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 EXECUTION OF REMAND ORDER

Plaintiff urges this Court to disregard the Supreme Court's October 3, 2022 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*"), and instead rush to send this case back to State court before the Supreme Court can provide substantial—if not dispositive—guidance on the fundamental and threshold question of whether federal courts have jurisdiction over these cases.[1] In doing so, Plaintiff ignores (or at least disregards) the real and irreparable harms Defendants will likely suffer, and the inefficiencies and waste of resources the parties and the Court would incur absent a stay. Contrary to Plaintiff's position, the Supreme Court's Order is a material and significant development that substantially increases the likelihood the Supreme Court will grant certiorari and resolve these issues in Defendants' favor. Accordingly, a further stay of the execution of the Remand Order is warranted.

First, Defendants have a strong likelihood of success on the merits. Although Plaintiff

[1] This reply brief 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.

contends that Defendants' motion was filed "based on a materially identical record," Opposition to Mot. to Stay at 1, ECF 158 ("Opp."), Plaintiff does not dispute, nor could it, that the likelihood the Supreme Court will grant defendants' petition in *Suncor* is now *more than 46 times greater* than petitions when the Supreme Court does not invite the Solicitor General's views.[2] An order requesting the views of the Solicitor General is exceedingly uncommon and demonstrates that at least four Justices have a serious interest in the issues presented *and* believe the issues are worthy of further consideration by the Court. In fact, Plaintiff completely ignores that, of the nearly 1,000 petitions addressed by the Court in its October 3, 2022 Order List, the Court asked for the Solicitor General's views *in only four* cases. Plaintiff concedes that the merits of a further stay depend on the "grant of a petition for certiorari," Opp. at 1, and the simple, and undisputed, fact is that such a grant is now *significantly* more likely to occur than it would have initially appeared to this Court when deciding whether to grant Defendants' initial motion to stay. Plaintiff does not dispute, and thus concedes, that a grant is 46 times more likely when the Court seeks the views of the Solicitor General, and that alone should be dispositive here.

Plaintiff's attempts to evade this significant development are not persuasive. As an initial matter, Plaintiff's statement that "district courts within [a] circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority" is a red herring. Opp. at 10 (quoting *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000)). Defendants are not asking this Court to decline to follow *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), before the Supreme Court has set aside that decision. Rather, Defendants are asking for a modest stay to await anticipated guidance from the Supreme Court. Stated another way, Defendants are asking the Court to refrain from acting—they are *not* asking the

[2] 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).

Court to act contrary to Circuit precedent. Indeed, Plaintiff acknowledges that any stay would be relatively brief because "assuming the *Boulder* petition is granted, the Supreme Court will likely rule this term or next." Opp. at 4-5.

Plaintiff's suggestion that the Supreme Court's Order is not material because the Solicitor General *might* not recommend that the Court grant certiorari also misses the mark. *Id.* at 10-11. For starters, Plaintiff engages in the exact type of speculation about future events for which it criticizes Defendants. The United States may well take the same views on these issues that it has repeatedly taken in nearly identical cases. Indeed, Plaintiff does not, and cannot, dispute that the United States has taken positions supporting Defendants' positions on certiorari *and* the merits. For example, the United States has unequivocally stated that these types of climate change-related claims 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). Similarly, the United States has explained that applying "potentially conflicting" state law would be inappropriate because the case "depends on alleged injuries . . . caused by emissions from all over the world." 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). And, even more to the point, the United States has already told the Ninth Circuit that: "[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." *City of Oakland*, No. 18-16663, Dkt. 198 at 2 (emphasis added). Plaintiff merely speculates that the Solicitor General's office might change the government's position from that taken under previous administrations. But even if it did, the switch itself would also weigh in favor of Supreme Court review, as it would signal that judicial intervention and resolution of these threshold issues of federal jurisdiction in cases of national importance is necessary. Thus, no matter what the

Solicitor General does, there is a strong likelihood that the Supreme Court will grant certiorari.

