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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 SUNCOR ENERGY (U.S.A.) INC.,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 25-170
7 COUNTY COMMISSIONERS OF)
8 BOULDER COUNTY, ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Monday, October 5, 2026
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:06 a.m.
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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this term in Case 25-170, Suncor
5 Energy versus County Commissioners of Boulder
6 County.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON K. SHANMUGAM

9 ON BEHALF OF THE PETITIONERS

10 MR. SHANMUGAM: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 This case involves an unprecedented
13 effort to use state law to regulate global
14 conduct. Boulder is suing Petitioners under
15 Colorado law on the theory that their global
16 conduct increased the global use of fossil
17 fuels, which led to an increase in global
18 greenhouse-gas emissions, which contributed to
19 global climate change, which resulted in global
20 harms.

21 Our constitutional system does not
22 permit state law to be used in that manner.
23 The Constitution bars the application of state
24 law to certain inherently federal areas. When
25 the states entered the Union, the plan of the

1 Convention required them to surrender certain
2 preexisting powers in order to ensure each
3 state's equal sovereignty.

4 Because of the ambient nature of air
5 and water and the conflicting rights of states,
6 this Court has held for over a century that
7 federal law governs interstate pollution
8 claims. That principle applies with even
9 greater force to claims involving global
10 climate change.

11 In addition, the Constitution's
12 prohibition on extraterritorial regulation
13 precludes a state from extending its law beyond
14 its borders to regulate global conduct with
15 global effects. A state does not have the
16 power to regulate out-of-state conduct based
17 solely on attenuated effects on the state.

18 What is more, the use of state law to
19 regulate global climate change would
20 substantially interfere with the nation's
21 foreign policy. And far from authorizing the
22 application of state law, the Clean Air Act
23 independently preempts any effort by one state
24 to impose its law on emissions originating in
25 others.

1 If Boulder's claims are allowed to go
2 forward, some 90,000 municipalities across the
3 country will have the ability to make national
4 and international energy policy by asking
5 juries to impose catastrophic damages on
6 selected fossil-fuel producers.

7 Put simply, that is not the
8 constitutional scheme that the Founders
9 adopted. The Colorado Supreme Court's judgment
10 should accordingly be reversed.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Shanmugam, before
13 we get to the merits, would you spend some time
14 and explain why we have jurisdiction?

15 MR. SHANMUGAM: Sure, Justice Thomas.
16 Our view is that the Court has both statutory
17 and constitutional jurisdiction. I'll address
18 those in turn.

19 On statutory jurisdiction, our view is
20 that Atlantic Richfield is directly on point.
21 It could not be clearer as a matter of Colorado
22 law that the proceeding below was a
23 self-contained original proceeding which gives
24 rise to jurisdiction in this Court under
25 Section 1257.

1 Boulder's argument to the contrary is
2 that because this case did not involve a formal
3 writ proceeding directed at the lower court,
4 that it falls outside the scope of Atlantic
5 Richfield. But, in Atlantic Richfield itself,
6 this Court attached no weight to the form of
7 the underlying proceeding. Instead, the Court
8 relied on the fact that it was a self-contained
9 proceeding.

10 In fact, this proceeding contained
11 many of the hallmarks of a writ proceeding.
12 The Colorado Supreme Court ordered the trial
13 court to respond to its order to show cause and
14 then discharged the order to show cause at the
15 end of the proceeding.

16 And the Colorado Supreme Court's move
17 away from formal writs is not unusual. As the
18 brief of the state -- former state supreme
19 court justices points out, many states have
20 made that move toward a more informal label for
21 their proceedings.

22 The key point is that, in Colorado as
23 elsewhere, these original proceedings are
24 distinct from ordinary appellate proceedings,
25 even interlocutory appellate proceedings. In

1 Colorado, there are separate rules, Rule 21 and
2 Rule 4.2, that govern each.

3 As to constitutional jurisdiction, I
4 think our submission here is a straightforward
5 one. Because this case is coming from a state
6 court, you look to the injuries suffered by the
7 Petitioners, who were the defendants in the
8 lower court proceeding. The decision below
9 definitively adjudicated our legal rights and
10 it did so in a way that was binding not just in
11 this case but in other cases in Colorado as
12 well.

13 So not only are my clients exposed to
14 a greater risk of liability as a result of the
15 fact that one of our central defenses has been
16 knocked out, but in a very real sense, we have
17 lost the right to be free from state
18 regulation, which was how this Court
19 characterized the loss of a preemption defense
20 in NCAA versus Murphy, and as a result, we will
21 suffer an injury. So that personal stake, in
22 our view, is sufficient for Article III
23 purposes.

24 JUSTICE SOTOMAYOR: Counsel --

25 CHIEF JUSTICE ROBERTS: Counsel, you

1 would concede that there are some situations in
2 which an individual who engages in conduct in
3 State B causes harm to somebody in State A can
4 be sued under the law of State A, right?

5 MR. SHANMUGAM: Mr. Chief Justice, we
6 would concede that. And so the principle of no
7 extraterritorial regulation that I articulated
8 in my opening does admit of exceptions. There
9 are cases in which the Court has permitted
10 that, where a defendant can be said to be
11 constructively present in the state by virtue
12 of their conduct.

13 CHIEF JUSTICE ROBERTS: Well --

14 MR. SHANMUGAM: In this case --

15 CHIEF JUSTICE ROBERTS: -- well,
16 constructively present in the state.
17 Presumably, that is because of whatever injury
18 they've inflicted upon the person in State A,
19 right?

20 MR. SHANMUGAM: Yes, and in the mine
21 run of --

22 CHIEF JUSTICE ROBERTS: Well, yeah, if
23 you throw a rock over the border and hit him,
24 that person can be --

25 MR. SHANMUGAM: Correct. And we have

1 no truck with those cases. Our point is that
2 this goes further than any of those cases, and
3 I would submit that that's really for three
4 reasons.

5 First, none of the conduct that is at
6 issue here can really be said to have been
7 directed at Colorado.

8 Second, the harm at issue here is a
9 harm that is diffused nationwide and, indeed,
10 worldwide.

11 And, third, any causal nexus here is
12 severely attenuated.

13 CHIEF JUSTICE ROBERTS: Well, just --

14 MR. SHANMUGAM: And I'd just --

15 CHIEF JUSTICE ROBERTS: -- before
16 you -- if you don't mind because I'll lose
17 track of the three of them otherwise.

18 Wasn't directed at State A. But, if
19 you're in B and you're aiming at C, but you hit
20 somebody in A, that doesn't make a difference,
21 does it?

22 MR. SHANMUGAM: Well, it -- it
23 certainly is true that if you are, say, across
24 a state border and you direct your conduct
25 across the state border, many of the cases on

1 which my friend relies fall into that paradigm.

2 I think what makes this case different
3 is that, in this case, not only do you not have
4 any sort of direction of the conduct towards
5 Colorado, but, again, the causal chain here is
6 severely attenuated. And there is no case on
7 which my friend relies where, in the face of
8 such an attenuated chain of causation, this
9 Court has said that the exception to the
10 venerable prohibition against extraterritorial
11 regulation applies. And I would submit that if
12 you accept Respondents' theory, the exception
13 would swallow the rule.

14 Now, just to be clear, as I indicated
15 at the outset, we are relying on two strands of
16 federalist principle here. The second is
17 extraterritoriality.

18 The first is the principle of equal
19 sovereignty, the notion that in an area like
20 this, there are uniquely federal interests that
21 dictate the application of federal law.

22 Now I think the virtue of that
23 approach is that it underlies the entire line
24 of cases from this Court involving interstate
25 pollution going all the way back --

1 JUSTICE KAGAN: Could I just keep you
2 -- before you leave the extraterritoriality
3 question?

4 MR. SHANMUGAM: Sure.

5 JUSTICE KAGAN: I mean, usually, we
6 think of extraterritoriality as questions of
7 choice of law. In other words, a state can't
8 apply its own law extraterritorially.

9 We -- you know, here, the
10 choice-of-law question has not been really
11 dealt with by the lower courts. So what --
12 what are you arguing?

13 Are you arguing, like, oh, everybody
14 knows this is a case where the plaintiffs are
15 going to want to apply Colorado law and that's
16 how we should treat it, and you're saying that
17 choice of law is impermissible? Or are you
18 saying something broader than that, which is,
19 regardless of the choice of law chosen, there's
20 something impermissible about this lawsuit
21 because of its extraterritorial nature?

22 MR. SHANMUGAM: Sure. So, Justice
23 Kagan, I'll give you our bottom line and then
24 the explanation.

25 Our bottom line is that, in fact, no

1 state's law can apply here and that before you
2 get to the question of choice of law, you've
3 got to determine which state's laws potentially
4 could apply here.

5 Our view is that under either the
6 equal sovereignty principle or the closely
7 related extraterritoriality principle, there is
8 no justification for Colorado's law applying,
9 the law of the affected state to apply.

10 JUSTICE GORSUCH: So just to interject
11 here, let's say your defendant is in -- from
12 Texas. You'd object to Colorado applying Texas
13 law?

14 MR. SHANMUGAM: We would object to
15 Colorado applying Texas law as well, but I
16 think the answer to that is a little more
17 complicated.

18 We acknowledge under our equal
19 sovereignty principle that Congress can
20 authorize state law to apply. Congress has
21 done that in a limited way in the Clean Air Act
22 by, in the saving clause, authorizing the law
23 of the source state to apply.

24 JUSTICE GORSUCH: So -- so just -- so
25 just to put a pin on it, if I understand it,

1 because it is complicated to me, you would say
2 that if the Clean Air Act -- it's the Clean Air
3 Act that forbids Colorado from applying Texas
4 law?

5 MR. SHANMUGAM: It is the --

6 JUSTICE GORSUCH: It's not any --
7 anything else? It's just the Clean Air Act?

8 MR. SHANMUGAM: It is the
9 constitutional principle that dictates --

10 JUSTICE GORSUCH: That's what I'm
11 wondering. I'm trying to disaggregate those
12 two.

13 MR. SHANMUGAM: Yes.

14 JUSTICE GORSUCH: Is there something
15 in the Constitution that prohibits the
16 application of Texas law to a Texas
17 defendant --

18 MR. SHANMUGAM: As a matter of --

19 JUSTICE GORSUCH: -- or is it the
20 Clean Air Act? Which is it?

21 MR. SHANMUGAM: As a matter of
22 constitutional structure, federal law and only
23 federal law can apply. We point to this
24 Court's cases starting with Missouri versus
25 Illinois --

1 JUSTICE GORSUCH: Could a Texas court
2 apply Texas law?

3 MR. SHANMUGAM: A Texas court can
4 apply Texas law --

5 JUSTICE GORSUCH: To a Texas
6 defendant?

7 MR. SHANMUGAM: -- to ordinary
8 interstate pollution claims by virtue of the
9 Clean Air Act.

10 So our view as to how this is supposed
11 to work, Justice Gorsuch -- and I recognize
12 that there are --

13 JUSTICE GORSUCH: It's a little
14 complicated.

15 MR. SHANMUGAM: This case is certainly
16 a little bit complicated.

17 JUSTICE BARRETT: Can I just ask you
18 to point out, you're talking about a source in
19 Texas?

20 JUSTICE GORSUCH: Yeah. Yeah, yeah.

21 MR. SHANMUGAM: Yes. So --

22 JUSTICE GORSUCH: Yeah. A Texas
23 defendant, who's -- who's a source, applying
24 Texas law --

25 MR. SHANMUGAM: Yeah, there's one --

1 JUSTICE GORSUCH: -- that would --

2 MR. SHANMUGAM: -- there's one caveat
3 that --

4 JUSTICE GORSUCH: -- that wouldn't
5 work either?

6 MR. SHANMUGAM: -- in our view,
7 prevents Texas law from applying, but it's an
8 important one. Here is how the analysis, in
9 our view, should work.

10 Step one, as a matter of
11 constitutional law, as this Court's cases
12 involving interstate pollution say, this is
13 within the field of the uniquely federal
14 interest. We go all the way back, again, to
15 Justice Holmes and Missouri versus Illinois
16 and his explanation as to why, as a matter of
17 constitutional structure, that is so.

18 Second, under our approach, it is for
19 Congress to authorize state law to apply if it
20 wishes to do so. Our --

21 JUSTICE KAGAN: I -- I think one
22 reason -- I'm sorry.

23 JUSTICE GORSUCH: No, please. I -- I
24 was just trying to supplement you. Go ahead.

25 JUSTICE KAGAN: As you did.

1 MR. SHANMUGAM: I do want to get to
2 point three, but --

3 JUSTICE KAGAN: But I think one reason
4 why this is becoming a little bit more
5 complicated is because you keep switching back
6 and forth between your two theories.

7 You know, one theory is a theory,
8 really, about air and water regulation and who
9 gets to do that.

10 And another theory is not about that
11 and really goes much further and sets out broad
12 principles of, you know, who can do what
13 extraterritorially with respect to any subject.
14 And as you're pressed on the extraterritorial
15 aspect, you go back to your environmental
16 theory.

17 So is it really that your
18 extraterritorial theory cannot stand alone?

19 MR. SHANMUGAM: Like my children, I
20 love both of our theories equally, Justice
21 Kagan.

22 JUSTICE KAGAN: Well, but if that's --

23 MR. SHANMUGAM: But let me explain --

24 JUSTICE KAGAN: -- if that's true,
25 then you can't answer questions about the

1 extraterritorial theory by referring to the
2 nature of air and water regulation.

3 MR. SHANMUGAM: They both get you to
4 the same result in this case, and let me
5 explain why.

6 As I was saying to Justice Gorsuch,
7 under our equal sovereignty theory, Congress
8 has the authority to authorize state law to
9 apply. There's nothing anomalous about that.
10 That is just Congress saying that in this
11 uniquely federal area, we can prescribe as
12 the federal rule of decision that state law
13 applies. It's no different from a court
14 applying federal common law borrowing state
15 law.

16 Now my caveat, which I think is an
17 important one, is that in the context of these
18 sorts of climate change claims, it really
19 doesn't make a lot of sense to talk about the
20 source state law.

