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August 26, 2026

VIA CM/ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *United States of America v. State of New York*, No. 1:25-cv-03656

Dear Judge Castel,

The United States provides this Notice of Supplemental Authority to inform the Court of recent assertions by defendants Letitia James, in her official capacity as the Attorney General of New York, and Amanda Lefton, in her official capacity as acting Commissioner of the New York State Department of Environmental Conservation (together, “Defendant Officials”) regarding *City of New York v. Chevron Corporation*, 993 F.3d 81 (2nd Cir. 2021). In another case challenging the New York Climate Superfund Act, N.Y. Env’tl. Conserv. Law § 76-0101 *et seq.* (“Climate Act”), Defendant Officials have conceded that if a court holds that the public nuisance suit at issue in *City of New York* is not distinguishable from the Climate Act, then there are no set of facts that would make the Climate Act lawful and there is no additional preemption analysis for a Court to conduct before holding the Climate Act unlawful. As the United States explained in its Motion for Summary Judgment, under *City of New York*, Defendants cannot use “state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions.” Dkt. No. 74 at 1 (quoting *City of New York*, 993 F.3d at 85). Because Defendants seek to use a state statute—the Climate Act—to hold energy companies strictly liable for global greenhouse gas emissions, *City of New York* is on all fours with this case. The Court should declare the Climate Act unlawful and enjoin its implementation.

The Plaintiffs in *West Virginia v. Letitia James*, No. 1:25-cv-168 (N.D.N.Y.) challenge the Climate Act with materially similar claims to the ones the United States has asserted in this case. The *West Virginia* Plaintiffs assert that, under *City of New York*, the Climate Act is unconstitutional “because it seeks to regulate matters

that the U.S. Constitution commits exclusively to the federal Government and exceeds the territorial bounds of the State’s constitutional authority.” *West Virginia*, No. 1:25-cv-168, Dkt. No. 216-1 at 10 (N.D.N.Y.). *See also West Virginia*, No. 1:25-cv-168, Dkt. No. 217-1 at 23. The *West Virginia* Plaintiffs further assert that the Climate Act is preempted by the Clean Air Act and the United States’ conduct of foreign affairs. *West Virginia*, No. 1:25-cv-168, Dkt. No. 216-1 at 15-23 (N.D.N.Y.). *See also West Virginia*, No. 1:25-cv-168, Dkt. No. 217-1 at 36-50. The United States submitted a Statement of Interest in support of the *West Virginia* Plaintiffs’ Motions for Summary Judgment. *West Virginia*, No. 1:25-cv-168, Dkt. No. 222.

The Northern District of New York scheduled a hearing on the parties’ cross-motions for summary judgment for July 30, 2026. *See West Virginia*, No. 1:25-cv-168, Dkt. No. 289. The Court also entered a text order directing the parties to “be prepared to address the following questions” at oral argument:

- (1) If the Court finds that *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is not distinguishable, is there any set of facts under which the Climate Change Superfund Act is constitutional? *See Antonyuk v. James*, 120 F.4th 941, 983 (2d Cir. 2024); and
- (2) If the Court finds that *City of New York* is not distinguishable, does the Court need to engage in any additional preemption analysis?

West Virginia, No. 1:25-cv-168 at Dkt. No. 300.

At the hearing, Defendant Officials acknowledged that if “the Court finds that the *City of New York* is not distinguishable from” Plaintiffs’ case challenging the Climate Act then “there are no set of facts that would make the Climate Act constitutional, and there’s no additional preemption analysis before the Court to conduct.” Ex. A, *West Virginia* Tr. at 7:4-14. Defendant Officials’ concessions are directly applicable to the Parties’ positions here on the United States’ Motion for Summary Judgment and support granting the United States’ requested relief.

Sincerely,

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Ex. A: Transcript of Hearing Conducted July 30, 2026, *State of West Virginia, et al. v. Letitia James, et al.*, No. 1:25-cv-168 (N.D.N.Y.)

EXHIBIT A

Transcript of Hearing Conducted July 30, 2026,
State of West Virginia, et al. v. Letitia James, et al., No.
1:25-cv-168 (N.D.N.Y.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
STATE OF WEST VIRGINIA, et al.,

Plaintiffs,

vs.

1:25-cv-168

LETITIA JAMES, et al.,

Defendants.
-----x

**TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE BRENDA K. SANNES
held on July 30, 2026
100 South Clinton Street, Syracuse, NY**

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1 (1:03 p.m.)

2 COURTROOM DEPUTY: State of West Virginia, et al.
3 versus James for oral argument. Counsel, please state your
4 appearances for the record.

5 MR. DAVID: Caleb David for the plaintiffs. I also
6 have with me Caleb Seckman and Attorney General John B.
7 McCuskey.

8 THE COURT: Good afternoon.

9 MR. DAVID: Good afternoon, your Honor.

10 MR. LEHOTSKY: Good afternoon, your Honor. Steven
11 Lehotsky for the plaintiffs Chamber of Commerce of the United
12 States of America, American Petroleum Institute, the National
13 Mining Association, the Business Council of the State of New
14 York. With me at counsel table I have Jared Magnuson and
15 Yvonne Hennessey.

16 THE COURT: Good afternoon.

17 MS. KRISHNAN: Good afternoon, your Honor. Sabita
18 Krishnan on behalf of the State of New York. And with me I
19 have Ayah Badran and Laura Mirman-Heslin.

20 THE COURT: Good afternoon to you all.

21 MR. SWENSON: Good afternoon. Ian Swenson on
22 behalf of the United States.

23 THE COURT: Good afternoon to everyone.

24 We're here today for oral argument on the pending
25 summary judgment motions and the motions related to the

1 summary judgment motions. And I'll start with New York
2 State, and then I assume both counsel for West Virginia and
3 the Chamber of Commerce would like an opportunity to argue,
4 so we'll turn to them, and then last we'll hear from counsel
5 for the United States. And I'll give New York a brief
6 rebuttal as well.

7 Let me just say before New York starts, it would be
8 helpful to start with the issue of standing. It would seem
9 to me that Alpha and several of the members of the Chamber of
10 Commerce associations have standing here, specifically Alpha,
11 Exxon Mobil and Chevron, at least. It seems to me that the
12 standard, it's enough if those entities show that they face a
13 credible threat of enforcement.

14 And if I consider the memorandum, the October 2023
15 memorandum written by two of the Act sponsors, which has a
16 list, an approximate list of covered companies, including
17 Alpha, Exxon and Chevron, and also if I consider the U.S.
18 Energy Information Administration reports, and considering
19 all of this information just for the fact that these things
20 were said and their effect on the entities here, that report
21 says Alpha was the fourth largest producer of coal in the
22 United States during the relevant period.

23 So my question about standing is doesn't Alpha and
24 don't these entities have, given this information which I'm
25 only considering for the fact that it was said and not for

1 the hearsay, not for hearsay but not for the truth of the
2 matter asserted, but given that, don't they have a credible
3 fear that they will face enforcement of the statute? It's my
4 understanding that if at least one plaintiff has standing,
5 the suit may proceed. So I'll let New York State argue.

6 MS. KRISHNAN: Good afternoon, your Honor. Let me
7 start with standing as you suggested.

8 The key issue on standing is whether plaintiffs
9 have met their burden to show injury. And I'm going to turn
10 to the Chamber plaintiffs and Alpha since that's where it
11 seems like you're interested in hearing more about.

