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

ANNE ARUNDEL COUNTY, MARYLAND, Plaintiff, v. BP P.L.C.; *et al.*, Defendants.	CASE NO.: 21-cv-01323-SAG

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROCEEDINGS

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I. INTRODUCTION

Plaintiff urges this Court to disregard the very real possibility that the Supreme Court will grant the defendants' certiorari petition in *Baltimore* and instead rush to consider issues on which the Supreme Court may soon provide substantial—if not dispositive—guidance, all while ignoring the very real harms and inefficiencies the parties and the Court would suffer in doing so. That would be a mistake. It would be much more efficient and pragmatic to continue to stay proceedings here and allow the appellate process in *Baltimore* to conclude, thereby allowing the Supreme Court to decide threshold issues of removal and federal jurisdiction before having the parties here brief those issues and this Court decide them.

The Court exercised its inherent discretion to stay proceedings pending the Fourth Circuit's decision in *Baltimore*. A further stay pending certiorari is a reasonable and natural next step, and will further the interest of judicial economy, just as the prior stay did. As the Court recognized previously in *Annapolis*, "[n]o one involved in this case—neither the parties nor the Court—wishes to see months of effort rendered obsolete" by appellate review. *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021). "Such an outcome is easily prevented by a stay." *Id.* This logic still applies; and the stay should remain in place to preserve the *status quo* until the appellate process reaches its conclusion.

Plaintiff does not dispute that, if the Supreme Court were to reverse and find that removal was proper on any of the grounds presented by the defendants in *Baltimore*, removal here would necessarily be proper, and the time and effort spent by this Court and the parties in the interim would have been unnecessary. For example, if the Supreme Court determines that claims seeking redress for the alleged consequences of global climate change arise under federal law (as it has previously held on multiple occasions), removal would necessarily be warranted here. Plaintiff

instead argues that "there is no meaningful chance that the Supreme Court will grant *certiorari*." Opp. at 13. That is exactly what plaintiffs in other climate change-related cases incorrectly predicted when the first certiorari petition was pending in *Baltimore*. And not only did the Supreme Court grant certiorari in *Baltimore*, but it reversed in a 7-1 decision. Plaintiffs were wrong then and could very well be wrong again. As this Court previously noted, how the appellate process will play out is not a "foregone conclusion." *Annapolis*, 2021 WL 2000469, at *4.

There is more than a reasonable likelihood that the Supreme Court will grant review because the Fourth Circuit's decision entrenched an existing circuit split and conflicts with long-standing Supreme Court precedent. Plaintiff argues that there is no split because *Baltimore* and the Second Circuit's decision in *City of New York* were "in different procedural postures." Opp. at 9. But Plaintiff fails to address the substance of those decisions. The Second Circuit held that claims seeking redress for alleged injuries caused by global climate change are "federal claims" that "must be brought under federal common law," *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021), while the Fourth Circuit found "no reason to fashion any federal common law," *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 202 (4th Cir. 2022). Regardless of the procedural posture, those conflicting interpretations of a fundamental issue of law is the epitome of a circuit split. Indeed, the Fourth Circuit held that the Second Circuit's decision suffered from a "legal flaw," a fact Plaintiff omits in its Opposition. *Id.* at 203.

Plaintiff does not seriously contend that it would suffer prejudice from a short stay. In fact, it does not dispute, and thus concedes, that it seeks only money damages, which can be awarded at any time. As this Court previously explained in granting the stay in *Annapolis*, "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that [D]efendants' activities have allegedly helped set in motion. The urgency of the threat of climate

change writ large is distinct from [P]laintiff's interest in a speedy determination of federal jurisdiction in this suit." *Annapolis*, 2021 WL 2000469, at *4.

On the other hand, a premature and potentially erroneous remand could substantially prejudice Defendants. It is ironic that Plaintiff now claims urgency, while conceding that most of the "allegations in the County's complaint involve Defendants' conduct in the 1980s, 1990s, and earlier." Opp. at 12. And Plaintiff offers no explanation for why it waited more than *two years* to bring its lawsuit after the City of Baltimore filed its substantially similar complaint. Defendants' motion for a stay should be granted.[1]

II. ARGUMENT

A. The Court Has Broad Discretion to Stay Proceedings

In granting the previous stay in *Annapolis*, this Court recognized that "[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)). And in exercising its discretion to enter that stay, the Court applied the three factors set forth in *Landis*. *Id.* at *3. The same factors should be applied here for the simple reason that, as before, Defendants seek a stay pending an appeal in a *different* case.