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. 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 v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021). 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.* Consistent with that reasoning, "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 nominally pleaded under state law, they necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95. The Second Circuit held that these types of claims are "the quintessential example of when federal common law is most needed." *Id.* at 92. That decision contrasts sharply with the Tenth Circuit's decision in *Suncor* and the Fourth Circuit's decision in *Baltimore.*

Plaintiff attempts to minimize this clear circuit conflict by arguing that those cases were in a "different procedural posture." Opp. at 8. But that *procedural* difference is irrelevant to the *substantive* difference in the opinions: the Fourth Circuit, for example, saw "no reason to fashion any federal common law for [d]efendants," *Baltimore*, 31 F.4th at 202, while the Second Circuit squarely held that similar climate change-related claims "*must* be brought under federal common law," *City of New York*, 993 F.3d at 95 (emphasis added). The decisions are thus irreconcilable on this point of controlling law, and the resulting conflict warrants Supreme Court review. *See* U.S. S. Ct. Rule 10(a).

Plaintiff argues that "[t]he Fourth Circuit and every other circuit court to consider the issue have held that removal jurisdiction does not exist in similar climate deception cases," such that Defendants fail to show a likelihood of success if certiorari is granted. Opp. at 8-9. That is exactly what plaintiffs in other climate change-related cases incorrectly predicted when the first certiorari petition was pending in *Baltimore*. Not only did the Supreme Court grant certiorari in *Baltimore*, but also it reversed in a 7-1 decision. Plaintiffs were wrong then and could very well be wrong now. As this Court previously noted, how the appellate process will play out is not a "foregone conclusion." *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021).

Second, Defendants will be irreparably harmed absent a stay. Plaintiff acknowledges that to show irreparable harm, Defendants need only show that the threatened harm is "at least probable, not merely possible." Opp. at 3 (citing *Nken*, 566 U.S. at 434-35). Defendants have done so. Nevertheless, Plaintiff seeks to have this Court require that Defendants prove with virtual certainty that they will suffer those harms. But that is not the standard. If it were, motions to stay would almost never be granted. Defendants have shown that irreparable harm is *at least probable*.

If this action is erroneously remanded to state court, Defendants will be denied their right to a federal forum—the potential consequences of which would likely be significant. Defendants functionally could lose their right to have this action litigated in the federal forum it deserves. Mot. at 5. Plaintiff cannot dismiss this very real possibility by referring to it as "speculative" or relying on the pace of a different case, in a different court, under different circumstances, to say that such harm is unlikely to occur. Opp. at 4-5. There is no guarantee that this case will move at the same pace as any other. In fact, for these reasons Chief Judge Tunheim of the District of Minnesota stayed 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).

Significantly, certain aspects of state court litigation could not meaningfully be undone if the case were later removed to federal court. For example, if discovery is propounded in state court, with state rules (instead of federal rules) governing discovery, and it is later determined that the case and all discovery are governed by federal law and should be conducted under this Court's rules and supervision, that discovery cannot readily be undone. Indeed, documents produced and deposition testimony elicited in state court could already have been made available to the world in public filings and thus cannot be clawed back. And even if some discovery materials have not become public, and the federal court orders that they be returned or destroyed, there is no practical way that a court can stop a party from using the information it has learned from those documents and testimony. How, for example, would this Court be able to unwind a party's memory of documents and deposition testimony that it received under the state court process? While this Court could nullify the state court's orders allowing any such discovery to proceed, it could not reverse or eliminate the litigation advantages either party may have received under those state court orders.[3]

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 is designed to avoid. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). "District courts have been sensitive to concerns about forcing

[3] Plaintiff's external counsel, Sher Edling LLP, represents many other state and local governments across the country in similar climate change lawsuits. There would be no practical way of preventing Sher Edling from using the information it learns from documents produced in *this* litigation to its advantage in those other lawsuits. Indeed, Sher Edling has recently made clear that it seeks to use discovery obtained in one climate change lawsuit pending in state court in other matters in which it represents different clients in different jurisdictions. *See* Pls.' Position Stmt. on Protective Order at 1, *City & County of Honolulu v. Sunoco LP*, Civ. No. 20-380 (Haw. Cir. Ct. Oct. 21, 2022), Dkt. No. 771.

parties to litigate in two forums simultaneously when granting stays pending appeal." *Id.* Courts therefore 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"). There is no need to risk such conflicting decisions here.

