UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STATE OF MINNESOTA, BY ITS ATTORNEY GENERAL, KEITH ELLISON, Plaintiff, v. AMERICAN PETROLEUM INSTITUTE, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, KOCH INDUSTRIES, INC., FLINT HILLS RESOURCES LP, and FLINT HILLS RESOURCES PINE BEND, Defendants.	Case No. 20-cv-1636-JRT-HB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS AND ATTORNEY FEES PURSUANT TO 28 U.S.C. § 1447(c)

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INTRODUCTION

The Attorney General's motion for fees and costs seeks the same relief this Court declined to grant when ordering remand. In the time since the Attorney General's first motion, any conceivable grounds for seeking fees and costs have been dispelled by the Court's 37-page opinion explaining the reasoning that formed the basis for its remand order and by the recent decision of the Second Circuit supporting Defendants' position that the Attorney General's claims arise under federal common law. In addition, no binding Eighth Circuit precedent has previously addressed the novel legal issues raised here, and Defendants are currently seeking appellate review of those questions of first impression. The current record thus demonstrates that Defendants did not—and do not—lack a reasonable basis for removal. Fees and costs should not be awarded on this record.[1]

First, the Court's remand decision in this case supports denying the Attorney General's present motion. As the Court's opinion acknowledged, "Defendants question whether there can be a state law action for alleged climate change injuries at all. *The Court does not disagree that assessing this type of injury raises broad and complicated questions*." ECF No. 76 at 22 (emphasis added). This Court further recognized that "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial." *Id.* at 33. Indeed, the issues raised in

[1] By filing this brief in opposition to the Attorney General's Motion for Costs and Attorney Fees, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants. *See Norsyn, Inc.* v. *Desai*, 351 F.3d 825, 828 n.3 (8th Cir. 2003); *Nationwide Eng'g & Control Sys., Inc.* v. *Thomas*, 837 F.2d 345, 347-48 (8th Cir. 1988).

the notice of removal and remand briefing were so substantial that the Court expressed "*some reluctance in remanding such significant litigation to state court*." *Id.* at 33. (emphasis added). That is sufficient to conclude that Defendants had an objectively reasonable basis for removal. That solid basis in law is confirmed by two Supreme Court decisions that had previously found that interstate pollution claims arise under federal law, including one dealing specifically with climate change. *Illinois* v. *City of Milwaukee, Wis.*, 406 U.S. 91, 100 (1972) (*Milwaukee I*); *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 420-23 (2011) (*AEP*).

Second, the Second Circuit recently held in *City of New York* v. *Chevron Corp.* that federal common law, not state law, governs claims seeking redress for global climate change. 993 F.3d 81, 92 (2d Cir. 2021). The Second Circuit reasoned that a plaintiff, such as the Attorney General, cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its alleged injuries. *Id.* at 91. That holding aligns with the position Defendants urged here and will argue to the Eighth Circuit, further demonstrating the objective reasonableness of seeking removal.

Third, there remains no Eighth Circuit precedent addressing the arguments for removal in the context presented here. That fact alone means the Court should deny the Attorney General's motion. Advocating a good faith interpretation of the law is not sanctionable. Regardless of whether other district courts applying the law of other circuits have rejected federal jurisdiction in other climate-change lawsuits, no court in the Eighth Circuit had previously addressed these questions of first impression. In addition, the Second Circuit endorsed the conclusion in *City of New York* that claims in climate-change

litigation, like here, are governed by federal common law, a holding that supports federal jurisdiction. *Id.* Judge Alsup also came to this conclusion in a well-reasoned opinion in *California* v. *BP p.l.c.* No. C 17-06011 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *vacated and remanded sub nom. City of Oakland* v. *BP PLC*, 960 F.3d 570 (9th Cir. 2020). Other circuit courts considering appeals in climate-change cases have not even reached the merits of most of the grounds for removal raised here, including federal common law. *See, e.g.*, *Mayor and City Council of Baltimore* v. *BP P.L.C.*, 952 F.3d 452, 461 (4th Cir. 2020) (denying removal as unwarranted only under the federal officer removal statute). Given this evolving area of law, it is entirely reasonable for Defendants to not only have opposed remand in this Court, but to seek further review in the Eighth Circuit, as they do now. Defendants' legitimate need to preserve these issues for appeal further undermines the Attorney General's baseless assertion of bad faith. As this Court has previously recognized, preserving appellate issues is an objectively reasonable ground for removal.

Fourth, while the Attorney General relies on decisions from a number of other out-of-circuit district and circuit courts remanding climate change-related litigation, costs and fees were not awarded to the plaintiffs in any of those cases.

Finally, the Attorney General's motion suffers from evidentiary and procedural defects that provide an independent basis for denial.

