UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF THE REMAND ORDER PENDING APPEAL

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INTRODUCTION

Defendants respectfully request that this Court stay execution of its Order remanding this case (the "Remand Order") until the Eighth Circuit and, if needed, the U.S. Supreme Court, have the opportunity to determine whether this action should be heard in federal court, in a case of first impression in this Circuit.[1] The Eighth Circuit is likely to review all of the bases for federal jurisdiction raised by Defendants and is likely to find federal jurisdiction on one or more such grounds.

First, the Attorney General's claims are governed by federal common law, which confers federal jurisdiction over its complaint. As the Court recognized in its Remand Order, "[t]he Supreme Court has specifically recognized federal common law in the arena of transboundary pollution and environmental protection . . . ." ECF No. 76 at 12. Although the Court held that federal common law does not apply to the Attorney General's claims, on the basis that the Attorney General has not pled a cause of action for interstate pollution on the face of the complaint, *id.* at 12-13, the Eighth Circuit is likely to hold otherwise, based at least in part on the persuasive, intervening decision by the Second Circuit in *City of New York* v. *Chevron Corp.*, No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021).

One day after this Court entered its Remand Order, the Second Circuit in *City of New York* affirmed the dismissal of the City's complaint, holding that municipalities may *not* "utilize state tort law to hold multinational oil companies liable for the *damages* caused by global greenhouse gas emissions." *Id.* at *1 (emphasis added). In so holding, the Second Circuit found that the case presented "the quintessential example of when federal common law is most needed," *id.* at *6,

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

reasoning that "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution," *id.*, and that claims for damages allegedly caused by global warming are "not well-suited to the application of state law," *id.* at *1.[2] Importantly, the Second Circuit rejected the City's artful pleading of its claims, reasoning that "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages . . . . [T]he City's complaint whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of the City's harm. But the City cannot have it both ways." *Id.* at *5. So, too, here—the Attorney General cannot both claim that this is a consumer protection case that has nothing to do with interstate pollution, and at the same time seek damages to remedy the alleged impacts of climate change. The Eighth Circuit is likely to follow the Second Circuit's persuasive reasoning and apply federal common law to the Attorney General's artfully pled state law claims requesting relief for alleged climate change injuries.

Second, this lawsuit requires the resolution of substantial, disputed questions of federal law about national and international energy policy and environmental protection. Congress and federal agencies have already decided—over the course of several decades and administrations—that domestic oil and gas production should be promoted. The Attorney General disputes that long-held conclusion, and would have this Court declare that fossil fuel products are so "dangerous" that statements promoting oil and gas are inherently misleading. ECF No. 1, Ex. 11 ¶ 200.

[2] As this Court recognized in its Remand Order, because the City in *City of New York* filed its complaint in federal court, that case did not present the same removal questions at issue here. ECF No. 76 at 12 n.1. However, the Second Circuit's rationale in disposing of the City's claims on the merits, on the ground that they necessarily arise under federal common law, clearly supports removal.

However, as the Second Circuit reasoned in *City of New York*, "[t]o permit this suit to proceed under state law would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." 2021 WL 1216541, at *7. There, the Second Circuit held that it could not condone the City's attempt to "sidestep[]" the "numerous federal statutory regimes and international treaties" regulating greenhouse gas emissions, "effectively seek[ing] to replace these carefully crafted frameworks—which are the product of the political process—with a patchwork" of state law claims. *Id.* at *1. Indeed, a substantial question of constitutional law exists as to whether there can be a state law claim for climate change allegations under our constitutional structure.

Third, the Attorney General's claims implicate many actions Defendants allegedly conspired to undertake at the direction of federal officers, requiring removal under the Federal Officer Removal Statute. Certain Defendants have engaged in substantial activities at federal direction since the 1940s, including through: (i) production and transportation of fuels indispensable to the Allied effort in World War II; (ii) production of specialized jet fuels throughout the Cold War and up to the present; (iii) fossil fuel exploration and extraction on the federally managed Outer Continental Shelf (the "OCS"); and (iv) exploration and production pursuant to agreements with federal agencies.

