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' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants write in response to Plaintiff's notice regarding the Supreme Court's recent decision in *BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) and developments in two other climate-related cases, *City of Annapolis* v. *BP P.L.C. et al.*, No. ELH-21-772 (D. Md. May 19, 2021) and *City & County of Honolulu* v. *Sunoco LP, et al.*, No. 1CCV-20-0000380 (Haw. Cir. Ct. May 19, 2021).[1] Contrary to Plaintiff's assertion, *Baltimore* directly supports Defendants' pending motion to stay remand (ECF No. 87). It also undercuts the Attorney General's core argument in support of its pending motion for costs and attorney fees (ECF No. 94). Meanwhile, the district court's decision

[1] By filing this notice, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

to stay proceedings in *City of Annapolis* simply confirms why a stay is appropriate here, while the state court's decision in *City and County of Honolulu*, which arises in a distinct procedural posture, has little bearing on Defendants' motion.

Plaintiff here opposed Defendants' motion to stay remand pending appeal to the Eighth Circuit in large part because "the scope of Defendants' appeal to the Eighth Circuit will be limited to federal officer jurisdiction," which purportedly prevented Defendants from raising "serious questions going to the merits" on appeal. (ECF No. 91, at 6–7 (citation omitted)). According to Plaintiff, the Supreme Court was "unlikely to overrule" the "overwhelming consensus" holding that review pursuant to 28 U.S.C. § 1447(d) is limited to removal under the federal officer statute. (*Id*. at 7.)

Plaintiff's prediction was wrong, a fact notably absent from Plaintiff's six-page submission. The Supreme Court in *Baltimore* held that 28 U.S.C. § 1447(d) "permit[s] a court of appeals to review *any issue* in a district court order remanding a case to state court where the defendant premised removal in part on the federal officer removal statute[.]" 141 S. Ct. at 1536 (emphasis added). The Court reasoned that "the relevant portion of § 1447(d) provides that 'an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal,'" and the plain meaning of the term "order" refers to "a 'written direction or command delivered by . . . a court or judge.'" *Id.* at 1537 (emphasis added) (quoting Black's Law Dictionary 1322 (11th ed. 2019)). Therefore, "when a district court's removal order rejects all of the defendants' grounds for removal, § 1447(d) authorizes a court of appeals to review each and every one of them." *Id.* at 1538.

Baltimore is important here because it means that all of the grounds for removal advanced by Defendants will be subject to review by the Eighth Circuit on appeal, including federal-question jurisdiction. *See id.* at 1537 ("Normally, federal jurisdiction is not optional; subject to exceptions not relevant here, courts are obliged to decide cases within the scope of federal jurisdiction assigned to them. So the district court wasn't at liberty to remove the City's case from its docket until it determined that it lacked any authority to entertain the suit." (internal quotation marks and citation omitted)). The *Baltimore* decision is relevant for the additional reason that many of the cases relied upon by Plaintiff in its opposition to the stay motion (*see, e.g.*, ECF No. 91, at 24–28), and in its motion for costs and attorney fees (*see, e.g.*, ECF No. 95, at 1 n.1)—including the Fourth Circuit decision in *Baltimore*, which the Supreme Court has now vacated and remanded to the Fourth Circuit—will now be subject to plenary appellate review.

Recognizing the fundamental shift in the law *Baltimore* has precipitated, other federal courts have issued stays pending the court of appeals' application of *Baltimore*. As Plaintiff notes, the district court in *City of Annapolis* recently stayed proceedings in that lawsuit against several energy companies, pending the Fourth Circuit's decision on remand in *Baltimore*. The district court rejected the City's arguments for the "simple but important reason" that the "Fourth Circuit's ruling on remand in the *Baltimore Case* is not a foregone conclusion." 2021 WL 2000469, at *4. Here, as in *City of Annapolis*, a number of defendants' jurisdictional arguments "raise novel questions of law on which the [Eighth] Circuit has yet to opine." *Id.* The court also rejected a version of the argument Plaintiff advances here, that the "climate change crisis presents an emergency" that weighs against

a stay. ECF No. 91, at 23. The *City of Annapolis* court reasoned: "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion. The urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." 2021 WL 2000469, at *4. And just yesterday, in a related action, the court stayed proceedings pursuant to a joint stipulation, pending the Fourth Circuit's decision on remand in *Baltimore*. *See City of Charleston* v. *Brabham Oil Co. et al.*, No. 2:20-cv-03579-BHH (D.S.C. May 27, 2021); *cf. City of Oakland* v. *BP P.L.C. et al.*, No. 3:17-cv-6011 (May 20, 2021) (minute entry memorializing court's instruction that the parties are to request a case management conference "pending developments in the pending Supreme Court case," namely, *Chevron Corp.* v. *City of Oakland* (No. 20-1089)).

