**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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No. 21-1404

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SUNOCO, INC. (R&M), et al.,

*Applicants*,

v.

PERRY CLINE, on behalf of himself and all other similarly situated,

*Respondent.*

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# EMERGENCY APPLICATION FOR INJUNCTION OR STAY PENDING RESOLUTION OF PETITION FOR CERTIOARI

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT:

Sunoco faces imminent execution of a nine-figure damages award that it has never been allowed to appeal. Sunoco has been placed in this unenviable position through no fault of its own. When faced with a sizable class-action damages award that purported to be a final and appealable judgment but did not comply with applicable Tenth Circuit law on finality, Sunoco took the sensible course of filing a protective notice of appeal. In doing so, Sunoco did not abandon its good-faith belief that there was no final judgment, but rather forthrightly told the Tenth Circuit that the district court's orders were not final and thus not appealable (and are also infirm on the merits). The first time Sunoco did so, the Tenth Circuit did what other circuits do under comparable circumstances: It dismissed the appeal for lack of jurisdiction and sent a clear signal that the district court's order was not final. But when the district court subsequently tried and failed to fix the finality problem and Sunoco followed the same course, the Tenth Circuit inexplicably faulted Sunoco for failing to carry its burden of establishing appellate jurisdiction. In a break from its own prior practice and that of its sister circuits, the court faulted Sunoco for forthrightly articulating its view that the appellate court lacked jurisdiction because the district court has not yet issued a final judgment. That misguided view disregards a court's jurisdiction to decide its own jurisdiction, guts the well-established practice of protective notices of appeal, and puts appellants in the impossible position of forever losing their rights to a merits appeal if they have the temerity to insist that the district court is wrong in its view that it has issued a final judgment.

The Tenth Circuit's erroneous decision is the subject of a fully briefed petition for certiorari, but the lower courts are intent on allowing execution of the $155 million award to proceed before this Court can address that petition. Sunoco has exhausted every possible avenue to try to get those execution efforts put on hold, but the lower courts seem bound and determined to allow execution to move forward without giving this Court time to resolve the petition and without giving Sunoco the opportunity that every other litigant enjoys: the right to appeal a decision on the merits before execution proceeds. Sunoco is thus left with no other choice but to ask this Court for emergency relief to protect Sunoco from this irreparable injury and to protect this Court's own jurisdiction.

That relief is readily warranted. There is at least a fair prospect that the Court will grant the petition and reverse, as the Tenth Circuit's decision is plainly wrong and poses a direct threat to protective appeals. Unless the Court intervenes now, Sunoco will suffer irreparable injury, as there is neither any realistic prospect that it could recover $155 million once it has been distributed to the more than 53,000 class members nor any prospect that the Tenth Circuit will address the merits of this nine-figure damages award before execution proceeds. Making matters worse, the class representative seems intent on executing in the most disruptive manner possible, as he declined Sunoco's offers of full financial assurance in favor of sweeping asset discovery that he apparently plans to deploy to inflict unnecessary costs, impose liens, frustrate business operations, and perhaps even seize physical property. Those are classic forms of irreparable injury, and they are as unnecessary as they are

irreparable, as no one doubts that Sunoco is good for the money and will pay promptly if and when the underlying order is affirmed on appeal as both final under Tenth Circuit law and correct on the merits. The Court should put a stop to all of these ongoing and irreparable efforts to enforce a judgment that is not final, appealable, or executable. A stay will prevent irreparable injury, preserve Sunoco's right to appeal, and ensure that this Court can resolve Sunoco's petition without having to worry that any relief it may grant could prove illusory.

## OPINIONS AND ORDERS BELOW

The Tenth Circuit's August 25 order denying Sunoco's motion for a stay or injunction of the enforcement proceedings is attached as Exhibit 1. The magistrate judge's August 9 order setting deadlines for production of documents and for asset hearing is attached as Exhibit 2. The Tenth Circuit's August 4 order denying Sunoco's motion for a stay or injunction of the enforcement proceedings is attached as Exhibit 3. The district court's June 14 order denying Sunoco's request to extend the stay of the enforcement proceedings is attached as Exhibit 4. The district court's March 31 order denying Sunoco's motion to enjoin the enforcement proceedings is attached as Exhibit 5. The Tenth Circuit's November 1, 2021 order dismissing Sunoco's appeals is attached as Exhibit 6. The district court's August 27, 2020 "Judgment Order" is attached as Exhibit 7. The district court's August 17, 2020 order is reported at 479 F.Supp.3d 1148 and attached as Exhibit 8.[1]

[1] The remaining orders of the Tenth Circuit and the district court are reproduced in the Appendix (hereinafter "App."), filed in conjunction with Sunoco's pending petition

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1), 28 U.S.C. §2101(f), and 28 U.S.C. §1651(a).

