No. 19A-

IN THE

Supreme Court of the United States

BP P.L.C., ET AL.,
Applicants,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND PENDING APPEAL

AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable John G. Roberts,
Chief Justice of the United States
And Circuit Justice for the Fourth Circuit

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

The Mayor and City Council of Baltimore seek to hold 26 multinational energy companies (the "Applicants") accountable—in Maryland state court—for allegedly causing global climate change. Applicants seek to litigate these claims in a federal forum, where they belong, and thus removed the suit to the United States District Court for the District of Maryland. Applicants' notice of removal invoked numerous grounds for federal jurisdiction, including federal officer removal under 28 U.S.C. § 1442, but the district court granted the Respondent's motion to remand the suit back to Maryland state court. Applicants have an appeal as of right under 28 U.S.C. § 1447(d), and asked both the district court and Fourth Circuit to stay the remand pending appeal. Both courts denied Applicants' request for a stay.

Applicants respectfully request that this Court stay the district court's remand order pending this appeal and, if the Fourth Circuit affirms the order remanding this case, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, in light of the potentially irrevocable consequences of a remand, applicants request that the Court enter a temporary emergency stay of the remand order until the Court decides whether to grant this application. This suit—like a dozen other related suits that have been filed around the country and removed to federal court, and which are now pending in various postures in five of the Courts of Appeals—raises claims that necessarily arise under

federal common law, implicate oil and gas production activities performed at the direction of federal officers and on federal lands, and require resolution in a federal forum. The two district courts that have reached the merits of these global warming claims have dismissed, concluding that federal common law does not provide a remedy. These inherently federal cases should not be resolved piecemeal in state court under state law.

There is a likelihood of irreparable harm in the absence of a stay because even if the action returns to federal court before the state court enters a final judgment, Applicants would be unable to recover the cost and burdens of duplicative litigation, and the district court would need to untangle any state court rulings made during the pendency of the appeal, creating significant comity and federalism issues. In contrast, and with respect to the balance of equities, Respondent will suffer no harm from a stay.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation. BP Products North America Inc. is also a 100% wholly

owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP Products North America is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petroleos de Venezuela S.A. No publicly held corporation owns ten percent or more of CITGO's stock;

CNX Resources Corporation is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns ten percent or more of CNX Resources Corporation's stock.

CONSOL Energy Inc. is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors, which is a subsidiary of publicly held BlackRock, Inc., owns ten percent or more of CONSOL Energy Inc.'s stock.

CONSOL Marine Terminals LLC is a wholly owned subsidiary of CONSOL Energy Sales Company LLC, which is a wholly owned subsidiary of CONSOL Energy Inc., a publicly held corporation. No other publicly held corporation owns ten percent or more of CONSOL Marine Terminals LLC's stock.

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns ten percent or more of ConocoPhillips's stock. ConocoPhillips Company is a wholly owned operating subsidiary of ConocoPhillips.

Crown Petroleum Corporation no longer exists. In 2005, it was merged into Crown Central LLC. Crown Central LLC's sole member is Crown Central New Holdings, LLC. The sole member of Crown Central New Holdings, LLC is Rosemore Holdings, Inc., which is a wholly owned subsidiary of Rosemore, Inc.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns ten percent or more of Exxon Mobil Corporation's stock. ExxonMobil Oil Corporation is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Hess Corporation is a publicly traded corporation and it has no corporate parent. There is no publicly held corporation that owns ten percent or more of Hess Corporation's stock.

Applicant the Louisiana Land & Exploration Company is defunct and has merged into The Louisiana Land and Exploration Company, LLC, which is not a party to this action and did not appear during proceedings below.

Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation. Marathon Oil Corporation has no parent corporation. Based on the Schedule 13G/A filed with the SEC on July 10, 2019, BlackRock, Inc., through itself and as the parent holding company or control person over certain subsidiaries, beneficially owns ten percent or more of Marathon Oil Corporation's stock.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Marathon Petroleum Corporation's stock.

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns ten percent or more of Phillips 66's stock. Applicant Phillips 66 Company is not a party to this appeal, as it was never served with the underlying lawsuit and thus did not appear before the United States District Court for Maryland.

Royal Dutch Shell plc, a publicly held UK company, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Royal Dutch Shell plc's stock. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate parent is Royal Dutch Shell plc.

Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation. No other publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This case is one of fourteen nearly identical cases pending in federal courts around the country in which various state and local government entities have sought to hold energy companies liable for the alleged effects of global climate change.[1] Plaintiffs filed all but one of these actions in state court, and defendants have removed all of the state-court actions to federal court. Defendants have argued in each case that federal law—not state law—necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil fuel production.

These arguments have divided the lower courts. Two courts agreed that global warming claims arise under federal law, regardless whether plaintiffs affix state-law labels to their claims, and dismissed on the merits. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018). A third held that federal common law does *not* govern plaintiffs' global warming claims, reasoning erroneously that Congressional displacement of federal common law makes state law operative and thus defeats removal. *See Cty. of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal.

[1] *See Cty. of San Mateo* v. *Chevron Corp*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach* v. *Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin* v. *Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond* v. *Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland* v. *BP P.L.C.*, No. 17-cv-6011 (N.D. Cal.); *City and Cty. of San Francisco* v. *BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns* v. *Chevron Corp.*, No. 3:18-cv-7477 (N.D. Cal.); *State of Rhode Island* v. *Chevron Corp.*, No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County* v. *BP P.L.C.*, No. 2:18-cv-758-RSL (W.D. Wash.); *City of New York* v. *BP P.L.C.*, No. 18-cv-182-JFK (S.D.N.Y.); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, No. 18-cv-1672 (D. Colo.).

2018). And three other courts, including the district court in this case, held that the well-pleaded complaint rule bars removal of claims nominally asserted under state law, regardless of whether the claims are governed by federal common law. *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July, 22, 2019); *Mayor and City Council of Baltimore* v. *BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. June 10, 2019); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019). Each of those suits is on appeal before the federal circuit courts,[2] and several other related cases are stayed pending those appeals.

