Nos. 22-2082, 22-2101

United States Court of Appeals for the Fourth Circuit

ANNE ARUNDEL COUNTY, MARYLAND,

Plaintiff-Appellee,

v.

BP P.L.C., *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-01323-SAG
(The Honorable Stephanie A. Gallagher)

CITY OF ANNAPOLIS, MARYLAND,

Plaintiff-Appellee,

v.

BP P.L.C., *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-00772-SAG
(The Honorable Stephanie A. Gallagher)

DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION TO SUBMIT ON THE PAPERS

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INTRODUCTION

Plaintiffs in this consolidated appeal, Anne Arundel County and the City of Annapolis, ask the Court to forgo oral argument in a case presenting issues of first impression with indisputably significant implications for the law of removal in this Circuit. Plaintiffs fail to justify their request, and this Court should ensure that it has the benefit of oral argument on the complex questions raised before it for the first time.

Plaintiffs filed their two cases in Maryland state court, seeking to use Maryland state law to impose liability on select energy companies for physical harms allegedly attributable to the effects of global climate change that arises from the cumulative impact of worldwide greenhouse gas emissions over the past several decades. Defendants removed these sweeping actions to federal district court and, after the district court erroneously remanded them, now ask this Court to reverse the district court's rulings with respect to two bases for removal: federal officer removal under 42 U.S.C. § 1442(a) and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *See* Opening Brief ("OB") at 5–6.

Plaintiffs themselves admit that—although this Court has decided some of the issues in this case in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore IV*")—the core questions presented in *this appeal* have *not* been resolved by this Court. *See* Mot. 4–5. Despite this concession, Plaintiffs ask this Court to dispense with oral argument on these questions of first impression for this Court based on the decisions of *other* circuits.

There is no basis to forgo oral argument. The novel issues raised in this appeal are complex and of critical importance to our federal system. As the Supreme Court has explained, "the right of removal under § 1442(a)(1) is made absolute" whenever a suit in a state court is for or relating to any act under color of federal office, because absent such protection, federal officers and those acting under them could be harassed and their work frustrated "at any time" "for an alleged offense against the law of the State, yet warranted by the Federal authority they possess." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (internal quotation marks omitted). Given the significance of the novel questions presented in this appeal, Defendants respectfully submit that oral argument would be beneficial to their resolution. *See* Fed. R. App. 34(a)(2).

ARGUMENT

Federal Rule of Appellate Procedure 34 provides that "[o]ral argument *must* be allowed in *every case*" unless a panel of this Court unanimously determines that the issues presented are "frivolous," already "authoritatively decided," or so "adequately presented" in the written briefs that oral argument would not "significantly aid[]" "the decisional process." Fed. R. App. P. 34(a)(2) (emphases added).

None of these exceptions to the presumption of oral argument applies to this consolidated appeal. Plaintiffs do not suggest that this appeal is frivolous. *See* Mot. 1–8. And the only issues that Plaintiffs contend have been "authoritatively decided" are Defendants' Outer Continental Shelf Lands Act and federal question arguments—which Defendants acknowledge are foreclosed by Circuit precedent, do not press in this appeal, and have only preserved for further review. *See* OB.2, 12, 67.

Plaintiffs provide no reason to think that oral argument would not be beneficial. Rather, Plaintiffs' motion relies principally on their unsupported assertion that "the facts and legal arguments are adequately presented in the briefs and record" such that this Court would not "significantly" benefit from oral argument. *See* Fed. R. App. P. 34(a)(2). But

Plaintiffs acknowledge that this Court has not previously addressed Defendants' core arguments. *See* Mot. 5–7. Indeed, this appeal presents several arguments on important questions of first impression for this Court regarding federal jurisdiction.

First, Defendants have submitted new evidence in support of federal officer removal under 42 U.S.C. § 1442(a) that this Court did not have before it and did not pass upon in *Baltimore IV*, including evidence of Defendants producing highly specialized fuels for the U.S. military. *See* OB.33–37.

