

The Supreme Court heard oral arguments today in [*Suncor Energy v. County Commissioners of Boulder County*](#). At issue is whether the city and county of Boulder can move forward with its state court case against defendants Exxon Mobil Corporation and Suncor Energy for allegedly deceiving the public about their products' role in climate change. Some three dozen local governments and states throughout the United States have filed similar lawsuits in state court against fossil fuel companies over their alleged deception and false advertising. Although none of these cases have yet gone to trial, the U.S. Supreme Court decided to review Boulder's case at the request of the oil company petitioners.

There is much to unpack about the arguments and how the justices received them. But I first want to highlight an argument that went largely unmade, one that may matter as the justices decide the case. (You can [read or hear](#) the arguments at the court's website.)

Several justices pressed the idea that a tort suit is regulation by another name. Justice Barrett put it most directly: "Everybody agrees that state tort law is a form of regulation." Justice Kavanaugh warned that suits like Boulder's could "bankrupt" defendants. Chief Justice Roberts asked whether the suit was "an attempt to evade" the Court's precedents on emissions. Boulder's counsel answered that a damages award doesn't prohibit anything; it just requires defendants "to internalize a portion of the cost of their activities." That is true. But it invites a response the Court has given before: damages regulate conduct too.

There's another answer: The Supreme Court has always recognized that tort verdicts influence behavior, and it has **never** treated that as a reason to wipe out state remedies Congress chose to preserve. That's why, as I told Mother Jones in a [preview article](#), it's useful to see *Suncor* as a tort case rather than as a climate lawsuit. From nuclear power to tobacco to pesticides, the Court has held that federal regulation and state compensation can coexist. I'll expound on my reasoning below. First, let's turn to what was actually argued.

Assessing the Arguments

The oil companies' broadest theory had a bad day, but narrower ones are very much alive.

Several justices resisted the idea that the Constitution's structure alone bars state climate suits. Justice Kagan asked of the companies' "plan of the Convention"

theory: “Where’s the text for that? Where’s the support for that? Where’s the precedent for that? Where’s the *anything* for that?” Justice Barrett called the companies’ retreat to constitutional structure “a little slippery.” Justices Gorsuch, Sotomayor, and Jackson also pressed hard on it.

The real fight was over two narrower routes.

The first was Justice Kavanaugh’s. In his view, four precedents (*Milwaukee I*, *Milwaukee II*, *International Paper Co. v. Ouellette*, and *American Electric Power v. Connecticut*, or *AEP*) make “crystal-clear that interstate air and water pollution are matters for federal law unless Congress specifically preserves state law.” On that reading, the Clean Air Act preserves suits under the law of the state where the pollution originates (the “source state”). It does not preserve suits under the law of the injured state, like Colorado. When petitioners’ counsel pointed out that Boulder is relying on Colorado law, Kavanaugh replied, “That resolves this case.”

The second was Justice Kagan’s. She pointed to *AEP*’s closing paragraph, which says that whether a state suit is available depends on the preemptive effect of the Clean Air Act. That makes this an ordinary question of statutory preemption, not constitutional structure. But Kagan also suggested to Boulder’s counsel that the Clean Air Act might be “the more natural and simpler route towards [the companies’] view of what should happen here.”

So, both narrower routes could still limit the options for Boulder. The open question is how much of the case survives. It’s worth noting that the foreign-affairs framing that dominated op-ed pages in the lead-up to argument drew no questions from the justices. It came up only in petitioners’ opening and, briefly, in rebuttal.

So, what can we tell from the questions each justice asked?

Justice by Justice

Justices Sotomayor and Jackson: seem firmly with Boulder. Sotomayor: (1) noted the companies hadn’t raised their extraterritoriality argument below until their reply brief; (2) questioned the Court’s jurisdiction, and asked whether it should certify the question of Colorado procedure to the Colorado Supreme Court rather than decide it; (3) said she didn’t know that “we’ve ever talked of spending money on litigation as a constitutional injury”; (4) told Boulder’s counsel that this case looks like *Commonwealth Edison v. Montana*, which upheld a state coal tax despite the Clean

Air Act: "Isn't this your case?"