21 Remember that my clients are not
22 emitters, as was the case in American Electric
23 Power. My clients are producers of fossil
24 fuels. And these sorts of claims -- I said at
25 the outset that these claims -- that the

1 application of federal law follows a fortiori
2 from the interstate pollution cases.

3 Unlike in the traditional interstate
4 pollution cases like Ouellette, where you have
5 two states, the source state and the affected
6 state, here, because the claim runs through
7 global climate change, the claims here
8 necessarily depend on the emissions of anyone
9 who uses fossil fuels worldwide.

10 All 50 states and --

11 JUSTICE SOTOMAYOR: Counsel, can I
12 bring you back -- can I bring you back --

13 MR. SHANMUGAM: -- foreign countries
14 have an interest.

15 JUSTICE SOTOMAYOR: -- to the point?

16 I have a starting problem, which is
17 I don't see anywhere below where you argue the
18 extraterritoriality principle at all.

19 And in this case, you raised it only
20 on reply. And yet you come here and start
21 arguing it as your first argument.

22 Haven't you forfeited? It's a defense
23 like any other. If you didn't raise it
24 below -- I didn't see anywhere in your briefs
25 this argument. But putting that aside, I'm

1 trying to disentangle them.

2 You are really staying away from the
3 word that seemed to control the briefing below
4 and even here, which is preemption, all right?

5 Are you claim -- you -- you don't win
6 unless you get us to say that federal law
7 preempts state law in this area, period,
8 correct?

9 MR. SHANMUGAM: That is correct, which
10 is to say this is --

11 JUSTICE SOTOMAYOR: But you can't say
12 that for the reasons that Justice -- the Chief
13 Justice pointed out, which is there are
14 nuisance suits that we have permitted under
15 state law in both the -- in the Clean Water
16 Act, and I don't see why we wouldn't permit it
17 under the Clean Air Act either.

18 MR. SHANMUGAM: Yeah. Let me answer
19 that question. And I do want to finish off my
20 answer to Justice Kagan. But let me address
21 your question first, Justice Sotomayor.

22 I respectfully disagree with your
23 suggestion that this issue was not fully
24 preserved. And I would note that we made all
25 these arguments in our petition for certiorari.

1 There was never any suggestion by Respondent
2 that these arguments were not made below.

3 Now I will acknowledge that I think
4 that the two strands of our argument are
5 closely related, and the reason that they are
6 closely related is that the constitutional
7 source for our arguments is essentially the
8 same. Our constitutional source is that when
9 the states went into the constitutional system,
10 the states sacrificed certain rights that they
11 would have had as independent sovereigns, and
12 they went into the Union on an equal footing.

13 That is really the source for the
14 extraterritoriality principle, which goes all
15 the way back to Justice Marshall and Justice
16 Story.

17 I would point this Court to the
18 various amicus briefs, including the amicus
19 brief of Professor Prakash, as well as the
20 amicus brief of Tennessee, which set out the
21 originalist history for these principles in
22 some detail.

23 Now, to answer, Justice Sotomayor, the
24 last part of your question, yes, it is true in
25 both Ouellette and in American Electric Power

1 that the Court recognized that there is some
2 room for state law to operate at least in the
3 context of a bilateral interstate pollution
4 dispute. But that is because the Clean Water
5 Act and the Clean Air Act contain these saving
6 clauses, which this Court --

7 JUSTICE SOTOMAYOR: What do you do
8 with Watson? What do you do with Watson that
9 didn't -- it wasn't a bilateral situation?

10 MR. SHANMUGAM: With -- with, sorry?

11 JUSTICE SOTOMAYOR: Watson. Watson
12 versus Employer Liability. That was a
13 multi-state case.

14 MR. SHANMUGAM: Oh, I am not sure I'm
15 remembering which case you're --

16 JUSTICE SOTOMAYOR: Well, that was a
17 constructive presence case.

18 MR. SHANMUGAM: Oh. Well, look, I
19 think what I would say as to the constructive
20 presence cases more generally, not just Watson
21 but any other constructive presence case, is
22 that there is no case comparable to this one.
23 I actually think that the closest case on which
24 my friend relies is State versus Lord, which
25 was not a case from this Court. But even in

1 that case, what you were dealing with was the
2 diversion of water into the affected state.

3 It was much easier to say in that
4 context that the nuisance existed in the
5 affected state than here. And, again, I would
6 just say that in Ouellette, in AEP, the Court
7 was plainly construing and definitively
8 construing the scope of the savings clauses to
9 apply only to source state law.

10 And the last thing -- can I say one
11 last thing to Justice Kagan? And I'll be very
12 brief.

13 CHIEF JUSTICE ROBERTS: Sure.

14 MR. SHANMUGAM: Justice Kagan, on the
15 extraterritoriality principle, I think what I
16 would say is that if you accept our view that
17 this goes too far under the extraterritoriality
18 principle, I think your analysis is at an end.

19 I suppose that one could make an
20 additional argument that even as to the
21 extraterritoriality principle, a state could --
22 Congress could authorize the application of
23 state law. But it would still get you to the
24 same result. So, yes, these are separate
25 strands, but I think, ultimately, the

1 conclusion under each is the same.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: I want to go back
7 to jurisdiction. I don't want to leave it.

8 As I look at Article 21 of the
9 Colorado system, which is very different than
10 the one that we looked at in Atlantic
11 Richfield, it has two strands. And our amicus
12 tell us that very directly. They tell us that
13 the first strand is like Atlantic Richfield,
14 has to do with writs of prohibition or some
15 sort of writ of that sort, but that it also
16 encompasses appellate jurisdiction. And we
17 don't have a right to take certiorari over
18 appellate jurisdiction cases.

19 How do we know, since the court below
20 didn't tell us, that this was an original writ
21 or just an interlocutory appeal?

22 MR. SHANMUGAM: Sure. So I don't
23 think, with respect, that that characterization
24 of Rule 21 is correct. I think it is true that
25 Rule 21, which is labeled Original Jurisdiction

1 Under the Constitution, sweeps in two
2 constitutional provisions in Colorado: Article
3 VI, Section 2, which grants the supreme court
4 superintending control, and Article VI, Section
5 3, which grants the supreme court power to
6 issue certain writs.

7 But I think that the key fact here is
8 that whichever strand of the Constitution
9 you're proceeding under, the rule itself is
10 talking about original jurisdiction in the
11 Colorado Supreme Court, and it could not be
12 clearer --

13 JUSTICE SOTOMAYOR: If we're unsure --

14 MR. SHANMUGAM: -- that the rule
15 provides for self-contained proceedings. I'm
16 sorry.

17 JUSTICE SOTOMAYOR: -- if we're unsure
18 of your characterization, because there's
19 certainly a number of amici brief who disagree
20 with that characterization, shouldn't we be
21 certifying this question to the Colorado court
22 instead of us deciding it? We have to be sure
23 of our jurisdiction before we take it.

24 MR. SHANMUGAM: You do, Justice
25 Sotomayor, but we cite numerous decisions from

1 the Colorado Supreme Court that characterize
2 the proceeding in exactly this fashion. And if
3 you have --

4 JUSTICE SOTOMAYOR: And the other side
5 gives us numerous statements completely to the
6 contrary that describe it just as an appellate
7 process.

8 MR. SHANMUGAM: That is -- with
9 respect, I don't think that that is accurate.
10 I think the best thing that my friend on the
11 other side has pointed to is the fact that the
12 decretal language in this case remanded.

13 But I think the problem with that
14 argument is that in Atlantic Richfield itself,
15 the Montana Supreme Court's decision not only
16 remanded but affirmed the lower court, and yet
17 the court said this is the exercise of original
18 jurisdiction. And can -- if I could add --

19 JUSTICE SOTOMAYOR: With respect to
20 the Cox stand of your -- the Cox strand of your
21 statutory argument, you still have federal
22 defenses below that are available, aren't
23 there?

24 MR. SHANMUGAM: We do. But we cite --

25 JUSTICE SOTOMAYOR: You still have

1 personal jurisdiction. That's usually how we
2 protect against extraterritoriality, correct?

3 MR. SHANMUGAM: But that provides very
4 limited protection in a context like this, as
5 evidenced by the fact that the trial court
6 rejected that defense and then used --

7 JUSTICE SOTOMAYOR: I mean, you still
8 have an appeal of that.

9 MR. SHANMUGAM: -- and then used
10 personal jurisdiction to bootstrap jurisdiction
11 worldwide.

12 JUSTICE SOTOMAYOR: You also have
13 causation arguments to raise. The indirectness
14 of this could be a defense to any of the public
15 nuisance arguments.

16 MR. SHANMUGAM: But the very point of
17 the fourth exception under Cox is that it
18 provides for review in circumstances where the
19 party seeking review might still prevail on
20 non-federal grounds. And we point to Fort
21 Wayne Books for the proposition that --

22 JUSTICE SOTOMAYOR: Well, that one, we
23 took great pains to say that it was because
24 there was a second constitutional principle at
25 issue, which was a First Amendment right, where

1 the injury was immediate. Here, the injury is
2 not immediate to you. You still have appellate
3 rights below that can protect any federal
4 claims you have.

5 MR. SHANMUGAM: We would submit that
6 the injury to us is immediate for the reasons
7 that I said earlier in response to Justice
8 Thomas.

9 JUSTICE SOTOMAYOR: Because you're
10 spending money that -- in litigation. But I
11 don't know that we've ever talked of spending
12 money on litigation as a constitutional injury.

13 MR. SHANMUGAM: But we are doing so
14 involuntarily as a result of the adverse ruling
15 on a question of federal law. The Court need
16 only get to Cox if it disagrees with the
17 application of Atlantic Richfield, a unanimous
18 decision that is on all fours here.

19 And the last thing I would say, to the
20 extent that there is any doubt, and there
21 really shouldn't be, about Colorado procedure,
22 is, again, that in Colorado, the best evidence
23 that this is in the self-contained original
24 proceeding category is that Colorado provides
25 for two avenues in a circumstance like this.

1 You can take an interlocutory appeal
2 under Colorado Appellate Rule 4.2. That rule
3 looks a lot like Section 1292 in the federal
4 context. And that goes to the Colorado court
5 of appeals first, as you would expect.

6 Or you can go directly to the Colorado
7 Supreme Court. The standard is quite high.
8 You've got to show that you have an
9 extraordinary question. But, if you do, the
10 proceeding begins and ends in the Colorado
11 Supreme Court. And the rules distinguish
12 explicitly between the original proceeding in
13 the Colorado Supreme Court on the one hand and
14 the underlying proceeding in the trial court on
15 the other.

16 CHIEF JUSTICE ROBERTS: Justice Kagan,
17 anything further?

18 JUSTICE KAGAN: Mr. Shanmugam, in --
19 in multiple respects, this suit appears to be
20 based on the old 1990s tobacco suits that were
21 brought by states and local governments
22 basically saying that big tobacco had made
23 representations, misrepresentations, which had
24 caused people to use the product in -- to
25 overuse the product, causing harm to those

1 governments. I suppose the opioid litigation
2 more recently follows the same model.

3 This is chapter 3. So, if this is
4 chapter 3, were chapters 1 and 2 also
5 preempted?

6 MR. SHANMUGAM: I don't think so. I
7 would submit that this is, in fact, a very
8 different book, and that is for the simple
9 reason --

10 JUSTICE KAGAN: A very different?

11 MR. SHANMUGAM: Book, not the same --
12 not a chapter in the same book, and that is
13 because, in the tobacco litigation, as your
14 question illustrates, that feels a lot more
15 like a traditional misrepresentation claim
16 where you have representations that are being
17 made about a product, you have consumers
18 relying on those representations and, as a
19 result, suffering injury quite directly if you
20 accept the claims. And in that case, the
21 remedies are --

22 JUSTICE KAGAN: I'm waiting to see the
23 distinction, because this complaint talks a lot
24 about misrepresentations that are made by
25 the -- the defendants.

1 MR. SHANMUGAM: Well, I -- I think, in
2 an effort to avoid what would obviously be the
3 preemptive force of our constitutional
4 arguments and, indeed, also our Clean Air Act
5 arguments, Respondent has attempted to back up
6 one step to the misrepresentation.

7 But I want to make clear what is
8 different here. What is different here is that
9 the injury is not suffered by the Colorado
10 consumer in the traditional sense. The claim
11 here, if you look at the misrepresentation
12 strand of the claims -- and it's not very
13 clearly defined in the complaint, but take a
14 look, for instance, at paragraph 411 of the
15 complaint at page 105. It's not really like
16 any sort of misrepresentation claim that you
17 would be familiar with. It's a claim that --

18 JUSTICE KAGAN: So they might have a
19 bad claim on the merits, a more attenuated
20 claim on the merits. But this is the same kind
21 of lawsuit against the same kind of actors for
22 the same kind of harm.

23 MR. SHANMUGAM: I -- I --

24 JUSTICE KAGAN: And I guess I'm not
25 understanding how it is that the one would be

1 preempted and the other is not. Now you could
2 say to me: Look, it's because, really, in the
3 end, my claim is about air and water. But
4 that's not what you seem to be saying to me.

5 MR. SHANMUGAM: That is basically what
6 we're saying. And we rely on this Court's
7 decision in Kurns for the proposition, when
8 you're engaging in this type of analysis,
9 you've got to look at the gravamen of the
10 claim.

11 And our core submission for this Court
12 is that whatever state law label you attach to
13 the claims -- and, again, I would direct you to
14 the paragraphs that talk about
15 misrepresentation. The gravamen of the claim
16 here is that some marginal increase in
17 greenhouse-gas emissions attributable to my
18 clients' conduct caused the harm.

19 JUSTICE KAGAN: Well, you sound like
20 you have a very good causation argument. But,
21 again, I'm not sure what the difference in
22 preemption is. But let me ask it another way.

23 MR. SHANMUGAM: Kurns -- Kurns makes
24 clear that that is relevant to --

25 JUSTICE KAGAN: Sorry, Mr. Shanmugam,

1 let me ask it another way. Where does this
2 principle come from, the -- the sort of states
3 can't regulate in the air and water space?