In this case, the district court remanded to state court, and both the district court and the Fourth Circuit denied Applicants' request for a stay pending appeal. But a stay is amply justified.

First, this case implicates a well-developed circuit split over the scope of appellate jurisdiction under 28 U.S.C. § 1447(d). Section 1447(d) generally bars appellate review of district court orders remanding cases back to state court, but contains an exception where a basis for removal is 28 U.S.C. § 1442, the federal officer removal statute, or 28 U.S.C. § 1443, the civil rights removal statute. Where, as here, a party has invoked § 1442 as a basis for removal, the Sixth and Seventh Circuits have held that the court of appeals may review every issue in the district court's

[2] *Rhode Island* v. *Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.); *City of New York* v. *BP P.L.C.*, No. 18-2188 (2d Cir.); *Mayor and City Council of Baltimore* v. *BP P.L.C., et al.*, No. 19-1644 (4th Cir.); *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.) (consolidated with Nos. 18-15502, 18-15503, 18-16376); *City of Oakland* v. *BP P.L.C., et al*., No. 18-16663 (9th Cir.); *Bd. of Cty. Comm'rs of Boulder Ct., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

remand order. In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that the court of appeals may consider *only* whether removal was proper under § 1442 or § 1443. The Fifth Circuit has precedent going both ways. The First and Ninth Circuits (like the Fourth Circuit in this case) are currently considering the issue. That split requires resolution by this Court to ensure appellate jurisdiction is applied consistently across the nation.

Second, this Court has repeatedly granted review to address issues related to climate change because of their national and global importance. *See, e.g.*, *Am. Elec. Power Co.,* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011). It is difficult to imagine claims that more clearly implicate substantial questions of federal law and require uniform disposition than the claims at issue here, which seek to transform the nation's energy, environmental, national security, and foreign policies by punishing energy companies for lawfully supplying necessary oil and gas resources. Respondent wants a Maryland state court to declare Applicants' historical energy production and promotional activities across the United States and abroad to be a public nuisance, thereby regulating interstate and international energy production in the name of global warming. This Court has long held that lawsuits like this one targeting interstate pollution and related issues necessarily implicate uniquely federal interests and should be resolved under federal common law, not state law. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987); *AEP*, 564 U.S. 410.

Third, this case implicates a host of federal jurisdiction-granting statutes designed to protect federal interests by ensuring a federal forum, including the federal officer removal statute, 28 U.S.C. § 1442(a)(1), because Applicants extracted and sold oil and gas at the direction of federal officers; and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*., because Respondent's claims seek to limit oil and gas extraction on the Outer Continental Shelf, which is the subject of exclusive federal jurisdiction. This Court's intervention is required to prevent important federal interests from being adjudicated inconsistently—and protected unevenly—in the various state courts.

A stay of the district court's remand order pending appeal is the only way to avoid the significant burden that would be placed on the parties if they are forced to litigate this case on parallel tracks, and the recognized comity and federalism issues that would result from the reversal of a remand order after months (or years) of litigation in state court. The Fourth Circuit's failure to implement a stay requires this Court's intervention. This Court should stay the remand order pending appeal and, if necessary, pending review by this Court.[3] In addition, Applicants request an immediate administrative stay of the remand order pending the Court's consideration of this application.

[3] If this Application is referred to the full Court, applicants request that an interim stay be issued pending a response by Respondent and pending further order of this Court. *E.g.*, *In re U.S.*, 139 S. Ct. 16 (Mem.) (2018) (Roberts, C.J., in chambers).

STATEMENT

1. On July 20, 2018, the Mayor and City Council of Baltimore filed a complaint against more than two dozen American and foreign energy companies, alleging that Applicants' worldwide "extraction, refining, and/or formulation of fossil fuel products" is a "substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height." Attachment A at 98 ¶ 193. The complaint further alleges that this increase in global temperatures has led to rising sea levels, severe weather events, and other environmental changes that have injured or will injure the City of Baltimore. *Id.* at 98-99 ¶¶ 193-95. The complaint purports to assert Maryland state law causes of action. Respondent claims, for example, that Applicants' conduct in extracting and selling fossil fuel products around the world has caused a public and private nuisance, *id.* at 107-15 ¶¶ 218-36, and it asks the Maryland state court to "enjoin[] [Applicants] from creating future common-law nuisances." *Id.* at 111 ¶ 228. Respondent also purports to bring state law claims for strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violation of the Maryland Consumer Protection Act. *Id.* 115-30 ¶¶ 237-98.

2. Applicants removed this action to the U.S. District Court for the District of Maryland on July 31, 2018. Attachment B. The notice of removal asserted that the Respondent's claims are removable because they: (1) "are governed by federal common law," *id.* at 4; (2) "raise[ ] disputed and substantial federal questions," *id.* at 6; (3) "are completely preempted by the [Clean Air Act] and/or other federal statutes

and the United States Constitution," *id.* at 6-7; (4) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under OCSLA, 43 U.S.C. § 1331 *et seq.*, *id.* at 7; (5) arise out of conduct undertaken at the direction of federal officers, *id.*; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.*; (7) "are related to cases under Title 11 of the United States Code," *id.* at 7-8; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333," *id.* at 8.

Respondent moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion without hearing argument. Attachment C. Pursuant to the parties' stipulation, the district court stayed the remand for thirty days. *Id.* at 3. On June 12, 2019, Applicants filed a notice of appeal in the United States Court of Appeals for the Fourth Circuit. That appeal is fully briefed, and oral argument is tentatively calendared for the week of December 10-12, 2019. On June 23, 2019, the Applicants filed a motion in the district court to stay the remand pending appeal, and the parties stipulated to stay the remand until the district court had resolved that motion. The stipulation also provided that the remand would be stayed pending resolution of any motion to stay filed in the Fourth Circuit.

