No. 22-361

# In the Supreme Court of the United States

BP P.L.C., ET AL., PETITIONERS

*v.*

MAYOR AND CITY COUNCIL OF BALTIMORE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS


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The decision below implicates conflicts on two exceptionally important jurisdictional questions that have arisen with particular frequency in the numerous and materially identical climate-change cases pending in courts across the Nation. The petition in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550, presents the same questions, and last October, the Court invited the Solicitor General to file a brief expressing the views of the United States in that case.

Respondent candidly acknowledges that "this case is nearly identical, factually and procedurally, to [*Suncor*]" and that both cases present "the same [q]uestions." Br.

in Opp. 1. It is thus unsurprising that respondent's arguments against review are nearly identical to the arguments made by the respondents in *Suncor*. They are no more effective here than they were there.

Given the overlap between the cases, the best course is for the Court to hold the petition in this case pending a decision on certiorari in *Suncor*. The petition in *Suncor* should be granted, because the questions presented in these cases have divided the courts of appeals and will determine whether state courts have the power to impose the costs of global climate change on the energy industry. In the alternative, the petition in this case should be granted.

### A. The Decision Below Implicates Conflicts Among The Courts Of Appeals On Both Questions Presented

The questions presented in this case are, first, whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate; and second, whether a federal district court has jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. Respondent contends that there is no circuit conflict on either question, rehashing the same arguments made by the respondents in *Suncor*. Those arguments remain invalid.

As to the first question presented: respondent contends (Br. in Opp. 11) that the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), does not conflict with the decision below, because *City of New York* did not involve a case removed from state to federal court. But as petitioners have explained (Pet. 16), that distinction is irrelevant, because the well-pleaded complaint rule has nothing to do with the question

whether federal common law governs claims such as those asserted here. Respondent also argues (Br. in Opp. 14) that the court of appeals' resolution of the federal-common-law question in this case was unnecessary in light of its application of the well-pleaded complaint rule. But the court of appeals squarely held that federal common law does not govern respondent's claims, and it expressly declined to "follow *City of New York*" in the process. Pet. App. 19a. Nor is respondent correct to say that the allegations in the complaint here are "materially different" from those in *City of New York*. Br. in Opp. 14. The plaintiffs there similarly alleged that the defendant energy companies "continued to sell massive quantities of fossil fuels" despite knowing about the alleged effect the combustion of those fuels would have on the global climate. 993 F.3d at 86-87. And as in *Suncor* and the other related climate cases, respondent seeks damages for the alleged effects of global climate change allegedly caused by emissions from the combustion of petitioners' products. See Pet. App. 4a-5a.

As to the second question presented: like the respondents in *Suncor*, respondent here argues (Br. in Opp. 15-18) that no conflict exists because the decisions of the Fifth and Eighth Circuits were early applications of the "substantial federal question" doctrine that this Court subsequently synthesized in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). That characterization of those decisions is incorrect. See Reply Br. at 5, *Suncor*, *supra*. But in any event, such a characterization would not eliminate the conflict, because those cases would still permit removal of respondent's claims. After all, another way to characterize petitioners' argument that respondent's claims are federal in nature is to say that federal substantive law governs every element of respondent's claims, such that

each element presents a substantial question of federal law.

**B. The Decision Below Is Incorrect**

On the merits, respondent repeats the same fundamental errors as the respondents in *Suncor*. There is no need to "creat[e] a new category of federal common law" here, Br. in Opp. 21 (emphasis omitted), because the Court has applied federal rules of decision to claims seeking redress for injuries allegedly caused by interstate air and water pollution for more than a century. See Pet. 25-26. And whether the Clean Air Act displaces any remedy available under federal common law is a merits question, not a jurisdictional one. See Pet. 27-28.

Respondent's arguments concerning the well-pleaded complaint rule also lack merit. Respondent argues that petitioners seek to "create a new exception" to the rule, Br. in Opp. i, but the Court need only apply familiar jurisdictional principles to this context in order to decide the case in petitioners' favor. The Court has never limited the artful-pleading doctrine to the context of complete preemption, see Pet. 30, and the Court has already recognized that federal common law can function in the same way as completely preemptive statutes in the context of a "state-law complaint that alleges a present right to possession of Indian tribal lands." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 n.8 (1987) (citing *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974)). That is particularly true where, as here, the constitutional structure requires the exclusive application of federal law to a claim. See Pet. 25-26.

**C. The Questions Presented Are Important And Warrant The Court's Review In This Case**

Finally, respondent argues (Br. in Opp. 28-29) that review is not warranted because the questions presented

are not important and because the first question is not squarely presented in this case. Neither argument withstands scrutiny. As respondent grudgingly admits (Br. in Opp. 28), the questions presented are of vital importance in the nearly two dozen climate-change cases—seeking vast damages from the energy industry—currently pending in courts across the country, because they concern the vital question of where the cases will be litigated. See Pet. 23; States Br. at 10-13, *Suncor*, *supra*; API Br. at 15-21, *Suncor*, *supra*; WLF Br. 12-14. And this case obviously does present the question whether federal common law governs climate-change claims like those alleged here; respondent's contrary argument assumes that petitioners' invocation of federal common law merely presents an ordinary preemption defense. See Br. in Opp. 28-29. Of course, that is question-begging: the correct answer to the first question turns in part on whether federal common law governs the elements of respondent's claims or merely provides a defense to those claims. See Pet. 30.

In sum, respondent offers no good reason why the Court should decline to review the exceedingly important jurisdictional questions presented both by this case and by *Suncor*. To the contrary, the Court's review is amply warranted.

* * * * *

The petition for a writ of certiorari should be held pending a decision on the petition in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550. If the Court grants review in *Suncor*, the petition here should be held pending a decision there and then disposed of as is appropriate. Otherwise, the petition should be granted.

Respectfully submitted.

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