanding state standards.

Even if the Act could reasonably be read to embody a purpose of foreclosing states from striking a different balance when imposing limits on emissions from sources of pollutants regulated under the Act, the liability that Boulder seeks to impose here would not require any source to meet any particular emission standard, let alone any standard more stringent than standards applicable under the Act. Nor does Boulder seek to premise liability on the idea that emissions from particular sources that comply with Clean Air Act limitations are themselves unlawful. Rather, Boulder invokes state law to impose liability on the oil companies for marketing practices that have resulted in aggregate emissions of greenhouse gases that—even assuming compliance by each individual source of emissions with all applicable Clean Air Act requirements—have caused injurious climate change. Such liability does not in any way impair the Act's efficacy in achieving its objective of using source limitations to combat air pollution.

Further, nothing in the Act evinces an additional purpose of protecting the ability of oil companies or other commercial actors to promote the use of fuels and technologies that cause greenhouse gas emissions or other harmful forms of air pollution. Indeed, the Act recognizes that emissions limitations applicable to specific sources will not by themselves prevent harmful air pollution when many separate sources emit pollutants at levels the Act permits, and it encourages states to address that problem rather than discouraging them from doing so. For example, the Act contemplates that state implementation plans aimed at compliance with ambient air quality standards will include not only emission controls, but also other measures, including "economic incentives" to control overall emissions. 42 U.S.C. § 7410(a)(2)(A). Even in the limited number of instances where the Act does preempt states from regulating emissions from sources (such as motor vehicles) more stringently than do applicable federal standards, it does not suggest that encouraging use of lower-emission vehicles would be contrary to its objectives. *Cf. South Coast*, 541 U.S. at 258 (distinguishing such programs from preempted emission standards). Moreover, the Act makes clear that even when a state meets all applicable federal ambient air quality standards, it has a legitimate interest in preventing adverse effects that air pollution may cause "notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1). And the Act specifically recognizes the legitimacy of state efforts to "achieve or facilitate the reduction of greenhouse gas air pollution" by providing federal grants to assist them in those efforts. 42 U.S.C. § 7437(b).

More broadly, neither the Act's specific terms nor its overall structure suggests that it imposes a ceiling beyond which states cannot seek to protect their air. Nothing in the Act, for example, purports to give federal regulators the authority to balance the overall costs and benefits of clean air and prevent states from seeking air that is cleaner than federal emissions standards have achieved. And nothing in the Act authorizes the federal government to exempt certain kinds of pollutants (such as greenhouse gases) from applicable state statutory or common law. The Clean Air Act's provisions nowhere show a purpose of authorizing federal regulators to prescribe an optimal level of air pollution control that would be thwarted by additional state requirements and remedies.

Thus, state laws are not contrary to the Act's objectives when, for example, they: impose more stringent limits on emissions from sources covered by the Act; target pollutants not addressed by federal standards issued under the Act; adopt air quality standards or other measures aimed at making air cleaner than federal standards achieve; foster conservation measures to reduce reliance on fuels and technologies that, in the aggregate, cause harmful pollution even when each individual emission from a source meets federal standards; or, most relevant here, impose liability on entities that injure state residents by engaging in deceptive marketing that causes harmful air pollution. Such measures align perfectly with the Clean Air Act's real purposes and objectives, which are to regulate emissions in the specific ways the Act requires while leaving the states ample scope to go further in pursuing "reasonable … actions, consistent with the provisions of [the Act], for pollution prevention." 42 U.S.C. § 7401(c).

3. This Court's decision in *Ouellette* does not support the oil companies' implied-preemption arguments.

Despite the Act's evident purpose of *not* broadly preempting state antipollution measures, the oil companies argue that this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), supports the view the Clean Air Act impliedly preempts a state from providing any remedies under its own laws for pollution emanating from other states. That argument is both fundamentally mistaken and, even if correct, would not require dismissal of Boulder's claims.

Ouellette held that the permitting scheme established by the Clean Water Act for "point sources" of water pollutants impliedly prohibits a state from imposing liability under its own laws for regulated discharges of water pollutants in other states, *see id.* at 493–97, but *permits* liability to be imposed under the common law of the state where a source is located even if the discharge is permitted under the Clean Water Act, *id.* at 497–500. That holding rested heavily on the Court's reading of a "savings clause" in the Clean Water Act providing in part that nothing in that Act "shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) *of such States*." 33 U.SC. § 1370 (emphasis added). The Court held that "[t]his language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State," and thus "does not preclude preemption of the law of an affected State." *Ouellette*, 479 U.S. at 493.

By contrast, the Clean Air Act's broad disclaimer of preemption of *any* requirement of *any* state concerning control of air pollution, 42 U.S.C. § 7416, does not include the territorial limit on state jurisdiction that *Ouellette* found in the Clean Water Act. In the absence of the language that led the Court in *Ouellette* to conclude that "the Act itself does not speak directly to the issue" of preemption of the claims before it, the Court has no occasion to resort to guidance from "the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State." 479 U.S. at 493.