## STATEMENT OF CASE

### A. Legal Background

The federal courts of appeals have jurisdiction over appeals from "all final decisions of the district courts of the United States." 28 U.S.C. §1291. "A final decision is typically one by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotation marks and alterations omitted). The "finality requirement" is "jurisdictional in nature," so if a court of appeals "finds that the order from which a party seeks to appeal" is not final, its "inquiry is over," and it must dismiss the appeal for lack of jurisdiction. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). The "effect" of the finality rule is to "disallow appeal from any decision which is tentative, informal or incomplete." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As officers of the court, lawyers are obligated to apprise a court of their good-faith belief that the court lacks jurisdiction, *Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), and in the appellate context often do so by filing protective notices of appeal, Fed. Ct. App. Manual §1:9 (7th ed.).

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for certiorari, *Sunoco Partners Mrkg. & Terminals L.P., et al. v. Cline*, No. 21-1404 (Apr. 28, 2022).

With certain exceptions not relevant here, Federal Rule of Civil Procedure 58 requires "[e]very judgment and amended judgment" to be "set out in a separate document." Fed. R. Civ. P. 58(a). Thus, when a district court directs entry of judgment under Rule 58, that ordinarily signifies that the court views the judgment as final, and that the jurisdictional clock for filing an appeal has started running. "The label used by the District Court, however, cannot control an order's appealability." *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (quotation marks and alterations omitted). When faced with a purportedly final judgment, a court of appeals must look behind the label to the substance and determine whether the order truly ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment. *See id.*; *Sullivan v. Finkelstein*, 496 U.S. 617, 627-28 n.7 (1990). It is well established that "an order that determines liability but leaves damages to be calculated is not final." Wright & Miller, 16B Fed. Prac. & Proc. Juris. §4009 (3d ed.); *see Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (orders that leave "assessment of damages" to be resolved "have never been considered to be 'final' within the meaning of" §1291). In the class-action context, courts have understood that rule to mean that a "determination of damages that does not allocate an aggregate sum among claimants" is "not final." Wright & Miller, 15B Fed. Prac. & Proc. Juris. §3915.2 (2d ed.).

In keeping with that understanding, in a pair of cases known as *Strey* and *Cook* the Tenth Circuit has established two requirements that must be satisfied for an order awarding damages to a class to qualify as final and appealable. First, the

district court must establish "the formula that will determine the division of damages among class members." *Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87, 88 (10th Cir. 1982). Second, the district court must establish "the principles that will guide the disposition of any unclaimed funds." *Id. See Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1138 (10th Cir. 2010). Thus, in the Tenth Circuit, if a district court fails to address the allocation and disposition of all damages, even in a judgment that purports to be final, there is no valid final judgment. Such a non-final order should not be subject to execution or the basis of an appeal on the merits.

### B. Factual and Procedural Background

1. In 2017, respondent Perry Cline filed a class-action lawsuit against Sunoco under Oklahoma's Production Revenue Standards Act (PRSA). Cline alleged that Sunoco failed to pay statutory interest on late payments to a class of owners of interests in oil wells in Oklahoma. Dkt.2-2.2.[2] The district court certified a 53,000-member class despite serious doubts that many of the class members could be identified, and the case proceeded to a bench trial. On August 17, 2020, the court found Sunoco liable for failing to pay PRSA interest and awarded the class damages. Ex.8; Dkt.298.at.25; Dkt.231.at.13. On August 27, the court issued a "Judgment Order" awarding the class roughly $80 million in actual damages and $75 million in punitive damages. Ex.7. Although the court expressly designated it a Rule 58 judgment, the Judgment Order did not allocate the damages among class members

[2] "Dkt." refers to the district court docket, No. 17-cv-313-JAG (E.D. Okla.).

or provide any plan for the disposition of unclaimed funds, despite both being prerequisites for a final judgment under *Strey* and *Cook*.

Because the Judgment Order nonetheless purported to be a Rule 58 final judgment, Sunoco filed a protective notice of appeal, while forthrightly explaining why the "Judgment Order" was not actually final and appealable. Dkt.306; CA10.No.20-7055.09.21.20.Br. The Tenth Circuit agreed and dismissed the appeal for lack of jurisdiction, stating that the district court "had not yet issued a plan to allocate the damages it awarded," and so had not yet issued a final judgment. App.13.

2. In the meantime, Cline filed a proposed "Plan of Allocation" in the district court. Dkt.317. Sunoco objected that the proposed plan still did not meet the finality requirements of *Strey* and *Cook*. Dkt.321. Over Sunoco's objections, the court issued a "Plan of Allocation Order" adopting Cline's proposal and failing to remedy the finality defects Sunoco identified. App.31. Although the court did not issue a new Rule 58 judgment, it appeared to be of the view that the Plan of Allocation Order sufficed to render the combination of its orders a final judgment, so Sunoco filed a (second) protective notice of appeal. Dkt.340. Meanwhile, Sunoco filed motions for a new trial and to amend the "judgment," Dkt.322, 323, 347, 348, which the district court denied, App.14. At that point, Sunoco filed another protective notice of appeal, Dkt.351, and its second and third appeals were consolidated.

3. In those appeals, Sunoco forthrightly explained to the Tenth Circuit, as it had done with its first protective appeal, that the district court still had not issued a final judgment and thus the Tenth Circuit lacked jurisdiction over the merits.

