UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1818

STATE OF RHODE ISLAND

Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXON MOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, 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.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William Edgar Smith)

DEFENDANTS' EXPEDITED MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

This Court should enter a stay pending appeal of the district court's order granting the motion of the State of Rhode Island ("Plaintiff") to remand this action to state court. Fed. R. App. P. 8(a)(2)(ii).[1] Defendants respectfully request expedited review of this Motion because the district court's temporary stay of its order remanding this case to state court extends only through October 9, 2019 (Ex.G), and therefore Defendants request that the Court enter a stay by that date. Given the prospect that the Supreme Court will grant certiorari to resolve a circuit split embedded within this appeal, Defendants also request that, if this Court declines to stay remand pending appeal, it extend the current stay for 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

This case is one of thirteen nearly identical cases pending in federal courts nationwide in which state or local governments have asserted global warming claims against energy companies.[2] All but one of these actions were filed in state court and

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

[2] *See Cty. of San Mateo v. Chevron Corp.*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland v. BP P.L.C.*, No. 17-cv-6011 (N.D. Cal.); *California v. BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Bd. of Cty. Commissioners* v. *Suncor Energy (U.S.A.) Inc.*, No. 18-cv-1672 (D. Colo.); *King Cty. v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D.

removed to federal court. And in every state-court initiated suit, the courts have either denied remand or remand is presently stayed.

In each case, Defendants have argued that federal common law—not state law—necessarily governs claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production. Two district judges agreed, holding that global-warming claims arise under federal law, even though the plaintiffs affixed state-law labels to their claims. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) ("*City of New York*"). A third district judge held that removal was improper because federal common law does not govern the plaintiffs' global-warming claims, *see Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo*"), but that judge stayed remand pending appeal, thereby protecting defendants' appellate rights. Two other district judges remanded on the ground that the well-pleaded complaint rule barred removal, but the decisions remain stayed pending decisions on whether to extend stays through appeal. *Mayor & City Council of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 554–58 (D. Md. 2019), *as amended* (June 20, 2019) ("*Baltimore*"); *Bd. of Cty.*

Wash.); *City of New York v. BP P.L.C.*, No. 18-cv-00182-JFK (S.D.N.Y.); *Mayor & City Council of Balt. v. BP P.L.C.*, No. 1:18-cv-02357-ELH (D. Md.).

Commissioners v. Suncor Energy (U.S.A.) Inc., No. 18-cv-1672, ECF No. 69 at 6–19 (D. Colo. Sept. 5, 2019) ("*Suncor*").

These divergent district court orders—all of which are on appeal—confirm that Defendants' appeal raises serious legal questions about which reasonable jurists can disagree (and have disagreed). Defendants have a statutory right of appeal because they removed this case in part under the federal officer removal statute, 28 U.S.C. §1442(a). Yet appellate review would be rendered meaningless without a stay because state courts could dispose of critical issues in this case—or even render final judgment—while Defendants' appeal is pending. Even if the state court does not render a final judgment before then, a "rat's nest of comity and federalism issues" would result from reversal of a remand order after months or years of litigation in state court. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l*, LLC, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Accordingly, this Court should stay the remand pending appeal.

STATEMENT OF FACTS

On July 2, 2018, Plaintiff filed a complaint in Rhode Island state court, claiming that Defendants' "extraction, refining and/or formulation of fossil fuel products … is a substantial factor in causing [global warming]," which will "continue to [cause Plaintiff's] injuries." Ex.A ¶¶199, 201. The Complaint nominally asserts only state-law causes of action for public nuisance, failure to warn,

design defect, trespass, and causes of action under the Rhode Island Constitution and Environmental Rights Act. Ex.A ¶¶225–315. Plaintiff seeks compensatory and punitive damages, disgorgement of profits, and equitable relief, including "abatement of the nuisance complained of." *Id.* Prayer for Relief at 140.