Jackson called the case premature, noting the companies' other federal defenses are still pending in state court. She said the companies' extraterritoriality test "seems very close to a causation standard" and asked why they were trying to "constitutionalize" it. She also asked the Principal Deputy Solicitor General, Sarah Harris, whether Colorado, home to Suncor's refineries, is itself a source state. That question matters, because *Ouellette* preserves source-state law.

Justice Kavanaugh: firmly with the oil companies. He nearly coached the Solicitor General's office toward a stronger argument: interstate pollution is federal unless Congress preserves state law, so why wasn't that the lead? He answered Kagan's tobacco-and-opioids question by saying air and water pollution are different. He asked why a tort suit should be treated differently from a state statute doing the same thing. He closed by quoting *AEP*'s line that an expert agency is better equipped than "individual district judges" to address climate change, and asked whether the same isn't true of "a six-person state jury in Boulder."

Justice Barrett: leaning toward the companies, but by a narrower route. She rejected the companies' constitutional-structure theory. She read the Clean Air Act's savings clauses as preserving, not authorizing, preexisting state authority: "It says 'preserve.' And a saving clause suggests that you're saving something that already exists."

But she described that preexisting state authority as "much more circumscribed." She agreed the Clean Air Act did not make state law "spring into effect." And she embraced Kavanaugh's framing: "I think Justice Kavanaugh is right. It's also simply in our precedent. We've called it an enclave of federal common law."

To Boulder, she posed a hypothetical Colorado statute capping emissions in the other 49 states. When Boulder's counsel agreed such a statute would be invalid, she asked: "So, the same thing can happen through the tort suit, though?"

Barrett also raised EPA's recent position that the Clean Air Act does not authorize regulating greenhouse gases from motor vehicles. Her point was not that this helps Boulder. If the Act no longer displaces federal common law, she suggested, the issue reverts to federal common law, and a federal court could decide there is no cause of action. She seems prepared to rule for the companies without their constitutional theory.

Justice Kagan: with Boulder on method, uncertain on outcome. She pressed the companies hardest. She noted the suit resembles the 1990s tobacco suits and the more recent opioid litigation: “This is chapter 3. So, if this is chapter 3, were chapters 1 and 2 also preempted?” She added that the companies may have a weaker claim on the merits, “but this is the same kind of lawsuit against the same kind of actors for the same kind of harm.” She also challenged the constitutional theory and pointed to AEP’s closing paragraph.

With Boulder’s counsel, though, she asked: “You really read *Milwaukee I* to allow state regulation of air and water to any significant degree?” She also said Boulder’s suits “are so related to what kinds of emissions are appropriate.” When Boulder’s counsel argued that EPA’s disclaimer of authority makes Clean Air Act preemption hard to decide, she replied that “the statute is the statute.”

Her tobacco analogy suggests sympathy for the deception claims. Her Clean Air Act questions suggest skepticism about claims based on production and emissions. One shouldn’t count her as a vote to keep every claim.

Justice Gorsuch: seems skeptical of the companies’ theory, but hard to read. His Texas hypothetical exposed a gap in petitioners’ logic: they would object even to Texas law applied to a Texas source. He then pressed the Solicitor General’s office. EPA, he noted, has disclaimed the power to regulate greenhouse gases “not just from motor vehicles but more recently from stationary sources too.” If the Clean Air Act displaced federal common law and state law is also barred, “nobody can sue at all?” Harris answered, “I think that’s correct.” That skepticism fits Gorsuch’s opinions in *National Pork Producers v. Ross* and *Virginia Uranium*. He asked Boulder’s counsel whether this is “the same thing as the classic car manufacturer case.”

Chief Justice Roberts: seems skeptical of both sides, and harder on Boulder by the end. He pressed petitioners’ counsel with an ordinary tort hypothetical: if you throw a rock over the border and hit someone, you can be sued there. He told the Solicitor General’s office that familiar mass-tort and internet cases seem to be “precisely what’s going on here.” But with Boulder’s counsel, he raised the prospect of municipalities in every state copying Boulder’s pleadings. He then asked, “isn’t your suit an attempt to evade those decisions? It’s really ... an effort to reduce emissions.”