BACKGROUND

This case was removed on July 27, 2020. On August 26, 2020, the Attorney General moved to remand this case to Minnesota state court, *see* ECF No. 32, expressly requesting

that this Court award costs and attorney fees as part of its remand order, *see* ECF No. 35 at 30. The Attorney General's proposed order specified that Defendants should "pay the just costs and any actual expenses, including attorney fees, incurred by the State of Minnesota as a result of the removal." ECF No. 36 at 3.

The motion was fully briefed and the Court heard oral argument on the motion. ECF Nos. 32, 34, 35, 44, 51, 67. At oral argument, the Court questioned the Attorney General specifically about the worldwide scope of the causes of climate change. Remand Mot. Hr'g. Tr. 10:4-10:7. The Court also questioned whether climate change affected federal enclaves in Minnesota such that federal jurisdiction was appropriate. *Id.* at 11:21-12:1. The Court granted remand in a 37-page memorandum opinion that discussed at length the points and authorities Defendants raised in support of removal. While the Court rejected Defendants' arguments, it did not conclude that those arguments were frivolous or presented in bad faith. To the contrary, the Court acknowledged that "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial." ECF No. 76 at 21. While the Court granted the remand motion, it did not endorse the Attorney General's proposed remand order. Neither the Court's 37-page memorandum opinion nor its remand order granted the Attorney General's request for costs and attorney fees. *See* ECF No. 76.

Defendants filed a notice of appeal of the remand order on April 1, 2021, *see* ECF No. 81, based on their statutory right to appeal under the federal officer removal statute, *see* 28 U.S.C. § 1447(d). The appeal was subsequently docketed as No. 21-1752 before the Eighth Circuit on April 5, 2021, *see* ECF No. 85. Defendants also filed a petition for

permission to appeal under the Class Action Fairness Act ("CAFA") on April 13, 2021. *See Am. Petroleum Inst.* v. *State of Minnesota*, No. 21-8005 (8th Cir. 2021); 28 U.S.C. § 1453(c)(1) (authorizing court of appeals to review an order granting or denying a motion to remand a class action).

Following the commencement of appellate proceedings and this Court's issuance of an order temporarily staying execution of the remand order, the Attorney General filed this new motion seeking the same relief that the Court already declined to award. ECF No. 95. The Attorney General's brief includes a one-sentence assertion, unsupported by any evidence, claiming that its office and outside contingency-fee counsel spent approximately 580 hours at an estimated cost of $305,400 litigating the motion to remand, *id.* at 3, even though the salaries of the two lead lawyers on the Attorney General's staff are paid in full by a third-party advocacy group based in New York City.

LEGAL STANDARD

Courts "may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). The purpose of the statute is not to "discourage all but the most airtight claims" for removal, but instead to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Id.* at 140-41.

"In determining whether the removing party lacked an objectively reasonable basis for seeking removal, the district court does not consider the motive of the removing defendant." *Convent Corp.* v. *City of N. Little Rock, Ark.*, 784 F.3d 479, 483 (8th Cir.

2015). "Rather, the court must consider the objective merits of removal at the time of removal, irrespective of the ultimate remand." *Id.* (citation omitted). A defendant's basis for removal is "objectively reasonable" where, for example, "there was uncertainty as to whether removal was appropriate." *Cont'l Prop. Grp., Inc.* v. *City of Minneapolis*, No. 08–5929 ADM/JJK, 2009 WL 282096, at *4 (D. Minn. Feb. 5, 2009). It is also objectively reasonable for a defendant to continue asserting a particular removal ground so as "to preserve the issue for appeal." *Sultan* v. *3M Company*, No. 20-1747 (JRT/KMM), 2020 WL 7055576, *5 n.2 (D. Minn. Dec. 2, 2020).

Even if a defendant raises multiple grounds for removal, fees and costs cannot be awarded if any one of those grounds provided an objectively reasonable basis to remove. *See Martin*, 546 U.S. at 141 (holding that a defendant needs only "*an* objectively reasonable basis for seeking removal" (emphasis added)); *Carebourn Cap., L.P.* v. *Darkpulse, Inc.*, No. 21-CV-0288 (WMW/DTS), 2021 WL 614524, at *4 (D. Minn. Feb. 17, 2021) (holding that "one of [defendant's] bases for removal" was objectively reasonable); *Rosenbloom* v. *Jet's Am., Inc.*, 277 F. Supp. 3d 1072, 1074 (E.D. Mo. 2017) (declining to award costs and fees where defendant "had an objectively reasonable basis for seeking removal of this case, at least with respect to diversity jurisdiction").