On July 13, 2018, Shell Oil Products Company LLC removed this case to the U.S. District Court for the District of Rhode Island. Ex.B. Defendants explained that Plaintiff's claims are removable because they: (1) "implicate uniquely federal interests and are governed by federal common law," *id.* ¶5; (2) arise from actions Defendants took pursuant to a federal officer's directions, *id.* ¶9; (3) "raise[] disputed and substantial federal questions," *id.* ¶6; (4) arise out of or in connection with operations conducted on the Outer Continental Shelf, as described in the Outer Continental Shelf Lands Act ("OCSLA"), *id.* ¶8; (5) "are completely preempted by the Clean Air Act" and "other federal statutes and the United States Constitution," *id.* ¶7; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.* ¶10; (7) "are related to cases under Title 11 of the United States Code," *id.* ¶11; and (8) fall within the court's original admiralty jurisdiction under 28 U.S.C. §1333, Ex.C ¶5.

Plaintiff moved to remand on August 17, 2018. After a hearing on February 6, 2019, No. 18-cv-00395, ECF No. 113, Judge Smith granted remand, but "stayed [his order] for sixty days … giving the parties time to brief and the Court to decide

whether a further stay pending appeal is warranted." Ex.D at 17 ("Remand Order"). On August 9, 2019, Defendants moved to extend the stay of the Remand Order pending appeal, No. 18-cv-00395, ECF No. 126, and filed a Notice of Appeal. Ex.E. On August 19, 2019, pursuant to the parties' stipulation, the district court entered a Consent Order extending the stay of the Remand Order "through and including [the district court's] resolution of Defendants' Motion to Extend the Stay Pending Appeal, and if that motion is denied, for 30 days thereafter." No. 18-cv-00395, ECF No. 128.

On September 10, 2019, the district court initially denied Defendants' motion to stay in a text-only order, but shortly thereafter vacated the text-only order and reinstated the motion to stay. Ex.F. On September 11, 2019, the district court entered a new text-only order denying Defendants' motion for a stay, but staying the Remand Order until October 10, 2019, so Defendants could seek a stay from this Court. Ex.G.

ARGUMENT

In considering a motion to stay pending appeal, the Court must weigh (1) the likelihood that movants will prevail on the appeal, (2) whether movants will suffer irreparable injury absent a stay, (3) whether a stay will substantially harm other parties, and (4) whether a stay is in the public interest. *Nken v. Holder*, 556 U.S.

418, 434 (2009); *see also Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (same).

I. Defendants Meet the "Likelihood of Success" Standard for a Stay

The first element is satisfied where the appeal presents "serious legal questions." *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). This bar is not high: the analysis "closely resembles" a test used to determine whether an appeal would be "frivolous[]." *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 95 (1st Cir. 2003). The Court "need not predict the eventual outcome on the merits with absolute assurance." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9–10 (1st Cir. 2013); *see also* Canterbury *Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149 (D. Mass. 1998) ("probability of success on the merits" is not "interpreted or applied literally, even by the Courts of Appeals."). Indeed, this prong is satisfied when an appeal involves issues that are "neither elementary nor well-established," *Bos. Taxi Owners Ass'n v. City of Boston*, 187 F. Supp. 3d 339, 342 (D. Mass. 2016), or where "there 'is a dearth of controlling precedent and … appreciable room for differences of opinion' on … 'difficult and pivotal questions[.]'" *Chang v. Univ. of R.I.*, 107 F.R.D. 343, 345 (D.R.I. 1985) (quoting

Chang v. Univ. of R.I., 606 F. Supp. 1161, 1279 (D.R.I. 1985)). That standard is satisfied here.

A. This Court Can Consider Every Ground for Removal Rejected by the District Court, Each of Which Raises a Serious Legal Question.

Because the plain text of 28 U.S.C. §1447(d) makes remand *orders*—not particular *issues* or *grounds* for removal—reviewable on appeal where, as here, a case is removed under 28 U.S.C. §1442, this Court can consider every ground for removal. *See* 28 U.S.C. §1447(d) ("an *order* remanding a case to the State court from which it was removed pursuant to section 1442 … *shall be reviewable* by appeal or otherwise") (emphases added).

As the Seventh and Sixth Circuits have recently recognized, "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *see also Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (following *Lu Junhong*).

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), reinforces this interpretation of §1447(d). *Yamaha* involved the proper interpretation of 28 U.S.C. §1292(b), which provides that when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion," the court of appeals may "permit an appeal to be taken from such order." Addressing the scope of review, the Court held that "appellate

jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205. Thus, "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (quoting 9 J. Moore & B. Ward, Moore's Fed. Prac. ¶110.25[1], p. 300 (2d ed. 1995)).

