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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CITY OF HOBOKEN Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, Defendants.	Case No. 2:20-cv-14243 JMV-MF **BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL** **ORAL ARGUMENT REQUESTED**

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PRELIMINARY STATEMENT

To preserve the full effectiveness of Defendants' appellate rights and spare the parties and the Superior Court of New Jersey from what could be a substantial amount of unnecessary and ultimately futile litigation, Defendants respectfully request that the Court stay execution of its Remand Order until the Third Circuit has the opportunity to determine whether this action was properly removed to federal court. Defendants have an appeal as of right because they removed this case under, *inter alia*, the federal officer removal statute, 28 U.S.C. § 1442. *See* 28 U.S.C. § 1447(d). Defendants' appeal will present serious legal issues, including several questions of first impression in the Third Circuit. The Third Circuit has not yet considered the propriety of removing climate change-related actions like this one on *any* of the grounds asserted by Defendants, but will now be able to consider all of those grounds in light of the Supreme Court's recent decision in the similar climate-change case *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021) ("*Baltimore*") (holding that "when a district court's removal order rejects all of the defendant's grounds for removal, § 1447(d) authorizes a court of appeals to review each and every one of them").

The Court's Remand Order correctly notes that, as of the time of its decision, no matter presenting these removal issues was "pending before the Third Circuit." Remand Opinion at 7. Now, however, these matters are directly before the Third

Circuit in this very case, *see* D.E. 128 (Defendants' Notice of Appeal), and thus it would be prudent to await decision from the Third Circuit before proceeding further. Indeed, as the Court explained in its previous stay order, D.E. 127, because the Third Circuit has not yet "addressed Defendants' arguments," staying the case pending appeal "is prudent to preserve resources and in light of considerations of judicial economy. Specifically, the Third Circuit will be presented with matters of first impression that could potentially impact the Court's remand Order." *Id.* at 2. The same reasons that supported the Court's decision to grant a temporary stay of the Remand Order apply with equal force here.

Each of the removal grounds asserted by Defendants presents serious legal questions. Indeed, the fact that each ground will raise an issue of first impression in the Third Circuit alone warrants a stay. *See, e.g.*, *Nw. Airlines v. E.E.O.C.*, 1980 WL 4650, at *1 (D.C. Cir. Nov. 10, 1980) (per curiam). Moreover, recent decisions from other courts of appeals demonstrate that there is reasonable room for disagreement regarding removability on several of the grounds asserted by Defendants. For example, the Second Circuit's recent decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), provides strong support for Defendants' argument that Plaintiff's purported state law claims in fact "arise under" federal law. In that case, the Second Circuit held that, even where "suit[s] over global greenhouse gas emissions" are pleaded under state law, they "must be brought

under federal common law." *Id.* at 91, 95. Because "[g]lobal warming presents a uniquely international problem of national concern," the court explained, "[i]t is therefore not well-suited to the application of state law." *Id.* at 85–86.

The Fourth Circuit's decision in *County Board of Arlington County, Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243 (4th Cir. 2021), supports removal under the federal officer removal statute. There, the court upheld removal of state-law claims against pharmacies arising from their distribution of opioids because those pharmacies distributed opioids *in part* to U.S. servicemembers under federal contracts with the U.S. military. *See id.* at 257. The same is true here—Defendants produced and supplied the Department of Defense with billions of dollars of highly specialized jet fuel under detailed contracts overseen by federal officers that, like the contracts in *Arlington*, established "how [they] must operate" and fixed "[p]ricing . . . , shipping, payment and many other specifications." *Id.* at 252. The Fourth Circuit found that removal was proper even though plaintiffs did "not even mention" the government contracts in their complaint. *Id.* at 256.

The Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), also raises a serious legal question as to whether but-for causation is required for removal jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), as Plaintiff contends, or whether a connection between Plaintiff's claims and Defendants' activities on the Outer

Continental Shelf is sufficient, as Defendants contend. These and other serious legal questions presented by Defendants' appeal warrant a stay.

Absent a stay, Defendants will be irreparably injured, whereas a stay would harm neither Plaintiff nor the public. If a stay is denied, the Superior Court of New Jersey could commence proceedings on the merits while the Third Circuit is still considering whether that is the proper forum for this case. Such dual proceedings would raise a "rat's nest of comity and federalism issues" if the Third Circuit ultimately reverses the Remand Order after months (or even years) of litigation in state court, during which time the state court might have invested substantial time and resources and made numerous rulings. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). In addition, remanding to allow litigation to proceed in state court while the parties are before the Third Circuit on appeal would undermine and potentially frustrate Defendants' appellate rights, needlessly impose costs and burdens on the courts and parties alike, risk inconsistent rulings, and unduly complicate this litigation. Staying the Remand Order, on the other hand, would not prejudice Plaintiff and would avoid irreparable harm to Defendants, conserve judicial resources, and serve the interests of judicial efficiency.

