

No. 23A364

IN THE
SUPREME COURT OF THE UNITED STATES

BP AMERICA PRODUCTION COMPANY; HILCORP ENERGY COMPANY;
AND SHELL OIL COMPANY,
Applicants,

v.

PARISH OF CAMERON, LOUISIANA;
STATE OF LOUISIANA, EX REL. JEFF LANDRY, ATTORNEY GENERAL;
STATE OF LOUISIANA, THROUGH THE NATURAL RESOURCES OFFICE OF
COASTAL MANAGEMENT AND ITS SECRETARY THOMAS H. HARRIS;
CHEVRON U.S.A., INC.; TEXAS PACIFIC OIL COMPANY, INC.;
AND TEXAS PETROLEUM INVESTMENT COMPANY,
Respondents.

**On Application for an Emergency Stay
of the Ruling of the 38th Judicial District Court
for the Parish of Cameron, Louisiana**

**REPLY BRIEF IN SUPPORT OF
APPLICATION FOR AN EMERGENCY STAY**

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RULE 29.6 STATEMENTS

Applicants' Statements pursuant to Rule 29.6 were set forth at page iii of the Application for an Emergency Stay, and there are no amendments to those Statements.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT	3
I. THE COURT IS LIKELY TO GRANT THE CERTIORARI PETITION	3
II. APPLICANTS ARE LIKELY TO SUCCEED ON THE MERITS	5
III. THE BALANCE OF THE EQUITIES FAVORS A STAY	8
CONCLUSION.....	9
APPENDIX:	
Request for Judicial Notice Under Louisiana Code of Evidence Article 202, <i>Parish of Cameron v. Auster Oil & Gas, Inc., et al.</i> , No. 10-19582 (38th Jud. Dist. Ct. Oct. 27, 2023)	Reply Ex. 1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Althiser v. Richmondville Creamery Co.</i> , 215 N.Y.S.2d 122 (App. Div. 3d Dep't 1961).....	5
<i>Beech v. Leaf River Forest Prods., Inc.</i> , 691 So. 2d 446 (Miss. 1997).....	5
<i>Berry v. North Pine Elec. Coop., Inc.</i> , 50 N.W.2d 117 (Minn. 1951)	5
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	2, 4, 6, 8
<i>Monsanto Co., Ex parte</i> , 794 So. 2d 350 (Ala. 2001)	5
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)	4
CONSTITUTION AND STATUTES	
U.S. Const. amend. XIV.....	6
Due Process Clause.....	3, 7
State and Local Coastal Resources Management Act of 1978, La. Stat. Ann. §§ 49:214.21-49:214.42:	
§ 49:214.36(O)(2)	8
La. Code Civ. Proc. art. 122.....	6
LEGISLATIVE MATERIALS	
Tr. of Louisiana Senate Nat. Res. Comm. Hr'g (May 7, 2020).....	4

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**On Application for an Emergency Stay
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for the Parish of Cameron, Louisiana**

**REPLY BRIEF IN SUPPORT OF
APPLICATION FOR AN EMERGENCY STAY**

On November 27, 2023, the three out-of-state energy company applicants here will be forced to defend a trial in a case brought by Cameron Parish, Louisiana, that seeks more than \$7 billion for land-loss damages allegedly caused by the companies' historic oilfield operations in the Parish. The venire in this tiny rural parish consists of only 4,000 residents, who have witnessed and experienced their Parish and homes suffer significant land loss and hurricane storm damage. The Parish has argued in the trial court that every penny collected from this lawsuit

will benefit Cameron Parish for coastal restoration and hurricane protection—meaning that a complete verdict for the Parish would amount to \$1.4 million per resident in enhancements to property values, job prospects, and community benefits. Every potential juror thus has a substantial personal and financial interest in rendering a verdict against applicants and for the home parish.