12 The Chamber plaintiffs, the Chamber of Commerce
13 plaintiffs and Alpha Metallurgical Resources, which I'm going
14 to call Alpha, they bear the burden of establishing that at
15 least one association member faces imminent injury or at
16 least a substantial risk of injury or a credible threat of
17 injury.

18 And the associations and Alpha, as you indicated,
19 they rely on the statements of legislators to assert that
20 it's certainly impending or that there is a substantial risk
21 that they will receive a cost demand. But, your Honor, it's
22 not up to those legislators to determine which entities will
23 receive -- which entities will be responsible parties or will
24 receive the cost demand.

25 It's the New York Department of Environmental

1 Conservation who will determine in two years from now and
2 only after it issues its regulations setting out how it's
3 going to determine those responsible parties, they're going
4 to determine, they're going to set out the regulations for
5 that, and none of that has happened yet. So we really don't
6 think there is any evidence that shows a substantial risk or
7 a credible threat that DEC will identify these specific
8 particular parties as a responsible party.

9 Turning to the states, the states argue injury in
10 several ways.

11 THE COURT: And I think, isn't your understanding
12 that if one plaintiff has standing, the suit may proceed?

13 MS. KRISHNAN: Yes, your Honor. It is our
14 understanding that if one of the plaintiffs has standing, we
15 can move on. And so I can move on to the merits and maybe
16 I'll address the state standing if there is anything that I
17 want to address in rebuttal.

18 THE COURT: Thank you, Counsel.

19 MS. KRISHNAN: As to the merits of the summary
20 judgment motion, I'm going to be addressing the plaintiffs'
21 claims that the New York Climate Change Superfund Act, which
22 I'm going to call the Climate Act, I'm going to address the
23 claims that the Climate Act is preempted, and then I'm going
24 to turn this over to my colleague Ms. Mirman-Heslin who is
25 going to address their arguments that the Act is

1 unconstitutional extraterritorial regulation and that it's
2 preempted by the Foreign Affairs Doctrine.

3 I want to start by answering the Court's questions
4 that were set out in the text order last week. To the extent
5 the Court finds that the *City of New York* is not
6 distinguishable from this case, and we take that to mean that
7 the Court finds that there is no meaningful or significant
8 difference between the city's public nuisance claim in that
9 case and New York's Climate Act, that what the New York
10 legislature did was to implement the city's public nuisance
11 claim through a statute, then we think there are no set of
12 facts that would make the Climate Act constitutional, and
13 there's no additional preemption analysis before the Court to
14 conduct.

15 But we do think the *City of New York* is
16 distinguishable for two reasons. First, the Climate Act is
17 meaningfully and significantly different from the public
18 nuisance claim that the *City of New York* was considering in
19 that case.

20 And second, because the Climate Act is different
21 from the public nuisance claim, the Second Circuit's legal
22 analysis in that case cannot be applied here. Instead, the
23 Court must look at whether the Clean Air Act field preempts
24 or conflict preempts the Climate Act.

25 Turning to my first point, the Second Circuit's

1 decision was limited to the public nuisance claim at issue in
2 that case. The Court did not hold more broadly, as I think
3 the plaintiffs assert, that any liability related to
4 greenhouse gas emissions must be governed by federal law.

5 So I'm going to start by spending some time
6 explaining what the Climate Act does and how it was modeled
7 after the federal Superfund Act. And then I'm going to turn
8 to what federal law with the Clean Air Act does, and then I
9 will get to why the city's public nuisance claim in the
10 Second Circuit case, why it's different from the Climate Act.

11 The consequences of climate change, rising sea
12 levels, increasing temperatures, extreme weather events, all
13 of that has harmed New York and New Yorkers, and there's no
14 doubt that New York has to take steps to adapt to climate
15 change and to mitigate that harm. The legislature determined
16 that in order to do that, New York will have to make
17 significant investments in new and upgraded infrastructure,
18 and that it needs revenue to do that. This is at the heart
19 of the state's traditional police powers, identifying threats
20 to the health and well-being of residents, figuring how to
21 respond to those threats, and how to pay for that response.

22 Here the legislature passed the Climate Act to
23 collect \$75 billion over 25 years from responsible parties.
24 The legislature determined that this was a small percentage
25 of the total cost New York will face to mitigate the harms

1 from climate change. Responsible parties are those that
2 extracted and refined fossil fuels between 2000 and 2024 that
3 resulted in more than 1 billion metric tons of greenhouse gas
4 emissions globally.

5 The legislature focused on fuels extracted and
6 refined during that period because they found that there was
7 a marked increase in the rate of greenhouse gas emissions
8 after 2000. And it focused on worldwide greenhouse gas
9 emissions because it is the cumulative impact of greenhouse
10 gas emissions across the globe that is causing harm in
11 New York.

12 Responsible parties must also have sufficient
13 contact with New York to satisfy due process, so New York can
14 only issue cost demands to parties that have enough of a
15 connection to New York. Each responsible party's share of
16 the \$75 billion will be proportional to their share of the
17 total greenhouse gas emissions attributable to all
18 responsible parties. Responsible parties will not receive
19 these cost demands until 2028 and, as we discussed, only
20 after the Department of Environmental Conservation issues
21 regulations.

22 The legislature explicitly stated that there was no
23 finding of wrongdoing by responsible parties and there is no
24 finding of illegal activity. The Act does not tell fossil
25 fuel companies anything about what they can or can't do in

1 the future in terms of extracting or refining fossil fuels.
2 It's 2026, so there is nothing that a fossil fuel company can
3 do today to change the amount of fossil fuels it extracted or
4 refined in the past. Changing its future production levels
5 or implementing new technology, it's not going to change the
6 amount of the cost demand.

7 And the Chamber of Commerce plaintiffs, they
8 concede this in their complaint. This is paragraph 161, they
9 say, quote, "Nothing energy producers can do today can affect
10 liability under the Act." The Act also does not impose any
11 emission limits or require the abatement of any greenhouse
12 gases anywhere.

13 What it does is it identifies that greenhouse gases
14 from fossil fuels extracted and refined in the first two
15 decades of this century have contributed significantly to the
16 global buildup of greenhouse gas emissions that is largely
17 responsible for climate change and the harm it's causing in
18 New York. And it identifies the fossil fuel companies that
19 extracted and refined those fossil fuels as a source of
20 revenue to fund a small portion of the infrastructure needed
21 to mitigate the harm, and in this way it is modeled after the
22 federal Superfund Act, or CERCLA.

23 CERCLA establishes strict no-fault liability for
24 the costs to respond to and remediate the discharges of
25 hazardous waste on certain categories of responsible parties

1 who are involved with hazardous waste. CERCLA does not
2 itself regulate or set standards for those hazardous wastes;
3 that's covered by a different statute.

4 The First Circuit explained in *Dedham Water Company*
5 *v. Cumberland Farms Dairy*, 805 F.2d 1074, at 1008, the First
6 Circuit said Congress, quote, "intended that those
7 responsible for problems caused by the disposal of chemical
8 poisons bear the cost and responsibility for remedying the
9 harmful conditions they created."

