

No. A-

IN THE

*Supreme Court of the United States*

---

SUNOCO LP, *et al.*,

*Applicants,*

*v.*

CITY AND COUNTY OF HONOLULU, *et al.*,

*Respondents.*

---

**APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

THOMAS G. HUNGAR  
LOCHLAN F. SHELFER  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
(202) 955-8500

THEODORE J. BOUTROUS, JR.  
*Counsel of Record*  
WILLIAM E. THOMSON, III  
JOSHUA D. DICK  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, California 90071-3197  
(213) 229-7000  
tboutrous@gibsondunn.com

*Counsel for Applicants Chevron Corporation and Chevron U.S.A., Inc.  
[Additional counsel listed on signature page]*

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicants apply for a 60-day extension of time, to and including December 5, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.<sup>1</sup> The judgment of the court of appeals was entered on July 7, 2022. App., *infra*, 3a. Unless extended, the time for filing a petition for a writ of certiorari will expire on October 5, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. Congress entrusted federal courts to hear any claim “for or relating to any act” taken under a federal officer’s direction. 28 U.S.C. § 1442(a)(1). To qualify for removal, a defendant “must both raise a colorable federal defense, and establish that the suit is ‘for a[n] act under color of office.’” *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (alteration in original; citation omitted) (quoting 28 U.S.C. § 1442(a)(3)).

This Court has emphasized that the federal officer removal statute requires a “liberal construction.” *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). For example, courts are to “credit” the defendant’s—not plaintiff’s—“theory of the case” when considering federal officer removal. *Acker*, 527 U.S. at 432. And this Court has

---

<sup>1</sup> Applicants comprise Chevron Corporation, Chevron U.S.A. Inc., Exxon Mobil Corporation, ExxonMobil Oil Corporation, ConocoPhillips, ConocoPhillips Company, Phillips 66, Phillips 66 Company, Sunoco LP, Aloha Petroleum, Ltd., Aloha Petroleum LLC, Shell plc (*f/k/a* Royal Dutch Shell plc), Shell USA, Inc. (*f/k/a* Shell Oil Company), Shell Oil Products Company LLC, BP plc, BP America Inc., BHP Group Ltd., BHP Group plc, Woodside Energy Hawaii Inc. (*f/k/a* BHP Hawaii Inc.), and Marathon Petroleum Corporation.

warned against taking “a narrow, grudging” approach that frustrates Congress’s goals of protecting federal officers and allowing “the validity of [their] defense[s]” to be tested in a “federal forum.” *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

The federal courts of appeals have reached conflicting results on the requirements for satisfying the “colorable federal defense” prong for federal officer removal. Some courts of appeals—including the Ninth Circuit here—have allowed removal only in those limited instances where a defendant’s federal defense arises directly out of its official duties. Other courts of appeals, however, have correctly recognized that neither the statutory language of Section 1442(a) nor this Court’s precedents require such a narrow approach.

2. Applicants in this case are 20 oil-and-gas companies. Respondents are the City and County of Honolulu and the County of Maui. Each Respondent filed a separate action against Applicants in Hawaii state court, alleging that pollution from Defendants’ fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution, which “is the main driver of” the climate change that “caused harms ... , like property damage from extreme weather and land encroachment because of rising sea levels.” App., *infra*, 9a. Respondents assert numerous causes of action ostensibly under Hawaii state tort law, including claims for public and private nuisance, failure to warn, and trespass. *Id.*

Applicants removed the actions to the United States District Court for the District of Hawaii, where they were consolidated. The notices of removal asserted various grounds for federal jurisdiction, including that Respondents’ claims are

governed exclusively by federal common law, that removal is proper under this Court's precedent in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and that federal officer removal is authorized under 28 U.S.C. § 1442(a). App., *infra*, 30a. In particular, Applicants argued that Respondents' suits sought to impose liability and damages for Applicants' oil and gas activities, much of which was performed under the direction, supervision, and control of federal officers. *Id.* at 11a–13a. Additionally, Applicants raised numerous colorable federal defenses, including the government-contractor defense, preemption, federal immunity, and the defense that Plaintiffs' claims are barred by the U.S. Constitution, including the Interstate and Foreign Commerce Clauses, the Due Process Clause, the First Amendment, and the foreign-affairs doctrine. Respondents moved to remand, which the district court granted, and Applicants appealed.

