No. 21-8001

In the United States Court of Appeals for the District of Columbia Circuit

IN RE EXXON MOBIL CORPORATION, PETITIONER

ON PETITION FOR PERMISSION TO APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1815)
(THE HONORABLE TIMOTHY J. KELLY, J.)

REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO THE CLASS ACTION FAIRNESS ACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Authorities upon which we chiefly rely are marked with asterisks.

Page

Cases—continued:

Page

Cases—continued:

STATUTES AND RULES

Page

Statutes and rules—continued:

MISCELLANEOUS

INTRODUCTION

This Court has not decided whether a representative action filed under Section 28-3905(k)(1) of the D.C. Consumer Protection Procedures Act qualifies as a "class action" under the Class Action Fairness Act (CAFA). The district court observed the absence of "binding precedent" on the question, Pet. App. 6a, and Beyond Pesticides noted this Court's preference that D.C. courts first determine whether such actions "must be litigated as [] class action[s] under Rule 23" before considering a petition under CAFA. Opp. 9-10 (citation omitted). The D.C. Court of Appeals finally resolved that issue in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015), holding that a plaintiff's representative action under the Consumer Protection Act must proceed under D.C. Civil Rule 23. This case presents the Court with an ideal opportunity—for the first time since *Rotunda*—to determine whether such actions qualify as "class actions" under CAFA.

Beyond Pesticides does not dispute that the question is an open one in this circuit; that this case cleanly presents the question; or that the balance of harms favors review. Instead, Beyond Pesticides focuses largely on district-court decisions holding that *Rotunda* applies only to actions for damages and not for injunctive relief. But those cases provide more reason for the Court to grant review: the issue is continuously recurring, and litigants need guidance. In fact, since *Rotunda*, thirteen actions under Section 28-3905(k)(1) have been removed to the D.C. District—including six cases in the last year.

Absent guidance from this Court, the trend will surely continue. Defendants have every reason to remove cases under Section 28-3905(k)(1) to federal court, because the argument that such actions qualify as "class actions" under CAFA is compelling. Beyond Pesticides contends that *Rotunda* should be limited to actions for damages, but it fails to explain how the Consumer Protection Act or the D.C. Civil Rules support a distinction between actions for damages and actions for injunctive relief in determining whether Rule 23 applies. And while Beyond Pesticides claims that the D.C. local courts do not treat actions for injunctive relief as class actions, none of the cases it cites supports that conclusion.

In the end, Beyond Pesticides offers no valid reason to deny the petition. Nor does it offer any compelling reason why, if the petition is granted, the Court should refuse to decide the question of how to calculate the amount in controversy in cases seeking injunctive relief under Section 28-3905(k)(1). That question is also novel, important, and recurring, and the Court has jurisdiction to consider it. A brief stay of the remand order while this Court resolves the appeal is appropriate in light of the important, recurring legal questions presented. The petition for permission to appeal and the motion for a stay pending appeal should therefore be granted.

I. THE PETITION FOR PERMISSION TO APPEAL SHOULD BE GRANTED

A. The CAFA Question Warrants Review

The question whether a representative action filed on behalf of consumers in the District of Columbia under Section 28-3905(k)(1) qualifies as "class action" under CAFA is an important and recurring one in this circuit. This Court has not yet decided that question, and district courts are resolving it in a way that is incompatible with the D.C. Court of Appeals' decision in *Rotunda*. Beyond Pesticides contends that the petition for permission to appeal should nevertheless be denied, but each of its arguments lacks merit.

1. Beyond Pesticides agrees (Opp. 9-10) that this Court denied previous petitions presenting a similar question to this case on the ground that additional guidance was needed from the D.C. local courts. And Beyond Pesticides does not dispute that, under *Rotunda*, representative actions for damages under Section 28-3905(k)(1) qualify as class actions, regardless of how they are styled.

