Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ, *et al.*, Plaintiffs-Appellees, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

MOTION TO STAY THE MANDATE

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 41(d)(1), Defendants-Appellants respectfully move this Court to stay issuance of the mandate pending the filing and disposition of a timely petition for a writ of certiorari with the Supreme Court of the United States. A stay is warranted because Defendants' petition for a writ of certiorari will raise a substantial question that has divided the circuits: whether nominally state-law claims that are necessarily and exclusively governed by federal law by virtue of our constitutional structure "arise under" federal law, thereby enabling removal to federal court. The panel in this case, relying on *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), answered in the negative. The panel's decision has deepened an entrenched circuit split and is in significant tension with longstanding Supreme Court precedent on questions that the Court has not yet specifically addressed but that will be presented within Defendants-Appellants' petition for a writ of certiorari.

Absent a stay, these six cases may be remanded to four different California state courts. That potential harm amply justifies a stay of the mandate. Plaintiffs-Appellees oppose this motion.

BACKGROUND

Plaintiffs filed six separate actions against more than 30 energy companies in California state court, seeking to use state law to impose tort liability for past and future harms allegedly attributable to *global* climate change. *See* 3-ER-216 (alleging that "the dominant cause of global warming and sea level rise" is worldwide "greenhouse gas pollution"); 3-ER-247 (alleging that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused approximately 20% of global fossil fuel product-related CO_2 between 1965 and 2015, with contributions currently continuing unabated"). Asserting numerous putative claims under California tort law, including for public and private nuisance, Plaintiffs demand compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. 3-ER-292–312.

Defendants removed the actions to the Northern District of California, asserting several independent grounds for federal jurisdiction, including the federal-officer-removal statute, 28 U.S.C. § 1442, and federal-question jurisdiction based on federal common law, 2-ER-145–47, but the district court remanded the cases to state court, 1-ER-5–6.

On appeal, the panel initially held that it lacked jurisdiction under 28 U.S.C. § 1447(d) to review any portions of the remand order other than those involving federal-officer removal, *Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 596 (9th Cir. 2020), and then stayed the mandate pending Supreme Court review, ECF No. 238. The Supreme Court vacated the panel decision in light of *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), and remanded for consideration of Defendants' other bases for removal. *Chevron Corp. v. San Mateo Cnty.*, 141 S. Ct. 2666 (2021).

Upon remand to this Court, Defendants moved to file supplemental briefing regarding the additional bases for removal, ECF No. 269, but the panel denied the motion, ECF No. 288, and affirmed the district court's remand orders, Op. 17.

Defendants filed a petition for rehearing en banc on May 17, 2022. Dkt. 318. On June 27, 2022, the Court denied Defendants' petition. ECF No. 327. Absent a stay, the mandate will issue on July 5, 2022. Fed. R. App. P. 41(b).

ARGUMENT

This Court may stay the mandate when a petition for a writ of certiorari "would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(1). "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989).

I. Defendants' Petition Will Present A Substantial Question.

Defendants' petition for a writ of certiorari will present the question whether nominally state-law claims that, because of our constitutional structure, are necessarily and exclusively governed by federal law alone, are removable to federal court.

The panel's decision affirming the remand order directly contradicted numerous holdings from courts of appeals that have recognized that federal common law provides a ground for federal removal jurisdiction even if the claims were nominally pleaded under state law. *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997); *see also, e.g.*, *Republic of Philippines v. Marcos*, 806 F.2d 344, 352–54 (2d Cir. 1986); *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002);

Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997); *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001). Indeed, this Court, too, has held that a federal-common-law claim that is improperly labeled as a state-law claim is still subject to removal. *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954–55 (9th Cir. 1996) (holding that removal jurisdiction existed over plaintiff's purported "purely state law claims" because "[w]hen federal law applies, . . . it follows that the question arises under federal law"); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (noting that, despite pleading state-law claims, "[f]ederal jurisdiction would exist in this case if the claims arise under federal common law").

The panel decision also conflicts with the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), because the panel failed to appreciate that purported state-law claims seeking damages for the cumulative impact of global greenhouse-gas emissions from every state in the nation and every country in the world are necessarily and exclusively governed by federal law. As the Second Circuit explained, claims centered on transboundary emissions "demand the existence of federal common law" because they span state and even national

boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* at 90. In that case, the Second Circuit held that New York City's "sprawling" claims, which—like Plaintiffs'—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law" and thus necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95.