This is an extraordinary situation, and the state respondents do not deny the objective fact that the entire jury pool has a personal and financial stake in the outcome of this case. Nor do they deny that they will suffer no prejudice from holding the trial before a disinterested jury in another parish. The trial that will begin imminently threatens the clearly established federal due-process rights of applicants to have their case adjudicated by an impartial decisionmaker. The state respondents say applicants can weed out bias through voir dire, but this Court long has held that “the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). The extreme facts of this case demonstrate that every potential juror in Cameron Parish has an obvious and objective bias.

On October 18, 2023, the trial court denied applicants’ motions to continue the trial and to stay commencement of trial pending this Court’s resolution of the stay application and petition for a writ of certiorari. Because the state appellate courts already have denied applicants’ request for extraordinary writs, absent this Court’s action, applicants have no further opportunity to challenge Cameron Parish as a venue before trial begins there. This Court’s emergency relief is warranted.

ARGUMENT

The state respondents do not rebut any of the reasons why a stay should be granted in this exceptional case. First, the state respondents do not address the reasons why this Court is likely to grant certiorari. The state respondents attempt to distinguish the cases cited in the application, but those cases make clear the varying due-process standards state courts apply to the federal Constitution. Second, their arguments as to the likelihood of success fail to apply the objective standard that this Court has applied in other due process cases and under which the juror bias here is unacceptable. Finally, the state respondents' arguments on the equities concede that applicants will have no opportunity to obtain relief before trial begins and no harm will ensue from trying this case in another nearby parish.

I. THE COURT IS LIKELY TO GRANT THE CERTIORARI PETITION

The state respondents do not rebut any of the reasons why the Court is likely to grant the certiorari petition. A well-established conflict exists among state courts over when the Due Process Clause requires a transfer to a different venue based on juror bias.

The state respondents first argue (at 7) that the Court is unlikely to grant certiorari because the cases cited in the application "all involve decisionmakers with direct, substantial, and measurable pecuniary interests." But the state respondents do not deny that every potential juror has a substantial pecuniary interest in rendering a verdict for the Parish. That the State's coastal permitting statute does not confer standing on individual residents to assert claims for alleged violations, *see* Resp. 4, does not change this fact. The Parish is seeking \$7 billion in damages

that it says will be used for coastal protection in Cameron Parish—directly implicating the interests of all residents.

The state respondents also ignore the proper due-process inquiry. The standard is an objective one: a decisionmaker cannot adjudicate a case when “the probability of actual bias . . . is too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Contrary to the state respondents’ assertion (at 11), applicants have not “presume[d]” a risk of actual bias. In both the stay application (at 4-8, 15-18) and the pending certiorari petition (at 5-11), applicants have described at length the facts that, viewed objectively, create the “probability of actual bias” that the Court has held to be impermissible. *Caperton*, 556 U.S. at 872. Every resident of Cameron Parish is deeply affected by land loss, and the trial has been billed as “judgment day.”¹ It would defy reality to ignore the “probability of actual bias” in this case.

The state respondents unconvincingly attempt to distinguish the myriad state-court cases cited in the application. First, they assert—with no analysis—that there is no split among state courts and that the decision below does not implicate that split. But as discussed at length in the application (at 12) and in the petition (at 21-26), the decision below implicates a significant conflict between the highest courts of several States. Second, and relatedly, the state respondents’ attempt to distinguish these cases goes to the merits of applicants’ arguments, not to whether the Court is likely to grant the petition to clarify the legal standard.

¹ Tr. of Louisiana Senate Nat. Res. Comm. Hr’g 56:3 (May 7, 2020) (Stay Appl. Ex. 13).

In any event, the state respondents' attempts to distinguish these cases miss the mark. They contend that *Beech v. Leaf River Forest Products, Inc.*, 691 So. 2d 446 (Miss. 1997), and *Althiser v. Richmondville Creamery Co.*, 215 N.Y.S.2d 122 (App. Div. 3d Dep't 1961), are different because the potential jurors in those cases had "direct, substantial, and measurable pecuniary interests." Resp. 8, 10. They further claim (at 10) that "only the State of Louisiana and the Parish have a direct, substantial, and measurable pecuniary interest" here. That ignores both the state respondents' public statements and the objective realities that the gargantuan amount of money sought in this case cannot help but create a substantial pecuniary interest for every potential juror.

