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Boulder Has No Business Making Foreign Policy

The Supreme Court takes up a lawsuit against oil companies that far exceeds legitimate local authority.

By William P. Barr

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A Suncor refinery in Sarnia, Ontario. CARLOS OSORIO/REUTERS

When the Supreme Court returns for its new term on Monday, the first case it will hear is *Suncor Energy v. Boulder County*, which asks whether state and local governments may use state tort laws to impose liability on American companies for the effects of global climate change.

Boulder County and the city of Boulder sued Suncor and Exxon Mobil in a Colorado court, claiming their community has been harmed by global climate change. The plaintiffs seek damages for local harms. Liability would be based not on the company's actions in Colorado but on the extent its worldwide production and sale of fuels are found to have contributed to

greenhouse gases in the global atmosphere. A trial would give a local jury the authority to determine what share of global climate change each American company should be held responsible for. It is part of a wave of such litigation by left-leaning states and localities that aim at bankrupting fossil-fuel companies.

The defendants have several strong constitutional arguments: Our federal structure doesn't permit one state to regulate inherently interstate matters. Extraterritoriality principles prevent a state from applying its own law to impose liability for activities in other states or countries. The Clean Air Act assigns primary responsibility for regulating emissions to the Environmental Protection Agency, while preserving only limited state authority over in-state sources.

But one fundamental defect in Boulder's case hasn't received as much attention as it deserves: It intrudes directly into foreign policy, a field the Constitution commits to the federal government.

Boulder's complaint makes that plain. The city's claims are based on the global phenomenon of climate change and the atmospheric accumulation of greenhouse gases from every carbon source around the world. Its lawsuit therefore takes a position not merely on local environmental harms, but on how responsibility for an international problem should be allocated among American companies, foreign companies and foreign nations. That is foreign policy.

From the beginning, the Constitution was designed to ensure that the U.S. would speak with one voice in its dealings abroad. States may not conduct their own foreign relations or establish competing national policies toward other countries. The Supreme Court has repeatedly enforced that principle, recognizing that federal authority in matters affecting foreign relations must be free from local interference.

The reason is practical as well as constitutional. International problems require national bargaining. The federal government must be able to decide what obligations the U.S. will accept, what concessions it will seek from

other countries, how responsibility will be apportioned, and what combination of diplomacy, regulation and economic policy best serves the national interest. Those judgments often involve trade-offs extending far beyond the subject of any single lawsuit or regional interest. No city council or state court can make those choices for the country as a whole.

Climate policy is a textbook example. Presidents of both parties have treated greenhouse-gas emissions as a global problem that must be handled on the international stage—the only arena where these matters can be realistically and equitably handled. Different administrations have chosen different policies, but they have agreed that meaningful climate policy necessarily involves other sovereign nations.

Boulder's suit cuts across that national function. It asks a state court to impose potentially enormous liability on selected American energy companies for their alleged contribution to a worldwide phenomenon. Yet the overwhelming share of the conduct at issue lies beyond not only Colorado's borders but America's. That is precisely the kind of judgment the Constitution does not permit hundreds of state and local governments to make independently.

The Supreme Court's foreign-affairs cases provide a straightforward rule. In *American Insurance Association v. Garamendi* (2003), the justices allowed that when a state regulates in an area of traditional state responsibility but incidentally affects foreign relations, courts may have to weigh the state interest against the federal one. But where a state intrudes on foreign policy without a serious claim to be exercising a traditional responsibility, the Constitution plainly requires pre-emption.

Boulder can't plausibly claim a traditional state or local role in regulating worldwide greenhouse-gas emissions. States have authority over local environmental matters, but not over the global climate.

The conflict with foreign policy is obvious. For decades, presidents and Congress have pursued climate policy through federal statutes, diplomacy and international agreements. Those policies reflect difficult balancing of

environmental interests, economic growth, national security and relations with other countries. A state-law liability regime that imposes its own costs on American companies for global emissions would necessarily alter that national balance.

The problem would multiply if Boulder's theory were accepted. Dozens of states and municipalities could impose different standards, different measures of liability and different judgments about responsibility for the same global emissions. American energy companies could face massive cumulative liability—estimated by plaintiff-aligned experts in the trillions of dollars—under a patchwork of local rules, while the principal foreign sources of emissions remain outside American courts' reach.

Whatever one thinks about climate change or the proper regulation of fossil fuels, the Constitution assigns responsibility for the nation's dealings with the rest of the world to the federal government. The basic principle is older than the modern climate debate: America doesn't conduct foreign policy through state courthouses. *Suncor* gives the Supreme Court an opportunity to reaffirm that principle. Foreign policy is a job for the U.S. government, not Boulder.

Mr. Barr served as U.S. attorney general, 1991-93 and 2019-20. His law firm, Torridon Law PLLC, filed a friend-the-court brief in the Suncor case on behalf of former senior foreign-policy officials.

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