SUNCOR V. BOULDER COUNTY AND JUDICIAL COLLECTIVIZATION

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The upcoming Supreme Court case *Suncor v. Boulder County* presents a misunderstood challenge to the Supreme Court. The case involves an effort by Boulder, Colorado, to hold oil companies civilly liable for supposed effects of their out-of-state emissions. It is one of dozens of examples of "climate lawfare" being undertaken by states, localities, and private plaintiffs throughout the country. The proponents of this litigation are clear about their goal: it's not money damages or other traditional forms of tort remediation, but rather the bankrupting and control of oil companies in order to enact climate policies they can't achieve politically.

The legal theories espoused in climate lawfare are novel, aggressive, and almost always ineffective. Defendants have a strong track record of winning climate lawfare suits across the country, in liberal and conservative jurisdictions alike.

Hence, if the Supreme Court sides with Suncor, it would not be—as Boulder's defenders would claim—a potential giveaway to the oil and gas industry. Instead, it would merely be a recognition of the status quo.

On the other hand, if the Supreme Court does not side with Suncor, it will fling open the courthouse doors to a new and unprecedented form of judicial activism. It would implicitly authorize states and localities around the country to take control of national oil and gas policy through their courts. It would be the single greatest arrogation of political power to the judiciary since the Warren Court in the service of judicial collectivization.

I. THE GOAL OF CLIMATE LAWFARE IS CONTROL

While scores of climate lawfare suits have been brought by a variety of litigants,[1] they have one thing in common: they seek to use state courts to impose control over oil and gas companies.

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[1] *See, e.g.*, *infra* notes 12–19 and accompanying text.

Carbon emissions and their alleged externalities have long been a matter of public concern for the political branches in the United States. Democratic administrations at the state and federal level frequently enact policies to regulate them under their traditional powers. Congress has enacted significant legislation seeking to curb emissions, such as the so-called Inflation Reduction Act of 2022,[2] and has declined to pass more prescriptive legislation like "Cap and Trade."[3] (Indeed, Congress has only enacted the provision of "carrots" in climate policy and has consistently rejected coercive "sticks.") Congress, in this space, has also taken aim at efforts it has deemed misguided, such as California's electric vehicle mandates.[4] The Obama and Biden administrations prioritized policies that purport to address climate change,[5] while the Bush and Trump administrations have favored energy abundance.[6]

In short, the political process in the political branches of government has been very dynamic on the question of carbon emissions. Because these are complex areas of public policy with unsettled science and competing public goods, it should come as no surprise that the political process has yielded victories and defeats to all sides.

Climate lawfare seeks to short-circuit that process via the judiciary. One side in the dispute over climate policy can't get what it wants politically, so it is trying to get courts to impose it instead.

This isn't a matter of speculation; one of the attorneys who has been involved in the Boulder case, David Bookbinder, said as much at a Federalist Society panel. He explained, "Essentially, the tort liability is an indirect carbon tax. You sue an oil company, an oil company is liable, the oil company then passes that liability on to the people who are buying its products."[7] Bookbinder went on, "In some sense, it is the most efficient way—the people who buy those products are now going to be paying for the cost imposed by those products."[8]

Isn't that what the political process is for? The problem is that the political process is, at best, uncertain. So far, climate activists have failed to get significant traction for their program. Beyond that, the political process is an iterative give and take. It requires

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[2] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

[3] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

[4] *See, e.g.*, Pub. L. No. 119-16, 139 Stat. 66 (2025).

[5] *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

[6] *See, e.g.*, Exec. Order No. 14,213, 90 Fed. Reg. 15,225 (Feb. 14, 2025).

[7] Kamden Mulder, *Lawyer Behind Colorado Climate Suit Says the Quiet Part Out Loud: Litigation Is a Tax on Oil Companies and Consumers*, NAT'L REV: CAP. MATTERS (Oct. 20, 2025), https://www.nationalreview.com/news/lawyer-behind-colorado-climate-suit-says-the-quiet-part-out-loud-litigation-is-a-tax-on-oil-companies-and-consumers/.

[8] *Id.*

balancing many, often competing trade-offs and considerations. Litigation can push those considerations aside. As Bookbinder admitted, "I'd prefer an actual carbon tax, but if we can't get one of those, and I don't think anyone on this panel would [dis]agree Congress is likely to take on climate change anytime soon—so this is a rather convoluted way to achieve the goals of a carbon tax."[9]

Of course the carbon tax is only half of the way to get control. The other is to force the oil and gas companies into bankruptcy. As Bookbinder observed on that same panel, "[O]nce the first plaintiff gets a final, non-appealable judgment, no one else gets paid because every defendant in all of these cases immediately declares bankruptcy because they have to."[10] This would then result in government control of the oil industry because it would "make sure that the assets are then used for the benefit of the creditors [i.e. the government]. Those assets will continue to produce."[11]

In other words, it's not about traditional tort law but rather a public-policy exercise designed to take government control over a key industry via the courts. It's judicial collectivization.