On July 31, 2019, the district court denied Applicants' motion to stay. Attachment D. Although the district court "agree[d] that the removal of this case based on the application of federal law presents a complex and unsettled legal question," *id.* at 5, it concluded that § 1447(d) authorizes appeal *only* of the federal officer removal question, *id.* at 5-9. And it concluded that Applicants' appeal did not

present a serious legal question regarding that basis for removal. *Id.* at 8-9. The district court concluded that the other stay factors did not justify a stay. *Id.* at 9-11.

On October 1, 2019, the Fourth Circuit denied Applicants' motion for a stay pending appeal. Attachment E.

REASONS TO GRANT THE STAY

To grant a stay, a Justice must find "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (internal quotation marks and alterations omitted). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2012) (per curiam); *accord, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Simply put, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans For Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1302-1303 (2006) (Kennedy, J., in chambers). A stay is warranted here.

I. There Is More Than A Reasonable Probability This Court Will Grant Review If The Fourth Circuit Affirms The Remand Order.

There is a substantial probability that the Court will grant certiorari if the Fourth Circuit affirms the district court's remand order. At a minimum, certiorari is necessary to resolve an important issue of appellate jurisdiction that has divided the circuits—whether 28 U.S.C. § 1447(d) authorizes the appellate court to review the *entire* remand order where removal was based in part on the federal officer removal statute, 28 U.S.C. § 1442, or whether appellate jurisdiction is limited to reviewing only the federal officer issue. The Court will likely grant certiorari to review that question if the Fourth Circuit adopts the narrow view of § 1447(d). Alternatively, if the Fourth Circuit reviews the entire remand order and affirms, this Court is likely to grant certiorari on a different question: whether federal law necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil-fuel production—an issue of national importance that has divided the lower courts and is on appeal in the First, Second, and Ninth Circuits.

A. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Review Under 28 U.S.C. § 1447(d).

Section 1447(d) generally bars appellate courts from reviewing district court orders remanding cases to state court, but it contains an exception providing that "an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights cases] of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). The circuit courts are divided over whether § 1447(d) authorizes appellate review of the entire

remand "order" when § 1442 provided one of the bases for removal, or whether appellate review is limited to considering a single *issue—i.e.*, the propriety of removal under § 1442. The Sixth and Seventh Circuits have held that § 1447(d) confers appellate jurisdiction over every issue in the remand order. *See Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (holding, in a case where the defendant removed under § 1441 and § 1442, that "[o]ur jurisdiction to review the remand order also encompasses review of the district court's decision of the alternative ground for removal under 28 U.S.C. § 1441"); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) ("Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442," and "once an appeal of a remand 'order' has been authorized by statute, the court of appeals may consider *all* of the legal issues entailed in the decision to remand.") (emphasis added).

In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that § 1447(d) authorizes the appellate court to review *only* whether a case was properly removed under § 1442 or § 1443. *See State Farm Mut. Auto. Ins. Co.* v. *Baasch*, 644 F.2d 94, 96-97 (2d Cir. 1981) (per curiam) ("dismiss[ing] for want of appellate jurisdiction" "[i]nsofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a)," while addressing "denial of removal under 28 U.S.C. § 1443" on the merits); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Jacks* v. *Meridian Resource Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) ("[W]e do lack jurisdiction to review the district court's determination concerning the availability of federal common law to resolve this

suit . . . as it is a remand based upon [§ 1441]. Nonetheless, we retain jurisdiction to review the district court's remand on the issue of whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), applies."); *Patel* v. *Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (reviewing merits of remand decision addressing removal under § 1443 but dismissing the appeal as to all other removal grounds because the court "lack[ed] jurisdiction to review the remand order based on § 1441").[4]

The Fifth Circuit, meanwhile, has recent precedent going both directions. In *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), the court noted that "[a]lthough § 1447(d) allows review of the 'order remanding the case,' it has been held that review is limited to removability under [§ 1442 or §1443]." *Id.* at 296. The court rejected that view, concluding that "[r]eview should instead be extended to all possible grounds for removal underlying the order." *Id.* ("Like the Seventh Circuit, '[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons *for* an order, but the order itself.") (quoting *Lu Junhong*, 792 F.3d at 812). A few months later, however, a different panel held that § 1447(d) authorized review only of those grounds of removal specifically enumerated—*i.e.*, § 1442 and § 1443. *City of Walker* v. *Louisiana ex rel. Dep't of Transp. and Dev.,* 877

[4] In a parallel global warming case, the Ninth Circuit is considering the significance, *vel non*, of *Patel* given that the scope of appellate jurisdiction under § 1447(d) was not briefed, analyzed, or squarely decided in that case. *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (consolidated with Nos. 18-15502, 18-15503, 18-16376) (9th Cir.). In *San Mateo*, the district court stayed the remand pending appeal and *sua sponte* certified the remand order for interlocutory review. *Cty. of San Mateo* v. *Chevron Corp.*, No. 17-cv-4929 (N.D. Cal.), ECF No. 240.

F.3d 563, 566 (5th Cir. 2017).

A majority of circuits have thus weighed in on the precise issue presented by this appeal, and they are intractably divided.[5] There is more than a reasonable probability that this court will grant certiorari to address this important question of appellate jurisdiction.

B. Any Petition for Certiorari Will Present Important Substantive Questions of Federal Jurisdiction.

1. Whether Global Warming Claims Based Substantially on Conduct that Occurred at the Direction of Federal Officers are Removable Under the Federal Officer Removal Statute Is a Question of Great National Importance.