4 If I understand you correctly, it's
5 kind of the plan of the Convention, no state
6 would have entered into the Convention except
7 with the understanding that they couldn't
8 regulate in this sphere.

9 It -- we have used that argument on
10 occasion. We've never combined it with this
11 notion that you combine it with, which is,
12 like, well, actually, what we've -- what --
13 the -- the states wouldn't have entered in --
14 state regulation is forbidden unless Congress
15 says otherwise. So it's really just a default
16 rule.

17 So there's a default rule that was
18 part of the plan of the Convention. And I
19 suppose it's like: Wow, like, where is the
20 text for that? Where's the support for that?
21 Where's the precedent for that? Where's the
22 anything for that?

23 MR. SHANMUGAM: Sure. We talked about
24 this Court's cases on interstate pollution, but
25 let me provide, I think, a very concrete

1 grounding for each of the constitutional
2 principles we've been discussing.

3 For the equal sovereignty principle, I
4 would point to Justice Thomas's opinion for the
5 Court in Franchise Tax Board versus Hyatt,
6 which I think established three very important
7 premises for the argument.

8 There, the Court stated that the equal
9 sovereignty of each state imposed -- implied
10 certain limitations on the sovereignty of other
11 states.

12 Second, that there were certain areas
13 involving conflicting rights where states could
14 not supply the applicable rule of decision.
15 The Court cited borders, water rights, and
16 interstate compacts.

17 JUSTICE KAGAN: Mr. Shanmugam, my
18 clock is ticking, so I want to know the answer
19 to my question.

20 My question is: What's the support
21 for what -- for the no state -- for the --
22 the -- the default rule about air and water
23 regulation?

24 MR. SHANMUGAM: So I think that Hyatt
25 establishes the premise for this mode of

1 constitutional interpretation, and the cases
2 that applied federal common law before the
3 enactment of the Clean Air Act apply that
4 principle in the context of interstate
5 pollution.

6 And if I could point you to any cases
7 from this Court, the two I would select are
8 Missouri versus Illinois and Georgia versus
9 Tennessee Copper, two decisions written by
10 Justice Holmes within two years of each other
11 that talk about the fact that states no longer
12 have the right to abate forcible nuisances.

13 And on the extraterritoriality
14 principle, but I -- which I know we were
15 discussing earlier, I can actually do no better
16 than this Court's decision in National Pork
17 Producers, which recognized that there are
18 certain territorial limitations on state power
19 as a matter of constitutional structure that
20 are embodied to some extent in the Due Process
21 Clause and the Full Faith and Credit Clause but
22 that exist more broadly beyond those specific
23 applications.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: On the tobacco and
4 opioid question that Justice Kagan asked, and
5 she alluded to this, I thought the answer was
6 that this Court has consistently said that air
7 and water pollution are different in our
8 federal enclaves.

9 MR. SHANMUGAM: That is undoubtedly
10 true with regard to the --

11 JUSTICE KAVANAUGH: What -- why are
12 you resisting that? I just thought --

13 MR. SHANMUGAM: I -- I'm not resisting
14 that. I took --

15 JUSTICE KAVANAUGH: I mean, there's a
16 lot of constitutional theory being tossed
17 around, but we have four precedents on point.
18 Let me finish.

19 MR. SHANMUGAM: Well --

20 JUSTICE KAVANAUGH: Let me finish.
21 Milwaukee I, Milwaukee II, Ouellette, and AEP,
22 which, as I read them together, make
23 crystal-clear that interstate air and water
24 pollution are matters for federal law unless
25 Congress specifically preserves state law.

1 That is through and through those four
2 cases. So I -- maybe there's a flaw in that.
3 And, actually, there is one wrinkle I'm going
4 to raise, but you tell me why you're just
5 resisting that.

6 MR. SHANMUGAM: Sure. There's no flaw
7 in that with regard to our equal sovereignty
8 principle because the equal --

9 JUSTICE KAVANAUGH: Well, isn't
10 that -- I mean --

11 MR. SHANMUGAM: And -- and that is
12 dispositive in our view.

13 JUSTICE KAVANAUGH: Exactly.

14 MR. SHANMUGAM: So what we would say
15 is that when you're dealing with air and water
16 and their ambient aspects, that is what
17 implicates the conflicting rights of states.
18 And, boy, in the context of climate change, do
19 you ever have conflicting rights because states
20 have wildly divergent views on the correct
21 approach.

22 JUSTICE KAVANAUGH: So why -- we don't
23 have to reinvent the wheel because we've said
24 this multiple times, and Congress presumably,
25 when doing the Clean Air Act and doing the

1 Clean Air Act amendments, has relied on this
2 Court's precedents establishing that this kind
3 of pollution is a federal law matter unless
4 Congress speaks otherwise.

5 MR. SHANMUGAM: Correct. And --

6 JUSTICE KAVANAUGH: Okay. Now the
7 wrinkle -- and this is -- I think, goes back
8 to the Chief's question -- the one wrinkle,
9 it's a little -- and Justice Gorsuch's -- a
10 little bit of a problem for you, is that
11 Ouellette did allow the Vermont affected party
12 to sue the New York polluter under New York
13 State law.

14 What do we do with that? Give me the
15 explanation you would provide for how we deal
16 with that if your side is to prevail and not to
17 go back on choice of law.

18 MR. SHANMUGAM: So the easiest answer
19 to that, Justice Kavanaugh, is that it is clear
20 that my friend, Mr. Russell, is relying on
21 Colorado law, the law of the affected state.
22 So, if you --

23 JUSTICE KAVANAUGH: Okay. That
24 resolves this case. If he weren't, what's your
25 answer?

1 MR. SHANMUGAM: Yes. And that's very
2 important for us given the fact that there are
3 dozens of these cases out there.

4 So I think what I would say is that
5 if, say, a plaintiff in the next town over
6 tried to bring a claim against Exxon Mobil
7 under, say, Texas law, what we would say is
8 that it still is not a claim that really
9 involves the source state in any meaningful
10 sense because we're not talking about --

11 JUSTICE KAVANAUGH: How about if it
12 was against an emitter, a Texas emitter under
13 Texas law by a Texas affected party for --

14 MR. SHANMUGAM: That is --

15 JUSTICE KAVANAUGH: -- for
16 greenhouse-gas emissions?

17 MR. SHANMUGAM: -- that is the very
18 question that the Court left open in AEP. It
19 suggested that as to emitters, you might be
20 able to bring a claim under the source state
21 law. The Court didn't definitively resolve
22 that. It just left it open in the way that
23 this Court often does.

24 But we would say that in this context
25 of climate change, when you're suing producers,

1 you cannot do that. And I would say that the
2 most telling thing is that neither Respondent
3 nor any of their 28 amici suggest that the
4 Saving Clause in the Clean Air Act
5 affirmatively authorize claims in this context.

6 JUSTICE KAVANAUGH: Under Colorado
7 law?

8 MR. SHANMUGAM: At least under
9 Colorado law. But I didn't see an argument
10 anywhere as to why this -- it makes sense to
11 say that there is a source state for claims of
12 this variety.

13 JUSTICE KAVANAUGH: Okay. A different
14 point now.

15 The Clean Air Act is very significant
16 in terms of the responsibilities it puts on
17 states. We've had the cross-state air
18 pollution rule. I had that multiple times on
19 the D.C. Circuit. It came up here. EME Homer
20 sets forth the good neighbor provision, tells
21 the states what they can do.

22 Explain as clearly as you can the
23 conflicts or the inconsistencies or the -- or
24 the like that would result if states could do
25 tort suits and were no longer constrained by

1 the good neighbor provision in the way that the
2 Clean Air Act constrains them.

3 MR. SHANMUGAM: Yeah. So, certainly,
4 as this Court has recognized, we believe that
5 the Clean Air Act establishes a comprehensive
6 scheme for the regulation of air quality in the
7 United States.

8 JUSTICE KAVANAUGH: Right. I got
9 that.

10 MR. SHANMUGAM: But I don't want to --

11 JUSTICE KAVANAUGH: Just very
12 precisely, what are the states'
13 responsibilities that would be in tension with
14 allowing tort suits? If you could answer that
15 specifically.

16 MR. SHANMUGAM: I think the best place
17 to look is to Section 7411, which is Section
18 111 of the Clean Air Act, which makes the EPA
19 the primary regulator of stationery sources and
20 gives secondary authority to source states
21 because the states submit plans that specify
22 emissions reductions for point sources within
23 their jurisdiction.

24 You alluded to the good neighbor
25 provision, which is in the previous section,

1 which, for certain pollutants, requires states
2 to take into account the effects on neighboring
3 states in submitting plans.

4 This regime that Boulder is positing,
5 this liability regime runs directly contrary to
6 that because it is a scheme that gives EPA
7 primary authority and source states secondary
8 authority.

9 And, again, when we're talking about
10 source states, under the Clean Air Act, the
11 Clean Air Act reflects the judgment that it is
12 the emitters who are going to be regulated and
13 not the producers.

14 And so I think all of these arguments
15 dovetail with each other. The only other thing
16 I would say, just to close the loop on where
17 you started, Justice Kavanaugh, is that when I
18 was answering Justice Kagan's question, I was
19 really answering it with regard to the
20 extraterritoriality principle because I think
21 that's where it's clearest that the effects
22 here are much more attenuated --

23 JUSTICE KAVANAUGH: No, I would just
24 answer it with respect to our precedent.

25 MR. SHANMUGAM: Yeah.

1 JUSTICE KAVANAUGH: Our precedent says
2 air and water pollution are different. But
3 there is a wrinkle there on choice of law. And
4 that's the -- that's the tension I see.

5 MR. SHANMUGAM: Well, the wrinkle
6 is --

7 JUSTICE KAVANAUGH: I guess the
8 wrinkle's resolved under extraterritoriality.

9 MR. SHANMUGAM: And the wrinkle is
10 that it isn't so much choice of law as that
11 Congress has authorized state law to apply in a
12 very specific context.

13 That having been said -- and, again,
14 we think that both of these principles point to
15 the same result. But the virtue of the Court
16 potentially relying on the equal sovereignty
17 principle is that it is certainly not writing
18 on a blank slate. It wouldn't be doing that
19 even with extraterritoriality.

20 We have this line of cases culminating
21 in the Court's unanimous decision in AEP
22 rejecting claims against the actual emitters.
23 This case just represents an effort to back up
24 one step, and that's on the --

25 JUSTICE KAVANAUGH: Last question,

1 real succinctly. Do you think that our
2 precedents that I mentioned before come from
3 the equal sovereignty principle or the
4 extraterritoriality principle? I would have
5 thought the former.

6 MR. SHANMUGAM: I think the former.

7 JUSTICE KAVANAUGH: Okay. That's all
8 I need.

9 MR. SHANMUGAM: And --

10 JUSTICE KAVANAUGH: Thank you.

11 MR. SHANMUGAM: Yes. And the cases
12 that the Court relies on -- the principles the
13 Court relies are on the Hyatt principles.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: So I -- I want to
17 pick up on some of the questions Justice
18 Kavanaugh was asking you. As I read those four
19 precedents, the Milwaukee and Ouellette and
20 AEP, they do say, drawing on other older
21 precedents, that this is a field, interstate
22 pollution, air and water, is a field that's an
23 enclave of federal common law because it is not
24 suited to the law of any one state, bracketing
25 for one moment source state, state law, you

1 know, suits in the -- under the state law of
2 the source state. Right?

3 MR. SHANMUGAM: Yes.

4 JUSTICE BARRETT: Okay. So then when
5 you get to AEP -- so tell me if -- if I'm going
6 wrong in any spot here -- when you get to AEP,
7 what the Court says is, yes, before this was an
8 area of law which needed nationally uniform
9 federal rules, and in the absence of
10 congressional speak -- a statute, federal
11 common law is what governed.

12 But now we have the Clean Air Act and
13 Massachusetts versus EPA interpreted 7411 to
14 say that the EPA is the one that has the
15 authority to regulate greenhouse-gas emissions.
16 So to the extent there is a national rule,
17 Congress has given it to the EPA to set it.

18 Now, I think where I would quibble
19 with you is about where the state law comes in.
20 I do not read either Ouellette or AEP to say
21 that they are authorizing states to apply state
22 common law rules or apply their own law
23 otherwise. What I read it to be saying is if
24 you think of a Venn diagram, there was this
25 center where it always had to be an enclave of

1 federal common law, where federal courts were
2 developing the rules for interstate air and
3 water pollution, but even under that old
4 pre-Clean Air Act system, there was this outer
5 ring where states had authority.

6 So maybe in some of these cases that
7 we're talking about where you have the source
8 state and you are suing for, you know,
9 emissions and you're suing in Texas for
10 emissions from a Texas source, or maybe some of
11 these cross-border suits where there was a
12 tight connection, I understand what the Court
13 said in AEP to simply say: Congress preserved
14 some state authority. It -- it displaced -- to
15 the extent we need national rules, federal
16 courts, you're out of the business.

17 But it did not disturb some of that
18 state authority. And then the Court just
19 didn't decide how much of that state authority
20 it might have preempted or not because it
21 wasn't before it. But it's not that it said
22 Congress authorized states in any way. It just
23 left alone some of that preexisting authority,
24 maybe some of which might be affected by the
25 Clean Air Act.

1 Do you quibble with any of that?

2 MR. SHANMUGAM: I -- I -- I do
3 slightly quibble with that, Justice Barrett, in
4 that although the Court may not have used the
5 specific term "authorize," I do think it's the
6 implication of the Court's reasoning.

7 Remember that in Ouellette, the Court
8 cited not just Congress's pervasive regulation
9 under the Clean Water Act, but also, "the fact
10 that control of interstate pollution is
11 primarily a matter of federal law." And then
12 the Court went on to construe the saving clause
13 of the Clean Water Act.