Although the Court recognized that "these are plausible ways in which Defendants may have acted under the direction of federal officers," ECF No. 76 at 23, it ultimately rejected removal on these grounds, reasoning that "there does not appear to be any direction from or connection to the federal government related to the specific claims alleged here" because Defendants did not

claim that any federal officer directed their marketing, sales, or outreach activities, *id.* at 24. The Eighth Circuit is, however, unlikely to construe so narrowly the Attorney General's claims. The Attorney General's theory appears to be that Defendants' alleged promotion of fossil fuels led to increased combustion, which led in turn to increased greenhouse gas emissions, which led to climate change, which purportedly resulted in the alleged injuries. However, the Attorney General's "focus on this 'earlier moment' in the global warming lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York*, 2021 WL 1216541, at *11; *id.* at *5 ("Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions."). The Attorney General seeks damages based on alleged climate change injuries, and therefore seeks to impose liability for actions taken pursuant to the direction of federal officers.

Fourth, the Attorney General challenges Defendants' fossil fuel promotion and production activities, including necessarily their activities on the OCS. Federal jurisdiction is thus authorized under the Outer Continental Shelf Lands Act ("OCSLA"). Although this Court rejected this argument on the basis that "the State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign," ECF No. 76 at 26, the Eighth Circuit is likely to find that the Attorney General's claims, which seek damages based on alleged climate change injuries, arise in connection with Defendants' activities on the OCS. "Greenhouse gases once emitted become well mixed in the atmosphere," at which point they "cannot be traced back to their source." *City of New York*, 2021 WL 1216541, at *5-6 (citations omitted). As such, the Attorney General seeks "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at *6. This necessarily includes, among other things, the production of fossil fuels from the OCS.

Fifth, the Attorney General seeks to hold Defendants liable for sales of fossil fuels on federal enclaves located within the State of Minnesota, supporting federal enclave jurisdiction.

Sixth, because this suit is in substance a class action, it qualifies for removal under the Class Action Fairness Act ("CAFA"). The Eighth Circuit does not "prioritize a complaint's use of magic words over its factual allegations" to determine whether an action constitutes a "class action" under CAFA. *Williams* v. *Emp'rs Mut. Cas. Co*., 845 F.3d 891, 901 (8th Cir. 2017). Here, the Attorney General asserts claims on behalf of all Minnesota residents and is required by statute to attempt to distribute any damages it recovers to the consumers he purports to represent. In substance, this case is a class action under CAFA.

Seventh, diversity jurisdiction is satisfied because the Minnesota consumers on whose behalf the Attorney General sues are completely diverse from all Defendants, and the relief the Attorney General seeks exceeds the jurisdictional threshold.

Should this case be immediately remanded to the Minnesota state court, both Defendants and the Attorney General will be forced to simultaneously litigate Defendants' forthcoming appeal before the Eighth Circuit, and the merits of the Attorney General's claims before the Minnesota state court. In the process, Defendants' appellate rights will be compromised, and all parties will be forced to invest substantial resources that will be wasted should the Eighth Circuit or Supreme Court later hold that this case is removable. Similarly, the Minnesota state court will be forced to squander scarce judicial resources to adjudicate potentially unnecessary issues. And this Court will, in turn, be faced with the burden of evaluating the precedential or persuasive force of any intervening orders issued by the Minnesota state court. Staying the Remand Order pending appeal, by contrast, obviates all of these concerns. Indeed, for these and other reasons, courts have often granted stays pending appeal of remand orders. *See, e.g.*, *Dalton* v. *Walgreen Co.*, No. 13-603,

2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013); *Raskas* v. *Johnson & Johnson*, No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013); *Lafalier* v. *Cinnabar Serv. Co.*, No. 10-0005, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010); *Bledsoe* v. *Janssen Pharmaceutica*, No. 05-2330, 2006 WL 335450, *1 (E.D. Mo. Feb. 13, 2006). Just yesterday, the U.S. Court of Appeals for the District of Columbia Circuit issued an administrative stay pending resolution of Defendant ExxonMobil's petition for review, pursuant to 28 U.S.C. § 1453(c), of an order remanding a similar climate-change action removed pursuant to CAFA. *See* Order, *In re Exxon Mobil Corp.*, No. 21-8001 (D.C. Cir. Apr. 6, 2021) (per curiam).

At a minimum, the Court should enter a brief stay of the Remand Order to enable Defendants to seek a stay pending appeal from the Eighth Circuit. *See* Fed. R. App. P. 8(a)(2); *see, e.g.*, *Cellco P'ship* v. *Hatch*, No. 04-2981, 2004 WL 2066768, at *1 (D. Minn. Sept. 10, 2004).

