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, FLINT HILLS PINE BEND, Defendants.	Case No. 20-cv-1636-JRT-HB

PLAINTIFF STATE OF MINNESOTA'S
OPPOSITION TO MOTION TO STAY

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I. INTRODUCTION

The Court should deny the Motion to Stay ("Motion," Dkt. 58) filed by Defendants Koch Industries, Inc., Flint Hills Resources LP, and Flint Hills Resources Pine Bend (collectively, "Koch Defendants").[1]

The State of Minnesota ("State") filed this suit in Minnesota District Court in June 2020. Defendants improperly removed it to federal court based on grounds that have been consistently rejected by federal courts nationwide in substantially similar climate deception cases.[2] Even though briefing and argument on the State's motion to remand has been completed, the Koch Defendants now seek to stay these proceedings indefinitely, pending: (1) the U.S. Supreme Court's decision in *Baltimore II*, 952 F.3d 452, on an issue

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[1] Although only the Koch Defendants filed the Motion, the State's arguments in opposition apply equally to each defendant, should any of them later attempt to file another motion to stay.

[2] *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"), *petition for cert. filed* (U.S. Dec. 30, 2020) (No. 20-884); *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"), *petition for cert. filed* (U.S. Jan. 8, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, 141 S. Ct. 222 (2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed* (U.S. Dec. 8, 2020) (No. 20-783); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *petition for cert. filed* (U.S. Dec. 30, 2020) (No. 20-900); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

that has no bearing on this case; and (2) the mere possibility that the Supreme Court may grant the petition for a writ of certiorari in *Oakland*, 969 F.3d 895.

While both *Baltimore II* and *Oakland* involve similar claims regarding fossil fuel defendants' campaign to deceive the public about harms that they knew would result from the use of their products, neither merit a stay of this action. In *Baltimore II*, the question before the Supreme Court is narrowly confined to the scope of appellate review of remand orders under 28 U.S.C. § 1447(d). The Supreme Court's decision will therefore have no bearing on either the State's motion to remand or the merits of the State's claims. And even if the Supreme Court grants the petition for a writ of certiorari in *Oakland* (an improbable outcome, at best), defendants are not likely to succeed on the merits of a claim that has been rejected by the Ninth Circuit and five district courts to date. The Koch Defendants have failed to show, moreover, that they will be irreparably injured absent a stay. By contrast, the State will be substantially harmed by a stay that unduly and unnecessarily delays prosecution of the State's claims. Accordingly, the Koch Defendants cannot satisfy their burden of establishing the need for a stay.

II. BACKGROUND

A. The State of Minnesota's Case

The State sued Defendants in Minnesota state court, asserting state-law claims for (1) violations of the Minnesota Consumer Fraud Act; (2) failure to warn; (3) fraud and misrepresentation; (4) violations of the Minnesota Deceptive Trade Practices Act; and (5) violations of the False Statement in Advertising Act. Complaint, Dkt. 1-1 ("Compl.") ¶¶ 184–242. The State's claims rest on Defendants' campaign to deceive and mislead the

public and consumers about the devastating impacts of climate change and its link to fossil fuels, which led to disastrous impacts caused by profligate and increased use of Defendants' products. *Id.* ¶¶ 2–6. Defendants have known for more than half a century that their fossil-fuel products create greenhouse-gas pollution that warms the oceans, changes our climate, and causes sea levels to rise. *Id.* ¶¶ 3, 55–83. Despite this knowledge, Defendants funded and carried out a decades-long campaign of denial and disinformation about the existence of climate change and their products' contribution to it. *Id.* ¶¶ 84–131. The campaign included both a long-term pattern of direct misrepresentations and material omissions to consumers in the State and nationwide, as well as a strategy to indirectly influence consumers through the dissemination of misleading research to the press, government, and academia. *Id.*

Defendants wrongfully removed this state-law action to this Court on July 27, 2020, asserting the same jurisdictional arguments that have been repeatedly rejected by other courts. Notice of Removal, Dkt. 1 ("NOR"). The Parties have temporarily agreed to stay motions to dismiss pending the Court's decision regarding the State's motion to remand, which was fully briefed as of December 18, 2020, and argued on January 19, 2021. *See* Dkt. 31, 35, 44, 51, 62.

B. The Mayor and City Council of Baltimore's Case

In *Baltimore*, the plaintiff Mayor and City Council of Baltimore filed suit against Exxon and other fossil fuel defendants, asserting state-law claims for public and private nuisance, strict liability for failure to warn and design defect, negligent design defect and failure to warn, trespass, and violations of the Maryland Consumer Protection Act.

Baltimore II, 952 F.3d at 457. There, as in this case, "Baltimore d[id] not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; [rather,] it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* at 467. The defendants in *Baltimore*, like here, wrongfully removed that case. *Id.* at 457. The plaintiff filed a motion to remand, and the U.S. District Court for the District of Maryland granted the motion. *See Baltimore I*, 388 F. Supp. 3d at 555.