14 And I think the implication of
15 recognizing the constitutional principle is
16 that what the Court was effectively saying,
17 again, even though it didn't use the word
18 "authorize," was that Congress has -- has
19 authorized state law to operate where it
20 otherwise would not have been able to authorize
21 -- to -- to apply.

22 JUSTICE BARRETT: Well, I --

23 MR. SHANMUGAM: I --

24 JUSTICE BARRETT: -- mean, it doesn't
25 say "authorize." It says "preserve." And a

1 saving clause suggests that you're saving
2 something that already exists.

3 MR. SHANMUGAM: But I think that the
4 problem with that is that I think one of two
5 things would have to be true for that
6 characterization to be correct. One of them
7 would be that state law previously would have
8 operated for a claim of this variety. In other
9 words --

10 JUSTICE BARRETT: I'm not saying for a
11 claim of this variety. I'm saying for a claim
12 like I posited before that there was some room
13 for some state law nuisance claims for
14 pollution, but it was just much more
15 circumscribed.

16 MR. SHANMUGAM: Well, it was
17 incredibly circumscribed because if you look at
18 the cases that Boulder cites on page 36 of
19 their brief, I think that the best they can do
20 is the case I alluded to earlier involving
21 water diversion, where it's much easier to say
22 the nuisance is physically present in the
23 state.

24 But the alternative -- and I think
25 that this is the real upshot of the argument

1 that Boulder is making -- is to say that when
2 Congress enacted the Clean Water Act and the
3 Clean Air Act, that state law somehow sprung
4 into effect.

5 JUSTICE BARRETT: Yeah, yeah, yeah.

6 MR. SHANMUGAM: And --

7 JUSTICE BARRETT: I agree with you
8 there --

9 MR. SHANMUGAM: -- that can't possibly
10 be --

11 JUSTICE BARRETT: I --

12 MR. SHANMUGAM: -- correct.

13 JUSTICE BARRETT: I -- I agree with
14 you.

15 MR. SHANMUGAM: And -- and -- and the
16 last thing I would say on this line is that
17 when it comes to the federal common law, I
18 think at least in its brief -- we'll see what
19 my friend says at oral argument -- Boulder
20 suggests that the -- that the way to think
21 about this is to think about whether or not
22 there would have been a federal common law
23 cause of action.

24 But I think this Court, both in the
25 context of interstate pollution cases and

1 beyond, has made clear that a federal court can
2 decide for any number of reasons not to
3 recognize a federal common law claim, even in
4 an area where uniquely federal interests are
5 implicated.

6 So the mere fact that this Court
7 limited federal common law to cases where
8 states were bringing claims, either against
9 other states or even against private parties,
10 doesn't really tell you anything about the
11 field that is covered by the constitutional --

12 JUSTICE BARRETT: So are you --

13 MR. SHANMUGAM: -- principles.

14 JUSTICE BARRETT: -- saying that if --
15 so the federal government has now said that --
16 it has interpreted 7521 in EPA to not give EPA
17 the authority to regulate greenhouse-gases from
18 motor vehicles. So, potentially, then the
19 Court -- a court might say that the EPA does
20 not displace federal common law making
21 authority as to that.

22 You are saying that even if someone
23 invoked a federal common law nuisance cause of
24 action, that as a matter of federal common law,
25 a district court or, frankly, a state court, if

1 asked to apply federal common law, could say,
2 as a matter of federal common law, such a suit
3 isn't recognized?

4 MR. SHANMUGAM: So I think what we
5 would say as to that is that any decision that
6 EPA makes as to whether and how to regulate
7 greenhouse-gas emissions -- and that's
8 obviously subject to ongoing litigation -- but
9 any decision that EPA makes has no bearing on
10 our argument concerning constitutional
11 structure. Our arguments concerning
12 constitutional structure apply with full force,
13 regardless of what EPA says --

14 JUSTICE BARRETT: Okay. Well --

15 MR. SHANMUGAM: -- with regard to --

16 JUSTICE BARRETT: -- I think that's a
17 little slippery. This is kind of what Justice
18 Kagan was saying. I mean, we're talking about
19 enclaves of federal common law. And now you're
20 reverting to the constitutional structure equal
21 sovereignty point.

22 If we're just staying with enclaves of
23 federal common law, it seems that the answer
24 has to be yes, that would be a matter left to
25 federal common law. And then, sure, a federal

1 court could decide as a matter of federal
2 common law there's no cause of action.

3 MR. SHANMUGAM: I don't think so,
4 because I think that our argument is that this
5 falls within the enclave of the constitutional
6 principle. And so our argument does not depend
7 on what might be available as a matter of
8 federal common law.

9 And we would accept what this Court
10 has said, which is that the Clean Water Act and
11 the Clean Air Act have ousted federal common
12 law from the equation. But our view is that
13 the underlying constitutional principles still
14 govern what claims can be brought under state
15 law absent congressional authorization.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So a number of the
19 discussions that you've had with my colleagues
20 make me think that we're really early in this
21 case, that this is sort of premature from the
22 standpoint of this Court exercising its
23 jurisdiction.

24 So let me ask you, for example, do we
25 have a state court determination regarding the

1 choice of law here in this context?

2 MR. SHANMUGAM: So I think everyone
3 agrees that the Colorado Supreme Court's
4 decision reflected a definitive rejection of
5 our federal arguments here.

6 And so the issue is --

7 JUSTICE JACKSON: Not all of your
8 federal arguments. My understanding is that
9 you had a number of other federal defenses --

10 MR. SHANMUGAM: Right.

11 JUSTICE JACKSON: -- that are still
12 pending.

13 MR. SHANMUGAM: Yes, our -- our
14 preemption arguments, Justice Jackson.

15 JUSTICE JACKSON: Yes. Yes, yes, yes.

16 MR. SHANMUGAM: Yeah. Exactly. Those
17 were the issues after all that we --

18 JUSTICE JACKSON: No, I --

19 MR. SHANMUGAM: -- sought to have --

20 JUSTICE JACKSON: -- understand, but
21 when we think about exercising jurisdiction,
22 when we think about statutory jurisdiction and
23 when we think about the Court's determinations
24 about which cases it should hear, I wonder
25 whether we should be considering matters like

1 this essentially piecemeal insofar as you've
2 not only made this preemption argument. I
3 understand that you have several other federal
4 issues that you have raised that are still
5 pending in the state court. So why shouldn't
6 we wait and hear all of these claims once the
7 state courts are done with their federal
8 considerations?

9 MR. SHANMUGAM: So, Justice Jackson, I
10 think it certainly is true that we have argued
11 personal jurisdiction and other federal
12 defenses in this case and in other --

13 JUSTICE JACKSON: And they're still in
14 the state court. We could hear this again on
15 those issues assuming you lose here.

16 MR. SHANMUGAM: I think this Court
17 could do that. But I think, at this point, I
18 would point to the fact that, as we note in our
19 brief, we now are facing more than 60 cases
20 brought by municipalities in this context or
21 more than 60 municipalities. I think the
22 number of actual cases is around three dozen.
23 More are being filed --

24 JUSTICE JACKSON: Yeah.

25 MR. SHANMUGAM: -- literally by the

1 week. The most recent one was filed just last
2 Wednesday. And the federal issues that we are
3 advancing here have been fully decided by the
4 Colorado Supreme Court and, indeed, fully
5 decided in other courts as well.

6 And I would submit that, given the
7 extraordinary magnitude of these cases, where,
8 in each of these cases, plaintiffs are seeking
9 billions of dollars of damages, that we need an
10 answer to this question sooner rather than
11 later.

12 And just as a matter of judicial
13 administration, given the number of these cases
14 that are in courts around the country, that the
15 time is really now for this Court to resolve
16 these issues.

17 JUSTICE JACKSON: All right. So let
18 me just ask you on -- Justice Kagan started you
19 down a road of other kinds of litigation that
20 bear similarities to this.

21 I'm also wondering the extent to which
22 your -- I guess it's the extraterritoriality
23 principle relating to direct, traceable, and
24 particularized effects. Is that your
25 extraterritoriality?

1 MR. SHANMUGAM: Yes.

2 JUSTICE JACKSON: All right. That
3 seems very close to a causation standard or
4 test. So why is it that you are seeking to
5 constitutionalize that issue? And if you are,
6 how would a court go about figuring that out?

7 I mean, if we agree with you about
8 extraterritoriality, who's making the decision
9 as to whether or not there are direct,
10 traceable, and particular effects in this case?

11 MR. SHANMUGAM: So it is a threshold
12 determination for the Court as a matter of
13 federal law.

14 JUSTICE JACKSON: Isn't it a matter of
15 fact, though, whether or not there are direct,
16 traceable, and particularized effects within
17 the state?

18 MR. SHANMUGAM: So, Justice Jackson,
19 I think what I would say about that is it's a
20 slightly different inquiry from, say, the
21 causation inquiry as a matter of state law, and
22 that is because what you're really focusing on
23 here is the nexus with the state. You're
24 really focusing on the effects on the state.

25 And in this context, you can figure

1 all of that out from the theory that the
2 plaintiffs are advancing in their complaint.

3 JUSTICE JACKSON: From the theory, not
4 as a matter of fact as to whether or not the
5 pollution is causing problems with the state.

6 MR. SHANMUGAM: I don't think that
7 there are any factual disputes that the Court
8 needs to work out in order to apply our test.
9 The Court can simply look to the theory
10 underlying the plaintiffs' claims.

11 And I will say that I think a core
12 theme of Boulder's submission here is, you
13 know, don't think about this now because
14 causation is just an issue that can be worked
15 out as a matter of state law in the underlying
16 proceedings.

17 But I would point the Court to what
18 the trial court said in this case about
19 causation as a matter of state law. I would
20 point the Court to page 124A of the petition
21 appendix, where the court said, and I'm
22 quoting, that "in a multiple contributor tort
23 case, there is no need to tie specific injuries
24 to the actions of defendants."

25 As a matter of state law, the trial

1 court was applying some form of market-share
2 liability on steroids in this case, and that is
3 what --

4 JUSTICE JACKSON: Did you appeal that
5 causation ruling? I mean, my understanding was
6 that the trial court below concluded that
7 Boulder has plausibly alleged causation for its
8 torts claims, and you didn't appeal that.

9 MR. SHANMUGAM: As a matter of --

10 JUSTICE JACKSON: So are you trying to
11 make -- to -- to do that now in the context of
12 this constitutional argument?

13 MR. SHANMUGAM: As a matter of state
14 law, the trial court said that. And I make
15 this point simply to illustrate the risk that
16 state courts are not going to apply causation
17 principles in the way that would be familiar to
18 us.

19 We sought review on the preemption
20 issues precisely because we thought that those
21 were the issues of extraordinary importance
22 that the Colorado Supreme Court immediately
23 needed to resolve.

24 The critical point is that this
25 Court -- that a court cannot shirk its

1 responsibility to conduct this
2 extraterritoriality analysis at the outset.

3 And, again, Boulder's theory here
4 would permit the exception to swallow the rule.
5 If, in fact, any in-state effect is sufficient,
6 then the extraterritoriality principle really
7 has no force.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. SHANMUGAM: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Harris.

13 ORAL ARGUMENT OF SARAH M. HARRIS
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONERS

16 MS. HARRIS: Mr. Chief Justice, and
17 may it please the Court:

18 There are two main paths to reversal.

19 First, we agree with Petitioners,
20 interstate air pollution is an inherently
21 federal area, and Congress hasn't authorized
22 this suit in the Clean Air Act's saving clause.

23 Ouellette held that the savings clause
24 is what you get for the similar Clean Water
25 Act, and AEP ties the two together.

1 There's no claim here that Colorado is
2 making a claim under a source state -- source
3 state source of law that can proceed.

4 Second, this suit egregiously exceeds
5 constitutional limits on state authority.

6 Boulder's theory is that because
7 global climate change causes some Colorado
8 injury, Colorado can hold oil companies liable
9 for all their fossil fuel activities worldwide.

10 That eviscerates the theory of Pork
11 Producers that states can only regulate
12 out-of-state conduct with a direct nexus to
13 in-state injury.

14 Kansas in Phillips Petroleum couldn't
15 apply its law to a class action just by
16 pointing to some Kansas injuries when
17 97 percent of the conduct and injuries were out
18 of state. So too here.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Ms. Harris, would you
21 discuss the issue of jurisdiction and whether
22 or not this is a final determination from the
23 state court?

24 MS. HARRIS: I agree with everything
25 that Petitioners have said. Whether it is a

1 self-contained proceeding from the state court
2 follows exactly from Atlantic Richfield.
3 Everything there is present here.

4 The state supreme court for Colorado
5 is applying Rule 21, treating this case as a
6 self-contained original proceeding just like in
7 Atlantic Richfield, the Montana writ procedure.

8 So just like in Montana, the Colorado
9 Supreme Court directed the trial court to be a
10 respondent. That's at JA 141.

11 The test under Atlantic Richfield is:
12 Did the state supreme court treat the case as
13 a self-contained original proceeding? And the
14 answer seems to be emphatically yes.

15 And if you accepted Respondent's
16 contrary functional view of does this feel like
17 an interlocutory proceeding, does it feel kind
18 of appellatee, I don't know what remains of the
19 Court's traditional conception of its 1257
20 jurisdiction. You respect the state supreme
21 court's framing of these things. And it seems
22 clear that that's what the Colorado Supreme
23 Court did.

24 JUSTICE GORSUCH: Ms. Harris --

25 CHIEF JUSTICE ROBERTS: Counsel --

1 JUSTICE GORSUCH: Sorry, Chief.

2 CHIEF JUSTICE ROBERTS: I was going to
3 say there are a lot of familiar situations
4 where conduct outside of the state has broad
5 effects among other states and all that, and
6 yet we allow state courts in a particular state
7 to bring litigation that affects that, whether
8 it's a mass tort sort of thing or maybe
9 complaints about operations of the -- the
10 Internet.

11 I guess I'm not quite sure what makes
12 this situation different from those, all those
13 other ones, where we've allowed them to proceed
14 in -- in state court.