PROCEDURAL BACKGROUND

On June 24, 2020, Plaintiff Keith Ellison, Attorney General for the State of Minnesota, filed a Complaint against Defendants in the Ramsey County District Court, Second Judicial District of Minnesota. *See State of Minnesota* v. *Am. Petroleum Inst.*, No. 20-1636 (Minn. Dist. Ct. June 24, 2020). On July 27, 2020, Defendants timely removed the case pursuant to 28 U.S.C. §§ 1331, 1334, 1441, 1442, 1446, 1452, and 1367(a), and 43 U.S.C. § 1349. *See* ECF No. 1. On August 26, 2020, the Attorney General moved to remand this case to the Minnesota state court, *see* ECF No. 32, which this Court granted in a March 31, 2021 Memorandum Opinion, *see* ECF No. 76. On April 7, 2021, this Court temporarily stayed execution of the Remand Order pending resolution of this motion. *See* ECF No. 86.

LEGAL STANDARD

District courts have the authority to stay entry of an order or judgment in proceedings pending before them. *See* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the

district court for . . . a stay of the judgment or order of a district court pending appeal."). This includes the authority to stay remand orders pending appeal. *See, e.g.*, *Manier* v. *Medtech Prods., Inc.*, 29 F. Supp. 3d 1284, 1287 (S.D. Cal. 2014).

In deciding whether to enter a stay, courts consider the following 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." *Brady* v. *Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *accord Nken* v. *Holder*, 556 U.S. 418, 434 (2009). Success on the merits is not narrowly construed in this context, where "[a] stay is granted when the appeal presents 'serious' legal issues and the balance of equities favors the moving party." *Stuart* v. *State Farm Fire & Cas. Co.*, No. 14-4001, 2017 WL 5952872, at *2 (W.D. Ark. Jan. 25, 2017). The forthcoming appeal meets that standard.

ARGUMENT

A. Defendants' Appeal Raises Many Serious Legal Questions About Federal Jurisdiction over Climate Change-Related Claims.

Defendants have a clear right to appeal from the Remand Order because they removed this case under the federal officer removal statute. *See* ECF No. 1 ¶¶ 68-98. While normally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal," 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).

On appeal, the Eighth Circuit may properly consider all bases for removal advanced by the removing parties. The plain language of 28 U.S.C. § 1447(d) authorizes review of the *order* remanding a case removed under Section 1442, not a portion of the order. 28 U.S.C. § 1447(d)

("An *order* remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except 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." (emphasis added)). As the Seventh Circuit held in a thorough and well-reasoned opinion based on the plain language of Section 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* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *accord Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017).

Although the Eighth Circuit held otherwise in *Jacks* v. *Meridian Resources Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012), the Supreme Court agreed to resolve the conflict among the circuits on the scope of reviewability of remand orders in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (U.S.) ("*Baltimore*"). The Supreme Court heard argument in *Baltimore* on January 19, 2021, and a decision is expected by the end of June or sooner. There is good reason to believe that the Supreme Court will agree with the decisions that have held appellate jurisdiction lies over the entire remand order. In addition, Defendants have a right to seek review under CAFA, and Eighth Circuit precedent permits review of other grounds for removal in addition to CAFA on such petitions. *See Wullschleger* v. *Royal Canin U.S.A., Inc.*, 953 F.3d 519, 520 (8th Cir. 2020). Accordingly, the Eighth Circuit will be presented with the opportunity to resolve numerous grounds for removal of climate change-related claims like those asserted here.

1. Defendants' Appeal Will Present Several Compelling Grounds for Federal Jurisdiction.

a. Federal Common Law

The Eighth Circuit is likely to conclude that removal was proper because the Attorney General's claims are necessarily governed by federal common law. *See In re Otter Tail Power*

Co., 116 F.3d 1207, 1213-15 (8th Cir. 1997). Federal common law applies "where the basic scheme of the Constitution so demands," *Am. Elec. Power Co.* v. *Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011), such that the "federal system *does not permit the controversy to be resolved under state law*," because "the interstate or international nature of the controversy makes it *inappropriate for state law to control*." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (emphasis added).

The "basic scheme of the Constitution" demands that federal common law be applied to the Attorney General's claims for three independent reasons. *First*, federal common law applies to claims that "deal with air and water in their ambient or interstate aspects," including suits, like the Attorney General's, which assert claims rooted in the effects of global greenhouse gas emissions.[3] *AEP*, 564 U.S. at 421 (quoting *Illinois* v. *City of Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 103 (1972)); *see also, e.g.*, *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 487-88 (1987). *Second*, federal common law applies because the Attorney General claims injuries for "environmental and economic destruction" by way of federal "navigable waters" in Minnesota. *See Milwaukee I*, 406 U.S. at 102; *Michigan* v. *U.S. Army Corps of Engr's*, 667 F.3d 765, 771 (7th Cir. 2011). *Third*, because the Attorney General's case is intended to—and would—have significant impacts on U.S. foreign policy, it demands the application of the federal common law of foreign relations.