For these reasons, the Court should follow the lead of several other district courts in climate changed-related cases and grant a stay to allow the Third Circuit

the opportunity to consider and rule on "matters of first impression that could potentially impact the Court's remand Order." D.E. 127 at 2. At a minimum, if the Court decides not to grant a stay pending appeal, the Court should enter a brief stay of the Remand Order to enable Defendants to seek a stay pending appeal from the Third Circuit.[1]

BACKGROUND

On September 2, 2020, Plaintiff City of Hoboken filed a Complaint in the Superior Court of New Jersey. D.E. 1-2. On October 9, 2020, Defendants timely removed the case pursuant to 28 U.S.C. §§ 1331, 1332(d), 1367(a), 1441(a), 1442, and 1446, and 43 U.S.C. § 1349(b). D.E. 1. On November 5, 2020, Plaintiff filed a motion to remand to state court, D.E. 71, which the Court granted on September 8, 2021, D.E. 121, and temporarily stayed on September 9, 2021, D.E. 127.

On May 17, 2021, the Supreme Court issued its decision in *Baltimore*, holding that 28 U.S.C. § 1447(d) "permit[s] a court of appeals to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on the federal-officer removal statute." 141 S. Ct. at 1536. Before *Baltimore*, most appellate courts had refused to exercise jurisdiction under § 1447(d) beyond the federal officer ground. As a result, the scope of appellate review was limited. In

[1] This motion is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction.

light of *Baltimore*, this Court's Remand Order will be subject to plenary appellate review, and potentially reversal, in the Third Circuit on one or more grounds that no appellate court has yet addressed in a climate change-related case.[2]

Recognizing the fundamental shift in the law precipitated by *Baltimore*, other federal courts have issued stays pending appellate review of remand orders. Chief Judge Tunheim of the District of Minnesota, for example, stayed execution of his remand order pending appeal to the Eighth Circuit, concluding that "this action raises *weighty and significant questions* that intersect with rapidly evolving areas of legal thought." *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at *2 (D. Minn. Aug. 20, 2021) (emphasis added). The court found that "the Second Circuit's decision in *City of New York* provides a legal justification for addressing climate injuries through the framework of federal common law," *id.*, and "the *Baltimore* decision increases the likelihood that an appellate court will determine that certain climate change claims arise exclusively under federal law," *id.* at *3. The Court also noted that this "is not a case of applying thoroughly developed law to well-tread factual patterns; when it comes to questions of the proper forum for adjudicating harms related to climate change, 'the legal landscape is shifting beneath

[2] Several courts of appeals, including the First, Fourth, Eighth, Ninth, and Tenth Circuits, are now considering or will soon consider for the first time some of these additional grounds for removal of climate change-related cases, after having declined to review them in previous appeals.

[our] feet.'" *Id.* at *4. For these and other reasons, the court concluded: "Considerations of judicial economy and conservation of resources also weigh in favor of staying execution of the remand order as the Eighth Circuit determines whether the state or federal court has jurisdiction over this matter." *Id.*

Similarly, the District of Maryland stayed proceedings in a similar action pending the Fourth Circuit's decision on remand in *Baltimore*. *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469 (D. Md. May 19, 2021). The district court rejected the City of Annapolis's arguments opposing a stay for the "simple but important reason" that the "Fourth Circuit's ruling on remand in the *Baltimore Case* is not a foregone conclusion." *Id.* at *4. As in *City of Annapolis*, a number of Defendants' jurisdictional arguments here "raise novel questions of law on which the [Third] Circuit has yet to opine." *Id.* The *Annapolis* court also rejected the argument that the alleged exigencies of climate change weigh against a stay, reasoning that "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion. The urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." *Id.*