The same logic applies to §1447(d). Although removal under §1442 is a necessary predicate for appeal—just as a controlling question of law is a necessary predicate for an appeal under §1292(b)—once this predicate is satisfied, the appellate court has jurisdiction to review the whole order. Accordingly, Defendants' federal common law argument—and every other ground for removal—is properly presented on appeal.

Although Plaintiff has argued that an "overwhelming consensus" of circuits favors its interpretation, No. 18-cv-00395, ECF No. 129 at 8, that "consensus" has been abrogated by the amendment of the removal statute. In the Removal Clarification Act of 2011, Congress amended §1447(d) to allow review of remand orders in cases removed under §1442 (previously, only remand orders in cases removed under §1443 were reviewable), and it retained the "order" language the Supreme Court interpreted in *Yamaha*. Pub. L. No. 112-51, 125 Stat. 545 (2011). All but one case Plaintiff cited predated the Removal Clarification Act. The only

published decision on Plaintiff's side of the split postdating the Act—*Jacks v. Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012)—cited "nothing" to support its statutory interpretation. *Lu Junhong*, 792 F.3d at 812 (distinguishing *Jacks*). Nor did it "discuss the significance of the statutory reference to review of an 'order'" or even "mention *Yamaha*." *Id.* The two more recent circuit decisions (*Lu Junhong* and *Mays*) adopt Defendants' interpretation. Plaintiff's argument also conflicts with the leading treatise on federal jurisdiction. 15A Charles Alan Wright, et al., *Federal Practice & Procedure* §3914.11 (2d ed.) ("§1447(d) allows review of the '*order* remanding' the case …. Review should … be extended to all possible grounds for removal underlying the order.") (emphasis added).

The circuit split on this issue is reason enough to stay remand. *See United States v. Wilkinson*, 626 F. Supp. 2d 184, 195 (D. Mass. 2009) (granting stay where the "appeal of this decision will raise serious and difficult issues on which two circuits have split"); *Canterbury Liquors & Pantry*, 999 F. Supp. at 150 (granting stay where "two reported Court of Appeals decisions address[ed]" the issue and reached "differ[ing]" conclusions).

B. Defendants' Appeal Presents a Substantial Legal Question as to Whether Plaintiff's Claims Arise Under Federal Common Law.

Claims, like Plaintiff's, that "deal with air and water in their ambient or interstate aspects" are governed by "federal common law." *Milwaukee I*, 406 U.S. at 100. The federal common law removal ground thus presents "'appreciable room

for differences of opinion' on … 'difficult and pivotal questions[.]'" *Chang*, 107 F.R.D. at 345 (quoting *Chang*, 606 F. Supp. at 1279). Indeed, district courts around the country *already have* formed conflicting opinions on whether Plaintiff's global-warming claims arise under federal common law. *Compare BP*, 2018 WL 1064293, at *2–3, *and City of New York*, 325 F. Supp. 3d at 471–72, *with Baltimore*, 388 F. Supp. 3d at 554–58, *San Mateo*, 294 F. Supp. 3d at 937, *and Suncor*, No. 18-cv-1672, ECF No. 69 at 6–19.

In *BP*, the district court denied Oakland's and San Francisco's motions to remand global warming-related claims against five energy companies that are also defendants here. Like Plaintiff here, Oakland and San Francisco argued that the well-pleaded complaint rule barred removal because they had nominally asserted state-law claims. 2018 WL 1064293, at *5. The court disagreed, holding that "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—*are necessarily governed by federal common law*." *Id.* at *2 (emphasis added). The court relied on a line of Supreme Court decisions holding that federal common law applies "to an interstate nuisance claim." *Id.*[3] The well-pleaded complaint rule was no barrier to removal because the

[3] *See Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*") ("Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by

plaintiffs' "claims necessarily arise under federal common law." *Id.* at *5; *see Milwaukee I*, 406 U.S. at 107.

Likewise, in *City of New York*, the plaintiff purported to assert state-law claims against the same five Defendants seeking "damages for global-warming related injuries resulting from greenhouse gas emissions." 325 F. Supp. 3d at 472. The district court held that the plaintiff's claims, though nominally pleaded under state law, "are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision." *Id.* Although the City of New York filed its action in federal court on the basis of diversity, the district court's conclusion that the plaintiff's purported state-law claims arose under federal common law was critical to its decision to dismiss.