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[3] Petitioners in *Baltimore* raised the question whether climate change-related nuisance claims fall within federal courts' federal question jurisdiction because they necessarily arise under federal common law. *See* Brief for the Petitioners at 37-45, *BP p.l.c.* v. *Mayor & City Council of Baltimore* (No. 19-1189). And another certiorari petition is currently pending before the Supreme Court directly presenting this question. *See* Petition for a Writ of Certiorari at i, *Chevron Corp.* v. *City of Oakland* (No. 20-1089) ("Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.").

As set forth above, notwithstanding this Court's holding that the Attorney General has not pled a cause of action for interstate pollution on the face of the complaint, *see* ECF No. 76 at 12-13, the Eighth Circuit is likely to follow the Second Circuit's persuasive reasoning and apply federal common law to the Attorney General's artfully pleaded state law claims requesting relief for alleged climate change injuries.[4] *See also Milwaukee I*, 406 U.S. at 105 n.6. Less than one week ago in *City of New York*, the Second Circuit held that federal common law—not state law—governs claims seeking redress for climate change, and that "[a]rtful pleading cannot transform" such claims into "anything other than a suit over greenhouse gas emissions." 2021 WL 1216541, at *5. The court held that the City could not "disavow[] any intent to address emissions" while at the same time "identifying such emissions" as the source of the City's harm. *Id.* Likewise, the Attorney General should not be permitted to avoid federal jurisdiction by artfully pleading consumer protection claims, while at the same time seeking damages based on the alleged effect of emissions on the global climate.

b. *Grable* Jurisdiction

This action raises multiple, substantial federal issues that are actually disputed, warranting the exercise of federal question jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

[4] When a claim "arise[s] under federal common law" there "is a permissible basis for jurisdiction based on a federal question." *Treiber & Straub, Inc.* v. *U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007). For this reason, the Second Circuit's conclusion in *City of New York* that federal common law governed the City's claims is persuasive precedent in support of removal here. Once the Court concludes that the Attorney General's claims "must be brought under federal common law," *City of New York*, 2021 WL 1216541, at *9, it necessarily follows that there "is a permissible basis for jurisdiction based on a federal question," *Treiber & Straub*, 474 F.3d at 383.

First, as explained *supra*, the Eighth Circuit is likely to hold, as did the Second Circuit in *City of New York*, that federal common law exclusively governs the Attorney General's claims because they implicate multiple areas which our constitutional design does not allow state law to control. That independently warrants *Grable* jurisdiction, since a claim "raises substantial questions of federal law by implicating federal common law." *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *see also Battle* v. *Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002).

Second, the Attorney General's claims seek to upset the careful balance the federal government has struck between energy production and environmental protection. *See* 42 U.S.C. § 7401(c). As the Second Circuit held in *City of New York*, "[t]o permit this suit to proceed under state law would further risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." 2021 WL 1216541, at *7. The Eighth Circuit has made clear that *Grable* jurisdiction may be exercised over claims, like the Attorney General's, which "directly implicate[] actions taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc.* v. *Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). "[G]reenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties," and the Attorney General's efforts to "sidestep[]" such "carefully crafted frameworks" through this lawsuit is improper. *City of New York*, 2021 WL 1216541, at *1.

Third, to the extent the Attorney General asserts that federal policymakers would have adopted different energy and climate policies absent alleged misrepresentations, the Complaint asserts federal claims. *See Buckman Co.* v. *Pls.' Legal Comm.*, 531 U.S. 341, 347 (2001).

Fourth, adjudicating this action would require interpreting international climate agreements, which only a federal court can do. *See Maugnie* v. *Compagnie Nationale Air Fr.*, 549 F.2d 1256, 1258 (9th Cir. 1977).

Fifth, the Complaint necessarily raises the substantial federal question of whether a cognizable injury has been suffered by way of navigable waters of the United States and, if so, whether such injury can be remedied in a manner consistent with federal law.

Sixth, this action raises important constitutional questions, most notably the question of whether there can be a state-law action for alleged climate change injuries at all. *See City of Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304, 313 n.7 (1981).

c. Federal Officer Jurisdiction

Defendants have a substantial likelihood of success on the merits because this case is properly removed under the Federal Officer Removal Statute. *See* 28 U.S.C. § 1442(a). The Attorney General's claims relate to many actions taken by Defendants pursuant to federal direction.