The question whether Applicants properly invoked the federal officer removal statute will be worthy of this Court's review. Indeed, whether global warming claims targeting fossil-fuel production are removable under § 1442 when a substantial portion of the allegedly tortious production occurred at the direction of federal officers is an important question of federal law given the interests at stake and the likelihood of additional climate-change related litigation. This Court—like the Fourth Circuit—has jurisdiction to reach that issue regardless of how it rules on the scope of appellate review under § 1447(d), because Applicants invoked § 1442 in their Notice of Removal. *See* Attachment B at 7. The answer to that question is of great national importance because Applicants extracted a significant amount of fossil fuels for the military. *See*

[5] The First Circuit will consider this issue in a parallel global warming case involving many of the same Applicants. *See Rhode Island* v. *Shell Oil Products Co., LLC*, No. 19-1818 (1st Cir.). The Tenth Circuit may also consider the issue. *See Bd. of Cty. Comm'rs of Boulder Cty., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

infra at II.B. This Court is likely to review whether state courts are authorized to adjudicate claims seeking to deem conduct essential for national defense a public nuisance, and seeking to label products critical to the military "unreasonably dangerous," without input from the military.

2. Whether Global Warming Claims Based on Worldwide Greenhouse-Gas Emissions Necessarily Arise Under Federal Law Is a Question of Great National Importance.

This Court is also likely to grant certiorari if the Fourth Circuit concludes it has jurisdiction to review the entire remand order but affirms the district court's remand decision. The question presented in that scenario—whether global warming claims asserted against energy producers based on worldwide greenhouse-gas emissions must be resolved in federal court under federal law, or can instead be litigated in state courts under 50 different state laws—is one of utmost national importance that has divided the lower courts.

Thirteen virtually identical cases are now pending in federal courts across the country—six different district courts in four different circuits. All but one were filed in state court and subsequently removed to federal court. Applicants in each case argued that federal common law, not state law, necessarily governs claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production. The district courts are split as to whether these claims arise under federal or state law. *Compare California* v. *BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*") (holding that federal-question jurisdiction was present), *and City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (same), *with Cty. of San Mateo*

v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (holding that federal-question jurisdiction was not present), *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July 22, 2019) (claims do not arise under federal common law because plaintiff asserted only state law claims and well-pleaded complaint rule bars removal); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019) (same), *and Mayor and City Council of Baltimore* v. *BP*, *P.L.C.*, [App C] (same). The two federal district courts that have reached the merits of these global warming claims have dismissed on the ground that federal common law does not provide a remedy; *see City of Oakland*, 325 F. Supp. 3d at 1026 (dismissing global warming nuisance suits because "questions of how to appropriately balance the[] worldwide negatives [of greenhouse gas emissions] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies; our diplomats; our Executive, and at least the Senate"); *City of New York*, 325 F. Supp. 3d at 473 (dismissing claims because "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act"). This is not an issue that can wait for further percolation in the lower courts; the parties in these cases need to know whether the claims will be litigated under a uniform federal standard or subject to a "patchwork of fifty different answers to the same fundamental global issue[.]" *BP*, 2018 WL 1064293, at *3.

Few issues touch upon as many uniquely federal interests as global climate

change and energy production. The relief sought by the Respondent in these cases—ranging from an order enjoining Applicants' worldwide fossil-fuel production to a massive damages award—implicates a wide range of federal interests, including national security, energy policy, environmental policy, and foreign affairs. The question whether such claims warrant resolution in a federal forum under federal law presents a monumentally "important question of federal law." Sup. Ct. R. 10(c). Indeed, the issue is of such importance that the United States filed a district-court amicus brief in one of the cases, and appeared for oral argument in that court, to highlight the case's "potential to shape and influence broader policy questions concerning domestic and international energy production and use." Br. for the United States as Amicus Curiae at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The United States filed a similar amicus brief in the Second Circuit, noting that "international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders," and argued that "[a]pplication of *state* nuisance law . . . would substantially interfere with the ongoing foreign policy of the United States." Br. of for the United States as Amicus Curiae at 15-16, *City of New York* v. *BP P.L.C.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019). Given the proliferation of global warming suits seeking to hold energy producers liable for the alleged effects of global warming, this Court's review is urgently needed to clarify whether federal law necessarily applies to such claims.

Certiorari is especially likely here given this Court's history of reviewing decisions involving claims predicated on global-warming based injuries. In *AEP*, 564 U.S. at 419-20, this Court granted review to address whether a nuisance cause of action against greenhouse-gas emitters could be maintained under federal common law, even though there was no circuit split on the issue. In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court granted review to address whether the Environmental Protection Agency has statutory authority to regulate greenhouse gas emissions from new motor vehicles because of "the unusual importance of the underlying issue," notwithstanding "the absence of any conflicting decisions." *Id.* at 505-06. And in *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), the Court again granted review in the absence of a split to review EPA's assertion of regulatory authority over stationary-source greenhouse-gas emissions.

Whether the Fourth Circuit takes a narrow view of its own jurisdiction to review the remand order, or reviews the entire remand order and affirms, this Court is likely to grant certiorari. For the reasons set forth below, a reversal is likely in either scenario.

II. There is a Significant Likelihood that this Court Will Reverse.

If the Fourth Circuit holds that § 1447(d) limits the scope of appellate review to the propriety of removal under § 1442, this Court is likely to reverse and hold that the plain text of § 1447(d) authorizes review of the entire remand order. The Court is also likely to reverse if the Fourth Circuit affirms the district court's remand order after reviewing *only* the federal officer issue, because much of Defendants' allegedly

tortious fossil-fuel extraction and production occurred at the direction of federal officers. If the Fourth Circuit reviews the entire remand order but affirms the district court's conclusion that global warming claims based on worldwide greenhouse-gas emissions and fossil-fuel production do *not* arise under federal law, this Court is likely to reverse that decision as well.

A. Section 1447(d) Authorizes Review of the Entire Remand Order in Cases Removed Under § 1442.

Section 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 or otherwise." 28 U.S.C. §1447(d) (emphasis added). Applicants removed this case under § 1442 and have appealed the district court's rejection of removal on that ground. The plain text of § 1447(d) thus makes the entire remand *order*—not particular grounds for removal—reviewable on appeal.