Justice Thomas: uncertain but may be leaning toward the companies on

the merits. He opened both petitioners' and the government's arguments by asking about jurisdiction, but he often opens that way, so I wouldn't read much into it. More telling, he asked Boulder's counsel whether anything limits whom plaintiffs can sue, including large retailers. Counsel acknowledged, "Nothing in our theory prevents that."

Possible Outcomes

Since our previous [Legal Planet Guide](#) offered possible outcomes—always speculative, of course—here's how it looks after oral arguments, roughly from most to least likely:

1. **The companies win on a narrower ground than constitutional structure.** That ground would be either Kavanaugh's precedent-based route (only source-state law is preserved) or Kagan's Clean Air Act preemption route. Kavanaugh, Barrett, Roberts, and Thomas appeared inclined in this direction. With Justice Alito recused, they would need a fifth vote from Gorsuch or Kagan. The biggest question is whether such a ruling would reach the deception claims, which would be a real reach.
2. **A split result:** deception claims survive, while claims based on production and emissions do not. Kagan's tobacco analogy points this way. So does Boulder counsel's repeated emphasis that the deception claims fall "far outside anything the Clean Air Act is designed to deal with." The Court would send the deception claims back to Colorado.
3. **A 4-4 tie.** If neither Gorsuch nor Kagan joins the four justices who seemed sympathetic to the companies, the Colorado Supreme Court's ruling stands, and nothing is decided nationally.
4. **Dismissal for lack of jurisdiction.** Justices Sotomayor and Jackson pressed this, but few other justices engaged with it.
5. **A broad win for the companies on constitutional structure alone.** This looks unlikely after today.

Another answer to the "tort suits are regulation" objection

As I said at the outset, Justice Barrett is right in one sense: "everybody agrees" tort law regulates, even if it is intended to address actual harms not addressed by statutes. However, the Court has **never** treated a tort remedy's regulatory effect, by itself, as a reason to preempt it. Here's my reasoning:

- ***Bates v. Dow Agrosiences (2005)*** rejected the inducement theory: “an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.” That is also the answer to Justice Barrett’s hypothetical. A statute capping emissions in other states dictates a standard. A damages award leaves the defendant free to choose how to respond.
- ***Silkwood v. Kerr-McGee (1984)*** acknowledged that punitive damages have regulatory effects even in a field the federal government exclusively regulates. Congress, it held, intended “to tolerate whatever tension there was” between federal safety regulation and state compensation. That is the answer to Justice Kavanaugh’s question about juries and expert agencies. In *Silkwood*, a jury was allowed to award damages in the nuclear field, where the Nuclear Regulatory Commission is the expert regulator. ***Goodyear Atomic Corp. v. Miller (1988)*** built on *Silkwood*. It upheld an enhanced state workers’ compensation award for a safety violation at a federal nuclear facility, treating the award’s incidental regulatory effect as something Congress was willing to accept.
- The Clean Air Act’s text anticipates this. **Section 304(e)** provides that nothing in the citizen-suit provision restricts any right under statute or common law “to seek any other relief,” and **Section 116** preserves state authority more broadly. Congress knew common law remedies affect conduct and preserved them anyway.
- ***Ouellette*** is less hostile to Boulder than the companies suggest. It held that the injured state’s law was preempted because it conflicted with the Clean Water Act’s permitting scheme, not because damages are regulation. And it preserved suits under source-state law. That makes Justice Jackson’s question important: Colorado, home to Suncor’s refineries, may itself be a source state.
- The deception claims avoid the problem. ***Cipollone and Altria Group v. Good*** held that a general duty not to deceive is not a regulatory requirement about the underlying product, even though fraud verdicts also affect conduct. That is why Justice Kagan’s “chapter 3” question was so pointed.
- The cross-border concern has a narrower remedy. If the worry is damages reaching out-of-state conduct, ***BMW v. Gore*** and ***State Farm v. Campbell*** already supply the tool: limit damages to the harm suffered in the state. Nothing in those cases supports barring the claims entirely.

That’s my take. What did you think? Share in the comments.