Suncor Energy v. Boulder County: The United States Urges the Supreme Court to Stop Climate Suits While EPA Questions Authority to Regulate Emissions

Erika Kranz, Senior Staff Attorney
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Tort claims seeking to hold fossil fuel companies liable for the effects of climate change are pending in courts across the country, and many courts have grappled with whether these claims can go forward and, if so, in which court. The Trump administration wants to stop these lawsuits,[1] and the United States Office of the Solicitor General (OSG) has now asked the Supreme Court to help it achieve this objective by rejecting the state tort claims in *Suncor Energy v. Board of County Commissioners of Boulder County*. If the Supreme Court hears the case and adopts the position the United States urges, many similar cases might then be dismissed.

Boulder is a state court case involving tort claims against fossil fuel producers; the Colorado Supreme Court recently rejected industry's arguments that the Clean Air Act prevents Boulder's claims from proceeding. On September 11, 2025, the United States through OSG urged the Supreme Court to hear and to reverse that decision. The United States' brief is interesting for three reasons: (1) the United States is not a party in the case and the Supreme Court did not call for the solicitor general's views on whether it should hear the case, (2) the United States' position has changed from the last time it weighed in in this type of case, and (3) the United States' brief does not address EPA's pending proposal to rescind the Endangerment Finding — the legal foundation for federal greenhouse gas regulation under the Clean Air Act. In this analysis, I explain these three aspects of the brief.

Boulder background

Boulder (specifically the City of Boulder, Colorado and the Boulder County Commission) filed the case in Colorado state court, raising a variety of state tort and consumer protection claims against four companies that produce fossil fuels. Shortly after Boulder filed the case, the defendant companies sought to move the case from state to federal court under the theory that Boulder's claims arose under federal law, not state law. That issue went to the Court of Appeals for the Tenth Circuit, which agreed with the federal district court that Boulder's claims belonged in state court. In 2023, the US Supreme Court denied the defendant companies' request for review, leaving intact the Tenth Circuit's decision in Boulder's favor.[2]

Back in state court, the defendant companies filed a motion to dismiss Boulder's complaint, arguing that Boulder's state-law claims could not proceed because state law could not govern out-of-state conduct and that applying state tort law to the companies' conduct (including selling fuels outside the United States) could impair the federal government's power to decide foreign policy. The state trial court denied defendants' motion to dismiss. The defendant companies sought review in the Colorado Supreme Court, which held that the case could go forward in the state trial court.

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[1] *See* Executive Order, Protecting American Energy from State Overreach (Apr. 8, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/protecting-american-energy-from-state-overreach/.

[2] *Suncor Energy (U.S.C.) Inc. v. Board of County Commissioners of Boulder County*, 142 S. Ct. 1795 (2023).

The defendant companies in August 2025 filed a new petition for US Supreme Court review, asking the Supreme Court to reverse the Colorado Supreme Court's decision that Boulder's state tort claims can proceed.[3] Several non-parties have weighed in supporting the petition, including the United States. The Supreme Court has not yet decided whether to grant the petition and hear the case.

United States weighing in without being asked

While it is not unusual for the United States to provide its position about whether a case is worthy of Supreme Court review, it is quite unusual for the United States to do so unprompted.[4] Normally, when the Supreme Court wants the federal government's opinion on whether to hear a case (whether to grant a petition for certiorari), it asks. The Court will issue a CVSG (a Call for the View of the Solicitor General)—an invitation that OSG will take as a command to file a brief on the cert-worthiness of a case for review. OSG will then offer its take on whether the Court should hear the case—including whether the issue is of great importance requiring the Court's review, whether the case is a good vehicle for the Court to consider that important issue—and what the resolution should be if the Court does hear the case. The Court very often agrees with (or is persuaded by) OSG's recommendation.[5]

In this case, OSG did not wait for the Supreme Court to ask for its views, and it filed its brief in support of the defendant companies' request for Supreme Court review just weeks after the petition was filed.[6] OSG's quick and unsolicited brief suggests that this administration is eager to halt lawsuits like Boulder's, eliminating state and local governments' ability to impose liability on companies whose actions or products have contributed to climate change effects. It is difficult to say how much weight the Court will give the United States' position.[7] Whatever weight the Court gives it OSG's unprompted filing appears to be part of Trump administration's efforts to end climate liability cases as part of its broader effort to encourage fossil fuel production and scale back regulation of GHG emissions.

The United States' shifting approach

The United States' brief urging the Supreme Court to hear *Boulder* is not just procedurally unusual, it is a change in its position on and approach to state climate tort cases before the Court. While in

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[3] Petition for a Writ of Certiorari, *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County*, No. 25-170 (Aug. 8, 2025).