The same is true of Plaintiffs' claims. Plaintiffs seek damages for harms allegedly resulting from the cumulative use of all fossil-fuel products worldwide, which Plaintiffs assert "caused an enormous, foreseeable, and avoidable increase in . . . the concentration of greenhouse gases . . . in the Earth's atmosphere . . . contribut[ing] to a wide range of dire climate-related effects, including global warming, rising atmospheric and ocean temperatures, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, and sea level rise." 3-ER-215. These claims are necessarily governed exclusively by federal law, *see City of New York*, 993 F.3d at 92–95, and are therefore removable because they arise under federal law, *see, e.g.*, *Sam L. Majors Jewelers*, 117 F.3d at 926. The conflict between those precedents and the panel's decision

alone demonstrates that there is a considerable likelihood that the Supreme Court will grant certiorari. *See* Sup. Ct. R. 10(a) ("the reasons the Court considers" in granting review include whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals").[1]

A stay is also warranted because the Supreme Court has not yet addressed this recurring and important issue, and the approach followed by the panel is in clear tension with the Supreme Court's decisions in cases involving interstate and international emissions. *See* Sup. Ct. R. 10(c) (noting that review may be proper where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this

[1] While the Supreme Court declined to consider similar issues in *Oakland*, 969 F.3d 895, *cert. denied*, 141 S. Ct. 2776 (2021), three additional courts of appeals have weighed in since that case was decided, and all of them further deepened the split with the Second Circuit's reasoning in *City of New York*. *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 53–56 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 202 (4th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1257–63 (10th Cir. 2022).

Court"). The Supreme Court has long held that, as a matter of constitutional structure, claims based on interstate and international emissions are governed by federal law. "[T]he basic scheme of the Constitution . . . demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects," including claims based on interstate and international emissions. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") (noting that the "basic interests of federalism . . . demand[]" this result).

"[O]ur federal system does not permit [a] controversy [of this sort] to be resolved under state law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Indeed, "state law cannot be used" at all. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Milwaukee I*, 406 U.S. at 100, 108 n.10 (internal quotation marks omitted).

Because the panel's decision conflicts with the decisions of other courts of appeals and is in tension with decisions of the Supreme Court,

Defendants' petition will present a substantial question that is ripe for Supreme Court review.

II. There Is Good Cause To Stay The Mandate.

There is also "good cause for a stay" here. Fed. R. App. P. 41(d)(1). Absent a stay of the mandate, this action could be remanded to multiple state courts for further proceedings while the Supreme Court considers Defendants' petition for a writ of certiorari. If a remand to state court occurs and the panel's decision is ultimately reversed, Defendants may be denied the federal forum to which they are entitled. Congress has bestowed on defendants the right to litigate in federal court "actions that originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Without a stay of the mandate, Defendants could be deprived of that right, even if they later prevailed before the Supreme Court.

Moreover, Defendants could be forced to litigate these six cases in four different state courts, which could entail resolving numerous threshold and dispositive motions as well as potentially extensive discovery—all under state law. If the mandate issues and the Supreme Court ultimately reverses the panel's decision, this litigation will have proceeded

in state court under the wrong law—requiring the parties and the courts to start over from scratch once the case is again removed to federal court. A stay therefore serves the interests of judicial economy, as there is no need to proceed in state court until the question of federal jurisdiction has been finally resolved.

Finally, Plaintiffs will not suffer harm as a result of the stay. Plaintiffs do not seek to enjoin any of Defendants' conduct; rather, they ask only for monetary relief. 3-ER-312. At most, Plaintiffs' alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm. Indeed, Plaintiffs' counsel expressly consented to a stay pending the conclusion of any Supreme Court proceedings in a substantially similar climate-change action in the Northern District of California. *See Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Chevron Corp.*, No. 3:18-cv-7477 (N.D. Cal.), Dkt. 91, at 3 ("[T]he Parties jointly request that the Court stay further proceedings in this action until both sets of appeals currently pending in the Ninth Circuit"—referring to this appeal and *Oakland*—"are finally resolved, including resolution of any en banc proceedings in the Ninth Circuit or proceedings in the United States Supreme Court.").

Because a stay of the mandate will not harm Plaintiffs, whereas its issuance would threaten to impose substantial burdens and hardships not only for Defendants but also for the state and federal court dockets, there is "good cause" to stay the mandate.

CONCLUSION

This Court should stay issuance of the mandate pending the filing and disposition of a timely petition for a writ of certiorari.

Dated: June 29, 2022

Respectfully submitted,

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** 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.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 2,079 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This motion complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point New Century Schoolbook type.

Dated: June 29, 2022

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 29, 2022

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
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