Second, Defendants have pressed a new argument about the scope of Section 1442(a)'s requirement that Defendants' actions under federal guidance "relat[e] to" Plaintiffs' claims: that the relatedness inquiry mandated by the federal officer removal statute is not limited to the plaintiff's theory of liability, but instead requires courts to consider whether the defendant's federal action relates to the plaintiff's alleged *injury*. *See* OB.19–28. Because the relief that Plaintiffs seek—and the global emissions on which that relief depends—necessarily encompasses all of Defendants' fossil-fuel production, and as a result, Defendants' actions

taken under government direction "relat[e] to" their claims. *See* OB.26–28.

Third, Defendants present a new argument that Plaintiffs' claims are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because, based on their allegations about Defendants' purported misrepresentation campaigns, Plaintiffs' claims necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment. *See* OB.60–67.

This Court has not addressed these questions. Plaintiffs suggest that this Court should rely on decisions by *other* courts of appeals deciding similar issues, arguing that the Third and Ninth Circuits have concluded that Defendants' expanded evidentiary record does not support federal officer removal. *See* Mot. 6. But Plaintiffs concede that these questions are issues of first impression *in this Circuit*. The Court should have the benefit of oral argument in resolving such novel questions.

These questions are also significant to our federal system. The Supreme Court has long emphasized the importance of maintaining legal clarity in the test for federal officer removal. *See Colorado v. Symes*, 286 U.S. 510, 518 (1932) (federal officer removal statute reflects, and must be

interpreted "with highest regard for," the "equality" of interests of States and federal government). And the Court has repeatedly highlighted the "great importance" of removal statutes, which "brin[g] . . . into consideration the relation of the general government to the government of the States." *Tennessee v. Davis*, 100 U.S. 257, 260 (1879).

Given the complexity and importance of these jurisdictional questions, the other courts of appeals cited by Plaintiffs issued their decisions after oral argument. Indeed, the Ninth Circuit's decision in *City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), arose from a very similar context as the present appeal. In *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), the Ninth Circuit rejected the defendants' arguments for federal-officer removal based on a limited evidentiary record, just like this Court's decision in *Baltimore IV*. The Ninth Circuit subsequently heard oral argument in *Honolulu* in an appeal based on several *new bases* for federal-officer removal, including an expanded evidentiary record and arguments for the centrality of plaintiffs' injury to the jurisdictional analysis. *See Honolulu*, 39 F.4th at 1107. Just as in *Honolulu*, the record in this appeal is expanded from the one submitted in *Baltimore IV*, which was materially identical to that in *San*

Mateo, 31 F.4th at 229. And the Ninth Circuit has scheduled oral argument for November 13, 2023 in another appeal raising similar issues. *See City of Oakland v. BP PLC*, No. 22-16810 (9th Cir. Sept. 3, 2023), Dkt. 58. Thus, like the Ninth Circuit, this Court should afford Defendants' arguments full consideration through oral argument.

Plaintiffs also baselessly suggest that oral argument in this appeal will somehow "further delay" the resolution of their claims on the merits in Maryland state court. Mot. 4. That is not true. As Plaintiffs themselves acknowledge, the state-court proceedings are not stayed pending the outcome of this consolidated appeal, and the state courts are actively managing those dockets. Indeed, Plaintiffs correctly note that "Defendants will file motions to dismiss in both [state-court] actions on October 2, 2023." Mot. 3. Oral argument in this appeal therefore is not delaying resolution of Plaintiffs' claims in state court.

It is not the case that the two issues chiefly pressed in this appeal have been authoritatively decided by this Court, and Plaintiffs do not argue otherwise. Mot. 2. Nor is it the case that the Court's "decisional process would not be significantly aided by oral argument" when deciding novel questions untouched by *Baltimore IV*—each presenting significant

implications for the law of removal in this circuit. Fed. R. App. 34(a)(2)(c). Although Plaintiffs cite decisions from *outside* this Circuit, they have not demonstrated that the presumption in favor of oral argument should be set aside in this case raising issues of first impression.

CONCLUSION

The Court should deny Plaintiffs' motion and hold oral argument in this appeal to accord the parties the opportunity to address any questions that the panel might have that have not been answered by the briefs.

October 2, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5)–(6) and 32(g)(1), the undersigned certifies that this motion complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (New Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 1,454 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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