CA10.20-7064.11.17.20.Appellant.Br.; CA10.20-7064.10.20.21.Appellant.Br.2-6. Sunoco invoked the Tenth Circuit's jurisdiction to determine its own jurisdiction and suggested that the court remedy the problem by instructing the district court to make modest changes to the Plan of Allocation Order. Notwithstanding both parties' pleas that it resolve the finality dispute, identify any additional steps the district court might need to take, and decide the appeals on the merits once finality was resolved, the Tenth Circuit again dismissed the appeals.

In stark contrast to its order dismissing Sunoco's first appeal, however, the court expressly refused to "address whether the district court's plan of allocation order resulted in a final, appealable judgment." Ex.6.at.8.n.7. Instead, the court maintained that it was Sunoco's "burden" to "establish our jurisdiction," and then faulted Sunoco for "arguing or implying we lack jurisdiction because the district court's plan of allocation order does not result in a final, appealable judgment." *Id.* at 4-5. The court further faulted Sunoco for not pursuing other purported "options available to it to establish appellate jurisdiction," including mandamus. *Id.* at 6 & n.6. The Tenth Circuit made no effort to reconcile its opinion with the fact that it had just resolved the finality dispute in Sunoco's first protective appeal, even though Sunoco had affirmatively argued there, too, that the court lacked jurisdiction to resolve the merits of the appeal. The Tenth Circuit then dismissed the appeal not for lack of finality, but on the ground that Sunoco "did not meet its burden to establish appellate jurisdiction." *Id.* at 2. The court denied rehearing and rehearing en banc. App.11.

Sunoco then filed a mandamus petition asking the Tenth Circuit to order the district court to make modest modifications to its orders to render them final. CA10.21-7063.01.14.22.Reply. Without opining on finality, the Tenth Circuit denied the petition on the ground that "Sunoco has not shown either that it has no other adequate means to obtain relief or that its right to the writ is clear and indisputable," and further "conclude[d] that issuance of the writ is not appropriate under the circumstances." App.2. Sunoco then filed a petition for a writ of certiorari in this Court seeking review of the Tenth Circuit's order dismissing Sunoco's second and third protective appeals. *Sunoco Partners Mrkg. & Terminals L.P., et al. v. Cline*, No. 21-1404 (Apr. 28, 2022). After Cline initially waived his right to respond, this Court called for a response, and Cline then sought a 30-day extension. The petition is now fully briefed and remains pending.

4. Mere days after the Tenth Circuit denied Sunoco's petition for rehearing, Cline began pressing full speed ahead with efforts to collect the $155 million damages award. *See* Dkt.360. If Cline is able to collect and distribute that money to the tens of thousands of class members (or at least those who can actually be identified, which many cannot), it will be virtually impossible for Sunoco to get all of it back should this Court grant relief. In normal circumstances, Sunoco could protect itself and preserve this Court's ability to address Sunoco's petition in the ordinary course by obtaining a supersedeas bond to forestall those efforts until its petition for certiorari is resolved. But there is nothing normal or ordinary about this case. Because the verdict is not final and the Tenth Circuit refuses to consider a protective notice of

appeal, Sunoco cannot obtain a supersedeas bond. And while Sunoco has offered to provide Cline with some other form of financial assurance of his choosing if he will just hold off on executing until Sunoco has exhausted its appellate rights, Cline has flatly refused, and instead appears intent on proceeding to begin executing in the most disruptive manner possible. To that end, Cline issued a sweeping discovery request demanding every single document in Sunoco's possession that touches on any of Sunoco's assets and liabilities, "including but not limited to, pipelines, plants, terminals, tankage, rights of way, etc.," Dkt.360.at.3, with apparent plans to start imposing liens, disrupting business transactions, and perhaps even seizing physical assets. The lower courts have steadfastly refused to enjoin those enforcement efforts, and Sunoco has exhausted every conceivable avenue to halt such efforts before turning to this Court for extraordinary relief to protect Sunoco and this Court's jurisdiction.

First, because the Tenth Circuit's mandamus denial suggested that "other adequate means to obtain" a final and appealable judgment might exist, Sunoco went back to the district court and filed a motion trying to obtain just that. Invoking Federal Rules of Civil Procedure 58 and 60(b)(6), Sunoco asked the court to make two modest amendments to its orders to resolve the finality problems and to issue a new Rule 58 judgment. Dkt.372. While Cline did not and could not claim that making either modification would cause him or the class any prejudice, he opposed the relief nonetheless—precisely because to grant it would ensure that Sunoco could appeal. Dkt.379-2. Sunoco also filed a motion to enjoin enforcement proceedings until the

district court reduces the money damages award to a judgment that the Tenth Circuit recognizes as final and affirms. Dkt.376. While Cline has acknowledged that executing now only to discover later that there is not yet a final judgment would put him and the other class members at serious financial risk, he opposed that relief as well. Dkt.382-2. The district court denied both motions, Ex.5; Dkt.405, 407, although it purported to grant Sunoco's motion to enjoin "in part" by staying execution efforts for 60 days and ordering the parties into mediation, Ex.5.at.2. The court promised to lift the stay unless the parties made progress toward settlement during that period, and it subsequently did just that.