The state respondents' attempt to distinguish the other cases is equally unconvincing. They attempt (at 9) to distinguish *Ex parte Monsanto Co.*, 794 So. 2d 350 (Ala. 2001), by claiming that the Alabama Supreme Court required proof of bias, which is not the correct standard. And they attempt (at 9-10) to distinguish *Berry v. North Pine Electric Cooperative, Inc.*, 50 N.W.2d 117 (Minn. 1951), simply by arguing that it "bears little or no resemblance to the facts" here without addressing the legal rule applied in that case. In sum, the differing standards applied in those cases highlight the importance of a ruling from this Court clarifying the contours of the due-process right to an impartial decisionmaker. Accordingly, the Court is likely to grant certiorari.

II. APPLICANTS ARE LIKELY TO SUCCEED ON THE MERITS

The state respondents' arguments on the merits are equally unavailing. They dedicate much of their response to claiming that the pretrial publicity in this

case does not show that potential jurors are biased. But applicants' argument is not based on pretrial publicity but rather on the community-wide juror interest. The state respondents largely ignore the actual merits arguments: the Fourteenth Amendment does not allow a trial by a biased decisionmaker and all members of the jury pool have a substantial interest in the outcome of this case.²

Cameron Parish residents have been told—in a theme that will be repeated throughout the trial—that they have a financial interest in the outcome of this case and that their very land and livelihoods are at stake. That interest—fostered by widespread reports of public statements by the state respondents—violates applicants' due-process rights. As explained in the application (at 14-19), under the correct, objective standard that this Court applies in due-process cases, the undisputed facts confirm that every resident of the Parish has a substantial interest in the outcome of this case. The state respondents try to deflect from that reality by asserting that any “proof” of bias cannot be ascertained until voir dire questioning. But “the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” *Caperton*, 556 U.S. at 883. As described at length in the application and the petition, an objective inquiry here shows that “there is a serious risk of actual bias—based on objective and reasonable perceptions,” *id.* at 884, that renders Cameron Parish a constitutionally impermissible venue. This case

² The response also discusses at length (at 16-18) the statute's “mandatory venue” provision. But a mandatory venue still is subject to transfer where warranted. *See* La. Code Civ. Proc. art. 122 (“change of proper venue” where “[a]ny party by contradictory motion may obtain a change of venue upon proof that he cannot obtain a fair and impartial trial because of the undue influence of an adverse party, prejudice existing in the public mind, or some other sufficient cause”). In any event, a state-law “mandatory” venue provision cannot trump the U.S. Constitution.

is not, as the Parish contends (at 5-6 & n.18), like cases where a party challenges venue because taxpayers sit as jurors. The interests involved in this case are far more direct and substantial than the potential interests involved when a juror may perceive that her tax payments may be affected.

The state respondents do not contest that the proper standard under the Due Process Clause is an objective one. Nor do they contest that the standard is satisfied here. Instead, their main argument is that voir dire can weed out any biased jurors. But the examples they cite (at 14-15) support applicants' position. The Parish likely will use for-cause or peremptory challenges against employees of oil and gas companies on the ground that they would be considered partial to the companies. Voir dire thus would help the Parish examine potential biases of jurors (based on their employment) in applicants' favor. But the same cannot be said for applicants' voir dire challenges because every potential juror objectively is tainted by the benefits sought in the lawsuit. If the state respondents' standard were to be taken seriously, applicants would need to strike for cause every member of the venire. Yet that is the very condition that has led some state courts to grant motions to transfer for trial in another venue *before* voir dire. *See* Pet. 21-26.

