No. 25-170

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; EXXON MOBIL CORPORATION,
PETITIONERS

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONERS

THEODORE V. WELLS, JR.
DANIEL J. TOAL
YAHONNES CLEARY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

HUGH QUAN GOTTSCHALK
ERIC L. ROBERTSON
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
JAKE L. KRAMER
EMMA R. WHITE
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Constitutions, statutes, and rules:

Miscellaneous:

In the Supreme Court of the United States

No. 25-170

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; EXXON MOBIL CORPORATION,
PETITIONERS

v.

COUNTY COMMISSIONERS OF BOULDER COUNTY; CITY OF BOULDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE PETITIONERS

The case for certiorari here is extraordinarily compelling. The decision below authorized a local government to seek damages from select energy companies for the alleged effects of global greenhouse-gas emissions on the global climate. There is a clear and acknowledged conflict on the question whether federal law precludes such claims. Cases asserting similar claims have been filed in numerous jurisdictions; the damages in even one case could potentially reach into the billions of dollars; and there are thousands of other local governments that could bring their own actions.

The federal government has urged the Court to grant review, explaining in a rare uninvited amicus brief that the question presented is of "vast nationwide significance." Br. 2. More than half of the States have also urged review, arguing that the nationwide climate litigation represents a "grave threat" to their "equal sovereignty." Br. 20. Joining the chorus are over 100 members of Congress; leading business groups; academics; and former military leaders. The question presented cries out for the Court's resolution. And this case arises in a unique posture that resolves any jurisdictional doubts and provides a clean opportunity for review before exorbitant liability can be imposed.

Respondents do not dispute that the decision below deepens an existing conflict or that the question presented is of exceptional importance. Instead, respondents focus on identifying potential obstacles to review. But none is substantial. The Court has both statutory and constitutional jurisdiction on multiple grounds. No legislative or regulatory development diminishes the need for the Court's guidance. And further percolation would not aid the Court.

In a moment of candor, a member of respondents' legal team recently said the quiet part out loud: the tort liability being sought in the nationwide climate litigation is designed to serve as a "carbon tax" and would cause the entire energy industry to "declar[e] bankruptcy." Can State Courts Set Global Climate Policy, The Federalist Society, at 32:55-34:43 (Oct. 8, 2025) <tinyurl.com/fedsocpanel> (comments of David Bookbinder). Before these cases get anywhere near that point, the parties should know whether federal law precludes the claims from the outset. This is the right opportunity, and the optimal moment, to resolve that question. The petition for a writ of certiorari should be granted.

A. The Court Has Jurisdiction

Contrary to respondents' arguments (Br. in Opp. 6-17), the Court has both statutory and constitutional jurisdiction over this case.

1. The Court has statutory jurisdiction under 28 U.S.C. 1257(a) for two independent reasons.

a. As the United States has explained (Br. 10-12), this Court has jurisdiction under Section 1257(a) because the case arises from a final determination of the Colorado Supreme Court in an original proceeding. In *Atlantic Richfield Co.* v. *Christian*, 590 U.S. 1 (2020), the Montana Supreme Court granted a supervisory writ to review a trial court's order denying summary judgment; it ultimately affirmed the order and remanded for the case to continue. See *Atlantic Richfield Co.* v. *Montana Second Judicial District Court*, 408 P.3d 515, 517, 523 (Mont. 2017). This Court held that it had jurisdiction over that decision under Section 1257(a) because, under Montana law, "a supervisory writ proceeding is a self-contained case, not an interlocutory appeal." 590 U.S. at 12.

The same reasoning applies here. The Colorado Supreme Court stated that it was exercising "original jurisdiction" under Colorado Appellate Rule 21, pursuant to its authority under the state constitution to exercise "general superintending control over all inferior courts." Pet. App. 7a-8a; Colo. Const. Art. VI, § 2. And that court has repeatedly characterized similar Rule 21 proceedings as "original proceedings." See, *e.g.*, *People ex rel. T.T.*, 442 P.3d 851, 853, 855-856 (2019); *Fognani* v. *Young*, 115 P.3d 1268, 1271 (2005); *People* v. *District Court*, 664 P.2d 247, 251 (1983). Because the decision below was a "final determination of [an] original proceeding" under Colorado law, Colo. App. R. 21(h); see Colo. App. R. 21(*o*), it constituted the final resolution of a "self-contained case" for purposes of Section 1257(a). *Atlantic Richfield*, 590 U.S. at 12.

