

THREE THREADS FROM THE SUNCOR ARGUMENT

RYAN J. WALSH & MICHAEL A. FRAGOSO*

We found three exchanges at Monday’s argument in *Suncor Energy (U.S.A.) v. County Commissioners of Boulder County* particularly interesting and address them further here: (1) Since the defendants are producers rather than emitters, where is the “source State” whose law *Ouellette* preserved? (2) What does EPA’s current disclaimer of authority over greenhouse gases do to *AEP*? (3) If Congress carved greenhouse gases out of the Clean Air Act (CAA) altogether, would it follow that “nobody can sue at all?”¹

All three questions hover around propositions that we defended last month:² A State’s law has always stopped at its border, the Constitution gave States no means to change that rule, and the federal common law of interstate pollution exists because of it.

I. THE “YES”

When Principal Deputy Solicitor General Sarah Harris agreed that, before the Act, Boulder’s grievance “would be a federal common law question,” Justice Gorsuch said, “I’ll take ‘yes’ every day of the week.”³ Justice Barrett returned to the point a few minutes later, observing that “absent the Clean Air Act, that is a question of federal common law. Whether a federal court would fashion a cause of action under it is a different question, but it is still one of federal common law.”⁴

That is exactly right. After all, “if federal common law exists, it is because state law cannot be used.”⁵ The federal common law of interstate pollution was never a judicial preference for a federal rule over an available State one (and so was not “preemptive” in the conventional sense, *pace* Justice Sotomayor, who observed that petitioners were “staying away from the word that seemed to control the briefing below and even here, which is preemption”⁶). Rather, federal common law filled a space no State’s law could reach.

A State cannot reach extraterritorial production because its jurisdiction is “co-extensive with its territory; co-extensive with its legislative power.”⁷ In Justice Story’s words, a State’s laws bind “all persons, who are resident within

* Ryan J. Walsh is a partner at Eimer Stahl LLP, and Michael A. Fragoso is a partner at Torridon Law. Both represented amici supporting petitioners in *Suncor*. The views expressed here are their own.

¹ Transcript of Oral Argument at 69, *Suncor Energy (U.S.A.) v. Cnty. Comm’rs of Boulder County*, No. 25-170 (U.S. Oct. 5, 2026).

² See Ryan J. Walsh & Michael A. Fragoso, *Is the SCOTUS Climate Change Case a “Conservative Intuition in Search of a Constitutional Clause”?*, 8 Notre Dame J.L., Ethics & Pub. Pol’y: In Limine 1 (2026).

³ *Id.* at 66.

⁴ *Id.* at 70.

⁵ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 313 n.7 (1981).

⁶ Transcript, *supra* note 1, at 20.

⁷ *United States v. Bevens*, 16 U.S. 336, 387 (1818).

it” and “all contracts made, and acts done within it,” but “no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.”⁸ The Constitution denied the States every means of changing that rule (no war, no reprisal, no treaty; interstate controversies go to a federal court) and left only Congress with the power to alter it.

That leaves one dispute no State’s law can reach, an affected State’s claim against sources beyond its borders. Courts addressing such disputes first applied general law, then “federal common law,” and since 1970 the CAA and EPA regulations. Displacement changed the source of the federal rule of decision, from courts to Congress, and nothing else.

As Justice Gorsuch’s opinion in *Rodriguez v. FDIC*⁹ makes clear, this federal enclave has endured. *Rodriguez* said that federal common law has “a necessarily modest role,” warning that “strict conditions” must govern its expansion into any new area.¹⁰ But it added that the old areas remain, including “certain controversies between States,”¹¹ the category *Texas Industries* described as “interstate and international disputes implicating the conflicting rights of States.”¹² No one on Suncor’s side is asking the Court to stake out new ground.