II. Climate lawfare has been wildly unsuccessful

While the goal of climate lawfare is judicial collectivization, it has so far been wildly unsuccessful. The theories are so novel and so aggressive that they have failed across the country, including in liberal jurisdictions.

Defendants in climate lawfare cases have an impressive string of victories. Some cases have been in conservative jurisdictions, like South Carolina (Charleston brought suit),[12] but generally these suits have been brought in liberal strongholds and the results are little different.

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[9] *Id.*

[10] Ed Whelan, *'Every Defendant [Oil Company] Declares* Bankruptcy', Nat'l Rev: Bench Memos. (Oct. 20, 2025), https://www.nationalreview.com/bench-memos/every-defendant-oil-company-declares-bankruptcy/.

[11] *See* Emma Colton, *'Woke lawfare' exposed: Attorney unmasks carbon tax intent behind massive oil litigation*, Fox News (Nov. 11, 2025), https://www.foxnews.com/politics/woke-lawfare-exposed-attorney-unmasks-carbon-tax-intent-behind-massive-oil-litigation.

[12] *See, e.g.*, City of Charleston v. Brabham Oil Co., No. 2020-CP-10-03975 (S.C. C.P. Aug. 6, 2025).

Climate lawfare cases have floundered in New York,[13] New Jersey,[14] Maryland,[15] Delaware,[16] Pennsylvania,[17] Michigan,[18] and Puerto Rico.[19] The Supreme Court of liberal Maryland went so far as to observe, "state common law has never applied to the conduct alleged by the local governments."[20] It treated a key claim from Baltimore as absurd, explaining, "We determine that the duty the local governments seek to impose is, indeed, a duty to warn the entire human race of the effects of climate change. . . . Finding such a duty would stretch tort law beyond any manageable bounds."[21] These are not jurisdictions predisposed to cut oil and gas companies slack. But the cases being brought are so extreme and aggressive that they can't even win in their hand-picked jurisdictions.

The problem the one Bookbinder identified: one final judgment and the game is up. The strategy is one of asymmetric lawfare where the defendants need to win everywhere and the plaintiffs only need to win once.

III. The Supreme Court should exercise judicial restraint against Boulder

In the face of this coordinated effort to use the courts as an arm of climate policy, the Supreme Court should exercise judicial restraint and rule in favor of Suncor. Judicial restraint, properly understood, is not about letting cases run wild. It's about keeping the courts to their proper constitutional function.

Doing so here requires decisive action by the Supreme Court. Proper judicial restraint is not judicial minimalism or ducking questions. As Judge Diane Sykes of the Seventh Circuit has argued, "[S]trong avoidance and deference doctrines are not the answer. They may serve prudential or political concerns, but they are not necessary to enforce the separation of powers and indeed may undermine that critical feature in our constitutional design."[22] This is especially the case at the Supreme Court because "[t]he Court's legitimacy arises from the source of its authority—which is, of course, the Constitution—

[13] *See, e.g.*, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021).

[14] *See, e.g.*, Platkin v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Law Div. Feb. 5, 2025).

[15] *See, e.g.*, Mayor & City Council of Baltimore v. BP P.L.C., No. 11 (Md. Mar. 24, 2026).

[16] *See, e.g.*, Delaware v. BP America Inc., No. N20C-09-097 (Del. Super. Ct. Jan. 9, 2024) (Order Granting in Part Defendants' Motion to Dismiss).

[17] *See, e.g.*, Bucks County v. BP P.L.C., No. 2024-01836 (Pa. Ct. Com. Pl. May 16, 2025).

[18] *See, e.g.*, Michigan v. BP P.L.C., No. 26-cv-00254 (W.D. Mich. Sept. 22, 2026).

[19] Municipality of Bayamón v. Exxon Mobil Corp., No. 3:22-cv-01550 (D.P.R. Sept. 11, 2025).

[20] Mayor & City Council of Baltimore, at *1(Md. Mar. 24, 2026).

[21] *Id.* at *75.