From those premises, Beyond Pesticides makes an unsupported leap of logic, contending (Opp. 10-12) that *Rotunda* applies only to actions for damages under Section 28-3905(k)(1) and exempts *sub silentio* actions solely for injunctive or declaratory relief from Rule 23. But Beyond Pesticides does not explain why that is the only "realistic reading" of *Rotunda*; it merely quotes a single sentence from the opinion. *See* Opp. 12. The district-court cases that

Beyond Pesticides cites provide little more analysis. They state only briefly that the decision in *Rotunda* was motivated by a fear that "not requiring compliance with Rule 23 would preclude members of the public from asserting their own claims for damages," and that such a concern is not present in actions for injunctive relief. *See, e.g.*, *Toxin Free USA* v. *J.M. Smucker Co.*, Civ. No. 20-1013, 2020 WL 7024209, at *3 (D.D.C. Nov. 30, 2020).

It is true, of course, that *Rotunda* discussed that concern. But as ExxonMobil has explained (Pet. 13-14), the D.C. Court of Appeals' statutory analysis in *Rotunda* did not depend on the form of relief requested. Rather, the court analyzed whether the Consumer Protection Act "clearly or explicitly" "abrogated or repealed" the application of D.C. Civil Rule 23 to "representative suits" under the Consumer Protection Act and found no "unambiguous evidence" to that effect. 123 A.3d at 988 (brackets omitted). Nor is there any language in the Consumer Protection Act or the D.C. Civil Rules that supports a distinction between actions for damages and actions for injunctive relief. *See* Pet. 14-15.

2. It is especially clear that actions such as this one that proceed under subsection (D) of Section 28-3905(k)(1) qualify as "class actions" for purposes of CAFA. As ExxonMobil has explained (Pet. 11-12), that subsection imposes special safeguards that confirm the class nature of such an action. The statute makes clear that a plaintiff organization cannot proceed on behalf of a

"class of consumers" under subsection (D) unless those consumers have a claim in their own right. D.C. Code § 28-3905(k)(1)(D)(i). And the statute requires a plaintiff organization to have a "sufficient nexus" to the class's interests in order to represent them "adequately," as a way of tailoring the Rule 23 requirements of typicality and adequacy to the circumstances of a nonprofit serving as lead plaintiff. D.C. Code § 28-3905(k)(1)(D)(ii). Subsection (D) thus "authoriz[es]" a "representative person[]" to bring a suit as a "class action" in "similar" fashion to Federal Rule 23. 28 U.S.C. § 1332(d)(1)(B). Those provisions adjust the default rules applying to class actions to accommodate representative actions brought by public-interest organizations, thereby confirming *Rotunda's* holding that Rule 23 was intended to govern such actions.

Beyond Pesticides' only response is that "a public-interest organization could not be 'typical' of consumer purchasers for purposes of class certification." Opp. 8 n.1. But subsection (D) need not perfectly mirror the typicality requirement in Federal Civil Rule 23(a)(3) for an action under subsection (D) to have "class action" status under CAFA, which permits removal of a suit that "resemble[s]" or is "in substance" a class action. S. Rep. No. 109-14, at 35 (2005); *see Addison Automatics, Inc.* v. *Hartford Casualty Insurance Co.*, 731 F.3d 740, 742 (7th Cir. 2014).

3. Beyond Pesticides contends (Opp. 12-16) that D.C. local courts do not "[t]reat" actions for injunctive relief under Section 28-3905(k)(1) as class

actions. While Beyond Pesticides claims to discern legal conclusions from trial court "practices," it does not contend that any D.C. local court has actually held or concluded that class certification is not require for actions for equitable relief under Section 28-3905(k)(1), much less subsection (D). *See* Opp. 28. That is unsurprising, because no court has.