That distinguishes this case from *Sunoco LP* v. *City & County of Honolulu*, No. 23-947, where the petition arose from an interlocutory appeal in state court.

Respondents dismiss the Colorado Supreme Court's characterization of its own law as mere "shorthand." Br. in Opp. 11. But this Court does not "second-guess" a state court's "characterization of state law" on the nature of a state-court proceeding. *McKinney* v. *Arizona*, 589 U.S. 139, 146 (2020). And to the extent respondents contend that the proceeding "bears other markings of a discretionary, interlocutory appeal," Br. in Opp. 12, exactly the same could have been said about *Atlantic Richfield*. See 408 P.3d at 518, 523.

b. The Court also has jurisdiction under Section 1257(a) because this case falls within the fourth category of cases identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). See Pet. 32; U.S. Br. 21. Respondents' contrary arguments (Br. in Opp. 8-9) lack merit. The existence of additional *federal* defenses is not a jurisdictional bar under the fourth *Cox* factor. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-57 (1989); *id.* at 69 (O'Connor, J., concurring in part and dissenting in part). Instead, the Court requires that the petitioner "might prevail on the merits on *nonfederal* grounds," such that future review of the federal issue would be "render[ed] unnecessary." *Cox*, 420 U.S. at 482 (emphasis added). And reversal on the federal issue raised here would end this litigation, because respondents have never asserted a claim based solely on in-state emissions.

2. Separately, respondents invite the Court to question whether they have alleged a valid injury-in-fact for purposes of Article III jurisdiction. See Br. in Opp. 13-14. Unsurprisingly, however, respondents cannot bring themselves actually to argue that they suffered no such

injury. And while petitioners strongly dispute that respondents will be able to prove their claims, respondents have sufficiently alleged a cognizable injury at the pleading stage. Respondents seek to recover for "their past and future damages and costs to mitigate the impact of climate change" allegedly attributable to petitioners' conduct. Am. Compl. 121 (emphasis omitted). That is a paradigmatic Article III injury: respondents allege harm to their own "legally protected interest[s], like property or money," *Biden* v. *Nebraska*, 600 U.S. 477, 489 (2023), and seek damages as redress, see *Diamond Alternative Energy, LLC* v. *EPA*, 606 U.S. 100, 111 (2025). That distinguishes this case from *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 418-419, 420 (2011), where the plaintiffs attempted to redress only future injuries through prospective limits on the defendants' emissions.

The Court would also have Article III jurisdiction under *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989). The decision below "poses a serious and immediate threat" to petitioners, *id.* at 618, by eliminating a threshold defense to a lawsuit seeking billions of dollars in damages. Respondents' Article III objection is creative but insubstantial.

B. The Decision Below Deepens A Conflict On The Question Presented

The Colorado Supreme Court expressly departed from the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021). See Pet. App. 19a-20a. The United States agrees there is a conflict and explains that it "[w]arrants [t]his Court's [r]eview." Br. 19. Even respondents admit (Br. in Opp. 20) that there is a conflict as to their theory that petitioners knowingly produced, marketed, and sold fossil fuels at levels that allegedly caused climate change. That alone merits the Court's intervention.

Respondents nevertheless argue (Br. in Opp. 20) that review is not warranted because the Second Circuit did not also address a deceptive-marketing theory of liability. But it did: the complaint asserted liability based on the defendants' actions both in "producing, marketing, and selling fossil fuels," *and* "orchestrat[ing] a campaign of deception and denial regarding climate change." J.A. at 47-48, 51 (No. 18-2188). The Colorado Supreme Court was thus correct to recognize that the state-law claims in *City of New York* were "similar to those at issue here." Pet. App. 19a.