Plaintiff nevertheless argues that the Court should apply the factors in *Nken v. Holder*, 556 U.S. 418, 434 (2009). But these factors apply only when a defendant is seeking a stay pending its own appeal of an order or judgment *in the same case*. The Court soundly rejected this argument once before in *Annapolis*, and it should do so once again. This Court has already held that *Nken* does not apply where, as here, a party seeks a stay pending appeal in a different case. *Annapolis*,

[1] This reply is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, insufficient service of process, or lack of service of process.

2021 WL 2000469, at *4.

Undeterred, Plaintiff asserts that the applicable standard somehow changes because Defendants in *Baltimore* were seeking a stay pending appeal in the Fourth Circuit but now are seeking a stay pending review by the Supreme Court. That is a distinction without a difference. Both phases concerned federal appellate proceedings following an adverse district court decision, review of which may have a significant impact on proceedings in this case. Plaintiff's proffered cases are all inapposite, as the district courts in those cases applied the *Nken* factors with no discussion or analysis of whether the discretionary stay factors should apply. And, again, this Court has already held that *Nken* does not apply when a party seeks a stay pending appeal in a different case. In any event, as explained below, a stay is appropriate under either standard.

B. A Discretionary Stay Is Warranted

A discretionary stay is appropriate because: (1) a stay would conserve judicial resources and promote judicial economy; (2) Defendants face serious harm absent a stay; and (3) Plaintiff will not be prejudiced by a stay. Plaintiff's arguments in response all fail.

First, **a stay will conserve judicial resources and promote judicial economy**. Plaintiff does not—and cannot—seriously dispute that this prong of the test is satisfied. Plaintiff asserts that a stay will not promote judicial economy because "the decision on removal in *Baltimore* is *already* final." Opp. at 13. But that misses the point. The federal appellate process is *not* final because the *Baltimore* defendants will seek review from the Supreme Court. And because Plaintiff concedes that this case is "strikingly similar" to *Baltimore*, Opp. at 1, "a stay would indisputably conserve judicial resources," Mot. at 4. Indeed, Plaintiff does not dispute that a decision from the Supreme Court in *Baltimore* "could be dispositive here." *Id.* at 5. Plaintiff also does not dispute that "if the Supreme Court agrees with petitioners' argument that the plaintiff's claims necessarily arise under federal law," such "a ruling would completely obviate the need for the parties to brief

the propriety of removal here and for this Court to decide these issues." *Id.* at 10.

A stay is clearly warranted under these circumstances, as it "would avoid the 'needless duplication of work and the possibility of inconsistent rulings.'" *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Securities Corp.*, 2015 WL 222312, at *4 (E.D. Va. Jan. 14, 2015) (citation omitted); *see also Stone v. Trump*, 356 F. Supp. 3d 505, 518 (D. Md. 2018) (finding that a "stay would promote judicial economy" due to the "significant overlap" between the issues presented below and on appeal); *Gross v. Pliva USA, Inc.*, 2011 WL 13223899, at *1 (D. Md. Apr. 7, 2011) (staying proceedings where, "regardless of which way the Supreme Court comes down, its opinion" in a pending case would "provide guidance as to the . . . arguments available to the Parties" and to the legal issues at play). Indeed, as explained in Defendants' opening memorandum, this is exactly why two Colorado state courts in similar climate change-related cases recently granted motions to stay pending the defendants' forthcoming petition for a writ of certiorari to the Supreme Court after the Tenth Circuit affirmed remand. Mot. at 7.[2]