In fact, only one of the decisions cited by Beyond Pesticides even mentions the issue. And there, the court explained that it was unnecessary to decide whether an action for injunctive relief under Section 28-3905(k)(1) must proceed under D.C. Civil Rule 23 because the case was at the pleadings stage. *See Organic Consumers Association* v. *General Mills, Inc.*, Civ. No. 2016-6309-B, 2017 D.C. Super. LEXIS 4, at *12 (July 6, 2017). That makes sense, because only the named plaintiff is a party to a putative class action before class certification. *See, e.g.*, *Molock* v. *Whole Foods Market Group, Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020).

The fact that a court need not address class-certification issues at the pleadings stage in turn explains why none of the rulings cited by Beyond Pesticides even mentions the issue of whether an action for injunctive relief under Section 28-3905(k)(1) must proceed under D.C. Rule 23: each of those rulings decided issues that arose before class certification. Beyond Pesticides itself acknowledges (Opp. 13) that the decisions it relies on addressed threshold questions like "standing," not the further downstream question of class

certification. The D.C. Court of Appeals able to reach the Rule 23 issue at the pleadings stage in *Rotunda* was only because the complaint had "expressly disclaimed any intention to seek class certification." 123 A.3d at 982.

4. Finally, Beyond Pesticides argues that review of the CAFA question is not warranted because "no district court has expressed uncertainty" over the question whether an action under Section 28-3905(k)(1) qualifies as a "class action" under CAFA. Opp. 18. But Beyond Pesticides gets it exactly backwards. As Beyond Pesticides notes, both "opinions that preceded *Rotunda*" and "post-*Rotunda* decisions" from the district court have refused to permit removal of actions under Section 28-3905(k)(1). Opp. 17. Yet the issue continues to arise as defendants continue to remove such actions to federal court. Indeed, since *Rotunda*, thirteen actions seeking relief under Section 28-3905(k)(1) have been removed to federal court under CAFA, including six in the past year.[1]

[1] *Clean Label Project Foundation* v. *Pharmavite LLC*, Civ. No. 20-3846; *Fahey* v. *Folgers Coffee Company*, Civ. No. 20-3620; *Clean Label Project Foundation* v. *Mead Johnson & Co.*, Civ. No. 20-3231; *Clean Label Project Foundation* v. *Hain Celestial Group Inc.*, Civ. No. 20-3154; *Consumer Watchdog* v. *Zoom Video Communications, Inc.*, Civ. No. 20-2526; *Clean Label Project Foundation* v. *J.M. Smucker Co.*, Civ. No. 20-2311; *Toxin Free USA* v. *J.M Smucker Co.*, Civ. No. 20-1013; *Fahey* v. *Apple Inc.*, Civ. No. 20-534; *Fahey* v. *New England Coffee Co.*, No. 19-950; *Fahey* v. *Frontera Foods Inc.*, No. 18-2134; *Animal Legal Defense Fund* v. *Hormel Foods Corp.*, Civ. No. 16-1906; *Bradford* v. *George Washington University*, Civ. No. 16-858; *Smith* v. *Abbott Laboratories*, Civ. No. 16-501.

Accordingly, the "reason for appeal" is not simply "ExxonMobil's dissatisfaction" with "precedent," Opp. 19; it is the "*lack* of binding precedent" from this Court on the issue. Pet. App. 6a (emphasis added). Absent a decision from this Court on the question whether CAFA permits removal of actions under Section 28-3905(k)(1), the issue will surely continue to recur. Because the Court has not resolved this important and recurring question of federal law, the petition for permission to appeal should be granted.[2]

B. The Diversity Question Warrants Review

The question of how to calculate the amount in controversy in cases seeking injunctive relief under Section 28-3905(k)(1) is also an open, important, and recurring question in this circuit. Beyond Pesticides' arguments against review of that question are unpersuasive.