[22] Diane S. Sykes, *Minimalism and Its Limits*, CATO SUP. CT. REV. 17, 34 (2015), https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-1.pdf.

and is best preserved by adhering to decision methods that neither expand, nor contract, but legitimize the power of judicial review."[23]

Maintaining that legitimacy also involves the courts operating within their actual constitutional bounds. "Arrogating too much power to the judiciary," according to Judge Sykes, "distorts our politics and undermines our ability to democratically shape and alter our basic legal, social, and economic institutions."[24] In the case of *Suncor*, exercising supervisory control over lower courts in order to prevent their improper arrogation of political power is exactly what proper judicial restraint would require.

An example of unhelpful minimalism was seen in the early Trump administration. Faced with an avalanche of presumptively unappealable temporary restraining orders from liberal district courts, the Supreme Court ducked the issues as they came, preferring to let the "regular order" of litigation play out.[25] As a result, the duly elected administration found itself hamstrung by district judges all over the country as they ordered it how to execute the laws and spend money with shocking specificity.[26] Eventually this became untenable and the Court acted,[27] but only after months of trial judges setting themselves up as shadow cabinet secretaries. Judicial restraint properly understood entailed restraining rogue courts.

Another example was the recent *Monsanto v. Durnell* case, in which a 7-2 Court held that federal law preempts state-level failure-to-warn lawsuits regarding the pesticide Roundup.[28] The problem is that Monsanto first went to the Court on the case back in 2021 and 2022, where the Court then twice declined to take the case.[29] The statutory issue has persisted since 1984—during which time, in 2018, Monsanto ceased operating as an independent company. Eventually the Court took the case and delivered an

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[23] *Id.*

[24] *Id.*

[25] *See* Michael A. Fragoso, *In Defense of Amy Coney Barrett: An Examination of Her Record*, PUBLIC DISCOURSE (Mar. 17, 2025), https://www.thepublicdiscourse.com/2025/03/97396/ ("Here, it's the district courts that are being overtly political, and allowing them to do so by standing on legal formalities is itself a political choice, while restraining them—far from being political—would be consistent with sound process theory.").

[26] *See* Michael A. Fragoso, *Liberal trial judges, not Donald Trump, are inviting a constitutional crisis*, WASHINGTON REPORTER (Feb. 11, 2025), https://washingtonreporter.news/op-ed-mike-fragoso-liberal-trial-judges-not-donald-trump-are-inviting-a-constitutional-crisis/ ("But some of these orders go well beyond interfering with the executive by misapplying civil-service protections and in fact strike at the heart of Article II of the Constitution. Restricting the Senate-confirmed Treasury Secretary from reviewing information within his agency's control fundamentally frustrates his ability to "take care" that the laws be enforced. It's a staggering intrusion on presidential power from the judiciary.").

[27] *See* Trump v. J.G.G., 145 S. Ct. 1003 (2025).

[28] Monsanto Co. v. Durnell, 146 S. Ct. 2001 (2026).

[29] *See* Monsanto Co. v. Hardeman, 142 S. Ct. 2834 (2022) (cert. denied); Monsanto Co. v. Pilliod, 142 S. Ct. 2872 (2022) (cert. denied).

overwhelming victory for Monsanto. The problem is that in the intervening years the company suffered billions of dollars in business damage and countless jobs were lost wrought by the continuing litigation and its attendant press.[30] In a perhaps admirable desire to get the case just right, the Court delivered a hollow victory.

Similar dangers abound in *Suncor*, only with far greater potential consequences to the economy and national security. The perceived political stakes are high, which means the temptation to punt the case on technical grounds or otherwise kick the can down the road will be real. Doing so would compound the damage of *Monsanto* with that of the Trump TROs.

If the Court does not put a stop to Boulder's open efforts at judicial collectivization, it will be authorizing a political strategy that has so-far failed legally. Just as the Court implicitly authorized states, localities, and private parties to use the courts to wield executive power when it balked at stopping the Trump TROs, it will here encourage states, localities, and private parties to wield legislative power through the courts. If just one of those cases slips through the legal cracks, it will do lasting damage to the nation's energy industry. Because any such successful climate lawfare arguments will still be weak and novel, perhaps the Court would get around to fixing it in time. But, as with *Monsanto*, it may by then be too late. The bell can't be unrung.

The course of restraint, then, is to stop the strategy of judicial collectivization. Give climate policy back to elected policymakers and not litigants and activist judges.

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[30] *See, e.g.*, Adrià Calatayud, *Bayer Net Loss Widens on Weedkiller Litigation Charges*, WALL ST. J. (Mar. 4, 2026), https://www.wsj.com/business/earnings/bayer-net-loss-widens-on-weedkiller-litigation-charges-b697e3f8.