Boulder responds that the old enclave covered only sovereigns suing emitters for abatement, not a county suing producers for damages. But Justice Barrett’s distinction at argument tracks *AEP*’s: “Recognition that a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the controlling law.”¹³ Those are two questions, the ones Judge Friendly kept apart: first, whether a matter is federal, so that no State’s law supplies the rule of decision, and second, what the federal rule is. Hence, in *United States v. Standard Oil*, the question was federal, but the Court declined to supply a remedy, leaving that to Congress.¹⁴

II. WHERE IS THE SOURCE STATE?

Justice Gorsuch asked about a Texas emitter sued in Colorado. Would petitioners object to Colorado’s applying Texas law? If so, is it the Constitution or the Clean Air Act that forbids it?¹⁵

Texas law reaches the Texas smokestack and always has. Texas needed no permission from Congress in 1970 to keep that power because it always had it. Colorado law, on the other hand, never reached the Texas smokestack, with or without the Act. A Coloradan hurt by that smokestack has always had a remedy: a suit against the Texas source under Texas law in a Texas court (or, if the defendant is subject to personal jurisdiction in Colorado, in a Colorado court). Before the Act, the Coloradoan would have had a federal common-law claim as well. What Colorado has never had is the power to make its own law govern a Texas smokestack, for the same reason that Colorado law cannot reach a Texas crime.

Against this backdrop, the Act’s saving clauses make perfect sense. Section 7416 is captioned “Retention of State authority” and provides that nothing in the Act “shall preclude or deny the right of any State or political subdivision

⁸ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 20 (Boston, Hilliard, Gray, & Co. 1834).

⁹ 140 S. Ct. 713 (2020).

¹⁰ *Id.* at 717.

¹¹ *Id.* (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)).

¹² *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

¹³ *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 422 (2011).

¹⁴ 332 U.S. 301, 308, 314 (1947).

¹⁵ Transcript, *supra* note 1, at 13–15 (“Which is it?” And “[c]ould a Texas court apply Texas law? To a Texas defendant?”).

thereof to adopt or enforce” emission standards (within the State, on our reading). Section 7604(e) provides that nothing in that section “shall restrict any right” a person “may have under any statute or common law.”

Those are non-preclusion clauses. They save what already existed: the source State’s authority over its own sources. That is exactly what *Ouellette* said survived,¹⁶ and it is why *Ouellette* could say that affected States may not “do indirectly what they could not do directly.”¹⁷ “Could not” describes a disability that the Act found, not one it made. As Justice Barrett put it, the clause “says ‘preserve,’” and “a saving clause suggests that you’re saving something that already exists.”¹⁸ She and petitioners’ counsel agreed that the alternative (State law that “somehow sprung into effect” when Congress passed the Act) “can’t possibly be correct.”¹⁹

This case, however, is not against emitters (or “sources”). For an emitter, the source State is where the smokestack stands. For a producer there is no “source State.” Texas law reaches Exxon’s Texas wells and refineries, and Alberta law reaches Suncor’s oil sands, but Boulder does not claim that drilling in Texas or mining in Alberta harmed Colorado (except in the sense that *every* use of carbon as energy has harmed Colorado). The harm Boulder alleges runs through combustion, and the fuel is burned in every state and across the globe. Hence, it is hard to see why “it makes sense to say that there is a source state for claims of this variety” (petitioner’s counsel).²⁰ “[T]here’s no such thing as a source state in this case” (Deputy Solicitor General).²¹

The incoherence is Boulder’s fault. It sued producers rather than emitters to get out from under *AEP* and *Ouellette*, and in so doing, it left itself no “source State” whose law could reach the conduct of which it complains. That also makes it unnecessary to decide whether even a source State’s nuisance law could reach greenhouse gas emissions from its own sources, a question *AEP* left open²² and one that neither petitioners nor the government conceded at argument.²³

Congress could change the territorial rule for interstate commerce, but to do so it must speak clearly. It has not. What it did in 1970 was retire the judge-made remedy and retain the States’ intra-territorial authority.

III. WHAT DOES EPA’S DISCLAIMER CHANGE?

Justice Gorsuch’s second question went to the Deputy Solicitor General, whom he quizzed about EPA’s disclaiming “the power to regulate greenhouse gasses, not just from motor vehicles but more recently from stationary sources too.”²⁴ Her answer was that *AEP* described the Act as “Congress’s pronouncement” and that “EPA’s recent actions don’t change that.”²⁵

¹⁶ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

¹⁷ *Id.* at 495.

¹⁸ Transcript, *supra* note 1, at 47–48.

¹⁹ *Id.* at 48–49.

²⁰ *Id.* at 40.

²¹ *Id.* at 79.

²² *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 429 (2011).

