UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND

Plaintiff,

vs.

CHEVRON CORP.;
CHEVRON U.S.A. INC.;
EXXONMOBIL CORP.;
BP P.L.C.;
BP AMERICA, INC.;
BP PRODUCTS NORTH AMERICA, INC.;
ROYAL DUTCH SHELL PLC;
MOTIVA ENTERPRISES, LLC;
SHELL OIL PRODUCTS COMPANY LLC;
CITGO PETROLEUM CORP.;
CONOCOPHILLIPS;
CONOCOPHILLIPS COMPANY;
PHILLIPS 66;
MARATHON OIL COMPANY;
MARATHON OIL CORPORATION;
MARATHON PETROLEUM CORP.;
MARATHON PETROLEUM COMPANY LP;
SPEEDWAY LLC;
HESS CORP.;
LUKOIL PAN AMERICAS, LLC;
GETTY PETROLEUM MARKETING, INC.;
AND
DOES 1 through 100, inclusive,

Defendants.

Case Number: 1:18-cv-00395-WES-LDA

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO EXTEND THE TEMPORARY STAY OF THE REMAND ORDER PENDING APPEAL

[Removal from the Providence Superior Court of Rhode Island, C.A. No. PC-2018-4716]

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I. INTRODUCTION

"Because there is no federal jurisdiction under the various statutes and doctrines adverted to by Defendants," this Honorable Court granted the State's Motion to Remand. ECF No. 122 (Remand Order). In moving to extend the temporary stay of the Court's remand order, Defendants rehash their rejected arguments. The exact same arguments in support of issuing a stay, however, have very recently been considered and denied by another district court. *See Mayor & City Council of Baltimore v. BP P.L.C.* (hereinafter, "*City of Baltimore*"), No. ELH-18-2357, 2019 WL3464667 (D. Md. July 31, 2019) (Order Denying Motion to Stay). In *City of Baltimore*, the court found the defendants' arguments "unavailing" at best. *Id.* at *5, & n.2. So too here. Defendants recycle three main arguments in the instant motion; they are likewise insufficient to meet the heavy burden required for a stay.

First, Defendants contend that a stay should issue because they are likely to succeed on their appeal from this Court's remand order, based on the incorrect assumption that all of their rejected grounds for removal are reviewable on appeal. However, the majority of circuits have held that only the issue of federal officer removal would be subject to review. And, as this Court previously found, Defendants are not likely to succeed on federal officer removal jurisdiction because there is simply no causal nexus that supports Defendants' federal officer arguments. Furthermore, even if the Court reaches Defendants' other purported bases for federal removal jurisdiction, Defendants have no substantial likelihood of securing reversal.

Second, Defendants' assertion that they will be irreparably harmed if litigation proceeds in state court pending appeal is just as unavailing, speculative, and disingenuous as the District of Maryland found them in a nearly identical motion. *Id.* at *5.

Third, Defendants argue that the balance of harm tilts in their favor. Not so; it tips decidedly in the State's favor. Further delay of this litigation favors denial of a stay, particularly given the weakness of Defendants' chance of appellate success, the seriousness of the State's allegations, and the importance of advancing the State's claims. The Court should deny the requested stay.

II. BACKGROUND

On July 2, 2018, Plaintiff the State of Rhode Island filed its complaint in state court against 26 oil and gas companies. The complaint alleges that Defendants have substantially harmed the State through, among other activities, promoting, marketing, and selling fossil fuel products all while deceiving customers and the public about their products' climate-related hazards. Compl. ¶¶ 1–8. The State asserts Rhode Island common law causes of action for public nuisance, strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, impairment of public trust resources, and violations of Rhode Island's Environmental Rights Act. *Id.* ¶¶ 225–315.

On July 13, 2018, Defendant Shell Oil Products Company ("Shell") removed the action to this Court, purporting to raise seven separate grounds for removal. ECF No. 1 (Notice of Removal). One of the seven asserted grounds was federal officer removal under 28 U.S.C. § 1442. *Id.* at 6, ¶ 9. On July 20, 2018, Defendant Marathon Petroleum Company filed a supplemental notice of removal joining Shell's removal and adding admiralty jurisdiction as a supposed basis for removal. ECF. No. 156 (Supplemental Notice of Removal) ¶ 5.

The State moved to remand on August 18, 2018. ECF No. 102-2 (Motion to Remand). On July 22, 2019, this Court granted the State's motion, allowing a temporary stay for the parties to brief and the Court to decide whether a stay pending appeal is warranted. ECF No. 122 (Remand

Order). On August 9, 2019, Defendants filed the instant motion to extend the Court's interim stay. ECF No. 126 (Motion to Stay, hereinafter "Mot.").

III. ARGUMENT

A. Defendants Do Not Meet the Heavy Burden Required to Stay this Case

A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review," and as such "is not a matter of right," but "is instead 'an exercise of judicial discretion,'" with the "party requesting a stay bear[ing] the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 423, 427, 433–34 (2009) (citations omitted). Defendants bear a "heavy burden" in seeking this "extraordinary relief." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971).

