In the United States Court of Appeals for the Eighth Circuit

No. 21-1752

STATE OF MINNESOTA,
APPELLEE

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC, APPELLANTS

No. 21-8005

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC, PETITIONERS

v.

STATE OF MINNESOTA,
RESPONDENT

MOTION BY APPELLANTS FOR STAY OF THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d), appellants respectfully move this Court to stay issuance of the mandate pending the filing

of a petition for a writ of certiorari in the United States Supreme Court. Appellee, the State of Minnesota, has notified appellants that it opposes this motion.

1. The State filed an action against select energy companies and a national trade association in Minnesota state court, seeking to use state law to impose tort liability for past and future harms allegedly attributable to climate change. The State claims appellants have misled the public about climate change, and that appellants' production, sale, and promotion of fossil fuels have contributed to climate change and caused wide-ranging harm to Minnesota and its citizens. *See* App. 16-98. Asserting claims for common-law fraud, common-law strict liability and negligent failure to warn, and violations of state consumer-protection statutes, the State seeks restitution, disgorgement of profits, an order requiring appellants to fund a corrective public education campaign, and other injunctive relief. *See id.* at 88-98.

2. Appellants removed the action to the United States District Court for the District of Minnesota, asserting seven grounds for federal jurisdiction, including federal question jurisdiction based on federal common law. *See* App. 102-160. The district court remanded the case to state court. *See* Add. 1a-37a.

On March 23, 2023, this Court affirmed. It held that, because the State pleaded nominally state-law claims, removal was appropriate only if federal law completely preempted those claims or if the claims necessarily raised a

substantial, disputed federal question under *Grable & Sons Metal Products Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *See* Op. 5, 7. As to complete preemption, the Court concluded that "[t]here is no substitute federal cause of action" for the State's claims and that the absence of such a substitute triggers a "strong presumption against complete preemption." *Id.* at 7. The Court further reasoned that, because federal common law is "not statutory," it "does not express Congressional intent . . . to completely displace any particular state-law claim." *Id.* In addition, the Court rejected appellants' arguments for *Grable* jurisdiction, concluding that appellants did not "identify which specific elements of Minnesota's claims require the court to either interpret and apply federal common law or second-guess Congress's cost-benefit rationales in allowing the production and sale of fossil fuels." *Id.* at 9.

In a concurring opinion, Judge Stras explained that, while the State "purports to bring state-law consumer-protection claims," it was in reality "tak[ing] aim at the production and sale of fossil fuels worldwide." Op. 18. Because such a lawsuit would override the policy choices of the federal government and other States, it is "beyond the limits of state law" and "*should*" give rise to federal jurisdiction. *Id.* at 18, 21 (quoting *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021)). Even so, Judge Stras concluded that the State's lawsuit could not be removed under existing case law. *Id.* at

24. Absent a stay, the mandate is due to issue on April 13. *See* Fed. R. App. P. 40(a)(1), 41(b).

3. Federal Rule of Appellate Procedure 41(d) governs motions to stay the mandate pending the filing of a petition for a writ of certiorari. A court of appeals may stay the mandate when a petition for certiorari "would present a substantial question" and "there is good cause for a stay." Fed. R. App. P. 41(d)(1). In particular, this Court considers "whether there is a reasonable probability that the Supreme Court will grant certiorari, whether there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest." *Doe* v. *Miller*, 418 F.3d 950, 951 (8th Cir. 2005). Appellants plan to file a petition for a writ of certiorari presenting the questions (1) whether 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; and (2) whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.

a. A stay of the mandate is amply warranted. There is a significant likelihood that the Supreme Court will grant review to resolve those questions—which are "substantial" under any sense of the term, *see* Fed. R. App.

P. 41(d)(1)—and appellants have a strong chance of success on the merits, *see Doe*, 418 F.3d at 951.

i. The Supreme Court will likely grant review to resolve the two questions presented because they have divided the courts of appeals. *See* Sup. Ct. R. 10(a). As to the first question, the Second Circuit held in *City of New York*, *supra*, that the city's claims—which, like the State's, sought relief "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 were instead "federal claims" that "must be brought under federal common law." 993 F.3d at 92, 95. Like the First, Fourth, and Tenth Circuits, however, this Court has now reached the opposite conclusion. *See* Op. 5-7; *see also Rhode Island* v. *Shell Oil Products Co.*, 35 F.4th 44, 53-55 (1st Cir. 2022), pet. for cert. filed, No. 22-524 (Dec. 2, 2022); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 31 F.4th 178, 200-204 (4th Cir. 2022), pet. for cert. filed, No. 22-361 (Oct. 14, 2022); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1262 (10th Cir. 2022), pet. for cert. filed, No. 21-1550 (June 8, 2022). As to the second question, this Court's decision deepens a circuit conflict on whether federal common law provides a ground for federal removal jurisdiction even if the claims were nominally pleaded under state law. *Compare Sam L. Majors Jewelers* v. *ABX, Inc.*, 117