The *San Mateo* court remanded the cases before it, but for different reasons than the district court here. Whereas the district court below concluded that Defendants' federal common law argument was at odds with the well-pleaded

sources outside its domain."); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (Because "the regulation of interstate water pollution is a matter of federal, not state, law," interstate pollution disputes "should be resolved by reference to federal common law[.]"); *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (Environmental protection "is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law.").

complaint rule, Ex.D. 4-11, the *San Mateo* court simply held that "federal common law [did] *not* govern" the claims. *San Mateo*, 294 F. Supp. 3d at 937 (emphasis added).[4] Although *San Mateo* granted the plaintiffs' remand motion, it *sua sponte* certified its order for interlocutory review because defendants' removal arguments involved "controlling questions of law as to which there is substantial ground for difference of opinion." *San Mateo*, No. 17-cv-04929 (N.D. Cal.), ECF No. 240. The court also stayed remand pending appeal to the Ninth Circuit. *Id.*

Like this case, the *Baltimore* court rejected defendants' federal common law argument after concluding that it conflicted with the well-pleaded complaint rule. 388 F. Supp. 3d at 555. The court, however, recognized that "the removal of this case based on the application of federal [common] law presents a complex and unsettled legal question, as evidenced by the diverging opinions reached by other district courts that have considered the issue."[5] *Baltimore*, No. 18-cv-2357 (D. Md.

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[4] *San Mateo* based its conclusion on the Supreme Court's holding in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 564 U.S. at 424. As Defendants have explained, however, displacement of federal common law affects the availability of a remedy, not subject-matter jurisdiction. *See* No. 18-cv-00395, ECF No. 87 at 25.

[5] Judge Hollander ultimately denied defendants' motion to stay (a decision under review by the Fourth Circuit) after concluding that binding Fourth Circuit precedent dictated that appellate review was limited to whether removal under the federal officer removal statute was proper. *See Baltimore*, No. 18-CV-2357 (D. Md. July 31, 2019), ECF No. 192 at 7 (citing *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976)). No similar First Circuit precedent exists. Accordingly, the entire Remand

July 31, 2019), ECF No. 192 at 5. That remand order remains stayed while the Fourth Circuit considers whether to extend the stay through defendants' appeal. *See Baltimore,* No. 18-cv-2357 (D. Md. June 24, 2019), ECF No. 185.[6] In sum, even courts rejecting Defendants' position have recognized that there is legitimate disagreement on the application of federal common law, and none of the other virtually identical cases is currently proceeding in state court.

These conflicting decisions—on review before the Second, Fourth, Ninth, and Tenth Circuits—confirm that Defendants' appeal here presents serious legal questions about which "there 'is a dearth of controlling precedent and … appreciable room for differences of opinion' on … 'difficult and pivotal questions[.]'" *Chang*, 107 F.R.D. at 345 (quoting *Chang*, 606 F. Supp. at 1279); *cf. Providence Journal Co.*, 595 F.2d at 890 (granting stay pending appeal where there were "serious legal questions presented").

Order should be reviewed on appeal, including whether Plaintiff's claims arise under federal common law. *See supra* Section IA.

[6] *BP* and *City of New York* recognized that the well-pleaded complaint rule requires courts to scrutinize a complaint and determine whether the state-law labels plaintiffs affix to their claims are appropriate—*i.e.*, whether they are well-plead. And in *BP*, unlike here and in *Baltimore*, the district court determined that the well-pleaded complaint rule was not a barrier to removal because plaintiffs' claims were necessarily governed by federal common law—*i.e.*, the complaint did not well-plead state law claims.

C. Defendants Have Presented a Substantial Case on the Merits That Removal is Proper under the Federal Officer Removal Statute.

Defendants also removed this case under the federal officer removal statute, 28 U.S.C. §1442(a). Section 1442(a)(1) authorizes removal of suits brought against "any person acting under" a federal officer "for *or relating to* any act under color of such office." 28 U.S.C. §1442(a)(1) (emphasis added). The words "or relating to"—added by the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545—"'broaden[ed] the universe of acts' that enable federal removal." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (quoting H.R. Rep. 112-17, 6, 2011 U.S.C.C.A.N. 420, 425); *see also Zeringue v. Crane Co.*, 846 F.3d 785, 793–94 (5th Cir. 2017). Following that amendment, a party seeking federal officer removal must demonstrate only that (1) it acted under a federal officer; (2) it has a colorable federal defense; and (3) the charged conduct was carried out for or in relation to the asserted official authority. *Sawyer*, 860 F.3d at 254.