Defendants "must make the following four showings to secure a stay: '(1) a *strong showing* that [they are] likely to succeed on the merits, (2) a showing that unless a stay is granted [they] will suffer irreparable injury, (3) a showing that no substantial harm will come to the other interested parties, and (4) a showing that a stay will do no harm to the public interest.'" *Rio Grande Comty. Health Ctr., Inc. v. Armendariz*, 792 F.3d 229, 231 (1st Cir. 2015) (emphasis added) (denying motion to stay where the plaintiff did not satisfy these four elements and quoting *Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of Com. of Puerto Rico*, 818 F.2d 1034, 1039 (1st Cir. 1987)). The first two factors—likelihood of success and potential irreparable injury—are the "most critical." *Nken*, 556 U.S. at 434.

Defendants are unlikely to succeed on the merits of their appeal, as only one ground for removal—federal officer jurisdiction—is even reviewable by the Court of Appeals. Even if the entire Remand Order were reviewable, the First Circuit is likely to follow this Court's well-reasoned decision regarding Defendants' scattershot attempts to grasp at federal jurisdiction. And

even regardless of the merits of the appeal, a stay is not warranted because Defendants will not be irreparably harmed by proceeding in state court during the pendency of the appeal, but the State would continue to be harmed by further delay.

B. Defendants Are Not Likely to Succeed on Appeal

To obtain a stay, Defendants must first make "a *strong showing* that [they are] likely to succeed on the merits" of their appeal. *Rio Grande*, 792 F.3d at 231; *see also United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (defendant must demonstrate that "there is a *strong likelihood* that the issues presented on appeal could be rationally resolved" in its favor). "It is not enough that the chance of success on the merits be better than negligible," and "more than a mere possibility of relief is required." *Nken*, 556 U.S. at 434 (citations and punctuation omitted). Defendants cannot meet this burden.

1. The Clear Majority Rule Limits Appellate Review to Removal Jurisdiction Under the Federal Officer Provision of Section 1447(d)

In general, the removal statute strictly prohibits review of orders granting remand:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d). Although § 1447(d) allows Defendants to appeal this Court's rejection of federal officer removal, raising a federal officer argument does not beget appellate rights to *other* rejected removal grounds that are explicitly non-reviewable.

Although to the State's knowledge the First Circuit has not addressed this precise issue, the Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits have all found that appeal of the enumerated exceptions listed in § 1447(d) does not render reviewable *other* asserted bases removal. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Baasch*, 644 F.2d 94, 96–97 (2d Cir. 1981)

("Insofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a), it is dismissed for want of appellate jurisdiction."); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3rd Cir. 1997) (dismissing § 1441 appeal arguments "for want of appellate jurisdiction" based on "clear text of § 1447(d)"); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) ("Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)."); *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) (§ 1447(d) precluded the court from considering whether removal was proper under federal common law, and reviewing only removal under the federal officer statute and Class Action Fairness Act); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (limiting review to basis for removal for which § 1447(d) authorized appeal); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (dismissing appeal based on §§ 1441 and 1447(c), but deciding whether removal was proper pursuant to the § 1443 exception).[1]

The most recent case to affirm this interpretation of § 1447(d)—a case involving the exact removal-related issues presented here—is the District of Maryland's denial of the defendants' motion to stay in the City of Baltimore's case for climate change-related damages against many of the same defendants here. *See City of Baltimore*, 2019 WL3464667, at *4 (Order Denying Motion to Stay) ("[When] a case that was removed on several grounds is remanded, appellate jurisdiction of the remand extends only to those bases for removal that are reviewable." (citing *Lee v. Murraybey*, 487 F. App'x 84, 85 (4th Cir. 2012))). This is in accord with the purpose of prohibiting appellate review of remand orders. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 230, 237 (2007).

[1] *But see Lu Junhong v. Boeing Co.* ("*Lu Junhong*"), 792 F.3d 805, 811 (7th Cir. 2015); *Decatur Hosp. Auth. v. Aetna Health, Inc.* ("*Decatur*"), 854 F.3d 292 (5th Cir. 2017); and *Mays v. City of Flint, Mich.* ("*Mays*"), 871 F.3d 437, 442 (6th Cir. 2017), *cert.denied sub nom. Cook v. Mays*, 138 S. Ct. 1557 (2018). As explained in section III(B)(3), *infra*, these cases rest on either faulty reasoning or no reasoning at all.

Defendants' assertion that this Court's entire Remand Order is reviewable on appeal merely because they included a federal officer argument—an argument that this Court and two other district courts have all rejected on the merits —is not supported by their proffered authorities, which represent a minority position among the courts of appeals.