ARGUMENT

Objectively reasonable grounds supported Defendants' removal of this action. In their briefs, Defendants presented cogent legal arguments for removal supported by existing precedent, which is currently unsettled and undeveloped on the issues presented here. Indeed, the Supreme Court has repeatedly recognized that interstate pollution cases

arise under federal common law, including one case involving climate change. *Milwaukee I*, 406 U.S. at 98-100; *AEP*, 564 U.S. at 420-23. Numerous circuit courts have recognized that federal common law can serve as a basis for removal. *See Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *Caudill* v. *Blue Cross and Blue Shield of N.C.*, 999 F.2d 74, 77-78 (4th Cir. 1993). The Eighth Circuit has not spoken directly to the issues decided against Defendants. Defendants were entitled to argue from Supreme Court precedent and precedent in other circuits that this case was removable under federal common law. As the Court recognized in its remand decision, "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial." ECF No. 76 at 33. That statement by this Court reflects that the federal common law and *Grable* grounds for removal were reasonable. Going beyond mere reasonableness, in a recent unanimous decision, the Second Circuit provided strong support for the merits of Defendants' position that the Attorney General's claims arise only under federal common law. *City of New York*, 993 F.3d at 91-93. In the *City of New York* decision, the Second Circuit held that there is no state law claim for alleged harms caused by climate change, and that there is only a federal common law claim for such harm. *Id*. The Attorney General's reliance on other out-of-circuit decisions does not establish a lack of objective reasonableness, and the procedural and substantive defects in the Attorney General's motion provides yet another basis for denying the motion.

I. DEFENDANTS' GROUNDS FOR REMOVAL ARE OBJECTIVELY REASONABLE.

Defendants' grounds for removal in this action are objectively reasonable because they are grounded in the allegations contained in the complaint and are supported by Supreme Court and circuit precedent. Defendants timely removed this action based on the following grounds: (i) federal common law; (ii) *Grable* jurisdiction; (iii) federal enclave jurisdiction; (iv) the federal officer removal statute, 28 U.S.C. § 1442; (v) the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.; (vi) CAFA, 28 U.S.C. § 1453; and (vii) diversity jurisdiction, 28 U.S.C. § 1332. *See* ECF No. 1. Although Defendants need only one objectively reasonable ground for removal, *see Carebourn*, 2021 WL 614524, at *4; *Rosenbloom*, 277 F. Supp. 3d at 1074, each and every ground asserted here has an objectively reasonable basis, raises complex legal issues, and is supported by case law—precluding an award of costs and fees.[2]

Federal Common Law. Defendants' basis for removal on the ground that the Attorney General's claims arise under federal common law is objectively reasonable. As this Court acknowledged, "[t]he Supreme Court has specifically recognized federal common law in the arena of transboundary pollution and environmental protection," including actions that involve injuries allegedly predicated on the emission of global greenhouse gases. ECF No. 76 at 11-12 (citing *AEP*, 564 U.S. at 421 (2011)); *see also*

[2] While this Court did not accept Defendants' removal arguments and ordered remand, Defendants maintain that their arguments for removal are not just objectively reasonable, but are meritorious. Defendants are seeking review of the remand decision in the Eighth Circuit.

Int'l Paper Co. v. *Ouellette*, 479 U.S. 481, 492 (1987) ("[T]he control of interstate pollution is primarily a matter of federal law.").

Although this Court reasoned that the Attorney General did not plead a cause of action for interstate pollution on the face of the complaint, the relief requested by the Attorney General demonstrates that this case is a "suit over global greenhouse gas emissions," notwithstanding the Attorney General's attempts at "artful pleading." *City of New York*, 993 F.3d at 91. The Attorney General seeks to ensure that Defendants "bear the costs" of alleged climate change injuries, Compl. ¶ 7, *see also id.* ¶¶ 139-71, 230, 248, and concedes that this action is intended to address the "climate change crisis," ECF No. 91 at 23. Moreover, the Attorney General seeks redress for alleged climate change injuries, such as flooding, damage to infrastructure, personal injuries, and damages to forests. *See* Compl. ¶¶ 142-71. And, many parts of the Complaint speak of the global production of fossil fuels since the dawn of the Industrial Revolution and can be read to raise international issues of causation and harm. *See* Compl. ¶¶ 47-49, 51-53, 55-62, 67, 72-76, 81. Indeed, at oral argument, the Court inquired of the Attorney General's counsel as to why this case was not based on a global, rather than local phenomenon. Remand Mot. Hr'g. Tr. 10:4-10:7. As this Court acknowledged, if the Attorney General were seeking a referendum on emissions—which Defendants reasonably argue that it is—"state court would most certainly be an inappropriate venue." ECF No. 76 at 33.

This Court further acknowledged that whether state law can even apply to alleged climate change injuries, as claimed by the Attorney General here, "raises broad and complicated questions." *Id.* at 22. Other courts considering removal of similar climate-

related cases have agreed that the jurisdictional question is "complex." *Mayor & City Council of Baltimore* v. *BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *3 (D. Md. July 31, 2019); *see also City of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020) (finding that "these state law claims raise national and perhaps global questions").