The state respondents flip-flop in their response (at 19-20) about where any money received from this lawsuit will go: only to a small percentage of the Parish *but also* that it will benefit "each and every citizen of Louisiana." Resp. 19. In the trial court, however, on October 27, 2023, the Parish was clear: it requested judicial notice be given to the jury of a statutory provision that it construes to require that the entire damages award—the \$7 billion sought by the state respondents—be used

in Cameron Parish alone. *See* Request for Judicial Notice Under Louisiana Code of Evidence Article 202 at 2, *Parish of Cameron v. Auster Oil & Gas, Inc., et al.*, No. 10-19582 (38th Jud. Dist. Ct. Oct. 27, 2023) (“The purpose of this amendment was, *inter alia*, to ensure that monies from enforcement actions instituted by parishes, like this one, would be used for projects in those parishes.”) (attached as Reply Ex. 1) (citing La. Stat. Ann. § 49:214.36(O)(2)).

True, this case involves an unusual set of circumstances—a tiny rural parish with just 4,000 eligible jurors seeking a massive monetary judgment that will benefit each of them. But that is all the more reason to uphold applicants’ constitutional due process rights. Many of this Court’s most important due-process precedents announce standards in cases that have had extreme facts. *See, e.g., Caperton*, 556 U.S. at 886-87 (recognizing “extreme facts”). That feature has not previously deterred this Court from upholding the Constitution; here, the Court’s guidance is needed to clarify the proper standards for jury transfer motions in cases of juror bias. The extreme bias demonstrated here—and the abject violation of applicants’ constitutional rights—is a reason to grant emergency relief, not to deny it.

III. THE BALANCE OF THE EQUITIES FAVORS A STAY

The state respondents do not argue why a stay to allow this Court to consider the petition and proceedings to ensure an impartial forum would harm them in any way. Nor do they argue that they would be harmed by trying this case in another parish to an impartial jury. They claim (at 24) that “[t]he protection of Louisiana’s coast is now a matter of extreme urgency,” but they do not explain how a stay of the commencement of trial to determine an impartial forum will prohibit them from

restoring the coastline. Trial will be delayed, but they do not explain any harm from a delay: they still will be able to present their case at trial.

And their argument that applicants will not suffer irreparable injury absent a stay of the commencement of trial rings hollow. A transfer of venue is the only way to ensure a fair trial; voir dire cannot provide an adequate remedy where applicants would be required to challenge every juror for cause because of their self-interest. For the reasons discussed in the application (at 20-22), applicants will suffer irreparable harm absent a stay, and the Parish will suffer no harm from trying this case in a different parish.

CONCLUSION

Because a certiorari petition on this issue by applicants is currently pending before this Court, *see* No. 23-415 (filed Oct. 17, 2023), applicants respectfully request that the Court stay the commencement of trial pending the consideration and disposition of that petition, and any further proceedings in this Court, or to require an expedited response to the petition so that the Court may consider it prior to the scheduled commencement of the trial on November 27, 2023.

Respectfully submitted,



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November 6, 2023

APPENDIX

TABLE OF CONTENTS

Request for Judicial Notice Under Louisiana Code of Evidence Article
202, *Parish of Cameron v. Auster Oil & Gas, Inc., et al.*, No. 10-19582
(38th Jud. Dist. Ct. Oct. 27, 2023) Reply Ex. 1

38TH JUDICIAL DISTRICT COURT FOR THE PARISH OF CAMERON

STATE OF LOUISIANA

DOCKET NO. 10-19582

THE PARISH OF CAMERON

VERSUS

AUSTER OIL AND GAS, INC., ET AL.

FILED: _____

DEPUTY CLERK OF COURT

**REQUEST FOR JUDICIAL NOTICE UNDER
LOUISIANA CODE OF EVIDENCE ARTICLE 202**

COMES NOW, Plaintiff, Cameron Parish, and Intervenor, the State of Louisiana, through the Department of Natural Resources, Office of Coastal Management and its Secretary, Thomas F. Harris, to respectfully request judicial notice of the proposition that any monies awarded through this action shall be used for integrated coastal protection, including coastal restoration, hurricane protection, and improving the resiliency of the coastal area, in accordance with La. R.S. 49:214.36(O)(2).