2. Nothing in *American Policyholders* Supports Appellate Review of Purported Bases of Removal Jurisdiction Beyond the Federal Officer Issue

The only First Circuit authority that Defendants advance—relegated to a footnote in their motion—is inapt. *See* Mot. at 4 n.2; *American Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256 (1st Cir. 1993). In *American Policyholders*, the First Circuit reviewed a district court's order granting a motion to dismiss on the merits pursuant to Fed. R. Civ. P. 54(b), *not* an order granting remand under § 1447. *Id.* at 1258. Indeed, the court neither discussed nor even mentioned the limitations on appellate review in § 1447(d) that apply here. *See generally id.*

Unremarkably, the court evaluated subject matter jurisdiction—as every federal court must do. *See id.* at 1258–59; *see also Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 511 (1884) (A federal court must "deny its own jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record."); *In re Recticel Foam Corp.*, 859 F.2d 1000, 1002 (1st Cir. 1988) ("It is too elementary to warrant citation of authority that a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting."); *In re V&M Management, Inc.*, 321 F.3d 6, 7 (1st Cir. 2003) (When an "argument attacks the lower court's subject matter jurisdiction, [the appellate court] not only [has] jurisdiction to review but [is] obligated to do so."); *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986) ("Inasmuch as federal courts are courts of limited jurisdiction, the court may and, in fact, has an obligation to inquire into its jurisdiction sua sponte.").

Moreover, in *American Policyholders*, the court noted that the underlying removal notice mentioned 28 U.S.C. § 1441 (federal question) as well as § 1442 (federal officer) and determined that neither gave the court federal jurisdiction. *American Policyholders*, 989 F.2d at 1258-1263. The court then examined "out of an abundance of caution" whether any other basis supported jurisdiction and found that none did. *Id.* at 1263–64. The court vacated the lower court's dismissal and ordered the matter remanded. *Id.* at 1264. That is, in *American Policyholders* the court of appeals appropriately reviewed *sua sponte* whether federal court jurisdiction existed in a case where the district court (aided by the agreement of the parties) asserted jurisdiction existed. Such review is a far cry from examining on appeal purported grounds for jurisdiction following an order granting remand, where Congress has expressly provided that there shall be no review. 28 U.S.C. § 1447 (d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."). *American Policyholders* is inapposite.

3. Defendants' Other Authorities Do Not Support Appellate Review of Issues Beyond Federal Officer Jurisdiction

Defendants' repeated reliance on *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 865 F.3d 181, 185–86 (4th Cir. 2017), *see* Mot. at 2, 15, 16, 17, is also unavailing. In *Northrop Grumman*, the Fourth Circuit had jurisdiction over the appeal of a remand order because federal officer jurisdiction was the *only* asserted basis for removal, and the court reviewed only that ground. *Id.* ("We review de novo the district court's decision granting a motion to remand for lack of jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442."). Here, the issue is § 1447(d)'s express prohibition on appellate review of *other* purported bases for removal jurisdiction.

Defendants' argument that a circuit split on the issue itself provides a basis for a stay is also rebutted by the authority they cite for the proposition, *In re Cintas Corp. Overtime Pay*

Arbitration Litig. ("*In re Cintas*"), No. M06-CV-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007). *In re Cintas* only addressed whether a circuit split is relevant for purposes of certifying an order for interlocutory appeal where federal subject matter was potentially lacking in more than 70 related cases. 2007 WL 1302496, at *2. Even then, the Ninth Circuit certified for appeal an issue that was clearly split two–two. *Id*. Here of course, the circuits have reached an overwhelming consensus against Defendants' position. *See supra* at 5 (collecting Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuit authority limiting appellate review to bases for removal for which § 1447(d) authorizes appeal).

Defendants point to three cases that expanded the scope of review beyond the issue of federal officer jurisdiction. *See* Mot. at 4–7; *see also Lu Junhong*, 792 F.3d at 811; *Decatur*, 854 F.3d 292; *Mays*, 871 F.3d at 442. These cases represent not only the clear minority position, but are poorly reasoned (if reasoned at all).

Decatur and *Lu Junhong* allowed review of additional bases for jurisdiction based explicitly—and exclusively—on a misreading of *Yamaha Motor Corp., U.S.A. v. Calhoun* ("*Yamaha*"), 516 U.S. 199 (1996). *See Lu Junhong*, 792 F.3d at 811–12; *Decatur*, 854 F.3d 292, 296 (quoting *Lu Junhong*). *Yamaha*, however, did not involve a remand order, but an order certifying interlocutory appeal under 28 U.S.C. § 1292(b). That provision allows discretionary review of interlocutory orders, certified by the district court as presenting a "controlling question of law as to which there is substantial ground for difference of opinion." *Yamaha*, 516 U.S. at 205; 28 U.S.C. § 1292(b). Based on § 1292(b)'s plain text, the Supreme Court determined that courts of appeals may exercise jurisdiction over any question "fairly included within the *certified* order," and jurisdiction was "not tied to the particular [controlling question of law] formulated by the district court." *Id.* at 205 (emphasis added). *Yamaha*'s reasoning makes sense in the context of §

1292(b), under which the district court may certify virtually any non-final order for appeal at any point in the litigation and limiting review to the particular "controlling question of law"—as formulated by the district court—that could create opportunities for repeated appeals, thereby unreasonably lengthening the litigation. Under § 1447(d), by contrast, Congress identified only two specific and tightly-constrained grounds for appellate review of remand issues, against the statutory backdrop that § 1447(d) generally bars appellate review *of any kind* even if the remand order is manifestly erroneous. *See Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 491 (1st Cir. 1996) ("[W]here the district court order of remand rests on lack of subject matter jurisdiction, that order is not reviewable by appeal *or* mandamus, *even if erroneous*.") (emphases in original); *Cok v. Family Court of R.I.*, 985 F.2d 32, 34 (1st Cir. 1993) ("This court is altogether without jurisdiction to review the subject of this appeal: a district court order remanding plaintiff's case to a Rhode Island state court." (referencing *Unauthorized Practice of Law Committee v. Gordon*, 979 F.2d 11, 13 (1st Cir. 1992) ("An order remanding for lack of jurisdiction is immune from review, whether erroneous or not.")).