[4] *See* Patricia Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support From the Federal Government in Supreme Court Cases*, 10 JOURNAL OF APPELLATE PRACTICE AND PROCESS 209, 223–24 (2009) (describing why the Solicitor General only "infrequently" files unsolicited briefs regarding certiorari, and the "weighty presumption against such filings").

[5] Adam Feldman, *Comparing Cert Stage OSG Efforts Under Obama and Trump*, EMPIRICAL SCOTUS (June 5, 2019), https://empiricalscotus.com/2019/06/05/cert-stage-osg/ (showing that in cases where the Court issued a CVSG, the Court agreed with the Obama Solicitor General's recommendation to grant certiorari 92% of the time and the Trump Solicitor General's recommendation 100% of the time as of that date).

[6] In contrast, after the Court issued a CVSG about whether it should hear *Boulder* in 2022, OSG filed its brief more than five months later.

[7] *See* Millett, *supra* note 4, at 223 ("if the case is not one in which the Court believes that the Solicitor General's views would contribute distinctively to the certiorari debate, then the amicus brief is less likely to carry its usual weight").

similar recent cases OSG has generally encouraged the Court to not hear these cases or left open the possibility that some claims might be available, its position today is a clear invitation for the Supreme Court to shut down such cases. Below I describe the United States' position in three such recent cases, highlighting changes in OSG's approach to the *Boulder* petition.

BP v. Mayor & City Council of Baltimore (November 2020 brief)

OSG strategy (Trump administration): After a federal appeals court held that a climate tort case belonged in state court, the Supreme Court did not ask the United States' views on whether to hear an industry appeal, and the United States did not offer its opinion about whether the Court should do so. OSG did file an amicus brief on the merits of the case, raising questions about federal preemption of state-law climate change tort claims, even though those questions were not necessary for the Court to resolve the appeal. OSG suggested, but did not forcefully argue, that the Clean Air Act preempts state tort claims about climate change effects.

Case background: Baltimore sued 26 oil and gas companies in state court under state law, seeking damages related to climate change effects. The defendant companies sought to move the case to federal court, but the federal district court agreed with Baltimore that its case belonged in state court. Reviewing that decision, the Court of Appeals for the Fourth Circuit decided that it could only consider one of the companies' many theories for why the case should stay in federal court, and it rejected that theory. The companies sought Supreme Court review, arguing that the Fourth Circuit should have considered all the arguments for moving the case to federal court, including that the Clean Air Act preempts these kinds of state-law tort claims. The Supreme Court agreed to hear the case without asking for the United States' view. The United States then weighed in as an amicus on the merits, agreeing with the defendant companies that the Fourth Circuit should have considered all theories of federal jurisdiction.[8] In that context, the United States suggested that any claims regarding interstate pollution would be inherently federal in nature and that the Clean Air Act preempts such claims.[9] Although industry had made a similar argument in its brief, that issue was not directly before the Supreme Court, which had granted review only on a narrow question about the scope of what the Fourth Circuit should have considered on appeal from the district court. The Court ruled in industry's favor without addressing the preemption question.[10]

Suncor Energy v. County Commissioners of Boulder County (March 2023 brief)

OSG strategy (Biden administration): In *Boulder*'s previous trip to the Supreme Court,[11] the Supreme Court asked for the United States' views on whether to hear the appeal. OSG recommended that the Court not hear the appeal and instead let the Tenth Circuit's decision stand, sending the case back to state court. The United States also suggested that the Clean Air Act may not foreclose all state tort

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[8] Brief for the United States as Amicus Curiae Supporting Petitioners, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (Nov. 23, 2020).

[9] *Id.* at *26–27.

[10] *BP p.l.c. v. Mayor and City Council of Baltimore*, 593 U.S. 230 (2021).

[11] *Boulder* also involved two prior requests for Supreme Court intervention that did not result in United States filings.

claims about climate change effects, but more generally urged the Court to avoid answering those questions in this case because defendants had not made those arguments in the lower court.

