

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

**DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER**

Defendants respectfully move for an order staying execution of the remand order in this case, pending the 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. In support of this Motion to Stay Execution of the Remand Order, Defendants rely upon and incorporate by reference their accompanying Memorandum of Law in support.

DATED: October 11, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
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ANNE ARUNDEL COUNTY, MARYLAND,

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Defendants.

CASE NO.: 21-cv-01323 SAG

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY  
EXECUTION OF REMAND ORDER**

On September 29, 2022, this Court denied Defendants' Motion to Stay Proceedings (ECF 128) and granted Plaintiff's Motion to Remand (ECF 141). ECF 151 ("Remand Order").<sup>1</sup> At the same time, the Court also stayed execution of its Remand Order for thirty days and noted that it "is not amenable to further staying its remand order on the present record." *Id.* at 20. Since that time, however, there has been a significant development that has substantially changed the circumstances here and warrants a further stay of the Remand Order.

On October 3, 2022, the Supreme Court issued an order inviting the Solicitor General to file a brief expressing the views of the United States on the petition for a writ of certiorari in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 ("*Suncor*"), a petition involving a nearly identical set of climate change-related cases that were also remanded to state court. As explained below, this development substantially increases the likelihood that the Supreme Court will grant the certiorari petition and therefore warrants a stay of remand in this case. A stay is necessary to preserve the status quo while the Supreme Court considers if it will resolve the question of whether

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<sup>1</sup> This motion 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.



lawsuits, like this one, that seek damages for the alleged effects of global climate change are governed by federal common law and properly removable to federal court.

In its September 29 Order, this Court found that “[c]ourts consider four factors when determining whether to grant a stay: (1) the movant’s likelihood of success on the merits; (2) whether denial would cause irreparable injury to the movant; (3) whether issuance of the stay will substantially injure the non-movant; and (4) where the public interest lies.” ECF 151 at 7 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). All four of these factors now weigh in favor of granting a further stay in this case.

***First, Defendants have a strong likelihood of success on the merits.*** There is a substantial possibility that the Supreme Court will grant certiorari in *Suncor* and find that these climate change-related cases are governed by federal common law and belong in federal court.

*Suncor* involves a nearly identical set of climate change-related cases seeking damages for purported localized injuries allegedly caused by global climate change from worldwide greenhouse gas emissions. In 2019, the U.S. District Court for the District of Colorado remanded the cases to state court, and the Tenth Circuit affirmed the remand earlier this year. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F. 4th 1238 (10th Cir. 2022). The defendants in those cases—including ExxonMobil, a Defendant in this case—filed a petition for a writ of certiorari on June 8, 2022, asking the Supreme Court to decide two questions: (1) “[w]hether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate” and (2) “[w]hether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.” *Suncor* Petition for a Writ of Certiorari at i. The defendants in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (“*Baltimore*”), will present *these same issues* in their petition for a writ of certiorari to the Supreme Court when they

file their petition on October 14, 2022—*just three days* from today. And, of course, if the Supreme Court grants certiorari and answers these questions in the affirmative, removal would be appropriate here and remanding the case to state court would be improper.

The Supreme Court’s order inviting the Solicitor General to provide its views on these issues in *Suncor* is significant because petitions for which the Court calls for the Solicitor General’s views are “over 46 times more likely to be granted” than the average petition.<sup>2</sup> Moreover, the United States previously has taken the position that climate change-related claims similar to the ones asserted here are properly removable because “they are inherently and necessarily federal in nature.” Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189) (citing *City of Oakland v. B.P. p.l.c.*, No. 18-16663 (9th Cir.), Dkt. 198); *see also* Transcript of Oral Argument at 31:2-12, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189) (explaining that “potentially conflicting” state law is inappropriate because the case “depends on alleged injuries . . . caused by emissions from all over the world”); *Oakland.*, Dkt. 198 at 2 (“A putative state-law claim is also removable if alleged in a field that is properly governed by federal common law such that a cause of action, if any, is necessarily federal in character.”). And the United States, under the Obama Administration, warned of the risk that common-law suits targeting greenhouse gas emissions might interfere with federal regulations, noting that the “EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits” by “actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources of greenhouse gases will be regulated.” Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners at 45–46, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (No. 10-174) (2011 WL 1393805). The

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<sup>2</sup> David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 274 (2009).

conflict between the United States' previous positions that claims asserting injuries from global climate change are inherently federal and the position of the Tenth Circuit in *Suncor* (and the Fourth Circuit in *Baltimore*) further weighs in favor of Supreme Court review.

These are precisely the types of "compelling reasons" that support a grant of certiorari by the Supreme Court. *See* Sup. Ct. R. 10. Indeed, the Supreme Court's order makes clear that the question is "of sufficient public concern" for the Court to consider the government's views "relevant to [its] consideration of the case." Stephen M. Shapiro et al., *Supreme Court Practice* 6-163 (11th ed. 2019). Accordingly, there is a significant probability that the Supreme Court will grant certiorari and decide the issues presented in *Suncor* (and the forthcoming petition in *Baltimore*).

