No. 21-1550

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL., PETITIONERS

v.

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH 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. This is the first case to reach the Court on those questions since the decision in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). And this case is uniquely positioned among the group of cases currently headed to the Court. It involves a smaller group of defendants and thus is less likely than those cases to present recusal issues. And it would allow the Court to

decide the questions presented in this Term, instead of allowing those cases to gallop ahead in state court for an indefinite time.

In their brief in opposition, respondents devote more attention to arguing the merits than to addressing the traditional certiorari factors. That is telling. On the first question presented, respondents cannot plausibly reconcile the decision below with the Second Circuit's decision, and they blatantly ignore the decisions of the First and Fourth Circuits expressly rejecting the Second Circuit's reasoning. Only by doing so can respondents suggest that little has changed since the Court declined review in the immediate wake of *BP*. Respondents fare no better when they attempt to reconcile the conflicting decisions on the second question.

When respondents dispute the importance of the questions presented, they veer into fantasyland. The resolution of those questions will determine whether state courts have the power to impose the costs of global climate change on the energy industry. And respondents identify no valid obstacle to the Court's review of those questions here. Because this case presents the Court's best approaching opportunity to address the jurisdiction of the federal courts over climate-change claims, and because the immediate resolution of the questions presented will greatly serve the interests of judicial economy, the petition for a writ of certiorari should be granted.

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

Three courts of appeals, including the court below, have rejected the Second Circuit's holding in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), that 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. See Pet. 11-17. The courts of appeals have also split on the question whether federal jurisdiction extends to claims necessarily and exclusively governed by federal common law but labeled as arising under state law. See Pet. 17-23. Respondents' efforts to wave away those conflicts (Br. in Opp. 7-16) are unpersuasive.

1. On the first question presented, respondents argue (Br. in Opp. 8) that the "only" conflict petitioners raise lies between the decision below and the Second Circuit's decision in *City of New York*. But they entirely ignore the decisions of the First and Fourth Circuits, which expressly reject the Second Circuit's holding that federal common law governs materially identical climate-change claims. See Pet. 15-17. That silence speaks volumes.

Respondents halfheartedly contend (Br. in Opp. 8-9) that no conflict exists between the decision below and *City of New York*, noting that the Second Circuit did not decide the first question presented in the specific context of assessing the presence of federal jurisdiction. But as petitioners have explained (Pet. 14-15), that distinction is irrelevant, because the well-pleaded complaint rule has nothing to do with the question of whether federal common law governs claims such as those asserted here. Respondents offer no meaningful response. And contrary to respondents' suggestion, this Court grants certiorari to resolve conflicts over federal *questions*, not conflicts over cases' *outcomes*. See Sup. Ct. R. 10. The mere fact that the Second Circuit did not have occasion to address the second question presented does not preclude the existence of a conflict with decisions that addressed the first.

When respondents finally attempt to reconcile the decision below with *City of New York* (Br. in Opp. 10-11), their efforts are unavailing. Respondents contend that the Second Circuit held that federal common law *once*

governed similar claims, but that the Clean Air Act *now* provides the exclusive source of federal law that operates on such claims. Respondents thus understand the Second Circuit to have held only that the Act does not "'resuscitate' the previously preempted state law claims," rather than that federal common law continues to displace state law after the Act's enactment. Br. in Opp. 10 (citation omitted).

There are two principal flaws in that argument. *First*, the Second Circuit expressly concluded that the plaintiff—whose claims long postdated the Clean Air Act—brought "federal claims" that must arise "under federal common law." 993 F.3d at 95; see also *id.* at 95, 98, 101 (describing the claims as "federal common law claims"). *Second*, after concluding that the plaintiff's claims were federal claims, the Second Circuit declined to apply a "traditional statutory preemption analysis" and instead reasoned that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* at 98. The Second Circuit's holding that federal law continues to *displace* state law in this area cannot be reconciled with respondents' assertion that the court held only that the Clean Air Act did not *revive* state law.

For that reason, *City of New York* can only be understood to hold that federal common law governs in this area, even after the Act displaces any *remedy* available under federal common law. That holding squarely conflicts with the holding below that "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists*," allowing a plaintiff to assert "only state-law claims" in this area. Pet. App. 29a, 30a.

2. On the second question presented, respondents primarily argue (Br. in Opp. 14, 15) 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). Respondents' characterization of those decisions is incorrect.

