No. 19-1818

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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)

PLAINTIFF-APPELLEE'S RESPONSE TO EXPEDITED MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The district court granted the State of Rhode Island's (the "State" or "Plaintiff") motion to remand this case to state court, rejecting all of Defendants' asserted bases for removal. The district court then denied Defendants' motion to stay remand pending appeal, Ex. B to Defendants' Expedited Motion for a Stay Pending Appeal (Sept. 13, 2019) ("Mot."), clearing the way to return the State's action to Rhode Island state court, where it belongs. Orders remanding cases to state court are generally "not reviewable on appeal or otherwise," 28 U.S.C. § 1447(d), with the express purpose "to spare litigants the burden of delay incident to a judicial review of such order." *In re MacNeil Bros. Co.*, 259 F.2d 386, 388 (1st Cir. 1958). Here, the State filed its complaint more than 15 months ago, yet jurisdiction remains unsettled. This Court should vindicate the purpose of the removal procedure statute and prevent further delay by denying Defendants' meritless motion and permitting the State to proceed with its sovereign prerogatives in the venue of its choosing.

By granting the State's motion to remand, the district court joined three other courts that have granted motions to remand in cases alleging state law claims for climate change-related injuries against fossil fuel-industry defendants. *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo*"), appeal pending, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir.); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *as*

amended (June 20, 2019) ("*Baltimore* Remand Order"), appeal pending, Nos. 19-1644 (4th Cir.); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, __ F. Supp. 3d __, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *1 (D. Colo. Sept. 5, 2019) ("*Boulder*"), appeal pending, No. 19-1330 (10th Cir.).[1] And by denying Defendants' motion to stay, the district court joined the well-reasoned opinion from the District of Maryland rejecting identical arguments. *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667 (D. Md. July 31, 2019) ("*Baltimore* Stay Denial"). All the arguments Defendants raise in support of a stay have been rejected multiple times by four courts in four different circuits, and should be rejected again here.

First, Defendants' contention that a stay should issue because they are likely to succeed on their appeal rests on the incorrect assumption that all of their rejected grounds for removal are reviewable. The majority of circuits has held that where federal officer jurisdiction is raised as a basis for removal along with other theories, appellate jurisdiction exists only to review the federal officer argument. Moreover, Defendants are not likely to succeed on federal officer removal jurisdiction because,

[1] In a fourth case, the court reached a contrary conclusion. *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), appeal pending, No. 18-16663 (9th Cir.). There, the court held that the claims at issue were "governed by federal common law," but did not consider any of the other bases for removal raised by Defendants here. The district court below thoroughly considered and rejected the *BP* court's reasoning, as did the *San Mateo*, *Baltimore*, and *Boulder* courts.

as all district courts that have addressed the issue have found, there is no causal nexus that supports Defendants' federal officer arguments. Mot. Ex. D ("Remand Order") at 15–16; *San Mateo*, 294 F. Supp. 3d at 939; *Baltimore* Remand Order, 388 F. Supp. 3d at 568; *Boulder*, 2019 WL 4200398, *20. Furthermore, even if the Court reaches Defendants' other purported bases for removal jurisdiction, Defendants have no substantial likelihood of reversal.

Second, Defendants' assertion that they will be irreparably harmed if litigation proceeds in state court pending appeal is "speculative," "disingenuous," and ultimately "unavailing," as the District of Maryland held in denying a nearly identical motion. *Baltimore* Stay Denial, 2019 WL 3464667, at *5 & n.2.

Third, contrary to Defendants' argument that the balance of harm tilts in their favor, in truth it weighs decidedly in the State's favor. Potential further delay favors denying 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.

STATEMENT OF FACTS

On July 2, 2018, the State filed its complaint in state court against 26 oil and gas companies. The complaint alleges that Defendants have 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. Mot. Ex. A ("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, purporting to raise seven separate grounds for removal. Mot. Ex. B. 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. Mot Ex. C ¶ 5.

The State moved to remand on August 18, 2018. Mot. Ex. B. On July 22, 2019, the district 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. Mot. Ex. D ("Remand Order"). On August 9, 2019, Defendants filed a motion to extend the interim stay, which the district court denied on September 10, 2019. Mot. Ex. F. The following day, pursuant to the stipulation of the parties, the district court ordered that the remand would not be entered until October 10, 2019. Mot. Ex. G.

LEGAL STANDARD

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).

The moving party "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 Cmty. Health Ctr., Inc. v. Armendariz*, 792 F.3d 229, 231 (1st Cir. 2015) (per curiam); *see also Nken*, at 556 U.S. at 434 (same). The first two factors—likelihood of success and potential irreparable injury—are the "most critical." *Nken*, 556 U.S. at 434.