15 MS. HARRIS: Let me put it this way.
16 In all of those state court tort cases, of
17 course, you can regulate the out-of-state
18 injury directed at your state. That falls
19 comfortably within the constructive presence
20 exception.

21 The reason is the state that is
22 imposing the liability rule is saying: Hey, if
23 you bring your cars in my state, if you bring
24 your opioids in my state, you're liable for
25 conduct within my state.

1 What it's not doing is saying what
2 Colorado is doing here: You're banned from
3 making that product anywhere nationwide.
4 And so that's why this case falls more in the
5 BMW v -- v. Gore side of the line, where the
6 Court nicely illustrates the distinction.

7 CHIEF JUSTICE ROBERTS: Well, but
8 that's -- that's a question of relief and what
9 might be available. It seems to me that the
10 examples you gave are precisely what's going on
11 here: conduct that could have impacts in many
12 states, all of the states.

13 We still allow in many of these
14 situations people to file in their state to
15 seek relief from injuries that are occurring in
16 their state.

17 MS. HARRIS: Again, you only allow
18 that just as in BMW it's not a question of
19 remedy. It's a question of can you apply your
20 state law and what are the territorial limits,
21 going back to Pork Producers.

22 Again, if your liability rule is, if
23 you direct your conduct to my state, even if
24 it's out of state, the rule is, don't send your
25 cars, like, with -- with a bad paint job, as in

1 BMW, into Alabama. The rule cannot be, don't
2 do these paint jobs anywhere across the
3 country --

4 JUSTICE KAVANAUGH: Ms. -- Ms.
5 Harris --

6 MS. HARRIS: -- let alone across the
7 world.

8 JUSTICE KAVANAUGH: -- can I just ask
9 on the -- that's a very complicated inquiry:
10 direct effects, predictable effects.

11 Our Court, this Court, has said four
12 times that interstate air and water pollution
13 are a federal -- are matters for federal law
14 unless Congress preserves or, in
15 Mr. Shanmugam's words, authorizes state law.

16 Doesn't that take care of the issue?
17 What -- I mean, I guess I'm not sure why you're
18 leading with this more difficult inquiry than
19 the one that our precedents have set forth
20 since 1972.

21 MS. HARRIS: We agree that both paths
22 are available and have no problem if you
23 consider the -- the equal sovereignty
24 arguments.

25 JUSTICE KAVANAUGH: What's -- you're

1 leading with the other one, which makes me
2 think there's a problem with the precedent,
3 interstate air pollution one.

4 So what -- what's the problem with
5 that? Why are you leading with the other one?

6 MS. HARRIS: Because we think there
7 are two complementary theories in this case
8 that are good to expound. But we are a
9 hundred percent on board with what Petitioners
10 are saying.

11 JUSTICE GORSUCH: All right, Ms.
12 Harris, on -- on -- on the air theory --

13 MS. HARRIS: Sure.

14 JUSTICE GORSUCH: -- let's say we're
15 before the adoption of the Clean Air Act.

16 MS. HARRIS: Mm-hmm.

17 JUSTICE GORSUCH: Could the Respondent
18 here have brought a claim under federal common
19 law?

20 MS. HARRIS: I don't think so, but
21 this is the debate that the Court held open
22 under AEP, which is it's unclear what exact
23 causes of action federal courts would have felt
24 comfortable crafting. And this is sort of what
25 AEP walks through.

1 It says the instances in which courts
2 felt comfortable in the pre-Clean Air Act space
3 fashioning particular remedies had familiar
4 fact patterns, but that doesn't mean it's not
5 a federal area. And so the Court --

6 JUSTICE GORSUCH: But there would be a
7 federal common law question to adjudicate.

8 MS. HARRIS: It would be a federal
9 common law question, but I would say AEP
10 certainly says there's reasons to doubt that
11 courts are supposed to be fashioning causes of
12 action in all the states.

13 JUSTICE GORSUCH: Well, no, I
14 understand that. But we'd have a federal
15 common law question for some court to resolve,
16 right?

17 MS. HARRIS: You would have a federal
18 common law question, again, underpinning any
19 constitutional issues.

20 JUSTICE GORSUCH: Okay. All right.
21 All right. Let me stop you there. That --

22 MS. HARRIS: Sure.

23 JUSTICE GORSUCH: I'll take "yes"
24 every day of the week.

25 MS. HARRIS: Okay.

1 (Laughter.)

2 JUSTICE GORSUCH: What does the Clean
3 Air Act do to -- to alter that "yes"? Because
4 as I understand it, EPA has disclaimed the
5 power to regulate greenhouse gasses, not just
6 from motor vehicles but more recently from
7 stationary sources too.

8 So does the -- what -- does -- does
9 the Clean Air Act change anything?

10 MS. HARRIS: The Clean Air Act --

11 JUSTICE GORSUCH: About the fact that
12 there's a "yes" to -- to there's some common
13 law question to answer.

14 MS. HARRIS: So the Clean Air Act does
15 change things in the sense that, instead of
16 having space for federal courts to fashion
17 actions, the Court in AEP said the Clean Air
18 Act is Congress's pronouncement. What you get
19 is authorized by Congress. There is what you
20 get. EPA's recent actions don't change that
21 for two reasons. One is --

22 JUSTICE GORSUCH: Well, let me put a
23 finer point on it. If Congress didn't -- let's
24 just hypothesize EPA is correct about
25 greenhouse gasses and its capacity to regulate

1 them, though I know that's a hotly contested
2 issue and I'm -- I take no position on it here
3 presently for the purposes of this question,
4 but let's say Congress decided we're going to
5 carve that out from -- from EPA's
6 responsibility.

7 Does that mean that there couldn't
8 ever be a federal common law cause of action
9 for it --

10 MS. HARRIS: Well --

11 JUSTICE GORSUCH: -- just because
12 Congress didn't grant it to -- to EPA?

13 MS. HARRIS: I think so, and for two
14 reasons. One is you're talking about a federal
15 area where, if Congress has not authorized it,
16 there's reason to think that federal common law
17 shouldn't step in and fill the gaps for all the
18 reasons that Ouelette was talk talking being
19 hesitant for --

20 JUSTICE GORSUCH: So -- so before the
21 Clean Air Act, you'd have some federal common
22 law cause of action to -- to -- to decide. But
23 because -- because of the Clean Air Act and
24 Congress not addressing this issue, nobody can
25 sue at all?

1 MS. HARRIS: Again, I think that's
2 correct, but I want to make a -- an important
3 point which I think is getting missed here,
4 which is Congress has absolutely spoken to
5 regulation of greenhouse-gas emissions
6 elsewhere in the Clean Air Act. The renewable
7 fuels program is one of the best examples of
8 that. So the idea that there's some sort of
9 residual federal common law for some types of
10 greenhouse-gas emissions but not others is
11 strange. I think what --

12 JUSTICE GORSUCH: Well, they like
13 ethanol. We know that. But, I mean, what does
14 that have to do with emission of greenhouse
15 gas -- you -- you've disclaimed the power to
16 regulate that directly.

17 MS. HARRIS: To -- with respect --
18 again --

19 JUSTICE GORSUCH: The renewable fuel
20 mandate; just put in ethanol. Okay. I got it.

21 MS. HARRIS: The renewable fuel
22 mandate has direct discussion of greenhouse-gas
23 emissions regulations. So I think it's highly
24 relevant to the question of whether it's a
25 federal rule a decision.

1 I think we're also a little far afield
2 from what this actual claim entails, which is
3 under state law, under the law of an injured
4 state, can you have a capacious suit against
5 everyone who --

6 JUSTICE GORSUCH: I -- I understand
7 that.

8 JUSTICE BARRETT: No, but just to
9 follow up on what Justice Gorsuch said, that is
10 a separate question. I agree. You're right.

11 But you don't -- go back to the "yes."
12 I just want to make sure I have the "yes," that
13 absent the Clear Air Act, that is a question of
14 federal common law. Whether a federal court
15 would fashion a cause of action under it is a
16 different question, but it is still one of
17 federal common law.

18 MS. HARRIS: That would be correct,
19 but, again, it's federal common law, as
20 Petitioner is saying, underpinned by
21 constitutional concepts. So I don't want to
22 lose site of what kind of federal common law
23 we're talking about, what kind of federal area
24 we're talking about.

25 JUSTICE BARRETT: Well, right, but all

1 you're doing is saying that, yes, this is an
2 enclave of federal law. And I understand you
3 don't want to concede that if they turn around
4 and file another suit in Colorado state court
5 or in district court invoking a federal common
6 law cause of action, I understand you don't
7 want to concede that they could press such a
8 suit. But it is still a matter of federal law.

9 And maybe that is so because of some
10 sort of equal sovereignty or
11 extraterritoriality principle. I think Justice
12 Kavanaugh is right. It's also simply in our
13 precedent. We've called it an enclave of
14 federal common law.

15 MS. HARRIS: Yes, that's right. And I
16 just want to address one other thing that
17 Justice Kavanaugh had raised, which is what do
18 you do with the nature of the Clean Air Act
19 saving clause? And I think the best way to
20 think about it is it's a federal rule of
21 decision.

22 It's not the sort of weird exception
23 where you suddenly have state law that
24 preexisted its springing back -- springing into
25 being where it didn't otherwise exist. And I

1 --

2 JUSTICE SOTOMAYOR: What do you do
3 with the questions that Justice Barrett asked
4 Petitioners' counsel, which is there seems to
5 be an enclave of state law that is permissible?

6 MS. HARRIS: Right --

7 JUSTICE SOTOMAYOR: Even Ouellette
8 recognized that it was all right to bring the
9 state law claim there. So what do you do with
10 that?

11 MS. HARRIS: Yes. Just -- I'm glad
12 you asked that. I was trying to get to that.
13 And I think, respectfully, I don't agree with
14 the characterization of a residual preexisting
15 state interstate pollution law for the reason
16 that if you look to the Court's precedents, as
17 Justice Kavanaugh was mentioning, they say
18 things like: Federal law preempts state law in
19 interstate air pollution. It's not a thing
20 that exists.

21 And I think the only way to make sense
22 of Ouellette and the way it parses the saving
23 clause in light of that federal common law and
24 -- and history and its constitutional
25 underpinnings is to recognize that, because it

1 would be very strange indeed for the Court to
2 have held that as a matter of -- based on this
3 history and based on the text of the saving
4 clause under the Clean Water Act, that there is
5 no way for an injured state to sue under the
6 injured state's law if there was some
7 preexisting body of state law that was, like,
8 out there, it would be a sort of weird
9 displacement.

10 I think, instead, what the Court is
11 best read as saying is this has always been a
12 federal area. Congress authorizes a rule of
13 decision that the source state law can apply to
14 an otherwise intractable state/unstate
15 conflict. That's all states get to do, because
16 states don't get to then fill a vacuum of
17 federal area with state law.

18 And that's -- you could just stop
19 right there and you don't have -- that's the
20 end of Colorado's case.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Justice Thomas, anything further?

23 Justice Sotomayor?

24 Justice Kagan?

25 JUSTICE KAGAN: What do you make of

1 the closing paragraph of AEP, which says, you
2 know, as to these state claims, we're not
3 dealing with those, and then says the
4 availability of a state lawsuit depends on the
5 preemptive effect of the federal act?

6 MS. HARRIS: Yeah.

7 JUSTICE KAGAN: So -- so it's -- it's
8 clearly -- it's not looking to some big broad
9 constitutional principle. It's saying it just
10 depends on what the Clean Air Act says about
11 whether this state lawsuit can proceed.

12 That seems -- I -- I mean, I know that
13 you talk about the preemptive effect of the
14 Clean Air Act in, like, a few pages at the end
15 of your brief, but that's not your principal
16 submission. I mean, this suggests that that
17 should be the only question. So were they just
18 -- was -- was AEP just wrong in not
19 understanding that there was a bigger, broader,
20 more important constitutional question lurking
21 here?

22 MS. HARRIS: No. I think AEP is just
23 right. And so let me just read the next part
24 of AEP because I think it's highly
25 illuminating. When it say the preemptive

1 effect of the federal act, it cites Ouellette,
2 it cites the pages of Ouellette that talk about
3 the federal principles of federal common law.
4 And then it says, "[holding that the Clean
5 Water Act does not preclude aggrieved
6 individuals from bringing a nuisance claim
7 pursuant to the law of the source State.]"

8 The source state claims were what were
9 at issue in AEP. So I take all this discussion
10 to be saying, hey, if you want to know can you
11 bring a source state lawsuit, which is a thing
12 reserved AEP, go look to -- go look to
13 Ouellette. And if you look to Ouellette, the
14 thing that it says --

15 JUSTICE KAGAN: Well, if you look to
16 Ouellette, Ouellette is also almost entirely
17 about the Clean Water Act. It's basically
18 saying we have a statute, we need to know what
19 that statute preempts and what it leaves in
20 place.

21 And, again, that would have been a
22 very strange choice to make if it had at the
23 front of its mind the idea that the
24 Constitution itself, by virtue of the plan of
25 the convention, prevented states from touching

1 this area.

2 MS. HARRIS: Respectfully, I disagree
3 because the front part of Ouellette is all
4 about tracing this history that Petitioner has
5 been talking about, and that we agree with,
6 about why is this an area of federal common
7 law? Why is interstate air and water in their
8 ambient and interstate qualities an inherently
9 federal area even after Erie?

10 And the Court says, like, tracing
11 through that it -- compares it to interstate
12 boundaries disputes and everything else. And
13 those are the very things that the Hyatt
14 opinion says, no, they really are off limit to
15 states, they are inherently federal in a way
16 that has constitutional dimensions. And that
17 makes sense of the way Ouellette then proceeded
18 in its preemption analysis.

19 I think it's really hard to read the
20 ensuing discussion in -- in Ouellette about how
21 to parse what the Clean Water Act means, what
22 the saving clause means, and why exactly it is
23 that the holding is that the injured state's
24 suit is preempted if you don't have all that
25 preceding discussion front of mind and

1 recognize that the part of Ouellette that's key
2 is not just the pervasive regulation of the
3 Clean Water Act but the fact that control of
4 interstate pollution is primarily -- primarily
5 a matter of federal law that's explaining why
6 state law doesn't have more room than what
7 Congress has specifically authorized.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: Do you read AEP to
13 say that the Clean Air Act displaces federal
14 common law?

15 MS. HARRIS: Yes.

16 JUSTICE KAVANAUGH: Next question: On
17 the source state law point at the end of AEP,
18 the discussion you were just having with
19 Justice Kagan, do you read the savings clause
20 for the Clean Water Act and the Clean Air Act
21 to have the same scope?

22 MS. HARRIS: Yes, and not just me, but
23 every court of appeals to consider the question
24 has said the same thing, and the text of the
25 Clean Air Act reinforces that because the good

1 neighbor provisions, for instance, that we
2 talked about before, presupposed that the
3 states lack authority if they're the injured
4 state.

5 JUSTICE KAVANAUGH: So within the four
6 corners of the precedent, if just that
7 precedent, and if you're right about what you
8 just said, the scope being the same, what is
9 preserved by the Clean Air Act and what is
10 permissible is a state tort suit under the
11 source state's law but not under the affected
12 state's law, so not under Colorado law in this
13 case? Is that your argument for --

14 MS. HARRIS: Yes. And we know
15 Colorado law is the law that's being applied
16 from things like Pet. App. 54a to 55a. Like,
17 the idea that it's a mystery what law is
18 applying is just not right.

19 JUSTICE KAVANAUGH: Last question:
20 Out precedent says it, but do you object to
21 state tort suits going under the source state
22 law against emitters in that state? Is there
23 some separate -- maybe this is where
24 extraterritoriality or something else kicks in?

25 MS. HARRIS: Yes, because I think the

1 way -- the nature of this suit would offend
2 extraterritoriality principles --

3 JUSTICE KAVANAUGH: Okay.

4 MS. HARRIS: -- above and beyond.

5 JUSTICE KAVANAUGH: That's beyond our
6 precedent. Okay, thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 JUSTICE JACKSON: Let me just get
11 some -- sorry, can you hear he? Can I just get
12 some clarity on what you just discussed about
13 Justice Kavanaugh?

14 So what's the source state in this
15 case? Have we decided that yet? Is that
16 established?

17 MS. HARRIS: Well, there's no such
18 thing as a source state in this case because
19 Colorado's entire thesis is that the -- by mere
20 fact of having injuries in Colorado, they can
21 regulate Petitioners' worldwide conduct.

22 And, again, that is an unprecedented
23 idea of a --

24 JUSTICE JACKSON: Why does that not
25 implicate a source state? Maybe they're saying

1 the source is from a lot of different places.

2 But I don't know what you mean.

3 MS. HARRIS: Right. So they're trying
4 to apply Colorado law. Colorado is the injured
5 state, like the state in Ouellette that
6 couldn't proceed, it was Vermont, the injured
7 state.

8 JUSTICE JACKSON: Colorado does have
9 some refiners, though. Are they not
10 contributors in this way?

11 MS. HARRIS: That's not the thesis of
12 their suit. They're saying, because of their
13 injury, they get to sue for all of the
14 worldwide activities. They're not confining
15 themselves to saying, oh, there's particular
16 fossil-fuel activities within the State of
17 Colorado.

18 JUSTICE JACKSON: I know. But -- but,
19 if -- if there are multiple sources, I'm just
20 trying to figure out is Colorado one of them
21 per their allegations.

22 MS. HARRIS: I don't think so in
23 the -- in the nature of the suit. I don't
24 think you could carve out, like, some future --
25 I don't think you could save their complaint by

1 saying just because if you hypothesize not a
2 suit based on injury or -- but a suit based on
3 some unspecified --

4 JUSTICE JACKSON: I'm not carving it
5 out. You -- you -- you articulated a theory
6 with Justice Kavanaugh that said something to
7 the effect of what is saved is the potential
8 for a state tort suit under the source state's
9 law.

10 And so I'm trying to figure out is
11 Colorado a source state, one of them. Maybe
12 there are many. I thought they had emitters or
13 they at least had refineries. That was part of
14 their allegation.

15 So I appreciate that they also say
16 we're injured. That's what gives them a real
17 stake in this. But aren't they also at least
18 in part a source state?

19 MS. HARRIS: Again, if they wanted to
20 make that complaint -- that their complaint,
21 they would have to be focused on specifically
22 what are the source state emitters and what are
23 they doing to cause an injury in Colorado.
24 They don't get to jump around and say,
25 actually, what we want to regulate is all of

1 the out-of-state, out-of-country conduct that
2 is causing an injury.

3 JUSTICE JACKSON: I guess what I'm
4 trying to figure out is we don't really know
5 yet because we don't have the whole set of
6 facts related to how this pollution is
7 happening because we haven't gotten to that
8 stage in this litigation.

9 It feels to me like the defendants in
10 this case are coming in after attempting to
11 remove this to federal court, you know, years
12 of litigation about that where everybody says
13 no, finally, this has to stay in state court,
14 and now they're coming up with theories that
15 are bringing it back to federal court before
16 the state courts have really had a chance to
17 sort out who is the source, what is their
18 allegation with respect to how this causation
19 is happening. And maybe -- maybe they lose
20 because they can't actually trace this to any
21 particular source. Maybe.

22 But it -- it feels like we don't
23 really know enough to be confident that the
24 theories that you are proposing are actually
25 applicable here.

1 MS. HARRIS: Again, I think it would
2 be strange indeed to say that you aren't
3 certain if the federal law issues that are
4 squarely presented might be resolved on
5 different state law grounds down the road
6 because perhaps their theories are inchoate.
7 This is not sort of a, like, plead from the
8 podium to fix your complaint situation.

9 The question that the Colorado Supreme
10 Court resolved, the questions are all the
11 federal questions. Does federal law prevent
12 the suit that Colorado -- that Boulder chose to
13 fashion under Colorado law?

14 There down the chain, I'm injured in
15 Colorado. Therefore, I can sue all of the oil
16 producers for their conduct everywhere with no
17 limit in site. Is that okay? And the answer
18 under federal law for many reasons is no.

19 JUSTICE JACKSON: Thank you.

20 MS. HARRIS: I don't --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Russell.

24

25

1 ORAL ARGUMENT OF KEVIN K. RUSSELL

2 ON BEHALF OF THE RESPONDENTS

3 MR. RUSSELL: Mr. Chief Justice, and
4 may it please the Court:

5 Since the founding, states have had
6 the power to provide tort remedies for injuries
7 occurring within their borders even when the
8 conduct causing those injuries occurred
9 elsewhere.

10 When somebody in New York defames a
11 citizen of Boulder on national television or
12 somebody in California releases a computer
13 virus on the Internet or a biological virus
14 into the world and it causes mass damage in
15 Colorado, it has never been thought that only
16 federal law can provide a remedy simply because
17 the tortious conduct and the injury occurred in
18 different states because the harm was
19 widespread, the damages were large, or the
20 defendants were part of an important industry.

21 And applying state law to such cases
22 has never been viewed as one state
23 impermissibly projecting its law nationwide.
24 To be sure, specific constitutional provisions
25 limit choice of law and place other constraints

1 on the extraterritorial effects of state law.

2 But Petitioners invoke none of those
3 provisions here. Instead, they invite this
4 Court to find in the structure of the
5 Constitution a judicial power to declare some
6 subject matters inherently federal and,
7 therefore, preempted not by Congressional
8 enactments but by Congressional silence.

9 That claim inverts the Constitutional
10 structure and risks preemption being driven by
11 judicial policy intuitions rather than anything
12 in the Constitution itself.

13 The structure of the Constitution
14 places residual authority to preempt state laws
15 with undesirable nationwide effects in
16 Congress, not the courts. Accordingly, in AEP,
17 this Court held that preemption of global
18 warming nuisance claims is governed by the
19 preemptive force of the Clean Air Act, citing
20 Ouellette, which applied ordinary statutory
21 preemption principles and concluded that state
22 law could apply.

23 Here, the statute does not preempt
24 Respondents' deception and other claims against
25 non-emitters not subject to the Act.

1 But all of this must await another
2 case because Petitioners have failed to
3 establish this Court's jurisdiction to hear
4 this interlocutory appeal.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: If you prevail, is
7 there a limiting principle to whom you can --
8 as to whom you can sue?

9 MR. RUSSELL: There are a number. So
10 there's the constitutional limitations on
11 choice of law, which require a sufficient nexus
12 between the state whose law is to be applied
13 and the conduct at issue. There's the Dormant
14 Commerce Clause. There's personal jurisdiction
15 limitations.

16 The question here is not whether
17 anything in the Constitution prohibits this
18 lawsuit but whether the specific theories that
19 they raised in the Colorado Supreme Court
20 passed upon below are valid.

21 JUSTICE THOMAS: So you could just as
22 easily sue large retailers of -- of -- of these
23 products?

24 MR. RUSSELL: I think nothing in the
25 Constitution would prevent that. I think that

1 we would have --

2 JUSTICE THOMAS: But nothing in your
3 theory prevents that either, right?

4 MR. RUSSELL: Nothing in our theory
5 prevents that. It could be that the Colorado
6 courts would have a different idea that it is
7 first and foremost a question of -- of state
8 tort law.

9 But, in terms -- but, you know, when
10 lots of people act together to cause widespread
11 harm, it is not uncommon for multiple different
12 defendants to be potentially liable.

13 But the principal, I think,
14 protection, to the extent that seems
15 unreasonable, is that Congress stands at the
16 ready to intervene and to enact federal law
17 that preempts unreasonable state laws with
18 undesirable national effects.

19 JUSTICE KAVANAUGH: Well, Congress --
20 Congress could act to allow state tort lawsuits
21 too. The question in this case is really what
22 burdens on Congress. Does Congress have to act
23 to allow them, or does Congress have to act to
24 proscribe them? What's the baseline or the
25 default?

1 And I think, in the abstract, that
2 would be an interesting question, but we have
3 the precedents, you heard me mention them. And
4 just to, you know, go back to Ouellette, it
5 does say regulation of interstate water
6 pollution is a matter of federal, not state,
7 law.

8 Milwaukee I therefore held that these
9 cases should be resolved by reference to
10 federal common law. The implicit corollary of
11 this ruling was that state common law was
12 preempted.

13 A later decision made it clear that
14 state common law actions did not survive
15 Milwaukee I, and then, of course, AEP comes in
16 and says the Clean Air Act displaces federal
17 common law. But I think we're on a -- have a
18 wall of precedent that says state tort law does
19 not apply except for the Ouellette source state
20 thing.

21 So what do -- what do we do with that
22 precedent? And here's why -- you mentioned
23 Congress. Here's why I ask it. I think this
24 Court would be rightly accused of misleading
25 Congress for decades on what the state of the

1 law was when Congress acts in the Clean Air
2 Acts in the various amendments with respect to
3 issues such as this.

4 Congress could rightly believe that
5 this Court has set forth that interstate water
6 and air pollution were matters of federal law
7 and thus the burden being on Congress to act if
8 it wanted to allow state tort suits. So that's
9 linking up our precedent with Congress. Have
10 at it.

11 MR. RUSSELL: So I think -- here,
12 there's a number of things I can say about
13 that. Let me just start with how I understand
14 this Court's precedents to deal with the fact
15 that this -- that at least the -- the -- the
16 emissions suits dealt with in those cases.
17 This case is not about emissions. It's about
18 deception and producers.

19 But, even assuming that this case was
20 exactly about the same subject matter, I think
21 the Court has treated this as, look, there was
22 a body of federal common law. Set to the side
23 for the moment whether that body of common law
24 reflected this Court's determination that only
25 federal law could apply there or that the Court

1 had some degree of flexibility for deciding
2 that some subject matters of special federal
3 interest should be subject to federal common
4 law. But there was this federal common law.
5 Congress steps in and displaces it. And when
6 Congress steps and displaces it, it displaces
7 all of the policy decisions that were
8 previously made by courts, including on the
9 proper role of state law.

10 And the question then becomes just
11 one, as -- as Ouellette said, one of statutory
12 interpretation. And although Ouellette
13 acknowledged that previously this had been an
14 area that was dealt with comprehensively by
15 federal common law and although it did say that
16 the question is whether state -- whether
17 Congress preserved it, the way the Court
18 decided what was preserved, the way it decided,
19 for example, whether affected state law could
20 apply, was by applying ordinary preemption
21 principles, not asking whether Congress had
22 authorized it.

23 JUSTICE KAVANAUGH: Well, that -- that
24 suggests that Congress, when it did the Clean
25 Air Act, resurrected state tort law that had

1 previously been ruled to be preempted by
2 federal common law by this Court. And that's,
3 like, an all-time elephant and mouse hole in
4 terms of what Congress would have done there.

5 MR. RUSSELL: I don't think so. So,
6 in the Isla Petroleum case, this Court
7 confronted a similar situation in which a
8 federal statute had previously preempted part
9 of RICO's regulation of fuel prices. Congress
10 withdrew this. The argument -- same argument
11 was made that you should therefore start from
12 the premise that federal law -- that state law
13 has been preempted and the question is whether
14 Congress revived it. And this Court directly
15 rejected that framing.

16 I think that -- and there's a
17 constitutional reason for this. The Supremacy
18 Clause starts from the premise that state law
19 applies unless something in the Constitution or
20 the laws enacted in pursuance thereof preempt
21 it. And I don't think under that structure --

22 JUSTICE SOTOMAYOR: Counsel, the
23 problem with that is our statements that
24 federal common law control water and air. But
25 I think that we're sort of missing the point.

1 The Clean Air Act does not regulate marketing
2 or advertising of fuel, correct?

3 MR. RUSSELL: Correct.

4 JUSTICE SOTOMAYOR: It does not
5 mandate the use of specific fuel sources,
6 correct?

7 MR. RUSSELL: Correct.

8 JUSTICE SOTOMAYOR: So it's not clear
9 to me how regulating the production and false
10 advertisement of oils affects air and water,
11 correct?

12 MR. RUSSELL: Correct.

13 JUSTICE SOTOMAYOR: The Clean -- Clean
14 Air Act. And this case seems no different to
15 me from Commonwealth Edison versus Montana,
16 where we said that a state tax on coal did not
17 affect the Clean Air Act standards for those
18 that burned coal, correct?

19 MR. RUSSELL: Correct.

20 JUSTICE SOTOMAYOR: Isn't this your
21 case?

22 MR. RUSSELL: I think it's -- it's --
23 it is that case. So I think Petitioners'
24 argument requires this Court to jump through a
25 number of hoops to get indirectly at what the

1 Court can just act directly. And it requires
2 this Court to decide whether these sorts of
3 claims would have fallen in the scope of the
4 former federal common law even though all of
5 those cases involved suits against emitters for
6 their emissions.

7 It would then require this Court to
8 decide the second complicated question of
9 whether, when the Court creates federal common
10 law, it does so because it is exercising some
11 degree of law-making discretion or, instead,
12 only ever creates federal common law because
13 the Constitution forbids state law from
14 applying there, and then decide whether
15 Congress can overrule that determination and
16 then decide whether Congress actually did.

17 Instead, I would suggest that the
18 Court can and should directly answer the
19 question: What in the Constitution implicitly
20 prohibits Colorado or any other state's law
21 from applying to these claims? And they --
22 they'd raise their arguments, right? It's --
23 it's equal sovereignty and extraterritoriality.
24 But, as I explained in the opening, this Court
25 has for a long time understood that when a

1 state applies its tort law to in-state injuries
2 caused by out-of-state conduct, that is not an
3 impermissible exercise of extraterritoriality.

4 JUSTICE KAVANAUGH: What will --

5 JUSTICE KAGAN: I guess I don't --

6 CHIEF JUSTICE ROBERTS: Counsel, just
7 to make sure I have a correct understanding,
8 presumably, if you prevail, the next day, a
9 municipality in every single state will file a
10 lawsuit, they'll probably copy your pleadings,
11 and then there will be at least 50, you know,
12 different cities -- one state could do it, I
13 suppose -- causes of action filed. And -- and
14 what -- what do -- I mean, is it -- how -- how
15 do you think that will work out on the ground?

16 MR. RUSSELL: So I think, on the
17 ground -- I mean, there are other examples
18 where, you know, a course of conduct causes
19 mass liability across the nation, in asbestos,
20 you know, in other kinds of product liability
21 suits, and courts deal with them, you know,
22 through litigation, including there is an
23 MDL-like --

24 CHIEF JUSTICE ROBERTS: Well, asbestos
25 is a little --

1 MR. RUSSELL: -- process in states.

2 CHIEF JUSTICE ROBERTS: I -- I think
3 maybe asbestos is a little different since
4 that's not something that's necessarily -- it
5 doesn't have to be applied as broadly after a
6 decision of the sort you're talking about as it
7 was before.

8 But there's always going to be
9 greenhouse-gas emissions affecting every state.
10 So it's not as if anything other than your
11 litigation is going to address it. So, as a --
12 as a practical matter, what's your -- again,
13 what should -- what should happen?

14 MR. RUSSELL: As a practical -- as a
15 practical matter, I think before these
16 defendants face the kind of liability that they
17 are projecting, we are going to have to satisfy
18 the Dormant Commerce Clause. I mean, it's the
19 choice of law rules and restrictions on choice
20 of law that come from the constitutional
21 personal jurisdiction. And we're going to have
22 to prove proximate cause, which they say we
23 cannot prove.

24 And, you know, the mere fact that
25 there's going to be a lot -- there could be a

1 lot of litigation, I don't think there's
2 anything in the Constitution that says
3 preemption arises from -- whenever, you know, a
4 state law, if copied in other states, could
5 cause a lot of litigation.

6 CHIEF JUSTICE ROBERTS: Well, and --
7 and with the overlay that, of course, we're not
8 talking about regulation of emissions at all.
9 It's just sort of the pre -- production.

10 Now why -- does that have any
11 significance in the case?

12 MR. RUSSELL: Well --

13 CHIEF JUSTICE ROBERTS: There's a
14 reason why -- why aren't these suits directed
15 at greenhouse-gas emissions?

16 MR. RUSSELL: I think in part because
17 of Ouellette. You know, I think that that is a
18 field that has been occupied in significant
19 part by federal law.

20 CHIEF JUSTICE ROBERTS: Well, isn't
21 your --

22 MR. RUSSELL: We don't think that --

23 CHIEF JUSTICE ROBERTS: I'm sorry to
24 interrupt, but isn't your suit an attempt to
25 evade those decisions?

1 MR. RUSSELL: It's an attempt --

2 CHIEF JUSTICE ROBERTS: It's really --
3 it's an effort to reduce emissions. The -- the
4 fuel production itself doesn't have the sort of
5 universal harm that we're -- we're talking
6 about.

7 MR. RUSSELL: No, it is not an effort
8 to reduce emissions. For example, the
9 deception claim. Under our deception theory,
10 they can continue to produce as much fossil
11 fuels as they like and contribute to as much
12 air pollution and greenhouse-gas emissions as
13 the market will bear when consumers are
14 properly informed about the consequences of
15 that decision.

16 With respect to the production, the
17 production claims could have an indirect effect
18 on the emissions in the same way that a
19 severance tax on coal does, in the same way
20 that a gas tax overtly directed at trying to
21 reduce emissions and greenhouse gases does.

22 But I don't think that anything in the
23 Clean Air Act stretches as far as preempting
24 every state law that could have an effect on
25 emissions. That's --

1 JUSTICE GORSUCH: Mr. --

2 JUSTICE KAGAN: Do you think --

3 JUSTICE GORSUCH: -- Russell -- I'm
4 sorry, please go ahead.

5 JUSTICE KAGAN: No, go ahead.

6 JUSTICE GORSUCH: No.

7 JUSTICE KAGAN: Do you think Milwaukee
8 I is still good law? I mean, whatever you
9 think about the wall of precedents idea,
10 Milwaukee I seems fairly clearly to say there's
11 this area of state -- of environmental law that
12 it would be crazy for states to be the
13 regulators of, and this is primarily or
14 entirely a matter of federal law.

15 Does that survive? Does that survive
16 the environmental -- you know, the Clean Air
17 Act, the Clean Water Act, everything that we've
18 said about those two statutes? Is there still,
19 as Milwaukee I indicated, a constitutional
20 limit on what states can do in the air and
21 water field?

22 MR. RUSSELL: So, number one, I -- I
23 don't concede that when this Court says that an
24 area is meat for federal governments that that
25 means the Court has determined that the

1 Constitution forbids --

2 JUSTICE KAGAN: You really read
3 Milwaukee I to allow state regulation of air
4 and water to any significant degree?

5 MR. RUSSELL: No, but not for
6 constitutional reasons. It's not because the
7 Court thought there was a constitutional
8 problem. In fact, the Court -- what the Court
9 pointed to was the pervasive statutory
10 regulation in that space. And the Court viewed
11 the federal common law in that case as
12 principally filling up the details, providing a
13 supplemental remedy that federal law had not
14 provided.

15 JUSTICE KAGAN: But won't there have
16 to be federal common rather than state law
17 unless there was a constitutional principle
18 indicating exactly that?

19 MR. RUSSELL: Because I think that
20 this --

21 JUSTICE KAGAN: I mean, it's not just
22 like there has to be federal common law
23 because, what, we, the Court, think it would be
24 a good idea?

25 MR. RUSSELL: Well, I think that

1 the -- this Court's federal common law power
2 originates in a period prior to Erie, where the
3 Court viewed itself as all courts, as having
4 the power to create common law or to understand
5 common law and apply it to the particular
6 circumstances of particular cases. And that's
7 what it was doing in the original jurisdiction
8 cases.

9 After Erie, the Court understood
10 itself to retain a narrower band of that kind
11 of authority. And I don't think the Court has
12 ever thought that that authority is limited to
13 situations in which state law cannot
14 constitutionally apply.

15 Think of the test. The test is, is
16 there a conflict between state law and some
17 federal interest? And then compare that to
18 Hyatt III, where the Court self-consciously
19 found that the structure of the Constitution
20 preempted a state law. And there, that was a
21 self-conscious constitutional analysis, looking
22 at Founding-era documents like the Federalist
23 Papers and Founding-era understandings of the
24 role of state sovereignty.

25 There's nothing like that in Milwaukee

1 I or in any of this Court's --

2 JUSTICE KAGAN: Thank you.

3 MR. RUSSELL: -- cases.

4 JUSTICE KAVANAUGH: Well, in
5 Ouellette, what you've have relied on, it
6 specifically says in footnote 20 that Vermont
7 law cannot apply.

8 And my understanding of the factual
9 scenario in Ouellette, New York polluter,
10 Vermont affected state, is that your case,
11 Colorado, is the -- is Vermont, the equivalent
12 of Vermont, in that case.

13 And the Court there explicitly said
14 Vermont law could not apply. So what do we do
15 with that?

16 MR. RUSSELL: I think, at most, if
17 you thought our case was on all fours with
18 Ouellette -- and we don't think it is, but let
19 me set that aside for the moment -- that would
20 mean that we could proceed on these claims
21 under the -- the law of the source state.

22 JUSTICE KAVANAUGH: Do you agree that
23 under Ouellette you could not proceed under
24 Colorado law?

25 MR. RUSSELL: Yes. But my friends

1 have insisted that we have only pled Colorado
2 law. I urge you to look at the complaint. It
3 doesn't identify a state source of law. We
4 certainly didn't stake our case on it.

5 We have, in some of our briefing, said
6 that we think Colorado is the right choice of
7 law, and we do think that that would be
8 constitutionally permitted and isn't in
9 conflict with the --

10 JUSTICE GORSUCH: Can you spell that
11 out for me for just a minute?

12 Let -- let's suppose, you know, you
13 say to us, Mr. Russell, that we should look to
14 choice-of-law limits in the Constitution.

15 Is there anything anomalous, in your
16 mind, to applying state law here to worldwide
17 conduct?

18 MR. RUSSELL: State law in general?

19 No.

20 JUSTICE GORSUCH: Colorado state law.

21 MR. RUSSELL: No, I don't think so.

22 So if, like, a car was negligently manufactured
23 in Canada --

24 JUSTICE GORSUCH: It's the same thing
25 as the classic car manufacturer case or

1 something like that?

2 MR. RUSSELL: Well, I do think, you
3 know, the other side makes the argument that
4 the causal link here is more attenuated, and I
5 do think that is an appropriate consideration
6 under choice of law. The constitutional test
7 is whether the nexus is such that it would be
8 non-arbitrary and not fundamentally unfair
9 to apply Colorado law to these claims.

10 But, again -- I'm sorry.

11 JUSTICE BARRETT: Mr. -- are you
12 finished?

13 JUSTICE GORSUCH: But, again, I want
14 to hear the dot, dot, dot.

15 MR. RUSSELL: But, again, there hasn't
16 been a choice-of-law determination.

17 JUSTICE GORSUCH: Hasn't been, but you
18 think Colorado would be the appropriate choice
19 of law, just as if it were a car defect case,
20 manufactured, strict liability defects?

21 MR. RUSSELL: We do -- we do think so.

22 JUSTICE GORSUCH: Okay.

23 JUSTICE BARRETT: Mr. Russell --

24 MR. RUSSELL: We --

25 JUSTICE BARRETT: Oh, sorry. Please

1 finish.

2 MR. RUSSELL: Go ahead.

3 JUSTICE BARRETT: I just want to ask
4 about the limits of your theory. I want to put
5 aside the federal common law point for a minute
6 and just focus on the extraterritoriality
7 argument or the equal sovereignty argument.

8 So let's pretend the Clean Air Act
9 doesn't exist. So I don't want to talk about
10 statutory preemption.

11 Everybody agrees that state tort law
12 is a form of regulation. But what if Colorado
13 passed a law purporting to cap emissions in the
14 other 49 states? Is there any principle that
15 would prevent that?

16 MR. RUSSELL: I think that is the
17 BMW principle and is the principle that was
18 referred to in footnote 1 in National Pork
19 Producers.

20 This Court has always recognized --
21 the distinction between a state doing that,
22 directly regulating conduct, passing a statute
23 that says it's unlawful to engage in conduct in
24 another state, has always been understood as
25 different than a state providing a tort remedy

1 for conduct that took place elsewhere and
2 caused harm in --

3 JUSTICE BARRETT: So even if Colorado
4 says, whereas these emissions are harming the
5 residents of Colorado, whereas these emissions
6 are causing climate change that are creating
7 all of the exact same harms that your suit
8 alleges, that would not be okay?

9 MR. RUSSELL: I don't think so. And,
10 again --

11 JUSTICE BARRETT: So, the same thing
12 can happen through the tort suit, though?

13 MR. RUSSELL: It isn't the same thing.
14 All the tort suit is doing is making them -- it
15 doesn't prohibit them from engaging in the
16 conduct. It requires them to internalize a
17 portion of the cost of their activities by
18 paying for some of the damage that those
19 activities inflict.

20 And I think that's why the Court has
21 never concerned -- considered imposition of
22 tort liability for out-of-state conduct as a
23 form of extraterritorial or impermissibly
24 extraterritorial application of the source
25 state's -- or the injured state's law into

1 another sphere.

2 And I think Petitioners ultimately
3 don't disagree with that. They just say this
4 case is special either because it involves
5 water and air, because that's a special thing,
6 or because they say the connection here is too
7 attenuated.

8 And the question for preemption is not
9 whether the -- the allegations in this case are
10 in conflict with federal law but whether
11 Colorado law is consistent with the
12 requirements of federal law.

13 And even if the Federal Constitution
14 required a proximate causal relationship -- and
15 I don't think it goes that far, but even if it
16 did -- that is a state law element for all of
17 our claims. And I don't think that there can
18 be any argument that there is any conflict
19 between state and law when --

20 JUSTICE KAVANAUGH: Can I --

21 MR. RUSSELL: -- state and federal law
22 when they both require the same thing.

23 JUSTICE KAVANAUGH: Can I go back to
24 Justice Barrett's question?

25 You said the state law, an actual

1 state legislative act that did the same thing
2 that the tort suit is trying to do in terms of
3 penalizing conduct, would be preempted. I am
4 trying to understand the difference with the
5 state tort suit.

