

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

SUNCOR ENERGY (U.S.A.) INC.,)
ET AL.,)
Petitioners,)
v.) No. 25-170
COUNTY COMMISSIONERS OF)
BOULDER COUNTY, ET AL.,)
Respondents.)

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Place: Washington, D.C.
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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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9 of the Respondents.

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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,
4 can 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 diffuse 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
2 you -- 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 court, so what -- what
12 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, of 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's how the analysis, in our
9 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'd 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. And another theory is not
10 about that and really goes much further and
11 sets out broad principles of, you know, who can
12 do what extraterritorially with respect to any
13 subject. And as you're pressed on the
14 extraterritorial aspect, you go back to your
15 environmental theory.

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

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

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

22 MR. SHANMUGAM: But let me explain --

23 JUSTICE KAGAN: -- if that's true,
24 then you can't answer questions about the
25 extraterritorial theory by referring to the

1 nature of air and water regulation.

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

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

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

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

1 from the interstate pollution cases.

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

9 All 50 states and --

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

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

14 JUSTICE SOTOMAYOR: -- to the point?

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

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

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

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

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

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

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

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

21 I respectfully disagree with your
22 suggestion that this issue was not fully
23 preserved. And I would note that we made all
24 these arguments in our petition for certiorari.
25 There was never any suggestion by Respondent

1 that these arguments were not made below.

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

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

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

22 Now, to answer, Justice Sotomayor, the
23 last part of your question, yes, it is true in
24 both *Ouellette* and in *American Electric Power*
25 that the Court recognized that there is some

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

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

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

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

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

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

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

1 diversion of water into the affected state.

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

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

12 CHIEF JUSTICE ROBERTS: Sure.

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?
4 Justice Sotomayor?

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

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

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

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

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

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

12 JUSTICE SOTOMAYOR: If we're unsure --

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

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

23 MR. SHANMUGAM: You do, Justice
24 Sotomayor, but we cite numerous decisions from
25 the Colorado Supreme Court that characterize

1 the proceeding in exactly this fashion. And if
2 you have --

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

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

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

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

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

24 JUSTICE SOTOMAYOR: You still have
25 personal jurisdiction. That's usually how we

1 protect against extraterritoriality, correct?

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

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

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

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

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

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

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

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

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

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

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

25 You can take an interlocutory appeal

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

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

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

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

1 more recently follows the same model.

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

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

9 JUSTICE KAGAN: A very different?

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

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

25 MR. SHANMUGAM: Well, I -- I think, in

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

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

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

22 MR. SHANMUGAM: I -- I --

23 JUSTICE KAGAN: And I guess I'm not
24 understanding how it is that the one would be
25 preempted and the other is not. Now you could

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

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

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

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

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

24 JUSTICE KAGAN: Sorry, Mr. Shanmugam,
25 let me ask it another way. Where does this

1 principle come from, the -- the sort of states
2 can't regulate in the air and water space?

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

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

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

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

1 principles we've been discussing.

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

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

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

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

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

23 MR. SHANMUGAM: So I think that Hyatt
24 establishes the premise for this mode of
25 constitutional interpretation, and the cases

1 that applied federal common law before the
2 enactment of the Clean Air Act apply that
3 principle in the context of interstate
4 pollution.

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

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

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

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

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

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

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

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

18 MR. SHANMUGAM: Well --

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

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

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

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

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

12 JUSTICE KAVANAUGH: Exactly.

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

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

1 Court's precedents establishing that this kind
2 of pollution is a federal law matter unless
3 Congress speaks otherwise.

4 MR. SHANMUGAM: Correct. And --

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

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

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

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

25 MR. SHANMUGAM: Yes. And that's very

1 important for us given the fact that there are
2 dozens of these cases out there.

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

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

13 MR. SHANMUGAM: That is --

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

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

23 But we would say that in this context
24 of climate change, when you're suing producers,
25 you cannot do that. And I would say that the

1 most telling thing is that neither Respondent
2 nor any of their 28 amici suggest that the
3 saving clause in the Clean Air Act
4 affirmatively authorize claims in this context.

5 JUSTICE KAVANAUGH: Under Colorado
6 law?

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

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

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

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

1 Clean Air Act constrains them.

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

7 JUSTICE KAVANAUGH: Right. I got
8 that.

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

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

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

23 You alluded to the good neighbor
24 provision, which is in the previous section,
25 which, for certain pollutants, requires states

1 to take into account the effects on neighboring
2 states in submitting plans.

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

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

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

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

24 MR. SHANMUGAM: Yes.

25 JUSTICE KAVANAUGH: Our precedent says

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

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

6 JUSTICE KAVANAUGH: I guess the
7 wrinkle's resolved under your
8 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
8 an 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 with
19 you is about where the state law comes in. I
20 do not read either Ouellette or AEP to say that
21 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 had the source
8 state and you were suing for, you know,
9 emissions and you were 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 do slightly
3 quibble with that, Justice Barrett, in that,
4 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
21 authorize -- 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
18 at the cases that Boulder cites on page 36 of
19 their brief, I think that the best they can do
20 is the case that 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: -- and that can't
10 possibly be --

11 JUSTICE BARRETT: I don't even --

12 MR. SHANMUGAM: -- correct.

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

14 JUSTICE BARRETT: -- saying that if --
15 so the federal government has now said that
16 70 -- it's interpreted 7521 in the EPA to not
17 give EPA the authority to regulate
18 greenhouse-gases from motor vehicles. So,
19 potentially, then the Court -- a court might
20 say that the EPA does not displace federal
21 common law-making 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 its --

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

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

1 federal common law. And then, sure, a federal
2 court could decide as a matter of federal
3 common law there's no cause of action.

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

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

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

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

25 So let me ask you, for example, do we

1 have a state court determination regarding the
2 choice of law here in this context?

3 MR. SHANMUGAM: So I think everyone
4 agrees that the Colorado Supreme Court's
5 decision reflected a definitive rejection of
6 our federal arguments here, and so the issue
7 is --

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

11 MR. SHANMUGAM: Right.

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

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

16 JUSTICE JACKSON: Yes. Yes, yes, yes.

17 MR. SHANMUGAM: Yes. Exactly. And
18 those were the issues after all that we --

19 JUSTICE JACKSON: No, I --

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

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

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

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

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

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

25 JUSTICE JACKSON: Yeah.

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

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

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

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

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

1 extraterritoriality?