Following the remand decision, the defendants appealed and moved to stay the action pending appeal. The district court denied the defendants' motion to stay pending appeal, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *1 (D. Md. July 31, 2019), as did the Fourth Circuit, *see* Decl. of Leigh Currie in Support of Opposition to Motion to Stay ("Currie Decl.") Ex. 1. On the merits, the Fourth Circuit ultimately affirmed the district court's order granting remand. *See Baltimore II*, 952 F.3d 452. The defendants again sought a stay, this time filing an application with the United States Supreme Court to stay the Fourth Circuit's mandate. The Supreme Court denied that application. *BP P.L.C. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019). The mandate issued on March 30, 2020. Currie Decl. Ex. 2.

Meanwhile, the defendants filed a petition for writ of certiorari, presenting just one question for review by the Supreme Court:

> Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443.

Currie Decl. Ex. 3, Petition for a Writ of Certiorari at I, *BP p.l.c., et al., v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Mar. 31, 2020). By its terms, the question presented is limited to the scope of appellate review and does not concern the merits of any of the defendants' rejected bases for removal. *Id.* Thus, the Koch Defendants' motion to stay is premised on a falsity—that *Baltimore* could somehow affect this Court's resolution of remand issues here.

C. The City of Oakland and City and County of San Francisco's Case

In *Oakland*, the City of Oakland and the City and County of San Francisco also filed suit against Exxon and other fossil fuel defendants, asserting only claims for public nuisance under California law. 969 F.3d at 901. The plaintiffs alleged that defendants' misleading promotion and production of massive quantities of fossil fuels caused or contributed to sea level rise which have and will continue to injure the cities. *Id*. at 902. Again, the defendants in *Oakland*, like here, wrongfully removed the cases to federal court. *Id.* The plaintiffs filed a motion to remand, and the district court "denied the motion, concluding that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the Cities' claim was 'necessarily governed by federal common law.'" *Id*. The Ninth Circuit overturned the district court's ruling, holding that:

- "[T]he district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question" under *Grable*. *Id*. at 906.
- "[I]t is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution." *Id*.
- Defendants' claim that "the Cities' state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy. . . . d[id] not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id*. at 906–07.
- The "evaluation of the Cities' claim that the Energy Companies' activities amount to a public nuisance would require factual determinations, and a state-law claim that is 'fact-bound and situation-specific' is not the type of claim for which federal-question jurisdiction lies." *Id*. at 907.
- And defendants' argument "that the Cities' state-law claim for public nuisance arises under federal law because it is completely preempted by the Clean Air Act . . . also fails." *Id.*

On January 8, 2021, the *Oakland* defendants filed a petition for a writ of certiorari, seeking the Supreme Court's review of two questions, only the first of which has any relevance here:

> I. Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.

> II. Whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment in the district court.

Currie Decl. Ex. 4, Petition for a Writ of Certiorari at i, *Chevron Corporation, et al., v. City of Oakland et al.* (filed Jan. 8, 2021). The respondent public entities have 30 days from the date the petition is docketed to file a response, and may seek an extension of time to respond. As of the date of this filing, the case has not yet been docketed. It is likely the Supreme Court will not rule on the petition until very late in the current term—May or June at the earliest. If the Court does grant the petition, briefing and argument will likely take several months to complete, meaning the case may not be decided until the end of this year or early next year. In any event, however, the question presented in defendants' petition in *Oakland* does not merit a stay here because they are unlikely to succeed on the merits of an argument that has been rejected by numerous courts, as described below.

III. LEGAL STANDARD

Under the traditional standard for a stay pending judicial review, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (applying same factors); *Pederson v. Trump*, No. CV 19-2735 (JRT/HB), 2020 WL 4288316, at *5 (D.

Minn. July 26, 2020) (same). The first factor, "a demonstration of likelihood of success on the merits[,] must be considered in ruling on a motion to stay proceedings [even when it is] based on the outcome of unrelated cases on appeal." *Robinson v. Bank of Am., N.A.*, No. CIV. 11-2284 MJD/LIB, 2012 WL 2885587, at *1 (D. Minn. July 13, 2012); *see also Garcia v. Target Corp.*, 276 F. Supp. 3d 921, 924 (D. Minn. 2016) (describing the four traditional factors as "the standard factors weighed in this District on a motion to stay proceedings based on the outcome of other cases on appeal"); *Xiong v. Bank of Am., N.A.*, No. CV 11-3377 (JRT/JSM), 2012 WL 12903768, at *1 (D. Minn. June 26, 2012) (applying the four traditional factors where movant argued the instant case was similar to other cases pending appeal in the Eighth Circuit).

