No. 22-7163

In the United States Court of Appeals for the District of Columbia Circuit

DISTRICT OF COLUMBIA,
PLAINTIFF-APPELLEE

v.

EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION;
ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; BP P.L.C.;
BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1932) (THE HONORABLE TIMOTHY J. KELLY, J.)

REPLY IN SUPPORT OF MOTION OF APPELLANTS FOR AN EMERGENCY STAY OF THE REMAND ORDER PENDING APPEAL

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MISCELLANEOUS

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The District of Columbia urges the Court to subject the parties to costly and potentially futile proceedings in Superior Court before this Court has addressed defendants' grounds for federal jurisdiction. But all of the traditional factors support a stay here. Regardless of the standard the Court ultimately applies, defendants easily satisfy the first stay factor, likelihood of success on the merits. Indeed, over a century of Supreme Court precedent establishes that federal law alone governs claims related to interstate pollution. Those precedents apply with full force here. In addition, the Supreme Court has called for the views of the Solicitor General on the question whether federal common law permits removal of similar climate-related claims, and this case presents questions of first impression in this circuit.

The remaining stay factors tilt in defendants' favor as well. As for irreparable injury: the District contends that any injury defendants would suffer from litigating simultaneously in two forums cannot be irreparable, but that is incorrect, as the Second Circuit concluded in staying a similar case pending appeal. Absent a stay, defendants will be deprived of their right to litigate in a federal forum for at least a period of time if not permanently. As for balance of the harms, the District contends that delay could exacerbate local climate harms, but the outcome of this lawsuit cannot resolve the global phenomenon of climate change. A stay will conserve public resources and prevent duplicative litigation. The motion for a stay should be granted.

A. Defendants Are Likely To Prevail On Appeal

Defendants satisfy the first stay factor because the balance of the equities favors granting the stay and this appeal presents a serious legal question. *See* Mot. 7-17. Indeed, defendants have a strong likelihood of success on the merits. The District's contrary arguments (Opp. 9-20) lack merit.

1. The District first argues that the "sliding-scale approach to preliminary injunctions" is "no longer controlling" after *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), such that defendants cannot prevail merely by showing that the appeal presents a "serious legal question." Opp. 9 (citation omitted). But this Court has explained that *Winter* "d[id] not squarely discuss whether the four factors are to be balanced on a sliding scale." *Davis* v. *Pension Benefit Guarantee Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). Until this Court overrules its prior precedent endorsing the sliding-scale approach, that approach remains the law of the circuit. *See*, *e.g.*, *Mills* v. *District of Columbia*, 571 F.3d 1304, 1308, 1312 (2009); *Population Institute* v. *McPherson*, 797 F.2d 1062, 1078 (1986).

In any event, defendants can satisfy even the more stringent standard because they are likely to prevail on the merits. The District's claim that defendants have forfeited their argument under that standard is baseless: defendants specifically argued that they have a "strong chance of success on the

merits"; were "likely to prevail on the merits"; and had made a "strong showing of a likelihood of success on the merits." Mot. 7, 10, 17. Which standard this Court applies is thus of no moment.

2. Defendants have a strong argument that jurisdiction is present because the District's claims necessarily and exclusively arise under federal common law by virtue of our federal constitutional structure. *See* Mot. 8-14. The District argues (Opp. 10-14) that the well-pleaded complaint rule prevents removal of those claims and that federal common law does not govern its claims. Those arguments fail.

With respect to the well-pleaded complaint rule: the District contends (Opp. 10-11) that defendants' invocation of federal common law merely presents a federal defense. That is incorrect. Defendants' argument is that federal law alone provides the substantive rules of decision governing the elements of a claim seeking redress for injuries allegedly caused by interstate emissions (and their concomitant effect on the global climate). *See* Mot. 14 n.2. Notably, the District does not dispute that federal jurisdiction exists if federal common law does in fact govern the elements of its claims, as other courts of appeals have held. *See* Mot. 10.

The District next argues that, in order for federal common law to govern its claims, defendants must demonstrate a "significant conflict" between a "uniquely federal interest" and the operation of state law. Opp. 12 (citation

omitted). But this is not a "new area" where federal common law has never been applied. As the Second Circuit explained in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *Id.* at 91. That long line of precedent makes clear that only federal law can apply here. *See* Mot. 10-14.