The Supreme Court has also squarely held that interstate pollution torts arise under federal law. *See AEP*, 564 U.S. at 420-23; *Milwaukee I*, 406 U.S. at 98-100. And numerous circuits have held that federal common law provides an independent ground for removal. *See Sam L. Majors Jewelers*, 117 F.3d at 929; *Caudill*, 999 F.2d at 77-78. This combination of precedent, standing alone, means that the federal common law ground for removal was objectively reasonable. The State never denied that its theories of causation and injury were based on the interstate and global phenomenon of climate change. An argument that an alleged chain of causation and injury that involves world-wide fossil fuel production and emissions quite plausibly presents an issue of federal common law. That this Court disagreed regarding the applicability of those arguments given the facts of this case is a legitimate legal dispute (now before the Eighth Circuit), and does not reflect a frivolous or vexatious position.

***Grable* Jurisdiction.** While the Complaint brings state law causes of action on its face, the Attorney General's allegations demonstrate an attempt to countermand federal energy and environmental policy. *Juliana* v. *United States*, 947 F.3d 1159, 1167 (9th Cir. 2020) (noting that the federal government "affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for

domestic and overseas projects, and leases for fuel extraction on federal land."). As the Eighth Circuit has made clear, claims will present substantial federal questions sufficient to establish *Grable* federal question jurisdiction when they "directly implicate[] action[] taken by [the federal government] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc.*, v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). The Complaint can certainly be read as a collateral attack on federal governmental programs designed to encourage the production and use of fossil fuels. That alone is enough to support a plausible argument for *Grable* jurisdiction. In addition, the fact that the navigable waters of the United States are one instrumentality of the injury (over which the federal government has exclusive jurisdiction) provides another plausible ground for *Grable* removal. Indeed, Judge Alsup found that this was an alternative ground for federal jurisdiction in *California* v. *BP p.l.c.*, 2018 WL 1064293, at *5. Given that another federal district judge found the argument persuasive, it should not be labeled frivolous and worthy of sanction by a fee award.

Moreover, the Attorney General's putative assertion of state law claims is no bar to federal jurisdiction in this instance. The United States Supreme Court and several circuits, including the Eighth Circuit, have recognized that claims may arise exclusively under federal areas of law, regardless of whether plaintiff attempts to plead them as state law claims. *See, e.g.*, *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981); *Gore* v. *Trans World Airlines*, 210 F.3d 944, 950 (8th Cir. 2000); *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 352 (2d Cir. 1986); *Sam L. Majors Jewelers*, 117 F.3d at 924, 929.

It was thus objectively reasonable under existing precedent for Defendants to argue that merely pleading state law claims did not defeat removal.

Federal Enclave Jurisdiction. Defendants had several objectively reasonable bases for federal enclave jurisdiction over the Attorney General's claims. *First*, this action implicates oil and gas operations on military bases and other federal enclaves in Minnesota. *See, e.g.*, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369, 372-74 (1964). *Second*, the Complaint alleges a variety of climate change injuries purportedly suffered within federal enclaves in Minnesota, such as Fort Snelling Military Reservation. *Third*, the sale of Defendants' products within federal enclaves in Minnesota also establishes federal jurisdiction. *See, e.g.*, *Jones* v. *John Crane-Houdaille, Inc.*, Civil No. CCB-11-2374, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012); *Rosseter* v. *Indus. Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009); *Corley* v. *Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010). *Finally*, this action potentially concerns the acts of federal policymakers and thus, the District of Columbia, which is itself a federal enclave. All of these arguments are grounded in the Complaint's allegations and existing precedent and, therefore, present objectively reasonable bases for Defendants' motion to remand.

Federal Officer Removal Statute. This Court acknowledged that Defendants had identified "plausible ways" in which they "may have acted under the direction of federal officers." ECF No. 76 at 23. Although this Court declined to find that this action had the requisite connection to a governmental act to create federal officer removal jurisdiction, other courts have acknowledged the significant and comprehensive control the federal

government has exerted over energy production. *See, e.g.*, *ExxonMobil Corp.* v. *United States*, No. 10-2386, 2020 WL 5573048, at *12 (S.D. Tex. Sept. 16, 2020); *United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002).[3] Indeed, the Seventh Circuit recently held that federal officer jurisdiction existed where the defendants had produced products specifically designated for military use (like Avgas here). *See Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 941-45 (7th Cir. 2020). And the Fifth Circuit recently held that the Removal Clarification Act of 2011 "broadened federal officer removal to actions not just *causally* connected, but alternatively *connected or associated*, with acts under color of federal office." *See Latiolais* v. *Huntington*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc). This authority demonstrates objective reasonableness.

Outer Continental Shelf Lands Act. It was also objectively reasonable for Defendant to remove under the Outer Continental Shelf Lands Act. The Attorney General seeks damages for injuries allegedly resulting from greenhouse gas emissions, a substantial amount of which were extracted under federal direction on the Outer Continental Shelf ("OCS"). *See* ECF No. 44 at 50. The Outer Continental Shelf Lands Act vests federal courts with original jurisdiction over all actions "arising out of, or in connection with . . .

