No. 21-1752

United States Court of Appeals for the Eighth Circuit

STATE OF MINNESOTA, PLAINTIFF-APPELLEE

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (CIV. NO. 20-1636)
(THE HONORABLE JOHN R. TUNHEIM, C.J.)

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANTS' MOTION TO STAY REMAND ORDER

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INTRODUCTION

Appellants' Motion for Stay of the Mandate ("Motion") should be denied. Rather than sufficiently address the factors for a stay, the Motion repeats the arguments and authorities already presented in the merits briefing. But merits have already been decided; this Court's published opinion confirms this case belongs in state court.

On the merits of the Motion, Appellants have not met their burden to satisfy any of the elements necessary to support a stay of mandate, each of which is independently dispositive of Appellants' motion. First, Appellants have not established a reasonable probability the Supreme Court will grant their anticipated petition for a writ of certiorari. There is no split of appellate authority on the issues this Court decided, and the Supreme Court denied a nearly identical petition two years ago. Second, even assuming Appellants' certiorari petition were granted, Appellants have not shown a fair possibility that the Supreme Court will reverse. The jurisdictional principles this Court correctly applied in reaching its decision have been settled law for decades, and the Supreme Court has recently taken pains to solidify and clarify them. There is little reason to believe the Court will upend

them here. Third, Appellant have not demonstrated demonstrate that they will suffer irreparable harm by proceeding in state court. Litigating in state court is not a cognizable harm, let alone an irreparable one that could justify a stay. And finally, the balance of equities weighs in the State of Minnesota's favor. The State filed this case in the public interest in July 2020, and it should be allowed to proceed to the merits of its claims without further prejudicial delay.

Because the Appellants do not establish that any of these factors apply in this Case, the Motion should be denied.

PROCEDURAL HISTORY

Minnesota brought this public-interest action in state court nearly three years ago, asserting state-law consumer protection, failure to warn, and fraud claims. The State alleges that Appellants have known for more than half a century that their fossil-fuel products create greenhouse-gas pollution that increases global surface temperatures with potentially catastrophic results, but nonetheless planned, funded, and carried out a decades-long campaign of denial and disinformation about the existence of climate change and their products' direct role in causing it. *See* App.17, 31–70 (Complaint). Appellants removed to

federal district court in July 2020, asserting seven different theories of federal subject-matter jurisdiction. The district court granted the State's motion to remand in March 2021, rejecting each of Appellants' jurisdictional arguments. Appellants appealed.

On March 23, 2023, this Court affirmed. *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023). The Court held that none of Appellants' theories conferred jurisdiction, and that the case must be remanded to the state court where it was filed. The Court's opinion joins a chorus of six circuits that have affirmed remand in materially similar cases across the country. *See Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022). Appellants did not petition for rehearing. Appellants Motion confirms they intend to seek certiorari review.

ARGUMENT

An applicant moving for stay of mandate pending a petition for certiorari "bears a heavy burden." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The movant "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). The Court thus "consider[s] 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." *John Doe I v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

A. Appellants fail to establish a reasonable probability that the Supreme Court will grant certiorari.

Appellants do not meet their heavy burden of demonstrating a "reasonable probability that the Supreme Court will grant certiorari" here. *Miller*, 418 F.3d at 951. "[T]o demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari

petition, a party must demonstrate a reasonable probability that four Justices will vote to grant certiorari and that five Justices will vote to reverse the judgment of this court." *Senne v. Vill. of Palatine*, 695 F.3d 617, 619 (7th Cir. 2012) (Ripple, J., in chambers). Under that standard, courts "consider carefully the issues that the applicant plans to raise in its certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Id.*

The Supreme Court will only grant a writ of certiorari "for compelling reasons," which usually requires that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter "or 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 the Supreme Court. S. Ct. R. 10(a) & 10(c). But "certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

Appellants fail to demonstrate a reasonable probability that the Supreme Court will grant review here. Appellants principally contend that "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." Mot. at 5. That representation grossly misstates the status of these cases. This Court already recognized that there is no split of circuit authority on the only question squarely presented in this appeal, whether there is federal subject matter jurisdiction over Minnesota's state-law claims and claims like them. *See* 63 F.4th at 708. The Court explained that this case is not "the first time that the Energy Companies, or their oil-producing peers, have made these jurisdictional arguments," which have now come before courts of appeal in six circuits. 63 F.4th at 708. The Court's "sister circuits rejected them in each case," and the Court's opinion "join[s] them." *Id*.