In addition, even if § 1292(b)—in contrast to § 1447(d) —opens a wide range of issues to appeal, it does so only in specific procedural postures. That is, a § 1292(b) appeal is permitted only when both the district court and the court of appeals concur that a controlling question of law exists as to which reasonable minds could differ. Defendants' interpretation of § 1447(d), however, would allow an appeal *as of right* whenever a removing defendant asserts federal officer jurisdiction, with no gatekeeping performed by any court; such an outcome would completely eviscerate the statute's general prohibition on review of such orders. Finally, § 1292(b) does not contain § 1447(d)'s express bar on any appellate review of remand based on lack of federal subject matter jurisdiction and procedural defects. While interlocutory appeals allow review of questions

of law *earlier* than normally permitted—before a final judgment has issued—Defendant's interpretation would permit review of issues that are ordinarily statutorily prohibited from appellate review *at all*.

Nothing in *Yamaha* establishes a general rule regarding the scope of appeal for any statute in which the word "order" appears. The Supreme Court has often "affirmed that identical language may convey varying content when used in different statutes," and must be construed in light of the specific context of each use. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality) ("In law as in life . . . the same words, placed in different contexts, sometimes mean different things."). Here, the text, structure, and purposes of § 1447(d) are very different from § 1292(b), the provision the Court confronted in *Yamaha*. Section 1447(d) makes certain remand orders are merely "reviewable," removing a barrier to an appeal that must be authorized and delimited by other provisions of law. Section 1292(b), in contrast, directly authorizes the appeal of the certified order.

Defendants' citation to *Mays* is no more compelling than their irrelevant reference to *Yamaha*. The appellees in *Mays* did not contest the court's jurisdiction, and instead conceded that because the removing defendants "attempted to remove this case pursuant to 28 U.S.C. § 1442, the federal officer removal provision, the order remanding the case is reviewable on appeal." Plaintiffs-Appellees' Corrected Brief on Appeal at *1, *Mays v. City of Flint*, No. 16-2484, 2017 WL 541950 (6th Cir. Feb. 1, 2017). The Sixth Circuit's entire discussion of the scope of its review consisted of one sentence, citing *Lu Junhong* and no other authority. *Mays*, 871 F.3d at 442 ("Our jurisdiction to review the remand order also encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441.").

Finally, Defendants' reliance on the Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 & 546, is misplaced. The Act amended § 1447(d) by inserting the words "1442 or"

before "1443," with no other changes. As the Fourth Circuit explained in *Noel,* Congress's incorporation of § 1442 in addition to § 1443 did not expand appellate jurisdiction beyond those two bases expressly listed in § 1447(d). Moreover, although *Noel* predated the Removal Clarification Act, the Fourth Circuit has since affirmed *Noel*'s holding and its rationale limiting the scope of review. *See Lee,* 487 F. App'x at 85. There is no basis in logic or statutory interpretation to believe that Congress intended § 1447(d) to treat removal under § 1442 differently from removal under § 1443, and Defendants present none.

4. Defendants' Attempt to Invoke Federal Officer Jurisdiction Is Meritless

Defendants contend that their assertion of federal officer jurisdiction presents substantial legal questions. But as this Court held, "No causal connection between any actions Defendants took while 'acting under' federal officers or agencies and the allegations supporting the State's claims means there are not grounds for federal-officer removal, 28 U.S.C. § 1442(a)(1): Defendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were 'justified by [their] federal duty.'" (quoting *Mesa v. California*, 489 U.S. 121, 131–32 (1989)). ECF No. 122 (Remand Order) at 15.

Defendants offer no reason to believe the First Circuit would view their argument any more favorably. They instead repeat the same arguments and facts considered and rejected by this Court, as well as by two other federal district courts considering removal in cases alleging harms from climate change. *See also Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (rejecting defendants' "dubious assertion of federal officer removal" because defendants had "not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct"); *Mayor and City Council of Baltimore v. BP P.L.C.*, No. ELH-18-2357, 2019 WL 2436848 (D. Md. July 10, 2019) at *18

(Order Granting Remand) (defendants "have not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers."). Merely parroting arguments already rejected by this Court and other district courts does not show a likelihood of success on the merits. *See, e.g.*, *Gens v. Kaelin*, No. 17-cv-03601-BLF, 2017 WL 3033679, at *3 (N.D. Cal. July 18, 2017) ("Repetition of arguments previously made and rejected is insufficient to satisfy the first *Nken* factor.").

In ruling on a nearly identical motion, the District Court of Maryland denied the defendants' motion to stay pending appeal. The court found that it had "considered defendants' arguments at length and rejected them" in its remand order, that other courts have done the same, and that just because federal officer jurisdiction "may be subject to appellate review [ ] does not support the issuance of a stay pending appeal." *City of Baltimore*, 2019 WL 3464667, at *5 (Order Denying Motion to Stay).