Case background: After the Tenth Circuit sent Boulder's case back to state court, industry defendants sought Supreme Court review to reverse that decision and keep the case in federal court. The Court asked the United States to provide its view on the case, and OSG urged the Court not to hear the case.[12] Citing *American Electric Power v. Connecticut*, which held that federal common law claims for climate change damages are not available, OSG argued that Boulder's claims should not be understood as arising under federal common law because the Clean Air Act, which regulates air pollution, displaced all federal common law regarding air pollution.[13] OSG pointed out that whether the Clean Air Act displaced all state common law claims is a separate question answered by looking at the statute.[14] OSG acknowledged that Congress may so completely preempt a certain area of law to extinguish all possible state claims, but argued that complete preemption of civil claims is rare and must be explicit.[15] OSG urged that the Court need not determine whether the Clean Air Act accomplished this "rare" and "explicit" complete preemption because defendants had not raised the argument that the regulation of greenhouse gas emissions under the Clean Air Act preempted any state-law claims for damages related to those emissions.[16] The Supreme Court declined to hear the case, as OSG suggested.[17]

Sunoco LP v. City & County of Honolulu (December 2024 brief)

OSG strategy (Biden administration): The Supreme Court asked for the United States' views on whether it should hear an industry appeal, and OSG recommended that the Court decline review, leaving intact a state court decision allowing state climate tort claims to proceed. The United States acknowledged some tension between the Clean Air Act and some state tort claims, but it argued that marketing-related tort claims do not present a conflict with the Clean Air Act. It avoided taking a position on whether the Constitution itself forbid such claims and urged the Court to also avoid that question.

Case background: Honolulu's lawsuit claimed under state law that fossil fuel producers, distributors, and sellers had failed to warn about climate change harms associated with their products. After the Hawaii Supreme Court ruled that these tort claims could proceed, industry defendants sought Supreme Court review. The Supreme Court asked OSG to provide its views on whether federal (and not state) common law properly governs Honolulu's claims or if the Clean Air Act preempted such claims. OSG first pointed out that although the industry petitioners argued to the Supreme Court that the Constitution itself barred Honolulu's state-law claims, industry had not made that argument in the lower courts, and so the Court need not consider it (and OSG accordingly did not take a position

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[12] Brief for the United States as Amicus Curiae, *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (Mar. 16, 2023).

[13] *Id.* at *11–12 (citing *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011)).

[14] *Id.* at *13–14.

[15] *Id.* at *15.

[16] *Id.* at *16.

[17] *Suncor Energy (U.S.C.) Inc. v. Board of County Commissioners of Boulder County*, 142 S. Ct. 1795 (2023).

on the issue).[18] OSG argued that the Clean Air Act displaced any federal common law on greenhouse gas emissions, and that industry had not identified any federal common law on deceptive marketing claims like Honolulu's.[19] OSG acknowledged the Supreme Court's holding in *International Paper v. Ouellette* that state claims regarding water pollution discharged in another state would frustrate the federal system of water pollution regulation set up in the Clean Water Act, such that the Clean Water Act preempted state-law claims (reserving state-law claims against in-state discharges).[20] But OSG argued that deceptive marketing claims like Honolulu's did not similarly constitute an obstacle to the regulation of air pollution under the Clean Air Act.[21] The Supreme Court decided not to hear the case.[22]

Suncor Energy v. County Commissioners of Boulder County (September 2025 brief)

OSG strategy (Trump administration): In contrast to the above cases, the United States now urges the Supreme Court to hear industry defendants' request for review even though the Court did not ask for OSG's views. Its brief supporting review is a full-throated version of the position the first Trump administration suggested in *BP v. Mayor & City Council of Baltimore*. The United States strongly urges the Supreme Court to hear the case and shut down tort claims related to climate change effects on constitutional and statutory grounds.

Case background: In supporting industry's request that the Supreme Court reverse a Colorado Supreme Court decision allowing state climate tort claims to proceed, OSG takes strong positions on issues it avoided during the Biden administration. For example, in contrast to its *Honolulu* brief that avoided constitutional questions, OSG argues that "each State's equal dignity and sovereignty under the Constitution" means that state law almost never applies to conduct outside that state's territorial limits. OSG acknowledges that one exception would be the rare instance where there is a direct and traceable connection between the out-of-state conduct and the in-state harm, but OSG urges there is no such connection between greenhouse gas emissions in one state and climate change harms in another.[23] And whereas OSG steered clear of the question whether the Clean Air Act itself preempts state-law nuisance claims when opposing the last *Boulder* petition, OSG now argues that just as the Supreme Court held in *Ouellette* that the Clean Water Act preempts state-law suits concerning the discharge of pollutants in another state, the Clean Air Act preempts the application of state tort law to greenhouse gas emissions outside that state.[24] OSG further argues Boulder cannot avoid preemption by bringing claims that target the marketing and supply of fossil fuels, rather than emission of greenhouse gases. Because resolving Boulder's claims against producers would require judges to determine whether levels of greenhouse gas emissions were unreasonable, and the Clean

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[18] Brief for the United States as Amicus Curiae, at *12–13, *Sunoco LP v. City & County of Honolulu*, Nos. 23-847, 23-952 (Dec. 10, 2024).

[19] *Id.* at 14.

[20] *Id.* at 17–18 (citing *International Paper v. Ouellette*, 479 U.S. 481 (1987)).