First, federal officers extensively supervised and controlled Defendants' production of fossil fuels and development of specialized military products in support of multiple war efforts. The federal government exercised comprehensive control over the entire oil and gas industry during World War II by enlisting and fundamentally reshaping the industry to produce necessary war products, such as avgas. *See Exxon Mobil Corp.* v. *United States*, No. 10-2386, 2020 WL 5573048, at *12 (S.D. Tex. Sept. 16, 2020), *appeal pending*, No. 20-20590 (5th Cir. Nov. 13, 2020); *see also United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002) ("Because

avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II."). And the federal government has continued to exercise control over Defendants' contributions to military efforts from the Korean War onward. *See Exxon Mobil*, 2020 WL 5573048, at *15.

Second, pursuant to federal direction, Defendants have worked to extract and produce critical energy resources for the nation. The federal government has directed Defendants to explore, develop, and produce oil and gas on the OCS pursuant to leases issued by the federal government, and governed by OCSLA. *See* 43 U.S.C. § 1331. The terms and conditions of those leases subjected Defendants to significant federal control. For example, "the federal government retains the right to control a lessee's rate of production from its lease," including by setting the "Maximum Efficient Rate for production from a reservoir—that is, a cap on the production rate from all of the wells producing from a reservoir." ECF No. 1 ¶ 83.

Third, Defendant ExxonMobil acted at federal direction as an operator and lessee of the Strategic Petroleum Reserve Infrastructure, under which it was obligated to pay royalties in kind to the federal government. *See* 43 U.S.C. § 1353. As the Remand Order acknowledged, "these are plausible ways in which Defendants may have acted under the direction of federal officers." ECF No. 76 at 23.

This Court nevertheless declined to exercise federal officer jurisdiction, on the basis that "there does not appear to be any direction from or connection to the federal government related to the specific claims alleged here" because Defendants did not claim that any federal officer directed their marketing, sales, or outreach activities. *Id.* at 24. On appeal, the Eighth Circuit will likely reject the Attorney General's attempt to artfully plead its claims as somehow divorced from emissions, while still seeking damages for injuries allegedly resulting from emissions. *See City of*

New York, 2021 WL 1216541, at *5 ("Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions."). Moreover, as the Court noted, "courts have considered the causal connection requirement to be a low hurdle." ECF No. 76 at 23-24 (citing cases). Indeed, as amended, Section 1442 no longer demands a causal nexus at all. Congress amended Section 1442(a) in 2011 to add "relate to" to the statutory text, thereby "broaden[ing] federal officer removal to actions, not just *causally* connected, but . . . *connected* or *associated*, with acts under color of federal office." *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020). Here, the Attorney General seeks damages relating to injuries allegedly resulting from emissions, a substantial amount of which resulted from the combustion of fossil fuels produced under the direction of the federal government.

Finally, Defendants have many colorable federal defenses to the Attorney General's claims. For example, this action contravenes the dormant Commerce Clause, which invalidates state actions that have the "'practical effect' of regulating commerce occurring wholly outside that State's borders," *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989), or "control[ling] conduct beyond the boundaries of the State," *id.* at 336. A "State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996). However, the Attorney General's lawsuit seeks to do exactly that.

As the Second Circuit held in *City of New York*:

> To state the obvious, the City does not seek to hold the Producers liable for the effects of emissions released in New York, or even in New York's neighboring states. Instead, the City intends to hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years. In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet. Such a sprawling case is simply beyond the limits of state law.

2021 WL 1216541, at *6. The Court reasoned that "a substantial damages award like the one requested by the City would effectively regulate the Producers' behavior far beyond New York's borders." *Id.* The Second Circuit rejected the City's argument that a request for damages does not threaten to regulate emissions, reasoning that the City "ignores economic reality," and that "[a]s the Supreme Court has long recognized, 'regulation can be effectively exerted through an award of damages,' and 'the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* at *7 (quoting *Kurns* v. *R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012)).