In any event, the considerations that led the Court to find implied preemption under the Clean Water Act in *Ouellette* are not relevant to Boulder's claims. *Ouellette*'s application of purposes-and-objectives preemption rested on its conclusion "that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Id.* (citation omitted). Consistent with this view, *Ouellette* held only that the Clean Water Act "precludes a court from applying the law of an affected State *against an out-of-state source*." *Id.* at 494 (emphasis added).

As explained above, however, Boulder does not seek to abate or impose liability for emissions from particular sources, and its theory of liability does not rest on the explicit or implicit imposition of "separate discharge standards," *id.* at 493, that are different from those imposed under the Clean Air Act or the law of the state where emissions occur. Boulder's theory is not that the emissions themselves were unlawful, but that the oil companies acted unlawfully in promoting and marketing their products, knowing that their use would cause harm even if users complied with all applicable emissions standards. The Clean Air Act does not regulate such activities or address state regulation of them. Accordingly, unlike in *Ouellette,* nothing in the common-law principles underlying Boulder's claim "interferes with the methods by which the federal statute was designed to reach [its] goal[s]" or "upset[s] the balance of public and private interests … addressed by the Act." *Id*. at 494.

Finally, as Boulder points out, even assuming that *Ouellette*'s reasoning could be applied to the claims here, Boulder's action does not necessarily depend on application of *Colorado* law. The oil companies could prevail on their argument that Boulder's action must be dismissed only if the statute completely foreclosed application of state common law to remedy harms resulting from interstate pollution and thus did not permit *any* state's law to be applied to impose liability on the companies. But *Ouellette* makes clear that the conflict-preemption reasoning on which the Court relied, if applicable here, would leave Colorado courts free to provide remedies based on "the law of the *source* State." *Id*. at 497; *see id*. at 599–500.[5] In short, *Ouellette* cannot be squared with the oil companies' assertion that the Clean Air Act preempts any application of state common law to their conduct.

[5] The Court need not determine whether, if *Ouellette*'s reasoning were applicable here, the law of the "source state" would be considered to be that of the states from which the oil companies directed their wrongful promotion and marketing efforts or that of the states where those efforts caused emissions to occur. Either way, Boulder's claims must be permitted to proceed, with choice-of-law determinations to be made at an appropriate time.

IV. The oil companies' remaining arguments for displacement of state common law are unconvincing.

The oil companies' relegation of their claim of implied preemption under the Clean Air Act to last place among their preemption arguments reflects the absence of support for preemption in the statute's text. But the companies' other preemption arguments are equally venturesome and unsupported.

The oil companies rely heavily on this Court's former doctrine that certain claims seeking to abate emissions of interstate air and water pollution must be brought under federal common law. *See Illinois v. Milwaukee,* 406 U.S. 91, 93 (1972). This Court has since held, however, that the Clean Air Act has completely displaced that body of federal common law. *See Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423–29 (2011) (*AEP*). A body of judge-made federal law that has been superseded by an act of Congress and has no further force and effect cannot possibly be a "Law[] of the United States … made in pursuance" to the Constitution that, under the Supremacy Clause, is "binding" on judges in the face of contrary state law.

The oil companies therefore must fall back on the assertion that the Court's former creation of federal common law necessarily reflected the Court's view that the Constitution itself foreclosed the application of state common law to matters related to interstate air pollution, and that the Constitution likewise preempts Boulder's state common-law claims. The oil companies, however, cite no *holding* by the Court that the Constitution preempts all forms of state-law liability for harms attributable to interstate air pollution, let alone anything that identifies the "constitutional text," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503, that can serve as the source of that preemption.

Even if the Court's pre-Clean Air Act federal common law implicitly reflected some constitutional prohibition on the invocation of state common law, there is no basis for reading that prohibition any more broadly than the applications of state common law that the Court held were displaced by federal common law: namely, attempts to use the common law of "one State to abate pollution emanating from another State" by imposing limits on discharges or emissions from specific sources. *AEP*, 564 U.S. at 421. Again, however, Boulder's claims are not attempts to abate emissions permitted under the law of the source state, nor do they rest on the theory that the sources of those emissions acted unlawfully. The Court's old federal common-law decisions did not address claims like Boulder's, much less determine that the Constitution prohibits them.

AEP recognized that the answer to the question whether federal law preempts a common-law claim involving damages resulting from greenhouse-gas pollution must, in light of the abrogation of federal common law, be sought in the Clean Air Act, not in the Court's abrogated common-law decisions. 564 U.S. at 429. The absence of any basis in the Act for implied preemption of Boulder's claims is therefore fatal to the oil companies' preemption arguments.

CONCLUSION

If the Court concludes that it has jurisdiction, it should affirm the decision of the Supreme Court of Colorado.

Respectfully submitted,

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