The out-of-circuit cases Defendants cite, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 709 (E.D. Tex. 1998), and *Lalonde v. Delta Field Erection*, No. CIV.A.96-3244-B-M3, 1998 WL 34301466 (M.D. La. Aug. 6, 1998), do nothing to alter this Court's finding that the requisite causal nexus is absent. In both cases, the defendants established a causal nexus between a period of federal control over the defendants' conduct and the plaintiffs' claims. Here, however, Defendants failed to establish *any* causal connection. ECF No. 122 (Remand Order) at 15.

Defendants offer no reason why the First Circuit should evaluate the merits of their federal-officer argument any differently than this Court, let alone that they can meet the "strong likelihood" requirement for a stay. Because this is the only basis on which Defendants may seek review, a stay pending appeal is inappropriate.

5. Even if All Remand Issues Were Reviewable on Appeal, Defendants Still Cannot Show a Likelihood of Success

Even if the First Circuit considers the merits of Defendants' other jurisdictional arguments, their stay request remains unfounded because the First Circuit would likely reach the same conclusion as this Court: the State has asserted exclusively Rhode Island law claims, which should be decided under Rhode Island law, in Rhode Island state court. The Remand Order here meticulously analyzed and rejected the entirety of Defendants' notice of removal, and there is a substantial likelihood that the First Circuit will adopt this Court's analysis—whether it rules on the federal-officer question only or on all of Defendants' arguments.

Federal Common Law: Defendants' trite assertion that a substantial legal question exists concerning whether the State's claims "arise under federal common law" cites the same authority that was before this Court throughout the parties' briefing. Defendants rely principally on the order entered in *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*California* Order"), to support their contention that the State's Rhode Island law claims are "governed by" and thus "necessarily arise under federal common law." Mot. at 9–10. This Court considered and rejected that heavily-criticized order, and ruled to the contrary. Remand Order at 5–11; *see also* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 Mich. L. Rev. Online 25, 32–35 (2018). Quite simply, the court in *California* erred by accepting a preemption defense not properly before the court as a basis for jurisdiction, and by failing to apply the exclusive test for determining whether federal question jurisdiction lies over well-pleaded state law claims. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). The only other decisions that have squarely addressed the issue—in *County of San Mateo* and *City of Baltimore*—reached the same conclusion as this Court. *See County of San Mateo*, 294 F. Supp. 3d at 937 (concluding that

"federal common law does not govern the plaintiffs' claims"); *Mayor and City Council of Baltimore*, 2019 WL 2436848, at *8 (Order Granting Remand) ("Defendants have framed their argument to allege that federal common law governs the City [of Baltimore]'s public nuisance claim. In actuality, however, they present a veiled complete preemption argument. . . . Defendants have not shown that any federal common law claim for public nuisance is available to the City here, and case law suggests that any such federal common law claim has been displaced by the Clean Air Act."); Remand Order at 6 (concluding that "environmental federal common law does not—absent congressional say-so—completely preempt the State's public nuisance claim, and therefore provides no basis for removal").

Except in the circumstance described in *Grable*, there can be no federal question jurisdiction over a complaint that on its face alleges exclusively state law claims, even if those claims are arguably preempted by federal law. "[T]here is nothing in the artful pleading doctrine that sanctions this particular transformation" that Defendants seek. ECF No. 122 (Remand Order) at 6. Preemption is a defense and, as such, does not provide a basis for removal "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). Defendants also fail to offer any reason why their Clean Air Act ("CAA") preemption arguments have any chance of success on appeal, merely repeating those that this Court already rejected. ECF No. 122 (Remand Order) at 10 ("[T]he CAA authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law."); *see also* Mot. at 13.

The State's well-plead causes of action are, as this Court has held, "thoroughly state-law claims" that do not belong in federal court. ECF No. 122 (Remand Order) at 12. Defendants do

not seriously defend their position or challenge this Court's reasoning in disposing of their preemption arguments, and as such they cannot show the required "strong likelihood that the issues presented on appeal could be rationally resolved" in their favor. *Fourteen Various Firearms*, 897 F. Supp. at 273; *see also Rio Grande*, 792 F.3d at 231 (showing of strong likelihood of success on the merits of appeal required to issue a stay).

Grable: Defendants have no meaningful chance of success under *Grable*, because controlling authority squarely forecloses their arguments, and their pale contention that "reasonable jurists can disagree (and have disagreed)" about the removability of the State's claims, Mot. at 10, does not meet their burden. First, as this Court rightly noted, Defendants' *Grable* arguments, "are, if anything, premature defenses, which even if ultimately decisive, cannot support removal." ECF No. 122 (Remand Order) at 14; *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 9–10 (federal question jurisdiction exists only where a "question of federal law is a necessary element of one of the well-pleaded state claims"); *Gunn v. Minton*, 568 U.S. 251, 259 (2013) (stating four-part test to determine whether well-pleaded state law claims arise under federal law); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction."); Defendants' recitation of their *Grable* arguments cites authority already considered and properly rejected by this Court, and inapposite authority already distinguished in the State's briefing below. *See* ECF No. 122 (Remand Order) at 10–14.