²³ Transcript, *supra* note 1, at 39–40, 78–79. Nor would the problem disappear if Colorado confined its suit to Colorado producers. Justice Jackson asked whether Colorado, which “does have some refiners,” is “at least in part a source state.” Transcript, *supra* note 1, at 80–81. As to a refinery’s own emissions, it is, and Colorado may (and does) regulate those. But the harm Boulder sues over does not come from a refinery’s smokestack. It comes from burning the fuel that the refinery sells, by third parties everywhere, in gases that “become well mixed in the atmosphere,” *AEP*, 564 U.S. at 422. For those emissions there is no source State even when the producer is local.

²⁴ *Id.* at 67.

²⁵ *Id.*

AEP said as much. It held that the Act displaces federal common law claims to abate greenhouse gas emissions, and the Court refused to make displacement turn on what EPA chooses to do. “[T]he delegation is what displaces federal common law,” and “were EPA to decline to regulate carbon-dioxide emissions altogether . . . the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency’s expert determination.”²⁶

EPA’s recent renunciation of authority over greenhouse gases therefore changes nothing about displacement, which persists. If EPA has misread its statute, *AEP* also says where that fight belongs: “their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court.”²⁷ That litigation is ongoing.

No federal administrative developments could empower Colorado law to regulate beyond its borders. Whatever EPA does or Congress leaves undone, Colorado law does not reach conduct in Texas, Alberta, Angola, and Qatar. That is because of the rule “at the beginning,” as we have explained. And it would be equally true had the Clean Air Act never been passed.

IV. WHAT IF CONGRESS CARVED GREENHOUSE GASES OUT?

The harder version of the question was a hypothetical. Suppose the current EPA is right about its authority, and suppose also that Congress “decided we’re going to carve [greenhouse gases] out from EPA’s responsibility.” Would that mean “there couldn’t ever be a federal common law cause of action for it,” so that “nobody can sue at all?”²⁸ Not necessarily.

Start with what displacement means. Federal common law governs interstate pollution until Congress legislates on the subject. Once Congress does, the statute is the federal rule, and the judge-made rule drops out. That is what *AEP* held that the Clean Air Act did for greenhouse gases. If Congress took greenhouse gases out of the Act, the statute would no longer speak to the subject, and there could be space for a judge-made rule of decision.

That would not send the case to a Colorado jury applying Colorado law. It would confront a federal court with the question that *AEP* called “academic” and left open: whether to fashion a remedy for a claim like this one.

One way to handle it would be to repurpose the reasoning of *United States v. Standard Oil*. There, a soldier was struck by a company truck, and the government sued to recover what it had spent on his care. The Court agreed that federal law governed the question, then declined to create the liability, leaving the matter to Congress as “the primary and most often the exclusive arbiter.”²⁹ The government there could not recover under *any* body of law.

In any event, the rule of decision in the hypothetical would fall to federal court. Whether or not such a case could proceed would depend on how federal courts chose to craft liability, if at all.

V. FOUR PRECEDENTS ON POINT

Justice Kavanaugh put the premise in terms of precedent rather than theory. “[T]here’s a lot of constitutional theory being tossed around, but we have four precedents”—*Milwaukee I*, *Milwaukee II*, *Ouellette*, and *AEP*—that “make

²⁶ *AEP*, 564 U.S. at 426.

²⁷ *Id.* at 426–427.

²⁸ Transcript, *supra* note 1, at 67–68.

²⁹ *United States v. Standard Oil*, 332 U.S. 301, 308, 314 (1947).

crystal-clear that interstate air and water pollution are matters for federal law unless Congress specifically preserves state law.”³⁰

Justice Barrett read the cases the same way. Interstate pollution “is a field that’s an enclave of federal common law because it is not suited to the law of any one state,” excepting “suits . . . under the state law of the source state.”³¹ Her image was a Venn diagram: a center that “always had to be an enclave of federal common law” and an “outer ring where states had authority,” which the Act “just left alone.”³² That is the territorial rule, drawn from the cases that drew it from first principles.

Boulder’s brief responds by citing two of Justice Gorsuch’s opinions and one he joined in April. Read against the four precedents, none cuts against the premise.

