No. 21-15313

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF HONOLULU

Plaintiff-Appellee,

v.

SUNOCO LP., et al.,

Defendants-Appellants.

Appeal From The United States District Court for the District of Hawaii,
No. 20-cv-00163

The Honorable Derrick K. Watson

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO STAY THE DISTRICT COURT'S REMAND ORDER

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Defendants-Appellants Chevron Corporation and Chevron USA Inc.
[Additional counsel listed on signature page]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Defendants' appeal presents serious jurisdictional questions that have divided courts across the country and are currently pending before the Supreme Court.[1] This Court has already stayed proceedings in a similar action while the Supreme Court resolves those pending matters. *See County of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 240 (9th Cir.). Yet Plaintiff urges the Court to ignore these developments and send this action back to state court, where the parties will be subject to possible discovery, dispositive motions, and other potentially futile activity, before this Court has even had a chance to consider whether state court is the proper forum. Judicial efficiency and well-established Circuit precedent counsel against that result. *See Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011) (per curiam).

First, as in *San Mateo*, this appeal presents several "substantial legal questions," including questions that have divided the courts and questions of first impression in this Circuit. These questions include the scope of this Court's jurisdiction to review a remand order under 28 U.S.C. § 1447(d), the requisite causal nexus between Defendants' actions under federal direction or control and Plaintiff's claims for purposes of federal officer removal, and the operation of OCSLA and

[1] This motion is submitted subject to and without waiver of any defense or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

federal enclave jurisdiction in the context of claims asserting climate change–related harms.

Second, Defendants face irreparable harm if they are forced to litigate this action in state court before this Court has had the opportunity to consider the propriety of removal. Any litigation in state court would take place under state law and state rules of procedure, which may differ from their federal counterparts. *Bank of Am., N.A. v. Reyes-Toledo*, 428 P.3d 761, 769-75 (Haw. 2018) (rejecting the *Twombly-Iqbal* pleading standard); *State v. Fukusaku*, 946 P.2d 32, 43 (Haw. 1997) (rejecting full acceptance of *Daubert* standard for expert testimony). If Defendants ultimately prevail on appeal, the parties and the district court would need to expend substantial time and resources relitigating issues litigated in state court. Plaintiff does not dispute this, but rather notes that federal law "'recogniz[es] the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal.'" Opp. at 18. That is the point: *Because* the district court has plenary power to undo anything that happens in state court, its burden if and when this Court reverses the remand order, and the waste of the parties' and judicial resources, would be significant given the nature and scope of the issues. Moreover, litigation in state court could produce inconsistent outcomes in this case and the related *Maui* action, and if the cases reach a final judgment before this appeal is resolved, the appeal would be effectively mooted.

Third, and finally, the balance of harms favors a stay. Although Plaintiff complains about the supposed inconvenience of delay, it identifies no *harm* that would result from a stay pending appeal. This is for good reason: The monetary relief sought by Plaintiff is the antithesis of irreparable harm, and a stay would simply preserve the status quo until this Court decides the proper forum for Plaintiff's claims, sparing the parties, the public, and the judiciary the burden and expense of cumbersome and potentially unnecessary litigation.

For these reasons, the Court should grant a stay pending appellate review, just as it did in *San Mateo*.

ARGUMENT

I. Defendants Are Likely To Succeed on the Merits of Their Appeal

To show likely success on the merits, Defendants need only establish that their appeal raises a "substantial case for relief on the merits," not that "it is more likely than not that they will win on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). That standard is easily met here.

First, this appeal presents the question whether this Court has jurisdiction under 28 U.S.C. § 1447(d) to review the entire remand order or only the federal-officer *ground* for removal. Although this Court adopted the latter position in *San Mateo*, the Supreme Court agreed to consider the question in *BP plc v. Mayor and*

City Council of Baltimore, No. 19-1189 (U.S.)—prompting this Court to stay remand in *San Mateo*.