1. Beyond Pesticides first suggests (Opp. 20-22) that the Court may lack jurisdiction to consider non-CAFA grounds for removal in an appeal of a remand order authorized by CAFA. Beyond Pesticides further contends that

[2] Beyond Pesticides asserts in passing that "CAFA's requirements could not be met" here. Opp. 15 n.3. While the Court need not consider that issue at this stage, Beyond Pesticides is incorrect. With respect to the size of the proposed class: Beyond Pesticides purports to bring this action on behalf of the entire "D.C. general public," Opp. 23; *see* Compl. 23, 25, including consumers who never purchased any product from ExxonMobil, *see* Compl. 25. With respect to the amount in controversy: ExxonMobil sufficiently demonstrated that it would cost more than $5 million to provide Beyond Pesticides with its requested relief. *See* Compl. 5-8, 11; D. Ct. Dkt. 11, at 7-9; D. Ct. Dkt. 11-1.

the Supreme Court is "currently considering this issue" in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189, and faults ExxonMobil for failing to bring that fact to this Court's attention. Opp. 21. Beyond Pesticides errs by conflating two distinct issues.

The question presented in *BP* is whether 28 U.S.C. § 1447(d) permits a court of appeals to review all of the grounds for removal encompassed in a remand order in a case that was removed in part under the federal-officer or civil-rights removal statutes, 28 U.S.C. §§ 1442 and 1443. *See* Pet. Br. at i, *BP*, *supra*. That question arises because the second clause of Section 1447(d) expressly permits appellate review of a remand order in a case removed under one of those two statutes. Here, however, the question is whether 28 U.S.C. § 1453(c)(1) permits appellate review of all of the grounds for removal in a case removed on CAFA grounds. That is not the same question before the Supreme Court or decided in any of the other appellate decisions that Beyond Pesticides cites. *See* Opp. 20-21.

In fact, the very first case that Beyond Pesticides cites illustrates the distinction. In *Board of County Commissioners* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (2020), the Tenth Circuit held that review of a remand order in a case removed in part on federal-officer grounds was limited to the federal-officer ground for removal. *See id.* at 819; Opp. 20-21. In adopting that inter-

pretation of Section 1447(d), the Tenth Circuit distinguished its prior precedent permitting appellate review of all grounds for removal in a CAFA appeal authorized under Section 1453(c)(1). *Suncor Energy*, 965 F.3d at 810-813 (discussing *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009)). The Court concluded that broader review was available under Section 1453(c)(1) based on textual differences between that provision and Section 1447(d) and on the discretionary nature of review under Section 1453(c)(1). *See id.* The case for review of the entire remand order here is therefore even more compelling than in *BP*.

2. Beyond Pesticides next asserts (Opp. 22-24) that the non-aggregation principle precluded ExxonMobil from satisfying the amount-in-controversy requirement by demonstrating that its total cost of compliance with the requested injunction would exceed the jurisdictional threshold. That is incorrect.

a. In *Committee for GI Rights* v. *Callaway*, 518 F.2d 466 (1975), this Court held that a statutory amount-in-controversy requirement is satisfied "with respect to all of the plaintiffs" if "the costs that the [defendant] would incur if the plaintiffs prevailed" on its claim for injunctive relief exceeds the jurisdictional threshold. *Id.* at 473. The Court reaffirmed the so-called cost-to-defendant rule in *Smith* v. *Washington*, 593 F.2d 1097, 1101 n.6 (1978).

In a footnote in *Fenster* v. *Schneider*, 636 F.2d 765 (1980), the Court subsequently addressed the interaction between the cost-to-defendant rule and the non-aggregation principle articulated in *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Corp.*, 414 U.S. 291 (1973). The Court noted that "[t]he *Snyder* and *Zahn* cases did not involve the cost-to-defendant rule" and explained that the Ninth Circuit had refused to apply that rule in a case where the plaintiffs were seeking both damages and injunctive relief. *Fenster*, 363 F.3d at 767 n.1 (discussing *Snow* v. *Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977)). But this Court did not "attempt to resolve any possible conflict" because the district court had jurisdiction under a statute without an amount-in-controversy requirement. *Id.* at 767 & n.1.