ARGUMENT

A. Defendants Are Not Likely to Succeed on the Merits of Their Appeal.

To obtain a stay, Defendants must first make "a *strong showing* that [they are] likely to succeed on the merits" of their appeal. *Nken*, 556 U.S. at 434. "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); *see also Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6

(1st Cir. 1991) ("Likelihood of success cannot be woven from the gossamer threads of speculation and surmise.") (Selya, J.). Defendants here cannot show a likelihood of success on the one basis for removal over which this Court has appellate jurisdiction.

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 the district court's rejection of federal officer removal, raising a federal officer argument does not beget appellate rights as to *other* rejected removal grounds that are explicitly non-reviewable.

The Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits have all found that appeal under the enumerated exceptions in § 1447(d) does not provide appellate jurisdiction over *other* rejected removal bases. *See, e.g.*, *Jacks v. Meridian Res. Co.*, 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 as to §§ 1441 and 1447(c), but deciding whether removal was proper pursuant to § 1443); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997) (dismissing § 1441 appeal arguments "for want of appellate jurisdiction" based on "clear text of § 1447(d)"); *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."); *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).").

The most recent decision to reaffirm this interpretation of § 1447(d) is a case involving the exact removal-related issues presented here. The District of Maryland denied the defendants' motion to stay remand in a case brought by the City of Baltimore, alleging state law claims for climate change-related injuries against many of the same defendants in this appeal. *See Baltimore*, 2019 WL3464667, at *4. That result 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, 237 (2007), and the weight of appellate authority cited above.

2. Defendants' Authority Does Not Support Appellate Review of Issues Beyond Federal Officer Jurisdiction.

Defendants' argument that the district court's entire remand order is reviewable on appeal merely because they included federal officer jurisdiction as a ground for removal—a ground that four district courts have rejected—is not supported by their proffered authorities.

First, Defendants' reliance on the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) ("*Yamaha*"), is misplaced. Mot. at 7–8. *Yamaha* 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 is "not tied to the particular [controlling question of law] formulated by the district court." *Yamaha*, 516 U.S. at 205.

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, because limiting review to the particular "controlling question of law" formulated by the district court could create opportunities for repeated interlocutory

appeals. 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* from remand orders based on lack of federal subject matter jurisdiction and procedural defects, even if the remand order is manifestly erroneous.[2] Section 1292(b) also does not contain an express bar on appellate review akin to § 1447(d)'s. While interlocutory appeals under § 1292(b) allow review of questions of law *earlier* than normally permitted—before a final judgment has issued—Defendant's interpretation of § 1447(d) would permit review of issues that are ordinarily statutorily prohibited from appellate review *at all*.

In addition, even though § 1292(b) can open a wide range of issues to appeal—unlike § 1447(d)—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 would allow an appeal *as of right* whenever a removing defendant asserts federal officer jurisdiction alongside other theories, with no gatekeeping by any court, eviscerating § 1447(d)'s general prohibition

[2] *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).

on review. The majority of Circuits agree that the statute should not be read to be entirely self-effacing, as Defendants urge.

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*, 574 U.S. 528, 135 S. Ct. 1074, 1082 (2015) (plurality). Here, the text, structure, and purposes of § 1447(d) are plainly different from § 1292(b)'s.

Second, Defendants point to two cases that expanded the scope of review beyond the enumerated issues in § 1447(d). *See* Mot. at 7 (citing *Lu Junhong v. Boeing Co.*, 792 F.3d 811 (7th Cir. 2015); *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied sub nom. Cook v. Mays*, 138 S. Ct. 1557 (2018)). Those cases represent the clear minority position, and are flawed in their reasoning. *Lu Junhong* allowed review of additional bases for jurisdiction based explicitly—and exclusively—on the misreading of *Yamaha* discussed above. *See Lu Junhong*, 792 F.3d at 811–12. In *Mays*, the appellees did not contest appellate jurisdiction, and conceded that the remand order was reviewable. *See* 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 discussion of appellate

jurisdiction consisted of one sentence, citing *Lu Junhong* and no other case authority. *Mays*, 871 F.3d at 442.

Third, Defendants' reliance on the Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 & 546, is misplaced. Mot. at 8–9. The Act amended § 1447(d) by inserting the words "1442 or" before "1443," with no other changes. There is no basis in logic or statutory interpretation to believe that Congress's incorporation of § 1442 in addition to § 1443 expanded appellate jurisdiction beyond those bases expressly exempted from § 1447(d)'s general appellate bar. Indeed, multiple courts of appeal have rejected the interpretation Defendants advocate, as recently as this year. *See Attorney Grievance Comm'n of Md. v. Rheinstein*, 750 F. App'x 225, 226 (4th Cir. 2019) (per curiam) (dismissing appeal from remand order as to all asserted bases for removal other than § 1442), *petition for cert. filed*, No. 19-140 (July 30, 2019); *Wong v. Kracksmith, Inc.*, 764 F. App'x 583 (9th Cir. 2019) (per curiam) (dismissing appeal for lack of jurisdiction except as to removal under § 1443); *Claus v. Trammell*, 773 F. App'x 103 (3d Cir. 2019) (per curiam) (same).