Against this emerging trend in federal courts, one state court in Hawaii denied energy-company defendants a stay pending their Ninth Circuit appeal. *See* Pl.'s Notice, Ex. 1 at 24–26. That decision provides little guidance here. To begin, the state court addressed a request for a stay *after* remand had been effectuated and with state court proceedings already underway, a wholly distinct procedural posture. Here, by contrast, defendants seek a stay of the execution of this Court's remand order to state court until the Eighth Circuit and, if needed, the U.S. Supreme Court have had the opportunity to determine whether this case should be heard in federal court. In addition, the Hawaii court is within the Ninth Circuit, which is unique among the circuits for having already ruled on whether federal common law provides a basis for removal in cases like this one. *See City of Oakland* v. *BP PLC*, 969 F.3d 895 (9th Cir. 2020). No analogous Eighth Circuit

authority exists, which means the panel hearing the appeal of this case will address that specific issue for the first time. That fact distinguishes this case from any appeal in the Ninth Circuit and provides further grounds for granting a stay in light of the significant questions of first impression raised by the appeal here.

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Respectfully submitted,

/s/ Jerry W. Blackwell
Jerry W. Blackwell (MN #186867)
G. Tony Atwal (MN #331636)
BLACKWELL BURKE P.A.
431 South Seventh Street, Suite 2500
Minneapolis, MN 55415
Tel: (612) 343-3232
E-mail: blackwell@blackwellburke.com
E-mail: tatwal@blackwellburke.com

Patrick J. Conlon (*pro hac vice*)
EXXON MOBIL CORPORATION
22777 Springwoods Village Parkway
Spring, TX 77389
Tel: (832) 624-6336
E-mail:
patrick.j.conlon@exxonmobil.com

Theodore V. Wells Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com

Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

Todd Noteboom (MN #240047)
Andrew W. Davis (MN #386634)
Peter J. Schwingler (MN #388909)
STINSON LLP
50 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Tel: (612) 335-1500
E-mail: todd.noteboom@stinson.com

Andrew M. Luger (MN #0189261)
JONES DAY
90 South Seventh Street, Suite 4950
Minneapolis, MN 55402
Tel: (612) 217-8862
E-mail: aluger@jonesday.com

Debra R. Belott (*pro hac vice*)
JONES DAY
51 Louisiana Avenue, NW
Washington, D.C. 20001-2113
Tel: (202) 879-3689
E-mail: dbelott@jonesday.com

William A. Burck (*pro hac vice*)
QUINN EMANUEL LLP
1300 I Street, NW, Suite 900
Washington, D.C. 20005-4107
Tel: (202) 538-8120
E-mail:
williamburck@quinnemanuel.com

2001 K Street, NW
Washington, DC 20006-1047
Tel: (202) 223-7321
E-mail: janderson@paulweiss.com

Attorneys for Defendants
EXXON MOBIL CORPORATION and
EXXONMOBIL OIL CORPORATION

Thomas H. Boyd (MN #200517)
Eric F. Swanson (MN #188128)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street
Suite 3500 Cappella Tower
Minneapolis, MN 55402
Tel: (612) 604-6400
E-mail: tboyd@winthrop.com
E-mail: eswanson@winthrop.com

Andrew G. McBride (*pro hac vice*)
MCGUIREWOODS LLP
2001 K Street NW, Suite 400
Washington, D.C. 20006-1040
Tel: (202) 857-2487
E-mail: amcbride@mcguirewoods.com

Brian D. Schmalzbach (*pro hac vice*)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
Tel: (804) 775-4746
E-mail:
bschmalzbach@mcguirewoods.com

Attorneys for Defendant
AMERICAN PETROLEUM INSTITUTE

Stephen A. Swedlow (*pro hac vice*)
QUINN EMANUEL LLP
191 North Wacker Drive, Suite 2700
Chicago, IL 60606
Tel: (312) 705-7488
E-mail:
stephenswedlow@quinnemanuel.com

Attorneys for Defendants
KOCH INDUSTRIES, INC.,
FLINT HILLS RESOURCES LP, and
FLINT HILLS RESOURCES PINE BEND