Even before *Baltimore*, district courts had stayed remand orders pending appeal in climate change-related actions. For example, Judge Chhabria of the Northern District of California stayed execution of his remand order pending appeal

to the Ninth Circuit because "[t]he Court f[ound] that the[r]e are controlling questions of law as to which there is substantial ground for difference of opinion and that their resolution by the court of appeals will materially advance the litigation." *County of San Mateo v. Chevron Corp. et al.*, No. 17-cv-4929 (N.D. Cal.), Dkt. 240. And proceedings in other state and federal cases have been stayed pending further appellate review under *Baltimore*. *See* Order, *Pac. Coast Fed'n of Fishermen's Assocs., Inc. v. Chevron Corp.*, No. 18-cv-07477 (N.D. Cal. Jan. 2, 2019), Dkt. 91; Order, *City of Charleston v. Brabham Oil Co.*, No. 20-cv-3579 (D.S.C. May 27, 2021), Dkt. 121; Order Staying Case & Pending Motions, *Mayor & City Council of Baltimore v. BP P.L.C.*, Civ. No. 18-4219 (Md. Cir. Ct. May 28, 2021); Stipulation & Order Staying Proceedings, *Anne Arundel County v. BP P.L.C.*, No. 21-cv-1323 (D. Md. June 1, 2021), Dkt. 19; Order Granting Motion to Stay, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, Civ. No. 18-30349 (Colo. Dist. Ct. June 29, 2021); Order Granting Defendants' Motion to Stay, *Board of County Commissioners of San Miguel County v. Suncor Energy (U.S.A.) Inc.*, Civ. No. 21-150 (Colo. Dist. Ct. July 14, 2021).

LEGAL STANDARD

District courts have the authority to stay entry of an order or judgment in proceedings pending before them. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) ("District courts do ordinarily have authority to issue stays . . . where such a stay

would be a proper exercise of discretion.") (internal citations omitted); *see also* 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.*, *St. John v. Affinia Grp., Inc.,* 2009 WL 1586503, at *2 (D.N.J. June 8, 2009) (holding that "a stay of the remand order pending appeal is warranted").

In deciding whether to enter a stay, courts in the Third Circuit follow the traditional four-factor standard articulated by the Supreme Court. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991) (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). Under that standard, courts consider "(1) whether the stay applicant has made a 'strong' showing that it 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." *Revel AC, Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 568 (3d Cir. 2015) (alteration omitted) (citing *Hilton*, 481 U.S. at 776).

To establish a "'strong' likelihood of success on the merits," the moving party need show only that there "is a reasonable chance, or probability of winning." *Revel*, 802 F.3d at 568 (internal quotation marks omitted). And in cases where "the threat of irreparable harm is great because absent a stay . . . the status quo" will be

destroyed, "the party seeking the stay will not be required to make 'a strong showing of likely success on appeal' but rather only that there is a 'serious legal question[] presented.'" *Wadhwa v. Dep't of Veterans Affs.*, 2011 WL 13287074, at *1 (D.N.J. Feb. 1, 2011) (quoting *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979)) (alteration in original).

ARGUMENT

I. Defendants' Appeal Raises Many Serious Legal Questions About Federal Jurisdiction Over Climate Change-Related Tort Claims.

Defendants have a reasonable likelihood of success on the merits because the question of whether climate change-related claims pleaded under state law can nevertheless be removed to federal court presents several issues of first impression in the Third Circuit. It is well established that questions of first impression raised in an appeal warrant a stay. *See, e.g.*, *Moutevelis v. United States*, 564 F. Supp. 1554, 1556 (M.D. Pa. 1983), *aff'd*, 727 F.2d 313 (3d Cir. 1984) (granting a stay pending appeal where district court recognized its "opinion … may well involve issues of first impression in this Circuit"); *Nw. Airlines*, 1980 WL 4650, at *1 ("The stay is ordered in light of the questions of first impression raised by this appeal."); *Maxcrest Ltd. v. United States*, 2016 WL 6599463, at *2 (N.D. Cal. Nov. 7, 2016) (granting stay because defendant made a "sufficient showing that its appeal raises a legal question of first impression"); *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. 2010) (finding that "the plaintiffs have sufficiently demonstrated a

likelihood of success on the merits" where "the plaintiffs' appeal presents an issue of first impression" on which "the Court of Appeals may disagree" with the district court).