As relevant here, the court of appeals held that Applicants' argument for removal based on their sale of specialized fuels to the U.S. military and their production of vast quantities of oil and gas for the federal government since at least World War II was deficient because Applicants' federal defenses "do not flow from official duties," which the court deemed fatal to removal under Section 1442. App., *infra*, 17a; *see id.* at 16a (holding that "[t]he defense must arise out of defendant's official duties" (cleaned up; citation omitted)). In so holding, the court of appeals departed from the Third Circuit's decision in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia*, 790 F.3d 457 (3d Cir. 2015), which specifically rejected the contention "that the federal defense must coincide with an asserted federal

duty,” instead holding that what matters for purposes of removal “is that a defense raises a federal question, not that a federal duty forms the defense,” *id.* at 473. Similarly, the court of appeals diverged from the approach taken by the Sixth Circuit. *See City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 391 (6th Cir. 2007) (concluding that the colorable-defense prong was satisfied when the defendant “assert[ed] the defense of preemption”). Likewise, this Court’s precedents confirm that the federal defense need not arise out of a federal duty. *See, e.g., Acker*, 527 U.S. at 437 (allowing removal because the defendant-judges’ defense of “intergovernmental tax immunity” was federal, even though the judges were not duty-bound to oppose the tax); *Mesa v. California*, 489 U.S. 121, 130 (1989) (requiring only that a defendant’s counter-argument be “defensive” and “based in federal law”). Indeed, this Court has expressly repudiated the Ninth Circuit’s contrary view. In *Mesa*, the Court held that a proffered defense based on “the *absence* of a federally created duty” under federal law still qualifies as a “federal defense.” 489 U.S. at 129.

The court of appeals also applied the wrong standard of review for federal-officer removal, contradicting binding precedent from other courts of appeals and this Court—and this error infected the entirety of its analysis and ultimately its rejection of Applicants’ federal officer removal arguments. *Compare App., infra*, 10a (“[W]e strictly construe the [federal officer] removal statute against removal jurisdiction.”), *with City of Cookeville*, 484 F.3d at 390 (“§ 1442 is to be interpreted broadly in favor of removal.” (quotation marks omitted)); *Watson*, 551 U.S. at 147 (“this Court has made clear that

the [federal-officer-removal] statute must be ‘liberally construed’); *Willingham*, 395 U.S. at 407 (warning against “a narrow, grudging” interpretation).

3. The undersigned counsel respectfully request a 60-day extension of time, to and including December 5, 2022, within which to file a petition for a writ of certiorari. This case presents significant and complex issues concerning the scope of federal jurisdiction. A 60-day extension of time is necessary to allow Applicants’ counsel to prepare the petition addressing these important issues and detailing the widening conflict among the courts of appeals, and to coordinate among the petitioning parties, who comprise 20 distinct entities represented by 18 different law firms, all of whom must approve the petition before it can be filed. The current deadline also overlaps with national and religious holidays that will make coordination among these parties and their counsel more difficult.

A 60-day extension will not cause Respondents any prejudice. Indeed, litigation continues in state court in both cases, so a 60-day extension in which to file a petition for a writ of certiorari in this Court will not affect the pace of litigation in the parallel Hawaii state-court proceedings.

Accordingly, Applicants respectfully request that the time to file a petition for a writ of certiorari be extended by 60 days, to and including December 5, 2022.

Respectfully submitted.