As the Seventh and Sixth Circuits recently recognized in determining the scope of review under § 1447(d), "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong*, 792 F.3d at 811; *accord Mays*, 871 F.3d at 442; 15A Wright et al., *Fed. Prac. & P.* §3914.11 (2d ed.). "In general, the purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal." *See* 14C Wright & Miller, *Fed. Prac. & P.* § 3740 (Rev. 4th ed.). But, as Judge Easterbrook has explained, "once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has

been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 811. In such cases, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*; *accord* 15C Wright et al., *Fed. Prac. & P.* § 3914.11 (2d ed.) ("Once an appeal is taken there is very little to be gained by limiting review.").

This Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), confirms that interpretation of § 1447(d). *Yamaha* involved similar language in 28 U.S.C. § 1292(b), which provides that when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion," the court of appeals may "permit an appeal to be taken from such order." This Court held that once review is granted, "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id*. at 205. As a result, "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (quoting 9 J. Moore & B. Ward, Moore's Fed. Prac. ¶110.25[1], p. 300 (2d ed. 1995)).

Respondent has argued below that adopting Applicants' proposed interpretation of § 1447(d) would encourage litigants to frivolously invoke § 1442 as a means of guaranteeing appellate review. But "sufficient sanctions are available to deter frivolous removal arguments[.]" 15A Wright et al., *Fed. Prac. & P*. § 3914.11*; see also Lu Junhong*, 792 F.3d at 813 ("[A] frivolous removal leads to sanctions[.]"); *see, e.g.*, *Wong* v. *Kracksmith*, 764 F. App'x 583 (9th Cir. 2019) (Mem.) (affirming

remand and district court's imposition of sanctions for filing "a frivolous notice of removal" under § 1443). "What's more, a court may resolve frivolous interlocutory appeals summarily[,]" and a "district judge may, after certifying that an interlocutory appeal is frivolous, proceed with the litigation (including a remand)." *Lu Junhong*, 792 F.3d at 813 (citations omitted). There are no good policy reasons for ignoring the plain text of § 1447(d), which authorizes appellate review of a remand "*order*" in cases removed under § 1442.

If the Fourth Circuit dismisses Applicants' appeal in part on the ground that it lacks jurisdiction to review the whole remand order, this Court will likely grant certiorari and reverse.

B. Applicants Properly Removed This Case Under the Federal Officer Removal Statute Because Much of Applicants' Fossil-Fuel Extraction Occurred at the Direction of Federal Officers.

Reversal is also likely—regardless of how the Court rules on the scope of appellate review under § 1447(d)—because Applicants properly removed this action under 28 U.S.C. § 1442, the federal officer removal statute. Section 1442 authorizes removal of suits brought against "any person acting under" a federal officer "for *or relating to* any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added). This Court has already made clear that "[t]he words 'acting under' are broad," and that "the statute must be liberally construed." *Watson* v. *Philip Morris Co.*, 551 U.S. 142, 147 (2007). And by adding the words "or relating to" in the Removal Clarification Act of 2011, Pub L. No. 112-51, 125 Stat. 545, Congress rendered this already "broad" grant of federal jurisdiction even more expansive. *See Sawyer* v. *Foster Wheeler LLC*,

860 F.3d 249, 255, 258 (4th Cir. 2017) (quoting H.R. Rep. 112-17, at 6, 2011 U.S.C.C.A.N. 420, 425). Following the Removal Clarification Act, a party seeking federal officer removal need only demonstrate that (1) it acted under a federal officer; (2) it has a colorable federal defense; and (3) the charged conduct was carried out for or in relation to the asserted official authority. *Id.* at 254. A private contractor "acts under" the direction of a federal officer when it "help[s] the Government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson*, 551 U.S. at 153, 151.

Applicants satisfy that broad standard. The complaint alleges that all of applicants' extraction and production of fossil fuels contributed to Respondent's climate-change-based injuries. At least some of the Applicants extracted, produced, and sold fossil fuels "act[ing] under a federal officer" that sought to procure fuel. *See* Attachment B at 35-39 ¶¶ 61-64. Standard Oil—a predecessor of applicant Chevron—extracted oil pursuant to a contract with the U.S. Navy that *required* it to produce "not less than 15,000 barrels of oil per day." *Mayor and City Council of Baltimore* v *BP P.L.C.*, No. 19-1644, ECF No. 74 ("Joint Appendix") at 250. Applicant CITGO also contracted with the U.S. Navy to supply and distribute gasoline and diesel fuels needed for naval operations between 1998 and 2012. *Id.* at 318-19. Thus, the reasonableness of Applicants' production directly turns on the orders of federal officials who contractually obligated Applicants to deliver fuels at specified levels. And other Applicants extracted oil pursuant to OCSLA and strategic petroleum reserve leases with the federal government. *Id.* at 212-13.

The district court assumed that at least some Applicants were "act[ing] under a federal officer" and could raise colorable federal defenses, but held that removal was improper because their conduct under federal direction was not sufficiently connected to Respondent's claims. Attachment C at 36 (Applicants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels"). But to satisfy the nexus requirement, a defendant must show "only that the charged conduct relate[s] to an act under color of federal office." *Sawyer*, 860 F.3d at 258 (emphasis added). Thus, "the hurdle erected by [the causal-connection] requirement is quite low." *In re Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017). Indeed, courts have regularly allowed removal of suits under the federal officer removal statute even when only a fraction of the allegedly tortious activity occurred under the direction of federal officers. *See, e.g.*, *Reed* v. *Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) (holding the "ten years" plaintiff worked under federal direction was "sufficient to support § 1442(a)(1) removal" even though plaintiff alleged harm due to exposure to a chemical produced by the defendant over a 35-year period); *Lalonde* v. *Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (holding defendant's work with the federal government for 11 years established a "causal connection" warranting removal, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer).