A stay is also appropriate because Defendants' appeal presents a host of novel, and potentially complex, issues related to threshold questions of federal jurisdiction. *See Rennie v. Klein*, 481 F. Supp. 552, 555 (D.N.J. 1979) ("[T]ribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.") (citation omitted); *Rescigno v. Statoil USA Onshore Properties Inc.*, 2020 WL 4473004, at *2 (M.D. Pa. Aug. 4, 2020) (holding that the likelihood-of-success prong is satisfied where the district court's "decision was based on unsettled precedent or involved a novel area of law"). Indeed, recent decisions from the Supreme Court and other federal appellate courts clearly demonstrate that, at a minimum, the question whether climate change-related cases are subject to federal jurisdiction is an open question with reasonable room for disagreement. *See Nasr v. Hogan*, 2008 WL 2367206, at *1 (M.D. Pa. June 6, 2008) (granting stay where "jurists of reason could disagree with our conclusion"); *In re: Bayou Shores SNE, LLC*, 2015 WL 6502704, at *1–2 (M.D. Fla. Oct. 27, 2015) (granting stay because there was "disagreement on this issue among other circuit courts and lower courts"

and "the Court must acknowledge the debate and that reasonable people could disagree").

First, Defendants have presented a serious legal issue regarding whether removal was proper because Plaintiff's claims necessarily "arise under" federal common law. The Supreme Court has consistently admonished that "where there is an overriding federal interest in the need for a uniform rule of decision," *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*"), "state law cannot be used," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Interstate pollution is one such area: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court explained, "[f]ederal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9.

Citing this "mostly unbroken string of cases . . . appl[ying] federal law to disputes involving interstate air or water pollution," the Second Circuit recently held that, despite being pleaded under state law, materially similar climate change-related claims are necessarily governed by federal law. The court reasoned that "[g]lobal warming presents a uniquely international problem of national concern [and] is

therefore not well-suited to the application of state law," *City of New York*, 993 F.3d at 86–87, such that the plaintiff's claims there, as here, "must be brought under federal common law," *id.* at 95. Because the plaintiff in *City of New York* filed its complaint in federal court, that case did not present the same removal question at issue here. *See id.* at 94. But the Second Circuit's rationale in disposing of the plaintiff's claims on the merits because they were necessarily governed by federal law supports removal. The Second Circuit "concluded that the City's claims" that seek redress for injuries allegedly caused by interstate emissions, although pleaded under state law, are "federal claims." *Id.* at 95. Such claims, like Plaintiff's claims here, thus arise under federal law for purposes of 28 U.S.C. § 1331 and are removable under 28 U.S.C. § 1441. *See Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (an action that "raises claims arising under federal law" "permit[s] removal").

The Second Circuit expressly rejected the plaintiff's attempt to reframe its case as focused on anything other than emissions: "Artful 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. Put differently, the 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 91. So, too, here. *See, e.g.*, Compl. ¶ 3 ("Together, the fossil fuels produced by Defendants make up more than 12% of global emissions between 1965 and 2017."); *id.* ¶ 2 ("[T]he fossil fuels [Defendants] extract, produce, market, and sell on a massive scale are causing accelerating climate change."). And while the Second Circuit acknowledged "recent opinions holding that 'state-law claim[s] for public nuisance [brought against fossil fuel companies] do[] not arise under federal law,'" *City of New York*, 993 F.3d at 93 (alterations in original), this simply confirms that this issue raises a serious legal question.

Indeed, to the extent this Court's Remand Order depends on its interpretation of Plaintiff's Complaint as turning on "Defendants' allegedly deceptive promotion of oil and gas," rather than their "production" of oil and gas, Remand Opinion at 18, 21, that conclusion itself presents a substantial legal question. As the District of Minnesota recently observed in granting a stay in a similar action, although "the City of New York asserted public and private nuisance related explicitly to environmental and infrastructure damage against both foreign and domestic defendants"—which it considered "markedly different causes of action than the consumer protection and misrepresentation claims" pending before it—"the Second Circuit's decision in *City of New York* provides a legal justification for addressing climate change injuries through the framework of federal common law and at least slightly increases the

likelihood that Defendants will prevail on their efforts to keep this, and similar actions, in federal court." *Minnesota*, 2021 WL 3711072, at *2.