Fourth, Defendants' argument that a circuit split exists warranting a stay is not supported by their citations. In *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150–52 (D. Mass 1998), there were "*only* two reported Court of Appeals decisions" addressing the question at issue, which "differ[ed]," but the district court denied a stay regardless (emphasis added). Here, by contrast, the large weight of

appellate authority, dating back decades, has rejected Defendants' interpretation of § 1447(d). In *United States v. Wilkinson*, 626 F. Supp. 2d 184 (D. Mass. 2009), not only was circuit authority split, but the decision involved the federal government's request to stay an order finding a federal criminal statute facially unconstitutional, and the Supreme Court had stayed another case raising the same challenge, "clearly communicat[ing]" its "belie[f] that at least a temporary stay in the cases before this court is justified." *Id.* at 194–95. None of the weighty considerations favoring a stay in *Wilkinson* are at issue here.

3. Defendants' Attempt to Invoke Federal Officer Jurisdiction Is Meritless and Does Not Warrant a Stay of the Remand Order.

Four courts have considered federal officer removal arguments identical to Defendants' in cases brought by public entity plaintiffs against fossil-fuel industry defendants, and all have rejected them. Remand Order at 15–16; *San Mateo*, 294 F. Supp. 3d at 939; *Baltimore* Remand Order, 388 F. Supp. 3d at 568; *Boulder*, 2019 WL 4200398, at *20. The district court here held:

> [N]o 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.'

Remand Order at 15.

Defendants now simply rehash the same arguments considered and rejected by the district court and three others. Merely parroting arguments already rejected

by multiple district courts does not show a likelihood of success on the merits. *Gens v. Kaelin*, No. 17-cv-03601-BLF, 2017 WL 3033679, at *3 (N.D. Cal. July 18, 2017).[3]

In ruling on a nearly identical motion, the district court of Maryland denied the defendants' motion to stay pending appeal. The court, which had "considered defendants' arguments at length and rejected them" in its remand order, ruled that just because federal officer jurisdiction "may be subject to appellate review [ ] does not support the issuance of a stay pending appeal." *Baltimore* Stay Denial, 2019 WL 3464667, at *5.

The 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 the district 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'

[3] In any event, the record does not support Defendants' vague assertion that federal officers directed certain Defendants to extract fossil fuels and produce a defective product. Mot. at 15. In their notice of removal, Defendants relied on a Unit Plan Contract ("UPC") between Standard Oil (Chevron's predecessor) and the U.S. Navy to support federal officer jurisdiction. But the UPC did not require Standard or any Defendant to produce massive volumes of fossil fuel (it in fact curtailed production), did not dictate how Standard or any Defendant sold or marketed fossil fuels, and did not require or authorize any Defendant to withhold known risks. *See* Ex. D to Mot. Ex. B ("Not. of Rem.") §§ 4(b), 5(d).

conduct and the plaintiffs' claims.[4] Here, however, Defendants failed to establish *any* causal connection. Remand Order at 15.

Defendants offer no reason why this Court should evaluate the merits of their federal-officer argument any differently than the district court, let alone that they can satisfy the likelihood-of-success requirement to obtain a stay. Because this is the only basis on which Defendants may seek review, a stay pending appeal is inappropriate.

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

Even if the Court considers the merits of Defendants' other jurisdictional arguments, Defendants have shown no likelihood of success on any of their theories. Removal statutes are strictly construed, and any doubts as to the propriety of removal are resolved in favor of remand. *Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 11 (1st Cir. 2004). The presumption against removal jurisdiction applies with added force where, as here, a sovereign state brings an action "in state court to enforce its

[4] Defendants' reliance on *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017), and *Zeringue v. Crane Co.*, 846 F.3d 785 (5th Cir. 2017), is likewise misplaced. In *Sawyer*, the government exercised "intense direction and control" over the conduct in question. 860 F.3d at 253. And in *Zeringue*, there was evidence the government "exercised a significant degree of guidance and control over" the defendant, as government specifications governed all aspects of the equipment at issue. 846 F.3d at 792. In contrast, here, Defendants can only point to a contract between the Navy and one of the Defendants' predecessors which merely settled those parties' respective ownership in an oil field.

own . . . laws" and "alleges only state law causes of action brought to protect [state] residents." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012). In that circumstance the "claim of sovereign protection from removal arises in its most powerful form." *Id.* (quotations omitted). Against that backdrop, all of Defendants' arguments fail.