Plaintiff resorts to arguing that a stay would not conserve judicial resources because "there is no meaningful chance that the Supreme Court will grant certiorari." Opp. at 13. This misses the mark because, as this Court has explained, "the likelihood of a movant's success on the merits is not relevant." *Annapolis*, 2021 WL 2000469, at *4. In any event, there is a very good chance that the Supreme Court will grant review because the Fourth Circuit's decision satisfies several of the grounds the Supreme Court considers to warrant a grant of certiorari: it squarely "conflicts with the decision of" the Second Circuit, it "conflicts with" (indeed, it is irreconcilable with) "relevant decisions of [the Supreme Court]" regarding the application of federal common law to

[2] Defendants in the *Suncor Energy (U.S.A.), Inc.* action, to which Plaintiff refers, recently filed a petition for a writ of certiorari of the Tenth's Circuit's judgment. Petition for Writ of Certiorari, *Suncor Energy (U.S.A.), Inc*. v. *Board of County Commissioners of Boulder County*, No. 19-1330 (June 8, 2022).

controversies concerning interstate pollution, and it presents "an important question of federal law that has not been, but should be, decided by [the Supreme Court]." Sup. Ct. R. 10(a), (c).

The Second Circuit unequivocally held that claims seeking damages from injuries allegedly caused by interstate emissions "demand the existence of federal common law." *City of New York*, 993 F.3d at 90. As the Second Circuit explained, claims of this sort span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* Indeed, "a mostly unbroken string of cases has applied federal law to disputes involving interstate air . . . pollution." *Id.* The Second Circuit held that New York City's "sprawling" claims, which—*like Plaintiff's here*—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law." *Id.* at 93. Accordingly, even though the claims were pleaded purportedly under state law, they necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95. In fact, the Second Circuit held that these types of claims are "the quintessential example of when federal common law is most needed." *Id.* at 92.

The Fourth Circuit reached the opposite conclusion. That court saw "no reason to fashion any federal common law for [d]efendants," and "reject[ed] [d]efendants' attempts to invoke federal common law." *Baltimore*, 31 F.4th at 203. The Fourth Circuit was not shy about expressing its disagreement with the Second Circuit, stating that its decision "suffers from *the same legal flaw* as [d]efendants' arguments." *Id.* (emphasis added). The Fourth Circuit expressly refused to "follow *City of New York*," and it "decline[d] to create a federal rule of decision" to govern plaintiff's claims. *Id.* The court concluded that the Second Circuit erred by relying on the "mostly unbroken string of cases" from the Supreme Court over the last century, *City of New York*, 993 F.3d at 91, instead of assessing whether there was a "significant conflict between the state-

law claims before it and the federal interests at stake," *Baltimore*, 31 F.4th at 204. The Fourth Circuit thus concluded that the Second Circuit "evad[ed] the careful analysis that the Supreme Court requires" to determine whether federal common law applies. *Id*.

Plaintiff attempts to explain away this clear circuit split by arguing that the cases were in a "different procedural posture." Opp. at 9. But that *procedural* difference is irrelevant to the *substantive* difference in the opinions: the Fourth Circuit saw "no reason to fashion any federal common law for [d]efendants," *Baltimore*, 31 F.4th at 202, while the Second Circuit held that similar climate change claims "must be brought under federal common law." *City of New York*, 993 F.3d at 92, 95. The decisions are thus irreconcilable on this point of controlling law, and the resulting conflict warrants Supreme Court review. *See* U.S. S. Ct. R. 10(a).

Plaintiff suggests that the fact that "two other circuit courts" have recently issued rulings similar to the Fourth Circuit's makes it less likely the Supreme Court will grant certiorari. Opp. at 9. The exact opposite is true: those decisions only further entrench the split and further dictate the need for the Supreme Court's guidance. For example, the First Circuit found it could not "rule that any federal common law controls Rhode Island's claims," *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022), while the Second Circuit held that these claims "demand the existence of federal common law," *City of New York*, 993 F.3d at 90. Plaintiff also ignores that there are multiple appeals in the same posture pending in other circuits—including the Second, Third, Eighth, and Ninth—which may deepen this already entrenched circuit split in the coming months, further increasing the likelihood of certiorari.