Moreover, there is a serious legal question whether claims that are necessarily governed by federal common law are subject to federal jurisdiction. This Court correctly observed that *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), involved a different factual scenario insofar as plaintiffs in that case "filed their complaint in federal court." Remand Opinion at 10–11. But the Supreme Court expressly held that there is federal question jurisdiction over "claims founded upon federal common law as well as those of statutory origin." *National Farmers Union*, 471 U.S. at 850. Multiple courts of appeals have also held that federal common law provides 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); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997) (concluding "removal is proper" because plaintiff's pleaded state-law claims "arose under federal common law"). Accordingly, the removability of claims that are governed by federal common law presents a serious legal question where there is, at a minimum, reasonable room for disagreement among the courts.[3]

[3] The question of how the well-pleaded complaint rule affects the analysis of whether the case arises under federal or state law likewise presents a serious legal question. While some courts in other climate change cases have held that the well-pleaded

Second, Defendants' appeal will present a serious legal question regarding the propriety of removal under the federal officer removal statute. In denying removal on this ground, this Court held that federal officer removal did not apply because "Hoboken's Complaint is focused on Defendants' decades long misinformation campaign that was utilized to boost Defendants' sales to consumers [and] Defendants do not claim that any federal officer directed them to engage in the alleged misinformation campaign." Remand Opinion at 20.

There is a reasonable ground for disagreement on this issue, especially in light of the Fourth Circuit's recent decision in *Arlington County*, which affirmed removal of a case asserting state-law claims against "opioid manufacturers, distributors and pharmacies . . . for causing, or contributing to, the opioid epidemic in Arlington County, Virginia." 996 F.3d at 247. The Fourth Circuit held that the defendants "acted under" federal direction or control because they contracted with the Department of Defense to provide pharmaceuticals "to 'provide[] medical care to

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complaint rule requires adhering to the state law labels the plaintiff affixes to its claims, *e.g.*, *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 147 (D.R.I. 2019), other courts—including the Third Circuit—have held that it is the *substance* of the claims pleaded, not the Plaintiff's labeling of them as federal or state law claims, that controls whether the well-pleaded complaint asserts a federal cause of action, *e.g.*, *Jarbough v. Atty. Gen.*, 483 F.3d 184, 189 (3d Cir. 2007) ("We are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim."). The rule's focus on the substance of the claims pled is confirmed by its corollary—the artful pleading doctrine—which prohibits plaintiffs from avoiding federal jurisdiction by disguising federal claims as state law claims. *E.g.*, *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002) ("[T]he artful pleading doctrine . . . requires a court to peer through what are ostensibly wholly state claims to discern the federal question lurking in the verbiage.").

current and retired service members and their families,'" and these contracts were "extensively governed by various federal statutes and regulations." *Id.* at 249. Here, Defendants provide highly specialized fuels to the Department of Defense and other federal agencies under equally detailed federal requirements. Moreover, even if the Complaint is construed as focusing on alleged misrepresentations, the Third Circuit, and other Circuits, have held that Defendants are *not* "required to allege that the complained-of conduct *itself* was at the behest of the federal agency." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 470 (3d Cir. 2015) ("*Def. Ass'n of Philadephia*"); *accord Baker v. Atl. Richfield Co.*, 962 F.3d 937, 944 (7th Cir. 2020).

The Fourth Circuit's decision also highlights a serious legal question regarding the "for or relating to" prong of the federal officer removal statute. As this Court correctly noted, to satisfy this prong "it is sufficient for there to be a 'connection' or 'association' between the act in question and the federal officer." Remand Opinion at 19–20 (quoting *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 310 (3d Cir. 2019)). And although the Third Circuit has not yet considered how close the "connection" or "association" between a plaintiff's claims and a defendant's conduct must be, the Fourth Circuit in *Arlington County* expressly held that the reason a defendant need show only "a connection or association between the act in question and the federal office" is that, in the Removal Clarification Act of 2011,

Congress abandoned "the old 'causal nexus' test" that previously governed federal officer removal. *Id.* at 256; *see also Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc) ("By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office.").

Here, the Court found that Defendants' alleged "deception" was not sufficiently connected to their production of oil and gas at the direction of federal officers. Remand Opinion at 22. But the Court also observed that Plaintiff's causal theory is based on an alleged "decades long misinformation campaign that was utilized to boost Defendants' sales," causing an increase in greenhouse gas emissions, and those increased emissions allegedly resulted in Plaintiff's alleged injuries. Remand Opinion at 20. Similarly, the plaintiff in *Arlington* alleged that its injuries were caused by over-production and over-use of opioids, but nevertheless argued that there was no federal jurisdiction because the "Complaint did not even mention" distribution or sales to the government. *Arlington*, 996 F.3d at 256. The Fourth Circuit rejected this argument, holding that plaintiff's "position would elevate form over substance" insofar as "Arlington's claims seek monetary damages due to harm arising from 'every opioid prescription' filled by pharmacies" such as the defendants. *Id.* at 257.