"'The proponent of a stay bears the burden of establishing its need.'" *Kreditverein der Bank Austria v. Nejezchleba*, 477 F.3d 942, 945 n.3 (8th Cir. 2007) (quoting *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). "A stay is an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right, even if irreparable injury might otherwise result to the [movant]." *Nken*, 556 U.S. at 427 (quotations and citation omitted). "Because a stay is not a matter of right, but rather an exercise of judicial discretion, the applicant bears the burden of showing that the circumstances justify an exercise of that discretion." *Brady v. Nat'l Football League*, 779 F. Supp. 2d 1043, 1046 (D. Minn. 2011) (quotations and citation omitted). This burden is "a heavy one" that, in most cases, will not be met. *Id.*; *see also Bae Sys. Land & Armaments L.P. v. Ibis Tek, LLC*, 124 F. Supp. 3d 878, 890 (D. Minn. 2015) ("Because a stay of proceedings has the potential to damage the party opposing it, the decision to stay

should weigh the competing interests and maintain an even balance, recognizing that the Supreme Court has counseled moderation in use." (quotations omitted)).

IV. ARGUMENT

A. Other Courts Have Denied Requests for Stays in Similar Cases.

In persuasive opinions, two district courts have denied similar requests for a stay in similar cases.

In *Baltimore*, following the district court's order to remand the case, defendants moved for a stay pending resolution of the appeal of the remand order. The court weighed each of the four traditional stay factors and ultimately denied the motion. *Baltimore*, 2019 WL 3464667 at *2. As to the first factor, the court found that a stay was not warranted because any appellate review would be limited to federal officer removal, and defendants did not demonstrate "a substantial likelihood of success on the merits of th[at] issue" because "[t]hey merely recite[d] the same arguments outlined in their Notice of Removal and opposition to the City's Remand Motion." *Id*. at *4. Even if the remand order were reviewable in its entirety, however, the court found that a stay still was not warranted because the defendants also failed to show that the remaining three factors supported a stay. *Id*. at *5.

As to the second factor, the court rejected defendants' arguments that "an immediate remand would render their appeal meaningless and would undermine the right to a federal forum provided by the federal officer removal statute . . . . that federal courts are 'uniquely qualified' to address the issues raised in this case and, further, that proceeding with litigation in state court would cost them significant time and money." *Id*.

(citations omitted). The court held that "defendants' appeal would only be rendered moot in the unlikely event that a final judgment is reached in state court before resolution of their appeal"—a "speculative harm [that] does not constitute an irreparable injury." *Id*. The court also rejected defendants' argument that federal courts are "uniquely qualified," finding "state courts are well equipped to handle complex cases." *Id*. And it found that defendants had not "shown that the cost of proceeding with litigation in state court would cause them to suffer irreparable injury," *id*., citing *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

Finally, in considering the third and fourth factors, which assess the harm to the opposing party and weigh the public interest, the court rejected defendants' arguments that a stay "would avoid costly, potentially wasteful litigation in state court" and that it "would delay proceedings in state court 'only briefly' and, thus, would not prejudice the City." *Baltimore*, 2019 WL 3464667 at *6. Instead, the court held that denial of the stay was warranted because

> [t]his case is in its earliest stages and a stay pending appeal would further delay litigation on the merits of the City's claims. This favors denial of a stay, particularly given the seriousness of the City's allegations and the amount of damages at stake. Further, even if the remand is vacated on appeal, the interim proceedings in state court may well advance the resolution of the case in federal court. After all, the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum.

Id. Accordingly, the court denied the motion.

In *City & County of Honolulu v. Sunoco, LP*, Case No. 20-cv-00163 (D. Haw.) ("*Honolulu*"), prior to any briefing on a motion to remand, the defendants sought a continued stay of proceedings pending resolution of the petitions for certiorari in *Oakland* and a similar climate deception case, *San Mateo II*. The court there held:

> There is not a strong likelihood of acceptance of certiorari or reversal; Defendants in this case will not be 'irreparably injured absent a stay'; a further stay will, however, 'substantially injure' Plaintiff by unnecessarily prolonging these proceedings for an indeterminate amount of time; and there is 'always a public interest' in the 'prompt' resolution of a dispute.

See Currie Decl. Ex. 5, Order Lifting Stay, *Honolulu*, No. 20-cv-00163, Dkt. 111 (D. Haw. Aug. 21, 2020) (quoting *Nken*, 556 U.S. at 434, 436). The court then set deadlines for briefing the motion to remand. *Id*.