Moreover, Plaintiff offers no response to the fact that Supreme Court review is especially likely because "the Fourth Circuit decision on such an important federal question cannot be reconciled with Supreme Court precedent." Mot. at 7 (citing U.S.C. Ct. R. 10(c)). For more than

a century, the Supreme Court has applied uniform federal common-law rules of decision to claims seeking redress for interstate pollution. *See City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), the Supreme Court reasoned that "[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." *Id*. at 108 n.9 (citation omitted). In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court unambiguously reaffirmed that "the regulation of interstate water pollution is a matter of federal, not state, law." *Id.* at 488. And in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), the Court reiterated that federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id*. at 421. This is because, as a matter of constitutional structure, claims based on interstate and international emissions are necessarily governed *exclusively* by federal law: "the basic scheme of the Constitution . . . demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421; *see also Milwaukee I*, 406 U.S. at 105 n.6 (noting that the "basic interests of federalism . . . demand[]" this result).

Because the Fourth Circuit's decision splits with Supreme Court precedent and the law of other circuits, there is, contrary to Plaintiff's assertion, *at the very least* a "meaningful chance" that the Supreme Court will grant the defendants' petition for a writ of certiorari in *Baltimore*. *Contra.* Opp. at 13.

Second, Defendants face serious hardship absent a stay. Plaintiff does not dispute that without a stay Defendants will be required to litigate remand issues in this Court prior to the ultimate resolution of the federal jurisdiction question—an exercise that may turn out to be entirely

unnecessary if the Supreme Court concludes that there is federal jurisdiction over actions alleging harms from global climate change. Rather, Plaintiff argues that this is not a sufficient amount of harm. But courts routinely find irreparable harm where, as here, there is a substantial "risk of [the] inefficient use of the parties' time and resources," *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016), and where the parties may incur "wasteful, unrecoverable, and possibly duplicative costs," *Ewing Indus. Co. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015).

If this action is erroneously remanded to state court, Defendants will be denied their right to a federal forum—the potential consequences of which could be significant. For example, Plaintiff's Opposition implies an intent to seek discovery from Defendants as soon as possible to avoid what it calls "increasingly stale" evidence. Opp. at 11. But, if such discovery is propounded in state court, with state rules governing discovery, and later it is determined that the case and all discovery is governed by federal law and should be conducted under this Court's rules and supervision, that discovery cannot readily be undone. Whether the court in that scenario should return the parties to the *status quo ante* and determine such discovery issues for itself or should defer to the prior decision of the state court, even if it would have decided them differently, is precisely the type of "rat's nest of comity and federalism issues" that a stay would avoid. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). There is no need to risk such conflicting decisions.

Third, **Plaintiff does not seriously contest that it would not be prejudiced by a brief stay of proceedings**. As an initial matter, Plaintiff does not dispute that it seeks only monetary damages for its alleged injuries, which can, of course, be awarded at any time. Mot. at 8–9. Plaintiff also does not dispute that where a case "is still in the very early stages of litigation, there

is little prejudice to either side if the Court stays the case." Mot. at 8 (quoting *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005)). Plaintiff concedes that "[n]o responsive pleading[s] have been filed, no discovery has been propounded or responded to, [and] no initial disclosures have been made." Opp. at 3. In fact, the only potential harm Plaintiff identifies is the risk that "evidence will become increasingly stale" and "witnesses will become unavailable." *Id.* at 13. But Plaintiff does not allege (nor could it) that Defendants have failed to comply with their document preservation obligations or have otherwise failed to maintain evidence. Nor does Plaintiff identify a single witness that will become unavailable or that it urgently needs to depose. Plaintiff's vague assertions of an interest in access to discovery are insufficient. *See Strickler v. Waters*, 989 F.2d 1375, 1383 (4th Cir. 1993) ("[A] vague and conclusory allegation does not state the kind of specific injury or prejudice to [a party's] litigation."); *see also, e.g.*, *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 170 Md. App. 520, 530 (2006) (stating that "a particular and specific demonstration of fact, as distinguished from general, conclusory statements," is necessary to reveal "some injustice, prejudice, or consequential harm") (citation omitted).[3]

C. A Stay Is Warranted Under the *Nken* Factors

A stay is appropriate even under the *Nken* factors. The *Nken* factors are: "(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

[3] Regardless, a stay would not preclude Plaintiff from seeking leave to take a particular deposition to preserve testimony if circumstances show that such relief is warranted. Indeed, that is exactly what happened in a similar climate change-related case, *Commonwealth of Massachusetts v. Exxon Mobil Corp.*, No. 1984 CV 03333-BLA1 (Sup. Ct. Suffolk Cnty. Mass.). There, discovery was stayed pending appeal, but the court granted the Commonwealth's subsequent motion for leave to depose two specific elderly witnesses.

lies." 556 U.S. at 434. The final two factors "merge" when the party opposing the stay is the government. *Id.* at 435. Defendants have established that a stay is warranted under these factors.

First, as discussed above, there is a reasonable likelihood that the Supreme Court will grant defendants' certiorari petition in *Baltimore* to resolve a clear circuit spilt on an issue of significant national importance.

Second, Defendants will be irreparably harmed if they are deprived of their right to a federal forum and improperly forced to litigate this action in state court. As explained above, not only would simultaneous litigation in federal and state court be costly, burdensome and highly inefficient for both the parties and the judicial system, any decisions rendered by the state court may not be easily undone by the federal courts if the Supreme Court determines removal was proper. It was precisely for these reasons that Chief Judge Tunheim of the District of Minnesota granted a stay in a similar climate change-related case, finding that defendants "demonstrated a likelihood of irreparable harm" because of the "heightened likelihood that the state court would decide the merits of the claims or address dispositive motions before Defendants' appeal is fully exhausted." *Minnesota v. Am. Petroleum Inst.*, 2021 WL 3711072, at *3 (D. Minn. Aug. 20, 2021). That risk is equally present in this case.

Third, as this Court recognized in granting the prior stay in *Annapolis*, Plaintiff will not be harmed by a stay as "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that [D]efendants' activities have allegedly helped set in motion. The urgency of the threat of climate change writ large is distinct from [P]laintiff's interest in a speedy determination of federal jurisdiction in this suit." 2021 WL 2000469, at *4.

III. CONCLUSION

For these reasons and those set forth in the Memorandum of Law in Support of Defendants' Motion to Stay, the Court should continue to stay further proceedings in this case pending Defendants' forthcoming petition for a writ of certiorari to the Supreme Court in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644, and any subsequent merits review by that Court.

DATED: June 22, 2022

Respectfully submitted,

/s/ *David B. Hamilton*
David B. Hamilton (Bar No. 04308)
Sarah E. Meyer (Bar No. 29448)
Hillary V. Colonna (Bar No. 19704)
WOMBLE BOND DICKINSON (US) LLP
100 Light Street, 26th Floor
Baltimore, MD 21202
Telephone: (410) 545-5800
Facsimile: (410) 545-5801
Email: david.hamilton@wbd-us.com
Email: sarah.meyer@wbd-us.com
Email: hillary.colonna@wbd-us.com

Matthew J. Peters (Bar No. 21902)
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Email: matthew.peters@lw.com

Steven M. Bauer (pro hac vice)
Margaret A. Tough (pro hac vice)
Katherine A. Rouse (pro hac vice)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
Email: steven.bauer@lw.com
Email: margaret.tough@lw.com
Email: katherine.rouse@lw.com

/s/ *Ty Kelly Cronin*
Ty Kelly Cronin (Bar No. 27166)
Alison C. Schurick (Bar No. 19770)
Kyle S. Kushner (Bar No. 20305)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ P.C.
100 Light Street, 19th Floor
Baltimore, MD 21202
Telephone: (410) 862-1049
Facsimile: (410) 547-0699
Email: tykelly@bakerdonelson.com
Email: aschurick@bakerdonelson.com
Email: kskushner@bakerdonelson.com

Theodore J. Boutrous, Jr. (*pro hac vice*)
William E. Thomson (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
tboutrous@gibsondunn.com
wthomson@gibsondunn.com

Andrea E. Neuman (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
aneuman@gibsondunn.com

Jameson R. Jones (*pro hac vice*)
Daniel R. Brody (*pro hac vice*)
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140
Email: jameson.jones@bartlit-beck.com
Email: dan.brody@bartlit-beck.com

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

/s/Matthew J. Peters
Matthew J. Peters (Bar No. 21902)
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Email: matthew.peters@lw.com

Steven M. Bauer (*pro hac vice*)
Margaret A. Tough (*pro hac vice*)
Katherine A. Rouse (*pro hac vice*)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
Email: steven.bauer@lw.com
Email: margaret.tough@lw.com
Email: katherine.rouse@lw.com

Attorneys for Defendants Phillips 66 and Phillips 66 Company

Thomas G. Hungar (Bar No. 012180)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
thungar@gibsondunn.com

Joshua D. Dick (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
Facsimile: (415) 393-8306
jdick@gibsondunn.com

Attorneys for Defendants Chevron Corporation and Chevron U.S.A. Inc.

/s/ Martha Thomsen
Martha Thomsen (Bar No. 18560)
Megan H. Berge (*pro hac vice*)
BAKER BOTTS LLP
700 K Street, N.W.
Washington, DC 20001-5692
Telephone: (202) 639-7863
Facsimile: (202) 508-9329
Email: martha.thomsen@bakerbotts.com
Email: megan.berge@bakerbotts.com

J. Scott Janoe (*pro hac vice*)
BAKER BOTTS LLP
910 Louisiana Street
Houston, TX 77002
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Attorneys for Defendant Hess Corp.

/s/ Ava E. Lias-Booker
Ava E. Lias-Booker
MCGUIREWOODS LLP
500 E. Pratt Street, Suite 1000
Baltimore, MD 21202-3169
Telephone: (410) 659-4400
Facsimile: (410) 659-4599
Email: alias-booker@mcguirewoods.com

Melissa O. Martinez
MCGUIREWOODS LLP
500 E. Pratt Street, Suite 1000
Baltimore, MD 21202-3169
Telephone: (410) 659-4400
Facsimile: (410) 659-4599
Email: mmartinez@mcguirewoods.com

Brian D. Schmalzbach (*pro hac vice* pending)
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-4746
Facsimile: (804) 698-2304
Email: bschmalzbach@mcguirewoods.com

Attorneys for Defendant American Petroleum Institute

/s/ Tracy A. Roman
Tracy A. Roman, Bar Number 11245
Kathleen Taylor Sooy (*pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
Email: troman@crowell.com
Email: ksooy@crowell.com

Honor R. Costello (*pro hac vice*)
CROWELL & MORING LLP
590 Madison Avenue, 20th Fl.
New York, NY 10022
Telephone: (212) 223-4000
Facsimile: (212) 223-4134
Email: hcostello@crowell.com

Attorneys for Defendants CONSOL Energy and CONSOL Marine Terminals LLC

/s/ James M. Webster, III
David C. Frederick (*pro hac vice*)
James M. Webster, III (Bar No. 23376)
Grace W. Knofczynski (*pro hac vice*)
Daniel S. Severson (*pro hac vice*)
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
Email: jwebster@kelloghansen.com

Attorneys for Defendants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company)

/s/ Noel J. Francisco
Noel J. Francisco (Bar No. 28961)
Daniella A. Einik (Bar No. 20245)
David M. Morrell (*pro hac vice*)
J. Benjamin Aguiñaga (*pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Email: njfrancisco@jonesday.com
Email: deinik@jonesday.com
Email: dmorrell@jonesday.com
Email: jbaguinaga@jonesday.com

/s/ Thomas K. Prevas
Thomas K. Prevas (Bar No. 29452)
Michelle N. Lipkowitz (Bar No. 27188)
SAUL EWING ARNSTEIN & LEHR LLP
Baltimore, MD 21202-3133
Telephone: (410) 332-8683
Facsimile: (410) 332-8123
Email: thomas.prevas@saul.com
Email: michelle.lipkowitz@saul.com

Attorneys for Defendants Crown Central LLC, Crown Central New Holdings LLC, and Rosemore, Inc.

David C. Kiernan (*pro hac vice*)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
Email: dkiernan@jonesday.com

Attorneys for Defendant CNX Resources Corp.