[21] *Id.* at 18.

[22] *Sunoco LP v. City & County of Honolulu*, 144 S. Ct. 2627 (2024).

[23] Brief for the United States as Amicus Curiae Supporting Petitioners, at *13–14, *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County*, No. 25-170 (Sept. 11, 2025).

[24] *Id.* at *16–17

Air Act reserves to EPA and source states the authority to answer that question, OSG argues that the Clean Air Act preempts those claims.[25]

The table below illustrates OSG's shifting strategy and position across these cases:

Case	Supreme Court CVSG?	OSG recommend Court grant review?	Position on preemption?	Address constitutional argument?
BP (Trump admin.)	No	No position	Suggested Court reach and find preemption, though not directly at issue	No
Boulder (Biden admin.)	Yes	No	Suggested against complete preemption, urged avoidance	No
Honolulu (Biden admin.)	Yes	No	Suggested against complete preemption, distinguished particular claims at issue	No, avoided and urged Court to avoid
Boulder (Trump admin.)	No	Yes	Forcefully argues for preemption, declines to distinguish particular claims at issue	Yes, argues Constitution prevents state claims

Questions about interaction with EPA's pending Endangerment Finding rule

OSG's brief encouraging the Supreme Court to review *Boulder* and shut down climate tort cases does not address a significant change that may be soon coming to federal greenhouse gas regulation. EPA has proposed rescinding its 2009 Endangerment Finding—the finding that greenhouse gas emissions endanger public health and welfare—that provides the foundation for regulating these emissions under the Clean Air Act. As EELP's analysis of the proposal explains, EPA has presented several potential rationales that it may use if it rescinds the Endangerment Finding. If EPA asserts that the Clean Air Act does not allow the agency to regulate greenhouse gas emissions, climate tort claimants may argue that this changes the analysis of whether the Clean Air Act preempts state-law (or federal-law) tort claims.

More specifically, the potential interaction of an Endangerment Finding rescission and Supreme Court review in *Boulder* raises several questions:

- If EPA decides that it lacks authority under the Clean Air Act to regulate greenhouse gas emissions, how will litigants argue that interpretation affects the Supreme Court's rationale in *American Electric Power v. Connecticut*, in which the Court rejected federal common law claims for climate change harms because the Clean Air Act delegated authority to EPA to regulate those emissions?
- How would a new interpretation of the Clean Air Act through a repeal of the Endangerment Finding affect analysis under *Ouellette*, where the Court looked closely to the text and scope

[25] *Id.* at 17.

of the relevant statute before deciding that it preempted most potential state-law claims involving pollution.

- Will EPA craft an Endangerment Finding rescission rationale that attempts to avoid these questions or otherwise undermine its arguments in *Boulder*?

Whatever theory it uses, if EPA finalizes a rescission of the Endangerment Finding, we expect that legal challenges will follow. That litigation may well take years to resolve, with the question of federal regulation of greenhouse gases in limbo until resolution.

Looking ahead

At this moment, much is unknown. We do not know whether the Supreme Court will hear *Boulder*. We also do not know whether EPA will finalize its proposed rescission of the Endangerment Finding, when it will do so, or what rationale it will use. We do not know whether courts will uphold EPA's final rule in the legal challenges we expect to follow. Because it could take years for resolution of that expected litigation, the Supreme Court could easily resolve *Boulder* while Endangerment Finding litigation is pending, potentially relying on a regulatory landscape subject to dramatic shifts. OSG's brief does not acknowledge these complications that might ordinarily counsel against Supreme Court review.

OSG's unsolicited amicus brief urging the Supreme Court to hear this case is consistent with the Trump administration's broader strategy of deregulating greenhouse gas emissions at the federal level and also preventing states from taking steps to fill that regulatory void.[26] As OSG emphasized in its brief, *Boulder* is just one of many pending cases involving state tort claims involving climate change harms, and the administration is keen to prevent those cases from proceeding.

We will be watching how EPA finalizes its Endangerment Finding proposal, whether the Supreme Court grants review in *Boulder*, and, if so, how the rule and the case intersect.

[26] Indeed, the Trump administration has also sued states to prevent them from bringing such suits and has sued states to prevent other states to invalidate their "climate superfund law." *United States* v. *Michigan*, No. 25-cv-496 (W.D. Mich., filed Apr. 30, 2025); *United States* v. *Hawaii*, No. 25-cv-179 (D. Haw., filed Apr. 30, 2025); *United States* v. *New York*, No. 25-cv-3656 (S.D.N.Y., filed May 1, 2025); *United States* v. *Vermont*, No. 25-cv-463 (D. Vt., filed May 1, 2025).