The district court also held that federal officer removal was improper because the government did not direct Applicants "to conceal the hazards of fossil fuels or

prohibit[] them from providing warnings to consumers." Attachment C at 36. But Respondent has asserted claims for public and private nuisance, strict liability and negligent design defect, and trespass—causes of action that turn on Applicants' alleged *extraction and production*, not their promotional or lobbying activities. Attachment A at 107-15 ¶¶ 218-36; *id.* at 117-23 ¶¶ 249-69; *id.*at 126-28 ¶¶ 282-90. There is, at the very least, a serious legal question as to whether removal is proper where one of the primary "acts for which [Applicants] have been sued," Attachment C at 37, was taken at the direction of federal officers.

There is thus a reasonable likelihood that this Court will reverse and hold that removal was proper under § 1442.

C. Respondent's Claims Arise Under Federal Common Law and Are Removable on Several Other Grounds.

If the Fourth Circuit reviews the whole remand order and affirms, this Court is likely to reverse that decision for several reasons.

1. To begin with, Applicants properly removed Respondent's global warming claims because the claims arise under federal common law, regardless of how they were pleaded.

To decide whether federal law governs Respondent's claims, the district court was required to determine whether Respondent's global warming claims implicate "uniquely federal interests" that require a uniform rule of federal decision, *Tex Indus.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), and thus fall within the ambit of federal common law. *See United States* v. *Standard Oil*, 332 U.S. 301, 307 (1947) (holding that "matters essentially of federal character" must be governed by federal

common law, but dismissing the claims because federal common law did not provide a remedy). The answer to that question is plainly yes, because Respondent's claims seek to label global fossil-fuel extraction and production—and the subsequent creation of greenhouse-gases—a public nuisance, thereby implicating "uniquely federal interests" in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing climate change. *Tex Indus.*, 451 U.S. at 640-41. Because federal common law must provide the rule of decision, Respondent's claims "arise under" federal law and are removable under 28 U.S.C. §§ 1331 and 1441.

The district court declined even to conduct this analysis, erroneously concluding that Applicants' argument regarding the application of federal common law was merely a "cleverly veiled preemption argument." Attachment C at 12. But the question of which law governs a cause of action—state or federal common law—is not merely a *defense* to Respondent's claims. On the contrary, for purposes of removal, this choice-of-law determination is a threshold jurisdictional question. As this Court has explained, "if the dispositive issues stated in the complaint require the application of federal common law," the "cause of action . . . 'arises under' federal law." *Milwaukee I*, 406 U.S. at 100.

Courts have long recognized that federal jurisdiction exists if a claim arises under federal common law. *Wayne* v. *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also New SD, Inc.* v. *Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (upholding removal of contract claim nominally asserted under state law

because "contracts connected with the national security[] are governed by federal law"); *Treiber & Straub, Inc.* v. *U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law . . . is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co.* v. *Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts[.]"); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims . . . arise under federal common law.").

This Court has long recognized that "[f]ederal common law and not the varying common law of the individual states is . . . entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. Because "the regulation of interstate . . . pollution is a matter of federal, not state, law," the Court has held that cases involving interstate pollution "should be resolved by reference to federal common law." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (citing *Milwaukee I*, 406 U.S. at 107)). Indeed, "such claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut* v. *Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410; *see, e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute).

Global warming claims plainly involve interstate pollution because they are premised on harms allegedly caused by worldwide greenhouse gas emissions. This

Court has recognized that state law cannot apply to such claims. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming. *Id.* at 418. The Second Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance," and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In reviewing that decision, this Court reiterated that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects,'" and explained that "borrowing the law of a particular State" to resolve plaintiffs' global warming claims "would be inappropriate." *AEP*, 564 U.S. at 421-22; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855, 854 (9th Cir. 2012) (concluding that "federal common law" applied to a "transboundary pollution suit[]" brought by an Alaskan city asserting public claims under federal and state law for damages from "sea levels ris[ing]" and other alleged effects of defendants' "emissions of large quantities of greenhouse gases").

The claims asserted here must likewise be governed by federal common law because Respondent alleges injury from Applicants' contributions to interstate greenhouse-gas pollution. Although Respondent seeks to frame this case as being about Applicants' worldwide fossil-fuel production and promotion—rather than emissions—the Complaint alleges that Applicants created a nuisance by producing fossil fuels whose combustion released "at least 151,000 gigatons of CO2 between 1965 and 2015." Attachment A at 4 ¶ 7. This case, like *AEP*, thus turns on

greenhouse gas emissions, as three district courts adjudicating similar claims have recognized. *See City of New York*, 325 F. Supp. 3d at 472 (holding that even though plaintiff sought to hold defendants liable for producing "massive quantities of fossil fuels," "the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases"); *City of Oakland*, 325 F. Supp. 3d at 1024 (holding that although "defendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel," "the harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels"); *County of San Mateo*, 294 F. Supp. 3d at 937 (noting that plaintiffs' claims against energy producers were "nearly identical" to previous claims asserted against greenhouse-gas emitters because plaintiffs alleged "that the defendants' contributions to greenhouse gas emissions constituted a substantial and unreasonable interference with public rights."). This case is thus precisely the sort of transboundary pollution suit that "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488.

The relief requested in the complaint—an injunction to abate the nuisance, compensatory and punitive damages, and disgorgement of profits—also implicates "uniquely federal interests" and thus requires a uniform rule of federal decision. *Texas Indus.*, 451 U.S. 630, 640 (1981). As the federal government recently emphasized in *BP*, "the United States has strong economic and national security interests in promoting the development of fossil fuels," the very conduct the Respondent seeks to label a public nuisance. *Amicus Curiae* Br. for the United States

at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-06011 (N.D. Cal. May 24, 2018). The government explained that these cases have "the potential to . . . disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." *Id.* at 2.

Adjudicating Respondent's nuisance claim would necessarily require determining "what amount of carbon-dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428; *see City of New of York*, 325 F. Supp. 3d at 473 ("factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights); *California* v. *Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Any judgment as to whether the alleged harm caused by Applicants' contribution to worldwide emissions "out-weighs any offsetting benefit," Attachment A at 107 ¶220, implicates the federal government's unique interests in setting national and international policy on matters involving energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427.