As applied here, this Court's decisions in *Committee for GI Rights* and *Washington* do not "violate[] the *Zahn* rule against aggregation of claims." Opp. 23. In actions seeking only injunctive relief, the "relevant test" for determining the amount in controversy is whether "the cost to each defendant of an injunction running in favor of one plaintiff" exceeds the jurisdictional threshold. *Synfuel Technologies, Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006) (citation removed); *see also Allen* v. *R&H Oil & Gas Co.*, 63 F.3d 1326, 1331 & n.7 (5th Cir. 1995). And as *Snyder* itself explains, the non-aggregation principle does not apply where "two or more plaintiffs

unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335.

The relief that Beyond Pesticides seeks here—modification of ExxonMobil's advertising—is an all-or-nothing proposition. The cost to ExxonMobil to comply with the requested injunction is thus fixed no matter how many plaintiffs are involved. Accordingly, the amount in controversy is inherent in the claim asserted whether by one or many; it is not an aggregation of individual claims. Because the total cost to ExxonMobil to comply with the injunction exceeds the jurisdictional threshold, the amount-in-controversy requirement is satisfied. *See Synfuel Technologies*, 463 F.3d at 652.

b. Beyond Pesticides' arguments to the contrary lack merit.

i. Beyond Pesticides contends (Opp. 22 n.6) that *Lovell* v. *State Farm Mutual Automobile Insurance Co.*, 466 F.3d 893, 898 (10th Cir. 2006), and *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 610 (7th Cir. 1997), contradict ExxonMobil's argument, but those cases only confirm its correctness. In *Brand Name Drugs*, the Seventh Circuit agreed that the appropriate test is "the cost to each defendant of an injunction running in favor of one plaintiff." 123 F.3d at 610. And in *Lovell*, the Tenth Circuit applied that principle to conclude that the amount-in-controversy requirement was satisfied where the defendant would incur the same above-threshold costs whether one or many plaintiffs obtained injunctive relief. *See*

466 F.3d at 898. In such situations, "the compliance cost to any single plaintiff exceeds the requisite amount in controversy." *Id.*

Nor is the Ninth Circuit's decision in *In re Ford/Citibank Cardholder Rebate Litigation*, 264 F.3d 952 (2001), to the contrary. *See* Opp. 22 n.6. Like *Brand Name Drugs*, it simply forbids consideration of "administrative" costs to the defendant—a far cry from the programmatic changes to marketing that ExxonMobil would need to undertake to comply with the requested injunctive relief in this case. *See Ford/Citibank*, 264 F.3d at 960-961.

ii. Beyond Pesticides also relies on decisions from district judges in this circuit holding the non-aggregation principle requires courts to divide the cost of a defendant's compliance with an injunction under the Consumer Protection Act by the number of plaintiffs benefited by the injunction. *See* Opp. 22-24. The foundational decision appears to have been *Breakman* v. *AOL LLC*, 545 F. Supp. 2d 96 (2008), where the court concluded that the non-aggregation principle did not apply in an action seeking both injunctive relief and damages. *See id.* at 105-106; cf. p. 11, *supra*. In subsequent decisions, however, district judges extended *Breakman* to actions seeking only injunctive relief.

For example, in *Animal Legal Defense Fund* v. *Hormel Foods Corp.*, 249 F. Supp. 3d 53 (2017), the court acknowledged that, under this Court's "precedent," the cost-to-defendant rule "remains an appropriate measure of

the amount in controversy in this [c]ircuit." *Id.* at 59. But in the very next sentence, the court concluded that "it would not be an appropriate measure to apply," even in an action seeking only equitable relief, because it conflicts with the non-aggregation principle. *See id.*; *accord*, *e.g.*, *Organic Consumers Association* v. *R.C. Bigelow, Inc.*, 314 F. Supp. 3d 344, 350 (2018); *Witte* v. *General Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (2015).