Plaintiff asserts that this issue "do[es] not warrant a stay" because "the Supreme Court is unlikely to overrule the Fourth Circuit's decision" in *Baltimore*, which also limited review to the federal-officer ground for removal. Opp. at 12. But the Supreme Court's grant of certiorari in a case raising the same issue, and this Court's grant of a stay in *San Mateo*, shows that Defendants have a substantial prospect of success, and non-party observers agree. Indeed, "[b]ased on the justices' questions, [University of Maryland Law Professor Robert] Percival said it seems likely that they'll rule that the Court of Appeals must consider all of the companies' arguments—not just the one about federal officers." Christine Condon, *U.S. Supreme Court Hears Arguments in Baltimore's Climate Change Lawsuit Against Fossil Fuel Companies*, Baltimore Sun (Jan. 19, 2021), https://tinyurl.com/yyfhd47j; *see also, e.g.*, Lawrence Hurley, *U.S. Supreme Court Wrestles With Dispute Over Baltimore Climate Suit*, Reuters (Jan. 19, 2021), https://tinyurl.com/emje9th8 ("U.S. Supreme Court [J]ustices on Tuesday appeared to lean toward energy companies in a dispute over a lawsuit filed by the city of Baltimore seeking monetary damages for the impact of global climate change."). And the Supreme Court far more often than not reverses in the cases it considers. *See* SCOTUS Case Reversal Rates (2007-

Present), https://tinyurl.com/e9f7hjp (noting that the Court's average reversal rate since 2007 is 70.1 percent).[2]

If the Supreme Court does reverse in *Baltimore*, Defendants' appeal here will present several grounds for removal that no federal appellate court has yet considered—including OCSLA and federal enclave jurisdiction. *See infra* at 8–9. Plaintiff concedes that "'issues of first impression within the Ninth Circuit'" constitute "'serious legal issues'" warranting a stay, Opp. at 7 (quoting *In re Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019)), but urges this Court to disregard those issues of first impression on the theory that, even if the Supreme Court holds that Section 1447(d) confers appellate jurisdiction over all asserted grounds for removal, this Court might still exercise "discretion" not to review those additional issues, *id.* at 11. But federal courts lack "discretion" to refuse to exercise the jurisdiction conferred by Congress, so Plaintiff's supposition is meritless. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.").

[2] Plaintiff's assertion that federal officer removal arguments should be briefed while *Baltimore* is pending, Opp. at 13, is irrelevant to the immediate motion. Defendants here are seeking to stay remand to the state court pending appeal in this Court. Defendants have *not* asked this Court to stay the *appeal* pending the outcome of *Baltimore*.

Second, irrespective of the outcome in *Baltimore*, a stay is warranted because Defendants have established a "reasonable probability" or "fair prospect" of success on federal officer removal in light of the new evidence that was not before this Court in *San Mateo*. In that case, this Court held that defendants failed to demonstrate that they "acted under" a federal officer, finding insufficient defendants' evidence that they acted "pursuant to a federal officer's direction" by carrying out a "basic governmental task" or acting as the government's "agent" in their operation of the Elk Hills Reserve or under OCS leases. *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 602–03 (2020). Defendants have filled those gaps here. *See* Mot. at 9–11 (citing new evidence).

Plaintiff argues that this is all beside the point because this aspect of Defendants' appeal supposedly "does not challenge any applicable legal standard," but rather "boils down to a contention that the district court incorrectly applied the law to the facts." Opp. at 8. But the question is whether Defendants have a "substantial case for relief on the merits," *Lair*, 697 F.3d at 1204—not whether they have a substantial case for relief *on a pure question of law*. Where, as here, the Court in a prior case identified specific evidentiary deficiencies, and in this case those deficiencies have been cured, the answer must clearly be "yes." Indeed, where a likelihood of success on the merits has been established, there is no basis for denying a stay simply because of *how* that success will come about.

In any event, Defendants' federal officer removal argument *does* raise a question of law—a point that Plaintiff in the end concedes: Whether "the district court did not sufficiently 'credit' their 'theory of the case'" is a "*legal* argument." Opp. at 9. While Plaintiff attempts to brush this aside on the ground that "the Court need only credit a defendant's theory of the case with respect to the 'causal nexus' and 'colorable federal defense' elements of federal officer removal," *id.*, the district court's opinion rests *entirely* on those two elements.