[3] The Attorney General's reliance on *City & County of Honolulu* v. *Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237 (D. Haw. Feb. 12, 2021) is misplaced. There, the court determined it would "assume Defendants acted under a federal officer," *id.* at *5, but ultimately rejected federal officer jurisdiction after concluding it was constrained by the Ninth Circuit's decision in *City of San Mateo*, 960 F.3d at 598. The Ninth Circuit's decision in *City of San Mateo* is not controlling in this Circuit, and the Eighth Circuit could reasonably find federal officer jurisdiction appropriate on these facts. In addition, the decision in that case was reached *after* this case was removed, and therefore cannot provide the basis for imposition of fees and costs here.

any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b); *see Tenn. Gas Pipeline* v. *Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996). Defendants have conducted significant "exploration, development, or production" of minerals on the OCS. 43 U.S.C. § 1349(b). Furthermore, the Attorney General's claims "arise out of" those operations and, thus, reasonably fall under the Outer Continental Shelf Lands Act's broad jurisdictional sweep. *Barker* v. *Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013). Federal policy is to encourage exploration and production of fossil fuels on the OCS. Defendants reasonably argued that the Attorney General's lawsuit would discourage such production and thus affect conduct on the OCS.

CAFA. Defendants' argument that the Attorney General's claims implicate federal jurisdiction under CAFA is objectively reasonable. CAFA permits removal of a suit that is "in substance a class action," notwithstanding a plaintiff's "attempt to disguise the true nature of the suit." *Addison Automatics, Inc.* v. *Hartford Cas. Ins. Co.*, 731 F.3d 740, 741-42 (7th Cir. 2013); *see also Williams* v. *Emps. Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017) (noting it will not "prioritize a complaint's use of magic words over its factual allegations" to determine whether an action constitutes a "class action" under CAFA). The Complaint asserts claims on behalf of *all* Minnesota residents and "[f]ossil-fuel consumers." *See, e.g.*, Compl. ¶¶ 191, 194, 215, 230. By bringing this action in a representative capacity on behalf of Minnesota's residents and consumers, the Attorney

General put forth what is in substance a putative class action. It was, therefore, objectively reasonable for Defendants to remove on this basis under CAFA.

Diversity Jurisdiction. Defendants further demonstrated an objectively reasonable basis to remove under diversity jurisdiction. To establish more than a nominal interest in the litigation, the Attorney General must demonstrate a "quasi-sovereign interest" in the action, distinct "from the interests of particular private parties." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *see also Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976). In this case, however, the Attorney General is suing under Minnesota Statute § 8.31, a statute intended to protect Minnesota *residents* from deceptive trade practices, based on injuries incurred by Minnesota *residents*. It is thus reasonable for Defendants to remove on the basis that Minnesota consumers are the true parties of interest in this action.

Clearly, Defendants have raised "nuanced legal questions" and have cited case law supporting their assertion of federal jurisdiction. There is no Eighth Circuit precedent that precludes any of these arguments, and there are Supreme Court and out-of-circuit precedents that strongly support them. The Eighth Circuit will now address these issues for the first time on a clean slate. In these circumstances, costs and fees should not be awarded. *See Johnson* v. *LaSalle Bank Nat. Ass'n*, 663 F. Supp. 2d 747, 756 (D. Minn. 2009); *Ricci* v. *Ameriquest Mortg. Co.*, No. CV 05-1214 (JRT/FLN), 2006 WL 8444883, at *2 (D. Minn. Jan. 31, 2006) (denying the plaintiff's request for attorney fees because the defendant "offered case law authority in support of its position" even though the court "determined that the case law . . . was distinguishable").

II. THIS COURT'S REMAND DECISION DEMONSTRATES THE OBJECTIVE REASONABLENESS OF DEFENDANTS' REMOVAL.

This Court's remand decision acknowledges that Defendants presented complex, reasonable arguments supported by existing precedent. In its opinion granting the Attorney General's motion to remand, this Court "recognize[d] that the vast threat of climate change requires a comprehensive federal, and indeed, global response," ECF No. 76 at 33, and that "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial." *Id.* at 21. This Court thus acknowledged that even though it did not agree with Defendants' federal common law and *Grable* arguments, it did find a reasonable basis behind them. Similarly, the Court agreed with Defendants that "assessing this type of injury raises broad and complicated questions." *Id.* at 22. Moreover, "[g]iven the stakes," this Court expressed "some reluctance in remanding such significant litigation to state court." *Id*. at 33. These statements by the Court reflect that an award of fees and costs against the Defendants is unwarranted.