The State's well-pleaded state law claims do not fall within the "slim category" of cases for which removal is permitted. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006). Defendants cannot establish any likelihood of appellate success on this ground either.

OCSLA, Federal Enclave, Bankruptcy Law, and Admiralty Law: Defendants' remaining arguments for federal jurisdiction based on the Outer Continental Shelf Lands Act ("OCSLA"), federal enclave law, bankruptcy law, and admiralty law likely have the same chance of success as the amount of pages it took this Court to dispose of these strained arguments on remand—that is, virtually none. ECF No. 122 (Remand Order) at 15–16.

Defendants' contention that they have a "substantial argument" under the OCSLA relies on a wholly inapposite Supreme Court opinion that involved no jurisdictional question. Mot. at 12. In *Parker Drilling Management Services, Ltd. v. Newton*, the plaintiff worked on drilling platforms off the California coast, and filed a class action alleging violations of California wage-and-hour laws and related claims based on work that he and others physically performed on those platforms. ___ U.S.___, 139 S. Ct. 1881, 1886 (June 10, 2019). The defendant removed to federal court and moved for judgment on the pleadings. *Id.* There is no indication that the plaintiff contested removal, and the parties agreed that plaintiff's work on defendant's platforms was governed by OCSLA. *Id.* Under OCSLA, exclusive federal jurisdiction exists over the Outer Continental Shelf ("OCS"), and the laws of adjacent states are incorporated as the governing federal law "[t]o the extent that they are applicable and not inconsistent with" any other federal provision. 43 U.S.C. § 1333(a)(2)(A). The issue before the Court in *Parker* was whether California wage-and-hour law applied on adjacent regions of the OCS, in addition to the federal Fair Labor Standards Act—a choice of law question with no relevance or relationship to removal jurisdiction. *Parker Drilling* has no bearing on whether the state law claims here were removable, where, as this Court explained in its Remand Order, "Defendants' operations on the Outer Continental Shelf may have contributed to the State's injuries; however, Defendants have not shown that these injuries would not have occurred but for those operations[,]" citing *In re Deepwater Horizon*, 745 F.3d 157, 163–

64 (5th Cir. 2014). Nothing in *Parker* overcomes this Court's prior rejection of OCSLA removal jurisdiction.

The same is true for Defendants' already-rebuffed federal-enclave argument. This Court correctly found no federal enclave jurisdiction because "the State's claims did not arise" on federal land "especially since [the State's] complaint avoids seeking relief for damages to any federal lands." ECF No. 122 (Remand Order) at 15. Defendants offer no support for why the First Circuit would find any differently than this Court has.

Their bankruptcy-law and admiralty-law arguments fare no better, as Defendants devote just two conclusory sentences that these purported grounds for removal represent "serious legal questions" on which "reasonable jurists could disagree." Mot. at 13–14. The Court handily rejected both arguments in its Remand Order, concluding that bankruptcy law does not support removal because the State's action is "designed primarily to protect the public safety and welfare," and "state-law claims cannot be removed based solely on federal admiralty jurisdiction." ECF No. 122 (Remand Order) at 15 (internal citations omitted). Defendants do not even attempt to challenge these findings or explain how there is a strong likelihood that the First Circuit would reverse them.

Defendants simply have not demonstrated any likelihood of success on appeal, even if all grounds for removal are reviewable, which they are not. Thus, Defendants have failed to satisfy the first element required to issue a stay, and as explained below, they cannot meet the remaining requirements.

C. Proceeding in State Court Will Not Cause Defendants Irreparable Injury

No stay may issue without a finding that the threatened harm to the moving party is truly "irreparable," and that such irreparable harm is at least probable. *See Nken*, 556 U.S. at 430 (the "possibility standard is too lenient"); *id.* at 434–35. "[M]ore than the prospect of irremediable harm

is necessary to trigger a garden variety judicial stay: factors reminiscent of those which grace the preliminary injunction standard must routinely be considered." *Della Valle v. U.S. Dept. of Agric.*, 619 F. Supp. 1297, 1302 (D.R.I. 1958) (internal citation omitted); *see also Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970). In particular, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see also Venus Springs v. Ally Fin., Inc.*, No. 3:10-CV-00311-MOC, 2015 WL 1893825, at *4 (W.D.N.C. Apr. 27, 2015) ("Though Plaintiff will indeed face financial consequences for not complying with the court order, the court finds that such consequences do not constitute irreparable harm.").

Where, as here, a case is in its early stages, "the risk of harm to [defendant] if discovery proceeds is low." *DKS, Inc. v. Corp. Bus. Sols., Inc.*, No. 2:15-cv-00132-MCE-DAD, 2015 WL 6951281, at *2 (E.D. Cal. Nov. 10, 2015) (denying motion to stay pending appeal); *see also Nero v. Mosby*, No. CV 16-1304, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017) (denying motion to stay pending appeal from order denying in part defendant's motion to dismiss, because defendant would "not suffer irreparable injury" from participating in discovery on remaining claims "and a stay would only delay any discovery-related burden on her"). Thus, even "if the case proceeds in state court but then ultimately returns to federal court, the interim proceedings in state court may well help advance the resolution of the case." *Broadway Grill, Inc. v. Visa Inc.*, No. 16-CV-04040-PJH, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016).