No court has accepted Appellants' keystone assertion that "claims necessarily and exclusively governed by federal common law but labeled

as arising under state law" present a federal question, Mot. at 4, because as this Court correctly held, "the potential applicability of a *defense* arising under federal law doesn't create jurisdiction," 63 F.4th at 709. Every court to address the issue in similar cases has held that the federal concerns Appellants raise at most "spea[k] to a potential defense on the merits of those claims, specifically a preemption defense, rather than to the jurisdictional issue" and have affirmed remand. *Id.* (quoting *Boulder*, 25 F.4th at 1266). There is no circuit split for the Supreme Court to resolve.

Appellants also claim a separate circuit conflict exists over "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." Mot. at 4. But even conceding *arguendo* that such a division exists, it is not implicated in this case The Court acknowledged that some other circuit decisions have address "whether the Clean Air Act displaced federal common law on transboundary pollution" and "whether the Clean Air Act preempts state-law claims" related to climate change, but "decline[d] to reach either question" because "even assuming that

federal common law still exists in this space," it would not confer jurisdiction under the well-pleaded complaint rule or any of the rule's exceptions. 63 F.4th at 710 n.5. The Court expressly declined to adjudicated whether and to what extent federal common law "governs" here, and that issue thus could not provide the Supreme Court a basis to grant the petition. *See, e.g.*, *Jepson v. Bank of New York Mellon*, 821 F.3d 805, 807–08 (7th Cir. 2016) (Ripple, J., in chambers) (no stay where anticipated certiorari petition arguably identified issue subject to a circuit conflict, but issue was not basis for circuit court's decision).

Appellants also cannot show a reasonable probability that review will be granted because the Supreme Court denied a nearly-identical petition just two years ago in *City of Oakland v. BP PLC*. There, the Ninth Circuit held that the plaintiff cities' state-law claims alleging misleading statements in connection with the sale of fossil fuel products were not removable, rejecting the same jurisdictional arguments premised on federal common law that Appellants advance here. 969 F.3d 895, 908 (9th Cir. 2020). The defendants petitioned for certiorari, framing the question presented as "[w]hether putative state-law tort claims alleging harm from global climate change are removable because

they arise under federal law." Pet. for Cert. at i, *Chevron Corp. v. City of Oakland*, No. 20-1089, 2021 WL 495645 (U.S. Jan. 8, 2021); *compare* Mot. at 4 (dividing same issue between two questions). The Supreme Court denied the petition. *Chevron Corp. v. City of Oakland*, 141 S.Ct. 2776 (2021). The Court's "recent denial demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue," which in turn shows that Appellants cannot meet their burden. *See Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1321 (1994) (Rehnquist, J., in chambers).

Finally, the Motion does not arise in a vacuum—several petitions in materially-similar cases are already pending before the Supreme Court, and are likely to be decided imminently. *See infra* fn2. The view of the Solicitor General is that the Supreme Court should not hear those cases. By the time this Court considers the Motion, can consider that development.

B. Even if the Supreme Court were to grant the petition, Appellants fail to establish a fair possibility they will secure reversal of this Court's opinion.

Even if there were any probability the Court would grant certiorari review in the absence of a split, it is highly unlikely the Court

would reverse that a century of jurisprudence on which this Court relied, interpreting bedrock jurisdictional statutes Congress has left unperturbed since 1887. "For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff*'s complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 (1983). And "[b]y unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully v. First Nat'l Bank*, 299 U.S. 109, 116 (1936).