Defendants subsequently filed a request for reconsideration of the order denying the stay, which the *Honolulu* court denied. Currie Decl. Ex. 6, Order Denying Defendants' Request for Reconsideration of Stay, *Honolulu*, No. 20-cv-00163, Dkt. 115 (D. Haw. Sept. 9, 2020). The sole basis for the request was that the Ninth Circuit had stayed the issuance of the mandate in *San Mateo II* pending the resolution of the petition for certiorari in that case. *Id.* at 2. In denying the request, the court noted that the defendants had "stated the *limited* guidance this Court should expect from the Ninth Circuit in the [*Oakland* and *San Mateo II*] cases." *Id.* The Court held it was ultimately "unpersuaded that the contingent utility of a stay in this case outweighs proceeding in the normal course with, at the very least, Plaintiff's anticipated motion to remand." *Id.* at 3. The defendants did not seek further reconsideration after the Supreme Court granted certiorari in *Baltimore II*, likely because that certiorari petition, like the petitions from

San Mateo II and *Oakland*, could not impact the district court's disposition of the remand motion in *Honolulu*. The same conclusion is warranted here.

B. Defendants Have Not Made a Strong Showing That They Will Succeed on the Merits.

"The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Org. for Black Struggle*, 978 F.3d at 607; *see also Nken*, 556 U.S. at 434. "It is not enough that the chance of success on the merits be better than negligible. . . . more than a mere possibility of relief is required." *Nken*, 556 U.S. at 434 (quotations omitted). Here, the Koch Defendants merely argue that "the Supreme Court's decisions in *Baltimore* and/or *Oakland could* be dispositive," Motion at 6; "*could* narrow the issues before this Court and guide both the parties and the Court in deciding the threshold question of federal jurisdiction," *id* at 7; or "*could* affirm the propriety of removal of state-law tort claims . . . or at least provide *additional guidance* regarding the legal standards applicable to the removal grounds at issue here," *id*. (emphases added). Defendants have not met their burden of demonstrating they will succeed on the merits of their own claims, much less on the merits of the *Baltimore* or *Oakland* appeals. For this reason alone, this Court should deny the Motion.

1. *Defendants will not succeed on the merits here.*

Defendants argue that a stay is warranted because "whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law" is "squarely at issue in *Baltimore*, *Oakland*, and this case." Motion at 6.

However, Defendants are unlikely to prevail on their "arising under" arguments (i.e. *Grable*, complete preemption, and federal common law), since those arguments have already been rejected by five other district courts and the Ninth Circuit, and in any event those arguments were not presented in the *Baltimore* cert petition.

***Grable*.** Every court that has considered *Grable* jurisdiction in analogous cases has rejected it.[3] *Grable* jurisdiction requires the defendant to satisfy four elements. *See* Motion to Remand, Dkt. 35, at 6. Here, Defendants cannot prevail on any element, but the "necessarily raised" and "substantial" elements are clearly dispositive.

A federal issue is "necessarily raised" under *Grable* only when "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 28 (1983). That means a removing defendant "should be able to point to the specific elements of [the plaintiff's] state law claims" that require proof under federal law. *Cent. Iowa Power Co-op v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 914 (8th Cir. 2009). Here, all of the State's claims are pleaded under state law. No element of any claim requires proof of any federal question. *See* Motion to Remand at 7–9. The court's observation in *San Mateo I* applies fully in *Baltimore*, *Oakland*, and here: Defendants "have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the [State's] claims," and instead "mostly gesture to federal law

[3] *See* n.2, *supra* (collecting cases).

and federal concerns in a generalized way" that is insufficient to establish jurisdiction. *San Mateo I*, 294 F. Supp. 3d at 938.

A question may be "substantial" when it presents "a 'pure issue of law' that directly draws into question 'the constitutional validity of an act of Congress,' or challenges the actions of a federal agency, and a ruling on the issue is 'both dispositive of the case and would be controlling in numerous other cases.'" *Oakland*, 969 F.3d at 905 (citations omitted). "By contrast, a federal issue is not substantial if it is 'fact-bound and situation-specific.'" *Id.* (citations omitted). The State's claims here, like the plaintiffs' claims in *Oakland*, certainly do not turn on a "pure" issue of federal law and are deeply fact-bound and situation-specific. The issues here simply are not "substantial" under *Grable*. *See* Motion to Remand at 9–10.

The balance of state and federal responsibility also strongly favors adjudication of these cases in state court, since the State seeks to enforce its own laws in its own courts, and product defect and consumer protection claims are squarely within the State's traditional police authority.