2 MR. SHANMUGAM: Yes.

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

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

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

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

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

1 And in this context, you can figure
2 all of that out from the theory that the
3 plaintiffs are advancing in their complaint.

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

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

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

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

1 As a matter of state law, the trial
2 court was applying some form of market-share
3 liability on steroids in this case, and that is
4 what --

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

10 MR. SHANMUGAM: As a matter of --

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

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

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

25 The critical point is that this

1 Court -- that a court cannot shirk its
2 responsibility to conduct this
3 extraterritoriality analysis at the outset.

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

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. SHANMUGAM: Thank you.

13 CHIEF JUSTICE ROBERTS: Ms. Harris.

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

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

19 There are two main paths to reversal.

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

24 Ouellette held that the saving clause
25 is what you get for the similar Clean Water

1 Act, and AEP ties the two together.

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

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

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

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

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

20 I welcome the Court's questions.

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

25 MS. HARRIS: I agree with everything

1 that Petitioners have said. Whether it is a
2 self-contained proceeding from the state court
3 follows exactly from Atlantic Richfield.
4 Everything there is present here.

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

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

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

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

25 JUSTICE GORSUCH: Ms. Harris --

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE GORSUCH: Oh, sorry, Chief.

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

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

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

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

1 conduct within my state.

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

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

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

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

23 Again, if your liability rule is, if
24 you direct your conduct to my state, even if
25 it's out of state, the rule is, don't send your

1 cars, like, with -- with a bad paint job, as in
2 BMW, into Alabama. The rule cannot be, don't
3 do these paint jobs anywhere across the
4 country --

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

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

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

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

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

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

1 JUSTICE KAVANAUGH: What's -- you're
2 leading with the other one, which makes me
3 think there's a problem with the precedent,
4 interstate air pollution one.

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

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

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

14 MS. HARRIS: Sure.

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

17 MS. HARRIS: Mm-hmm.

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

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

1 AEP walks through.

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

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

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

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

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

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

23 MS. HARRIS: Sure.

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

1 MS. HARRIS: Okay.

2 (Laughter.)

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

9 So this -- what -- does -- does the
10 Clean Air Act change anything --

11 MS. HARRIS: The Clean Air Act, we --

12 JUSTICE GORSUCH: -- about the fact
13 that there's a "yes" to -- that there's some
14 common law question to answer?

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

23 JUSTICE GORSUCH: Well, let me put a
24 finer point on it. If Congress didn't -- let's
25 just hypothesize EPA is correct about

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

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

11 MS. HARRIS: Well --

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

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

21 And, second of all --

22 JUSTICE GORSUCH: So -- so, before the
23 Clean Air Act, you'd have some federal common
24 law cause of action to -- to -- to decide.
25 But, because -- because of the Clean Air Act

1 and Congress not addressing this issue, nobody
2 can sue at all?

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

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

19 MS. HARRIS: To -- with re- -- again,
20 with --

21 JUSTICE GORSUCH: The renewable fuel
22 mandate, just put in ethanol. Okay. I got it.

23 MS. HARRIS: The renewable fuel
24 mandate has direct discussion of greenhouse-gas
25 emissions regulations. So I think it's highly

1 relevant to the question of whether it's a
2 federal rule of decision.

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

8 JUSTICE GORSUCH: No, I -- I
9 understand that.

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

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

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

1 we're talking about, what kind of federal area
2 we're talking about.

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

12 MS. HARRIS: It's --

13 JUSTICE BARRETT: And maybe that is so
14 because of some sort of equal sovereignty or
15 extraterritoriality principle. I think Justice
16 Kavanaugh is right. It's also simply -- in our
17 precedent, we've called it an enclave of
18 federal common law.

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

1 It's not the sort of weird exception
2 where you suddenly have state law that
3 preexisted springing back -- springing into
4 being where it didn't otherwise exist. And I
5 would --

6 JUSTICE SOTOMAYOR: What do you do
7 with the questions that Justice Barrett asked
8 Petitioners' counsel, which is there seems to
9 be an enclave of state law that is permissible?

10 MS. HARRIS: Right, and it --

11 JUSTICE SOTOMAYOR: Even Ouellette
12 recognized that it was all right to bring the
13 state law claim there. So what do you do with
14 that?

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

25 And I think the only way to make sense

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

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

22 And that's -- you could just stop
23 right there and you don't have -- that's the
24 end of Colorado's case.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas, anything further?

2 Justice Sotomayor?

3 Justice Kagan?

4 JUSTICE KAGAN: What do you make of
5 the closing paragraph of AEP, which says, you
6 know, as to these state claims, we're not
7 dealing with those, and then says the
8 availability of a state lawsuit depends on the
9 preemptive effect of the federal act?

10 MS. HARRIS: Yeah.

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

16 That seems -- I -- I mean, I know that
17 you talk about the preemptive effect of the
18 Clean Air Act in, like, a few pages at the end
19 of your brief, but that's not your principal
20 submission. I mean, this suggests that that
21 should be the only question.

22 So were they just -- was -- was AEP
23 just wrong in not understanding that there was
24 a bigger, broader, more important
25 constitutional question lurking here?

1 MS. HARRIS: No. I think AEP is just
2 right. And so let me just read the next part
3 of AEP because I think it's highly
4 illuminating. When it says the preemptive
5 effect of the federal act, it cites Ouellette,
6 it cites the pages of Ouellette that talk about
7 the federal principles of federal common law.
8 And then it says, "[holding that the Clean
9 Water Act does not preclude aggrieved
10 individuals from bringing a nuisance claim
11 pursuant to the law of the source State.]"

12 The source state claims were what it
13 were -- what were at issue in AEP. So I take
14 all of this discussion to be saying, hey, if
15 you want to know can you bring a source state
16 lawsuit, which is a thing reserved in AEP, go
17 look to -- go look to Ouellette. And if you
18 look to Ouellette, the thing that it says about
19 how --

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

1 And, again, that would have been a
2 very strange choice to make if it had at the
3 front of its mind the idea that the
4 Constitution itself, by virtue of the plan of
5 the Convention, prevented states from touching
6 this area.