F.3d 922, 924 (5th Cir. 1997), *with, e.g.*, *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699, 707-708 (3d Cir. 2022), pet. for cert. filed, No. 22-821 (Feb. 27, 2023).

In addition, appellants are likely to prevail on the merits. Federal common law necessarily supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "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, 640-641 (1981) (citation omitted). And "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), the Supreme Court reasoned that "[f]ederal common law," and not the "varying common law of the individual States," is "necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Id.* at 107 n.9 (citation omitted). In *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court unambiguously reaffirmed that "the regulation of interstate water pollution is a matter of federal, not state, law." *Id.* at 488 (citation omitted). And in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011)—a case involving similar claims alleging injury from the contribution of greenhouse-gas emissions to global climate change—the Court reiterated that

federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421 (citation omitted).

Consistent with this longstanding precedent, Judge Stras correctly observed that, when a complaint alleges an interstate dispute that requires a uniform federal rule of decision, "[s]tate law is no substitute." Op. 19-20. Appellants submit that the Supreme Court is likely to agree with Judge Stras's reasoning, and the Second Circuit's, and proceed to hold that the State's claims arise under federal law. In addition, the Supreme 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. The Supreme Court need only apply familiar jurisdictional principles to this context in order to conclude that the State's claims, which are inherently federal in nature, give rise to federal jurisdiction.

ii. The questions presented are also undeniably important. Nearly two dozen climate-change lawsuits are pending in courts across the country. Like the State's, those lawsuits "seek[] a global remedy for a global issue." Op. 18 (Stras, J., concurring). Whether those lawsuits must be resolved by a uniform rule of federal decision or instead by a patchwork of fifty states'

disparate laws is a question that has wide-reaching implications for both national energy policy and interstate federalism. Only the Supreme Court can resolve that question, *see id.* at 23 (Stras, J., concurring), making its review especially warranted.

The Supreme Court, moreover, has already expressed an interest in the two questions appellants plan to raise in their petition for a writ of certiorari. In *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*., S. Ct. No. 21-1550 (June 8, 2022), the Court invited the Solicitor General to file a brief expressing the views of the United States on those questions. That fact alone indicates that the Court is likely to grant review in *Suncor*: once the Court has invited the Solicitor General to express the United States' views, a petition for a writ of certiorari "is over 46 times more likely to be granted." David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 274 (2009) (Thompson & Wachtell).

Although the Solicitor General recommended that the Supreme Court deny review, that recommendation reflects an abrupt reversal in the government's position. As the *Suncor* petitioners recently pointed out in a supplemental brief, just two years ago, the United States argued that claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-

gas emissions on the global climate are "inherently federal in nature," even when labeled as arising under state law. Supp. Br. at 1, *Suncor*, *supra* (quoting Oral Arg. Tr. at 31, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021)). The government explained that, despite the Clean Air Act's displacement of any remedy under federal common law, "[a]ny putative tort claims that seek to apply the law of an affected State to conduct in another State . . . continue to arise under federal, not state law, for jurisdictional purposes." *See id.* at 1-2 (citations omitted). The government added that the well-pleaded complaint rule presented no obstacle to removal. *See id.* at 2 (citation omitted).

But in *Suncor*, the government abandoned its previous position, citing a "change in Administration." *Suncor*, U.S. Br. 7. Even setting aside the serious deficiencies in the government's current position—detailed in the *Suncor* petitioners' supplemental brief—the fact that the last two administrations have taken contrary positions confirms, at a very minimum, that there are substantial legal arguments on both sides of the questions presented. *Cf.* Thompson & Wachtell 274 (noting that "the Court is likely to still grant a petition after a CVSG, even if the SG has recommended denying").

b. There is "good cause for a stay" of the mandate. Fed. R. App. P. 41(d)(1). Absent a stay, once the Ramsey County District Court receives the remand order, this case will proceed in that forum while appellants' petition

for a writ of certiorari is pending. Congress, however, has bestowed on defendants the right to litigate in federal court "actions that originally could have been filed in federal court." *Caterpillar Inc.*, 482 U.S. at 392. Appellants could be irreparably deprived of that right if forced to litigate this case in Minnesota state court and this Court's decision is overturned. As the district court here explained in staying its remand order pending the resolution of this appeal, "concrete and irreparable injury" exists where the "failure to enter a stay will result in a meaningless victory in the event of appellate success." D. Ct. Dkt. No. 116, at 10 (citation and internal quotation marks omitted).