Sunoco timely appealed both orders. Dkt.408, 409. And when the 60-day stay lapsed, Sunoco asked the district court to extend it until the Tenth Circuit resolves its pending appeals and this Court acts on Sunoco's pending petition for certiorari. Dkt.419. Instead, the district court denied Sunoco's request without comment and ordered execution proceedings to resume. Ex.4.at.1. In an abundance of caution given the district court's failure to acknowledge that it had denied the injunctive relief Sunoco sought, Sunoco noticed an appeal from that order as well and moved to consolidate that appeal with its pending appeals. And at the same time, Sunoco filed a motion asking the Tenth Circuit for an injunction against or stay of execution efforts pending resolution of its pending appeals and petition for certiorari. CA10.22-7017.06.24.2022.Motion; CA10.22-7018.06.24.2022.Motion.

Instead, the Tenth Circuit sua sponte ordered briefing on whether it had jurisdiction over the two appeals from the (implicit) denial of Sunoco's motion for an

injunction and then proceeded to dismiss them both. According to the Tenth Circuit, while Sunoco asked the district court to enjoin the class from executing rather than to stay the operation of a final judgment (because there is no final judgment to stay), Sunoco was still really seeking "a stay, not an injunction," and hence the order denying Sunoco's motion is not appealable. Ex.3.at.4. And while the court did not dismiss Sunoco's appeal from the denial of its motion to alter or amend the "judgment," it ordered the parties to brief jurisdiction in that appeal too, faulting Sunoco for having "filed six appeals" from the same district court case even though the Tenth Circuit has so far refused to entertain any of those appeals on the merits. *Id*.at.2. The court further stated that it would resolve the stay/injunction motion associated with that appeal in a separate order. *See id*.at.4.

Despite that pending motion and Sunoco' pending petition for certiorari, the magistrate judge proceeded to order Sunoco to produce *all* of the exceedingly wide-ranging asset information that Cline has requested by August 31, 2022, and to then appear through a designated representative for an asset hearing on September 12, 2022. *See* Ex.2.at.4. Sunoco filed objections to the magistrate's order, in which (among other things) it asked the district court to at least hold off until the Tenth Circuit resolved the pending motion for an injunction or stay. *See* Dkt.431. Cline vehemently opposed those objections and refused to delay execution or narrow the scope of these sweeping requests at all. *See* Dkt.432.

Meanwhile Sunoco's motion for a stay of or injunction against execution had been pending with the Tenth Circuit for more than two months with no sign of

resolution in sight. Accordingly, given the impending August 31 deadline, on August 25 Sunoco filed a motion asking the Tenth Circuit to enter an administrative stay of execution efforts at least until it resolved the stay/injunction motion. CA10-7018.08.25.2022.Motion. And in the event the Tenth Circuit denied the motion, Sunoco asked the court to grant a brief administrative stay to give Sunoco time to promptly seek relief from this Court, so that this Court would not have to deal with a highly expedited emergency application for emergency relief. *See id.* Instead, mere hours later, the Tenth Circuit denied Sunoco's underlying stay/injunction motion, offering no explanation other than that Sunoco has "not shown that a stay or injunction is warranted." Ex.1.at.1. And the Tenth Circuit refused to grant any stay whatsoever to give Sunoco time to seek relief from this Court, claiming that no reprieve was warranted notwithstanding the fast-approaching August 31 deadline because Sunoco represented that it was "ready and willing [to seek relief from the Supreme Court] on an expedited basis." *Id.* at 2. The Tenth Circuit thus left Sunoco with a grand total of three business days in which to seek relief from this Court before it will be forced to hand over all manner of asset information that will enable Cline to begin disrupting Sunoco's operations in service of his efforts to collect a $155 million damages award that has never been subject to appellate review.

## REASONS FOR GRANTING THE APPLICATION

To obtain an order preserving the status quo pending resolution of a petition for certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the petition sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3)

a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). In close cases, the Court will also "balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* This Court routinely grants stays in cases where it would be nearly impossible for the applicant to recover a large sum of money if it is distributed pursuant to an award that is subsequently invalidated. *See, e.g.*, *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (irreparable harm where funds held in escrow "would be very difficult to recover" once distributed); *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304-05 (2010) (Scalia, J., in chambers) ("If expenditures cannot be recouped, the resulting loss may be irreparable."). That relief is readily warranted here to prevent the impending havoc that Cline intends to wreak by trying to collect and distribute to 53,000 class members a $155 million class-action damages award that has never been tested on appeal. Whether through a stay, an injunction, or a writ of mandamus, the Court should halt Cline's execution efforts and preserve the status quo pending the disposition of Sunoco's petition for certiorari.

## I. There Is A Reasonable Probability That This Court Will Grant Certiorari And Reverse The Judgment Below.

This case plainly satisfies the first two factors in this Court's stay analysis, as there is both "a reasonable probability" that the Court will grant certiorari and a "fair prospect" that the Court will vacate or reverse the decision below. The Tenth Circuit's profoundly flawed decision below not only is incredibly inequitable, but marks a stark departure from uniform and long-settled practice, places attorneys and clients in an impossible position, and deprives the protective appeal practice of much of its utility.