Louisiana Code of Evidence Article 202, titled **Judicial notice of legal matters**, provides in pertinent part:

- A. **Mandatory.** A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state, territory, and other jurisdiction of the United States, and of the ordinances enacted by any political subdivision within the court's territorial jurisdiction whenever certified copies of the ordinances have been filed with the clerk of that court.

* * *

- D. **Time of taking notice.** Judicial notice of the foregoing legal matters may be taken at any stage of the proceeding, provided that before taking judicial notice of a matter in its instructions to the jury, the court shall inform the parties before closing arguments begin.

The Parish requests judicial notice of La. R.S. 49:214.36(O)(2), which requires that any monies received through this action shall be used for integrated coastal protection, including coastal restoration, hurricane protection, and improving the resiliency of the coastal area. That subsection of the SLCRMA specifically provides:

Any monies received by any state or local governmental entity **arising from or related to a state or federal permit issued** pursuant to R.S. 49:214.21 et seq., 33 U.S.C. 1344, or 33 U.S.C. 408, **a violation thereof, or enforcement thereof, or for damages or other relief arising from or related to any of the foregoing, or for damages or other relief arising from or related to any use as defined by R.S. 49:214.23, shall be used for**

integrated coastal protection, including coastal restoration, hurricane protection, and improving the resiliency of the coastal area.¹

Subsection (O) was added to the enforcement statute in 2014 pursuant to Act 544 of the Louisiana Legislature. The purpose of this amendment was, *inter alia*, to ensure that monies from enforcement actions instituted by parishes, like this one, would be used for projects in those parishes.

The Parish anticipates that Defendants will urge an atextual interpretation of the SLCRMA that relies on subsections (J) and (I) to the exclusion of subsection (O), but neither subsection (J) nor (I) apply. Under subsections (J) or (I), monies “collected” by the Secretary in an enforcement action by the Secretary are subject to the split contemplated by (J)(1). Under subsection (O), “any monies *received*” by the Parish, pursuant to its own enforcement action, for permit violations, enforcement, or damages or other relief arising from “any use” *must* be used for integrated coastal protection projects in accordance with subsection (O)(2). Logically, monies “collected” by the Secretary cannot be monies “received” by the parish, and monies “received” by the Parish cannot be monies “collected by the Secretary.”

The effect of judicial notice is found in Louisiana Code of Evidence Article 201, which states in pertinent part:

- G. **Instructing Jury.** In a civil case, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

This Honorable Court should, pursuant to Louisiana Code of Evidence article 202, take judicial notice of the legal matters above and instruct the jury that they are to accept those propositions as law of the case.

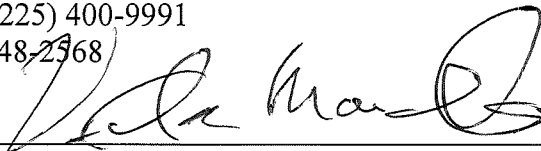
RULE 9.8 STATEMENT

Pursuant to Rule 9.8 of the Uniform Rules for District Courts, Plaintiff states that the trial of this matter is set to begin on November 27, 2023, and further states that it does not intend to present live testimony at the hearing on this matter.

¹ La. R.S. 49:214.36(O)(2) (emphasis supplied).

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38TH JUDICIAL DISTRICT COURT FOR THE PARISH OF CAMERON

STATE OF LOUISIANA

DOCKET NO. 10-19582

THE PARISH OF CAMERON

VERSUS

AUSTER OIL AND GAS, INC., ET AL.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing document has been forwarded to all known counsel of record by email and/or by placing same in the United States mail, postage prepaid, and properly addressed.

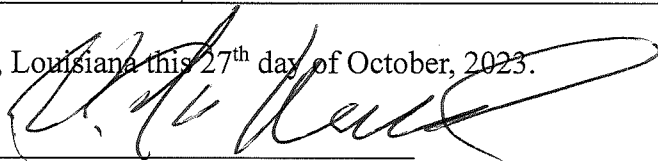
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Baton Rouge, Louisiana this 27th day of October, 2023.



Victor L. Marcello