Complete preemption. Many of Defendants' "arising under" arguments, in *Baltimore*, *Oakland*, and here, are only cognizable as suggesting the plaintiffs' claims are completely preempted. For example, Defendants say that "federal common law exclusively governs" the State's claims, *see* NOR ¶ 54. But because ordinary preemption cannot provide removal jurisdiction, Defendants' arguments only make sense as complete preemption theories. *See* Notice of Removal at 10–11. Additionally, contrary to Defendants' arguments, the "artful pleading" doctrine does not provide a free floating,

rudderless basis to determine that a plaintiff's claims simply *are* federal. As the Supreme Court has held, the artful pleading and complete preemption doctrines are coextensive. *See, e.g.*, *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998); *see also* Reply on Motion to Remand, Dkt. 51, at 4 n.3 (collecting cases). The few cases Defendants cite in support of their independent artful pleading theory, *see* Opp. to Remand, Dkt. 44, at 29 n.21, do not help them. In *Gore v. Trans World Airlines*, 210 F.3d 944, 950 (8th Cir. 2000), for instance, the Eighth Circuit stated that under the artful pleading doctrine, "'a plaintiff may not defeat removal by omitting to plead necessary federal questions,'" quoting from the Supreme Court's decision in *Rivet*. In the same paragraph from *Rivet* quoted by the Eighth Circuit, the Supreme Court stated: "The artful pleading doctrine allows removal *where federal law completely preempts a plaintiff's state-law claim*." *Rivet*, 522 U.S. at 475 (emphasis added); *see also Phipps v. F.D.I.C.*, 417 F.3d 1006, 1010–13 (8th Cir. 2005) (applying artful pleading doctrine to determine whether the plaintiff's claims were completely preempted by the National Bank Act). Out of respect for the well-pleaded complaint rule, the Court must constrain its analysis to the contours of the complete preemption doctrine.

Complete preemption occurs only in the rare circumstance where "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quotations omitted). No statute is implicated here that would convert the State's Minnesota law claims into federal ones, and Defendants do not supply one. Every court to consider the question has held that similar claims are not completely preempted

by any federal statute. *See Baltimore I*, *San Mateo I*, *Rhode Island I*, *Boulder I*, *Massachusetts*, and *Oakland*.

Federal common law. Federal common law cannot provide jurisdiction for at least four reasons. *First*, the State relies solely on state law and has not asserted a federal common law claim in this case. "A defendant is not permitted to inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law." *Gore*, 210 F.3d at 948. Defendants' attempt to do so here must be rejected.

Second, federal common law cannot provide an independent basis for removal jurisdiction. *See* Motion to Remand at 13–14, Reply at 6–7. Confronted with identical arguments concerning federal common law, the Ninth Circuit in *Oakland* held that the only two relevant exceptions to the well-pleaded complaint rule are *Grable* and the complete preemption doctrine. 969 F.3d at 904–09. There is no separate jurisdictional basis to remove state-law claims that are purportedly "governed by" federal law. Defendants "fail to cite any Supreme Court or other controlling authority authorizing removal based on state-law claims implicating federal common law," because there is none. *Boulder I*, 405 F. Supp. 3d at 963.

Third, the State's product defect and consumer protection claims simply have nothing to do with the various areas of federal law invoked by Defendants. *See* Motion to Remand at 14–15, Reply at 7–10. Just as in *Massachusetts*, 462 F. Supp. 3d at 43–44, there is no basis to presume that Congress intended to subsume state statutory consumer-protection claims or common-law product-liability claims into judge-made federal law concerning interstate pollution, federal waterways, or foreign policy. Regardless of

whether those issues might be an appropriate area for federal common lawmaking, none has anything to do with the garden variety consumer protection and product defect claims the State has alleged here.

Fourth, Defendants' heavy reliance on the federal common law of interstate air pollution is misplaced. *See* Motion to Remand at 16–17. For starters, that body of judge-made law does not concern the tortious conduct at issue in this suit, namely: deceptive marketing and trade practices. In any event, the Clean Air Act ("CAA") has displaced any federal common law on greenhouse-gas emissions that might have once existed. As the Supreme Court explained in *AEP*, "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants" because it was "plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"). It thus did not answer the "academic question whether, in the absence of the [CAA], the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming"; if ever such a cause of action existed, it did not survive the CAA. *Id.* at 423. The Court expressly reserved the question of whether the plaintiffs' state nuisance claims remained viable, "leav[ing] the matter open for consideration on remand." *Id.* at 429. The Ninth Circuit likewise held in *Oakland* that "the Supreme Court has not yet determined that there *is* a federal common law of public nuisance relating to interstate pollution," because "*federal* public-nuisance claims aimed at imposing liability on energy producers" for climate crisis injuries "are displaced by the Clean Air Act,"

citing *AEP*. *Oakland*, 969 F.3d at 906 (emphasis added); *see also San Mateo I*, 294 F. Supp. 3d at 937. Accordingly, Defendants have not met their burden to show they will succeed on the merits of their "arising under" arguments here.

2. *The* Baltimore *appeal is not relevant, and Defendants are unlikely to succeed on the merits of that appeal.*

Nor have Defendants shown that the *Baltimore* appeal is even relevant here, much less whether they will succeed on the merits of the appeal. As described above, the defendants in *Baltimore* do not challenge the Fourth Circuit's substantive determination that removal based on the federal-officer removal statute, 28 U.S.C. § 1442, was improper. Both their petition for certiorari and merits brief raise only one procedural question for review:

> Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443.