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

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

24 I think it's really hard to read the
25 ensuing discussion in -- in Ouellette about how

1 to parse what the Clean Water Act means, what
2 the saving clause means, and why exactly it is
3 that the holding is that the injured state's
4 suit is preempted if you don't have all that
5 preceding discussion front of mind and
6 recognize that the part of Ouellette that's key
7 is not just the pervasive regulation of the
8 Clean Water Act but the fact that control of
9 interstate pollution is primarily -- primarily
10 a matter of federal law that's explaining why
11 state law doesn't have more room than what
12 Congress has specifically authorized.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Do you read AEP to
18 say that the Clean Air Act displaces federal
19 common law?

20 MS. HARRIS: Yes.

21 JUSTICE KAVANAUGH: Next question: On
22 the source state law point at the end of AEP,
23 the discussion you were just having with
24 Justice Kagan, do you read the savings clause
25 for the Clean Water Act and the Clean Air Act

1 to have the same scope?

2 MS. HARRIS: Yes, and not just me, but
3 every court of appeals to consider the question
4 has said the same thing, and the text of the
5 Clean Air Act reinforces that because the good
6 neighbor provisions, for instance, that we
7 talked about before, presupposed that the
8 states lack authority if they're the injured
9 state.

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

19 MS. HARRIS: Yes. And we know
20 Colorado law is the law that's being applied
21 from things like Pet. App. 54a to 55a. Like,
22 the idea that it's a mystery what law is
23 applying is just not right.

24 JUSTICE KAVANAUGH: Last question:
25 Out precedent says it, but do you object to

1 state tort suits going under the source state
2 law against emitters in that state? Is there
3 some separate -- maybe this is where
4 extraterritoriality or something else kicks in?

5 MS. HARRIS: Yes, because I think the
6 way -- the nature of this suit would offend
7 extraterritoriality principles --

8 JUSTICE KAVANAUGH: Okay.

9 MS. HARRIS: -- above and beyond.

10 JUSTICE KAVANAUGH: That's beyond our
11 precedent. Okay, thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 Justice Jackson?

15 JUSTICE JACKSON: Let me just get
16 some -- sorry, can you hear he? Can I just get
17 some clarity on what you just discussed about
18 Justice Kavanaugh?

19 So what's the source state in this
20 case? Have we decided that yet? Is that
21 established?

22 MS. HARRIS: Well, there's no such
23 thing as a source state in this case because
24 Colorado's entire thesis is that the -- by a
25 mere fact of having injuries in Colorado, they

1 can regulate Petitioners' worldwide conduct.

2 And, again, that is an unprecedented
3 idea of a --

4 JUSTICE JACKSON: Why does that not
5 implicate a source state? Maybe they're saying
6 the source is from a lot of different places.
7 But I don't know what you mean.

8 MS. HARRIS: Right. So they're trying
9 to apply Colorado law. Colorado is the injured
10 state, like the state in Ouellette that
11 couldn't proceed, it was Vermont, the injured
12 state.

13 JUSTICE JACKSON: Colorado does have
14 some refiners, though. Are they not
15 contributors in this way?

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

23 JUSTICE JACKSON: I know. But -- but,
24 if -- if there are multiple sources, I'm just
25 trying to figure out is Colorado one of them

1 per their allegations.

2 MS. HARRIS: I don't think so in
3 the -- in the nature of the suit. I don't
4 think you could carve out, like, some future --
5 I don't think you could save their complaint by
6 saying just because if you hypothesize not a
7 suit based on injury or -- but a suit based on
8 some unspecified --

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

15 And so I'm trying to figure out is
16 Colorado a source state, one of them. Maybe
17 there are many. I thought they had emitters or
18 they at least had refineries. That was part of
19 their allegation.

20 So I appreciate that they also say
21 we're injured. That's what gives them a real
22 stake in this. But aren't they also at least
23 in part a source state?

24 MS. HARRIS: Again, if they wanted to
25 make that complaint -- that their complaint,

1 they would have to be focused on specifically
2 what are the source state emitters and what are
3 they doing to cause an injury in Colorado.
4 They don't get to jump around and say,
5 actually, what we want to regulate is all of
6 the out-of-state, out-of-country conduct that
7 is causing an injury.

8 JUSTICE JACKSON: I guess what I'm
9 trying to figure out is we don't really know
10 yet because we don't have the whole set of
11 facts related to how this pollution is
12 happening because we haven't gotten to that
13 stage in this litigation.

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

1 particular source. Maybe.

2 But it -- it feels like we don't
3 really know enough to be confident that the
4 theories that you are proposing are actually
5 applicable here.

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

14 The question that the Colorado Supreme
15 Court resolved, the questions are all the
16 federal questions. Does federal law prevent
17 the suit that Colorado -- that Boulder chose to
18 fashion under Colorado law?

19 There down the chain, I'm injured in
20 Colorado. Therefore, I can sue all of the oil
21 producers for their conduct everywhere with no
22 limit in site. Is that okay? And the answer
23 under federal law for many reasons is no.

24 JUSTICE JACKSON: Thank you.

25 MS. HARRIS: I don't --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Russell.

4 ORAL ARGUMENT OF KEVIN K. RUSSELL
5 ON BEHALF OF THE RESPONDENTS

6 MR. RUSSELL: Mr. Chief Justice, and
7 may it please the Court:

8 Since the Founding, states have had
9 the power to provide tort remedies for injuries
10 occurring within their borders even when the
11 conduct causing those injuries occurred
12 elsewhere.

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

24 And applying state law to such cases
25 has never been viewed as one state

1 impermissibly projecting its law nationwide.
2 To be sure, specific constitutional provisions
3 limit choice of law and place other constraints
4 on the extraterritorial effects of state law.

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

12 That claim inverts the constitutional
13 structure and risks preemption being driven by
14 judicial policy intuitions rather than anything
15 in the Constitution itself.

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

1 Here, the statute does not preempt
2 Respondents' deception and other claims against
3 non-emitters not subject to the Act.

4 But all of this must await another
5 case because Petitioners have failed to
6 establish this Court's jurisdiction to hear
7 this interlocutory appeal.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: If you prevail, is
10 there a limiting principle to whom you can --
11 as to whom you can sue?