The fact that Plaintiff tries to recast its claims as based on Defendants' marketing and promotion of fossil fuels, rather than their production of such fuels under the direction and control of federal officers, makes no difference in evaluating the propriety of federal officer removal. As the Supreme Court, the Third Circuit, and multiple other circuit courts have made clear, when both parties have reasonable theories of the case, the court must credit Defendants' theory for purposes of federal officer removal. *See, e.g.*, *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432–33 (1999) ("[W]e credit the [defendants]' theory of the case for purposes of . . . our jurisdictional inquiry"; defendants need not have "an airtight case on the merits" to show the requisite nexus.); *Cessna v. Rea Energy Coop., Inc.*, 753 F. App'x 124, 1128 (3d Cir. 2018) (crediting defendant's theory of the case to uphold removal, and explaining that "to choose between . . . competing interpretations of . . . the law is to decide the merits of this case, which would defeat the purpose of the removal statute" (internal quotation marks and alteration omitted) (quoting *Jefferson Cnty.*, 527 U.S. at 432)); *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020) ("[W]e 'credit the [defendants'] theory of the case for purposes of both elements of' the removal inquiry."); *Baker*, 962 F.3d at 941, 947 ("Both the [plaintiffs] and the [defendants] have reasonable theories of this case. Our role at this stage of the litigation is to credit only the [defendants]' theory" so long as the

theory is "plausible."). In rejecting federal officer jurisdiction, however, the Court did not consider whether Defendants advanced a reasonable theory.[4]

At a minimum, Defendants have a reasonable theory of the case, which raises a serious legal question: whether greenhouse gas emissions caused by billions of consumers' use of fossil fuels—which were produced, in part, under the direction, supervision, and control of the federal government—allegedly resulted in Plaintiff's purported harms. This theory of the case is more than plausible. Indeed, the Complaint is explicit that there would be no alleged harm, and therefore no claims, without the greenhouse gas emissions allegedly caused, in part, by the consumption of fossil fuel products, including those produced by Defendants at the direction of federal officers. *See, e.g.*, Compl. ¶ 39 ("The recent acceleration of fossil fuel emissions has led to a correspondingly sharp spike in atmospheric concentration of CO_2."); *id.* ¶ 41 ("[T]he rising concentration of atmospheric CO_2 . . . is driving global warming."); *id.* ¶ 44 ("The currently accelerating global warming has caused major climate disruptions and portends more devastating climate disruptions in the near future."); *id.* ¶ 45 ("Three types of climate disruption pose an especially urgent threat to Hoboken: sea level rise, extreme heat, and extreme rainfall events.").

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[4] "[T]he federal officer removal statute is to be 'broadly construed' in favor of a federal forum" and the court must "construe the facts in the removal notice in the light most favorable to the" existence of federal officer removal. *Def. Ass'n of Philadelphia*, 790 F.3d at 466–67.

Third, whether OCSLA confers federal jurisdiction over this action presents a serious legal question because the Third Circuit has never considered the issue in the context of a climate change-related action. OCSLA gives federal district courts original jurisdiction over actions that "aris[e] out of, or in connection with . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1). While this Court held that OCSLA jurisdiction does not exist because Plaintiff's claims do not "arise out of, or in connection with" Defendants' activities on the OCS, it acknowledged that the Third Circuit has never considered the scope of this jurisdictional language. Remand Opinion at 17. Moreover, the Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), confirms that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not always require but-for causation. *Id.* at 1026 (declining to require "a strict causal relationship between the defendant's in-state activity and the litigation" for specific jurisdiction). Accordingly, there is a serious legal question whether Defendants' extensive operations on the OCS satisfy this expansive statutory standard.

Fourth, the propriety of federal enclave jurisdiction also presents a serious legal question. *See Bordetsky v. Akima Logistics Servs., LLC*, 2014 WL 7177321,

at *1 (D.N.J. Dec. 16, 2014) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'") (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006)). Plaintiff does not dispute that Defendants conduct substantial fossil fuel production on federal enclaves. The Court concluded that this production is irrelevant because "[t]he focus of Hoboken's claims is on harm that occurred in Hoboken rather than in a federal enclave." Remand Opinion at 22–23. But even if Plaintiff's claims are based in part on alleged injuries that did not occur on federal enclaves, that does not defeat federal jurisdiction so long as "*some of the events* alleged . . . occurred on a federal enclave." *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (emphasis added); *see also Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012) ("A suit based on events occurring in a federal enclave . . . implicates federal question jurisdiction under § 1331.").