For these reasons, two district courts have held that federal common law governs global-warming claims asserted against energy producers based on the worldwide production and combustion of fossil fuels. In *BP*, the district court denied a motion to remand global-warming claims filed by the City of Oakland and the City

and County of San Francisco against five energy producers, all of them Applicants here. Like Respondent, the *BP* plaintiffs argued that the well-pleaded complaint rule barred removal because they had nominally asserted claims under state law. 2018 WL 1064293, at *5. The court disagreed, holding that plaintiffs' "nuisance claims—which address the national and international geophysical phenomenon of global warming—*are necessarily governed by federal common law*." *Id.* at *2 (emphasis added). As the court explained, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global warming. *Id.* at *3. The court held that the "well-pleaded complaint rule does not bar removal of these actions" because "[f]ederal jurisdiction exists" if "the claims necessarily arise under federal common law." *Id.* at *5.

In *City of New York*, the court likewise concluded that claims pleaded under state law against the same five energy producers for "damages for global-warming related injuries" "are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims *arise under federal common law* and require a uniform standard of decision." 325 F. Supp. 3d at 472 (emphasis added).

Given the uniquely federal interests implicated by Respondent's claims, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Allowing state law to govern would permit states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. As the U.S. Solicitor General explained in *AEP*, "resolving such claims would require each court . . . to determin[e] whether and

to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, No. 10-174 (S. Ct.), 2011 WL 317143, at *37. Proceeding under the nation's 50 different state laws is untenable, as this state-by-state approach could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*

Because federal common law governs Respondent's global warming claims—and because the well-pleaded complaint rule does not bar removal of claims nominally pleaded under state law when those claims arise under federal common law—this Court is likely to reverse any decision by the Fourth Circuit affirming the district court's erroneous remand order.

2. Applicants removed Respondents' global warming claims on several other grounds, each of which also supports federal jurisdiction, and thus provides a basis for reversal.

First, even if Respondent were right that state law governs its claims, the claims would still give rise to federal jurisdiction under *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). In *Grable*, this Court held that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313-314). Those elements are satisfied here. Respondent's nuisance claims, for instance, require a

reasonableness determination that raises questions about how to regulate and limit the nation's energy production and emissions levels. Those issues are inextricably linked to the "unique federal interests" in national security, foreign affairs, energy policy, economic policy, and environmental regulation. It is difficult to imagine a case that better implicates "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312.

Second, removal is warranted under OCSLA, which extends federal jurisdiction to a "broad range of legal disputes" in any way "relating to resource development on the Outer Continental Shelf," *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 569-570 (5th Cir. 1994), by extending federal jurisdiction to all "cases and controversies arising out of, or in connection with, . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of . . . minerals." 43 U.S.C. § 1349(b)(1). Respondent seeks to hold Applicants liable for *all* of their exploration for and production of oil and gas, and some of the Applicants extracted a substantial portion of the oil and gas they produced on the OCS. Attachment B at 32-35 ¶¶ 55-56. *See Parker Drilling Mgmt. Servs.* v. *Newton*, 139 S. Ct. 1881, 1886 (2019) ("Under the OCSLA, all law on the OCS is federal law."). Furthermore, the relief Respondent seeks—abatement of the alleged nuisance of oil and gas production—"threatens to impair the total recovery of the federally-owned minerals" from the OCS, which brings this case "within the

jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570; *see also United Offshore Co.* v. *S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (OCSLA jurisdiction extends to any matter where "the resolution of the dispute would affect the exploitation of minerals on the outer continental shelf"). This case was thus properly removed under OCSLA because plaintiff's claims, "though ostensibly premised on [state] law, arise under the 'law of the United States' under [43 U.S.C.] § 1333(a)(2)," such that "[a] federal question . . . appears on the face of [plaintiff's] well-pleaded complaint." *Ten Taxpayer Citizens Grp.* v. *Cape Wind Assoc., LLC*, 373 F.3d 183, 193 (1st Cir. 2004).

Given the numerous bases for federal jurisdiction, this Court is likely to reverse a decision by the Fourth Circuit affirming the remand order.

III. There Is a Likelihood of Irreparable Harm Absent a Stay.

Unless this Court stays the remand order, the Clerk of Court for the District of Maryland will promptly mail a certified copy of the remand order to the Circuit Court for Baltimore City, and "the State Court may thereupon proceed with [the] case." 28 U.S.C. §1447(c). This outcome would irreparably harm Applicants in four distinct ways.

First, it would force Applicants to answer in state court for conduct "relating to" an official federal act. 28 U.S.C. § 1442. This is an irreparable harm in and of itself. And it is precisely the harm that Congress sought to avoid in making denials of § 1442 removals immediately appealable. The legislative history of the Removal Clarification Act of 2011 reflects Congress's belief that "[f]ederal officers or agents . . .

should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." H.R. Rep. No. 112-17(I), pt. 1, at 3 (2011). Yet that is what remand would allow. Congress understood that even appearing before state courts could subject federal officials and their agents to "political harassment" that could "needlessly hamper[]" federal and federally-sanctioned operations. *Id.* For that reason, Congress sought to protect federal officers and their agents from biased "outcomes" at all stages of litigation from "pre-suit discovery" to final judgment. *See id.* at 2, 3-4; *see also* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 1442, 125 Stat 545 (expanding the scope of a removable "civil action" under § 1442 to include "any proceeding" in which "a subpoena for testimony or documents is sought or issued"). Remand would thwart that effort by allowing Applicants to be haled into state court for actions taken in relation to their role as federal agents. Because the harm is being forced to answer in state court—not just being subjected to ultimate liability in that court—the harm cannot be cured by a reversal on appeal.