The District attempts to distinguish that precedent on the ground that its claims are based solely on "false and misleading statements" to consumers and do not concern interstate emissions. Opp. 13. But the District is seeking relief in the form of "restitution" and "damages," and it alleges injuries from climate change in the form of "more frequent and extreme precipitation events and associated flooding," as well as future "flooding, extreme weather, and heat waves." D. Ct. Dkt. 1-14, at 44, 77. The District is thus seeking more than ordinary consumer-protection remedies; it is transparently attempting to use consumer-protection laws to recover damages from purported local injuries allegedly caused by a global phenomenon arising from interstate—and international—emissions.

In any event, the long line of precedent applying federal law to disputes regarding interstate pollution shows there is, in fact, a "significant conflict" between "a uniquely federal interest" and the operation of state law. *See* Mot. 11-14. As the Supreme Court has explained, controversies over interstate

pollution "touch[] basic interests of federalism" and implicate the "overriding [f]ederal interest in the need for a uniform rule of decision." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). Because this case is fundamentally about interstate air pollution, allowing the District to apply its law to this dispute would improperly extend the District's authority far beyond its borders. *See* Mot. 11-13.

The District attempts to distinguish *City of New York* on two grounds (Opp. 13-14): one, that it was filed originally in federal court and, two, that it involved nuisance claims rather than consumer-protection claims. Neither distinction withstands scrutiny. While the Second Circuit may not have had occasion to address the question whether the application of federal common law to climate-related claims gives rise to federal jurisdiction, it did squarely hold that such claims "must be brought under federal common law" because they are "simply beyond the limits of state law." 993 F.3d at 92, 95. As for the District's argument concerning the types of claims at issue: defendants have already explained why the District's claims do not truly sound in consumer protection. *See* p. 4, *supra*. And the plaintiff in *City of New York* similarly alleged that the defendants there "downplayed the risks" of fossil-fuel products to the global climate and "continued to sell massive quantities of fossil fuels" despite their alleged knowledge of those risks. 993 F.3d at 86-87. But as the Second Circuit explained, a plaintiff cannot use "[a]rtful pleading" to

avoid the application of federal common law where it is "seeking damages" "precisely *because* fossil fuels emit greenhouse gases." *Id.* at 91. So too here.[*]

The District goes so far as to contend that the foregoing ground for removal does not even present a "serious legal question[]." Opp. 10. But that assertion is simply not credible in light of the Supreme Court's decision to call for the Solicitor General's views on that same question in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550. While it may be true that "only about 1% of petitions for certiorari are granted," Opp. 20 (citation omitted), "the grant rate is considerably higher following a [call for the views of the Solicitor General]." David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures*, 16 Geo. Mason L. Rev. 237, 273 (2009). And notably, the District does not dispute that the government has already taken the position that federal law governs claims like those alleged here, rendering them removable to federal court. *See* Mot. 9. Given that the questions presented in *Suncor* both involve circuit conflicts, *see* Mot. 9-10, it is beyond reasonable dispute that this appeal presents serious legal questions.

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[*] There is currently an appeal pending before the Second Circuit in *Connecticut* v. *Exxon Mobil Corp.*, No. 21-1446, involving similar climate-related claims. There, the Second Circuit granted the defendant's motion to stay pending appeal, holding that the defendant had "made a sufficient showing that it is entitled to a stay." Order 1 (Oct. 5, 2021) (Dkt. 80).

3. This case also belongs in federal court because the District's claims necessarily raise disputed and substantial federal issues; relate to numerous actions that defendants have undertaken at the direction of federal officers; and arise out of or in connection with defendants' substantial operations on the Outer Continental Shelf. *See* Mot. 14-17. Those grounds for jurisdiction also raise serious questions of first impression in this circuit and thus support a stay pending appeal.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

Issuance of the remand order would irreparably harm defendants because they would necessarily be deprived of their right to proceed in a federal forum for a period of time and could be deprived of that right permanently. *See* Mot. 18-20. The District's contrary arguments are incorrect.

The District contends that defendants' claim of irreparable harm is merely a complaint about "litigation expense." Opp. 8 (citation omitted). But there is "no categorical rule that time and money spent in litigation can never constitute an irreparable harm." *Richards* v. *Ernst & Young LLP*, Civ. No. 08-4988, 2012 WL 92738, at *3 (N.D. Cal. Jan. 11, 2012). And the District does not contend that defendants are likely to recover these litigation costs if they prevail. *See* Mot. 20.

The District's argument on this score also ignores defendants' "right and privilege" under federal law to proceed with the litigation in federal court if

federal jurisdiction exists. *Southern Pacific Co.* v. *Denton*, 146 U.S. 202, 207 (1892). If defendants prevail on federal jurisdiction, they are entitled to have the issues in the case decided by a federal judge. The issuance of the remand order in the absence of a stay necessarily infringes on that right.