There is also a strong likelihood that the Supreme Court will reverse the Fourth and Tenth Circuits' decisions and find that these types of climate change-related cases are necessarily and exclusively governed by federal common law and, therefore, removable to federal court. Although a number of circuits that have addressed these questions have concluded the opposite, those decisions stand in stark contrast to other court of appeals decisions. For example, the Second Circuit has squarely held, in reliance on a long line of Supreme Court authority, 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). If the Supreme Court were to adopt the Second Circuit's approach, the claims alleged here would be removable to federal court. *See, e.g., In Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 928 (5th Cir. 1997) (holding that "removal is proper" when nominally state law claims in fact "ar[i]se under federal common law"); *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 745 (E.D. Va. 2014) ("[A] case is properly removed if federal common law governs it."). And the fact that the Supreme Court has now issued an order seeking the views of the Solicitor General demonstrates that multiple Justices are interested in these issues and that the Court may reverse the Tenth and Fourth Circuits. The

Supreme Court's order makes evident that Defendants have a strong likelihood of success sufficient to justify a stay.

***Second, Defendants will be irreparably harmed absent a stay.*** In its prior Order, the Court held that “mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” ECF 174 at 8 (quoting *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970)). While it is true that simultaneous litigation in federal and state court would be costly and burdensome, that is not the only harm Defendants would suffer without a stay. Defendants would suffer the very real risk of being denied their *right* to a federal forum. Congress has bestowed on Defendants the right to litigate in federal court “actions that originally could have been filed in federal court.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Without a stay, Defendants could be deprived of that right and improperly forced to litigate this action in state court, even if they prevail before the Supreme Court. That constitutes irreparable harm. Indeed, Chief Judge Tunheim of the District of Minnesota granted a stay in a similar climate change-related case on this ground, 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. Moreover, simultaneous litigation would be highly inefficient for both the parties and the judicial system—and any state court litigation would be entirely unnecessary—if the Supreme Court concludes that there is federal jurisdiction over actions alleging harms from global climate change.

Even if the merits are not ultimately decided in state court while these issues are still before the Supreme Court, the potential consequences of litigating in state court while the appeal is pending could be significant and present irreparable harm. As then-Chief Judge Leonard P. Stark of the District of Delaware (now Circuit Judge) found in granting defendant’s motion to stay pending appeal in another

similar climate change-related case, defendants “demonstrated that they would likely suffer irreparable harm pending appeal,” as the appeal of the remand order is “guaranteed by statute,” and that right “could be effectively eliminated (or at least seriously jeopardized) by a premature remand, causing irreparable harm.” *State of Delaware v. BP America, Inc., et al.*, No. 20-cv-1429 (D. Del. Feb. 8, 2022), ECF No. 134 at 5. The court there explained that, if remanded, the state court could “rule on various substantive and procedural motions, including dispositive motions that require the adjudication of the parties’ claims and defenses.” *Id.* at 6. “There may be no practical way to ‘un-ring the bell’ of the state court’s intervening rulings,” the court continued, making “the likelihood of irreparable injury . . . real and not—as Plaintiff contends—‘highly speculative.’” *Id.* at 6. A stay is thus warranted to prevent Defendants’ appeal from being overtaken by state-court litigation and rendered ineffective—as well as to prevent needlessly expending substantial sums of money and wasting limited judicial resources.

***Third and fourth, a stay would not injure Plaintiff and a stay is in the public interest.*** Where, as here, the government is the opposing party, the third and fourth stay factors (*i.e.*, harm to opposing party and the public interest) merge and should be considered together. *Nken*, 556 U.S. at 435; *see also Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808, at \*12 (D. Md. May 30, 2019). Here, a stay would not prejudice Plaintiff’s ability to seek damages or other relief. Indeed, Plaintiff does not dispute that it seeks only monetary damages for its alleged injuries, which can, of course, be awarded at any time. A stay would in fact benefit Plaintiff by avoiding costly and potentially wasteful state court litigation. If Plaintiff is correct that these suits belong in state court, “a stay w[ill] not permanently deprive [them] of access to state court.” *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int’l LLC*, 2016 WL 3346349, at \*4 (E.D. Va. June 16, 2016). And Plaintiff’s ability to seek the relief it desires will not be prejudiced by a limited delay.

A stay would also “conserv[e] judicial resources and promot[e] judicial economy” by

unburdening the state court of potentially unnecessary litigation. *See United States v. 2366 San Pablo Ave.*, 2015 WL 525711, at \*5 (N.D. Cal. Feb. 6, 2015) (finding “a cognizable public interest in promoting judicial economy”); *Scott v. Family Dollar Stores, Inc.*, 2016 WL 4267954, at \*1 (W.D.N.C. Aug. 11, 2016) (granting a stay based on judicial economy). A stay is thus in the public interest.

\* \* \* \* \*

Defendants appreciate that this Court previously stated it was not amenable to a further stay on the “present record.” But, as explained above, circumstances have now changed significantly in a manner that warrants a stay to allow the Supreme Court the opportunity to provide critical, and potentially dispositive, guidance on these threshold issues of federal jurisdiction. For these reasons, execution of the Remand Order should be stayed pending the 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. If this Court is nevertheless inclined to deny this Motion, Defendants alternatively request that the Court enter a stay of the Remand Order to allow time for Defendants to seek a stay from the Fourth Circuit and for the Fourth Circuit to determine whether stay of the Remand Order is appropriate under these circumstances.<sup>3</sup>

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Respectfully submitted,

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<sup>3</sup> *Condon v. Haley*, 21 F. Supp. 3d 572, 588-89 n.15 (D.S.C. 2014) (denying motion to stay pending appeal, but granting stay “to allow the Fourth Circuit to receive Defendant’s . . . petition for an appeal stay and to consider that request in an orderly fashion” to ensure that “this court’s colleagues on the Fourth Circuit [have] a reasonable opportunity to receive and consider Defendant[’s] anticipated petition”); *Columbus-Am. Discovery Grp. Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 795 F. Supp. 2d 397, 401-02 (E.D. Va. 2011) (granting similar stay).

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of October 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

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