6 You were a little cavalier about the
7 state tort suit: just makes them internalize
8 it. It is going to bankrupt -- you know, if
9 there are enough of these, bankrupt these --
10 these various defendants and certainly other
11 defendants out there. I mean, anyone is a
12 potential defendant for a suit like this. Any
13 -- any manufacturer, any business.

14 So -- so why is the state tort suit
15 different than the state law? I'm just not
16 understanding that.

17 MR. RUSSELL: It's a matter of
18 tradition.

19 So you could just as easily say that
20 if Vermont holds a company in New Hampshire
21 liable for the damages for building a dam that
22 backs up water into Vermont, that might have
23 the practical effect of causing the people in
24 the other state to act differently. It may
25 have -- may have a prohibitive effect.

1 But that has never been thought to
2 mean that Vermont doesn't have the power to
3 apply its law to that tort. And this -- you
4 know --

5 JUSTICE KAVANAUGH: Is --

6 MR. RUSSELL: -- this is what --

7 JUSTICE KAVANAUGH: -- that a
8 New Hampshire polluter in your example?

9 MR. RUSSELL: Frankly, I have lost
10 track.

11 JUSTICE KAVANAUGH: It was another
12 state, though?

13 I mean, I think Ouellette does say
14 that's -- Ouellette purports to be about
15 tradition and about the nature of the Union and
16 a lot of principles that say you can't apply
17 Vermont law in that circumstance. The law of
18 the affected state cannot be applied.

19 MR. RUSSELL: So let me first answer
20 the question about Ouellette and then the
21 broader general constitutional understanding
22 and tradition.

23 Ouellette said that the law of the
24 injured state could not apply for a very
25 specific reason, not for a constitutional

1 reason, but because it conflicted with the
2 Clean Water Act's permitting regime for
3 particular point sources.

4 The problem was that a particular
5 point source could be subjected to conflicting
6 rules with -- because -- if, you know, the
7 state of the injured --

8 JUSTICE KAVANAUGH: One interruption.

9 MR. RUSSELL: Sure.

10 JUSTICE KAVANAUGH: The background
11 principle of Ouellette, as stated by the Court,
12 was that state law would not apply unless
13 specifically preserved -- that's the phrase,
14 "specifically preserved" -- by the -- by the
15 Act. It flipped the usual preemption.

16 MR. RUSSELL: With respect, I don't
17 think it did, because the way it decided
18 whether it was specifically preserved. So the
19 question, the principal question presented, was
20 about the affected state's law.

21 And so it said: Well, we're going to
22 ask, is the affective state law preserved? And
23 it looks at the savings clause, and it says the
24 savings clause does not save it.

25 Under Petitioners' view, that should

1 have been the end of the case, because Congress
2 did not specifically authorize the affected
3 state's law to apply.

4 But instead the Court went further and
5 then said, look, that savings clauses don't
6 apply, and it went and applied an ordinary
7 statutory purposes-and-objectives preemption
8 analysis.

9 And the reason the source -- or the --
10 the affected state's law was preempted was
11 because of a conflict, not a lack of
12 authorization, but a conflict.

13 JUSTICE KAGAN: But suppose we did
14 that, Mr. Russell. I mean, we've been talking
15 a lot about these constitutional principles and
16 -- and your friends have indeed relegated the
17 Clean Air Act to a couple of pages at the end
18 of their briefs.

19 But I'm wondering why that isn't the
20 more natural and simpler route towards their
21 view of what should happen here.

22 In other words, the Clean Air Act sets
23 up an extremely complicated scheme about how
24 regulations of emissions, how it -- it should
25 operate, how air quality standards should be

1 devised and enforced.

2 And that scheme does -- actually does
3 involve states in a wide variety of ways, but
4 that scheme does not involve the kind of state
5 litigation that you brought.

6 And so why not just say: This really
7 does just get in the way of how the -- of how
8 Congress decided to regulate greenhouse gases
9 or any other air quality standards?

10 MR. RUSSELL: So a few responses to
11 that.

12 First, I think it is difficult to
13 decide whether the Clean Air Act preempts these
14 claims when we don't know whether the Clean Air
15 Act applies to greenhouse-gas emissions when
16 the EPA is saying it lacks the statutory
17 authority to do that.

18 JUSTICE KAGAN: Well, we know --

19 MR. RUSSELL: But --

20 JUSTICE KAGAN: -- what EPA says today
21 and -- and said last year and might say
22 tomorrow, but -- but the statute is the
23 statute.

24 MR. RUSSELL: Right. And then the
25 Court could interpret the statute and decide

1 the question that is presently pending in the
2 D.C. Circuit about whether this regulates
3 greenhouse gases. It was a very --

4 JUSTICE KAGAN: I don't think you have
5 to decide that question, Mr. Russell.

6 You know, whatever the answer to that
7 question is, we would say the Clean Air Act
8 sets up a scheme for basically regulating air
9 quality.

10 MR. RUSSELL: Well, I -- with respect,
11 I don't think that's an accurate reflection of
12 what it regulates. It regulates point-source
13 emissions.

14 It does not regulate everything that
15 has an indirect effect on emissions. It
16 doesn't regulate the severance -- coal
17 severance tax. It doesn't regulate gas taxes
18 that affected levels of emissions. Virginia
19 Uranium tells us that.

20 JUSTICE KAGAN: Well, I -- I
21 understand that theory, but, on the other hand,
22 your suits are so related to what kinds of
23 emissions are appropriate, right, the entire,
24 you know, causal chain of the suit is, by
25 virtue of what the defendants have done, the

1 products they've made, the way they've marketed
2 those products, they have caused emissions to
3 increase.

4 So everything depends on -- on this
5 idea that the defendants are responsible for
6 excessive emissions. And, you know, one can
7 look at the Clean Air Act and say the Clean Air
8 Act sets up a scheme for deciding what are
9 excessive emissions and what are not.

10 MR. RUSSELL: Well, with respect, I
11 disagree with that. Number one, the deception
12 claims, I think, are far outside anything the
13 Clean Air Act is designed to deal with. The
14 EPA doesn't have authority for regulating
15 the -- the ideal amount of deception in the
16 marketing of fossil fuels.

17 And, in fact, the -- the Clean Air Act
18 doesn't give the EPA authority to figure out
19 what is the ideal amount of emissions or
20 pollutions or the right mix of fuels or the
21 right level of economic activity. It is a much
22 more precise mandate that is limited at
23 putting -- is limited to putting a cap on the
24 amount of emissions from particular point
25 sources. It does not go forward to say that

1 states cannot enact laws that have the indirect
2 effect of raising the costs of fossil fuels and
3 thereby reducing their use or, you know,
4 enacting gasoline taxes again.

5 I think the -- the -- the mere fact
6 that these claims address, you know, things
7 that are a step -- a few steps removed do not
8 necessarily mean that Congress intended to
9 regulate them. That's the lesson from Virginia
10 Uranium.

11 And, of course, Congress remains free
12 to step in if it wants to define some different
13 limit. It requires some difficult line-drawing
14 of what kinds of conduct are impermissible for
15 states to regulate because -- by virtue of
16 their effect on the levels of emissions and
17 their impacts on air quality.

18 And I think it would be strange to
19 think that the -- the statute itself prevents
20 states from engaging in conduct that indirectly
21 improves air quality because that's the -- the
22 principal scheme of this statute, is to leave
23 it to states to decide how much to regulate
24 beyond the minimum level of regulation required
25 by the Act itself.

1 JUSTICE JACKSON: Can I --

2 CHIEF JUSTICE ROBERTS: Thank -- oh,
3 sorry.

4 JUSTICE JACKSON: Sorry, I just wanted
5 to focus for a second on the exchange I had
6 with Mr. Shanmugam about the direct, traceable,
7 and particularized effects.

8 Do you agree with him that that can be
9 decided as a matter of law in the context of
10 this case?

11 MR. RUSSELL: Well, number one, I
12 don't agree with him that that is a
13 constitutional test. This is some amalgamation
14 that they brought up from, I think, standing
15 and personal jurisdiction cases. I don't think
16 this Court has ever said that is the test.

17 But I don't think it can be decided as
18 a matter of law by this Court on the pleadings.
19 The question for preemption, as I said before,
20 is whether there is a compatibility between the
21 requirements of state law and federal law. And
22 I don't think there's any dispute that
23 Colorado's requirement or any state's
24 requirement of proximate causation would meet
25 the constitutional test.

1 And their assertion that we won't be
2 able to prove it, we won't be able to prove the
3 element just like if there's, you know -- the
4 First Amendment requires proof of actual malice
5 in a defamation case involving a public figure.
6 If state law requires that element, there's no
7 preemption there. And that doesn't mean that a
8 federal court, as a matter of constitutional
9 law, would decide whether or not there is
10 actual malice adequately alleged.

11 JUSTICE JACKSON: Thank you.

12 MR. RUSSELL: If I could return a
13 moment to jurisdiction and to the Atlantic
14 Richfield case, the thing that has been -- that
15 has made every case that this Court has decided
16 under that line of precedent a separate lawsuit
17 was that it had a separate defendant, which was
18 the trial court.

19 And that is not the case in this --
20 this case. They -- and when the rules required
21 them to identify against whom relief was
22 sought, at page 5 of their petition, they named
23 the Boulder defendants, not the Court. And I
24 recognize that that seems like a formal
25 distinction, but this is a line of precedent

1 that is itself very formal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything?

5 Justice Sotomayor?

6 Justice Kagan?

7 Justice Gorsuch?

8 Justice Kavanaugh, anything further?

9 JUSTICE KAVANAUGH: In AEP, the Court
10 said -- and this is picking up on Justice
11 Kagan's questions just now -- it's altogether
12 fitting that Congress designated an expert
13 agency here, EPA, as best suited to serve as
14 primary regulator of greenhouse-gas emissions.
15 The expert agency is surely better equipped to
16 do the job than individual district judges
17 issuing ad hoc case-by-case injunctions.
18 Federal judges lack the scientific, economic,
19 and technological resources an agency can
20 utilize in coping with issues of this order.

21 I mean, doesn't those same points
22 apply to a six-person state jury in Boulder and
23 other juries in another country?

24 MR. RUSSELL: I think that those are
25 all good policy arguments about why state law

1 should not apply here. But that's not the
2 question presented here.

3 The question is, you know, whether
4 there's something in the Constitution that
5 takes that policy decision away from Congress.
6 And --

7 JUSTICE KAVANAUGH: Well, I think that
8 was probably talking about how the Clean Air
9 Act had set forth a fairly comprehensive scheme
10 that gave the states roles and saying that that
11 meant that we shouldn't have, on top of the
12 Clean Air Act, this other looming body that
13 makes decisions.

14 MR. RUSSELL: Again -- again, none of
15 those reasons apply to the deception claims. I
16 don't think just saying that --

17 JUSTICE KAVANAUGH: Yeah.

18 MR. RUSSELL: -- you know, producers
19 cannot deceive the public implicates any of
20 those concerns.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 Thank you, counsel.

1 Rebuttal, Mr. Shanmugam.

2 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

3 ON BEHALF OF THE PETITIONERS

4 MR. SHANMUGAM: Thank you, Mr. Chief
5 Justice. Just three points on rebuttal.

6 First, the breadth of Boulder's theory
7 here is astonishing. First, there is no limit
8 under Boulder's theory on who could be sued.
9 My friend, Mr. Russell, cites personal
10 jurisdiction and the Dormant Commerce Clause.
11 But, under Boulder's theory, Boulder could tag
12 me with personal jurisdiction when I am in
13 Colorado in two weeks and sue me on a nuisance
14 claim for refilling my car and thereby
15 contributing to global climate change. There
16 is simply no limit, and personal jurisdiction
17 provides cold comfort in that regard.

18 Similarly, there's no limit on who can
19 sue. We haven't heard anything this morning to
20 suggest that the band of potential plaintiffs
21 would be limited to the mere 90,000
22 municipalities across the country. Any
23 individual who has suffered the effects of
24 climate change could sue under Boulder's theory
25 as well.

1 Second, the shortest line to a -- an
2 appropriately cabined and narrowed decision
3 here is to rely on the equal sovereignty
4 principle. In particular, the Court can rely
5 on this Court's case law from Missouri versus
6 Illinois right through to AEP in this
7 particular context.

8 We do believe that the conceptual
9 framework for that is set out in Franchise Tax
10 Board versus Hyatt, in which the Court said
11 that there are certain areas involving
12 conflicting rights where states cannot apply
13 the applicable rule of decision.

14 And the Court can certainly say, for
15 the reasons given by my friend, Ms. Harris,
16 that that reasoning is reinforced by the
17 extraterritoriality principle because there is
18 simply no precedent for extending any state's
19 authority as far as Boulder is suggesting. My
20 friend, Mr. Russell, cites none.

21 And third and finally, especially
22 given the foreign affairs implications -- and
23 remember that 90 percent of greenhouse-gas
24 emissions occur outside the United States --
25 this is a matter for the political branches on

1 the federal level in the first instance.

2 As the brief set out in some length,
3 in this area, the President and Congress have
4 struck a careful balance between energy
5 production on the one hand and greenhouse-gas
6 reductions on the other. Congress can always
7 act to authorize these claims if it so chooses.
8 But administrations of both political parties
9 have opposed liability schemes on the
10 international level. There's no warrant for
11 countenancing one on the domestic level.

12 In conclusion, this case and others
13 like it reflect an all-too-regrettable trend of
14 trying to resolve major political issues in
15 court rather than leaving them to the political
16 branches where they belong. Climate change is
17 certainly one of the most pressing issues of
18 the day, but we would submit that this is
19 exactly the wrong way to go about resolving it.

20 And so we would submit that the
21 judgment of the Colorado Supreme Court should
22 be reversed. Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, 11:53 p.m., the case was
2 submitted.)
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