To be sure, if defendants were to prevail on appeal after remand and the case were to return to federal court, defendants may argue that any rulings made by the Superior Court are void or, at a minimum, that the district court must revisit any such rulings. That issue alone creates a "rat's nest of comity and federalism issues" for the district court to resolve. *Northrop Grumman Technical Services, Inc.* v. *Dyncorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). But even if the district court were to revisit the Superior Court's decisions, irreparable injury could remain. For example, if the case were to proceed into discovery in Superior Court after the erroneous denial of a motion to dismiss, the district court's granting of a motion to dismiss after the case returns to federal court would not eliminate the injury of defendants having been subjected to potentially extensive discovery proceedings—including motion practice, document production, and depositions—when no discovery was warranted at all. Accordingly, even if the District were correct that discovery in Superior Court would mirror discovery in federal court, "discovery and other preliminary matters" may very well be "wasted efforts." Opp. 8.

The District separately argues that the Superior Court is unlikely to "resolve the case on the merits before this Court issues a decision on appeal." Opp. 7. The District is focused on the wrong timeframe. While the Superior Court may not resolve this case before this Court issues a decision in this appeal, one of the parties may seek subsequent review from the Supreme Court, and further proceedings may be necessary before this Court or the district court. If the Superior Court were to enter final judgment at any time before federal jurisdiction is finally resolved, defendants' right to a federal forum could be destroyed.

The District is also skeptical that this appeal may be prolonged beyond "typical timelines," Opp. 7, as the district court concluded in *Minnesota* v. *American Petroleum Institute*, Civ. No. 20-1636, 2021 WL 3711072 (D. Minn. Aug. 20, 2021). But the same considerations at issue in *Minnesota* are also present here. This Court too "may consider all asserted grounds for removal in a district court's remand order" rather than only "arguments for removal rooted in the federal officer removal statute." *Id.* at *3; *see also BP p.lc.* v. *Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1543 (2021). As in *Minnesota*, this appeal raises multiple grounds for removal and thus presents several complex questions of federal jurisdiction.

Proceedings in the *Suncor* case could further extend the timeline for appellate review here. As one district court recently explained in a similar

climate-related case, "there is no deadline associated with" a call for the views of the Solicitor General, and "the Supreme Court will not rule on the petition until the Solicitor General's Office files its brief." *City of Annapolis* v. *BP p.l.c.*, Civ. No. 21-772, 2022 WL 15523629, at *4 (D. Md. Oct. 27, 2022). Any grant of certiorari in the case could be several months away, and the case will now not be heard until the Supreme Court's 2024 term at the earliest. A subsequent decision from the Supreme Court could occasion further proceedings in this case, such as through an order from the Supreme Court granting a petition for certiorari in this case, vacating this Court's decision, and remanding for further proceedings in light of a decision in *Suncor*. The Superior Court could thus "reach dispositive and irreversible outcomes" before the question of jurisdiction is resolved here—irreparably harming defendants in the process. *Id.*

C. The Balance Of Harms Tilts Sharply In Defendants' Favor

Finally, the equities favor a stay. The District claims that delay will harm the public interest because "consumers are flooded with defendants' disinformation . . . which artificially inflates the market for fossil-fuel products and exacerbates the local climate harms in the District." Opp. 21. But "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion." *City of Annapolis* v. *BP p.l.c.*, Civ. No. 21-772, 2021 WL 2000469, at *4

(D. Md. May 19, 2021). The District also cites the "loss of evidence" as a concern. Opp. 21. But the District does not indicate what evidence might be lost during the pendency of this appeal, and the District waited to bring its lawsuit for years after the first similar action was filed, belying its concerns about "delay." *See Delaware* v. *BP America Inc.*, Civ. No. 20-1429, 2022 WL 605822, at *3 n.3 (D. Del. Feb. 8, 2022).

Entering a stay now would conserve public resources by avoiding duplicative proceedings and the "rat's nest of comity and federalism issues" the district court would face should the case return to federal court. *Northrop Grumman*, 2016 WL 3346349, at *4. As one court recently stated, "a relatively short pause of this likely lengthy litigation will not substantially harm [p]laintiff's ability to prosecute its case." *Delaware*, 2022 WL 605822, at *3.

* * * * *

The motion for a stay of the remand order pending appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the foregoing Reply in Support of Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 2,599 words. I further certify that the other signatories to this brief consented to my use of their electronic signature.

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JANUARY 20, 2023