/s/ Warren N. Weaver
Warren N. Weaver (CPF No. 8212010510)
WHITEFORD TAYLOR &
PRESTON LLP
7 Saint Paul Street., Suite 1400
Baltimore, MD 21202
Telephone: (410) 347-8757
Facsimile: (410) 223-4177
Email: wweaver@wtplaw.com

EIMER STAHL LLP
Nathan P. Eimer (*pro hac vice*)
Pamela R. Hanebutt (*pro hac vice*)
Lisa S. Meyer (*pro hac vice*)
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Telephone: (312) 660-7600
Email: neimer@eimerstahl.com
Email: phanebutt@eimerstahl.com
Email: lmeyer@eimerstahl.com

Robert E. Dunn (*pro hac vice*)
99 S. Almaden Blvd. Suite 642
San Jose, CA 95113
Telephone: (408) 889-1690
Email: rdunn@eimerstahl.com

Attorneys for Defendant CITGO Petroleum Corporation

/s/ Craig A. Thompson
Craig A. Thompson
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
Email: cathompson@venable.com

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Yahonnes Cleary (*pro hac vice*)
Caitlin E. Grusauskas (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3089
Facsimile: (212) 492-0089
Email: twells@paulweiss.com
Email: dtoal@paulweiss.com
Email: ycleary@paulweiss.com
Email: cgrusauskas@paulweiss.com

Attorneys for Defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation

/s/ John B. Isbister
John B. Isbister (Bar No. 00639)
Jaime W. Luse (Bar No. 27394)
TYDINGS & ROSENBERG LLP
One East Pratt Street, Suite 901
Baltimore, MD 21202
jisbister@Tydings.com
jluse@Tydings.com
Telephone: (410) 752-9700
Facsimile: (410) 727-5460

ARNOLD & PORTER KAYE SCHOLER LLP
Nancy Milburn (*pro hac vice*)
nancy.milburn@arnoldporter.com
Diana Reiter (*pro hac vice*)
diana.reiter@arnoldporter.com
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Facsimile: (212) 836-8689

Matthew T. Heartney (*pro hac vice*)
John D. Lombardo (*pro hac vice*)
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
Email: matthew.heartney@arnoldporter.com
Email: john.lombardo@arnoldporter.com

Jonathan W. Hughes (*pro hac vice*)
jonathan.hughes@arnoldporter.com
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: (415) 471-3156
Facsimile: (415) 471-3400

Attorneys for Defendants BP plc, BP America Inc., and BP Products North America Inc.

/s/ Mark S. Saudek
Mark S. Saudek
GALLAGHER EVELIUS & JONES LLP
218 North Charles Street, Suite 400
Baltimore, MD 21201
Telephone: (410) 347-1365
Facsimile: (410) 468-2786
Email: msaudek@gejlaw.com

Robert Reznick (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE, LLP
1152 15th Street NW
Washington, DC 20005
Telephone: (202) 339-8600
Facsimile: (202) 339-8500
Email: rreznick@orrick.com

James Stengel (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE, LLP
51 West 52nd Street
New York, New York 10019-6142
Telephone: (212) 506-5000
Facsimile: (212) 506-5151
Email: jstengel@orrick.com

Catherine Y. Lui (admitted *pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE, LLP
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5571
Facsimile: (415) 773-5759
Email: clui@orrick.com

Attorneys for Defendants Marathon Oil Corporation and Marathon Oil Company

/s/ Perie Reiko Koyama
Perie Reiko Koyama (CPF No. 1612130346)
PKoyama@HuntonAK.com
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
Telephone: (202) 955-1500
Facsimile: (202) 778-2201

Shawn Patrick Regan (*pro hac vice*)
SRegan@HuntonAK.com
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
Telephone: (212) 309-1000
Facsimile: (212) 309-1100

Shannon S. Broome (*pro hac vice*)
SBroome@HuntonAK.com
Ann Marie Mortimer (*pro hac vice*)
AMortimer@HuntonAK.com
HUNTON ANDREWS KURTH LLP
50 California Street, Suite 1700
San Francisco, CA 94111
Telephone: (415) 975-3700
Facsimile: (415) 975-3701

Attorneys for Defendants Marathon Petroleum Corporation and Speedway LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2022, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ *Ty Kelly Cronin*
Ty Kelly Cronin