The Court's long and detailed opinion granting the motion to remand is itself an indication that the Court grappled with and took seriously Defendants' arguments. Instead of merely dismissing the Defendants' numerous arguments as "unreasonable," the Court spent over thirty pages discussing Defendants' precedents and explaining exactly where and why it disagreed with Defendants' logic.[4] The Court did not call even one of Defendants' grounds for removal frivolous, let alone all of them. The Court would need

[4] Similarly, the Attorney General used over 19,000 words to argue that remand was appropriate. If each of Defendants' grounds for removal was objectively unreasonable, the Attorney General could have made its point in a more succinct fashion.

to consider *all* of Defendants' grounds for removal to be frivolous and not based on any objectively reasonable grounds in order to award costs and attorney fees.

III. THE SECOND CIRCUIT'S RECENT DECISION IN *CITY OF NEW YORK* DEMONSTRATES THE OBJECTIVE REASONABLENESS OF DEFENDANTS' REMOVAL.

The Second Circuit's recent decision in *City of New York* reinforces the objective reasonableness of Defendants' removal. The Second Circuit issued its decision in *City of New York* the day after this Court issued its remand decision. Notably, this Court inquired as to the status of the Second Circuit decision during oral argument in this case. Remand Mot. Hr'g Tr. 14:18-22. In a unanimous decision, the Second Circuit held that claims seeking redress for climate change are governed by federal common law. 993 F.3d 81 at 91-92. Such claims "must be brought under federal common law" because they are "federal claims" that present "the quintessential example of when federal common law is most needed." *Id*. at 92, 95. The Second Circuit rejected the contention that there was any state law claim for climate change. *Id*. at 91-92. *City of New York* demonstrates, at a minimum, the reasonableness of Defendants' federal common law argument. Indeed, on appeal, the Eighth Circuit will have an opportunity to consider the application of *City of New York*'s federal common law holding to the facts of this case.

In addition to federal common law, *City of New York* establishes the objective reasonableness of Defendants' ground for removal pursuant to *Grable* jurisdiction. While this Court found it to be a "logical leap" to "interpret this Complaint as a full-scale assault on all aspects of fossil fuel extraction, production, distribution, and use," ECF No. 76 at 22, the Second Circuit found that the plaintiff there could not "disavow[] any intent to

address emissions" while "identifying such emissions" as the source of its alleged injuries, 993 F.3d at 91. The Second Circuit recognized that permitting a suit such as the Attorney General's to proceed under state law will risk "upsetting the careful balance" struck by Congress and the Executive Branch between climate change policy, "a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id*. at 93. The Second Circuit's "significant federalism concerns" demonstrate that Defendants' removal pursuant to *Grable* jurisdiction was objectively reasonable. *Id.* Defendants specifically raised the constitutional separation of federal and state powers as a basis for *Grable* jurisdiction in their Notice of Removal. ECF No. 1 at ¶ 55.

City of New York also supports Defendants' federal officer ground for removal. This Court declined to find federal-officer removal jurisdiction, despite acknowledging that defendants identified "plausible ways" in which they "may have acted under the direction of federal officers," because of a perceived lack of causation: no federal officer directed defendants' marketing, sales, or outreach activities. ECF No. 76 at 23. In so holding, the Court accepted the Attorney General's artful characterization of its claims as divorced from global greenhouse-gas emissions. But in *City of New York*, the Second Circuit rejected that approach in the context of federal common law, and declined to accept the plaintiff's artful characterization of its claims. 993 F.3d at 91. *City of New York* thus demonstrates the objectively reasonable grounds upon which Defendants argued for federal officer removal.

IV. PRESERVING ARGUMENTS FOR APPEAL PROVIDES ANOTHER OBJECTIVELY REASONABLE BASIS FOR DEFENDANTS' REMOVAL.

The Attorney General ignores Defendants' right to raise and preserve these issues for appeal before the Eighth Circuit. The Attorney General cannot credibly argue that grounds for removal that have not yet been adjudicated by the Eighth Circuit are "objectively unreasonable." And the mere presence of contrary district court case law—outside this circuit—does not establish that Defendants' arguments are unfounded.[5] Rather, costs and fees are denied even where "the vast majority" of the persuasive case law supports remand. *LaSalle Bank Nat. Ass'n* v. *McCauley*, No. CIV. 10-1338, 2010 WL 3724387, at *5 (D. Minn. Aug. 20, 2010), *report and recommendation adopted*, 2010 WL 3724383 (D. Minn. Sept. 15, 2010). Even if Defendants' removal arguments are "repeatedly precluded" by courts outside this circuit, Defendants still have "a reasonable basis for continuing to assert" their arguments in order to "preserve the issue for appeal." *Sultan*, 2020 WL 7055576, at *5 n.2. Neither the Eighth Circuit nor the Supreme Court has conclusively addressed Defendants' arguments for federal jurisdiction.

Asserting arguments that have previously been rejected by other district courts outside this circuit, but that may be decided another way on appeal, is a proper, objectively reasonable ground for removal. Removal under such circumstances is also objectively reasonable where Defendants' arguments do not contradict clearly established law. *See*

[5] The Attorney General's brief does not address decisions by two federal district court judges that found that climate-change based torts arise exclusively under federal common law. Judge Alsup did so in *California* v. *BP p.l.c.*, 2018 WL 1064293, at *3, and Judge Keenan did so in his recently affirmed opinion in *City of New York*, 993 F.3d at 91.