1. It is blackletter law that "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). It is equally elementary that "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation ... to exercise' that authority." *Mata v. Lynch*, 576 U.S. 143, 150 (2015). As Chief Justice Marshall explained long ago, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Together, those foundational principles mean that a federal court of appeals always has both the power and the duty to determine definitively whether it possesses jurisdiction over an appeal.

Indeed, so foundational is that duty that a federal court must address jurisdiction sua sponte if the parties fail to raise it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction," "even if the parties fail to raise the issue."); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("An appellate federal court must satisfy itself" of "its own jurisdiction[.]"). And as officers of the court, counsel for the parties have a professional obligation to alert the court to, and be candid with the court about, concerns that jurisdiction may be lacking. *See Pastore*, 469 U.S. at 240; *BEM I, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir. 2002) ("As officers of the court, lawyers who practice in federal court have an obligation to assist the judges to keep within the boundaries fixed by the Constitution and Congress.").

Simply put, a lawyer with a good-faith belief that an order is not final and appealable is duty-bound to forthrightly share that view with the court.

Protective notices of appeal play an essential part in that process by preserving appellate rights when a would-be appellant faces an order the district court believes to be final, but the would-be appellant believes lacks the finality necessary for proper appellate jurisdiction. In those cases, litigants are not forced to suppress good-faith objections to appellate jurisdiction in order to pursue an appeal on the merits. Instead, it has long been common practice to notice an appeal, forthrightly raise the jurisdictional qualms, and ask the court of appeals to resolve that jurisdictional question at the threshold and reach the merits only if the appellate court concludes it has jurisdiction. Since the deadline for noticing an appeal is itself jurisdictional, courts and commentators strongly encourage the filing of protective appeals as the best way to avoid inadvertently forfeiting appellate rights in a broad range of cases where appellate jurisdiction is questionable. *See, e.g.*, Fed. Ct. App. Manual §1:9 (7th ed.) (recommending filing protective notice of appeal when there is "[u]ncertainty" about "whether the district court has entered final judgment"); *United States v. Owen*, 553 F.3d 161, 165 (2d Cir. 2009) ("[A] 'protective' notice of appeal is a useful litigation tool where, as here, the timeliness of a subsequent appeal could be called into question."); *cf. In re FCC*, 217 F.3d 125, 141 (2d Cir. 2000) (party filed two protective notices of appeal and asked court to "dismiss whichever appeal is improper"); *United States v. Poindexter*, 859 F.2d 216, 222 n.5 (D.C. Cir. 1988) (declining to "fault" counsel for pursuing protective appeals of non-final district court orders "[i]n light of

the unsettled caselaw" on finality). And nowhere is the importance of filing protective notices of appeal greater than when it comes to an adverse money judgment that the district court believes is final, but that the would-be appellant believes is non-final. In that scenario, the would-be appellant has no choice but to file a protective notice of appeal, because if a notice of appeal is not filed, the district court will authorize execution of the judgment that it believes (perhaps incorrectly) is final. Moreover, if the would-be appellant does not file a protective notice of appeal and raise the finality issue, it risks losing its appellate rights if it ultimately turns out to be mistaken in its good-faith belief that the judgment is not final. A protective notice of appeal invoking the court of appeals' jurisdiction to determine its own jurisdiction eliminates this dilemma.

Accordingly, courts of appeals have frequently resolved jurisdictional disputes in the context of protective appeals, even when the appellant is the one asserting that the court lacks jurisdiction to resolve the merits. *See, e.g., United States v. Sunset Ditch Co.*, 472 F.App'x 472, 473 (9th Cir. 2012) (resolving finality issue where appellant argued that there was "no appellate jurisdiction to hear any part of its protective appeal"); *Nat'l Assoc. of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 705 (5th Cir. 1994) (resolving appellate jurisdiction where appellant moved to dismiss its own appeal on basis of non-finality); *Arnold v. Indianapolis Airport Auth.*, 7 F.3d 238 (7th Cir. 1993) (deciding finality and appellate jurisdiction when appellants took protective appeals and then argued that there was no final judgment); *Truesdale v. DOJ*, 2012 WL 3791281, at *1 (D.C. Cir. Aug. 15, 2012)

(deciding finality and appellate jurisdiction where appellant argued that the court "lacks jurisdiction over the appeal because the district court has not entered a final judgment"). Indeed, *Cook*, one of the Tenth Circuit cases that Sunoco believes renders the orders here non-final, fits the pattern. *See* 618 F.3d at 1137-38 (resolving appellate jurisdiction where appellants moved to dismiss appeal on basis of non-finality). That practice is both unremarkable and consistent with the jurisdictional constraints of the courts of appeals because the jurisdiction the appellant is invoking when it asks the court to resolve such a dispute is not the court's jurisdiction to resolve the appeal on the merits. It is the court's "jurisdiction to determine its own jurisdiction," *Ruiz*, 536 U.S. at 628—jurisdiction that federal courts not only always possess, but have a "virtually unflagging ... obligation ... to exercise," *Mata*, 576 U.S. at 150.