Such reasoning effectively overrules the part of this Court's decision in *Committee for GI Rights* holding that the defendant had satisfied the amount-in-controversy requirement "with respect to all of the plaintiffs" because "the costs that the [defendant] would incur if the plaintiffs prevailed" on its claim for injunctive relief exceeded the jurisdictional threshold. 518 F.2d at 473. But that is this Court's prerogative—not the district court's. *Cf. Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that lower courts may not anticipatorily overrule a Supreme Court decision). Given the tension between this Court's precedent and decisions from the district court, review of the diversity question is warranted.

The diversity question is also recurring. As Beyond Pesticides itself demonstrates (Opp. 23-24), defendants have removed numerous actions for injunctive relief under Section 28-3905(k)(1) to federal court in recent years. Because appeals of remand orders are normally prohibited, *see* 28 U.S.C.

§ 1447(d), this Court usually lacks the ability to address the issue. This case provides the Court with a rare opportunity to provide much needed guidance.

II. THE MOTION FOR A STAY PENDING APPEAL SHOULD BE GRANTED

A stay of the remand order pending the Court's resolution of the CAFA petition and any appeal subsequently granted is warranted. Because of the statutory deadline for the Court to decide any appeal, the stay would be modest in duration. And the benefits of a stay are clear: the parties would need to litigate only one proceeding without the fear of wasted resources, and the district court would avoid the procedural morass of determining which rulings by the D.C. Superior Court would need to be vacated if the remand order is reversed. The costs, on the other hand, are slight: if ExxonMobil's appeal is ultimately unsuccessful, litigation before the Superior Court will be delayed only for a short time period. Given the disparities between the benefits and the costs, "the equities of the case suggest that the status quo should be maintained." *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977). Beyond Pesticides offers a variety of arguments as to why, in its view, a stay is not warranted, but each of those arguments lacks merit.

1. Beyond Pesticides first argues (Opp. 26-28) that ExxonMobil has not made a sufficiently strong showing of likelihood of success on the merits. But the "strong showing" standard cited by Beyond Pesticides (Opp. 27) is not

a "wooden 'probability' requirement"; it merely requires a showing that the issues presented are "fair ground[s] for litigation and thus for more deliberative investigation" if the other stay factors are present. *Holiday Tours*, 559 F.2d at 844 (citation omitted). And where, as here, the balance of harms and the public interest favor the movant, the first stay factor is satisfied if the case presents a "serious legal question." *Id.*

In any event, a stay is amply warranted here under any standard. As ExxonMobil has explained, the petition presents two serious legal questions that recur continually in this circuit but have not been resolved by this Court. *see* pp. 3-14, *supra*. And ExxonMobil's position on both questions is the correct one. ExxonMobil's arguments are based on controlling precedent from this Court and the D.C. Court of Appeals; Beyond Pesticides relies almost entirely on nonbinding district-court decisions. *Id.* ExxonMobil has identified grounds for appeal that are at least "fair," making a stay particularly warranted given its strong showing on the remaining stay factors. *Holiday Tours*, 559 F.2d at 844 (citation omitted).

2. Beyond Pesticides next contends (Opp. 28-32) that ExxonMobil will not suffer irreparable harm if the case is remanded. That argument fails.

While Beyond Pesticides is correct (Opp. 29-31) that litigation costs in some circumstances do not support a stay, there is "no categorical rule that time and money spent in litigation can never constitute an irreparable harm."

Richards v. *Ernst & Young LLP*, Civ. No. 08-4988, 2012 WL 92738, at *3 (N.D. Cal. Jan. 11, 2012). Instead, courts have found that such expenditures can be irreparable if they are truly wasteful. *See* Stay Mot. 17 (collecting cases).