10 So CERCLA, like the Climate Act, does not involve
11 the finding of illegal conduct or wrongdoing. The discharges
12 of hazardous waste that are being remediated may have been
13 legal at the time of their discharge and parties can be held
14 responsible for the cost of cleanup even if they were not
15 involved in the discharge itself but are owners of a site
16 where the discharge occurred previously.

17 The Second Circuit has explained, quote, "CERCLA is
18 not a regulatory standard setting statutes such at the Clean
19 Air Act, rather, the government generally undertakes
20 pollution abatement and polluters pay for such abatement
21 through tax and reimbursement liability." This is *New York*
22 *versus Shore Realty Corp.*, 759 F.2d 1032, at 1041.

23 So, the Second Circuit opinion makes clear that
24 just because CERCLA and the Climate Act require responsible
25 parties to pay money to the government to offset some of the

1 government's costs in responding to harm, that does not mean
2 the government is setting regulatory standards for those
3 responsible parties.

4 Now I'm going to talk about the other side of this,
5 what does federal law do?

6 At a high level the Clean Air Act imposes standards
7 and restrictions on pollution. It places limits on pollution
8 generating sources. So it says to stationary sources such as
9 power plants and factories, and to the manufacturers of cars
10 and trucks and aircrafts, it says you can only emit X amount
11 of pollution from your power plant or from the car that you
12 manufacture. And by limiting pollution emanating from each
13 of these individual sources, the Clean Air Act works to limit
14 overall pollution.

15 Now, until very recently the EPA has regulated
16 greenhouse gas emissions pursuant to the Clean Air Act. But
17 the EPA now says that the Clean Air Act does not give it
18 authority to regulate greenhouse gas emissions for motor
19 vehicles based on climate change impacts. We think that's
20 wrong, and New York State and other states and other parties
21 have challenged that in the DC Circuit, and it's going to be
22 up to that court to decide that issue. But that is the scope
23 of the Clean Air Act with regard to the greenhouse gas
24 emissions.

25 Prior to the Clean Air Act the federal common law

1 also operated in this same sphere. Federal courts applied a
2 specialized federal common law of nuisance to disputes
3 involving interstate pollution. These are cases where a
4 plaintiff, usually a state, brought a nuisance claim to
5 impose limits on pollution emanating from another state. And
6 in 1972 the Supreme Court had one of these cases before it,
7 this is *Illinois v. Milwaukee*, 406 U.S. 91. In that case
8 Illinois asserted that four Wisconsin cities had created a
9 public nuisance by dumping sewage into Lake Michigan.

10 The Supreme Court held that federal courts have
11 jurisdiction over the claims because the federal common law
12 of nuisance had to be applied to such claims. The court
13 explained that until federal laws or regulations preempted
14 the field of the federal common law of nuisance, which
15 eventually happened with the Clean Water Act and the Clean
16 Air Act, but until that point federal courts would set the
17 standards of care for suits alleging the creation of a public
18 nuisance through interstate pollution.

19 So, in summary, the Climate Act sets up a source of
20 revenue to offset some of New York's costs. It does not
21 reflect any judgment about the appropriate overall level of
22 greenhouse gas emissions or setting new standards for that.
23 The Clean Air Act does place limits on the amount of
24 greenhouse gas emissions coming out of power plants, cars,
25 factories, and by doing so it addresses overall greenhouse

1 gas limits.

2 Now I want to turn to the city's public nuisance
3 claim in the State of New York and where that fits. The city
4 brought a state common law public nuisance claim against a
5 group of large fossil fuel producers seeking damages for
6 harms caused by global greenhouse gases, and also seeking an
7 injunction to abate the public nuisance if defendants fail to
8 pay any court-ordered damages. The Second Circuit held that
9 the city could not bring that public nuisance claim regarding
10 interstate greenhouse gas emissions under state law, and it
11 had to do so, it could only bring that claim under the
12 federal common law of nuisance, that's the common law we were
13 just talking about. But the Clean Air Act displaced that
14 federal common law and with it the city's claim.

15 The Second Circuit relied on decades of Supreme
16 Court cases holding that this kind of claim had to be brought
17 under federal common law because it would set standards for
18 interstate pollution and that had to be done by federal law.
19 That federal common law of nuisance that the Second Circuit
20 relies on has its roots in English common law.

21 I'm going to be very brief but I want to talk about
22 the public nuisance claim a little bit more generally.
23 Public nuisance developed in English common law as a
24 principle that the infringement of the rights of the crown
25 was a crime. This is explained in Prosser and Keeton on the

1 law of torts. So public nuisance is therefore rooted in a
2 judgment of wrongdoing. The criminal roots of public
3 nuisance remain and many jurisdictions, including New York,
4 retain nuisance as a crime.

5 The civil asset of the common law of nuisance
6 eventually developed after tort damages were awarded as an
7 incidental remedy. And that's explained in the introductory
8 note to Chapter 40 of the Restatement Second of Torts. And
9 that restatement explains, a public nuisance is an
10 unreasonable interference with the right common to the
11 general public. So the public nuisance claim requires a
12 judge or a jury to determine what is an unreasonable
13 interference with the public right. It requires a court to
14 set a standard and determine what side of that standard the
15 defendant is on. And once a judge or a jury sets that
16 standard, the defendants and other similarly situated parties
17 must comply with that standard going forward or they'll face
18 the possibility of liability through an injunction or
19 damages.

20 And I think the Supreme Court's decision in *AEP*
21 *versus Connecticut* is helpful here. There the plaintiffs
22 brought public nuisance claims under federal common law
23 seeking an injunction requiring power plants to cap and
24 reduce their greenhouse gas emissions over time. And the
25 Supreme Court explained there that through the public

1 nuisance claim plaintiffs were asking federal judges to
2 determine what amount of carbon dioxide emissions is
3 unreasonable. This is 564 U.S. at 428. And the Supreme
4 Court held that this is what the Clean Air Act does, it sets
5 the standards for greenhouse gas emissions.

6 The city's public nuisance claim asked the Second
7 Circuit to do the same thing, to determine what amount of
8 greenhouse gas emissions attributable to the defendant was an
9 unreasonable interference with the public right. The Second
10 Circuit held that this is exactly what is covered by the
11 Clean Air Act.

12 Now, I understand that plaintiffs and the United
13 States describe the Second Circuit's holding in a way that is
14 not limited to the public nuisance claim that was at issue in
15 that case. They say that the Second Circuit held more
16 broadly that any liability associated with greenhouse gas
17 emissions will regulate those emissions nationally and only
18 federal law can do that. And I think that potentially they
19 go farther and say that anything at all related to greenhouse
20 gas emissions, whether it regulates them or not, must be
21 governed by federal law.

22 But the Supreme Court explained in *National Pork*
23 *Producers*, again a case that the parties have cited and
24 discussed in their briefs, the Supreme Court said there,
25 quote, "Our opinions dispose of discrete cases and

1 controversies and they must be read with a careful eye to
2 context." That's at 598 U.S. 374.

3 The Second Circuit in *City of New York v. Chevron*
4 was clear it was answering a specific question about the
5 claim before it. At page 91, the Court says, "Stripped to
6 its essence, then, the question before us is whether a
7 nuisance suit seeking to recover damages for the harms caused
8 by global greenhouse gas emissions may proceed under New York
9 law." The Court did not hold that compensation, a form of
10 relief, was preempted, it held that the city's public
11 nuisance claim was preempted.