2. When Sunoco was faced with a "Judgment Order" that purported to be a final Rule 58 judgment and awarded the class $155 million, Sunoco did what any rational litigant would do and noticed an appeal to protect its appellate rights. At the same time, Sunoco wished to preserve its finality objections and fulfilled its duty to the court by candidly alerting the Tenth Circuit to what it believed was a jurisdictional defect. In so doing, Sunoco explicitly invoked the Tenth Circuit's jurisdiction to determine its own jurisdiction to resolve whether the district court had issued a final and appealable judgment.

None of this struck the Tenth Circuit as problematic the first time this case came before it. To the contrary, the court agreed with Sunoco that the "Judgment

Order" failed to meet the *Strey* and *Cook* requirements for finality and dismissed the appeal for lack of jurisdiction, thus making clear to all that the district court still had work to do. Unsurprisingly, then, when the district court modified its order in an effort to render it final, but Sunoco still disagreed that the order qualified as such, Sunoco followed the same course. It noticed an appeal to protect its appellate rights while also bringing the unresolved finality problem to the Tenth Circuit's attention. Once again, Sunoco asked the court to resolve that dispute, pursuant to its jurisdiction to determine its own jurisdiction. And Cline did the same; indeed, he all but begged the Tenth Circuit to resolve the finality dispute.

One would have thought (as both parties did) that the Tenth Circuit would follow the same course as the first time around. Yet this time, the Tenth Circuit inexplicably changed course and dismissed the appeal on the ground that Sunoco failed to meet its "burden" to establish appellate jurisdiction, while expressly refusing to determine whether the district court's order was final. Ex.6.at.7 & n.7. Despite possessing both the power and the obligation to determine its own jurisdiction, the Tenth Circuit decided not to decide. The court did not purport to dismiss the appeal for lack of prosecution—for good reason, as the parties had submitted voluminous briefing on both jurisdiction and the merits, and had even proposed ways for the court to efficiently resolve any lingering finality concerns in order to reach the merits. Nor did the court dismiss the appeal for lack of jurisdiction because it found that the orders were non-final. Instead, the Tenth Circuit charted a novel third course, dismissing the appeal on the ground that Sunoco failed to meet its "burden" to

"establish our jurisdiction," while expressly refusing to "address whether the district court's plan of allocation order resulted in a final, appealable judgment." *Id.* at 4, 8 & n.7. In doing so, the court repeatedly emphasized that Sunoco had affirmatively argued the Tenth Circuit lacked jurisdiction over the merits because there is no final judgment. *Id.* at 4-8. In other words, the court dismissed the appeal and refused to resolve either finality or the merits solely because Sunoco preserved and asserted its good-faith belief that the orders were not final (as the obligations of officers of the court require).

That result is not only misguided, but inequitable in the extreme. When a party files an appeal to protect its right to appeal the substance of an order as to which it believes appealability is uncertain or lacking, the principal jurisdiction it is invoking is not the court's jurisdiction to review the underlying order. It is invoking first and foremost the court's "jurisdiction to determine its own jurisdiction"—jurisdiction that "a federal court always has." *Ruiz*, 536 U.S. at 628. The appellant thus need not "conjure up possible theories," Ex.6.at.6, as to how the court might have the very jurisdiction that the appellant believes is lacking. At most, all the appellant needs to do is point to the undisputed rule that courts always have jurisdiction to determine their own jurisdiction even when jurisdiction over the merits is lacking—which, as the Tenth Circuit acknowledged, is precisely what Sunoco did. *Id.* at 6 n.5.

The Tenth Circuit's contrary view not only flouted its unflagging obligation to exercise the jurisdiction it possesses, but renders protective appeals an exercise in futility whenever the would-be appellant thinks that appellate jurisdiction might be

lacking. In those circumstances an appellant files a protective appeal precisely because it has doubts about finality and appellate jurisdiction; otherwise, it would simply invoke the court's jurisdiction and prosecute the merits appeal. Yet the Tenth Circuit's decision eliminates the possibility that a party in Sunoco's position can preserve its appellate rights by pursuing a protective appeal, as the only way to preserve such rights would be to "forfeit" an objection to finality. And because finality goes to jurisdiction, a party cannot really forfeit the objection; it can only suppress it, contrary to its lawyer's obligations to the court. That cannot be the law. The price of a protective appeal cannot be the breach of a professional obligation.

3. This case provides a clear illustration of the untenable results the Tenth Circuit's nonsensical approach inevitably produces. For the past two years, Sunoco has been tirelessly trying to protect its right to secure its appellate day in court on the merits at every turn. After the Tenth Circuit agreed with Sunoco that the district court's initial "Judgment Order" was not final, and (in Sunoco's view) the district court failed to remedy the defects, Sunoco noticed two more appeals in which it invoked the Tenth Circuit's jurisdiction to determine its own jurisdiction, explained the finality problem no fewer than four times, and suggested various ways to fix it. When that failed, Sunoco sought rehearing and mandamus. And when that failed, Sunoco went back to the district court asking for exceptionally modest relief that would have produced a judgment that all could agree was final—only to have the district court insist yet again that it already has issued a final judgment.