Plaintiff asserts that "Defendants failed to make the threshold showing that they were acting under a federal superior," *id.*, but, in light of the new evidence Defendants presented, the district court "*assume[d]* Defendants acted under a federal officer in (1) supplying specialized fuels to, and constructing pipelines for, the federal government during World War II, (2) supplying specialized fuels for certain spy or reconnaissance planes during the Cold War, and (3) supplying specialized jet fuels for the Department of Defense." Mot. to Stay, Ex. A, at 12 (emphasis added). The district court's opinion therefore rests squarely on its failure to credit Defendants' theory of the case—and, as Plaintiff acknowledges, this failure "implicates a split of authority." Opp. at 9; *see also Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432–33 (1999) ("[W]e credit the [defendants]' theory of the case for purposes of . . . our jurisdictional inquiry."); *Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 941, 947 (7th Cir. 2020) ("Both the [plaintiffs] and the [defendants] have

reasonable theories of this case. Our role at this stage of the litigation is to credit only the [defendants]' theory" so long as the theory is "plausible.").[3]

The district court's decision also raises a substantial question because it contravenes the plain language of the Removal Clarification Act of 2011. *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015). Plaintiff acknowledges that "some circuit courts have held that the Removal Clarification Act of 2011 relaxed the causal connection requirement" in the federal officer removal statute "by adding the words 'or relating to' to 28 U.S.C. § 1442(a)," but urges that this is immaterial because the district court's interpretation "remains consistent with the language and purpose of § 1442 as amended." Opp. at 10. Other courts have rejected this view, however, thus presenting a substantial question for purposes of a stay. *See* Opp. at 7.

Third, the propriety of removal under OCSLA and federal enclave jurisdiction each presents an "issue of first impression," which thus raises a "serious legal question." *Delisle v. Speedy Cash*, 2019 WL 7755931, at *2 (S.D. Cal. Oct. 3, 2019).

---

[3] In concluding that "Defendants' theory of the case is not a theory for *this* case," the district court erroneously overlooked the fact that Plaintiff's claims *necessarily* rely on Defendants' production and distribution of oil and natural gas. Defendants therefore present an entirely reasonable theory of *this* case.

Plaintiff does not even address the merits of these issues. Instead, it asserts that they are insubstantial because those grounds for removal will be unreviewable *if* the Supreme Court affirms in *Baltimore*, and because other district courts have rejected those grounds for removal. *See* Opp. at 10–12. But as explained above, the Supreme Court may well reverse in *Baltimore*, and the fact that no *circuit* court has considered these issues confirms they are substantial.

These issues of first impression raise substantial legal questions. Plaintiff's claims encompass all of Defendant's worldwide "exploration, development, extraction . . . and . . . production" of oil and natural gas. Dkt. 1-2 at ¶ 19a, *see also id.* at ¶¶ 20g, 21a, 23b, 24a, 26a. This necessarily encompasses activities by Defendants on the Outer Continental Shelf, and therefore falls within OCSLA's "broad" grant of jurisdiction. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). For the same reason, Plaintiff's case necessarily encompasses conduct on federal enclaves, including emissions from jet fuel supplied by Defendants on U.S. military bases. OCSLA and federal enclave jurisdiction therefore raise serious legal questions, and this Court's resolution of those questions will have broad ramifications.

II. Defendants Will Be Irreparably Harmed Absent a Stay

Where the question on appeal is whether Defendants should be forced to litigate *at all* in state court under state law, denying a stay and allowing the case to

proceed would make the appellate right "an empty one." *Northrop Grumman Tech. Servs., Inc. v. Dyncorp Int'l LLC*, 2016 WL 3346349, at *3 (E.D. Vir. 2016); *see also* H.R. Rep. No. 112-17(I), pt. 1, at 2-4 (2011) (Removal Clarification Act of 2011 designed to prevent federal officers from being forced to litigate in state courts).[4] Moreover, if this Court denies Defendants' stay request, the state court could reach final judgment before Defendants' appeal is resolved. A final judgment in state court would make the remand order functionally "irrevocable." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

Plaintiff contends that Defendants could simply resume proceedings in federal court if successful on appeal. *See* Opp. at 17–18. But by that point, it is likely that substantial litigation would have taken place in the state court, such that the parties would need to re-brief and re-argue (and the district court would need to re-decide) many, if not all, of the matters a second time. This is not only wasteful and dismissive of both the parties' and the court's resources; it presents the risk of

[4] Plaintiff insists that there is no irreparable harm because, in other climate change cases, state courts have stayed proceedings following execution of a remand order. Opp. at 17. Of course, Plaintiff would not be opposing this stay if it thought that similar stays would be forthcoming in the state courts.

inconsistent decisions in the two courts, some of which might be impossible to undo. This constitutes irreparable harm.