Thus, "a substantial damages award like the one requested by the [Attorney General] would effectively regulate the Producers' behavior far beyond [Minnesota's] borders" since "[g]reenhouse gases once emitted 'become well mixed in the atmosphere.'" *Id.* at *6 (quoting *AEP*, 564 U.S. at 422). The Attorney General may not use Minnesota tort law to "impose its own policy choice on neighboring States," let alone every state in the country, *BMW*, 517 U.S. at 571, many of which depend on petroleum resources for energy and economic security, *Healy*, 491 U.S. at 336-37. The Attorney General's attempt to export its policy preferences to every other state constitutes a violation of the dormant Commerce Clause.

d. Outer Continental Shelf Lands Act

Jurisdiction is also properly exercised under OCSLA. *See* 43 U.S.C. § 1349(b)(1).

There is no dispute that Defendants have engaged in substantial operations on the OCS. Defendants and their affiliates operate a large share of the more than 5,000 active oil and gas leases on the nearly 27 million OCS acres that the Department of the Interior administers under OCSLA. ECF No. 1 ¶ 102.

The Attorney General's claims "arise out of or in connection with" those operations because fossil fuel production on the OCS is part of the production about which Defendants

allegedly misled Minnesota consumers. Although this Court rejected this argument on the basis that "the State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign," ECF No. 76 at 26, the Attorney General seeks damages relating to injuries allegedly resulting from emissions, a substantial amount of which resulted from the combustion of fossil fuels produced on the OCS. *See Tenn. Gas Pipeline* v. *Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) (holding that a plaintiff's claims "arise out of, or in connection" with operations on the OCS so long as those operations *contribute* to the injuries alleged). In any event, OCSLA jurisdiction is properly exercised over a dispute, like this one, that would "alter[] the progress of production activities" on the OCS, and thus "threaten[] to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS." *Amoco Prod. Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988).

e. Federal Enclave Jurisdiction

The Eighth Circuit may hold that this case warrants the exercise of federal enclave jurisdiction, too. The "key factor" in evaluating federal enclave jurisdiction "is the location of the plaintiff's injury or where the specific cause of action arose." *Sparling* v. *Doyle*, No. 13-00323, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014). The Attorney General's claims arise out of federal enclaves four times over.

First, in targeting Defendants' oil and gas operations and their alleged impacts, this action necessarily sweeps in those operations that occur on military bases and other federal enclaves. *See, e.g.*, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369, 372-74 (1964).

Second, in alleging a variety of climate change injuries suffered—and expected to be suffered—within Minnesota, the Complaint sweeps in harms to a variety of federal enclaves, including Fort Snelling Military Reservation, Federal Correctional Institution Sandstone, and Cass Lake Indian Hospital.

Third, under the Attorney General's theory, its claims arise out of sales of Defendants' products within Minnesota, which include sales on federal enclaves.

Fourth, to the extent the Attorney General asserts that federal policymakers would have adopted different energy and climate policies absent alleged misrepresentations, the Complaint necessarily touches conduct occurring in the District of Columbia, a federal enclave where Defendant API is headquartered and all Defendants engage in protected speech.

f. CAFA

Defendants removed this case under CAFA, because it is a "class action"—a "civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

Defendants respectfully submit that the Eighth Circuit is likely to embrace this ground for removal, as it has previously held that it will not "prioritize a complaint's use of magic words over its factual allegations" to determine whether an action constitutes a "class action" under CAFA. *Williams*, 845 F.3d at 901.

The Complaint's factual allegations demonstrate that this action "resemble[s]" a consumer class action. S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34. The Attorney General's central theory is that Defendants "conspir[ed] to deceive consumers" about climate change and failed to "warn[] consumers" of alleged harms associated with certain Defendants' products. ECF No. 1, Ex. 11 ¶¶ 204-05. The Complaint asserts claims on behalf of all Minnesota residents and "[f]ossil-fuel consumers." *See, e.g.*, *id.* ¶¶ 215 ("*Minnesota consumers*, regulators, policy makers, and the public relied on these misrepresentations, allowing for the purchase of more fossil-fuel products than otherwise would have occurred." (emphasis added)); 216 ("*Consumers*' . . . and the public's reliance on Defendants' misrepresentations in

continuing to purchase and use Defendants' fossil-fuel products was reasonable because Defendants held themselves out as experts and failed to disclose financial relationships with seemingly independent experts." (emphasis added)). The express purpose of this action is to transfer the alleged costs of climate change from "Minnesota taxpayers, residents, or broader segments of the public" to six out-of-state defendants. *See id.* ¶ 7. To that end, this action seeks a variety of remedies, including restitution on behalf of Minnesota consumers. *See id.* ¶ 248. Indeed, even the Attorney General concedes that this action contains the "fundamental attributes of a consumer class action" in certain "key respects." ECF No. 35 at 27-28.