Defendants' appeal here would not become "meaningless" without a stay, as Defendants contend. *See* Mot. at 17. Nothing that occurs in state court upon remand could moot or even affect Defendants' appeal. The cases on which Defendants primarily rely arose in the very different context of orders to disclose documents that would be impossible to claw back if released, thereby

effectively mooting any meaningful appeal from the trial courts' disclosure orders. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (once surrendered, "confidentiality will be lost for all time"); *Hiken v. Dep't of Def.*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (disclosure of information with "important national security implications" would moot appeal).

Similarly, *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers* involved a request to stay an order that both remanded the plaintiff's claims to state court *and* ordered the Army Corps of Engineers to re-issue an amended public notice concerning permits requested by the coal company intervenor-defendants. No. CV 3:08-0979, 2010 WL 11565166, at *2 (S.D.W. Va. May 4, 2010). The court granted a stay in part because "remand *and re-notice of the coal companies' permits* would, as a practical matter, moot [the coal companies'] respective appeals" from the order and cause irreparable harm. *Id.* at *4. Here, there are no substantive obligations that Defendants will likely face if a stay is withheld.

In the unlikely event the Remand Order were reversed, the state court proceedings would be suspended, the cases would return to this Court, and discovery and other pre-trial proceedings would presumably pick up exactly where they left off in state court. Regardless of the outcome of any appeal, Defendants will still be required to respond to the same discovery. As recognized in *City of Baltimore*, proceeding in state court while the appeal is pending "may well advance the resolution of the case." *City of Baltimore*, 2019 WL 3464667, at *6 (Order Denying Motion to Stay). No incremental burden—much less an irreparable injury—results from discovery incepting in a Maryland state court rather than a federal court.

Defendants insist that having to litigate their federal appeal and the remanded state court actions at the same time would moot their appeal if a state court judgment came before the appeal

was decided. Mot. at 17. But given the preliminary stage of the action, that is, "disingenuous." *See City of Baltimore*, 2019 WL 3464667, at *5, n.2 (Order Denying Motion to Stay).

D. The Balance of Harms Tilts Sharply in the State's Favor

A stay would prevent the State from seeking prompt redress of its claims. Proceedings have already been delayed for over a year since the State filed its complaint. On that basis alone, the public interest and balance of equities weigh against Defendants' continued interference with the State's exercise of its right, as master of its complaint, to proceed in Rhode Island state court. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083, 1087 (D. Haw. 1998) (refusing to stay remand order pending appeal because, in part, "the public interest at stake in this case is the interference with state court proceedings"); *see also Browning v. Navarro*, 743 F.2d 1069, 1079 n.26 (5th Cir. 1984) (declining to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity").

Although Defendants argue that a stay would avoid costly and potentially duplicative litigation, their current appeal "may be a fruitless exercise, costing the parties time and money that could otherwise be spent litigating the merits." *See SFA Grp., LLC v. Certain Underwriters at Lloyd's London*, No. CV 16-4202-GHK(JCX), 2017 WL 7661481, at *2 (C.D. Cal. Jan. 6, 2017).

Defendants principally rely on an unreported decision to demonstrate that a stay can be issued to avoid potentially duplicative litigation. Mot. at 18–19; *Raskas v. Johnson & Johnson*, No. 12-cv-2174-JCH, 2013 WL 1818133 (E.D. Mo. Apr. 29, 2013). First, and most critically, the court in *Raskas* did find that defendants satisfied the requisite showing that *they were likely to succeed on their appeal*, containing one issue of Class Action Fairness Act ("CAFA") jurisdiction. That is not the case here. Defendants have made no showing of likelihood of success. Second, the court explicitly referenced the minimal harm to the plaintiffs because of the expedited appellate

review process required for CAFA removal review. Although the First Circuit can and should quickly affirm this Court's remand decision, there are no such time periods in which the First Circuit must rule. Any further delay to the State is inappropriate.

Simply, this case has now been sent back to where it belongs—state court—and the public interest requires that the State's case proceed there.

IV. CONCLUSION

For the reasons explained above, this Court should deny Defendants' Motion to Extend the Stay of the Remand Order Pending Appeal.