12 Now, the Second Circuit did focus on damages as a
13 remedy, but that was because the city had argued it was only
14 seeking damages and therefore did not seek to impose any
15 standards of care or emissions restrictions. The Second
16 Circuit rejected that argument finding that it was economic
17 reality that a nuisance action seeking damages would have
18 that same effect. This is at page 92 of the opinion. And at
19 page 96 the court put it simply, "So whether styled as an
20 action for injunctive relief against the producers to stop
21 them from producing fossil fuels, or an action for damages
22 that would have the same practical effect, the city's claims
23 are barred by the Clean Air Act."

24 The Second Circuit did rely on two Supreme Court
25 cases in discussing damages, but neither of those cases held

1 that damages are always regulation. The Second Circuit
2 relied upon *Kurns v. Railroad Friction Products Corp.* And
3 that case involved state common law tort claims, which, like
4 a nuisance claim, imposes common law duties and standards of
5 care. And the Supreme Court held there that an award of
6 damages for those tort claims was a potent method of
7 regulation. Again, the damages awarded there, like in a
8 nuisance claim, enforces the standard of care.

9 The Second Circuit also cited to *San Diego Building*
10 *Trades Council*, another Supreme Court case. But in that case
11 the Supreme Court held only that California courts could not
12 enjoin conduct in a tort of unfair labor practices case, it
13 also could not award damages in that situation. It did not
14 hold that damages are a regulation as a matter of law.

15 And the Second Circuit was clear throughout its
16 opinion in the *City of New York v. Chevron* that it was
17 focused on the impact of nuisance claims and the standards
18 they would require a court to set. So at page 95 in
19 discussing the public nuisance claim in *AEP versus*
20 *Connecticut*, the Second Circuit says federal judges may not
21 set limits on greenhouse gas emissions in the face of a law
22 empowering the EPA to do the same.

23 At page 97, discussing the Supreme Court decision
24 in *Exxon Shipping*, the Second Circuit says, a common law
25 nuisance claim seeking damages is preempted where it amounts

1 to arguments for regulatory standards different from those
2 provided by the applicable federal standards. At page 97 to
3 98, the court discusses the vague and often indeterminate
4 standards attached to nuisance law and how it is ill-suited
5 to be administered by judges, particularly in the complex
6 area of environmental law.

7 THE COURT: Wouldn't you agree that the Climate
8 Act, like the nuisance common law claim in the *City of*
9 *New York*, implicates conflicting rights of states and our
10 relations with foreign nations, and so it involves uniquely
11 federal interests?

12 MS. KRISHNAN: Your Honor, I think the Second
13 Circuit held in that case that the public nuisance claim by
14 setting the standards, the standards for greenhouse gas
15 emissions through what the public nuisance claim requires, it
16 requires the court to make that determination about what
17 amount of greenhouse gas emissions is an unreasonable
18 interference with the public's right. By setting that
19 standard the public nuisance claim does interfere with the
20 interest of the federal government as set forth in the Clean
21 Air Act.

22 But the Climate Act does not set any standards, it
23 does not tell fossil fuel producers anything about what they
24 can or can't do in the future with respect to producing
25 fossil fuels or greenhouse gas emissions.

1 THE COURT: But the Second Circuit, and I do have
2 to follow the Second Circuit law, in the *City of New York* the
3 Second Circuit said that this common law cause of action
4 implicates the conflicting rights of states and our relations
5 with foreign nations, so it poses the quintessential example
6 of when federal common law is most needed. Isn't that the
7 case with the Climate Act as well?

8 MS. KRISHNAN: Could you point me to --

9 THE COURT: It's at 92, 993 F.3d at 92. The Court
10 says, therefore, it implicates the conflicting rights of
11 states and our relations with foreign nations, this case
12 poses the quintessential example of when federal common law
13 is most needed.

14 MS. KRISHNAN: Yes, your Honor. So the Court there
15 in this section the Court is discussing why the city's common
16 law public nuisance claim cannot be brought under state law
17 and it has to be brought under federal law. And here it says
18 that that claim, the city's public nuisance claim, it
19 implicates the conflicting rights of states and it's an
20 example of, quintessential example of where federal common
21 law is most needed.

22 As I think, as I've been talking about the public
23 nuisance claim, and that's what was at issue here, that's
24 what the Second Circuit is saying had to be brought under the
25 federal common law of nuisance, what it does is it sets the

1 standard of what is an unreasonable amount of greenhouse gas
2 emissions, so the defendants and others in similar
3 situations, they would then have to follow that standard.

4 And that is exactly what the Clean Air Act does,
5 and prior to the Clean Air Act that is what this federal
6 common law did. But the Climate Act does not set those
7 standards. It does not set standards for what fossil fuel
8 producers in terms of greenhouse gas emissions or in terms of
9 what amount of fossil fuel they can extract or refine into
10 the future.

11 So it doesn't implicate the same interest that's
12 set out here, because this interest that the Second Circuit
13 is talking about is rooted in that public nuisance claim and
14 what it would require a court to do to resolve that public
15 nuisance claim. And it's similarly what was required by the
16 federal common law that existed prior to the Clean Air Act.
17 It required federal courts to set standards that wherever the
18 defendants in that case were would have to follow, and those
19 were standards that would apply across state borders.

20 THE COURT: The Climate Act applies to greenhouse
21 gas emissions attributable to all fossil fuel extraction and
22 refining worldwide, it's not limited to such emissions within
23 the state, isn't that correct?

24 MS. KRISHNAN: That's correct, yeah.

25 THE COURT: So when the founders put together a

1 list, approximate list of covered companies, they have
2 entities all over the world on their approximate list of
3 covered companies. So isn't this Act, doesn't it implicate
4 the conflicting rights of states and our relations with
5 foreign nations?

6 MS. KRISHNAN: Your Honor, the threshold that's in
7 the Climate Act that the Department of Environmental
8 Conservation will determine which responsible parties meet
9 that threshold, that threshold is just a way to determine the
10 responsible parties; it doesn't set any standards going
11 forward.

12 To the extent there are entities on that list that
13 your Honor is referring to that have a connection to foreign
14 nations, I'm going to defer to my colleague who is going to
15 address the foreign affairs preemption, if that's all right
16 with your Honor.

17 THE COURT: All right. Let's assume I disagree
18 with your limited explanation of the holding of *City of*
19 *New York* with respect to it only applies to a common law
20 claim that sets the standards, then what is New York State's
21 argument?

22 MS. KRISHNAN: As I said at the outset in response
23 to your question, if the Court finds there is no meaningful
24 distinction between the public nuisance claim in the City's
25 case and the Climate Act, that essentially what the New York

1 legislature did was to implement that claim as a statute,
2 then we answer those questions by that there is no facts for
3 the Court to find that the Climate Act is constitutional and
4 there is no additional preemption analysis that would need to
5 be done.

6 But my first point was, yes, that the Climate Act
7 and the city's public nuisance claim are significantly and
8 meaningfully different. And then I'm going to turn to my
9 second point if you don't have any more questions.