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

19 The question here is not whether
20 anything in the Constitution prohibits this
21 lawsuit but whether the specific theories that
22 they raised and the -- the Colorado Supreme
23 Court passed upon below are valid.

24 JUSTICE THOMAS: So you could just as
25 easily sue large retailers of -- of -- of these

1 products?

2 MR. RUSSELL: I think nothing in the
3 Constitution would prevent that. I think that
4 we would have --

5 JUSTICE THOMAS: But nothing in your
6 theory prevents that either, right?

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

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

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

22 JUSTICE KAVANAUGH: Well, Congress --
23 Congress could act to allow state tort lawsuits
24 too. The question in this case is really what
25 burden is on Congress. Does Congress have to

1 act to allow them, or does Congress have to act
2 to proscribe them? What's the baseline or the
3 default?

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

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

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

24 So what do -- what do we do with that
25 precedent? And here's why -- you mentioned

1 Congress. Here's why I ask it. I think this
2 Court would be rightly accused of misleading
3 Congress for decades on what the state of the
4 law was when Congress acts in the Clean Air
5 Acts in the various amendments with respect to
6 issues such as this.

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

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

22 But, even assuming that this case was
23 exactly about the same subject matter, I think
24 the Court has treated this as, look, there was
25 a body of federal common law. Set to the side

1 for the moment whether that body of common law
2 reflected this Court's determination that only
3 federal law could apply there or that the Court
4 had some degree of flexibility for deciding
5 that some subject matters of special federal
6 interest should be subject to federal common
7 law. But there was this federal common law.
8 Congress steps in and displaces it. And when
9 Congress steps and displaces it, it displaces
10 all of the policy decisions that were
11 previously made by courts, including on the
12 proper role of state law.

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

1 JUSTICE KAVANAUGH: Well, that -- that
2 suggests that Congress, when it did the Clean
3 Air Act, resurrected state tort law that had
4 previously been ruled to be preempted by
5 federal common law by this Court. And that's,
6 like, an all-time elephant in mouse hole in
7 terms of what Congress would have done there.

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

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

25 JUSTICE SOTOMAYOR: Counsel, the

1 problem with that is our statements that
2 federal common law control water and air. But
3 I think that we're sort of missing the point.
4 The Clean Air Act does not regulate marketing
5 or advertising of fuel, correct?

6 MR. RUSSELL: Correct.

7 JUSTICE SOTOMAYOR: It does not
8 mandate the use of specific fuel sources,
9 correct?

10 MR. RUSSELL: Correct.

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

15 MR. RUSSELL: Correct.

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

22 MR. RUSSELL: Correct.

23 JUSTICE SOTOMAYOR: Isn't this that --
24 your case?

25 MR. RUSSELL: I think it's -- it's --

1 it is that case. So I think Petitioners'
2 argument requires this Court to jump through a
3 number of hoops to get indirectly at what the
4 Court can just act directly. And it requires
5 this Court to decide whether these sorts of
6 claims would have fallen in the scope of the
7 former federal common law even though all of
8 those cases involved suits against emitters for
9 their emissions.

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

20 Instead, I would suggest that the
21 Court can and should directly answer the
22 question: What in the Constitution implicitly
23 prohibits Colorado or any other state's law
24 from applying to these claims? And they --
25 they'd raise their arguments, right? It's --

1 it's equal sovereignty and extraterritoriality.
2 But, as I explained in the opening, this Court
3 has for a long time understood that when a
4 state applies its tort law to in-state injuries
5 caused by out-of-state conduct, that is not an
6 impermissible exercise of extraterritoriality.

7 JUSTICE KAVANAUGH: What will --

8 CHIEF JUSTICE ROBERTS: Counsel --

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

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

20 MR. RUSSELL: So I think, on the
21 ground, I mean, there are other examples where,
22 you know, a course of conduct causes mass
23 liability across the nation, in asbestos, you
24 know, in other kinds of product liability
25 suits, and courts deal with them, you know,

1 through litigation, including there is an
2 MDL-like --

3 CHIEF JUSTICE ROBERTS: Well, asbestos
4 is a little --

5 MR. RUSSELL: -- process in states.

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

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

18 MR. RUSSELL: As a practical -- as a
19 practical matter, I think, before these
20 defendants face the kind of liability that they
21 are projecting, we are going to have to satisfy
22 the Dormant Commerce Clause. I mean, it's the
23 choice of law rules and restrictions on choice
24 of law that come from the constitutional
25 personal jurisdiction. And we're going to have

1 to prove proximate cause, which they say we
2 cannot prove.

3 And, you know, the mere fact that
4 there's going to be a lot -- there could be a
5 lot of litigation, I don't think there's
6 anything in the Constitution that says
7 preemption arises from -- whenever, you know, a
8 state law, if copied in other states, could
9 cause a lot of litigation.

10 CHIEF JUSTICE ROBERTS: Well, and --
11 and with the overlay that, of course, we're not
12 talking about regulation of emissions at all.
13 It's just sort of the pre -- production.

14 Now why -- does that have any
15 significance in the case?

16 MR. RUSSELL: Well --

17 CHIEF JUSTICE ROBERTS: There's a
18 reason why -- why aren't these suits directed
19 at greenhouse-gas emissions?

20 MR. RUSSELL: I think in part because
21 of Ouellette. You know, I think that that is a
22 field that has been occupied in significant
23 part by federal law.

24 CHIEF JUSTICE ROBERTS: Well, isn't
25 your --

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

2 CHIEF JUSTICE ROBERTS: I'm sorry to
3 interrupt, but isn't your suit an attempt to
4 evade those decisions?

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

6 CHIEF JUSTICE ROBERTS: It's going --
7 it's an effort to reduce emissions. The -- the
8 fuel production itself doesn't have the sort of
9 universal harm that we're -- we're talking
10 about.