III. The Balance of Harm Tilts Decisively in Defendants' Favor

Plaintiff has disclaimed any desire "'to enjoin Defendants' production of oil and gas,'" and merely seeks "pay[ment] for local injuries." *City and County of Honolulu v. Sunoco LP*, No. 20-cv-163, Dkt. 121 at 7–8 (D. Haw. 2020). But a stay would not prejudice Plaintiff's ability to seek monetary or other relief. Plaintiff thus does not, and cannot, point to harm reasonably likely to occur during a stay, but that denial of a stay could avoid. At most, its alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm.

A stay would also conserve the parties' and judicial resources by avoiding costly litigation that could be rendered irrelevant if this Court reverses. Contrary to Plaintiff's contention that the appeal itself could be a "fruitless exercise," Opp. 19, the appeal raises substantial legal questions.

CONCLUSION

For these reasons, Defendants respectfully request that the Court stay entry of the district court's remand order pending resolution of their appeal.

DATED: March 12, 2021

Respectfully Submitted,

By: /s/ *Deborah K. Wright*
Deborah K. Wright
Keith D. Kirschbraun
Douglas R. Wright
WRIGHT & KIRSCHBRAUN
A Limited Liability Law Company

Paul Alston
Claire Wong Black
Glenn T. Melchinger
John-Anderson L. Meyer
DENTONS US LLP

Theodore V. Wells, Jr.
Kannon K. Shanmugam
Daniel J. Toal
Yahonnes Cleary
Caitlin E. Grusauskas
William T. Marks
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

By: ** /s/ *Theodore J. Boutrous, Jr.*
Theodore J Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP

Melvyn M. Miyagi
WATANABE ING LLP

Attorneys for Defendants Chevron Corporation and Chevron U.S.A., Inc.

** Pursuant to Ninth Circuit L.R. 25-5(e), counsel attests that all other parties on whose behalf the filing is submitted concur in the filing's contents.

By: /s/ *Crystal K. Rose*
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & HOLMA

Steven M. Bauer
Margaret A. Tough
Gabriella Kapp

By: /s/ *Michael Heihre*
C. Michael Heihre
Michi Momose
CADES SCHUTTE

J. Scott Janoe
Megan Berge
Sterling Marchand
BAKER BOTTS LLP

LATHAM & WATKINS LLP

Attorneys for Defendants ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company

Jameson R. Jones
Daniel R. Brody
Sean C. Grimsley
BARTLIT BECK LLP
Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

By: /s/ *Joachim P. Cox*
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP

David C. Frederick
Daniel S. Severson
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.

Attorneys for Defendants Royal Dutch Shell plc, Shell Oil Company, and Shell Oil Products Company LLC

Attorneys for Defendants Sunoco LP, Aloha Petroleum, LTD., and Aloha Petroleum LLC

By: /s/ *Lisa Woods Munger*
Lisa Woods Munger
Lisa A. Bail
David J. Hoftiezer
GOODSILL ANDERSON QUINN & STIFEL LLP

John D. Lombardo
Jonathan W. Hughes
Matthew T. Heartney
ARNOLD & PORTER KAYE SCHOLER LLP

Attorneys for Defendants BP plc and BP America Inc.

By: /s/*Breon S. Peace*
Breon S. Peace
Victor L. Hou
Boaz S. Morag
CLEARY GOTTLIEB STEEN & HAMILTON LLP

Margery S. Bronster
Lanson K. Kupau
BRONSTER FUJICHAKU ROBBINS

Attorneys for Defendants BHP Group Limited, BHP Group plc, and BHP Hawaii Inc.

By: /s/ *Shannon S. Broome*
Shannon S. Broome
Ann Marie Mortimer
Shawn Patrick Regan
HUNTON ANDREWS KURTH LLP

Ted N. Pettit
CASE LOMBARDI & PETTIT

Attorneys for Defendant Marathon Petroleum Corp.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached motion is proportionately spaced, has a typeface of 14 points, and complies with the word limits set forth in Fed. R. App. P. 27(d) because it has 2,599 words as calculated by Microsoft Word 2016.

/s/ *Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
Attorneys for Defendants-Appellants
Chevron Corp. and Chevron U.S.A. Inc.