This case satisfies these requirements. Plaintiff alleges Defendants' extraction and production of fossil fuels have contributed to Plaintiff's global warming-related injuries. *See, e.g.*, Ex.A ¶¶2, 49, 97, 197–224. Some Defendants extracted, produced, and sold fossil fuels at the direction of federal officers. *See* Ex.B ¶¶ 54–67. The Supreme Court has indicated that a private contractor "acts under" the direction of a federal officer when it "help[s] the government to produce

an item that it needs" under federal "subjection, guidance, or control." *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 143, 151 (2007).

The district court found "[n]o causal connection" between Plaintiff's claims and actions Defendants took while "acting under" federal officers because Defendants' "alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign" were not "justified by [their] federal duties." Ex.D at 15 (quoting *Mesa v. California*, 489 U.S. 121, 131–32 (1989)). However, Plaintiff asserts a claim for "Strict Liability for Design Defect," which does not depend on proof of an alleged "misinformation campaign." That claim alleges that "Defendants ... extracted, refined, formulated, designed, packaged, [and] distributed ... fossil fuel products," and those "fossil fuel products have not performed as safely as an ordinary consumer would expect them to." Ex.A ¶¶253, 255. To show a link between this claim and conduct undertaken at the direction of federal officers, Defendants do not need to prove that federal officers directed Defendants to engage in a "sophisticated misinformation campaign." No. 18-cv-00395, ECF No. 129 at 11 (quoting Ex.D at 15). On the contrary, "the focus of strict liability is on whether the design itself was unreasonably dangerous"—not "on the conduct of the manufacturer." *Connelly v. Hyundai Motor Co.*, 351 F.3d 535, 542 (1st Cir. 2003); *accord Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 781 (R.I. 1988). Because federal officers directed certain Defendants to extract and produce the very

"product" Plaintiff claims is defective, the charged conduct relates to acts taken under federal control.

Further, to satisfy the nexus requirement, removing parties need only show "that the charged conduct *relate[s] to* an act under color of federal office." *Sawyer*, 860 F.3d at 258; *accord Zeringue*, 846 F.3d at 793–94. The Supreme Court has long construed the phrase "relating to" as meaning "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

Because of this broad causal standard, federal officer removal is proper even when only a portion of the allegedly tortious activity occurred under federal officers' direction. *See*, *e.g.*, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) ("nexus present during" the "ten years" plaintiff worked under federal direction was "sufficient to support §1442(a)(1) removal" even though plaintiff alleged harm due to exposure to a chemical over a 35-year period); *see also Lalonde v. Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (defendant's work under government control for eleven years established a "causal connection" between the claims and defendants' conduct, notwithstanding two decades during which defendant was not under such control). There is a substantial legal question as to whether a sufficient relationship between Plaintiff's alleged

injuries and the conduct some Defendants undertook at the direction of federal officers supports removal under §1442(a)(1).

D. Several Other Grounds for Removal Present Serious Legal Questions.

Defendants' appeal presents substantial legal questions as to whether Plaintiff's claims are removable on several other grounds, each of which also supports federal jurisdiction.

First, there is a legitimate question as to whether Plaintiff's claims are removable under *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005), because Plaintiff's nuisance claim necessarily requires courts to determine the "reasonableness" of Defendants' activities, which will require courts to conduct a cost-benefit analysis governed by federal law. Congress has already weighed, and continues to weigh, the costs and benefits of fossil fuels, directing federal agencies to permit—and even promote—maximum fossil-fuel production while balancing environmental concerns. *See* No. 18-cv-00395, ECF No. 87 at 16 n.5, 31–32, 32 n.14. These agencies have concluded that Defendants' activities are reasonable and have therefore allowed them to continue.

Second, Defendants have a substantial argument that Plaintiff's claims were properly removed under OCSLA, which extends federal jurisdiction to "cases and controversies arising out of, or in connection with … any operation conducted on the outer Continental Shelf ['OCS'] which involves exploration, development, or

production of … minerals." 43 U.S.C. §1349(b)(1). Plaintiff seeks to hold Defendants liable for *all* of their exploration for and production of oil and gas. Some Defendants have extracted a substantial portion of the oil and gas they produced on the OCS. *See* Ex.B ¶¶51-53; *see Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019) ("Under the OCSLA, all law on the OCS is federal law."). Moreover, the relief Plaintiff seeks—abatement of the alleged nuisance of oil and gas production—"threatens to impair the total recovery of the federally-owned minerals" from the OCS, which justifies removal. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994); *see also United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990).