The majority opinion in *Hencely v. Fluor Corporation*, which Justice Gorsuch joined, intoned that there is “no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it.”³³ Thus, it rejected a structural theory with “no basis in the text of the Constitution or our precedent.”³⁴ The territorial rule, however, is not *in vacuo*. The four precedents are the law, and they stand on the shoulders of older ones: *Bevans* and *Bonaparte*, *Kansas v. Colorado*, *New York Life v. Head*, *Hinderlider*. Provisions of the Constitution insulate the rule.³⁵ And *Hencely*’s own footnote 3 accepts the premise: Structural constitutional law limits State law and pre-*Erie* general law alike.

Justice Gorsuch’s plurality opinion in *Virginia Uranium v. Warren* refused preemption built on “some brooding federal interest.”³⁶ Virginia was regulating mining inside Virginia, which is the outer ring of Justice Barrett’s diagram. This case, in stark contrast, seeks to regulate production, sale, and promotion “globally and historically.”

National Pork Producers Council v. Ross rejected an “almost *per se*” dormant Commerce Clause rule against in-state laws with out-of-state effects, and it noted that “tort laws” routinely have such effects.³⁷ Boulder’s suit is the mirror image: in-state effects offered to justify liability for out-of-state conduct.

Footnote 1 of *National Pork Producers* distinguished *Edgar v. MITE*, where Illinois “directly regulate[d]” transactions “wholly outside the State,” and noted that “[s]ome have questioned” whether the Illinois law tested “the territorial limits of state authority under the Constitution’s horizontal separation of powers” rather than the Commerce Clause.³⁸ That footnote describes this case, and Boulder’s counsel treated it as a real limit at argument. Asked by Justice Barrett whether Colorado could pass a statute capping emissions in the other 49 states, he said it could not, citing “the BMW principle” and “footnote 1 in *National Pork Producers*.”³⁹ That concession is Boulder’s undoing.

Nor does the territorial rule disturb ordinary interstate torts, the defective car shipped into Colorado (the analogy Boulder drew at argument⁴⁰), or the fraud aimed at a Colorado treasury. Those fall within *Strassheim*’s exception: “[a]cts done outside a jurisdiction, but intended to produce and producing

³⁰ Transcript, *supra* note 1, at 36–37.

³¹ *Id.* at 44–45.

³² *Id.* at 45–46.

³³ *Hencely v. Fluor Corporation*, 146 S. Ct. 1086, 1093 (2026).

³⁴ *Id.* at 1097.

³⁵ See, e.g., U.S. CONST. art. I, § 10; *id.* at art. III, § 2; *id.* at art. IV, § 3.

³⁶ *Virginia Uranium v. Warren*, 587 U.S. 761, 767 (2019).

³⁷ *National Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1154 (2023).

³⁸ *Id.* at 1157.

³⁹ Transcript, *supra* note 1, at 104–05.

⁴⁰ See *id.* at 102–03.

detrimental effects within it.”⁴¹ Boulder alleges no emission aimed at Colorado and no effect in Colorado that differs from the effect everywhere else on earth.

If the polluter’s mere *knowledge* that pollution from its factory would affect a downwind (or downstream) state were sufficient to invoke the affected State’s law, *Milwaukee I* would have come out differently. There, the cities in Wisconsin surely knew that the pollution they were dumping into Lake Michigan would affect Illinois residents (and especially Chicago’s drinking water). The Court nevertheless held that federal common law, not Illinois law, governed. That is because the Court has always treated effects of *pollution* (a mere byproduct that is not sold to citizens in the affected state) differently than a producer deliberately sending injurious products into the affected state.

VI. PRECEDENT RESOLVES THIS CASE

The *Suncor* case asks the Court to affirm three propositions that it already has endorsed: (1) Interstate pollution is a federal enclave, as affirmed by the likes of *Missouri v. Illinois*, *Milwaukee I*, *Texas Industries*, and *Rodriguez*. (2) The enclave exists because State law cannot be used there (*Milwaukee II*). And (3) the Act retired the federal judicial remedy while retaining only one State’s law—that of the source State (*Ouellette*, *AEP*).

Each of the pollution cases involved an identifiable out-of-state source (a sewer outfall, a paper mill, a power plant), so there was always a source State whose law the Act could retain. Here, the fuel was burned literally everywhere (and overwhelmingly by parties other than the defendants), so there is no source State. The only law left, then, is the affected State’s. And that is the one law that can never govern.

⁴¹ *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).