Federal Common Law: Defendants' assertion that the State's claims "arise under federal common law" cites the same authority rejected below. Defendants rely principally on the order in *California v. BP P.L.C.*, 2018 WL 1064293, 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. The district court carefully 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). The other decisions that have squarely addressed the issue—*San Mateo*, *Baltimore*, and *Boulder*—reached the same conclusion as the district court below. *See* Remand Order at 6; *San Mateo*, 294 F. Supp. 3d at 937; *Baltimore* Remand Order, 2019 WL 2436848, at *8; *Boulder* Remand Order, 2019 WL 4200398, at *3–9.

Except in the narrow circumstance described in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), and its progeny, 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. Remand Order at 6. Preemption is a defense, and therefore does not provide a basis for removal even if "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, repeating those already rejected by the district court. 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."). The State's well-pleaded causes of action are, as the district court held, "thoroughly state-law claims" that do not belong in federal court. Remand Order at 12.

Grable: Defendants have no meaningful chance of success under *Grable*; controlling authority squarely forecloses their arguments. *Franchise Tax Bd.*, 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"); *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."). Every district court that has

considered Defendants' *Grable* arguments, including the court below, has rejected them. Remand Order at 14; *San Mateo*, 294 F. Supp. 3d at 938; *Baltimore* Remand Order, 388 F. Supp. 3d at 561; *Boulder* Order at *9–13. As the district court rightly found, Defendants' *Grable* arguments, "are, if anything, premature defenses, which even if ultimately decisive, cannot support removal." Remand Order at 14. Defendants have failed to identify a specific issue of federal law that must be necessarily be resolved to adjudicate the state law claims, and instead have merely gestured to general federal concerns that cannot support removal.

OCSLA: Defendants' contention that they have a "substantial argument" for jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1) ("OCSLA"), relies on a wholly inapposite Supreme Court opinion that involved no jurisdictional question. Mot. at 17–18. In *Parker Drilling Management Services, Ltd. v. Newton*, the plaintiff worked on drilling platforms off the California coast, and alleged violations of California wage-and-hour laws based on work he physically performed on those platforms. 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 the plaintiff contested removal, and the parties agreed that plaintiff's work on defendant's platforms was governed by OCSLA. *Id.* The issue before the Court in *Parker* was whether California wage-and-hour law applied on adjacent regions of the Outer Continental Shelf, in addition to the federal Fair Labor Standards Act—a

choice of law question with no relevance to removal jurisdiction. 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." Remand Order at 15. Nothing in *Parker* conflicts with the district court's rejection of OCSLA removal jurisdiction.

Federal Enclave, Bankruptcy, Admiralty, Complete Preemption: Defendants' remaining arguments for federal jurisdiction based on the federal enclave doctrine, the bankruptcy removal statute, admiralty law, and complete preemption have the same chance of success as the amount of space Defendants devote to them in their brief—virtually none. Mot. at 18. The district court correctly rejected Defendants' arguments concerning each of these bases for removal. Remand Order at 10–11, 15–16. Defendants do not explain why there is a strong likelihood that this Court would reverse.

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

No stay may issue unless threatened harm to the moving party is truly "irreparable," and such irreparable harm is at least probable. *See Nken*, 556 U.S. at 430 (the "possibility standard is too lenient"); *id.* at 434–35. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Where, as here, a case is in its early stages, "the risk of harm to [a 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 partial dismissal order 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"). 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). The First Circuit authority on which Defendants rely arose in the very different context of an order 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. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (once surrendered, "confidentiality will be lost for all time").

In the unlikely event the Remand Order were reversed, the state court proceedings would be suspended, the cases would return to the District of Rhode Island, and discovery and other pre-trial proceedings would presumably pick up 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 *Baltimore*, proceeding in state court while the appeal is pending "may well advance the resolution of the case. After all, the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum." *Baltimore* Stay Denial, 2019 WL 3464667, at *6.

Defendants insist that having to litigate their federal appeal and the remanded state court action at the same time would moot their appeal if a state court judgment came before the appeal was decided. Mot. at 19. But given the preliminary stage of the action, that is "disingenuous." *See Baltimore* Stay Denial, 2019 WL 3464667, at *5 n.2.

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

A stay would prevent the State from seeking prompt redress of its claims. This favors denial of Defendants' Motion, "particularly given the seriousness of the [State]'s allegations and the amount of damages at stake." *Baltimore* Stay Denial, 2019 WL 3464667, at *6.

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, e.g.*, *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 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).

CONCLUSION

For the foregoing reasons, Defendants' motion to stay should be denied.

Dated: September 23, 2019

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CERTIFICATE OF COMPLIANCE

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 5,121 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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CERTIFICATE OF SERVICE

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