Second, remand would force Applicants—and Respondent—to waste substantial time and resources on state court proceedings that will be rendered pointless when the district court's remand order is reversed. Although litigation costs generally do not constitute irreparable injury, *see Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), courts have held that the such costs constitute irreparable harm where, as here, they would be duplicative and unrecoverable. *See, e.g.*, *Ewing Indus. Co.* v. *Bob Wines Nursery, Inc.*, No. 3:13-cv-931-J-39JBT, 2015 WL

12979096, at *3 (M.D. Fla. Feb. 5, 2015) ("[W]asteful, unrecoverable, and possibly duplicative costs are proper considerations" in the irreparable harm inquiry.); *see also Wilcox* v. *Lloyds TSB Bank, PLC*, No. 13-00508, 2016 WL 917893, at *5-6 (D. Haw. Mar. 7, 2016) (similar); *Citibank, N.A.* v. *Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (similar). Here, absent a stay, the parties will be forced to litigate before a state court applying the wrong law, while simultaneously litigating materially identical cases seeking the same relief before federal courts across the country. Avoidance of those costs alone justifies a stay pending appeal. *See Citibank*, 2017 WL 4511348, at *2-3 (granting motion to stay remand and noting that litigation costs would be avoided).

Third, even if this appeal can be resolved before the state court enters a final judgment, the district court would need to untangle any state court rulings made during the pendency of the appeal in the event of reversal. This would likely include rulings on multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings—all litigated under state law. Deciding how these rulings should apply once the case returns to federal court would involve a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. Courts routinely grant motions to stay remand orders to avoid this exact risk. *See, e.g.*, *id*. at *3 (collecting cases); *see also Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007) (noting "significant issues of comity" that arise when "a federal appeals court vacate[s]" a remand order and

"retroactively invalidates state court proceedings" that occurred during pendency of appeal).

Fourth, there is a risk that the state court could reach a final judgment before Applicants' appeal is resolved—an especially likely scenario given the high probability that this Court will grant review after the Fourth Circuit issues its initial decision. "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court *before* it becomes irrevocable." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could enter judgment against Applicants while their appeal is pending in federal court. *See Northrop Grumman*, 2016 WL 3346349, at *4 (defendant would suffer "severe and irreparable harm if no stay is issued" because an "intervening state court judgment or order could render the appeal meaningless"); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013) ("[L]oss of appellate rights alone constitutes irreparable harm.").[6]

IV. The Balance of Equities Decisively Favors the Applicants.

A stay would not prejudice Respondent's ability to seek relief or meaningfully exacerbate its injuries. Respondent's Complaint disclaims any desire "to restrain [Applicants] from engaging in their business operations," and merely "seeks to ensure that [Applicants] bear the costs of those impacts." Attachment A at 5 ¶12. Moreover,

[6] Indeed, if defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part).

according to Respondent, the harm alleged is already "locked in" and will occur "even in the absence of any future emissions." *See, e.g.*, *id.* at 4 ¶¶7-8; *id.* at 90 ¶¶ 179-180; *id.* at 99 ¶ 196. Respondent thus cannot point to harm reasonably likely to occur during a stay, but which denial of a stay could avoid. At most, its alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm.

Even if Respondent's jurisdictional arguments are correct, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. A stay would, however, benefit Respondent by avoiding costly and potentially wasteful state court litigation while the appeal is pending. *See Brinkman*, 2015 WL 13424471, at *1 (granting stay pending appeal so parties would not "face the burden of having to simultaneously litigate [the case] in state court and on appeal"). A stay would also conserve judicial resources and "promot[e] judicial economy" by unburdening the state court of potentially unnecessary litigation. *United States* v. *2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

The district court speculated that "interim proceedings in state court may well advance the resolution of the case in federal court," Attachment D at 11], but the threshold question on appeal is *which law governs* Respondent's claims—federal common law or state law. Any state court ruling addressing the viability of the claims under *Maryland* law is unlikely to assist the district court in determining whether the claims can proceed under *federal* law.

A stay could also avoid costly and needless discovery. Respondent has argued below that it will obtain discovery before dispositive motions are resolved regardless

of whether the case proceeds in state or federal court. But discovery in the district court does not commence until a scheduling order issues, and, generally, not until after Rule 12 motions are resolved. D. Md. L.R. 104.4; *see Wymes* v. *Lustbader*, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) ("On motion, it is not uncommon for courts to stay discovery pending resolution of dispositive motions."); *Stone* v. *Trump*, 335 F. Supp. 3d 749, 754 (D. Md. 2018) ("When a dispositive motion has the potential to dispose of the case, it is within the Court's discretion to stay discovery pending resolution of that motion."). Given the likelihood that the district court will dismiss Respondent's claims following reversal of the remand order, a stay could prevent the parties from engaging in discovery at all, saving both Respondent and the 26 Applicants enormous time and resources.[7]

CONCLUSION

Applicants respectfully request that this Court stay the district court's remand order pending the disposition of the appeal in the Fourth Circuit and, if that court affirms the remand order, pending the filing and disposition of a petition for a writ of certiorari in this Court. Applicants further request that the Court enter a temporary

[7] Federal and Maryland discovery standards and procedures also differ in important respects, raising the prospect that discovery rulings would need to be revisited if the remand order is reversed and the case returns to federal court. *Compare, e.g.*, Fed. R. Civ. P. 26(b)(1) (scope of discovery is limited to "any nonprivileged matter *relevant to any party's claim or defense*"), *with* Maryland R. Civ. P. 2-402(a) (allowing parties to obtain discovery "regarding any matter that is not privileged . . . if the matter sought is *relevant to the subject matter of the action*"); *compare* Fed. R. Civ. P. 37(e) (allowing court to impose evidentiary sanctions "only upon finding that the party acted with the *intent* to deprive another party of the information's use in the litigation"), *with* Maryland R. Civ. P. 2-433(b) (allowing sanctions for negligently failing to preserve electronic information).

emergency stay of the remand order until the Court decides whether to grant this application.

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