By: /s/ Deborah K. Wright

Deborah K. Wright  
WRIGHT & KIRSCHBRAUN, LLLC  
1885 Main Street, Suite 108  
Wailuku, HI 97693  
Telephone: 800.695.1255  
deborah@wkmaui.com

Paul Alston  
DENTONS US LLP  
1001 BISHOP ST., SUITE 1800  
HONOLULU, HI 96813  
Telephone: 808.524.1800  
paul.alston@dentons.com

Theodore V. Wells, Jr.  
Daniel J. Toal  
Caitlin Grusauskas  
Yahonnes Cleary  
PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Telephone: 212.373.3089  
twells@paulweiss.com  
dtoal@paulweiss.com  
cgrusauskas@paulweiss.com  
yccleary@paulweiss.com

Kannon K. Shanmugam  
William T. Marks  
PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP  
2001 K Street, NW  
Washington, DC 20006-1047  
Telephone: 202.223.7300  
kshanmugam@paulweiss.com  
wmarks@paulweiss.com

*Attorneys for Applicants Exxon Mobil Corpo-  
ration and ExxonMobil Oil Corporation*

By: \*\* /s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.  
William E. Thomson  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071  
Telephone: 213.229.7000  
Facsimile: 213.229.7520  
tboutrous@gibsondunn.com  
wthomson@gibsondunn.com

Thomas G. Hungar  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Telephone: (202) 955-8500  
thungar@gibsondunn.com

Andrea E. Neuman  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, NY 10166  
Telephone: 212.351.4000  
aneuman@gibsondunn.com

Joshua D. Dick  
GIBSON, DUNN & CRUTCHER LLP  
555 Mission Street, Suite 3000  
San Francisco, CA 94105-0921  
Telephone: 415.393.8200  
jdick@gibsondunn.com

Melvyn M. Miyagi  
WATANABE ING LLP  
999 Bishop Street, Suite 1250  
Honolulu, HI 96813  
Telephone: 808.544.8300  
Facsimile: 808.544.8399  
mmiyagi@wik.com

*Attorneys for Applicants Chevron Corporation and Chevron U.S.A., Inc.*

\*\* 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.



By: /s/ Crystal K. Rose  
Crystal K. Rose  
Adrian L. Lavarias  
Sharon Paris  
LUNG ROSE VOSS & WAGNILD  
Topa Financial Center, Suite 900  
700 Bishop Street  
Honolulu, HI 96813  
Telephone: 808.523.9000  
CRose@legalthawaii.com  
ALavarias@legalthawaii.com  
SParis@legalthawaii.com

Steven M. Bauer  
Margaret A. Tough  
LATHAM & WATKINS LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111-6538  
Telephone: 415.391.0600  
steven.bauer@lw.com  
margaret.tough@lw.com

*Attorneys for Applicants ConocoPhillips,  
ConocoPhillips Company, Phillips 66, and  
Phillips 66 Company*

Jameson R. Jones  
Daniel R. Brody  
BARTLIT BECK LLP  
1801 Wewatta Street, Suite 1200  
Denver, CO 80202  
Telephone: 303.592.3100  
jameson.jones@bartlit-beck.com  
dan.brody@bartlit-beck.com

*Attorneys for Applicants ConocoPhillips and  
ConocoPhillips Company*

By: /s/ Lisa Bail  
Lisa Bail  
David Hoftiezer  
GOODSILL ANDERSON QUINN &  
STIFEL  
A Limited Liability Law Partnership LLP  
999 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813  
Telephone: 808.547.5600  
Facsimile: 808.547.5880  
lbail@goodsill.com  
dhoftiezer@goodsill.com

John D. Lombardo  
Matthew T. Heartney  
ARNOLD AND PORTER KAYE SCHOLER  
LLP  
777 S. Figueroa St., 44th Floor  
Los Angeles, CA 90017-2513  
Telephone: 213.243.4000  
John.Lombardo@arnoldporter.com  
Matthew.Heartney@arnoldporter.com