Currie Decl. Ex. 3, Petition for a Writ of Certiorari at i, *BP p.l.c., et al., v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Mar. 31, 2020); Currie Decl. Ex. 7, Petitioners' Brief at i, *id.*

In their merits briefing, the *Baltimore* defendants also briefly argued that removal was proper because, according to them, the plaintiff's claims "necessarily arise under federal law." However, that issue is not properly before the Supreme Court, as it is not encompassed in the question presented by the defendants in either their petition for certiorari or their merits briefing. *See* Supreme Court Rule 14.1(a) ("Only the questions

set out in the petition, or fairly included therein, will be considered by the Court."). Even if the Supreme Court were to overrule the Fourth Circuit, it will doubtless adhere to its practice of declining to reach issues not addressed by the courts of appeal below, and remand the case for consideration of the other grounds of removal. *See, e.g.*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020).

Nor was there any indication at the *Baltimore* oral argument that the Court would be inclined to break with its own precedent and rule on issues the lower court had not considered. *See, e.g.*, Currie Ex. 8, Tr. of Oral Argument, *BP p.l.c., et al., v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Jan. 19, 2021) at 22:5–9 (Justice Barrett: "Don't you think it would be fairly aggressive for us to resolve the federal common law question here, assuming that we agreed with you on the antecedent removal point?"); 29:1–6 (B. Lucas, Asst. to the Solicitor General, for the United States: "We think [federal common law is] an important question that the Court will need to resolve at some point or another, but we haven't taken a position on whether the Court should use its discretion to decide it here.").

Given that eight circuit courts have rejected the *Baltimore* defendants' interpretation of Section 1447(d), the Supreme Court is unlikely to overrule the Fourth Circuit's decision. *See Rhode Island II*, 979 F.3d at 55 ("Though this is not a popularity contest, Rhode Island counts among its friends nearly all of the circuits that have weighed in on the topic and have limited appellate review to federal officer or civil rights removal.") (collecting cases). Even assuming it does, however, that will not resolve the question of whether that case was properly removed to federal court. Rather, it will

merely give the defendants an opportunity to challenge in the Fourth Circuit the district court's decision dismissing defendants' other grounds for removal—grounds which have already been rejected by every court that has considered them, with the exception of one district court decision that was later reversed.[4] Accordingly, in addition to failing to demonstrate that defendants will succeed on the merits of the appeal, defendants have not shown that the Supreme Court's decision in *Baltimore* will provide any guidance as to how this Court should resolve the motion to remand here.

3. *Nor will defendants succeed in the* Oakland *appeal.*

Nor have Defendants met their burden of demonstrating they will succeed on the merits of the *Oakland* appeal, where the question presented in the pending petition for certiorari is "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law." Currie Decl. Ex. 4, Petition for a Writ of Certiorari at i. For the reasons detailed in Part IV.B.1 above, the Ninth Circuit and five other district courts have all rejected Defendants' argument that these types of claims arise under federal law. *See, e.g.*, *Xiong*, 2012 WL 12903768, at *1 (denying motion to stay because plaintiff did not demonstrate a likelihood of success on the merits where "every court in [the] district that has considered similar claims has rejected the same arguments brought by the plaintiffs").

Moreover, even if Defendants were to succeed on the merits in *Oakland*—which they will not—a determination that *Oakland*'s public nuisance claims are governed by

[4] *See* n.2, *supra* (collecting cases).

federal common law would likely not control here, where the State's claims sound in statutory consumer protection laws and failure to warn.

C. Defendants Will Not be Irreparably Injured Absent a Stay.

"In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996). "[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434–35 (quotations and citation omitted).

Here, the Koch Defendants have not met their burden of proving that they will be irreparably injured absent a stay. That Defendants would be "forced" to appeal the remand order and litigate in state court simultaneously, Motion at 10, is not an irreparable injury. As the *Baltimore* court held, Defendants' appeal would only be rendered moot in the highly unlikely event that a final judgment is reached in state court before resolution of the appeal, and thus Defendants only raise the specter of a "speculative harm." *See* 2019 WL 3464667, at *5. Additionally, here as in *Baltimore*, interim proceedings in state court may well advance the resolution of the case in federal court, and the parties will have to file responsive pleadings or preliminary motions regardless of forum. *Id.* at *6; *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) (denying stay because alleged irreparable harm was speculative and unsubstantiated by the record).