10 THE COURT: Okay.

11 MS. KRISHNAN: I do want to make one more point.
12 The Second Circuit also determined that the standards set by
13 the city's public nuisance claim would regulate greenhouse
14 gas emissions in an indirect and roundabout way, and it
15 relied on the fact that nuisance standards and the ongoing
16 liability that they create would compel producers to change
17 their behavior and develop new means of pollution control.
18 This was undisputed in that case because the city had
19 conceded that its public nuisance claim would lead to
20 production side changes. This is at page 93.

21 But here the Chamber of Commerce associations, they
22 admit that the Climate Act will not compel them to change
23 their conduct because changing their production will not
24 change their liability. This is in their complaint.

25 And they offer declarations from many fossil fuel

1 executives. Not one of those executives says that they will
2 need to reduce production or implement new technology or
3 implement production controls or pollution controls. Those
4 are plaintiffs' own facts. And consistent with those facts
5 New York offered the testimony of Professor Fullerton that
6 consistent with that the Climate Act will not lead fossil
7 fuel producers to make changes to their production or changes
8 to their investment in fossil fuel supply.

9 So the *City of New York* held only that a public
10 nuisance claim that sought to impose nuisance standards on
11 fossil fuel companies and enforce them through a damages
12 award could only be asserted through federal law, but that
13 federal law was displaced by the Clean Air Act. The *City of*
14 *New York* does not control the outcome here because the
15 Climate Act does not impose any standards or reflect any
16 judgment about the appropriate overall level of greenhouse
17 gas emissions.

18 That leads to my second point. The Second Circuit
19 relied on decades of Supreme Court precedent holding that the
20 city's public nuisance claim could only be asserted through a
21 specialized federal common law of nuisance, but that federal
22 common law of nuisance does not apply here to the Climate Act
23 which is not a nuisance claim.

24 Instead, we think the Court has to look at whether
25 the Clean Air Act field preempts or conflict preempts the

1 Act. Express preemption is not an issue here, no one claims
2 that. The Second Circuit did not do that analysis in *City of*
3 *New York* because of the long-established principle that the
4 city could not assert its claim under state law, so there was
5 no need to consider whether federal law, the Clean Air Act,
6 preempted a state law.

7 As we have discussed, the Clean Air Act and the
8 Climate Act operate in different fields so there is no field
9 preemption. The Climate Act seeks to raise revenue from
10 fossil fuel companies, it does not impose any standards or
11 limits on the emissions of any stationary source or motor
12 vehicle.

13 Plaintiffs rely on the Supreme Court's decision in
14 *Ouellette*. This is a case that both parties cited and
15 discussed. But the Supreme Court did not address field
16 preemption there. And in that case the Vermont plaintiffs
17 sought to impose discharge standards on a New York point
18 source. That was the entire point of their claim, to place
19 limits on discharge from a point source in another state. So
20 that suit was clearly within the same field as the Clean
21 Water Act.

22 And turning to conflict preemption, plaintiffs also
23 have not identified a single provision of the Clean Air Act
24 that fossil fuel companies cannot comply with while also
25 responding to any cost demand they may receive. The Climate

1 Act is also not an obstacle to the Clean Air Act's objectives
2 because it does not set standards for greenhouse gas
3 emissions.

4 There are many state laws that impact fossil fuel
5 companies. For example, many states seek to raise revenue
6 through gas taxes. Consumers pay those taxes, but of course
7 higher costs lead to lower demand, which leads to lower
8 production, and of course thereby indirectly lowers
9 greenhouse gas emissions. But no one claims that those gas
10 taxes conflict with the objectives of the Clean Air Act
11 because of those impacts on greenhouse gas emissions.

12 And I think the only argument that plaintiffs
13 really make about conflict is their assertion that if
14 New York's law is allowed to proceed, other states will pass
15 similar laws and then fossil fuel companies will be faced
16 with different standards based on different state laws. But
17 the Climate Act does not impose standards, so plaintiffs are
18 asking the Court to speculate about what other states might
19 do and how those other statutes might set standards that
20 somehow interfere with the objectives of the Clean Air Act.

21 But even if it's true that other states may in the
22 future pass those kinds of laws, we think that that's
23 something that is better addressed by Congress rather than by
24 courts being forced to speculate about what other states
25 might do in the future.

1 THE COURT: Do you agree that if I grant summary
2 judgment to the plaintiffs, essentially because I don't find
3 that this case is distinguishable from *City of New York* and I
4 do have to follow the Second Circuit law, you would agree
5 that essentially that would resolve this case?

6 MS. KRISHNAN: It would resolve the claims that the
7 parties are seeking summary judgment on, yes.

8 THE COURT: Would there be anything left of the
9 case? And I'll ask plaintiffs that too.

10 MS. KRISHNAN: Well, there are other claims that
11 the plaintiffs have asserted, but I don't think -- I think
12 with the decision on the two claims that have been -- that
13 the plaintiffs have moved for partial summary judgment on, I
14 think that would resolve the issue of whether the Climate Act
15 is preempted, which would be the end of it.

16 THE COURT: Thank you, Counsel. And I'll hear from
17 your co-counsel.

18 MS. MIRMAN-HESLIN: Good afternoon, your Honor.

19 THE COURT: Good afternoon. Let me ask a
20 preliminary question. What is the applicable test here under
21 the foreign affairs preemption?

22 MS. MIRMAN-HESLIN: There are two tests. The
23 foreign affairs doctrine, it could conflict preempt or field
24 preempt, and under conflict preemption there are two
25 requirements. First, the foreign policy must have the effect

1 of domestic law. Executive action can preempt only if it was
2 taken pursuant to Article II of the Constitution, such as a
3 statute or ratified treaty, or was a systemic, unbroken,
4 executive practice, long pursued to the knowledge of
5 Congress. And the second requirement for conflict preemption
6 is that a state law must stand in the way of that foreign
7 policy.

8 And then in terms of field preemption, it will only
9 be field preempted if it does not fall within a state's
10 traditional responsibility and it takes a position on actions
11 by foreign nations or inquires into their affairs.

12 THE COURT: And let me ask you, in this case if I
13 find that the Climate Act is not a traditional state
14 responsibility because it is involved in interstate and
15 foreign, impacts interstate and foreign interests, then I
16 assume I would apply the field preemption test, and doesn't
17 it intrude on the field of foreign affairs?

18 MS. MIRMAN-HESLIN: Your Honor, we do not believe
19 that it intrudes on the field of foreign affairs. First, we
20 would disagree about the traditional state responsibility
21 because we do believe this is the state's police powers and
22 it's using to raise revenue and to protect New York's
23 property and its residents from harm, which is a traditional
24 power. And second, we don't think it invades the field
25 because it doesn't criticize any foreign governments or

1 instruct the Department of Environmental Conservation to
2 inquire into the affairs of other countries. In fact, the
3 Act applies the same objective criteria to domestic and
4 foreign corporations and only corporations with sufficient
5 contacts will receive cost demands. Courts have upheld state
6 laws imposing obligations on foreign companies operating in
7 those states as well as addressing traditional state concerns
8 such as pollution that may impact foreign trade.

9 In *Barclays Bank v. Franchise Tax Board of*
10 *California*, a Supreme Court case from 1994, the Court upheld
11 a state tax methodology challenged by foreign companies
12 because Congress is aware of the issue and declined to
13 preempt that methodology. In another example, in *Portland*
14 *Pipe Line Corporation v. City of South Portland*, the Court
15 rejected a challenge to a city ordinance that had the
16 practical effect of preventing the import of Canadian oil,
17 but that law did not explicitly target any particular foreign
18 country.