Fifth, this action raises a serious legal question regarding the availability of *Grable* jurisdiction in light of the multiple, substantial federal issues that are actually disputed in this case. Again, this is a question of first impression because the Third Circuit has never considered whether climate change-related actions may be removed under *Grable*. Adjudicating Plaintiff's claims will necessarily require the court to balance the competing interests of environmental protection and economic growth—a balance that federal law entrusts to the EPA. *AEP*, 564 U.S. at 427 ("The

Clean Air Act entrusts such complex balancing to EPA in the first instance[.]"). *Grable* jurisdiction may be exercised over claims, like Plaintiff'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 Plaintiff's efforts to "sidestep[]" such "carefully crafted frameworks" through this lawsuit are improper. *City of New York*, 993 F.3d at 86.

Finally, there is a serious legal question regarding removal of this case under the Class Action Fairness Act 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). The definition of a "class action," Congress explained, "is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled 'class actions.' Generally speaking, lawsuits that resemble a purported class action should be considered class actions for purposes of applying these provisions." S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (formatting altered). The Complaint is replete with allegations concerning alleged efforts to mislead, and injuries purportedly suffered by, the class members on whose behalf this suit is brought:

Hoboken consumers. *See, e.g.*, Compl. ¶¶ 18(l), 20(h), 172, 188. By suing in a representative capacity on behalf of Hoboken consumers, Plaintiff has chosen to bring what is in substance a putative class action: a "representative suit[] on behalf of [a] group of persons similarly situated." 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1 (4th ed. 2002).

II. Defendants Will Suffer Irreparable Harm Absent a Stay.

Once the clerk mails the certified copy of the Remand Order to the Superior Court of New Jersey, "the State Court may thereupon proceed with such case." 28 U.S.C. § 1447(c). Absent a stay of the Remand Order, the parties will therefore proceed simultaneously along at least two tracks: they will brief and argue Defendants' appeal from the Remand Order in the Third Circuit while simultaneously litigating the merits of Plaintiff's claims in the Superior Court of New Jersey. As a result, Defendants will likely suffer irreparable harm in multiple ways.

First, denying the stay motion could render Defendants' right to appeal hollow in many respects if the Superior Court of New Jersey issues rulings on the merits before appellate review is completed. *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."); *see also Wadhwa v. Dep't of Veterans Affs.*, 2011

WL 13287074, at *2 (D.N.J. Feb. 1, 2011) (citing *Providence Journal*, 595 F.2d at 890); *Hicks v. Swanhart*, 2012 WL 6152901, at *3 (D.N.J. Dec. 10, 2012) ("The possibility of mootness, however, is a consideration which weighs in favor of a stay of the proceedings."). Because a final "state court judgment or order could render the appeal meaningless," Defendants face "severe and irreparable harm if no stay is issued." *Northrop Grumman*, 2016 WL 3346349, at *4; *see also Indiana State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Grp., Inc.*, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (granting stay because the Class Action Fairness Act allows a defendant to seek review of a remand order, and if "the case is actually remanded, and the state court proceeds to move it forward, the appellate right would be an empty one"). As the District of Minnesota found in staying a similar climate change-related action, "dispositive resolution of the claims pending full appellate review would constitute a *concrete and irreparable injury*, particularly 'where a failure to enter a stay will result in a meaningless victory in the event of appellate success.'" *Minnesota*, 2021 WL 3711072, at *3 (emphasis added).

Second, Defendants would be irreparably harmed if they are forced to litigate their federal appeal and the remanded state court action simultaneously. Even if Defendants' appeal is expedited, the proceedings in the Third Circuit will require a substantial period of time. During that time, the Superior Court of New Jersey 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 court could 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, Plaintiff may argue that the Superior Court of New Jersey has 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.

There is no reason to run the risk of conflicting court decisions, and there may be no way to un-ring the bell of potential outcomes in state court as a practical matter. Defendants are, for example, unlikely to recover much (if any) of their burden and expense incurred from potentially needless litigation in state court from the governmental Plaintiff in this case. Such unrecoverable expenses constitute irreparable harm. *See Onyx Enterprises Int'l Corp. v. Volkswagen Grp. of Am., Inc.*, 2021 WL 1338731, at *4 (D.N.J. Apr. 9, 2021) ("[W]hen the hardship of litigation expense and time is for a case that may be unnecessary after the findings of the other proceeding, those litigation expenses establish the requisite hardship."); *cf. Kennecott Corp. v. Smith*, 637 F.2d 181, 189 (3d Cir. 1980) (considering "substantial financial costs which are not recoverable" in irreparable harm analysis).