O'Neill v. *St. Jude Med., Inc.*, No. CIV. 04-1211 (JRT), 2004 WL 1765335, at *5–6 (D. Minn. Aug. 5, 2004).[6] For example, the *O'Neill* court denied the plaintiff's motion for attorney fees where the defendants' removal was based on legal questions yet to be conclusively decided concerning federal question jurisdiction and the federal common law of foreign relations. *Id.*; *see also Pathfinder Transp., LLC* v. *Pinnacle Propane, LLC*, 259 F. Supp. 3d 949, 954 (W.D. Ark. 2017) (concluding defendant did not lack an objectively reasonable basis for seeking removal where neither the Supreme Court nor the Eighth Circuit directly addressed the treatment of master limited partnerships for purposes of diversity jurisdiction). The same conclusion applies here. This case implicates a complex and evolving area of law—federal jurisdiction over lawsuits seeking redress from alleged climate change injuries—that has not yet been conclusively addressed by the Eighth Circuit.

This Court recently recognized this point in *Sultan*, 2020 WL 7055576. In that case, 3M removed a products liability action based on the government contractor defense even though this Court had previously held that the defense does not confer federal jurisdiction over the type of claims at issue. *See id.* at *1. Because 3M continued "to assert the government contractor defense, even though it ha[d] been repeatedly precluded," plaintiffs

[6] Courts in this district generally grant fees and costs only under special circumstances—not present here—such as where removal was "blatantly untimely," *Uptime Sys., LLC* v. *Kennard L., P.C.*, No. 20-1597 (JRT/ECW), 2021 WL 424470, at *4 (D. Minn. Feb. 8, 2021), the argument supporting removal was counter to what the defendants had been arguing up to that point, *4Brava, LLC* v. *Sachs*, No. CV 15-2744 (JRT/DTS), 2018 WL 2254569, at *5 (D. Minn. May 17, 2018), or where defendants removed and then *defendants* moved to remand, *Lindgren* v. *State Farm Ins. Companies*, No. 04-3153 (JRT/FLN), 2005 WL 1325053, at *1 (D. Minn. May 23, 2005).

moved for costs and fees under section 1447(c). *Id.* at *5 n.2. This Court declined to award such relief, finding that 3M had "a reasonable basis for continuing to assert this defense, for it needs to do so to preserve the issue for appeal, as the Eighth Circuit has not yet rejected or affirmed it." *Id.* The same reasoning applies here and the Court, as it did in *Sultan*, should deny the motion for costs and fees.

V. THE CASES CITED BY THE ATTORNEY GENERAL DO NOT SUPPORT AN AWARD OF COSTS AND FEES.

The Attorney General's main argument for costs and fees is that other federal courts outside this circuit have remanded climate-change cases, pointing to decisions from "six other district courts and four circuit courts in substantially similar cases" that granted plaintiffs' motions to remand as purported evidence that the Defendants lacked any objective basis from removal. *See* ECF No. 95 at 8. But none of those courts ever awarded the plaintiff costs and fees. On the contrary, in a recent decision in a climate-change consumer deception case, a district court expressly declined to grant the plaintiff's request in its remand motion to impose costs and fees on ExxonMobil pursuant to section 1447(c), "given the lack of binding precedent on the issues presented" under CAFA and diversity jurisdiction. *Beyond Pesticides* v. *Exxon Mobil Corp.*, No. CV 20-1815 (TJK), 2021 WL 1092167, at *3 (D.D.C. Mar. 22, 2021).

VI. THE ATTORNEY GENERAL'S REQUEST FOR COSTS AND FEES LACKS EVIDENTIARY SUPPORT AND IS PROCEDURALLY DEFECTIVE.

There is no evidentiary support for the Attorney General's request, which does not include, as it must, any supporting evidence of the costs and fees actually incurred, or of

the reasonableness of the award itself. *See Macon* v. *Fam. Dollar Stores of Mo, LLC*, No. 4:16–cv–00689–NCC, 2017 WL 4957767, at *3 (E.D. Mo. Nov. 1, 2017) (declining to award costs and fees under 28 U.S.C. § 1447(c) because plaintiff "failed to provide any evidence in support of his request for fees"); *E. Baton Rouge Par. Sch. Bd.* v. *Wells*, No. CIV.A. 11–333–JJB–DL, 2011 WL 3444321, at *3 (M.D. La. June 30, 2011) (same); *Stroh* v. *Colonial Bank, N.A.*, No. 4:08-CV-73 (CDL), 2008 WL 4831752, at *4 (M.D. Ga. Nov. 4, 2008) (same). An estimate in a legal brief, with a suggestion that additional support may be provided later, is not a valid basis to support an award of fees and costs. Such a motion must be accompanied by supporting documentation so that Defendants can fairly respond to it; not a mere promise to provide evidence after the fact.