19 Here while the Deputy Secretary Landau raises
20 concerns that the Climate Act would impact relations between
21 U.S. and foreign countries where fossil fuel producers are
22 located, that's pure speculation on his part. At this time
23 DEC has not even determined that any foreign state owned
24 companies have sufficient contacts with New York to be held
25 liable under the Act. It has not enacted any regulations to

1 determine what sufficient contacts will be, for example. So
2 that's why we believe the law is not field preempted, your
3 Honor.

4 THE COURT: I see. Thank you, Counsel.

5 MS. MIRMAN-HESLIN: I was also going to speak to
6 the extraterritoriality regulation claims. Would you like me
7 to do that?

8 THE COURT: Yes.

9 MS. MIRMAN-HESLIN: First, as my colleague
10 Ms. Krishnan just discussed, the Climate Act does not
11 regulate emissions. However, even if it did, the structure
12 of the constitution does permit it extraterritorial
13 regulation. Three months ago in *Hencely v. Fluor*
14 *Corporation*, the Supreme Court explained that, "there is no
15 federal preemption in vacuo, without a constitutional text or
16 a federal statute to assert it." For this reason, plaintiffs
17 are unable to produce any case law holding that the
18 constitution structure or the equal sovereignty of states
19 creates a per se ban on extraterritorial regulation.

20 Instead, plaintiffs rely on cases that address
21 specific clauses of the constitution, such as the dormant
22 commerce clause and the due process clause. Since plaintiffs
23 are not seeking summary judgment on their commerce clause or
24 due process clause claims, the court need not look any
25 further to deny plaintiffs' unsupported constitutional

1 pollution claim.

2 Unless your Honor would like me to speak more
3 specifically to those clauses, I end my argument.

4 THE COURT: Okay. Thank you, Counsel. And now
5 I'll hear from counsel for the State of West Virginia.

6 MR. DAVID: Thank you, your Honor.

7 Your Honor, I'll start at standing just as New York
8 did. Alpha Metallurgical clearly has standing in this case.
9 As the Second Circuit explained in the *Antonyuk* case, there
10 only needs to be a credible threat of enforcement, and here
11 Alpha meets that standard in spades. The New York
12 legislature included Alpha's predecessor Contura on a list of
13 covered companies. They attributed more than 4 billion tons
14 of greenhouse gas emissions to Contura. The Carbon Majors
15 Database, which is also being used by the legislature to
16 identify these responsible parties, lists Contura as
17 producing well over 4 billion tons of greenhouse gas
18 emissions. So all of that not for the truth of the matter,
19 but it just shows that there is a credible threat of
20 enforcement against Alpha, so Alpha has standing, and because
21 they have standing. We don't need to talk about anyone
22 else's but I will briefly mention that the states have
23 standing as sovereigns.

24 THE COURT: And you can move on, Counsel, because I
25 agree with you if Alpha has standing, there is no need to

1 address another plaintiff.

2 MR. DAVID: Thank you, your Honor.

3 The *City of New York* case is just simply
4 indistinguishable. And we now know that New York concedes
5 that if it is indistinguishable, then we win, the case is
6 over, and we agree with that, we don't need to worry about
7 any of the other claims that we haven't moved for summary
8 judgment on. But I want to explain why the *City of New York*
9 is not distinguishable here.

10 THE COURT: I take it you also agree with New York
11 that if the Court finds it not distinguishable, the Court
12 doesn't need to engage in any additional preemption analysis,
13 foreign affairs analysis?

14 MR. DAVID: Yes, your Honor. If the Court finds
15 that it's not distinguishable under the facts of *City of*
16 *New York*, can rely just on *City of New York's* analysis, we
17 don't need to worry about traditional preemption, whether
18 it's field or conflict, or extraterritoriality or foreign
19 affairs.

20 THE COURT: Thank you.

21 MR. DAVID: Your Honor, this case and *City of*
22 *New York* are indistinguishable. Both involve strict
23 liability schemes. And just as New York State is doing now,
24 New York City argued that they weren't regulating anything,
25 this was just a revenue raising measure. They were trying to

1 seek compensation for climate harms.

2 But the Second Circuit held that the federal common
3 law and the Clean Air Act preempted the City of New York's
4 tort suit, and the reason for that really is straightforward,
5 imposing liability for global greenhouse gas emissions is a
6 potent method of governing conduct in controlling policy. In
7 other words, a strict liability scheme based on global
8 greenhouse gas emissions regulates interstate and
9 international emissions. That regulatory power has always
10 resided with the federal government and New York can't usurp
11 that power through the Climate Change Superfund Act.

12 I want to start with the idea that there is a
13 difference between a tort suit and a statute. A supremacy
14 clause doesn't care whether the law is written or not. It
15 uses the word laws in two places. It uses laws when it's
16 describing the federal law is supreme and it uses laws when
17 it's describing a contrary state law, including state
18 constitutions and state laws are preempted if they are
19 contrary.

20 So doesn't matter if we're talking about the United
21 States Constitution, federal common law, or federal statutes,
22 they are supreme. And it doesn't matter if we're talking
23 about state constitution, state statutes or state common law,
24 if they are contrary to the federal law, then they are
25 preempted. So there is no difference if it's written down or

1 not. And there are unfortunately not a whole lot of things
2 that are directly on point, but the Supreme Court has at
3 least, and some circuit courts have at least made statements,
4 including the Supreme Court in *Illinois versus City of*
5 *Milwaukee*, that's Milwaukee I. They said that the question
6 of apportionment of interstate waters is a question of
7 federal common law upon which state statutes or decisions are
8 not conclusive. In *Lowry versus Baltimore and Ohio Railroad*,
9 the Third Circuit said federal common law, not state statutes
10 or decisional law, governs whether causes of action under the
11 federal securities laws run with the affected securities.
12 Again, federal common law can preempt state statutes.

13 Third Circuit had another case, *New Jersey Retail*
14 *Merchants Association versus Sidamon-Eristoff*, where they
15 explained that state law can be preempted by federal common
16 law. And the Sixth circuit in *Gaff versus FDIC* said when
17 they were deciding a substantive rule of federal common law,
18 it applied and preempted state regulation in a commercial law
19 case. So there the statement from the Supreme Court dealing
20 with interstate waters I think is particularly instructive
21 because interstate waters and interstate air have always been
22 kind of going together, that's why the Clean Water Act and
23 the Clean Air Act had very similar structures. Defendants
24 have not pointed to a single case where federal common law
25 was deemed to not have a preemptive effect of a contrary

1 state statute, those laws just don't exist.

2 Moving to the point of *City of New York* and its
3 general framework of how it gets to preemption in this case,
4 the federal common law we know controls and it controls as
5 the Second Circuit said in the *City of New York*, it exists
6 because state law cannot be used. It exists in an area of
7 such uniquely federal interest that you simply can't use
8 state law, and that's what we have here when we're talking
9 about interstate air pollution.