Jonathan W. Hughes  
ARNOLD AND PORTER KAYE SCHOLER  
LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111  
Telephone: 415.471.3100  
Jonathan.Hughes@arnoldporter.com

*Attorneys for Applicants  
BP plc and BP America Inc.*

By: */s/ David C. Frederick*  
David C. Frederick  
Daniel S. Severson  
KELLOGG, HANSEN, TODD, FIGEL &  
FREDERICK, P.L.L.C.  
1615 M. St., N.W., Suite 400  
Washington, D.C. 20036  
Telephone: 202.326.7900  
dfrederick@kellogghansen.com  
dseverson@kellogghansen.com

Joachim P. Cox  
Randall C. Whattoff  
COX FRICKE LLP  
Queen's Court  
800 Bethel Street, Suite 600  
Honolulu, HI 96813  
Telephone: 808.585.9440  
jcox@cfhawaii.com  
rwhattoff@cfhawaii.com

*Attorneys for Applicants*  
*Shell plc (f/k/a Royal Dutch Shell plc),*  
*Shell USA, Inc. (f/k/a Shell Oil Company),*  
*and Shell Oil Products Company LLC*

By: */s/ C. Michael Heihre*  
C. Michael Heihre  
CADES SCHUTTE A LIMITED LIABILITY  
LAW PARTNERSHIP LLP  
Cades Schutte Building  
1000 Bishop Street, Suite 1200  
Honolulu, HI 96813  
Telephone: 808.521.9200  
Facsimile: 808.521.9210  
mheihre@cades.com

J. Scott Janoe  
BAKER BOTTS LLP  
910 Louisiana Street  
Houston, Texas 77002  
Telephone: 713.229.1553  
Facsimile: 713.229.7953  
scott.janoe@bakerbotts.com

Megan Berge  
Sterling Marchand  
BAKER BOTTS LLP  
700 K Street, N.W.  
Washington, D.C. 20001  
Telephone: 202.639.1308  
Facsimile: 202.639.7890  
megan.berge@bakerbotts.com  
sterling.marchand@bakerbotts.com

*Attorneys for Applicants*  
*Sunoco LP, Aloha Petroleum, LTD., and*  
*Aloha Petroleum LLC*

By: /s/ Victor L. Hou  
Victor L. Hou  
Boaz S. Morag  
CLEARY GOTTLIEB  
One Liberty Plaza  
New York, NY 10006  
Telephone: 212.225.2894  
vhou@cgsh.com  
bmorag@cgsh.com

Margery S. Bronster  
Lanson Kupau  
BRONSTER FUJICHAKU ROBBINS  
1003 Bishop St. #2300  
Honolulu, HI 96813  
Telephone: 808.524.5644  
Facsimile: 808.599.1881  
mbronster@bfrhawaii.com  
lkupau@bfrhawaii.com

*Attorneys for Applicants BHP Group  
Limited, BHP Group plc, and Woodside En-  
ergy Hawaii Inc. (f/k/a BHP Hawaii Inc.)*

By: /s/ Shannon S. Broome  
Shannon S. Broome  
HUNTON ANDREWS KURTH LLP  
50 California St., Suite 1700  
San Francisco, CA 94111  
Telephone: 415.975.3700  
sbroome@huntonak.com

Shawn Patrick Regan  
HUNTON ANDREWS KURTH LLP  
200 Park Avenue, 52nd Floor  
New York, NY 10166  
Telephone: 212.309.1000  
sregan@huntonak.com

Ann Marie Mortimer  
HUNTON ANDREWS KURTH LLP  
550 South Hope Street, Suite 2000  
Los Angeles, CA 90071  
Telephone: 213.532.2103  
AMortimer@HuntonAK.com

Ted N. Pettit  
CASE LOMBARDI & PETTIT  
737 Bishop St. #2600  
Honolulu, HI 96813  
tpettit@caselombardi.com

*Attorneys for Applicant  
Marathon Petroleum Corp.*

September 16, 2022