The well-pleaded complaint rule traces to Section 1 of the 1887 amendments to the 1875 Judiciary Act, under which it was "essential" to the lower federal courts' original jurisdiction "that the plaintiff's declaration or bill should show that he asserts a right under the constitution or laws of the United States." *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 461 (1894). The general right of removal jurisdiction was limited to "such suits as might have been brought in that court by the plaintiff under the first section." *Id.* at 462. Congress

has retained both rules ever since, and the general removal statute today allows removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The "'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts," and applies with full force in the "century-old jurisdictional framework governing removal of federal question cases from state into federal courts." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Appellants have not shown any likelihood the Supreme Court will reconsider its precedents concerning the well-pleaded complaint rule. To the contrary, the Court has expressly acknowledged that its "caselaw construing § 1331 was for many decades . . . highly 'unruly,'" and has worked diligently to clarify the rule. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 385 (2016). *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). "In an effort to bring some order" to the doctrine, the Court "condensed [its] prior cases into" the four-element *Grable* test that this Court applied here. *Gunn v. Minton*, 568 U.S. 251, 258 (2013); 63 F.4th

at 711–12. The Supreme Court has expressed its confidence that the *Grable* doctrine usually "provides ready answers to jurisdictional questions," and that existing precedent provides adequate "guidance whenever borderline cases crop up." *Manning*, 578 U.S. at 392. Appellants have not shown a fair prospect the Court will reverse course.

C. Appellants have not shown they will suffer irreparable harm.

Appellants' Motion must be denied for the additional reason that they have not shown, or seriously attempted to show, that they will likely suffer irreparable harm absent a stay. An Appellants' failure to demonstrate irreparable harm provides independent grounds to deny a of mandate stay such that "likelihood of success on the merits need not be considered" if irreparable harm is not shown. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Even where certiorari has already been granted and there is a demonstrated likelihood of reversal, a stay will be denied absent such a showing. *E.g.*, *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301–02 (2014).

To carry their burden, Appellants must show the harm they will allegedly face is "certain and great and of such imminence that there is

a clear and present need for equitable relief." *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (cleaned up) (quoting *Roudachevski v. All–Am. Care Ctrs.*, Inc., 648 F.3d 701, 706 (8th Cir. 2011)); *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996) (same); *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) (same). Importantly here, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Appellants primarily assert that they might or might not "be required to submit to greater discovery in state court," and if they are there would be "no way to undo the associated cost and burden." Mot. at 10. But participating in litigation under state procedural rules is simply not irreparable injury. In a recent analogous proceeding before the Ninth Circuit, the court recognized that litigating in state court does "not rise to the level of irreparable harm," even if the parties might face "increased litigation burdens and possible inefficiencies if this court later finds the cases were properly removed." *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392, at *1 (9th Cir. Mar. 13,

2021) (denying stay pending appeal). Courts in this circuit have likewise held that where a party asserts that discovery and other pretrial proceedings in state court could be "wasted" if a remand order is reversed, "this concern is speculative" and will not warrant a stay where there is "no indication that the fruits of those efforts cannot be used in federal court should the case return." *Lundeen v. Canadian Pac. Ry. Co.*, No. CIV.04-3220 RHK/AJB, 2005 WL 775742, at *3 (D. Minn. Apr. 6, 2005). Time and money spent litigating in state court cannot constitute irreparable harm.

Appellants apparent concerns about prejudice also represent the type of speculative harm that will not support a stay. Appellants complain that the state court might "rule on various substantive and procedural motions" while their certiorari petition is pending. Mot. at 10. It is unlikely, however, that the state court will reach a final judgment or even significantly advance discovery before the petition is decided. Under the statutes and rules governing certiorari petition timing, Appellants' forthcoming petition will likely be resolved by

October 2023. [1] And in all likelihood, the Supreme Court will imminently grant or deny the petitions pending in similar cases out of the First, Third, Fourth, Ninth and Tenth Circuits within the next few weeks.[2] Appellants agree there is "substantial overlap" between those petitions and the issues they intend to raise in their anticipated petition, Mot. at 12, and the result of those petitions will be strongly predictive of the outcome here. It is not likely that the state court will resolve jurisdictional and/or dispositive motions or oversee extensive

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[1] Appellants' deadline to petition the Supreme Court can be no later than August 23, 2023, 150 days after this Court's entry of judgment. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 & 30.1. The Justices will then consider Appellants' petition at the so-called Long Conference at the end of the Court's summer recess, scheduled for Friday, September 26. *See* 28 U.S.C. § 2; Supr. Ct. R. 3. Appellants' petition will most likely be granted or denied the following Monday, October 2, the first day of the Court's next term. *See* Supreme Court Calendar, October Term 2023 https://www.supremecourt.gov/oral_arguments/2023TermCourtCalendar.pdf.