In *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (1997), the Fifth Circuit did not cite any of the precursors to *Grable* when concluding that federal jurisdiction was present; rather, it relied on two of this Court's cases involving federal common law. See *id.* at 926 (citing *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972), and *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 850 (1972)); see also *City of Hoboken* v. *Chevron Corp.*, No. 21-2728, 2022 WL 3440653, at *3 (3d Cir. Aug. 17, 2022) (expressly declining to follow *Sam L. Majors*). And while the Eighth Circuit in *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (1997), briefly mentioned jurisdiction based on the presence of a "substantial question of federal law," it too ultimately relied on precedent from this Court involving federal common law. See *id.* at 1214 (citing *National Farmers Union*, *supra*).

In any event, even if respondents' characterization were correct, it is merely a matter of labeling; it would not eliminate the conflict. Either way, those cases would still permit removal of respondents' claims. After all, another way to characterize petitioners' argument that respondents' claims are federal in nature is to say that federal substantive law governs every element of respondents' claims, such that each element presents a substantial question of federal law.

In a related vein, respondents suggest (Br. in Opp. 18-19) that the Court would be unable to consider this case in terms of the *Grable* doctrine because respondents forfeited the ability to rely on it. No forfeiture occurred here.

Petitioners' consistent position has been that federal jurisdiction exists because "federal common law supplies the rule of decision for [respondents'] claims." Pet. C.A. Br. 26. The question whether to conceptualize that argument in terms of the *Grable* doctrine or a separate jurisdictional framework is academic; at most, it involves a "new argument to support what has been [petitioners'] consistent claim," not a "new claim" that is subject to forfeiture. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). To the extent it concluded otherwise, the court below erred. See Pet. App. 33a-34a n.6. And in any event, the Court has "discretion to forgive any forfeiture." *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1730 n.1 (2022).

Respondents are also incorrect that *Sam L. Majors* and *Otter Tail* are "no longer good law after *Grable*." Br. in Opp. 15. Even viewed through the lens of *Grable*, the federal questions in those cases were substantial and disputed, and there is no reason to think that their resolution in federal court would disrupt the federal-state balance. See *Grable*, 545 U.S. at 314. There is thus a clear conflict on the second question presented, as well as the first.

B. The Decision Below Is Incorrect

Respondents devote significant time (Br. in Opp. 19-30) to defending the court of appeals' decision on the merits. Petitioners offer just a few additional points here and leave fuller responses to subsequent merits briefing if certiorari is granted.

1. Respondents contend (Br. in Opp. 20-21) that "significant extensions" of this Court's precedent would be necessary in order to apply federal common law to their claims in the first instance. Not so. Though one would never know it from respondents' brief, this Court has applied federal rules of decision to claims seeking redress

for injuries allegedly caused by interstate air and water pollution for well over a century. See Pet. 24-25. It matters not that respondents, as the plaintiffs below, are municipal governments rather than States. See Br. in Opp. 20-21. This Court has applied federal common law to lawsuits in which neither the federal government nor a State was a party. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511 (1988).

2. Respondents further contend (Br. in Opp. 24-25) that, even if federal common law once governed their claims, the Clean Air Act has displaced that body of federal law and thus eliminated any basis for federal jurisdiction. That argument lacks merit for several reasons.

To begin with, it conflates jurisdiction with the merits. See Pet. 26. Whether a party can obtain a remedy under federal common law on the merits is a distinct question from whether the claim arises under federal common law for jurisdictional purposes. The Court made this very point in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), explaining that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if the claim "may fail at a later stage for a variety of reasons." *Id.* at 675.

In addition, the upshot of respondents' argument is that the Clean Air Act's displacement of a *remedy* under federal common law somehow revives otherwise inoperable state law. But such displacement "does not mean the door was opened for tort claims based on the common law of an affected State targeting conduct in another State." U.S. Br. at 27, *BP*, *supra* (No. 19-1189). Only federal law can apply in cases involving "interstate and international disputes implicating the conflicting rights of States," because "our federal system does not permit the controversy to be resolved under state law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981);

see Pet. 26; States Br. 3-9. And while Congress may enact a savings clause to revive state law in certain circumstances, respondents do not argue that the Act's savings clause authorizes their claims. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492, 497 (1987).

