

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND,

Plaintiff,

v.

BP P.L.C.; *et al.*,

Defendants.

CASE NO.: 21-cv-00772-SAG

**JOINT SUBMISSION REGARDING FOURTH CIRCUIT DECISION IN *BALTIMORE***<sup>1</sup>

Pursuant to the Court's Order Staying Proceedings, Dkt. No. 123, the Parties jointly write to inform the Court that on April 7, 2022, the Fourth Circuit issued a decision affirming the district court's remand order. *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644, 2022 WL 1039685 (4th Cir. Apr. 7, 2022) ("*Baltimore*"). Defendants intend to file a petition for rehearing *en banc*, and, depending on the outcome of that petition, a petition for a writ of certiorari seeking the United States Supreme Court's review of the Fourth Circuit's decision. The Parties have met and conferred and have different positions on what the next steps in this case should be. The Parties' respective positions are provided below.

**Plaintiff's Position:**

The Fourth Circuit's unanimous decision in *Baltimore* held that Baltimore's case must be remanded to state court because none of the defendants' jurisdictional theories had merit. The City of Annapolis' complaint was removed to this Court thirteen months ago, and no substantive

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<sup>1</sup> This submission does not operate as an admission of any factual allegation or legal conclusion and is submitted subject to and without waiver of any right, defense, affirmative defense, claim, or objection, including lack of subject matter jurisdiction, or lack of personal jurisdiction, insufficient process, or insufficient service of process.

proceedings have occurred in that time. Now that *Baltimore* has been decided, the Court now has complete guidance to proceed on the City’s motion to remand to state court. Defendants have not attempted to show that any of the relevant factors that would support an additional stay pending appeal are satisfied. *See generally Nken v. Holder*, 556 U.S. 418 (2009). In the interests of justice and of the parties, the Court should proceed with briefing on the City’s motion to remand without further delay.

The *Baltimore* decision was clear and unequivocal, and is in concert with multiple other circuit decisions. The court held that removal was improper under the same five theories Defendants asserted in their Notice of Removal here. *See* Dkt. 1 (“NOR”). The court “resoundingly agree[d] with Baltimore and reject[ed] Defendants’ attempts to invoke federal common law” as a basis for removal jurisdiction. *Compare Baltimore v. BP P.L.C.*, No. 19-1644, 2022 WL 1039685, at \*5 (4th Cir. Apr. 7, 2022), with NOR ¶¶ 14–28. It held no substantial federal issue was necessarily raised on the face of the complaint that could create jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *Compare Baltimore*, 2022 WL 1039685, at \*11–15, with NOR ¶¶ 29–54. There was no jurisdiction under the federal enclaves doctrine. *Compare Baltimore*, 2022 WL 1039685, at \*183–93, with NOR ¶¶ 188–98. There was no jurisdiction under the Outer Continental Shelf Lands Act. *Compare Baltimore*, 2022 WL 1039685, at \*19–22, with NOR ¶¶ 55–66. And the court reaffirmed its prior holding that there was no jurisdiction under the federal officer removal statute. *Compare Baltimore*, 2022 WL 1039685, at \*26–35, with NOR ¶¶ 67–181. Each of these grounds for removal was also recently rejected by the Tenth Circuit in another climate-change related case brought in state court under state law *See Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) (“*Boulder*”). And just this week, the Ninth Circuit

rejected all the same arguments and affirmed remand for the second time in another climate-change related case, *County of San Mateo, et al. v. Chevron Corp., et al.*, No. 18-15499, 2022 WL 1151275 (9th Cir. Apr. 19, 2022).<sup>2</sup> The remaining two arguments Defendants have raised based on the Class Action Fairness Act and fraudulent joinder, *see* NOR ¶¶ 184–210, were not at issue in *Baltimore* and thus neither an *en banc* panel of the Fourth Circuit nor the Supreme Court would consider them. These appellate decisions have been joined by a remarkable chorus of ten district courts around the country.<sup>3</sup>

*City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), does not conflict with the Fourth Circuit’s decision and does not provide any basis for a longer stay. “First and foremost, *City of New York* was in a completely different procedural posture” from both *Baltimore* and *Boulder*, because that decision considered a motion to dismiss in a case filed in federal court in the first instance, so the Second Circuit “confined itself to Rule 12(b)(6) and never addressed its own subject-matter jurisdiction.” *See Baltimore*, 2022 WL 1039685, at \*7; *see also id.* (“*City of New*

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<sup>2</sup> The First Circuit previously rejected jurisdiction under defendants’ federal officer removal theories in *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50 (1st Cir. 2020) (“*Rhode Island*”), *cert. granted, judgment vacated and remanded*, 141 S. Ct. 2666 (2021). The *Rhode Island* decision was vacated and remanded by the Supreme Court for the First Circuit to consider bases for removal it originally held it lacked jurisdiction to consider. The *Boulder*, *Baltimore*, and *San Mateo* cases were in the same procedural posture before the recent decisions in those cases affirming remand for the second time.

<sup>3</sup> In addition to the decisions affirmed in *Baltimore*, *Boulder*, *San Mateo*, and *Rhode Island*, motions to remand have been granted in California, Connecticut, Delaware, Hawaii, Minnesota, Massachusetts, and New Jersey. *See Delaware v. BP Am. Inc.*, No. CV 20-1429-LPS, 2022 WL 58484 (D. Del. Jan. 5, 2022), *appeal pending*, No. 22-1096 (3d Cir.); *City of Hoboken v. Exxon Mobil Corp.*, No. 20-cv-142343-JMV, 2021 WL 4077541 (D.N.J. Sept. 8, 2021), *appeal pending*, No. 21-2728 (3d Cir.); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal pending*, No. 21-1446 (2d Cir.); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal pending*, No. 21-1752 (8th Cir.); *City and Cnty. of Honolulu v. Sunoco LP, et al.*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *appeal pending*, Nos. 21-15313, 21-15318 (9th Cir.); *Massachusetts v. Exxon Mobil Corp.*, 462 F.Supp.3d 31 (D. Mass. 2020).

*York* does not pertain to the issues before us.”); *Boulder*, 25 F.4th at 1262 (finding no conflict with *City of New York*). Second, *City of New York* explicitly “reconcile[d] its conclusion with the parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law” precisely because “[t]he single issue before each of those federal courts was thus whether the defendants’ anticipated defenses could singlehandedly create federal-question jurisdiction” as Defendants urge here. See *City of New York*, 993 F.3d at 93–94. The court said of the “fleet of cases” granting remand, “their reasoning does not conflict with our holding.” *Id.* at 94. Finally, there is a *de minimis* likelihood the Supreme Court will eventually grant Defendants’ petition for certiorari based on a supposed conflict between *City of New York* and *Baltimore* regarding federal common law. The Court already denied the defendants’ petition for certiorari from the decision in *City of Oakland v. BP PLC*, based on the same supposed circuit split. *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom. Chevron Corp. v. City of Oakland, California*, 141 S. Ct. 2776 (2021).

The City of Annapolis has waited nearly a year to find a courtroom while appeals go forward in other cases. The appeal that formed the basis for the existing stay is now resolved, and there is no reason for additional delay. The Court should lift the existing stay and proceed with briefing the City’s motion to remand.

**Defendants’ Position:**

Proceedings before this Court should continue to be stayed pending the resolution of Defendants’ forthcoming petition for rehearing *en banc* in the Fourth Circuit and, if necessary, proceedings before the U.S. Supreme Court in *Baltimore*. A brief stay pending the ultimate resolution of the federal jurisdiction question—*i.e.*, whether this case should proceed in federal or state court—by the Fourth Circuit *en banc*, and potentially the Supreme Court, is in the interests

of justice and judicial economy, and makes practical sense. If either the Fourth Circuit *en banc* or the Supreme Court determines that removal was proper, further proceedings on Plaintiff's motion to remand in this Court will be unnecessary. At a minimum, further review and a decision from the Fourth Circuit *en banc* or from the Supreme Court on these threshold issues will provide important guidance to both the Parties and the Court. In short, the same logic that justified the current stay continues to apply and the stay should remain in place to preserve the *status quo* and allow the appellate process to reach its conclusion. As this Court and other federal district courts have explained in granting stays pending appellate review, the "legal landscape is shifting beneath [our] feet," *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469, at \*4 (D. Md. May 19, 2021), and these actions raise "weighty and significant questions that intersect with rapidly evolving areas of legal thought," *Minnesota v. Am. Petroleum Inst.*, 2021 WL 3711072, at \*2 (D. Minn. Aug. 20, 2021).

Importantly, *en banc* or Supreme Court review is all the more likely here given the current circuit split among federal courts of appeals on the threshold question of whether federal common law applies to claims, like those asserted here, that seek redress from injuries allegedly caused by global climate change. In a clear and direct conflict with the Fourth Circuit's decision in *Baltimore*, the Second Circuit held that federal common law necessarily governs climate change-related claims like those asserted in this action. This conflict is a factor that is important to both *en banc* and Supreme Court review, and is amplified by the Fourth Circuit's express language making the conflict plain. The Fourth Circuit stated that it saw "no reason to fashion any federal common law for Defendants," *Baltimore*, 2022 WL 1039685, at \*34, whereas the Second Circuit unequivocally (and correctly) held that "[s]uch a sprawling case [as this one] is simply beyond the limits of state law" and that these types of climate change-related claims "must be brought under

federal common law,” *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021). The Fourth Circuit also held that it “defies logic” to conclude that federal common law would continue to exist after being displaced by the Clean Air Act. *Baltimore*, 2022 WL 1039685, at \*10. The Second Circuit, however, held that federal common law governed plaintiff’s claims—explaining that “state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one”—and rejected Plaintiff’s opposite theory as “too strange to seriously contemplate.” *City of New York*, 993 F.3d at 99. Plaintiff’s assertion that this conflict vanishes because of the cases’ “different procedural posture” makes no sense. The Second Circuit held that climate change-related claims are necessarily and exclusively based on federal common law, whereas the Fourth Circuit held that federal common law is irrelevant because that body of law has been displaced by the Clean Air Act. The circuit split on this issue is important because if Plaintiff’s claims arise exclusively under federal common law, then this Court has federal question jurisdiction and removal is proper. *See* NOR at 15–23.

These issues present direct conflicts between the courts of appeals, and the Fourth Circuit *en banc* and/or Supreme Court may very well grant review in the *Baltimore* case again to resolve these critical issues. Plaintiff mischaracterizes the state of the law at the relevant time in claiming that the Supreme Court decided not to grant certiorari in *City of Oakland v. BP PLC* “based on the same supposed circuit split.” Since that time, the Fourth, Ninth, and Tenth Circuits have each issued further decisions on these issues that are in tension with one another and clearly reject the Second Circuit’s express holding in *City of New York* that federal law necessarily governs suits “seeking to recover damages for the harms caused by greenhouse gas emissions.” 993 F.3d at 91. Now that there is an acknowledged conflict among the circuits, Supreme Court review is far likelier

than it was at the time of the *City of Oakland* petition.

One of the bases for granting *en banc* review is if “the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a)(2). And a key consideration in granting *certiorari* is whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” U.S. S. Ct. R. 10(a). The conflict between the Second and Fourth Circuits concerns which law governs claims related to “[g]lobal warming,” a “uniquely international problem of national concern.” *City of New York*, 993 F.3d at 85. That is a quintessential “question of exceptional importance” and “important matter” that strongly favors further appellate review. Moreover, *three* more federal circuits are set to rule in the first instance on these same issues soon, increasing the likelihood of more conflicting decisions and, thus, of *en banc* and Supreme Court intervention.<sup>4</sup>

Until such time as the appellate process is complete, this Court will not have “complete guidance,” as Plaintiff asserts, on the propriety of removal. Indeed, if either the Fourth Circuit *en banc* or the U.S. Supreme Court determines that removal was proper on any of the grounds asserted by defendants in *Baltimore*, there will be no need for further briefing or proceedings on the removal issues here.

Moreover, Defendants here, as they have done recently in other courts, would raise additional removal arguments that the Fourth Circuit did not consider in *Baltimore*. See Notice of Removal, Dkt. No. 1. For instance, Defendants would submit a far more extensive evidentiary record in support of federal officer removal which demonstrates that Defendants acted under

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<sup>4</sup> Four appeals presenting this question of first impression are currently pending in the First, Third, and Eighth Circuits. See *Delaware v. BP Am. Inc.*, No. 22-1096 (3d Cir.); *City of Hoboken v. ExxonMobil Corp.*, No. 21-2728 (3d Cir.); *Minnesota v. Am. Petroleum Inst.*, No. 21-1752 (8th Cir.); *Rhode Island v. Shell Oil Prods. Co.*, 19-1818 (1st Cir.).

federal officers in performing essential tasks for the federal government. For example, Defendants have shown that they have and continue to produce and supply large quantities of highly specialized fuels that are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military. *Id.* at 88–94. As another example, Defendants will argue that there is federal jurisdiction under *Grable* because Plaintiff’s claims necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment. *Id.* 35-37. If the Fourth Circuit *en banc* or the Supreme Court concludes that removal was appropriate on any of the grounds asserted in *Baltimore*, this Court would not need to spend time and resources evaluating and ruling on these additional arguments. As a consequence, continuing the stay during the brief period necessary for resolution of the *en banc* and/or Supreme Court proceedings makes good practical sense for both the Court and the parties.

Importantly, as this Court previously recognized, “[a] district court has broad discretion to stay proceedings as part of its inherent power to control its own docket.” *Annapolis*, 2021 WL 2000469, at \*2 (citing *Landis v. North American*, 299 U.S. 248, 254 (1936)). Plaintiff implies that the Court should analyze whether to continue the stay under the standard outlined in *Nken v. Holder*, 556 U.S. 418 (2009), but that standard is inapplicable in this context. “[T]he standard for granting a stay pending appeal differs from the standard for a discretionary stay in other circumstances, which is what defendants seek here. The former resembles the familiar analysis for granting a preliminary injunction . . . [while] the standard applicable here . . . entails consideration of judicial economy and prejudice to both sides.” *Id.* at \*4.<sup>5</sup>

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<sup>5</sup> If it would be helpful to the Court, Defendants can file a formal motion to stay, which will more completely show why a further stay is appropriate, once the Fourth Circuit issues its mandate in *Baltimore*.



A brief stay pending the ultimate resolution of the federal jurisdiction question in *Baltimore* by the Fourth Circuit *en banc*, and potentially the Supreme Court, is in the interests of justice and judicial economy, as this Court previously recognized by staying this case pending the outcome of *Baltimore* in the Fourth Circuit. Moreover, Plaintiff will not be prejudiced by a brief continued stay in a case that is principally based on purported historical harm, rather than prospective harm. At most, a stay would modestly postpone Plaintiff's alleged entitlement to money damages. As this Court observed in granting the current stay, "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.* Therefore, continuing the stay during the brief period necessary for resolution of the *en banc* and/or Supreme Court proceedings is warranted.

Dated: April 21, 2022

Respectfully submitted,

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