On Monday, the U.S. Supreme Court agreed to take up the Boulder v. Suncor Energy case, one of the growing set of state-law nuisance and consumer protection cases filed by states and municipalities against fossil fuel companies for harms from climate change. The Court will review the Colorado Supreme Court's decision to allow the case to proceed past a motion to dismiss. For a few reasons, we're in for a real ride on this one.

In this case, Boulder County alleges that a set of fossil fuel companies doing business there have long misrepresented the climate change risks of their products. The lawsuit asserts state law claims including public and private nuisance, trespass, unjust enrichment, and civil conspiracy, and seeks damages.

The fact that the Justices decided to take this case will be worrisome to any similarly-situated plaintiffs nationally, given that this Supreme Court can be trusted on climate change topics about as far as I could throw its marbled house. California is one of many states with a pending lawsuit against fossil fuel companies, alleging statewide climate change-related harms. The USSC granted cert on a few questions, among them:

> [w]hether federal law precludes state-law claims seeking relief from injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on global climate.

In their petition for review, industry lawyers argue that federal law does not allow Boulder to bring claims under state law concerning harms stemming from greenhouse gas emissions and global climate change. In their view, Boulder "cannot make energy policy for the entire country. . . . [S]tate law cannot impose the costs of global climate change on a subset of the world's energy producers chosen by a single municipality." It's easy to imagine a handful of conservative Justices itching to ride that set of ideas pretty far.

But here's the part that has me spinning a bit. The fact that this cert grant comes on the tails of the Endangerment Finding rescission makes the case even more fraught — and there's a way in which the rescission could *undermine*, not strengthen, Boulder's arguments. (This runs contrary to the general — and generally correct — thinking that the rescission likely strengthens state law claims and authorities.) Here's why:

- Industry defendants make the argument (among others) that federal common law preempts Colorado's state law claims here, requiring dismissal of Boulder's case. This argument goes: Plaintiffs can't bring claims like this under state law, because claims like this (related to harms from interstate and out-of-state air emissions) are the sole province of federal common law.
- That industry argument was rejected by Colorado's Supreme Court in part because of Clean Air Act climate authority. The Colorado court concluded, in line with firm USSC precedent, that there is no federal common law related to interstate greenhouse gas emissions, because the Clean Air Act statute displaced any such federal common law — by giving EPA the authority to regulate greenhouse gases. No federal common law, no preemption. State law claims can go forward. (The Colorado court also separately concluded that the Clean Air Act does not itself preempt Boulder's claims.)
- But if EPA no longer has the statutory authority to regulate greenhouse gases, as it claims in the Endangerment Finding rescission, does federal common law spring back to life? And — if so — does this strengthen industry's preemption arguments?

A corollary, of course, is that if federal common law nuisance claims spring back to life, industry defendants could face a new swath of lawsuits based on federal law claims. (Think AEP v Conn redux.) The rescission might also increase state power in a range of other ways, including to explore state-created vehicle emission standards, as both Dan and Ann have noted (here and here). But none of that would particularly help the Boulder plaintiffs, or others like them, who have based their strategy around state law claims. Those plaintiffs certainly have good counterarguments–such as whether federal common law exists in this arena even after the rescission, and whether (if it does) it should preclude state law consumer-deception claims. But plaintiffs' lives have just become undeniably more complex.