In any event, a difference in the challenged conduct would not eliminate the conflict, because the theory of harm is identical in both cases. In *City of New York*, the plaintiff "identif[ied] [interstate and international] emissions as the singular source of [its] harm." 993 F.3d at 91. And here, respondents allege harm only from petitioners' conduct that allegedly increased emissions and global climate change. See Pet. 29. The Colorado Supreme Court concluded that federal law did not preclude claims seeking relief for the alleged effects of greenhouse-gas emissions, see Pet. App. 20a-21a, while the Second Circuit concluded that federal law did preclude those claims, see 993 F.3d at 91. The resulting conflict warrants this Court's review.

Respondents also contend (Br. in Opp. 21-23) that the Second Circuit did not agree with petitioners' theory of constitutional preclusion. That contention misunderstands the Second Circuit's reasoning. In holding that the plaintiff's state-law claims could not proceed, the Second Circuit explained that, where "federal common law exists, it is because state law cannot be used," as state law is not "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 legis-

lative one." 993 F.3d at 98 (citation omitted). And the reason federal common law would have applied in the absence of displacement was that the claims would have allowed for regulation "far beyond New York's borders" and would have "implicat[ed] the conflicting rights of [S]tates" and "our relations with foreign nations." *Id.* at 92 (citation omitted). The Second Circuit thus recognized that state law did not apply because of background principles traceable to the structure of the Constitution. That is precisely petitioners' theory.

As petitioners have explained (Pet. 18-20), the decision below is also inconsistent with *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291 (4th Cir. 2010), and *Illinois* v. *City of Milwaukee* (*Milwaukee III*), 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). Respondents briefly contend (Br. in Opp. 21 n.8) that those decisions are not "on-point," but they do not dispute that those decisions rejected attempts to use state law to redress injuries allegedly caused by pollution from other States. There is plainly a conflict here, and only this Court can resolve it.

C. The Decision Below Is Incorrect

Under well-established principles, the Constitution and the Clean Air Act preclude respondents' claims. In its amicus brief, the federal government agrees, calling the Colorado Supreme Court's decision "manifestly wrong." Br. 2, 12-19. Although ultimately a matter for another day, respondents' contrary merits arguments warrant a brief response here.

1. Respondents recognize (Br. in Opp. 30) that, in an inherently federal area, state law can be preempted by federal common law. According to respondents, however, once Congress has displaced federal common law with a federal statute, "the scope of any preemption turns on

congressional intent and the usual preemption analysis." *Id.* at 29.

Respondents ignore the reasons why federal common law exists in the first place. Courts apply federal common law in areas in which "the authority and duties of the United States as sovereign are intimately involved" or "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). For that reason, where "federal common law exists, it is because state law cannot be used" as a constitutional matter. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981).

Respondents recognize that the adoption of federal common law is "informed by considerations of the constitutional structure," Br. in Opp. 30, but they proceed to cast aside those same constitutional considerations when Congress has displaced federal common law by statute. That makes little sense. The displacement of federal common law does "nothing to undermine" the constitutional reasons why state law could not apply in the first instance. *Milwaukee III*, 731 F.2d at 410. As the Second Circuit aptly put it, it is "too strange to seriously contemplate" that congressional action in an already inherently federal area would silently invite state law to apply. *City of New York*, 993 F.3d at 98-99.

So considered, respondents' invocation of the presumption against preemption (Br. in Opp. 23-25) is puzzling. The presumption is "not triggered when [a] State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). The fact that Congress may not expressly preempt state law when legislating in such an area "may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably

apply." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 387-388 (2000).

2. Under petitioners' theory of constitutional preclusion, "the only state suits that remain available" to provide redress for injuries allegedly caused by interstate emissions are "those specifically preserved by" the Clean Air Act. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492 (1987). Respondents seek to sow doubt about petitioners' theory by arguing that, if the Constitution is what displaces state law, there is necessarily "no room for Congress to permit state law to apply." Br. in Opp. 22. Respondents are mistaken. In some contexts, Congress can authorize deviations from the default rules derived from the Constitution's structure. See *Northeast Bancorp, Inc.* v. *Board of Governors of Federal Reserve System*, 472 U.S. 159, 174 (1985) (dormant Commerce Clause); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) (state sovereign immunity). Congress may also adopt state substantive law as the federal rule of decision in an area governed by federal law. See 18 U.S.C. 13; 28 U.S.C. 1346(b)(1). Although Congress authorized the application of source-state law in the Clean Air Act, see *Ouellette*, 479 U.S. at 497-499, it has not authorized the application of state law to emissions emanating from another State.