With a judgment that the district court believes is final and the Tenth Circuit seems uninterested in reviewing, Sunoco is left trying to fend off aggressive efforts to collect a $155 million "judgment" that it has been unable to appeal, all because the Tenth Circuit refused to exercise its unquestioned jurisdiction to decide whether that "judgment" is final and appealable. None of that is remotely consistent with this Court's admonishment that procedural rules surrounding appeals are supposed to "facilitate a proper decision on the merits," not trap parties in some intractable "game of skill" where foot-faults "may be decisive to the outcome." *Forman v. Davis*, 371 U.S. 178, 181-82 (1962). The Tenth Circuit's bizarre treatment of protective appeals has no counterpart in other circuits or this Court's practice. No other court of appeals treats the rule that the party invoking the court's appellate jurisdiction bears the burden of establishing jurisdiction as an excuse for dismissing protective appeals without resolving the very jurisdictional issues that they are brought to tee up. Instead, every other court recognizes that protective appeals are just an unremarkable exercise of their jurisdiction to determine their own jurisdiction. *See, e.g., Sunset Ditch*, 472 F.App'x at 473; *Nat'l Assoc. of Gov't Emps.*, 40 F.3d at 705; *Arnold*, 7 F.3d 238; *Truesdale*, 2012 WL 3791281, at *1.

In short, the Tenth Circuit's decision leaves Sunoco stuck between a district court that believes that it has issued a final judgment that is ready for execution and a court of appeals that refuses to say whether it agrees, let alone consider a merits appeal or even stay the execution process pending this Court's review. Left standing, that decision threatens to have devastating consequences, both for Sunoco and for

other parties seeking to protect their appellate rights in the face of jurisdictional uncertainties. There is thus at the very least a reasonable probability that this Court will grant certiorari (or mandamus), break the impasse, and direct the Tenth Circuit to exercise the jurisdiction it plainly possesses to resolve protective notices of appeal.

## II. Sunoco Will Suffer Irreparable Harm Absent Relief From This Court, And The Balance Of Equities Favors Preserving The Status Quo.

Unless this Court grants relief, irreparable injury is all but certain, as Cline is on the brink of collecting a $155 million class-action damages award that may not have been reduced to a final judgment, definitely has not been subject to appellate review, and would be exceedingly difficult to get back. An applicant can establish irreparable harm by showing "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *Fish v. Kobach*, 840 F.3d 710, 751 (10th Cir. 2016). In the context of money judgments and property transfers, courts have long recognized that immediate execution before a defendant may be "heard" on appeal constitutes "irreparable injury" when recovering money or property after the fact would be nearly impossible. *Forgay v. Conrad*, 47 U.S. 201, 204 (1848); *see also Philip Morris*, 561 U.S. at 1304-05 ("If expenditures cannot be recouped, the resulting loss may be irreparable."); *Mori*, 454 U.S. at 1303 (irreparable harm where funds held in escrow "would be very difficult to recover" once distributed).

That is precisely the case here. Cline is aggressively attempting to collect the $155 million damages award, despite knowing that Sunoco is still trying to get its one bite at the appellate apple and still waiting to hear from this Court on its pending

petition. Cline has told the district court that he has "already filed the [purported] Judgment and required paperwork" in a county where he has identified "significant assets" held by Sunoco. Dkt.378.at.5. And he insists that there is "nothing" to "prevent" him "from collecting" on the damages award save his professed desire "to be careful to identify the correct assets." *Id.* Cline has also conspicuously refused to represent that he will hold off on distributing to the 53,0000 class members any assets he manages to collect. And if Cline were to collect and distribute $155 million of Sunoco's assets only to have a court later conclude that there was no final judgment to execute, it would be virtually impossible for Sunoco to unscramble the egg—to track down tens of thousands of recipients of relatively small damages awards and recover the money that it should never have had to pay in the first place.

Yet absent this Court's intervention, that is exactly the situation that will come to pass in a matter of days. The magistrate judge has ordered Sunoco to produce by August 31 a shockingly broad amount of asset information that will enable Cline to start imposing liens, disrupting all manner of transactions, and perhaps even trying to seize Sunoco's physical property. *See* Ex.2. The magistrate judge did so at the district court's behest, *see* Ex.4; Dkt.370, 389, 390, even though the district court acknowledged the risks for both sides if Cline were to execute only to have the Tenth Circuit later conclude that there is no final judgment, Dkt.406.at.29-30. Thus, as things presently stand, Sunoco must produce in 48 hours every single document in its possession that touches on any of its more than 18,000 physical assets. Dkt. 360 at 3; *see* Dkt. 377, Hamilton Decl. ¶3. Cline's demand, which the magistrate judge

blithely granted in full, is so broad that it could require production of invoices or contracts supporting each and every receivable. *See* Dkt. 377, Hayse. Decl. ¶4. And if all of that were not enough, Sunoco must produce by September 12 someone who can speak, to the court's and Cline's satisfaction, to every single one of Sunoco's assets and liabilities.