Although some courts have held that an action brought in a *parens patriae* capacity is not a "class action" within the meaning of CAFA, that remains an open question within the Eighth Circuit. *See Missouri ex rel. Koster* v. *Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010) (noting that "there is no controlling law" from the Eighth Circuit "on the issue"). Critically, none of the other courts to have considered this question have specifically examined Minnesota Statutes Section 8.31, under which the Attorney General sues. *Cf. Nessel ex rel. Michigan* v. *AmeriGas Partners, L.P.*, 954 F.3d 831, 835-36 (6th Cir. 2020) (examining Michigan law to determine whether action brought by Michigan attorney general was a class action). The Eighth Circuit will decide whether Section 8.31's unique features—including the requirement that the Attorney General attempt to distribute damages to the consumers he purports to represent, *see* Minn. Stat. § 8.31(2c)—make this action a class action "in substance." *Addison Automatics, Inc.* v. *Hartford Cas. Ins. Co.*, 731 F.3d 740, 742 (7th Cir. 2013).

g. Diversity of Citizenship

Finally, this action is removable under diversity jurisdiction. *See* 28 U.S.C. § 1332(a). *First*, it is undisputed that the amount-in-controversy exceeds $75,000. *See id. Second*, the parties are "completely diverse." *Id.* No Defendants are citizens of Minnesota. *See* ECF No. 1 ¶ 116.

For purposes of diversity jurisdiction, the real plaintiffs in interest are the Minnesota consumers on whose behalf the Attorney General sues, all of whom are Minnesota citizens. That is because the Attorney General fails to plausibly allege that Defendants caused widespread harm to Minnesota as a whole, and seeks relief that would accrue to the personal benefit of individual consumers. *See Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

* * *

In short, the Eighth Circuit is likely to have jurisdiction to review all of Defendants' asserted bases for removal, and is likely to hold that this action was properly removed under one or more of them. At the very least, Defendants have presented "'serious' legal issues" on appeal, which suffices to warrant a stay where, as here, "the balance of equities favors the moving party." *Stuart*, 2017 WL 5952872, at *2.

B. Defendants Will Suffer Irreparable Harm Absent a Stay.

Unless this Court stays the Remand Order, Defendants will be forced to litigate their appeal of the Remand Order before the Eighth Circuit and potentially the U.S. Supreme Court while simultaneously defending themselves against the Attorney General's claims in Minnesota state court. *See* 28 U.S.C. § 1447(c). They will suffer irreparable harm in the process.

First, while Defendants' appeal is pending, the Minnesota state court could rule on various substantive and procedural motions, including dispositive motions in which the parties' claims and defenses are adjudicated. It is also possible that the state court will decide discovery motions. And there is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, the Attorney General may argue that Minnesota state courts have different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in state court would be different than in federal court.

Should the Minnesota state court address or resolve those arguments, Defendants' appellate rights would be irreparably hollowed. *See Northrop Grumman Tech. Servs., Inc.* v. *Dyncorp Int'l LLC*, No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016) (holding that, because any "intervening state court judgment or order could render the[ir] appeal meaningless," defendants face "severe and irreparable harm if no stay is issued"); *cf. Providence Journal Co.* v. *Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."); *Hiken* v. *Dep't of Def.*, No. 06-2812, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardships tipped in favor of granting stay because right to appeal an order to disclose information otherwise "would become moot").

Second, Defendants will be greatly burdened by litigating the merits of the Attorney General's claims in the Minnesota state court while their appeal is pending. Without a stay, Defendants would be forced to devote substantial resources to litigating in Minnesota state court, including the preparation of a motion to dismiss under local rules, as well as discovery. If the Eighth Circuit or U.S. Supreme Court subsequently hold that this case is properly removable, the resources devoted to preparing those motions would be wasted. Because Defendants are unlikely to recover any of these sunk costs from the state, this harm is irreparable. *See Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304-05 (2010).