Here, at least some litigation costs in Superior Court would be wasteful. For example, the D.C. Anti-Strategic Lawsuit Against Public Participation Act (Anti-SLAPP Act) does not apply in federal court, *see Abbas* v. *Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015), but ExxonMobil will forfeit its rights in Superior Court if it does not prepare and litigate a special motion to dismiss under that statute on remand. If the case returned to federal court, all of the resources spent in support of that motion—including, potentially, expedited discovery, *see* D.C. Code § 16-5502(c)(2)—would have been unnecessary.

In addition, it is not clear whether any interlocutory decisions by the D.C. Superior Court would have law-of-the-case effect if the case returned to federal court. *See Margolis* v. *U-Haul International, Inc.*, 818 F. Supp. 2d 91, 98-99 (D.D.C. 2011); (citing *Langevine* v. *District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997)). The parties could thus potentially relitigate any rulings by the Superior Court, including discovery rulings. The wasteful and duplicative nature of such costs support a finding of irreparable harm.

The costs at issue here thus amount to more than "[m]ere litigation expense," *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24

(1974), or an "annoyance" akin to "taxes," *Thorp* v. *District of Columbia*, 317 F. Supp. 3d 74, 88 (D.D.C. 2018). Nor is this a situation where the movant is seeking to stay separate litigation instituted by a government regulator. *Cf. id.*; *John Doe Co.* v. *CFPB*, 235 F. Supp. 3d 194, 203 (D.D.C. 2017). Here, Beyond Pesticides is a private litigant insisting on the expenditure of resources that would be entirely pointless if this appeal is successful. Such expenditures would qualify as irreparable harm and thus justify a stay.

3. The remaining factors counsel in favor of a stay as well. Beyond Pesticides makes no effort to argue that it will be harmed by a stay. *See* Opp. 32-33. Nor can it, given that any stay would be brief and would do nothing to "permanently deprive [it] of access to state court." *Northrop Grumman Technical Services, Inc.* v. *DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016).

Instead, Beyond Pesticides contends that the Court should consider the final stay factors together, as courts do when the government is a party to the litigation, because the "D.C. public are the other parties interested in the proceeding." Opp. 33 (emphasis omitted). But Beyond Pesticides offers no support for that approach. In any event, Beyond Pesticides does not make a credible argument that the public interest will suffer due to the stay. It offers no evidence of on-going harm to the class of consumers it seeks to represent. And

"the expedited review process for appeals under § 1453(c) . . . all but eliminates [any] alleged harm." *Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *3 (W.D.N.C. Oct. 10, 2017).

The costs imposed on the federal and D.C. courts absent a stay are far more concrete. ExxonMobil must file its Anti-SLAPP Act motion within 45 days of service, D.C. Code § 16-5502(a), and 21 of those days elapsed between service and removal. D. Ct. Dkt. 1, at 1. Because D.C. law requires an expedited hearing and ruling in proceedings under the Anti-SLAPP Act, *see* D.C. Code § 16-5502(d), it is likely that the superior court will be far along the path to a ruling by the time this Court renders any decision on appeal. Should the Court reverse the remand order, that time and effort will have been wasted. Upon return to federal court, the district court would then be forced to determine what effect, if any, the superior court's interlocutory rulings and conclusions would have on the federal case. *See Northrop Grumman*, 2016 WL 3346349, at *4. To avoid that result, a stay of the district court's remand order is appropriate.

* * * * *

The petition for permission to appeal and the motion for a stay pending appeal should be granted.

Respectfully submitted,

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APRIL 19, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 5(c)(1) and 32(c)(2), that the foregoing Reply in Support of the Petition for Permission to Appeal Pursuant to the Class Action Fairness Act is proportionately spaced, has a typeface of 14 points or more, and contains 4,554 words.

APRIL 19, 2021

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on April 19, 2021, a copy of the attached Reply in Support of Petition for Permission to Appeal Pursuant to the Class Action Fairness Act was filed with the Clerk and served on counsel through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM