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Colorado Supreme Court Rules That Boulder's Tort-Based Climate Change Damages Lawsuit Will Proceed in State Court.

In its opinion released on May 12, 2025, Colorado Supreme Court Justice Richard Gabriel, writing for the majority, denied motions from ExxonMobil and three Suncor entities, allowing Boulder County and the City of Boulder to proceed in state court with their climate accountability lawsuit seeking damages and other relief for climate change injuries.[1]

Seven Years of State and Federal Court Rulings

The original complaint was filed seven years ago on April 17, 2018[2], seeking a jury trial, damages and other relief from the fossil fuel companies for climate change harms. The local governments alleged that the companies concealed and misrepresented the climate change impacts of fossil fuel products while continuing to market and sell the products, leading to injuries from extreme weather, wildfires, and other climate change injuries.

In terms of damages, the plaintiffs are asking for:

> Monetary relief to compensate Plaintiffs for their past and future damages and costs to mitigate the impact of climate change, such as the costs to analyze, evaluate, mitigate, abate, and/or remediate the impacts of climate change. . . .
>
> Damages to compensate Plaintiffs for past and reasonably certain future damages, including but not limited to decreased value in water rights; decreased value in agricultural holdings and real property; increased administrative and staffing costs; monitoring costs; costs of past mitigation

> efforts; and all other costs and harms previously described in this Complaint. . . . [and]
>
> [Costs of] remediation and/or abatement of the hazards discussed above by the Defendants by any other practical means.[3]

Preemption and Venue Are the Issues. No Damages or Injunctive Rulings Yet.

The Colorado Supreme Court's decision rejected the defendants' argument (and the arguments of the seven amicus briefs filed in the case[4] that state law is preempted. Thus, the claims need not proceed in federal court. The court also affirmed that those harmed by an altered climate have the right to legal recourse against those responsible – in state court.

But any substantive rulings related to damages and mandatory injunctive relief will have to await a jury trial and further trial court and appellate decisions. In Justice Gabriel's words:

> Although this case presents substantial issues of global import, the question before us is narrow: whether the district court erred in concluding that the common law tort claims brought by plaintiffs, the County Commissioners of Boulder County and the City of Boulder (collectively, "Boulder"), against defendants, Exxon Mobil Corporation, Suncor Energy USA, Inc., Suncor Energy Sales, Inc., and Suncor Energy Inc., may proceed under state law.
>
> Specifically, Boulder asserts claims for public and private nuisance, trespass, unjust enrichment, and civil conspiracy, and it seeks damages for the role that defendants' production, promotion, refining, marketing, and sale of fossil fuels has allegedly played in exacerbating climate change, which, in turn, has purportedly caused harm to Boulder's property and residents. Defendants contend that these claims are preempted by federal law.

And the court's ruling:

> We now conclude that Boulder's claims are not preempted by federal law and, therefore, the district court did not err in declining to dismiss those claims. Accordingly, we discharge the order to show cause and remand this case to the

district court for further proceedings consistent with this opinion. **In doing so, we express no opinion on the ultimate viability of the merits of Boulder's claims.** (Emphasis added.)

A Lengthy Appellate Back-and-Forth

Soon after filing the lawsuit, defendants "removed the case" to federal district court in Denver. The federal district court remanded it back to state court. The defendants appealed the federal district court's remand order to the U.S. Tenth Circuit Court of Appeals and also moved to dismiss the state court action for lack of personal jurisdiction and failure to state a claim. The state district court then "stayed the proceedings" pending resolution of the federal appeal.

After lengthy litigation in the Tenth Circuit and two *certiorari* petitions in the U.S. Supreme Court, on February 8, 2022, the Tenth Circuit affirmed the federal district court's remand order, and the case resumed in the Boulder County District Court.[5]

The Boulder County district court then considered (and denied) defendants' pending motions to dismiss. In their motion to dismiss for failure to state a claim, defendants argued that Boulder's claims were "displaced" or otherwise preempted by federal law.

The defendants argued that (1) the claims were governed by the federal common law of interstate pollution; (2) the federal Clean Air Act and other federal statutes preempted Boulder's claims; and (3) the federal foreign affairs power (which gives the federal government exclusive authority over foreign affairs) preempted the claims because the claims would impair the federal government's effective exercise of foreign policy.

Original Jurisdiction in the Colorado Supreme Court

Bypassing the Colorado Court of Appeals, the Colorado Supreme Court, recognizing that it was an extraordinary remedy "limited in its purpose and availability," then exercised original jurisdiction under C.A.R. 21 in order to "hear matters that present issues of significant public importance that we have not previously considered" and stating further:

> To date, we have not addressed the preemptive effect of federal law on state common law tort claims for harms related to climate change. Whether these claims may proceed against defendants has important implications for Colorado and its citizens. Moreover, other courts that have addressed similar questions have reached differing conclusions. Compare *City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1181 (Haw. 2023) (concluding that claims like those at issue in this case were not preempted), with *City of New York v. Chevron Corp.*, 993 F.3d 81, 85–86 (2d Cir. 2021) (concluding that claims like those at issue in this case were preempted). Thus, we believe that resolution of this issue warrants the exercise of our original jurisdiction under C.A.R. 21.

Rulings on the Defendants' Arguments

Federal Common Law. Stating that it is "axiomatic" that there is no "federal general common law," the court acknowledges that the U.S. Supreme Court recognizes narrower, more specialized areas of federal common law addressing matters within national legislative power, "as directed by Congress and when the basic constitutional scheme so demands." And one specific area "of previously recognized federal common law that is pertinent to the matter now before us concerned 'suits brought by one State to abate pollution emanating from another State.' "

After analyzing the precedent, the court states:

> In line with this settled precedent, we, too, conclude that the CAA [Clean Air Act] displaced the federal common law in this area, and, therefore, federal common law does not preempt Boulder's claims here. Instead, we must look to whether the CAA preempts Boulder's claims.

The Clean Air Act. Acknowledging that Congress has the power to preempt state law, the court made its determination guided by two tenets:

> (1) Congress's intent to preempt controls; and
>
> (2) Courts will not presume that federal law supersedes the states' historic police powers unless the law reveals Congress's clear and manifest purpose to do so.

Analyzing the three forms of federal preemption, *i.e.,* express preemption, field preemption, and conflict preemption, the majority concludes that the plaintiffs' claims are not preempted by either federal common law or the Clean Air Act.

Federalism Concerns Arising from the U.S. Constitution. The majority then addresses a series of other defenses that:

> appear to contend that Boulder's state law claims assert what were formerly federal common law claims involving interstate pollution and . . . federal common law or federalism concerns arising from the U.S. Constitution.

Rather than provide the detail here, I commit the reader to the ten pages of analysis by Justice Gabriel addressing each of those issues before concluding: "In sum, defendants' arguments do not convince us that federal law preempts Boulder's stated law claims in this case."

The Justice Samour Dissent – The Majority Gives Boulder the "Green Light to Act as its Own Republic." "A Patchwork of Inconsistent Local Standards That Will Beget Regulatory Chaos."

Colorado Supreme Court Justice Carlos Samour Jr. begins his dissent with "The Pledge of Allegiance states that the United States of America is 'one Nation under God, indivisible.'"

He continues: "Of course, in 2025, there is no dispute about our status: We are but one indivisible nation. Yet, the majority in this case gives Boulder, Colorado, the **green light to act as its own republic**." And "I would make the order to show cause absolute and **nip Boulder's state-law claims in the bud**." (Emphasis added.)

Rather than summarize his dissent, I commit the reader to the ensuing 27 pages of analysis. But I must include the entirety of his colorful conclusion (with his shout-out to one of my favorite rock bands, *Fleetwood Mac*):

> Given the number of local municipalities throughout the country that have already brought claims like those advanced by Boulder, given that more and more municipalities are joining this trend, and given further that a number of courts have now ruled that such claims may be prosecuted, I respectfully urge

the Supreme Court to take up this issue – whether in this case or another one.

My colleagues in the majority, like other courts, interpret Supreme Court precedent as permitting Boulder's claims. Respectfully, I believe that they misread those cases. I'm concerned that this decision will contribute to a **patchwork of inconsistent local standards that will beget regulatory chaos.**

To borrow from Fleetwood Mac's old hit song, the message our court conveys to Boulder and other Colorado municipalities today is that "**you can go your own way**" to regulate interstate and international air pollution. Fleetwood Mac, *Go Your Own Way*, on 27 Rumours (Warner Bros. Records Inc. 1977). (Emphasis added.)

In our indivisible nation, that just can't be right. I respectfully dissent.

This blog was drafted by John Watson, an attorney in the Spencer Fane Denver, Colorado, office. For more information, visit www.spencerfane.com.

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1 Plaintiffs: County Commissioners of Boulder County and City of Boulder. Defendants: Suncor Energy USA, Inc.; Suncor Energy Sales, Inc.; Suncor Energy Inc.; and ExxonMobil Corporation.

2 Court documents including original complaint filed in April 2018 and subsequent proceedings and briefs.

3 The lawsuit originated in state district court in Boulder County and included San Miguel County as a plaintiff. *See* Complaint filed April 17, 2018. In its ruling on January 25, 2021, the Boulder County district court denied the defendants' motion to transfer the City of Boulder and Board of County Commissioners of Boulder County's action to Denver County District Court but ruled that venue for the claims of the third plaintiff – the Board of County Commissioners of San Miguel County – would only be proper in San Miguel County.

Thus, appellate proceedings in the U.S. Tenth Circuit Court of Appeals, the U.S. Supreme Court, and ultimately the Colorado Supreme Court involved only the Boulder City and County entities.

4 Amicus briefs were filed in the Colorado Supreme Court by (1) the American Association for Justice and Colorado Trial Lawyers Association, (2) U.S. Chamber of Commerce, (3)

Environmental Law & Justice Scholars & Advocates, (4) National Association of Manufacturers, (5) Natural Resources Defense Council, (6) Professor Richard Epstein, Professor John Yoo, and Mountain States Legal Foundation, and (7) Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, Geoffrey Supran, and Union of Concerned Scientists.

[5] *See* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1246 (10th Cir. 2022).

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