Dated: August 23, 2019

STATE OF RHODE ISLAND
PETER F. NERONHA, ATTORNEY GENERAL
By his Attorneys,

/s/ Neil F.X. Kelly
Neil F.X. Kelly
Assistant Attorney General
Deputy Chief of the Civil Division (Bar No. 4515)
Rebecca Partington
Assistant Attorney General
Chief of the Civil Division (Bar No. 3890)
DEPARTMENT OF THE ATTORNEY GENERAL
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400
nkelly@riag.ri.gov
rpartington@riag.ri.gov

Victor M. Sher, *pro hac vice*
Matthew K. Edling, *pro hac vice*
SHER EDLING LLP
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
Tel: (628) 231-2500
vic@sheredling.com
matt@sheredling.com

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, the foregoing document was filed electronically and is available for viewing and downloading through the ECF system. Notice of this filing will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ Neil F.X. Kelly

Neil F.X. Kelly

John A. Tarantino
Adler Pollock & Sheehan P.C.
One Citizens Plaza
8th Floor
Providence, RI 02903
274-7200
Fax: 351-4607
Email: jtarantino@apslaw.com

Nicole J. Benjamin
Adler, Pollock & Sheehan, PC
One Citizens Plaza
8th Floor
Providence, RI 02903
274-7200
351-4607 (fax)
nbenjamin@apslaw.com

Philip H. Curtis
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
212-836-8000
212-836-8689 (fax)
philip.curtis@arnoldporter.com

Patricia K. Rocha
Adler Pollock & Sheehan P.C.
One Citizens Plaza
8th Floor
Providence, RI 02903
274-7200
Fax: 351-4607
Email: procha@apslaw.com

Matthew T. Heartney
Arnold & Porter Kaye Scholer LLP
777 South Figueroa Street
44th Floor
Los Angeles, CA 90017-5844
213-243-4000
Fax: 213-243-4199
Email:
matthew.heartney@arnoldporter.com

Nancy G. Milburn
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
212-836-8000
Fax: 212-836-8689
Email: nancy.milburn@arnoldporter.com

Attorneys for Defendant BP Products North America, Inc.

Theodore J. Boutrous, Jr.
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071-3197
213-229-7804
213-229-6804 (fax)
tboutrous@gibsondunn.com

Gerald J. Petros
Robin-Lee Main
Ryan M. Gainor
Hinckley Allen & Snyder
100 Westminster Street
Suite 1500
Providence, RI 02903-0819
274-2000
Fax: 277-9600
Email: gpetros@hinckleyallen.com
Email: rmain@hinckleyallen.com
Email: rgainor@hinckleyallen.com

Joshua S. Lipshutz
Gibson, Dunn and Crutcher
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
202-955-8217
Fax: 202-530-8217
Email: jlipshiz@gibsondunn.com

Neal S. Manne
Susman Godfrey LLP
1000 Louisiana Street
Suite 5100
Houston, TX 77002
713-653-7827
Fax: 713-654-6666
Email: nmanne@susmangodfrey.com

Attorneys for Defendant Chevron Corp. and *Chevron USA, Inc.*

Lauren Motola-Davis
Lewis Brisbois Bisgaard & Smith LLP
1 Turks Head Place
Suite 400
Providence, RI 02903
401-406-3313
Fax: 401-406-3312
Email: Lauren.MotolaDavis@lewisbrisbois.com

Samuel A. Kennedy-Smith
Lewis, Brisbois, Bisgaard & Smith, LLP
1 Turks Head Place
Suite 400
Providence, RI 02903
617-861-7974
Email: samuel.kennedy-smith@lewisbrisbois.com

Attorneys for Lukeoil Pan Americas LLC

Jeffrey B. Pine
Lynch & Pine, Attorneys at Law
One Park Row
Fifth Floor
Providence, RI 02903
401-274-4400
Fax: 401-274-3326
Email: jpine@lynchpine.com

Attorney for Marathon Oil Corporation

Robert D. Fine
Chace, Ruttenberg & Freedman, LLP
One Park Row
Suite 300
Providence, RI 02093
453-6400
Fax: 453-6411
Email: rfine@crfllp.com

David C. Frederick
Kellogg, Hansen, Todd, Figel & Frederick, PLLC
1615 M Street NW
Suite 400
Washington, DC 20036
202-326-7900
Fax: 202-326-7999
Email: dfrederick@kellogghansen.com

Elizabeth A. Kim
Jerome C. Roth
Munger, Tolles & Olson, LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
415-512-4010
Fax: 415-664-6910
Email: elizabeth.kim@mto.com
Email: jerome.roth@mto.com

Douglas J. Emanuel
Chace, Ruttenberg & Freedman, LLP
One Park Row
Suite 300
Providence, RI 02093
453-6400
Fax: 453-6411
Email: demanuel@crfllp.com

Attorneys for Defendant Shell Oil Products Company, LLC

Ann Marie Mortimer
Hunton Andrews Kurth LLP
550 South Hope Street
Suite 2000
Los Angeles, CA 90071
(213) 532-2103
Fax: (213) 312-4752
Email: AMortimer@HuntonAK.com

Jeffrey B. Pine
Lynch & Pine, Attorneys at Law
One Park Row
Fifth Floor
Providence, RI 02903
401-274-4400
Fax: 401-274-3326
Email: jpine@lynchpine.com

Shannon S. Broome
Hunton Andrews Kurth LLP
50 California Street
San Francisco, CA 94111
415-975-3718
Fax: 415-975-3701
Email: SBroome@HuntonAK.com
Shawn Patrick Regan
Hunton Andrews Kurth LLP
200 Park Abenue
New York, NY 10166
212-309-1046
Fax: 212-309-1100
Email: SRegan@HuntonAK.com

Attorneys for Marathon Petroleum Corp., Marathon Petroleum Company, LP and *Speedway, LLC*