10 So federal common law exists, it ensures that
11 states do not regulate interstate air pollution, and then the
12 Clean Air Act comes in and federal common law remains a
13 backdrop for the Clean Air Act. The Clean Air Act therefore
14 would allow a state to regulate interstate air pollution only
15 if it explicitly gives it permission to. And there is simply
16 nothing in the Clean Air Act that does that. Instead, the
17 Clean Air Act cabins what states are able to do. It allows
18 them to comment on proposed EPA rules or on state
19 implementation plans. It allows them, if they do have a
20 concern that a source in another state is causing a problem
21 with an implementation plan, they can petition EPA and EPA
22 then has the investigative and enforcement authority. But
23 the states can't go it alone, they don't have the authority
24 under the Clean Air Act to take regulation into their own
25 hands.

1 And the savings clause and the citizens suit clause
2 don't authorize New York statute either. The Second Circuit
3 in again *City of New York* said that those clauses permit only
4 state lawsuits brought under the law of the pollution source
5 state. And I believe my friend on the other side said that
6 that's similar to the case in *Ouellette* where they were
7 talking about Vermont suing a New York source and that they
8 can't do that and that conflicts with the Clean Water Act.
9 But that's exactly what New York is trying to accomplish
10 here, is that they are suing sources entirely outside of
11 New York and some of them outside of the United States under
12 New York law. There is no effective difference just because
13 they wrote it down in the statute.

14 Last on this point of *City of New York*, this is
15 somehow different, there's no regulation occurring. The
16 Second Circuit made it very clear that imposing damages
17 awards is a potent method of regulation, so it doesn't matter
18 that we're looking at retroactive strict liability. The only
19 option for anyone who's subject to enforcement here is to
20 stop producing greenhouse gas emissions going forward.

21 The statute only requires two things for someone to
22 be held strictly liable. You extract coal, oil, or natural
23 gas or you refine oil, and you produce at least a billion
24 tons of emissions in a given period. If both of those are
25 met, you are strictly liable. So companies that are facing

1 that threat of enforcement are going to have to consider
2 whether they're going to face that threat of enforcement in
3 the future.

4 It's the same thing as any tort suit when a
5 judgment comes in and they have to pay out compensatory
6 damages. These are compensatory damages, that's how they're
7 even characterized within the statute. So there really is no
8 difference between the tort suit and between this being a
9 statute, and it still regulates in the exact same way that
10 the Supreme Court has said, compensatory damages regulate in
11 the same way that the Second Circuit has said that
12 compensatory damages regulate.

13 Your Honor, unless you would like to hear about the
14 other theories, I'll end it there. Unless you have any
15 further questions, then we would ask that you grant the
16 states' and our coalition's summary judgment.

17 THE COURT: Thank you, Counsel. Now I'll hear from
18 counsel for the Chamber of Commerce plaintiff.

19 MR. LEHOTSKY: Thank you. Steve Lehotsky for the
20 Chamber coalition plaintiffs.

21 I agree with everything that counsel for West
22 Virginia, the coalition, said. I'll try to be brief. I'll
23 focus on three points.

24 First is I'll start with standing. If your Honor
25 has any questions with respect to standing, we agree that at

1 least two of the members of our plaintiff coalition are
2 injured. We would submit that all seven of the members that
3 we've identified by name and have submitted declarations are
4 all injured. But unless your Honor has any questions with
5 respect to standing, I'll move on to the merits.

6 THE COURT: You refer to two. Which two are you
7 referring to?

8 MR. LEHOTSKY: Your Honor, you said Exxon and
9 Chevron, you thought at least those two. We would certainly
10 agree with you that at least Exxon and Chevron, but we also
11 think the other Shell and BP and the three coal companies
12 that are members of the National Mining Association are also
13 all injured by the Act, under the standard that we think that
14 both your Honor and New York had correctly identified what
15 the standard is for establishing Article III standing.

16 THE COURT: Okay, thank you, Counsel.

17 MR. LEHOTSKY: So with respect to the merits, I'll
18 focus on only two points. New York concedes, as I think they
19 had to, that if the *City of New York* decision applies, then
20 the Act is unconstitutional in all of its applications, it
21 lacks any plainly legitimate sweep, that's because on its
22 face it very clearly applies to worldwide emissions and to
23 emissions that are outside the State of New York. And indeed
24 the 1 billion ton threshold in the statute can only be
25 reached by emissions outside the State of New York.

1 So then the whole question is whether the *City of*
2 *New York* decision binds this Court. If it does, then there
3 is no circumstances which this Act is constitutional, we
4 would ask the court to enter judgment.

5 The state seems to hang its distinction as to why
6 *City of New York* does not apply on two grounds. One is that
7 there is a distinction between public nuisance claims and
8 strict liability claims; and two, that it's compensatory
9 damages and that that's somehow different from what the *City*
10 *of New York* was seeking in its previous case. I think both
11 points are wrong.

12 I think the first point about the difference
13 between public nuisance liability that the city was seeking
14 and the strict liability that the state is seeking through
15 the Act is belied by *City of New York* itself. And here I
16 read from page 93, quote, "While the city is not expressly
17 seeking to impose a standard of care or emission restrictions
18 on the producers, the goal of its lawsuit is perhaps even
19 more ambitious; to effectively impose strict liability for
20 the damages caused by fossil fuel emissions no matter where
21 in the world those emissions were released or who released
22 them."

23 And of course the statute itself says repeatedly
24 that they are seeking strict liability, strictly liable, and
25 the State of New York said today that's exactly what they're

1 seeking to impose. There is no distinction. In the *City of*
2 *New York* it was de facto essentially a strict liability
3 regime, which is exactly what the State of New York is trying
4 to do now through the Act, and that's this Act is really just
5 a tort suit disguised as a statute. The legislature is
6 trying to do what the Second Circuit has said the judiciary
7 may not do, and the Act is simply a repackaging of the same
8 arguments that the *City of New York* tried and failed to
9 succeed with in the Second Circuit.

10 I would point the Court to a couple of places in
11 the *City of New York* decision where it refers to state law
12 without qualification or limitation. So, for instance, at
13 page 92 the *City of New York* decision says that the claims
14 sought by the city were, quote, "simply beyond the limits of
15 state law." That's because, as West Virginia correctly
16 argued, they're all governed by federal law.

17 Likewise, other places in the opinion where they
18 refer to state law, such as relying on the *Milwaukee I*
19 decision, which we've heard about today from counsel for
20 New York, which referred to federal common law being the law
21 that applied rather than any state law.

22 And here I think it's important to recognize that
23 there really is no distinction between the exact theory of
24 liability, whether it's a public nuisance standard, a
25 negligence standard, a strict liability standard. What

1 matters is that the state is attempting to impose monetary
2 liability, financial consequences upon emissions of
3 greenhouse gases that are otherwise lawful under the Clean
4 Air Act. And that's what the conflict is. The conflict is
5 that our member companies, the plaintiffs' member companies
6 are allowed to engage under the Clean Air Act of these types
7 of emissions and they're allowed to do it around the world,
8 and now the State of New York sort of taking matters into its
9 own hands to impose financial consequences upon those
10 otherwise lawful emissions, and that's what creates the
11 conflict, as your Honor noted, with other states, with other
12 foreign nations without foreign policy and with the policy of
13 the United States.