Plaintiff's assertion that a federal court "*could* modify or dissolve any prior state court orders" if the Supreme Court concludes there is federal jurisdiction is misleading. Opp. at 6 (emphasis added). The federal court would need to reconsider *each and every* state court ruling and decide whether those rulings should remain effective because any orders by the state court may be void if the Supreme Court determines that the state court did not have jurisdiction. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)) ("Without jurisdiction the court cannot proceed at all in any cause."); *Fooks' Ex'rs v. Ghingher*, 172 Md. 612 (1937) ("The judgment or decree o[f] a court which had no jurisdiction to enter it is void") (internal quotation marks and citations omitted); *Bereska v. State*, 194 Md. App. 664, 686 (2010) ("[A]ny action taken by a court while it lacks fundamental jurisdiction is a nullity, for to act without such jurisdiction is not to act at all") (internal quotation marks and citations omitted). Thus, Plaintiff is wrong to suggest that "interim proceedings in state court may well advance resolution of the case in federal court." Opp. at 6.

Plaintiff does not dispute that without a stay, Defendants will be required to litigate in the state 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. Defendants cannot recover the substantial non-monetary company resources (including significant time and effort by company personnel) that they would need

to dedicate to such proceedings, and they are unlikely to recover any of their burden and expense incurred from potentially needless litigation in state court from the governmental Plaintiff in this case. 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); *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 and fourth, a stay would not injure Plaintiff and a stay is in the public interest. As an initial matter, Plaintiff largely concedes that it seeks *only monetary damages* for its alleged injuries, which can, of course, be awarded at any time. Opp. at 13-14. Plaintiff's footnote stating that it "requests abatement of the alleged nuisances," *id.* at 14, is disingenuous at best, because Plaintiff fails to explain that what it really seeks by "abatement" is actually just an abatement fund, which is functionally monetary damages. Indeed, Plaintiff has disavowed seeking injunctive relief. If a court (either federal or state) ultimately determines that Defendants are liable (which it should not), the award of money damages that Plaintiff seeks could be made at any time.

Plaintiff devotes much of its Opposition to describing the alleged harms it may suffer as a result of global climate change. *See, e.g.*, *id.* at 13-14. But as this Court has already explained, "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly help 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. Accordingly, Plaintiff cannot plausibly claim any meaningful harm from a brief stay, whereas a premature and potentially erroneous remand could substantially prejudice Defendants. Moreover, Plaintiff's recent and belated cries for "urgency" ring hollow and

must be rejected—Plaintiff's own actions in waiting years to file the present lawsuit undercut any claim of harm from a stay. In fact, Plaintiff waited to file this lawsuit until *more than two and a half years* after the City of Baltimore filed its substantially similar, and well publicized, lawsuit.

Plaintiff asserts that "this case has yet to proceed beyond its initial stages." Opp. at 14. But that is exactly the point: 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." *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005). The *only* potential harm Plaintiff identifies is "the risk of permanently thwarting the County's access to discovery from elderly witnesses, whose memories will likely fade, and in the form of documentary evidence dating back decades." Opp. at 12. 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 who will become unavailable or which it urgently needs to depose, nor does it explain why ordinary document preservation mechanisms would be insufficient to mitigate these supposed risks. 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). 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.[4]

[4] 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.

* * * * *

For these reasons and those in the Memorandum of Law in Support of Defendants' Motion to Stay, the Court should stay execution of the Remand Order in this case pending Defendants' petition for a writ of certiorari to the Supreme Court in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 22-361 (which was filed on October 14, 2022 and docketed on October 18, 2022), and any subsequent merits review by that Court.

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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)
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

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
Email: tboutrous@gibsondunn.com
Email: 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
Email: 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* pending)
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, D.C. 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, Texas 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, Maryland 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, Maryland 21202-3169
Telephone: (410) 659-4400
Facsimile: (410) 659-4599
Email: mmartinez@mcguirewoods.com

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

Attorneys for American Petroleum Institute

/s/ Tracy A. Roman
Tracy A. Roman (Bar No. 11245)
Kathleen Taylor Sooy (*pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
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 CONSOL Energy Inc. 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, D.C. 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
JONES DAY
Noel J. Francisco (Bar No. 28961)
Daniella A. Einik (Bar No. 20245)
David M. Morrell (*pro hac vice*)
J. Benjamin Aguiñaga (*pro hac vice*)
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: njfrancisco@jonesday.com
E-mail: deinik@jonesday.com
E-mail: dmorrell@jonesday.com
E-mail: 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, Maryland 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.

/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

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

Attorneys for Defendant CNX Resources Corp.

/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 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, Maryland 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 (*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, NW
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 24th 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*
Ty Kelly Cronin