3. Respondents further contend that their claims "do not fall within the scope of the former federal common law of interstate pollution." Br. in Opp. 25. That is wrong. Seeking injury in the form of physical harms allegedly caused by global emissions, as petitioners do, is just an indirect method of regulating interstate and international emissions. See Pet. 28-29; p. 2, *supra*.

4. Respondents also argue (Br. in Opp. 26-28) that the Clean Air Act would not preempt their state-law claims under a traditional preemption analysis. But as the United States has explained, "there can be no dispute"

that the Clean Air Act would have preempted respondents' claims if they had "brought the same common-law claims against out-of-state emitters." Br. 17. And "[s]uing the suppliers instead of the emitters does not avoid the conflict with the Clean Air Act's decisionmaking scheme," because those claims still require a determination of the proper levels of greenhouse-gas emissions across the country—a judgment that Congress left to the Environmental Protection Agency. *Ibid.*

D. The Question Presented Is Important And Warrants The Court's Review In This Case

Respondents do not dispute that the question presented is important. And if there were any doubt, the numerous amici supporting the petition—including the federal government, 26 States, and over 100 members of Congress—dispel it.

Respondents nevertheless insist that this is not the "right case" or the "right time." Br. in Opp. 17. But if not now, when? The unique posture of this case provides the Court with the opportunity to address the question presented where there is no doubt about the Court's jurisdiction. See pp. 3-5, *supra.* There is no reason to think that plaintiffs whose claims are dismissed will seek this Court's review; the plaintiff in *City of New York* did not. And as for the suits brought by the federal government, the States being sued have sought dismissal on the ground that the question presented should instead be resolved in cases such as this one. See, *e.g.*, Mot. to Dismiss, *United States* v. *Michigan*, Civ. No. 25-496 (W.D. Mich.), Dkt. No. 11. While the defendants in these cases will theoretically be able to seek review after liability is imposed, that is cold comfort given the growing number of cases and the sheer magnitude of the potential liability. See States Br. 18; Members of Congress Br. 9-10, 17-20; API Br. 15-17.

The Court need not be detained long by respondents' other arguments. It is entirely unrealistic to think that respondents will be able to parse their claims at some later point in the litigation and divide up their damages so as to apply "the law of the jurisdictions where products were marketed or caused emissions." Br. in Opp. 17. The mechanism of injury, after all, is the global accumulation of greenhouse gases from worldwide fossil-fuel combustion. Potential "legislative and regulatory developments" also present no concern. *Id.* at 19. No legislation has been introduced to create a "liability shield." *Ibid.* And any proposed regulatory changes are irrelevant, because the preclusion of respondents' state-law claims does not depend on the content of any agency regulations.

Finally, further percolation would provide no benefit. See Br. in Opp. 17-18. As evidenced by the dissent below, petitioners unambiguously asserted the same theory of preclusion before the Colorado Supreme Court that they are asserting now. See Pet. App. 35a-39a, 43a-45a. And as already explained, the Second Circuit's decision in *City of New York* rests on the same logic as petitioners' theory. Those decisions, together with Justice Samour's dissent below, comprehensively set out the arguments on both sides of the conflict. There is no realistic chance that further percolation through state courts handpicked by plaintiffs will benefit the Court, and the Court is unlikely to see a better vehicle for review of the question presented before liability is imposed. As the federal government agrees, given the "vast nationwide significance" of the question and the sheer magnitude of liability at issue for one of the Nation's most vital industries, this case is an ideal vehicle for the Court's review. U.S. Br. 2, 19-22.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HUGH QUAN GOTTSCHALK
ERIC L. ROBERTSON
WHEELER TRIGG
O'DONNELL LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202

Counsel for Petitioners
Suncor Energy (U.S.A.) Inc.
and Suncor Energy Sales Inc.

KANNON K. SHANMUGAM
WILLIAM T. MARKS
JAKE L. KRAMER
EMMA R. WHITE
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
YAHONNES CLEARY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

Counsel for Petitioner
Exxon Mobil Corporation

NOVEMBER 2025