In addition, while appellants' petition is pending, the Ramsey County District Court could rule on various substantive and procedural motions, including dispositive motions adjudicating the parties' claims and defenses. The court may also decide discovery motions. There is serious risk that such motions would be decided differently than they would be in federal court. For example, the State may argue that Minnesota courts have different discovery rules than federal courts, raising the possibility that the outcome of these motions in state court would be different. *Compare* Minn. R. Civ. P. 33.01(a) (providing that a party may serve up to 50 written interrogatories on another party without court approval), *with* Fed. R. Civ. P. 33(a)(1) (limiting that number to 25). Should appellants be required to submit to greater discovery in state court, there will be no way to undo the associated cost and burden;

appellants' ability to take advantage of the federal forum would be "effectively mooted," and they would suffer irreparable harm as a result. *See Suarez* v. *Saul*, Civ. No. 19-173, 2020 WL 5535625, at *1 (D. Conn. Sept. 15, 2020); *Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017).

The balance of equities also tips sharply in appellants' favor. The State will not be prejudiced by a stay. As one court noted in granting a stay of proceedings in a similar climate-change case, "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," and "[t]he urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." *City of Annapolis* v. *BP p.l.c.*, Civ. No. 21-772, 2021 WL 2000469, at *4 (D. Md. May 19, 2021). As another court noted, "a relatively short pause of this likely lengthy litigation will not substantially harm [p]laintiff's ability to prosecute its case." *Delaware* v. *BP America Inc.*, 2022 WL 605822, at *3 (D. Del. Feb. 8, 2022). "The public interest would be best served by avoiding the possibility of unnecessary or duplicative litigation and concentrating resources on litigating [p]laintiff's claims in the proper forum." *Id.*

So too here. A stay would conserve the parties' resources by allowing them to litigate this case to completion without being saddled with

simultaneous and potentially unnecessary litigation in state court. *See Dalton* v. *Walgreen Co.*, Civ. No. 13-603, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013). Similarly, a stay will avoid the same risk of harm to the State from potentially inconsistent outcomes if the remand order is reversed. *See Raskas* v. *Johnson & Johnson*, Civ. No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

The "public interest" would also be served by a stay. The state court would be spared from wasting scarce judicial resources adjudicating an action that may later be returned to federal court. *See Delaware*, 2022 WL 605822, at *3. And, if this Court's decision is overturned, the federal district court would be spared from confronting the "rat's nest of comity and federalism issues" that would inevitably arise if the court had to evaluate the precedential or persuasive force of any intervening merits or discovery orders issued by the state court. *Northrop Grumman Technical Services, Inc.* v. *DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Accordingly, all of the relevant factors support the issuance of a stay here. *See Doe*, 418 F.3d at 951.

At a minimum, given the substantial overlap between the questions appellants plan to raise in their petition for a writ of certiorari and the questions presented in the *Suncor* petition, appellants seek a modest stay of the mandate until the Supreme Court resolves the *Suncor* petition, which it is due to

consider at its April 21 conference. There is little reason immediately to resume proceedings in state court when the Supreme Court will soon issue relevant guidance. A brief stay therefore would serve the public interest in judicial economy and impose no prejudice on the State.

* * * * *

For the foregoing reasons, this Court should stay issuance of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court, or, at a minimum, pending the Supreme Court's resolution of the petition for certiorari in *Suncor*.

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 Rules of Appellate Procedure 27(d)(1)(E), (d)(2)(A), 32(g)(1), and 32(a)(5)-(6), that the foregoing Motion by Appellants for Stay of the Mandate is proportionately spaced, has a typeface of 14 points or more, and contains 2,838 words. I further certify that the electronic version of this brief was automatically scanned for viruses and found to contain no known viruses.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

APRIL 12, 2023

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the bar of this Court, certify that, on April 12, 2023, the attached Motion by Appellants for Stay of the Mandate was filed through the Court's electronic filing system. I further certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system.

/s/ Kannon K. Shanmugam
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