[2] The petition for certiorari in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 21-1550 (U.S.), has been distributed for consideration at the Supreme Court's conference for April 21, 2023, the same day this opposition brief is due. Materially similar petitions in *Rhode Island v. Shell Oil Products Co.*, No. 22-524 (U.S.); *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 22-361 (U.S.); and *City & County of Honolulu v. Sunoco LP*, No. 22-523 (U.S.), are calendared for consideration at the same conference. The petition in *Chevron Corp. v. City of Hoboken*, No. 22-821 (U.S.), which presents the same questions, has been distributed for conference on May 11.

discovery before the merits of Appellants' petition are resolved. "[T]he theoretical possibility that the state court could irrevocably adjudicate the parties' claims and defenses" and all ancillary matters before October "falls short of meeting the demanding irreparable harm standard." *Honolulu*, No. 21-15313, 2021 WL 1017392, at *1.

At bottom, litigation in state court is not a harm. Minnesota's courts are perfectly competent to hear issues before them, including Appellants' federal preemption defenses. "[A]s important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate." 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.11.1 (3d ed. Sept. 2022 update).

D. The Equities and Public Interest Weigh in Favor of Permitting This Case to Proceed.

The equities and public interest weigh heavily against a stay. On one hand, the Court should consider the State's desire to vindicate its claims for the benefit of its citizens. This case is brought in the public interest and seeks to hold marketers accountable for false and misleading statements about the nature and risks of their products. On

the other hand, the Appellants seek to avoid and delay such accountability.

The State brought this case in July 2020, and the people of the state deserve to have it proceed and be heard. Yet the State's case has not proceeded on the merits for nearly three years. Continuing to delay the State's day in court would further frustrate "Congress's longstanding 'policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 238 (2007) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)). The State is entitled to move forward on its claims, and the public interest as expressed in both federal congressional policy and the State's *parens patriae* interest weigh decidedly in favor of advancing this case on the merits.

Appellants only response is to complain that if the mandate issues and remand is later reversed in the Supreme Court, it could create problems for comity and federalism. *See* Mot. at 12 (quoting *Northrop Grumman Tech. Svcs., Inc. v. DynCorp Int'l LLC*, Civ. No. 16-

534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016)). That is not true. Removal after some litigation in the state system is common, and the ramifications of removal in that circumstance is not mysterious. When a case is removed, "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450. Federal law governs future proceedings, and the district court has jurisdiction to address any prior state court orders the same way it would any other interlocutory order. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 437 (1974).

There is simply no harm in allowing state courts to govern the litigation while the case is before them. And as noted above, litigating in state court is simply not a cognizable imminent harm, so too it should outweigh the public interest in the State's case proceeding.

CONCLUSION

Appellants' Motion for a Stay of Mandate must be denied.

Dated: April 21, 2023

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITS

I, Victor M. Sher, certify, pursuant to Federal Rules of Appellate Procedure 27(d)(1)(E) and (d)(2)(A) and 32(g)(1), that the foregoing Opposition to Appellants' Motion to Stay Remand Order is proportionately spaced, has a type-face of 14 points or more, was prepared using Microsoft Word 2016, and contains 3,644 words. I further certify that the electronic version of this filing was automatically scanned for viruses and found to contain no known viruses.

April 21, 2023

/s/ Victor M. Sher
VICTOR M. SHER

CERTIFICATE OF SERVICE

I, Victor M. Sher, hereby certify that on April 21, 2023, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

April 21, 2023

/s/ Victor M. Sher
VICTOR M. SHER