"District courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal." *Northrop Grumman*, 2016 WL 3346349, at *4. Courts frequently grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens posed by simultaneous litigation in state and federal courts. *See, e.g.*, *Citibank, N.A.* v. *Jackson*, No. 16-712, 2017 WL 4511348, at

*2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting that litigation costs would be avoided); *Northrop Grumman*, 2016 WL 3346349, at *4 (entering stay because, "[i]f this order is not stayed, Plaintiff and Defendant will also both face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court"); *Dalton*, 2013 WL 2367837, at *2 (granting motion to stay the remand, reasoning that "Defendant will be irreparably harmed by the burden of having to simultaneously litigate these cases in state court and on appeal to the Eighth Circuit, as well as the potential of inconsistent outcomes if the state court rules on any motions while the appeal is pending"); *Raskas*, 2013 WL 1818133, at *2 ("The burden of having to simultaneously litigate these cases in state court and on appeal to the Eighth Circuit, as well as the potential of inconsistent outcomes if the state court rules on any motions while the case is pending before the Eighth Circuit, weigh in favor of granting the stays [of remand]."); *Lafalier*, 2010 WL 1816377, at *2 ("State Farm should not be required to simultaneously respond to plaintiffs' discovery requests and pursue its request for appellate review of the Court's remand order. This would impose an unfair burden on State Farm."); *Bledsoe*, 2006 WL 335450, at*1 (granting motion to stay the remand order as the "stay will allow for consistent pretrial rulings and will conserve judicial resources because only one court will need to make such rulings"). These authorities underscore the irreparable harm Defendants face here.

C. The Balance of Harms Tilts Sharply in Defendants' Favor.

Although "[t]he first two factors of the traditional standard are the most critical," *Nken*, 556 U.S. at 434, the remaining factors further support staying the Remand Order pending appeal. Where, as here, the government is the opposing party, the third and fourth stay factors (i.e., harm to the opposing party and the public interest) "merge" and should be considered together. *Id.* at 435; *see, e.g.*, *Northport Health Servs. of Ark., LLC* v. *U.S. Dep't of Health & Human Servs.*, No. 19-5168, 2020 WL 2091796, at *1 (W.D. Ark. Apr. 30, 2020).

The Attorney General will not be "substantially injured" if this Court enters a stay. On the contrary, the Attorney General will *benefit* from such a stay, which would conserve its resources—financial and otherwise—by allowing it to litigate Defendants' appeal without being saddled with simultaneous—and potentially unnecessary—litigation in Minnesota state court. *See Dalton*, 2013 WL 2367837, at *2 ("[N]either party would be required to incur additional expenses from simultaneous litigation."). Similarly, under a stay, the Attorney General will avoid the same risk of harm from potentially inconsistent outcomes of proceedings in the Eighth Circuit and before this Court if removal is affirmed on appeal.[5] *See Raskas*, 2013 WL 1818133, at *2.

The "public interest" will be served by staying remand. The Minnesota state court would be spared from wasting scarce judicial resources on adjudicating an action that may later be returned to federal court. *See, e.g.*, *Henin* v. *Soo Line R.R.*, No. 19-336, 2019 WL 3759804, at *2 (D. Minn. Aug. 9, 2019); *Diaz-Lebel* v. *TD Bank USA, N.A.*, No. 17-5110, 2018 WL 8754122, at *1 (D. Minn. Feb. 23, 2018). And this Court's resources will be spared, too. Should the Eighth Circuit or U.S. Supreme Court reverse the Remand Order, this Court will be forced to address the effects of any interim rulings by the Minnesota state court. Among other things, the Court would need to evaluate the precedential or persuasive force of any intervening merits orders issued by the Minnesota state court, revisit the scope of any discovery orders, determine whether and to what extent any discovery that was improperly ordered may be clawed back or subjected to protective

[5] Any delay in the Attorney General's receipt of money damages—to which it is not entitled, because Defendants are not liable for any alleged injuries—would not be irreparable. *See Philip Morris*, 561 U.S. at 1304; *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). That is especially true here, where a substantial amount of the damages the Attorney General seeks to recover would be compensation for purported costs that have not yet been incurred and which may not be incurred for decades. *See* ECF No. 1, Ex. 11 ¶ 6 ("If Defendants had not misled the public to pad their own pockets, Minnesota would not have already incurred such large costs because of climate change *and would not be facing such dramatic future costs*." (emphasis added)).

orders, and more. That amounts to a "rat's nest of comity and federalism issues" that may be obviated though the issuance of a stay. *Northrop Grumman*, 2016 WL 3346349, at *4.

CONCLUSION

For the foregoing reasons, this Court should grant the motion and stay execution of the Remand Order pending appeal. If the Court decides not to grant a stay pending appeal, Defendants respectfully request that this Court grant a temporary stay to preserve their right to seek a stay from the Eighth Circuit. *See* Fed. R. App. P. 8(a)(2); *see, e.g.*, *Cellco P'ship*, 2004 WL 2066768, at *1.

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Respectfully submitted,

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