Sunoco thus stands to suffer irreparable injury even apart from the problems with trying to recover any money that is wrongly distributed to the 53,000 class members. Cline is targeting "pipelines, plants, terminals, tankage, rights of way," and "all oil and Natural Gas Liquids" owned by Sunoco. Dkt.360-1.at.4. Seizing or placing a lien on those assets, as Cline apparently intends to do, would irreparably harm Sunoco by depriving it of its assets and dissipating the proceeds. *See Forgay*, 47 U.S. (6 How.) at 204; *United States v. Hodges*, 684 F.App'x 722, 726 (10th Cir. 2017) (order of sale constituted irreparable harm). It could also disrupt Sunoco's supply contracts and contractual relationships with numerous third parties, not to mention the end-user consumers that Sunoco's operations serve—and all on the basis of a non-final damages award that has never been subject to appellate review. That is classic imminent and irreparable harm, *see Husky Ventures, Inc. v. B55 Invs., Ltd.*, 911 F.3d 1000, 1012-13 (10th Cir. 2018), and it readily warrants this Court's intervention, *see e.g.*, *Mori*, 454 U.S. at 1303; *Philip Morris*, 561 U.S. at 1304-05.

Indeed, the Federal Rules recognize these ways in which premature execution of a money judgment can cause irreparable harm, and they ordinarily protect defendants against "the risk of satisfying the judgment only to find that restitution

is impossible after reversal on appeal." *Poplar Grove Planting & Ref. v. Bache Halsey Stuart*, 600 F.2d 1189, 1191 (5th Cir. 1979). To that end, Rule 62 allows appellants to post a bond or other security for a stay of execution "to protect" themselves "from execution of an adverse judgment during an appeal, as well as to provide assurance to the appellee if thus prevented from collecting on the judgment." *Niemi v. Lasshofer*, 770 F.3d 1331, 1343 (10th Cir. 2014); *see* Fed. R. Civ. P. 62(b), (d). Thus, the Federal Rules of Appellate Procedure reflect the common-sense judgment that allowing execution efforts to proceed before a final judgment is affirmed on appeal puts the cart before the horse and inflicts injury that often cannot be undone if the judgment is reversed. Ordinarily, Sunoco would have availed itself of that protection, but it cannot do so here—precisely because there is no final damages judgment and the Tenth Circuit has expressed a steadfast unwillingness to consider any merits appeal. *See* Wright & Miller, 11 Fed. Prac. & Proc. Civ. §2901 (Rule 62 "does not govern stays in proceedings other than to enforce a judgment"); *id.* n.3 ("As used in this rule, 'judgment' means 'a decree and any order from which an appeal lies.' Rule 54(a).").

The injuries to Sunoco are as unnecessary as they are irreparable. There is no serious question about Sunoco's ability to pay the award or its willingness to do so without controversy (or need for any of this discovery or enforcement efforts) if it is given an opportunity to air its merits arguments on appeal and does not prevail. Cline nonetheless seems intent on forcing the most costly and disruptive execution process possible in an effort to force a settlement, and Sunoco must resist in order to

protect its appellate rights. Indeed, while Sunoco has offered other forms of financial assurance, Cline refuses to accept them, presumably in hopes of using inordinately disruptive execution tactics to try to coerce Sunoco into settling and giving up its appellate rights before this Court can even resolve its pending petition for certiorari. This Court should not allow Cline to leverage the Tenth Circuit's patently erroneous decision to try to preempt any review of a deeply flawed $155 million class-action damages award.

The remaining equitable factors strongly favor Sunoco. Cline and the class will suffer no harm from waiting to collect their damages until this Court resolves Sunoco's petition, as there has never been any dispute that Sunoco will be able to pay the damages award if and when the time comes to do so. And money judgments are enforceable only upon entry of an appealable final judgment, so it would make little sense to treat the mere fact of having to wait for that requirement to be satisfied as a cognizable harm. Thus, the balance of equities—irreparable harm to Sunoco on the one hand, and no harm to the class on the other hand—plainly favors Sunoco. In fact, Sunoco and the class would both benefit from pausing enforcement proceedings and maintaining the status quo while this Court considers Sunoco's petition, as any writ of execution would be invalid until there is a final and appealable judgment. And should liability or damages ultimately be reversed, Cline and the class would be obligated to return any money Sunoco was forced to pay due to premature enforcement—a process that would prove expensive and time-consuming for all parties while almost certainly guaranteeing that Sunoco paid out unwarranted

damages that cannot be feasibly recovered. *Baltimore & Ohio R.R. v. United States*, 279 U.S. 781, 786 (1929). Thus, this is the rare situation where preserving the status quo not only would cause no harm, but would actually benefit both sides in the long run.

The public interest also favors preserving the status quo, as the rule that money judgments may not be executed until appellate rights have been exhausted exists precisely to protect defendants' appellate rights. Preserving that ordinary order of operations here would also serve the interests of this Court, as maintaining the status quo would protect this Court's ability to consider Sunoco's petition free of concerns that execution may be a *fait accompli* before the Court can rule on it. And "maintain[ing] the status quo" for the few more weeks it will take to resolve threshold issues that will dictate whether Cline has a judgment to lawfully execute would not "harm the public interest in any capacity." *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1221 (10th Cir. 2003). At a minimum, the Court should grant an administrative stay to give it time to fully consider this application, as there is simply no need for execution to go into full swing in a matter of days.

## CONCLUSION

For the foregoing reasons, Sunoco respectfully request that this Court grant this emergency application and halt enforcement proceedings pending resolution of Applicants' petition of certiorari.

Respectfully submitted,

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