Finally, Defendants have asserted several other removal grounds that, at a minimum, raise substantial questions, including that the claims arise on federal enclaves (ECF 87 at 53–56), are removable under the bankruptcy removal statute (*id.* at 63–67), are completely preempted by federal law (*id.* at 43–48), and are removable under admiralty jurisdiction (*id.* at 67–70).

II. Defendants Will Be Irreparably Harmed If The Remand Is Not Stayed

If the state court proceeds with this case while Defendants' appeal is pending and this Court ultimately finds that federal jurisdiction is proper, the district court (and possibly later this Court) would need to untangle the legal effect of any state-court rulings upon return to federal court, creating a "rat's nest of comity and

federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. These rulings would likely address multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings under state law. For this very reason, courts routinely stay remand orders pending appeal of those orders. *See, e.g., id.* at *3 (collecting cases).

Moreover, "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable." *Providence Journal Co.*, 595 F.2d at 890. Without a stay, the state court could reach a final judgment before Defendants' appeal is resolved—especially if the Supreme Court grants certiorari to resolve the circuit split on the proper scope of appellate review under §1447(d), and potentially after remand on that issue, grants certiorari on whether federal law governs these and nearly identical global-warming claims pending in other circuits. *See Northrop Grumman*, 2016 WL 3346349, at *4 (defendant would suffer "severe and irreparable harm if no stay is issued" because an "intervening state court judgment or order could render the appeal meaningless"); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013) ("[L]oss of appellate rights alone constitutes irreparable harm.").

Staying remand pending appeal would also save Defendants—and Plaintiff—from expending substantial time and resources litigating in state court. These costs

cannot be recovered if this Court reverses. *See Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand, noting litigation costs would be avoided).

III. The Balance of Harm Tilts Decisively In Defendants' Favor

Where, as here, "the Government is the opposing party," the third and fourth 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 Devitri v. Cronen*, 289 F. Supp. 3d 287, 297 (D. Mass. 2018) (same). A stay would neither prejudice Plaintiff's ability to seek relief nor meaningfully exacerbate Plaintiff's injuries. Indeed, Plaintiff's own complaint asserts that its injuries "will occur even in the absence of any future emissions" as a result of "locked in greenhouse gases already emitted." Ex.A ¶¶7-8, 207. Plaintiff would benefit from a stay by avoiding costly and potentially wasteful state court litigation should this Court conclude that this action belongs in federal court. *See Brinkman v. John Crane, Inc.*, 2015 WL 13424471, at *1 (E.D. Va. Dec. 14, 2015) (granting stay pending appeal so parties would not have to face the "burden of having to simultaneously litigate [the case] in state court and on appeal"). Moreover, even if Plaintiff's jurisdictional arguments are correct, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4; *see also Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 913 (5th Cir. 2011) (this factor weighed in favor of a stay where "[t]he

only potential injury faced by [the opposing party] is delay in vindication of its claim"); *Providence Journal Co.*, 595 F.2d at 890 (staying lower court decision where failure to grant a stay would "entirely destroy appellants' rights to secure meaningful review," and harm plaintiff "only to the extent that it postpones the moment of" relief).

Finally, a stay pending appeal would conserve judicial resources and promote judicial economy by unburdening the state court of potentially unnecessary, time-consuming litigation. *See United States v. 2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015). Any state court ruling addressing the viability of the claims under Rhode Island is unlikely to assist the district court in determining whether the claims can proceed under federal law. Additionally, because the discovery procedures and standards are different, any discovery disputes would likely have to be re-litigated in federal court. A stay is thus in the public interest.

CONCLUSION

Defendants respectfully request that the Court extend the stay of the Remand Order pending resolution of their appeal, and that the Court do so by October 9, 2019 before the district court's stay expires. Alternatively, at a minimum, the Court should extend the stay by 14 days to allow Defendants time to seek an emergency stay from the Supreme Court.

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Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally-spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,140 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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