3. Respondents also contend (Br. in Opp. 22-23, 28-29) that the well-pleaded complaint rule bars the exercise of jurisdiction over its claims. But respondents are wrong to suggest that the application of federal common law to their claims here is an exercise in ordinary preemption. Ordinary preemption is a defense to a plaintiff's claim. *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58, 63 (1987). And where such a defense applies, it "invalidate[s]" the plaintiff's claim and thus prohibits the plaintiff from proceeding with that claim. See *Oneok, Inc.* v. *Learjet, Inc.*, 575 U.S. 373, 376 (2015). By contrast, where federal common law supplies the substantive law governing the plaintiff's claim, the plaintiff may proceed with its claim, but under principles of federal and not state law.

Respondents suggest that petitioners' position would require the creation of a "new exception" to the well-pleaded complaint rule. Br. in Opp. 22. Wrong again. This Court has already held that an "independent corollary" of the rule is that a plaintiff "may not defeat removal" through artful pleading: that is, by "omitting to plead necessary federal questions in a complaint." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). A federal question is "necessary" for purposes of that rule where, as here, the constitutional structure mandates the application of federal law. See Pet. 24-25; U.S. Br. at 28, *BP*, *supra*.

Respondents argue (Br. in Opp. 28) that the artful-pleading doctrine is limited to the context of *statutory* complete preemption. But this Court has never so held, and drawing a line between statutory claims and claims

necessarily and exclusively governed by federal common law would lead to bizarre results. Because claims necessarily and exclusively governed by federal common law would proceed in state court, see p. 8, *supra*, state judges would be tasked with developing the substantive content of federal common law in the first instance, subject only to ultimate review by this Court. Through artful pleading and venue selection, plaintiffs could effectively prevent the federal judiciary from developing the federal common law in areas implicating "uniquely federal interests," including "interstate and international disputes implicating the conflicting rights of States." *Texas Industries*, 451 U.S. at 640; see ALF Br. 17-21; NAM Br. 8-12.

Indeed, this 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). The same is true for putative state-law claims seeking redress for injuries allegedly caused by interstate or international emissions. Far from creating a "new exception" (Br. in Opp. 22), the Court need only apply familiar jurisdictional principles to this context in order to decide the case in petitioners' favor.

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

This case is an ideal vehicle for resolving the questions presented and is uniquely positioned among the climate-change cases currently headed to the Court for at least two reasons. First, it involves a smaller set of defendants than those cases and is thus less likely to present recusal issues. And second, it allows the Court to determine the appropriate forum for these cases in this Term rather than in a subsequent one, which would limit the waste of

judicial and party resources litigating the merits in state court if the Court ultimately holds that federal jurisdiction is present. See Chamber Br. 13-16. Respondents' pleas for the Court to deny or defer review ring hollow.

1. Respondents contend that the questions presented are not worthy of review because they have "no recurring importance." Br. in Opp. 16. That is preposterous. 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. See States Br. 10-13; API Br. 15-21; WLF Br. 12-14. And respondents do not dispute that the second question could arise in any case in which federal common law provides the rule of decision but the plaintiff labels its claims as arising under state law.

Respondents are wrong (Br. in Opp. 17) that nothing has changed since the Court declined review in *Chevron Corp.* v. *City of Oakland*, 141 S. Ct. 2776 (2021)—immediately after the Court's decision in *BP*. The landscape has shifted dramatically: four additional courts of appeals have now weighed in on federal jurisdiction over the climate-change cases, addressing one or both questions presented in the process. See Pet. 15-17, 23; *City of Hoboken*, *supra*. The deepening conflicts that have developed on those questions make them ripe for the Court's review.

2. Respondents argue that the Court should await a better vehicle to address the first question because the court of appeals "did not decide" whether "respondents' claim falls within the scope of the federal common law of interstate pollution that existed prior to the Clean Air Act." Br. in Opp. 18. But as respondents themselves acknowledge (*id.* at 10), that is not the relevant question; instead, it is whether federal common law continues to displace state law *after* the Act's enactment. On that point, the court of appeals made its view clear. See p. 4, *supra*.

Finally, respondents object (Br. in Opp. 18) that petitioners must prevail on both questions to obtain reversal of the judgment below. True enough. But there is nothing unusual about that, see, *e.g.*, *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), and granting review on both questions would provide the Court with maximum optionality to decide the case in any way it sees fit. Because both questions are exceedingly important and are the subject of circuit conflicts; because immediate review would serve the interests of judicial economy and allow the Court to consider the questions presented in a case that is less likely to present recusal issues; and because a decision to deny review would likely delay the resolution of the questions until next Term if not longer, the Court should grant review in this case.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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