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

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

1 But I don't think that anything in the
2 Clean Air Act stretches as far as preempting
3 every state law that could have an effect on
4 emissions. That's --

5 JUSTICE GORSUCH: Mr. --

6 JUSTICE KAGAN: Do you think --

7 JUSTICE GORSUCH: -- Russell -- I'm
8 sorry, please go ahead.

9 JUSTICE KAGAN: No, go ahead.

10 JUSTICE GORSUCH: No.

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

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

1 MR. RUSSELL: So, number one, I -- I
2 don't concede that when this Court says that an
3 area is meat for federal governments that that
4 means that the Court has determined that the
5 Constitution forbids --

6 JUSTICE KAGAN: You really read
7 Milwaukee I to allow state regulation of air
8 and water to any significant degree?

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

19 JUSTICE KAGAN: Well, why would there
20 have to be federal common rather than state law
21 unless there was a constitutional principle
22 indicating exactly that?

23 MR. RUSSELL: Because I think that
24 this --

25 JUSTICE KAGAN: I mean, it's not just

1 like there has to be federal common law
2 because, what, we, the Court, think it would be
3 a good idea?

4 MR. RUSSELL: Well, I think that
5 the -- this Court's federal common law power
6 originates in a period prior to Erie, where the
7 Court viewed itself as all courts, as having
8 the power to create common law or to understand
9 common law and apply it to the particular
10 circumstances of particular cases. And that's
11 what it was doing in the original jurisdiction
12 cases.

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

19 Think of the test. The test is, is
20 there a conflict between state law and some
21 federal interest? And then compare that to
22 Hyatt III, where the Court self-consciously
23 found that the structure of the Constitution
24 preempted a state law. And there, that was a
25 self-conscious constitutional analysis, looking

1 at Founding-era documents like the Federalist
2 Papers and Founding-era understandings of the
3 role of state sovereignty.

4 There's nothing like that in Milwaukee
5 I or in any of this Court's --

6 JUSTICE KAGAN: Thank you.

7 MR. RUSSELL: -- cases.

8 JUSTICE KAVANAUGH: Well, in
9 Ouellette, which you've relied on, it
10 specifically says in Footnote 20 that Vermont
11 law cannot apply.

12 And my understanding of the factual
13 scenario in Ouellette, New York polluter,
14 Vermont affected state, is that your case,
15 Colorado, is the -- is Vermont, the equivalent
16 of Vermont in that case. And the Court there
17 explicitly said Vermont law could not apply.

18 So what do we do with that?

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

25 JUSTICE KAVANAUGH: Do you agree that

1 under Ouellette, you could not proceed under
2 Colorado law?

3 MR. RUSSELL: Yes. But my friends
4 have insisted that we've only pled Colorado
5 law. I urge you to look at the complaint. It
6 doesn't identify a state source of law. We
7 certainly didn't stake our case on it.

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

13 JUSTICE GORSUCH: Can you -- can you
14 spell that out for me for just a minute?

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

18 Is there anything anomalous in your
19 mind to applying state law here to worldwide
20 conduct?

21 MR. RUSSELL: State law in general?
22 No.

23 JUSTICE GORSUCH: No, Colorado state
24 law.

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

1 So if, like, a car was negligently manufactured
2 in -- in Canada --

3 JUSTICE GORSUCH: You say it's just --
4 it's the same thing as -- as the classic car
5 manufacturer case or something like that?

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

15 But, again -- I'm sorry.

16 JUSTICE BARRETT: Mr. -- are you
17 finished?

18 JUSTICE GORSUCH: But, again? I want
19 to hear the -- the dot, dot, dot.

20 MR. RUSSELL: But, again, there hasn't
21 been a choice-of-law determination in this
22 case. And Petitioners --

23 JUSTICE GORSUCH: Hasn't been, but you
24 think Colorado would be the appropriate choice
25 of law, just as if it were a car defect case,

1 manufactured, strict liability defects?

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

3 JUSTICE GORSUCH: Okay.

4 JUSTICE BARRETT: Mr. Russell --

5 JUSTICE KAVANAUGH: We --

6 JUSTICE BARRETT: Oh, sorry. Please
7 finish.

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE BARRETT: I just want to ask
10 about the limits of your theory. I want to put
11 aside the federal common law point for a minute
12 and just focus on the extraterritoriality
13 argument or the equal sovereignty argument.

14 So let's pretend the Clear -- Clean
15 Air Act doesn't exist. So I don't want to talk
16 about statutory preemption.

17 Everybody agrees that state tort law
18 is a form of regulation. But what if Colorado
19 passed a law purporting to cap emissions in the
20 other 49 states? Is there any principle that
21 would prevent that?

22 MR. RUSSELL: I think that is the
23 BMW principle and is the principle that was
24 referred to in Footnote 1 in National Pork
25 Producers.

1 This Court has always recognized --
2 the distinction between a state doing that,
3 directly regulating conduct, passing a statute
4 that says it's unlawful to engage in conduct in
5 another state, has always been understood as
6 different than a state providing a tort remedy
7 for conduct that took place elsewhere and
8 caused harm in --

9 JUSTICE BARRETT: So, even if Colorado
10 says, whereas these emissions are harming the
11 residents of Colorado, whereas these emissions
12 are causing climate change that are creating
13 all of the exact same harms that your suit
14 alleges, that would not be okay?

15 MR. RUSSELL: I don't think so. And,
16 again --

17 JUSTICE BARRETT: So the same thing
18 can happen through the tort suit, though?

19 MR. RUSSELL: It isn't the same thing.
20 All the tort suit is doing is making them -- it
21 doesn't prohibit them from engaging in the
22 conduct. It requires them to internalize a
23 portion of the costs of their activities by
24 paying for some of the damage that those
25 activities inflict.

1 And I think that's why the Court has
2 never concerned -- considered imposition of
3 tort liability for out-of-state conduct as a
4 form of extraterritorial or impermissibly
5 extraterritorial application of the source
6 state's -- or the -- the injured state's law
7 into another sphere.

8 And I think Petitioners ultimately
9 don't disagree with that. They just say this
10 case is special either because it involves
11 water and air because that's a special thing or
12 because they say the connection here is too
13 attenuated.

14 And the question for preemption is not
15 whether the -- the allegations in this case are
16 in conflict with federal law but whether
17 Colorado law is consistent with the
18 requirements of federal law.