Defendants also claim that they will be irreparably harmed because absent a stay, they "face a substantial waste of resources," Motion at 10, but as this Court recently held, "cost, inefficiency, and inconvenience do not amount to the certain and great harm that

must justify a stay." *Pederson*, 2020 WL 4288316, at *5 (quotations omitted). Defendants' reliance on *IBEW Local 98 Pension Fund v. Best Buy Co.*, No. CIV. 11-429 DWF/FLN, 2014 WL 4540228 (D. Minn. Sept. 11, 2014), and *Henin v. R.R.*, No. CV 19-336 (PAM/BRT), 2019 WL 3759804 (D. Minn. Aug. 9, 2019), is misplaced. In *IBEW*, the court stayed proceedings pending a petition for permission to appeal a class certification ruling, since that ruling "raise[d] the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle." 2014 WL 4540228 at *2. And in *Henin*, the court stayed proceedings pending the Eighth Circuit's resolution of an appeal that had the potential to resolve the litigation. 2019 WL 3759804, at *2. Here, Defendants will not feel "irresistible pressure" to settle absent a stay, nor will resolution of the pending cert petitions simplify resolution of the merits of the State's claims.

Notably, Defendants state that they "have provided additional factual support for removal in this case that was not presented in *Baltimore*." Motion at 6. Thus, regardless of the disposition of *Baltimore II* or *Oakland* in the Supreme Court, this Court will need to consider those matters. *See, e.g.*, Currie Decl. Ex. 6, Order Denying Defendants' Request for Reconsideration of Stay in *Honolulu* at 3 (noting defendants presented new facts and authority not at issue in *San Mateo II*, and holding "the Court remains unpersuaded that the contingent utility of a stay in this case outweighs proceeding in the normal course with, at the very least, Plaintiff's anticipated motion to remand"). Delaying the inevitable only harms the State. Defendants have not met their burden of demonstrating that any irreparable harm will result absent a stay.

D. Issuance of a Stay Will Substantially Injure the State and Is Not in the Public Interest.

While the State's claims are predicated on Defendants' misrepresentations and failure to warn—and they do not implicate the regulation of greenhouse gas emissions or interstate pollution—the State does intend to use the damages recovered in this case to address the harms of climate change. As the State and Minnesotans are acutely aware, every day matters when it comes to mitigating climate change's persistent and increasingly damaging effects. Temperatures continue to rise, the State's streets continue to flood, counties throughout the State regularly declare flood or drought emergencies, heavy precipitation continues to stress and erode public infrastructure, among other harms. *See, e.g.*, Compl. ¶¶ 139–71.

The State brought this action to help pay the enormous costs associated with recovering from and becoming resilient to the now inevitable and devastating consequences of climate change caused by Defendants' campaign of deception. A stay will further delay resolution of this action and an award of damages that can be used to mitigate the now unpreventable, worsening impacts from climate change—impacts Defendants foresaw and concealed and have until now thrust on the State and its residents. Defendants' request for a stay only delays resolution of this matter and continues to shift the costs for which Defendants are liable onto the State and Minnesotans—costs that grow as the harms experienced by the State and its residents increase in frequency and intensity. *See, e.g.*, *Baltimore*, 2019 WL 3464667, at *6 (third and fourth factors weighed in favor of denying stay given "the seriousness of the City's

allegations and the amount of damages at stake"); Currie Decl. Ex. 5, Order Lifting Stay in *Honolulu* (holding stay would "'substantially injure' Plaintiff by unnecessarily prolonging these proceedings for an indeterminate amount of time; and there is 'always a public interest' in the 'prompt' resolution of a dispute") (quoting *Nken*, 556 U.S. at 434, 436); *Morgan Stanley Smith Barney LLC v. Johnson*, No. CV 17-1101 (PAM/TNL), 2018 WL 5314945, at *2 (D. Minn. Oct. 26, 2018) ("Public policy also supports denying a stay. The public interest lies with the swift resolution of legal claims and judgments.").

The State's case was filed in June 2020, and the Supreme Court may not render a decision in *Baltimore* until late June 2021, and in *Oakland*—assuming the petition for certiorari is granted—until late 2021 or even 2022. Contrary to the Koch Defendants' contentions, a stay of this length is not at all "brief." The authority they cite involves stays of shorter duration[5] or stays pending decisions that concerned dispositive legal issues that would obviate the need for the expenditure of further resources.[6] Motion at 8.

[5] *See, e.g., Christianson v. Ocwen Loan Servicing, LLC,* No. CV 17-1525 (DWF/TNL), 2017 WL 5665211, at *2 (D. Minn. Nov. 20, 2017) ("[S]hould a decision not be issued in the next sixty days, the parties will submit a status report outlining their respective positions on continuing or lifting the stay").