14 With respect to the second distinction that the
15 state has offered that it's not regulation because the state
16 is not imposing through the Act any standard of abatement or
17 emissions control technology or anything like that. Again,
18 this is an argument that was tried and rejected in the *City*
19 *of New York* already. And we also think it's based on a false
20 premise that whether there is abatement or a regulation is
21 not what is determinative for the claims in Counts One and
22 Counts Two in our complaint, because again our argument is
23 that New York has no authority as a matter of law to impose
24 financial consequences upon those emissions. And so whether
25 you think there is a regulation or not has no bearing on the

1 outcome of our claim.

2 So again, unless your Honor has further questions
3 with respect to any of the other issues in the case, we would
4 urge you to grant summary judgment in favor of the Chamber
5 coalition plaintiffs on Counts One and Two and to issue an
6 injunction against the enforcement of that law.

7 THE COURT: Let me ask you a question. In your
8 motion papers you also ask for a permanent injunction, but
9 I'm assuming if the Court granted summary judgment on Counts
10 One and Two, that would not be necessary.

11 MR. LEHOTSKY: I think that's right, your Honor,
12 assuming there is a declaration that the law is
13 unconstitutional and the injunction against an enforcement,
14 then yes.

15 THE COURT: I don't know what you mean by
16 declaration. A decision ruling that the Counts One and Two
17 summary judgment in your favor?

18 MR. LEHOTSKY: Yes, your Honor.

19 THE COURT: Thank you, Counsel.

20 MR. LEHOTSKY: Thank you, your Honor.

21 THE COURT: Now I'll hear from counsel for the
22 United States. Let me ask you, with respect to field
23 preemption, if you could focus your argument on that. Does
24 this law intrude on the field of foreign affairs without
25 addressing a traditional state responsibility? I assume you

1 agree that's the standard.

2 MR. SWENSON: Absolutely, your Honor, we agree that
3 is the standard. I think the *City of New York* answers the
4 question whether this is a traditional use of state
5 authority, so that's easy, and it is an area of ongoing
6 foreign policy.

7 The United States has been engaged in diplomatic
8 negotiations about greenhouse gas emissions for several
9 decades now, and the papers in this case have mentioned the
10 Framework Convention, mentioned the negotiations of the Kyoto
11 Protocol, the Paris Climate agreement. We've been in these
12 agreements, we've out of these agreements, it's an ongoing
13 area of active negotiation for our foreign policy, it's an
14 active area of foreign policy concerns, absolutely, your
15 Honor.

16 THE COURT: What about New York State's argument
17 that the United States pulled out of the Framework
18 Convention, pulled out of the Paris agreement?

19 MR. SWENSON: Well, withdrawing from those
20 agreements is still a conscious choice of foreign policy.
21 Entering into an agreement is a choice. Exiting an agreement
22 is a choice. And here the United States has a unified policy
23 trying to promote domestic energy production, you can see
24 that in the withdrawal from the agreements we just mentioned.

25 You can also see it in actions by the federal

1 government for our domestic policy. So, for example, the
2 President has declared a national energy emergency in
3 Executive Order 14,156. There the President has stressed
4 that a secure, reliable, diversified and affordable supply of
5 domestic energy is necessary to drive our economy and is
6 necessary for national security. The President also has an
7 Executive Order 14,154, where he has directed federal
8 agencies to streamline the permitting process for domestic
9 energy projects and has directed federal agencies to suspend,
10 revise, or rescind all federal agency actions that unduly
11 burden domestic energy.

12 So in our foreign affairs we are trying to promote
13 energy production and in our domestic affairs we're trying to
14 promote domestic energy production.

15 THE COURT: Thank you, Counsel. Anything further?

16 MR. SWENSON: Your Honor, we agree with the parties
17 as to the State of New York and the Court can stop its
18 analysis there. If you would like to hear about the federal
19 policy concerns in this case, I can speak to that and how the
20 Clean Air Act is a unified federal policy, but it seems like
21 the Court has heard enough of that matter already, unless you
22 would like to hear more.

23 THE COURT: No, I think I have it. Thank you,
24 Counsel.

25 I will give New York State an opportunity for a

1 brief rebuttal if you would like, not necessary, but you may.

2 MS. KRISHNAN: Do you mind if we take a moment to
3 confer?

4 THE COURT: Absolutely, you can have a moment.

5 (Short pause.)

6 MS. KRISHNAN: I want to make one brief point and
7 then I think my colleague is going to make another point as
8 well.

9 I think I heard counsel for West Virginia say that
10 the fossil fuel companies, their only option to avoid
11 liability is to stop producing going forward. But I think
12 the facts in this record reflect that, one, the Chamber of
13 Commerce Associations have conceded that there is nothing
14 they can do to change the liability under the Act, and we
15 have declarations from a number of fossil fuel company
16 executives, not one of them said that the result of this Act
17 or any potential act that might be passed by another state in
18 the future, that the impact of those things would be that
19 they would have to make different decisions about production,
20 they would have to invest in pollution control or anything
21 like that, so that was the one point that I wanted to make.

22 THE COURT: Thank you, Counsel.

23 MS. MIRMAN-HESLIN: I just wanted to respond to the
24 points that the United States made on foreign affairs.

25 I would like to say that plaintiffs failed to

1 identify any foreign policy with which the Act conflicts.
2 Within international climate negotiations, the United States
3 has opposed liability and compensation schemes under which
4 developed nations provide financial assistance to developing
5 nations. These negotiations do not concern fossil fuel
6 companies' liability for climate damages. In particular,
7 because the UN Framework Convention and the agreements under
8 it bind only countries and regional entities like the EU and
9 not corporations.

10 The United States speculates that the Climate Act
11 will interfere with various executive interests related to
12 energy, but the executives preference for a certain policy
13 approach without more does not invalidate a state law and
14 generalized remarks about energy costs and availability are
15 not a basis for conflict or field preemption.

16 Treating hypothetical market effects as a clear
17 conflict would allow the Executive branch to preempt any
18 state law that may influence energy production, from work
19 place safety to consumer protection law. The Constitution
20 delegates that law-making authority to Congress, not the
21 Executive.

22 I would also like to distinguish *City of New York*
23 in terms of its foreign affairs analysis. In that case the
24 court, the Second Circuit, did not apply the foreign affairs
25 doctrine or find that the law was precluded, the tort suit

1 was precluded under it. It was a decision about whether
2 federal common law can be applied against foreign emissions.
3 And that difference is significant because the court was
4 deciding whether it should expand federal common law to
5 foreign emissions, and it found that quote, "Federal courts
6 must proceed cautiously when venturing into the international
7 arena so as to avoid unintentionally stepping on the toes of
8 the political branches." So that was a matter of judicial
9 restraint.

10 Here the Court would not be expanding federal
11 common law because the case concerns statutory law, and the
12 New York State legislature chose to apply its statute to
13 international emissions. So the same concerns about judicial
14 restraint do not apply. And Congress can always enact
15 legislation to stop the Climate Act if it thinks that is
16 necessary.

17 Thank you, your Honor.

18 THE COURT: Thank you, Counsel.

19 Thank you to all counsel. The oral arguments were
20 very helpful to the Court, I will take this under submission
21 and issue a written decision. Thank you. And safe travels
22 to everyone who traveled here.

23 (2:14 p.m.)

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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
do hereby certify that pursuant to Section 753, Title 28,
United States Code, that the foregoing is a true and correct
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in the above-entitled matter and that the transcript page
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s/ Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter