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.

On Writ of Certiorari to
the Supreme Court of Colorado

BRIEF OF *AMICUS CURIAE* NEUTRAL PRINCIPLES SUPPORTING PETITIONERS AND REVERSAL

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QUESTIONS PRESENTED

1. Whether 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.

2. Whether this Court has statutory and Article III jurisdiction to hear this case.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Neutral Principles is a nonprofit, nonpartisan organization created to promote the consistent and rigorous application of neutral legal principles emphasizing fidelity to the text and structure of the Constitution and laws regardless of outcome. Its mission is to apply traditionally conservative legal methods in a rigorously nonpartisan way—ensuring that both substantive and procedural constitutional safeguards against government overreach are upheld, regardless of shifting political winds. As jurists and scholars such as Judge Bork, Professor Wechsler, and many others before and since have recognized, the unprincipled exercise of judicial power in pursuit of particular results is unsustainable and illegitimate. Since the 1980s, conservative scholarship and jurisprudence have demonstrated that such neutral principles are best found in a faithful, unbiased adherence to the original public meaning of the text of the Constitution, and, when necessary, relevant history and tradition that may help resolve any ambiguities in that text.

Neutral Principles is interested in this case because it involves attempts to impose liability for core political speech and public debate over scientific and economic issues as a means of punishing disfavored speakers and ideas. Such punishments abridge the core meaning and function of the First Amendment's protections for speech, association, and petitioning the

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution toward the brief's preparation or submission.

government. The First Amendment violations highlighted by plaintiffs' newfound emphasis on speech-based claims provide an additional reason to treat lawsuits over such national and global issues as preempted or barred by federal law and the Constitution in order to avoid the profound First Amendment burdens that would arise if this suit is allowed to proceed. They also provide independent alternative grounds to reverse the judgment below.

This case also involves an attempt by territorially limited government entities to regulate national and international speech and commerce based on the claimed downstream consequences of decisions made by millions of subsequent actors. Extraterritorial overreach by state or local governments is contrary to the original meaning of the Commerce Clause and other structural components of the Constitution constraining such overreach.

SUMMARY OF ARGUMENT

Trying to avoid federal preemption, plaintiffs in this and other climate-change cases have shifted from claims targeting emissions to claims alleging supposed "deception." These "deception"-based claims are still preempted, because they still target emissions by seeking relief for injuries allegedly caused by emissions. But that shift also threatens numerous First Amendment violations and the possibility of conflicting regulations of national speech, association, and petitioning that further support preemption of such local efforts. Climate-change plaintiffs seek to punish energy companies not just for the asserted consequences of emissions, which result from the decisions and

actions of millions of other actors and governments, but for the companies' speech about climate change that plaintiffs claim led to such emissions.

This case is an example of this pattern, but it is not an outlier: There are many like it across the country. And there likely will be many more in the field of climate change, with some potentially taking diametrically opposed views of what scientific speech is true or false. This Court should keep the serious First Amendment issues underlying this litigation campaign in mind in deciding this case. The danger to First Amendment rights is another reason favoring uniform national regulation of these issues as opposed to opportunistic state and local overreach that seeks to punish and suppress speech and debate on this controversial topic.

ARGUMENT

I. The First Amendment Protects Advocacy, Petitioning, and Expressive Association Related to Debates About Climate Change.

The speech that forms the basis for alleged liability in this case is core advocacy, petitioning, and expressive association that is protected by the First Amendment. Merely characterizing it as "marketing" does nothing to change its essential nature and its constitutional protection.

Attempts to impose liability based in part on constitutionally protected speech are subject to First Amendment scrutiny (and, as Parts I.B-F show, fail such scrutiny). Since the Framing Era, American law has recognized that civil liability claims based on expression are subject to constitutional scrutiny.

Before the Fourteenth Amendment and the subsequent incorporation of the First Amendment, this took place under state constitutional free expression provisions. Many early cases from 1799 on acknowledge that civil lawsuits are subject to state constitutional provisions protecting the right to petition, speak, and print. Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 Iowa L. Rev. 249, 253-254 (2010); see, *e.g.*, *Harris* v. *Huntington*, 2 Tyl. 129, 145-146 (Vt. 1802) (rejecting tort liability based partly on the constitutional right to petition); *Reid* v. *Delorme*, 4 S.C.L. (2 Brev.) 76, 79 (S.C. Const. Ct. App. 1806) (likewise); see also, *e.g.*, Const. Diary (Phila.), Dec. 14, 1799, at 3 (article on *Rush* v. *Cobbett*) (reporting on a jury instruction that recognized that the free press provision of the state constitution applied to tort liability); *Runkle* v. *Meyer*, 3 Yeates 518, 520 (Pa. 1803) (likewise).