[6] *Williams v. TGI Friday's Inc.*, No. 4:15-CV-1469 RLW, 2016 WL 1453032, at *2 (E.D. Mo. Apr. 12, 2016) (Defendant sought stay "in light of two pending appeals that concern potentially dispositive threshold legal issues."); *Thompson v. Rally House of Kansas City, Inc.*, No. 15-00886-CV-W-GAF, 2016 WL 9023433, at *4 (W.D. Mo. Jan. 25, 2016) (staying case pending Supreme Court decision that could determine whether the plaintiff had standing); *Yaakov v. Varitronics, LLC,* No. CIV. 14-5008 ADM/FLN, 2015 WL 5092501, at *4 (D. Minn. Aug. 28, 2015) ("The question the Supreme Court is anticipated to answer is likely dispositive of Bais Yaakov's claims.").

In contrast, Defendants seek to stay this matter for months pending decisions that will have no bearing on the merits of the action.

Moreover, if the Supreme Court reverses the Fourth Circuit in *Baltimore*, which is unlikely, and remands for consideration of the other grounds for appeal, presumably there would be new jurisdictional briefing that will take at least another year for the Fourth Circuit to resolve. Defendants' parade of hypotheticals regarding the resolution of *Baltimore* and *Oakland* in the Supreme Court contemplates years' worth of delay without offering *any* reason to believe that this Court (and the Fourth Circuit) would disagree with every other court that has considered the various jurisdictional arguments that have been asserted by Defendants. *Baltimore* and *Oakland* cannot affect the proceedings here. Defendants' pageant of possibilities is no reason to stay this action and pales in comparison to the additional years of burden the State is facing and will continue to face without efficient resolution of this action.[7]

[7] Relying on *Carlson Pet Prod., Inc. v. N. States Indus., Inc.*, No. 017-CV-02529 PJSK/MM, 2018 WL 1152001, at *1 (D. Minn. Mar. 5, 2018), Defendants assert that a stay would not prejudice either side because this case is in the early stages of litigation. Motion at 8. But in *Carslon*, the court stayed the case pending the Patent and Trademark Office's reexamination of certain patents that had the potential to greatly simplify issues central to the merits of the case. In cases such as this, where the issue is the appropriate forum, the fact that the litigation is in its early stages actually weighs *against* a stay. *See Dickson v. Gospel for Asia, Inc.*, No. 5:16-CV-05027, 2017 WL 7731214, at *2 (W.D. Ark. Feb. 8, 2017) (defendants failed to show harm absent a stay pending appeal of denial of motion to compel arbitration since "the harm to Defendants of being deprived of their chosen forum is minimal at this early stage of litigation" and the "only foreseeable 'harm' of discovery in this forum is that it might reveal that Defendants have, in fact, committed fraud.").

Finally, Defendants' cursory statement that "principles of federalism" favor a stay is nonsensical and finds no support in the single case they cite for that proposition. *See* Motion at 11. The plaintiff in *In re Otter Tail Power Co.*, 116 F.3d 1207, 1208–09 (8th Cir. 1997) sued in state court to enjoin an electric utility from servicing property on trust land within the Fort Trotten Indian Reservation in North Dakota. The dispute had already proceeded through multiple rounds of litigation in state and federal court, and the Eighth Circuit held that the district court had subject-matter jurisdiction over the removed state court complaint because the plaintiff's "request for injunctive relief [was] specifically premised on [an] alleged deviation by [the defendant] from the terms of the district court's previous order" in a related case, which "explicitly analyzed the effects of a United States treaty, various federal statutes, and the federal common law" to determine which government had authority to regulate electric utilities on the reservation and to what extent. *Id.* at 1213–14. The plaintiff "*acknowledge[d] that the district court ha[d] subject matter jurisdiction in this case*," but argued that remand was nonetheless proper under various abstention doctrines. *Id.* at 1214–15 (emphasis added). The court explained in relevant part that while the case "raise[d] important questions of federal law requiring interpretation of treaties, federal statutes, and the federal common law of inherent tribal sovereignty," it "d[id] not, however, raise any issues of constitutional law," and thus abstention under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) would be improper. *Id.* at 1215. Defendants imply, misleadingly, that the "important questions" "raised" in the complaint were the basis for subject-matter jurisdiction, which is simply false. Jurisdiction existed, *and was not contested*, "because the plaintiff's complaint is

essentially an attempt to enforce a prior order of the district court" that actually and necessarily analyzed and applied federal law. *See id.* at 1214 n.6. The discussion of "important questions" was dicta elaborating on why the district court could not separately remand based on an abstention doctrine. Ultimately, *In re Otter Tail* says nothing about stays pending appeal, nothing about federalism (except as a theoretical basis underpinning abstention doctrines), and ultimately nothing relevant about this case at all.

V. CONCLUSION

Granting a stay in this case would delay for at least a year—or more—the State's right to proceed on its purely state-law claims in state court, and would prevent this Court from deciding threshold jurisdictional issues that all parties in all cases agree should be decided by the district courts in the first instance. For the foregoing reasons, the Court should deny Defendants' motion to stay.

Respectfully Submitted,

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