19 And even if the federal Constitution
20 required a proximate causal relationship -- and
21 I don't think it goes that far, but even if it
22 did, that is a state law element for all of our
23 claims. And I don't think that there can be
24 any argument that there's any conflict between
25 state and law when --

1 JUSTICE KAVANAUGH: Can I --

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

4 JUSTICE KAVANAUGH: Can I go back to
5 Justice Barrett's question?

6 You said the state law -- an actual
7 state legislative act that did the same thing
8 that the tort suit is trying to do in terms of
9 penalizing conduct would be preempted. I'm
10 trying to understand the difference with the
11 state tort suit.

12 You were a little cavalier about the
13 state tort suit just makes them internalize it.
14 It's going to bankrupt -- you know, if there
15 are enough of these, bankrupt these -- these
16 various defendants and certainly other
17 defendants out there. I mean, anyone is a
18 potential defendant for a suit like this,
19 any -- any manufacturer, any business.

20 So -- so why is the state tort suit
21 different than the state law? I'm just not
22 understanding that.

23 MR. RUSSELL: It's a matter of -- of
24 tradition.

25 So you could just as easily say that

1 if Vermont holds a -- a company in New
2 Hampshire liable for the damages for building a
3 dam that backs up water into Vermont, that
4 might have the practical effect of causing the
5 people in the other state to act differently.
6 It may have -- may have a prohibitive effect.

7 But that has never been thought to
8 mean that Vermont doesn't have the power to
9 apply its law to that tort. And this -- you
10 know --

11 JUSTICE KAVANAUGH: With the --

12 MR. RUSSELL: -- this is where --

13 JUSTICE KAVANAUGH: -- was it a
14 New Hampshire polluter in your example?

15 MR. RUSSELL: Frankly, I've lost track
16 of --

17 JUSTICE KAVANAUGH: It was another
18 state, though?

19 I mean, I think Ouellette does say
20 that's -- Ouellette purports to be about
21 tradition and about the nature of the Union and
22 a lot of principles that say you can't apply
23 Vermont law in that circumstance. The law of
24 the affected state cannot be applied.

25 MR. RUSSELL: So let me first answer

1 the question about Ouellette and then the --
2 the broader general constitutional
3 understanding and tradition.

4 Ouellette said that the law of the
5 injured state could not apply for a very
6 specific reason, not for a constitutional
7 reason but because it conflicted with the Clean
8 Water Act's permitting regime for particular
9 point sources.

10 The problem was that a particular
11 point source could be subjected to conflicting
12 rules with -- because -- if, you know, the
13 state of the injured --

14 JUSTICE KAVANAUGH: One interruption.

15 MR. RUSSELL: Sure.

16 JUSTICE KAVANAUGH: The background
17 principle of Ouellette, as stated by the Court,
18 was that state law would not apply unless
19 specifically preserved -- that's the phrase,
20 "specifically preserved" -- by the -- by the
21 Act. It flipped the usual preemption.

22 MR. RUSSELL: With respect, I don't
23 think it did, because the way it decided
24 whether it was specifically preserved. So the
25 question, the principal question presented, was

1 about the affected state's law.

2 And so it said: Well, we're going to
3 ask, is the effective state law preserved? And
4 it looks at the savings clause, and it says the
5 savings clause does not save it.

6 Under Petitioners' view, that should
7 have been the end of the case because Congress
8 did not specifically authorize the affected
9 state's law to apply.

10 But, instead, the Court went further
11 and then said, look, that savings clauses don't
12 apply, and it went and applied an ordinary
13 statutory purposes-and-objectives preemption
14 analysis.

15 And the reason the source -- or the --
16 the affected state's law was preempted was
17 because of a conflict, not a lack of
18 authorization but a conflict.

19 JUSTICE KAGAN: So suppose we did
20 that, Mr. Russell. I mean, we've been talking
21 a lot about these constitutional principles,
22 and -- and your friends have indeed relegated
23 the Clean Air Act to a couple of pages at the
24 end of their briefs.

25 But I'm wondering why that isn't the

1 more natural and simpler route towards their
2 view of what should happen here.

3 In other words, the Clean Air Act sets
4 up an extremely complicated scheme about how
5 regulations of emissions, how it should
6 operate, how air quality standards should be
7 devised and enforced, and that scheme does --
8 actually does involve states in a wide variety
9 of ways, but that scheme does not involve the
10 kind of state litigation that you brought.

11 And so why not just say: This really
12 does just get in the way of how the -- of how
13 Congress decided to regulate greenhouse gases
14 or any other air quality standards?

15 MR. RUSSELL: So a few responses to
16 that.

17 First, I think it is difficult to
18 decide whether the Clean Air Act preempts these
19 claims when we don't know whether the Clean Air
20 Act applies to greenhouse-gas emissions when
21 the EPA is saying it lacks the statutory
22 authority to do that.

23 JUSTICE KAGAN: Well, we know --

24 MR. RUSSELL: But --

25 JUSTICE KAGAN: -- what the EPA says

1 today and -- and said last year and might say
2 tomorrow, but -- but -- but the statute is the
3 statute, and --

4 MR. RUSSELL: Right. And the Court
5 could interpret the statute and decide the
6 question that is presently pending in the D.C.
7 Circuit about whether this regulates greenhouse
8 gases. It was a very --

9 JUSTICE KAGAN: I don't think we would
10 have to decide that question, Mr. Russell.
11 We -- you know, whatever the answer to that
12 question is, we would say the Clean Air Act
13 sets up a scheme for basically regulating air
14 quality.

15 MR. RUSSELL: Well, I -- with respect,
16 I don't think that's an accurate reflection of
17 what it regulates. It regulates point-source
18 emissions.

19 It does not regulate everything that
20 has an indirect effect on emissions. It
21 doesn't regulate the severance -- coal
22 severance tax. It doesn't regulate gas taxes
23 that affected levels of emissions. Virginia
24 Uranium tells us that.

25 JUSTICE KAGAN: Well, I -- I

1 understand that theory, but, on the other hand,
2 your suits are so related to what kinds of
3 emissions are appropriate, right? The entire,
4 you know, causal chain of the suit is, by
5 virtue of what the defendants have done, the
6 products they've made, the way they've marketed
7 those products, they have caused emissions to
8 increase.