It is also not clear that any fees associated with lead counsel for the Attorney General are even recoverable under existing law. The salaries of the two lead lawyers on the Attorney General's staff are paid in full by the NYU State Energy and Environmental Impact Center (the "State Impact Center"), which launched in 2017 with a $6 million donation from Bloomberg Philanthropies.[7] *See* ECF 1, Ex. 7. The State Impact Center recruits and embeds "Special Assistant Attorneys General" ("SAAGs") within state attorney general offices around the country to pursue "progressive clean energy, climate, and environmental matters." *Id.* at 3. It is far from clear that any fees purportedly

[7] *See* Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, Wash. Post (Aug. 16, 2017), https://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html.

attributable to the embedded employees of the State Impact Center should be, or could be, recovered through this motion. *See In re Thompson*, 426 B.R. 759, 765–67 (Bankr. N.D. Ill. 2010) (denying an award of attorney fees pursuant to a separate statute that the court found to be analogous to section 1447(c), reasoning that section 1447(c) is one of "[a] few fee-shifting statutes [that] allow[s] recovery of only those attorneys' fees for which a party is actually responsible," and holding in the context of the separate statute that because the party's attorneys had waived any right to collect attorney fees from the party, the party was not legally responsible for the fees). Here, as in *In re Thompson*, the Attorney General's office is not legally responsible for the SAAGs' salaries. *Cf. United States* v. *122.00 Acres of Land, More or Less, Located in Koochiching Cty., Minn.*, 856 F.2d 56, 57–59 (8th Cir. 1988) (declining to award attorney fees under a statute analogous to 1447(c) that also limits recovery to fees "actually incurred," reasoning that defendant had not incurred attorney fees as it was not yet obligated to pay any fees pursuant to its agreement).

There is also an open question whether the Attorney General's request is procedurally defective. The plain language of section 1447(c) states that "[a]n *order remanding the case* may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (emphasis added). The case law is mixed on whether that plain language forecloses an award of fees when the motion for fees is brought after the "order remanding the case" is issued. In the relatively rare instances in which this Court has granted costs and fees under section 1447(c), it has done so *in the remand order itself*, not following a successive motion for fees and costs after the remand order was issued. *See, e.g.*, *Uptime Sys.*, 2021 WL 424470, at *4; *Neo*

Corp. ex rel. Minnesota Methane, LLC v. *Fortistar Methane, LLC*, No. CIV. 01-168 (JRT/FLN), 2003 WL 21402748, at *1 (D. Minn. June 16, 2003). Because this Court did not grant the Attorney General's "original motion for sanctions and fees," and the Attorney General "provide[s] no authority for the Court to rule on a 'second' motion seeking the same relief as the first," this Court should decline to entertain the Attorney General's duplicative motion. *Hildreth* v. *City of Des Moines*, No. 4:17-CV-00374-SMR-CFB, 2018 WL 11276639, at *1 (S.D. Iowa Mar. 27, 2018). Multiple other courts addressing the statutory language of section 1447(c) have concluded that a post-order motion for fees and costs, like the Attorney General's here, is impermissible. *United Broad. Corp.* v. *Miami Tele-Commc'ns, Inc.*, 140 F.R.D. 12, 14 (S.D. Fla. 1991) ("This court is of the opinion that the plain language of the statute controls and clearly provides that if the court is going to award costs and expenses, including attorneys' fees pursuant to 28 U.S.C. § 1447(c), it must be taken care of in the order of remand."); *Faust* v. *Com. of Pa. Dep't of Revenue*, No. CIV. A. 89-7295, 1990 WL 11674, at *1 (E.D. Pa. Feb. 8, 1990) (rejecting motion for fees and costs because "any motion for fees must be made in conjunction with the motion to remand, not after the motion to remand has already been decided").

CONCLUSION

This suit implicates issues of pressing national concern in the exceptionally complex and rapidly evolving area of climate-change litigation. Defendants' grounds for removal were objectively reasonable. As explained above, this finding is supported by the Court's remand decision in this case, which acknowledged that the type of injury alleged here "raises broad and complicated questions." ECF No. 76 at 22. It is further supported by the

Second Circuit's decision in *City of New York*, which held that federal common law, not state law, governs claims seeking redress for global climate change. 993 F.3d at 91-92. Moreover, Defendants' arguments presented an issue of first impression in the Eighth Circuit, and Defendants had a legitimate need to preserve these issues for appeal. Finally, the Attorney General's motion suffers from procedural and evidentiary defects that provide an independent basis for denial. For these reasons, this Court should deny the Attorney General's motion for costs and attorney fees pursuant to 28 U.S.C. § 1447(c).

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Respectfully submitted,

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