Following in this tradition, and after the incorporation of the First Amendment, civil lawsuits based on speech have been constrained by the First Amendment. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46 (1988). This Court's *Noerr*/*Pennington* line of cases regarding antitrust liability took the same approach, interpreting federal statutes "in the light of the First Amendment[]." *FTC* v. *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); see, *e.g.*, *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965).

The decisions cited above applied the First Amendment even where the plaintiffs were private entities, recognizing that the plaintiffs' invocation of the government's coercive power through the courts sufficed to trigger constitutional scrutiny. Here, where plaintiffs are themselves government entities, constitutional constraints are doubly applicable.

A. Climate-Change Lawsuit Claims Rest in Part on Defendants' Constitutionally Protected Speech, Petitioning, and Association.

There is no genuine doubt that the recent climate-change lawsuits brought by governments turn on defendants' political advocacy. Notwithstanding the assertion by plaintiffs that they "**do not** seek to impose liability" based on defendants' "speech," "participat[ion] in public debates," or "lobbying or petitioning." J.A.139, ¶¶ 541-542, that is precisely what they are doing. Plaintiffs expressly "seek to impose liability on Defendants in connection with misrepresentations about the known dangers of their products, in connection with their marketing of those products and in connection with the sale of those products," J.A.139, ¶ 541. But they include all public speech directly or indirectly related to their products and climate change under the rubric of "marketing" and have a boundless conception of what speech is "in connection" with marketing and sales, making their disclaimer meaningless. Other parts of the Amended Complaint show that these supposed misrepresentations do indeed include "participat[ion] in public debates" about climate change.

In Part III.C of their Amended Complaint, titled "Defendants' fossil fuel activities have caused and will continue to cause Plaintiffs' damages and losses," J.A.84, Plaintiffs fault Defendants for supposedly "act[ing] to thwart public awareness and understanding through misleading advertising and other communications." J.A.106, ¶ 418. They claim Defendants "ran multiple advertisements downplaying the risks of climate change and emphasizing uncertainty." J.A.107, ¶ 419. They similarly claim defendants "criticized" the "Kyoto process," and "emphasized scientific uncertainties." J.A.107, ¶ 421 (cleaned up).

They likewise attack the defendants' expressive associations, arguing that defendants "communicated through API [the American Petroleum Institute], and groups that were created, organized or controlled by API," such as "the Global Climate Coalition," which "spent millions of dollars on advertising that tried to discredit climate science, and cast doubt on the dangerous consequences of climate change." J.A.107-108, ¶¶ 422-424. They further allege that, through another organization, defendants aimed "to get a majority of the American public to recognize that significant uncertainties exist in climate science and to make climate change a non-issue, meaning that the Kyoto Protocol is defeated and there are no further initiatives to thwart the threat of climate change." J.A.108-109, ¶ 427 (cleaned up). And they claim that defendants "promoted the work" of "a cadre of claimed climate scientists" "to cast doubt on climate science." J.A.109, ¶¶ 429-430. See generally J.A.104-112, ¶¶ 407-443 (offering many more examples of such speech, and of its persuasiveness to the public). Whatever one might

think of the merits of such speech, it was indeed speech, participation in political debate, lobbying, and petitioning (as well as expressive association). Such examples are core First Amendment activity, not merely the sort of product advertising so directly part of specific commercial transactions that it would be categorized as commercial speech (see Part I.C *infra*).

In a similar case brought by Honolulu, plaintiffs sought to depose hundreds of third-party witnesses, including alleged "climate-denial leaders and authors of climate disinformation, PR strategists, and fringe scientists and academics," "Hawai'i and national media organizations," "think tanks," and "interest groups related to Defendants' misinformation campaign." Letter from Stephanie D. Biehl, Sher Edling, LLP & Dana M.O. Viola, Corporation Counsel, to Jerry M. Hiatt, Hiatt & Hiatt, in the matter of *City & County of Honolulu* v. *Sunoco, LP*, Case No. 1ccv-20-0000380 (Haw. Cir. Ct., 1st Cir. Apr. 10, 2026), available at https://perma.cc/8JJY-B5J9. That too illustrates how climate-change lawsuit plaintiffs are broadly targeting public commentary on scientific and political matters, as well as the expressive associations that engage in such debates.

Other climate-change lawsuits likewise routinely target defendants' public statements as part of the basis for supposed liability. The Introduction to a recent Multnomah County brief makes this clear: The opening sentence reads,

> For decades, powerful corporations have engaged in the same pattern of undermining the scientific consensus, suppressing

> unfavorable research, and manufacturing uncertainty through misinformation campaigns on issues critical to public safety—issues like tobacco, asbestos, opioids, obesity and climate change—all for financial gain.

Pl. Multnomah County's Resp. to Mot. to Dismiss at 1, *County of Multnomah* v. *Exxon Mobil Corp.*, No. 23-cv-25164 (Ore. Cir. Ct., Multnomah Cnty. July 8, 2025). Later on the same page, the brief asserts that "Defendants continue to glorify fossil fuels, arguing that any downside to their consumption is simply outweighed by their utility, without addressing Defendants' deep-rooted public deception or its disastrous consequences in Oregon upon which Plaintiff's claims are based." *Ibid.* It argues that defendants seek "to quell concerns and thoroughly confuse the public about the dangers of greenhouse gasses and the seriousness of anthropogenic climate change, thus impeding actions to prepare for the consequences of climate change." *Ibid.*

Climate-change lawsuit plaintiffs likewise target speech when they argue that defendants are engaged in a "misinformation campaign" "to downplay and/or outright deny the causal relationship between their GHG emissions and extreme weather events." Pls.' Mot. to Remand at 9, 10, *County of Multnomah* v. *Exxon Mobil Corp.*, No. 3:23-cv-1213-YY, 2024 WL 2938473 (D. Or. June 10, 2024), ECF No. 98. Indeed, they assert that this has been done "through both legitimate and illegitimate means." *Ibid.* While the meaning of "illegitimate means" here is not clear, the statement acknowledges that much of the means were not otherwise criminal or tortious. And much of the means consisted of fully First-Amendment-protected

activity—whether public advocacy, lobbying, or legal challenges to government action—and not mere commercial advertising, *e.g.*:

> Space Age filed a lawsuit in September 2020 in Oregon Circuit Court against then-Oregon governor Kate Brown alleging that Governor Brown's executive order directing state agencies to reduce greenhouse gas emissions violated separation of powers principles in the Oregon Constitution. Space Age has been an active participant in downplaying the need to reduce GHG emissions * * *.

Id. at 10 (footnote and citation omitted).

Similarly, in their arguments about personal jurisdiction over fossil-fuel companies, various plaintiffs often identify the allegedly tortious behavior as including political advocacy. One lawsuit, for instance, stresses defendants' "efforts to influence statutory and regulatory debate regarding fossil fuel consumption, electric power distribution, and greenhouse gas pollution policies," including "lobbying expenditures directed at numerous statutory and regulatory proposals." Complaint ¶ 29(e), *City of Imperial Beach* v. *Chevron Corp.*, No. C17-01227 (Cal. Super. Ct., Contra Costa Cnty. July 17, 2017); see also Complaint ¶ 32(e), *City of Richmond* v. *Chevron Corp.*, No. C18-00055 (Cal. Super. Ct., Contra Costa Cnty. Jan. 22, 2018). Plaintiffs similarly aim to hold many companies liable for their association with industry groups that seek to promote political messages. See *infra* Part I.E.

B. The First Amendment Protects Speech on Scientific Questions.

The speech over which climate change plaintiffs routinely sue is fully protected by the First Amendment, because it is advocacy on matters of core public concern and public policy.

In *United States* v. *Alvarez*, five members of this Court expressly recognized that the government cannot try to "penalize purportedly false speech" on such matters. 567 U.S. 709, 731 (2012) (Breyer, J., concurring in judgment). Justice Alito, joined by Justices Scalia and Thomas, reasoned:

> [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

Id. at 751-752 (Alito, J., dissenting). Justice Breyer, joined by Justice Kagan, expressly echoed this:

> As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." Laws restricting

> false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny.

Id. at 731-732 (Breyer, J., concurring in the judgment). Justice Kennedy's plurality opinion did not discuss this point, but that was likely because the plurality took an *even more* speech-protective view than did the concurrence and the dissent, see *id.* at 726-729, and thus saw no need for focusing specially on these categories of speech.

These opinions specifically refer to "the social sciences," but their logic applies equally to other sciences. There too "it is perilous to permit the state to be the arbiter of truth." There too placing public debate at the mercy of federal, state, and county officials, as well as of judges and jurors, "would present a grave and unacceptable danger of suppressing truthful speech." There too the underlying speech is on matters of the most serious "public concern."

Indeed, this Court has long spoken of broad protection for "scientific expression": "[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller* v. *California*, 413 U.S. 15, 22-23 (1973). And that is especially apt in the climate change cases, where the "scientific expression" is intimately tied with "political * * * expression" on difficult public policy questions—such as whether the "downside to [the] consumption [of fossil fuels] is simply outweighed by their utility," see *supra* p. 8.

As this Court has recognized in recent years, many questions yield "fierce scientific and policy debates." *United States* v. *Skrmetti*, 605 U.S. 495, 525 (2025). See, *e.g.*, *Chiles* v. *Salazar*, 146 S. Ct. 1010, 1027-1029 (2026) (discussing both the modern debate about sexual orientation and gender identity conversion therapy, and the past debate about whether homosexuality was a "mental disorder"); *Skrmetti*, 605 U.S. at 500-505, 523-525 (discussing the debate over youth gender medicine); *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020) (per curiam) (resolving the Free Exercise Clause question against the backdrop of the debate over COVID-19 lockdowns). Human nature being what it is, the "fierce[ness]" of the debates may manifest through each side feeling so strongly about its own correctness that it does not believe that there is indeed a genuine debate.

Partisans may be confident that the science is settled in their favor, and that only liars would contest that conclusion. Jurors may take the same view. Especially in relatively ideologically homogeneous communities, such jurors may well form the required supermajority for imposing massive liability on those with whom they disagree. In federal courts, civil juries must at least be unanimous. Fed. R. Civ. P. 48. But most state court systems do not require civil jury unanimity. See, *e.g.*, Mont. Const. art. II, § 26 (providing for a verdict by a 2/3 vote); Cal. Const. art. I, § 16 (providing for a verdict by a 3/4 vote); Paula Hannaford-Agor & Morgan Moffett, *2023 State-of-the-States Survey of Jury Improvement Efforts: Civil Jury*

Trials 5 & fig. 3, Nat'l Ctr. for State Cts. (2025), https://tinyurl.com/5mn4nrzj (cataloging the rules in all states).

Yet the supposed "expert consensus" relied on by decision makers—county officials, judges, jurors, and others—is often illusory. And in any event, that consensus cannot be a substitute for the ongoing process of free discussion that the First Amendment prescribes.

"[T]he American people and their representatives are entitled to disagree with those who hold themselves out as experts" in enacting legislation. *Skrmetti*, 605 U.S. at 530 (Thomas, J., concurring). And they are likewise entitled to hear from those who disagree with the putative experts. Resolving the policy implications of scientific debates is left "to the people, their elected representatives, and the democratic process." *Id.* at 525 (majority op.). Challenging the conventional wisdom of the day is often the foundation of political, social, and scientific advances. Indeed, such freedom of speech on all questions, including scientific ones, is what allows "the democratic process" to function.

C. The First Amendment Protects Speech on Scientific Questions Touching on One's Business.

Just as the First Amendment protects the right of fossil fuel critics to speak about scientific matters, it protects the same right of fossil fuel defenders, including fossil fuel producers. Whatever the justifications and merits of less rigorous protection for *commercial advertising* under this Court's jurisprudence, *e.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 65-68

(1983), this Court tolerates such differential treatment precisely because "[a] company has the full panoply of protections available to its direct comments on public issues." *Id.* at 68.

In *Zauderer* v. *Office of Disciplinary Counsel*, this Court concluded that speech about medical matters in a lawyer's commercial advertising was less protected commercial speech in part because "Ohio has placed no general restrictions on appellant's right to publish facts or express opinions regarding Dalkon Shield litigation; Ohio's Disciplinary Rules prevent him only from conveying those facts and opinions in the form of advertisements of his services as an attorney." 471 U.S. 626, 637 n.7 (1985) (quoting the "full panoply of protections available to its direct comments on public issues" statement from *Bolger*, 463 U.S. at 68). *Central Hudson Gas & Electric Corp.* v. *Public Service Commission* likewise distinguished commercial speech from fully protected "direct comments on public issues" by energy companies. 447 U.S. 557, 562 n.5 (1980). Whatever this Court may eventually decide as to reduced protection for commercial speech, any such reduction necessarily depends on businesses retaining the freedom to speak in public debate, even if not in purely commercial advertising.

Indeed, the case that *Bolger* cited for the "full panoply of protections" proposition—*Consolidated Edison Co.* v. *Public Service Commission of New York, Inc.*, 447 U.S. 530 (1980)—involved an energy company promoting an environmentally controversial energy source (in that case, nuclear power). See *Bolger,* 463 U.S. at 68 n.16. And this Court in *Consolidated Edison*

treated such speech as fully protected "participat[ion] in * * * public debate." 447 U.S. at 535.

Furthermore, this Court has long recognized that a company's motivation to protect its own business through its speech does not strip the speech of full protection. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670.

And while private collusion may be regulated under the antitrust laws, that is so precisely because public speech remains fully protected: Even businesses who seek anticompetitive legislation "can, with full antitrust immunity, engage in concerted efforts to influence * * * governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 510 (1988). Likewise, businesses can "present[] and vigorously argu[e] accurate scientific evidence before a nonpartisan private standard-setting body." *Id.* Businesses can surely do the same before the public more generally.

Speech on public issues, even by companies with an economic interest in the outcome, is protected in large part because speech can be valuable to listeners regardless of the speaker's identity. Corporate speech—which will usually be economically self-interested—is protected "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 775-76, 783 (1978).

Listeners need to be able to hear freely from both sides of the debate. Critics of fossil fuel companies speak prominently and freely, without worry of ruinous liability for statements about broad scientific questions, notwithstanding the varied downstream harms that would occur if they were wrong. For the benefit of listeners, fossil fuel companies must be permitted to engage in public debate without fear of liability or double standards. The government "has no * * * authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992).

Justice Breyer's dissent, joined by Justice O'Connor, in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003), supports this as well.[2] Justice Breyer reasoned that Nike's public speech responding to criticisms of its production processes was fully protected, because it "appear[ed] outside a traditional advertising format, such as a brief television or newspaper advertisement" and did "not propose the presentation or sale of a product or any other commercial transaction." *Id.* at 665 (Breyer, J., dissenting). Nike's speech, Justice Breyer noted, sought "to convey information to 'a diverse audience,' including individuals who have 'a general curiosity about, or genuine interest in,' the public controversy surrounding Nike." *Ibid.* (citations omitted).

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[2] None of this Court's members took the opposite view from this opinion in *Nike*; this Court declined to consider the First Amendment question in that case for procedural reasons. See *Nike*, 539 U.S. at 655 (mem.) (per curiam).

And, most importantly, the content of Nike's speech made "clear that, in context, it concerns a matter that is of significant public interest and active controversy, and it describes factual matters related to that subject in detail." *Ibid.* Nike's speech described "Nike's labor practices" and responded "to criticism of those practices," and did so "because those practices themselves play an important role in an existing public debate" "in which participants advocated, or opposed, public collective action." *Ibid.* "The First Amendment's protections of speech and press were 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes.'" *Id.* at 677-678 (Breyer, J., dissenting) (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)). This was said about speech discussing a company's labor practices—and the reasoning applies even more to discussions about some of the weightiest scientific and political issues being debated by Americans today.

D. The First Amendment Protects Petitioning the Government.

What is true of companies' speech to the public extends equally to companies' individual and collective petitioning of governmental bodies. And this principle likewise applies regardless of the economic self-interest behind the companies' speech.

As this Court has long recognized, "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting

resolution of their business and economic interests vis-à-vis their competitors." *California Motor Transp. Co.* v. *Trucking Unltd.,* 404 U.S. 508, 510-511 (1972). Indeed, as this Court noted, such speech was protected in *Noerr* even though "[t]he political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics." *Id.* at 512.

> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical."

Ibid. (quoting *Noerr*, 365 U.S. at 141).

To be sure, in the course of litigation, "unethical conduct in the setting of the adjudicatory process often results in sanctions." *Ibid.* But the fact that Rule 11 leaves judges with considerable authority to sanction filings that they view as frivolous and factually unfounded does not give the government authority to regulate speech outside litigation. *Id.* at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."). And even when it comes to litigation, only "objectively baseless" litigation loses its First Amendment immunity, regardless of its supposedly malign motivation.

Professional Real Estate Invs., Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993).

The constitutional protection for petitioning the government, and in particular, the EPA and other federal actors, is all the more reason to take a broad view of federal preemption as it relates to this case. Even if there was some question regarding field preemption by federal environmental laws, the fact that States and localities could punish companies for petitioning the federal government would deprive such federal actors of the companies' perspective on critical issues subject to actual or potential regulation. Impeding the flow of information to federal actors is in direct conflict with the regulatory and legislative authority of those actors.

E. The First Amendment Protects Expressive Association.

The climate-change lawsuits also routinely rely on defendants' joining with others to speak, petition, and litigate about fossil fuels. See, *e.g.*, J.A.107-110, ¶¶ 422-435. As part of these theories, they seek discovery of all participation in various associations, as well as communications within those associations. See, *e.g.*, 1st Req. Prod. of Docs. at 6 (¶ 17), 9-10 (¶¶ 16-17), *City & County of Honolulu* v. *Sunoco LP,* No. 1CCV-20-0000380 (LWC) (Haw. Cir. Ct., 1st Cir. Aug. 26, 2024) (seeking "Communications that occurred in the course of Your participation in Trade Associations or other organizations" from 1950 to the present as well as the identities of "all of Your current and former employees who were Board or committee members * * * [and] all Documents Concerning the governance structure,

organization, voting, rules, and policies for those organizations" from 1950 to the present); Pls.' 1st Req. Prod. of Docs., *City of Annapolis* v. *BP P.L.C.*, No. C-02-CV-21-000250 (Md. Cir. Ct., Anne Arundel Cnty. Aug. 13, 2024) (similar); Pl.'s 1st Reqs. Prod. of Docs. at 14-16 (¶¶ 27-28, 31-33), 24 (¶ 67), *Vermont* v. *Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. Oct. 13, 2025) (similar).

Yet "[t]he First Amendment * * * restricts the ability of the State to impose liability on an individual solely because of his association with another." *Claiborne Hardware*, 458 U.S. at 918-919 (so holding specifically as to civil liability). "Regular attendance and participation at * * * meetings" of a group, for instance, "is an insufficient predicate on which to impose liability," absent evidence of participation in planning "illegal conduct," such as violence (the issue in *Claiborne* itself), antitrust conspiracy, and the like. *Id.* at 924. And mere assertions of such conduct in connection with protected activities, and fishing expeditions supposedly to unearth such conduct, should be viewed with the usual skepticism of heightened scrutiny.

The First Amendment also recognizes "the 'vital relationship' between 'privacy in one's associations' and the 'freedom to associate.'" *First Choice Women's Res. Ctrs., Inc.* v. *Davenport*, 146 S. Ct. 1114, 1123 (2026) (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). "Strip away the ability of individuals to work together free from governmental oversight and intrusion, and the freedom to associate may become no freedom at all—individuals deterred, groups diminished, and their protected advocacy

suppressed." *Ibid.* This logic applies equally to the ability of businesses to work together for political ends.

Restrictions on or penalties for association, including piercing the "privacy in one's associations," make associating with others for political purposes a perilous proposition, and undermine the "right to associate with others" in order "to speak, * * * publish, * * * and petition." "Government actions tending to 'curtai[l] the freedom to associate' warrant 'the closest scrutiny under the First Amendment.'" *Id.* at 1122-1123 (quoting *NAACP*, 357 U.S. at 460-461, and *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 606 (2021)). Holding companies liable for the speech of groups they join, or requiring them to disclose the groups' membership or their internal political communications, fails such scrutiny, just as this Court held as to individuals in *Claiborne Hardware*.

In this case and others like it, the associations are not being accused of organizing violence (the allegation in *Claiborne*), antitrust conspiracy, or other such illegal conduct. They are being accused of speaking about controversial scientific questions related to climate change. For the reasons given in Parts I.B-I.C *supra*, such speech cannot itself be restricted. And for the reasons given above, associating to engage in such speech cannot be restricted, either.

F. The First Amendment Protects the Right Not to Speak

The climate-change lawsuits also often demand that courts order defendants to fund public advocacy campaigns supposedly aimed at correcting their

alleged misstatements. In this very lawsuit, plaintiffs ask the court to order plaintiffs to pay "the cost of public education programs concerning responses to climate alteration." J.A.138, ¶ 532. Likewise, the Connecticut lawsuit seeks an "order that ExxonMobil fund a corrective education campaign to remedy the harm inflicted by decades of disinformation." 2d Am. Compl. at 45, Prayer for Relief ¶ 5, *Connecticut* v. *Exxon Mobil Corp.*, No. HHD-CV20-6132568-S (Conn. Super. Ct., Hartford Cnty. Nov. 8, 2024); see also Compl. at 77, Prayer for Relief ¶ 7.4, *Leon* v. *Exxon*, No. 25-2-15986-8-SEA (Wash. Super. Ct., King Cnty. May 29, 2025) (seeking "an obligation to provide * * * a public education campaign to help rectify Defendants' decades of misinformation"); Compl. ¶ 246, *Minnesota* v. *American Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct., Ramsey Cnty. June 24, 2020) (likewise).

But such a remedy would constitute an unconstitutional speech compulsion. "Generally, * * * the government may not compel a person to speak its own preferred messages." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 586 (2023). And "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" to those raised by compelled speech. *Janus* v. *American Fed'n of State, Cnty. & Mun. Emps.*, 585 U.S. 878, 893 (2018). The protection against such compulsions also extends to businesses as well as individuals. See, *e.g.*, *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974) (cited as one of the supporting authorities in *303 Creative*, 600 U.S. at 586); *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality op.) (striking down a speech compulsion imposed on an

energy corporation, partly based on the principle that "[t]he identity of the speaker is not decisive in determining whether speech is protected"). A court thus may not require anti-fossil-fuel advocacy groups—or any other kinds of advocacy groups—to publish, or to fund publishing, purported corrections to fully protected public commentary just because judges or jurors conclude the commentary is misleading. *See* Parts I.B-I.C *supra* (explaining why businesses' speech on climate change is indeed fully protected). The same is true of requirements that climate-change lawsuit defendants express the views of their political adversaries.

To be sure, this Court's "precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *National Inst. Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*) (citing, among other cases, *Zauderer*, 471 U.S. at 651). But, for reasons given in Part I.C, much of the speech that the climate-change lawsuit plaintiffs target is not commercial, and the remedies they seek are not limited to disclaimers in commercial advertisements. And, as with the compelled speech related to abortion in *NIFLA*, the subject of climate change is "anything but an 'uncontroversial' topic." *Id.* at 769.

Likewise, as in *NIFLA*, a plaintiff in a climate-change case "could inform [the public] about [its views on climate change] 'without burdening a speaker with unwanted speech.'" *Ibid.* (quoting *Riley* v. *National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988)). That it would have to raise money for such speech from

its own supporters rather than from its opponents is precisely how a marketplace of ideas should work, as opposed to a centralized speech economy with the funding of favored ideas directed and compelled by the government or the courts.

II. Imposing Liability for Interstate and International Activity Based on the Local Downstream Consequences of Such Extraterritorial Behavior Is Beyond the Power of Individual States Under the Foreign Commerce Clause.

Besides the serious First Amendment concerns favoring a broad preemption ruling that would avoid such constitutional problems, the state-law suits in this case and others around the country seek to regulate national and international commerce in violation of the Commerce Clause and related structural constraints on extraterritorial regulation.

Boulder attempts to penalize multinational companies not merely for the local and immediate consequences of any local operations, but for the multicausal long-term consequences of their sales and speech around the country and around the globe. And it is seeking to impose liability on Suncor for the joint consequences of millions of decisions by actors beyond its borders, operating in interstate and international trade. Whatever reticence this Court might have in preempting largely ordinary State regulation that incidentally affects interstate commerce, that reticence would be misplaced when it comes to such a major encroachment on international commerce and an attempt to impose Boulder's views of nuisance and

appropriate speech on actors not just in other States but also in foreign countries.

For good reasons, this Court has understood Congress's delegated power over foreign commerce as exclusive of State powers. That understanding is consistent with the original public meaning of both the delegation of power to Congress in Article I, and the catch-all reservation of powers to the states and the people in the Tenth Amendment.

Regardless whether the Constitution supports the somewhat variable dormant interstate Commerce Clause as it had evolved over the years, a more textually grounded reading of the clause supports exclusive federal authority here. Boulder's attempt to impose Colorado law on interstate and foreign commerce conflicts with the Commerce Clause, Article I's delegation of powers, and the Tenth Amendment. And it more broadly conflicts with the Constitution's structure, which organizes horizontal relations among States on principles of (partial) state autonomy, equality, territoriality, non-aggression, and mutual recognition.

The power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" U.S. Const. art. I, § 8, cl. 3, is one of the "legislative Powers" that the Constitution "grant[s]," and promises will be "vested in[,] a Congress of the United States," U.S. Const. art. I, § 1.

As a textual matter Article I's grant of authority is exclusive. Taking the "words * * * in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged," *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816), any "legislative

power" granted "is * * * absolutely vested," *id.* at 329. And by vesting powers in Congress, the Constitution divested those same powers from the States. As Justice Story explained in *Hunter's Lessee*, "the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, *except so far as they were granted to the government of the United States*." *Id.* at 325 (emphasis added).

The text of the Tenth Amendment confirms this reading, providing that "[t]he powers *not* delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). By such wording the Tenth Amendment necessarily recognizes that powers that *are* delegated to the United States are *not* "reserved" to the States or the people, but reside solely in the federal government. Congress might exercise its power to seek assistance from, or grant permission for, some state activities properly understood to "regulate" interstate or foreign commerce. But the default rule is the *absence* of state power to regulate interstate and foreign commerce—not endless state encroachment on delegated national authority unless and until Congress affirmatively says otherwise.

And that is true even though Congress has the undoubted option to affirmatively disable state regulation of extraterritorial commerce. The exercise of national legislative authority was designed to be difficult. Hurdles such as bicameralism, the potential veto, and the volume of matters that compete for Congress's attention slow and often stop such exercise. Default

rules are thus important, and the constitutional default for Article I powers is that individual States may not take it upon themselves to exercise powers delegated to Congress. The Constitution sought to free foreign commerce from state mischief, not to preserve all opportunity for such mischief while the national legislative process struggles to keep up.

Consistent with a proper reading of the Constitutional text, this Court's early cases rejected any suggestion that the power to regulate extraterritorial commerce was held concurrently by Congress and the States.

In *Gibbons* v. *Ogden*, Daniel Webster argued that it would be "insidious and dangerous" for the States to have a "*general* concurrent power" with Congress that would allow the States to "do whatever Congress has left undone." 22 U.S. (9 Wheat.) 1, 17-18 (1824). This Court did not need to reach that question in *Gibbons*, *id.* at 208-212, but several justices did discuss it in the *Passenger Cases*, addressing fees imposed by New York on ships carrying people traveling into the State. *Smith* v. *Turner,* 48 U.S. (7 How.) 283 (1849) (*Passenger Cases*). Justice McLean extensively reviewed the various powers delegated to Congress, the necessity of their exclusiveness within the narrow confines of such delegations, and concluded:

> Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of Gibbons *v.* Ogden, reiterated in Brown *v.* The State of Maryland, and often re-asserted by Mr. Justice Story, who

> participated in those decisions, I am brought to the conclusion, that the power "to regulate commerce with foreign nations, and among the several States," by the Constitution, is exclusively vested in Congress.

Id. at 400.

Justice Story, for his part, spoke of one State's "cheerful acquiescence" in the exclusivity of the commerce power, a point he said had not been "seriously controverted." 2 Joseph Story, *Commentaries on the Constitution of the United States* 515, § 1067 (Bos., Hilliard, Gray & Co. 1833), https://tinyurl.com/4xx3aavj. He explained that the "power to regulate commerce is general and unlimited in its terms" and left "no *residuum*" to the States. *Id.* at 513, § 1063. He continued that "when a State proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power, which is granted to congress; and is doing the very thing which congress is authorized to do." *Id.* at 514, § 1064.

The power to tax, by contrast, is different. Congress originally was empowered to adopt "uniform" taxes "throughout the United States" to pay for distinctly national obligations and activities "of the United States." U.S. Const. art. I, § 8, cl. 1. States may tax only within their jurisdiction and they do so for different ends. "In imposing taxes for state purposes, a state is not doing what congress is empowered to do." 2 Story, *supra* at 513, § 1064.

Especially in cases involving foreign commerce, this Court has described the commerce power as an exclusive delegation. In *Crutcher* v. *Kentucky*, 141 U.S.

47 (1891), this Court explained that the "prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states." *Id.* at 58.

This Court eventually moved away from its earlier understanding as to exclusive federal power over interstate commerce, discovering the very "residuum of power" in the States to act in "the absence of conflicting legislation by Congress," *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945), that Joseph Story rejected in his *Commentaries*. But this Court nonetheless continued to recognize greater exclusive Congressional authority as to foreign commerce, concluding that the federal "power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce." *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434 (1932).

In *Atlantic Cleaners*, this Court explained its conclusion that the Commerce Clause could be plenary as to foreign commerce but not as to interstate commerce by noting that "there is no rule of statutory construction" that precluded it from treating the "same word" as though it has "different meanings." *Id.* at 433.[3] And

[3] A genuinely originalist and textualist reading would recognize that the Commerce Clause, at least at its core and not expanded beyond its terms over the years, is exclusive as to interstate commerce as well. But this Court's reluctance to return to the original meaning of the Commerce Clause in the interstate commerce

indeed there is some "evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd.* v. *Los Angeles County*, 441 U.S. 434, 448 (1979).

Even taking those cases rejecting the exclusivity of the interstate commerce power on their own terms, any residuum of power left with the States was limited and would apply only to "matters of local concern" that would "in some measure affect interstate commerce" or "to some extent, regulate it." *Southern Pac.*, 325 U.S. at 767 (collecting cases). For that reason, just over a decade after this Court decided *Southern Pacific*, it could still say, correctly, that its cases recognized that the "Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any *direct* restrictions or impositions by the States." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959) (emphasis added) (citation omitted). In the foreign commerce context, this Court should be even more cautious in permitting direct or indirect burdens on international commerce.

The subsequent tendency to find even more exceptions to interstate commerce exclusivity—adding more judicial policymaking into the mix—was perhaps driven by concerns that an exclusive reading of an ever-expanding commerce power would foreclose too many state laws regulating ordinary local matters

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context should not prevent it from maintaining the original meaning of the Clause in the foreign commerce context, consistent with its past precedent in this area.

that in some way had an *effect* on interstate commerce. But while such concerns are understandable, they arise from a different error, not from a proper understanding of exclusivity.

Under an original and narrower view of the commerce power (apart from the erroneously expansive gloss of the Necessary and Proper Clause), any problem of excessively disabling state powers would have been limited. *Cf.* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 493 (1941) ("On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority pari passu from the states."). As Justice Thomas has explained, the "Clause's text, structure, and history all indicate that, at the time of the founding, the term "'commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.'" *Gonzales* v. *Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (quoting *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring))).

When the commerce power is properly constrained to those activities, any alleged harm from divesting the States of such power is necessarily cabined. "While in its content the commerce clause was designed to include only a limited number of matters, the states could no more legislate with propriety as to subjects falling within its limits than Congress could as to any subjects falling outside them." Abel, *supra*, 25 Minn. L. Rev. at 494.

Just as this Court has recognized that the vesting of powers in one branch forecloses exercise of or encroachment on such powers by another branch in the context of horizontal separation of powers, so too it should continue to recognize a vertical separation of powers between the federal government and the states, especially concerning the exclusive federal power to regulate foreign commerce. Plaintiffs' attempt to extend their tort laws to encompass extraterritorial conduct and global consequences reaches well into the regulation of foreign commerce that is the exclusive province of the federal government.

CONCLUSION

Recognizing, for the reasons given in petitioners' brief, that respondents' claims are preempted by federal law will, among other things, help avoid the serious First Amendment problems and Foreign Commerce Clause problems that climate-change plaintiffs' theories would yield. The judgment of the Colorado Supreme Court should therefore be reversed.

Respectfully submitted,

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