9 So everything depends on -- on this
10 idea that the defendants are responsible for
11 excessive emissions. And, you know, one can
12 look at the Clean Air Act and say the Clean Air
13 Act sets up a scheme for deciding what are
14 excessive emissions and what are not.

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

22 And, in fact, the -- the Clean Air Act
23 doesn't give the EPA authority to figure out
24 what is the ideal amount of emissions or
25 pollutions or the right mix of fuels or the

1 right level of economic activity. It is a much
2 more precise mandate that is limited at
3 putting -- is limited to putting a cap on the
4 amount of emissions from particular point
5 sources. It does not go forward to say that
6 states cannot enact laws that have the indirect
7 effect of raising the costs of fossil fuels and
8 thereby reducing their use or, you know,
9 enacting gasoline taxes again.

10 I think the -- the -- the mere fact
11 that these claims address, you know, things
12 that are a step -- a few steps removed do not
13 necessarily mean that Congress intended to
14 regulate them. That's the lesson from Virginia
15 Uranium.

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

23 And I think it would be strange to
24 think that the -- the statute itself prevents
25 states from engaging in conduct that indirectly

1 improves air quality because that's the -- the
2 principal scheme of this statute, is to leave
3 it to states to decide how much to regulate
4 beyond the minimum level of regulation required
5 by the Act itself.

6 JUSTICE JACKSON: Can I --

7 CHIEF JUSTICE ROBERTS: Thank -- oh,
8 sorry.

9 JUSTICE JACKSON: Sorry, I just wanted
10 to focus for a second on the exchange I had
11 with Mr. Shanmugam about the direct, traceable,
12 and particularized effects.

13 Do you agree with him that that can be
14 decided as a matter of law in the context of
15 this case?

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

22 But I don't think it can be decided as
23 a matter of law by this Court on the pleadings.
24 The question for preemption, as I said before,
25 is whether there is a compatibility between the

1 requirements of state law and federal law. And
2 I don't think there's any dispute that
3 Colorado's requirement or any state's
4 requirement of proximate causation would meet
5 the constitutional test.

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

16 JUSTICE JACKSON: Thank you.

17 MR. RUSSELL: If I could return just
18 for a moment to jurisdiction and to the
19 Atlantic Richfield case, the thing that has
20 been -- that has made every case that this
21 Court has decided under that line of precedent
22 a separate lawsuit was that it had a separate
23 defendant, which was the trial court.

24 And that is not the case in this --
25 this case. They -- and when the rules required

1 them to identify against whom relief was
2 sought, at page 5 of their petition, they named
3 the Boulder defendants, not the Court. And I
4 recognize that that seems like a formal
5 distinction, but this is a line of precedent
6 that is itself very formal.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything?

10 Justice Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh, anything further?

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

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

4 MR. RUSSELL: I think that those are
5 all good policy arguments about why state law
6 should not apply here. But that's not the
7 question presented here.

8 The question is, you know, whether
9 there's something in the Constitution that
10 takes that policy decision away from Congress.
11 And --

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

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

22 JUSTICE KAVANAUGH: Yeah.

23 MR. RUSSELL: -- you know, producers
24 cannot deceive the public implicates any of
25 those concerns.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice

3 Barrett?

4 Justice Jackson?

5 Thank you, counsel.

6 Rebuttal, Mr. Shanmugam.

7 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

8 ON BEHALF OF THE PETITIONERS

9 MR. SHANMUGAM: Thank you, Mr. Chief

10 Justice. Just three points on rebuttal.

11 First, the breadth of Boulder's theory

12 here is astonishing. First, there is no limit

13 under Boulder's theory on who could be sued.

14 My friend, Mr. Russell, cites personal

15 jurisdiction and the Dormant Commerce Clause.

16 But, under Boulder's theory, Boulder

17 could tag me with personal jurisdiction when I

18 am in Colorado in two weeks and sue me on a

19 nuisance claim for refilling my car and thereby

20 contributing to global climate change. There

21 is simply no limit, and personal jurisdiction

22 provides cold comfort in that regard.

23 Similarly, there's no limit on who can

24 sue. We haven't heard anything this morning to

25 suggest that the band of potential plaintiffs

1 would be limited to the mere 90,000
2 municipalities across the country. Any
3 individual who has suffered the effects of
4 climate change could sue under Boulder's theory
5 as well.

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

13 We do believe that the conceptual
14 framework for that is set out in Franchise Tax
15 Board versus Hyatt, in which the Court said
16 that there are certain areas involving
17 conflicting rights where states cannot apply
18 the applicable rule of decision.

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

1 And third and finally, especially
2 given the foreign affairs implications -- and
3 remember that 90 percent of greenhouse-gas
4 emissions occur outside the United States --
5 this is a matter for the political branches on
6 the federal level in the first instance.

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

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

1 Colorado Supreme Court should be reversed.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, 11:53 a.m., the case was
7 submitted.)