Third, if the Third Circuit ultimately concludes that Defendants properly removed this action, this Court would have to wrestle with the effects of any state court rulings made while the Remand Order was on appeal. Among other things,

the Court would need to 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 orders, evaluate the alleged relevance or persuasive force of any intervening merits orders issued by the state court, and more. This would create a "rat's nest of comity and federalism issues" that would need to be untangled if the Third Circuit reverses. *Northrop Grumman*, 2016 WL 3346349, at *4.

"District courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal." *Id.* at *3. Indeed, courts routinely 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.*, *id.* (entering stay because "[i]f th[e] 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"); *Estate of Joseph Maglioli v. Andover Subacute Rehab. Ctr.*, 2021 WL 2525714, at *7 & n.3 (D.N.J. June 18, 2021) (acknowledging that "the burden of simultaneous litigation and the potential for inconsistent outcomes constitutes irreparable harm"); *Raskas*, 2013 WL 1818133, at *2 (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while the case is pending" on appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential

of inconsistent outcomes if the state court rules on any motions while the appeal is pending"). This Court should do the same here.

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

Where, as here, the Government is the opposing party, "assessing the harm to the opposing party and weighing the public interest . . . merge." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011), *as amended* (Mar. 7, 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). As an initial matter, there can be no legitimate dispute that Plaintiff will *not* be harmed if the Court grants Defendants' Motion because Plaintiff principally seeks monetary damages, which can, of course, be awarded at any time. Compensable "'[e]conomic loss does not constitute irreparable harm.'" *Longo v. Env't Prot. & Improvement Co., Inc.*, 2017 WL 2426864, at *10 (D.N.J. June 5, 2017) (quoting *Acierno v. New Castle Cnty.*, 40 F. 3d 645, 633 (3d Cir. 1994)); *see also Telebrands Corp. v. Grace Mfg.*, 2010 WL 4929312, at *4 (D.N.J. Nov. 30, 2010) ("It is well settled that a purely economic injury is compensable in money damages and therefore can never constitute irreparable harm."). And as the District of Maryland recently noted in granting a stay of proceedings in a similar climate change-related case, "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion. The urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy

determination of federal jurisdiction in this suit." *City of Annapolis*, 2021 WL 2000469, at *4. The same is even more true for Plaintiff's interest in a speedy determination of the merits.

In fact, Plaintiff will, in many ways, benefit from a stay. With a stay in place, Plaintiff will avoid the same risk of harm from potentially inconsistent outcomes in remanded state court proceedings as will Defendants. *See Raskas*, 2013 WL 1818133, at *2. Similarly, a stay would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate Defendants' appeal without being saddled with simultaneous state court litigation. *See Dalton*, 2013 WL 2367837, at *2 ("[N]either party would be required to incur additional expenses from simultaneous litigation."). And while "a stay would not permanently deprive [Plaintiff] of access to state court," Defendants could "face[] a real chance that [their] right to meaningful appeal will be permanently destroyed by an intervening state court judgment." *Northrop Grumman*, 2016 WL 3346349, at *4.

As the District of Minnesota recently explained in granting a stay: "[T]he public also has an interest in conserving resources by avoiding unnecessary or duplicative litigation, particularly where, as here, the [court of appeals] will be addressing for the first time whether the state court has jurisdiction to resolve the claims and redress the injuries alleged at all." *Minnesota*, 2021 WL 3711072, at *4. Courts frequently hold that "conserving judicial resources and promoting judicial

economy" is a recognized ground for a stay, and a stay here would indisputably promote that interest. *See Raskas*, 2013 WL 1818133, at *2; *Trusted Transp. Sols., LLC v. Guarantee Ins. Co.*, 2018 WL 2187379, at *4 (D.N.J. May 11, 2018) ("The court should consider whether the stay would . . . further the interest of judicial economy."); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *3 (W.D.N.C. Oct. 10, 2017). At bottom, "it makes sense for all parties to allow the [Third Circuit] to address these weighty jurisdictional issues prior to commencing litigation in state court." *Minnesota*, 2021 WL 3711072, at *4.

CONCLUSION

For the foregoing reasons, the 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 ask that it grant a temporary stay to preserve Defendants' right to seek a stay from the Third Circuit.

Respectfully submitted,

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