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1 1 [2] 30:3 104:24 10:06 [4] 4:2 105 [1] 31:14 111 [1] 41:17 119 [1] 3:14 124a [1] 57:21 1257 [2] 6:25 61:20 1292 [1] 29:2 141 [1] 61:11 1972 [1] 64:21 1990s [1] 29:19 2 2 [2] 25:2 30:3 20 [1] 101:10 21 [5] 8:1 24:7,23,24 61:6 25-170 [1] 4:4 28 [1] 40:2 3 3 [3] 25:4 30:2,3 36 [1] 48:18 4 4 [1] 3:4 4.2 [2] 8:2 29:1 411 [1] 31:13 49 [1] 104:20 5 5 [1] 117:2 50 [2] 19:9 94:15 54a [1] 78:21 55a [1] 78:21 59 [1] 3:8 6 60 [2] 54:20,22 7 70 [1] 50:16 7411 [2] 41:16 45:13 7521 [1] 50:16 8 84 [1] 3:11 9 90 [1] 121:3 90,000 [2] 6:2 120:1 97 [1] 60:18 A a.m [1] 4:2 abate [1] 35:11	ability [2] 6:3 68:20 able [4] 39:19 47:20 116:7,7 about [79] 12:20 15:18 17:8, 10,24 18:8,18 25:9 28:20 30:16,23 32:2,13 33:22 34: 21 35:10 39:9,10 42:8 45: 19 46:7 49:21,21 50:10 51: 19 53:22,23,24,25 56:7,8, 20 57:14,19 62:10 67:12,25 68:15,19 71:1,2,24 74:14, 17 75:6,18,22 76:9,10,10, 25 78:7,12 79:17 82:17 89: 15,20,20,23 95:10 96:12 97: 10,18 98:13,22 104:10,16 107:12 108:20,21 109:1 110:1,21 111:4 112:7 115: 11 118:5,13 121:24 above [1] 79:9 absence [1] 45:9 absent [2] 52:16 70:16 absolutely [1] 69:6 abstract [1] 88:4 accept [4] 11:12 23:15 30: 19 52:10 accepted [1] 61:16 accordingly [2] 6:10 85:19 account [1] 42:1 accurate [2] 26:8 112:16 accused [1] 89:2 acknowledge [2] 13:18 21:2 acknowledged [1] 90:16 across [7] 6:2 10:23,25 64:3, 7 94:23 120:2 act [91] 5:22 13:21 14:2,3,7, 20 15:9 20:15,16 22:4,4 31: 3 35:2 37:24,25 40:3,14 41: 1,4,17 42:9,10 45:12 46:4, 25 47:9,13 49:2,3 52:11,12 60:1 65:16 66:3 67:4,10,11, 15,19 68:23,25 69:8 70:16 71:22 73:8 74:9,14,18 75:5, 9,22 77:1,8,18,25,25 78:5, 14 85:22 86:3 87:13,23 88: 1,1,19 89:10 91:3 92:4,17, 20 93:4 98:2,21,21 104:15 107:7 108:5 109:21 110:23 111:3,18,20 112:12 113:12, 13,18,22 115:5 118:14,17 121:12 action [11] 49:23 50:24 52:3 60:16 65:24 66:13 68:9,24 70:18 71:9 94:17 actions [4] 57:25 67:18,21 88:17 activities [5] 60:10 80:19,21 105:23,25 activity [1] 114:1 actors [1] 31:20	acts [2] 89:4,5 act's [2] 59:23 109:8 actual [6] 43:22 54:23 70:4 107:6 116:9,15 actually [9] 22:22 33:11 35: 14 37:2 82:5,25 83:4 93:19 111:8 ad [1] 117:22 add [1] 26:17 addition [1] 5:11 additional [1] 23:19 address [5] 6:17 20:19 71: 20 95:15 114:11 addressing [1] 69:1 adequately [1] 116:15 adjudicate [1] 66:8 adjudicated [1] 8:9 administration [1] 55:14 administrations [1] 121:13 admit [1] 9:8 adopted [1] 6:9 adoption [1] 65:16 advancing [2] 55:4 57:3 adverse [1] 28:13 advertisement [1] 92:13 advertising [1] 92:5 aep [26] 23:5 36:20 39:17 43: 21 44:20 45:5,6,20 46:13 60:1 65:23 66:1,10 67:18 74:5,22 75:1,3,13,16 77:17, 22 85:19 88:18 117:14 120: 11 affairs [1] 121:2 affect [1] 92:20 affected [16] 13:9 19:4 23:1, 4 38:10,20 39:12 46:24 78: 16 90:22 101:14 108:24 110:1,8,16 112:23 affecting [1] 95:13 affects [2] 62:8 92:13 affirmatively [1] 40:4 affirmed [1] 26:15 afield [1] 70:3 after [5] 53:18 76:14 82:15 95:9 100:13 again [29] 11:5 16:14 23:4 28:21 32:12,20 42:8 43:13 47:17 54:15 59:4 63:18,23 66:19 69:3,19 70:22 76:1 80:2 81:24 83:6 95:16 103: 15,18,20 105:16 114:9 118: 19,19 against [13] 11:10 27:1 31: 20 39:5,11 43:22 50:8,9 70: 6 79:2 86:2 93:8 117:1 agency [3] 117:18,20,24 aggrieved [1] 75:9 agree [12] 49:7,13 56:8 59:	20 60:25 64:22 70:12 72: 17 76:10 101:25 115:13,17 agrees [2] 53:4 104:17 ahead [4] 16:24 98:8,9 104: 8 aiming [1] 10:19 air [97] 5:4,22 13:21 14:2,2,7, 20 15:9 17:8 18:1 20:16 22: 4 31:3 32:2 33:2 34:21 35: 2 36:5,22 37:14,24,25 40:3, 14,16 41:1,4,5,17 42:9,10 43:1 44:22 45:12 46:2,4,25 49:3 52:12 59:21,23 64:13 65:4,13,16 66:3 67:4,10,11, 15,18 68:23,25 69:8 70:16 71:22 72:23 74:14,18 76: 12 77:18,25 78:5,14 85:22 88:19 89:4,9 91:3 92:2,4, 13,17,20 97:16 98:2,20,24 99:7 104:15 106:11 110:23 111:3,6,14,18,19 112:12,13 113:12,12,18,22 114:22 115:1 118:13,17 alabama [1] 64:2 all [48] 11:25 16:14 19:9,17 20,3,23 21:13 28:17 42:13 44:7 53:8,18 54:7 55:18 56: 3 57:2 60:10 62:6,13,17 63: 13 65:12 66:13,21,22 68:18, 21 69:2 71:3 72:12 73:19 75:14 76:8 77:4 80:18 82:5 83:15,20 86:4 90:10 93:7 96:12 100:7 101:20 105:13, 20 106:22 118:5 allegation [2] 81:19 82:23 allegations [2] 81:1 106:15 alleged [2] 58:8 116:15 alleges [1] 105:14 allow [8] 38:10 62:7 63:14, 18 87:23 88:1 89:11 99:7 allowed [2] 6:1 62:14 allowing [1] 41:13 all-time [1] 91:6 all-too-regrettable [1] 121: 18 alluded [3] 36:4 41:23 48:20 almost [1] 75:21 alone [3] 17:17 46:23 64:7 already [1] 48:2 also [11] 24:14 27:11 30:3 31:3 47:9 55:22 70:3 71:16 75:21 81:20,22 alter [1] 67:4 alternative [1] 48:24 although [3] 47:4 90:15,18 altogether [1] 117:16 always [6] 45:25 73:15 95: 12 105:1,5 121:11
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