Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ, *et al.*, Plaintiff-Appellees, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	Appeal No. 18-16376 No. 18-cv-00450-VC; 18-cv-00458-VC; 118-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

OPPOSITION TO MOTION TO STAY MANDATE

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INTRODUCTION

Defendants' Motion to Stay the Mandate ("Motion") is the latest in a line of increasingly strained attempts to prevent these cases from moving forward in state court. Defendants raise the same arguments they presented in their Petition for Rehearing En Banc, which the Court unanimously voted to deny. Dkt No. 235. The panel should likewise deny the instant motion.

Defendants' proposed Petition for a Writ of Certiorari ("Petition") does not satisfy either of the two required elements for a stay under Federal Rule of Appellate Procedure 41(d)(1): it neither raises a substantial question nor demonstrates good cause for a stay. Moreover, all prior requests for stays pending further federal appellate review have been denied in each of the substantially identical cases against Defendants and other similarly situated energy companies in courts throughout the country—including three district courts, three other circuit courts, and the U.S. Supreme Court—further indication that Defendants' latest stay request lacks merit.

The Petition fails to raise a substantial question. Defendants plan to argue, as they did in seeking en banc review, Dkt. No. 222, that because they raised a federal-officer jurisdiction ground for removal in district court, this Court was required by 28 U.S.C. § 1447(d) to review *every* ground for removal rejected by the district court, not just that one baseless ground that was made reviewable by Section 1447(d). This Court's rejection of that argument was consistent with the overwhelming weight of circuit court

authority, including the recent decisions of the Fourth and Tenth Circuits, which reached the identical conclusion in similar cases involving many of these same defendants. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore I*"), *pet. for cert. pending* No. 19-1189; *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder*").[1]

Defendants have also failed to make the required showing of good cause to stay the mandate, an independent reason to deny the requested stay. Defendants argue they will be irreparably harmed if forced to litigate in state court absent a stay. But none of the harms they allege are real or irreparable. Besides, in the unlikely event these cases are later returned to federal court (which can only happen if certiorari is granted *and* the Supreme Court reverses *and* defendants are later able to establish that federal question jurisdiction existed at the time of removal), allowing state court discovery and other proceedings in the interim would help advance the cases' ultimate resolution.

[1] Even if the Supreme Court were to grant certiorari and reverse, these cases would likely *still* be remanded to state court because none of the defendants' grounds for federal question removal jurisdiction have merit. Only one judge, in one district court, has ever found federal subject matter jurisdiction in any of the pending public nuisance/state tort cases brought in recent years against energy company defendants for climate impacts, and that ruling was reversed on appeal by this Court in *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom. Oakland v. BP PLC*, No. 18-16663, 2020 WL 4678380 (9th Cir. Aug. 12, 2020).

Merits proceedings in these cases have already been stayed for almost three years due to Defendants' meritless appeals. It is time for these cases to proceed in state court, where they were filed and where they belong.

BACKGROUND

The six sets of public entity plaintiffs here filed six separate lawsuits in various California state courts, asserting state-law claims against the energy company defendants. They allege that Defendants have known for decades about the direct link between fossil fuel use and global warming, yet engaged in a coordinated effort to conceal that knowledge from the general public and local governments.

Between August 2017 and January 2018, Defendants removed all six cases to federal court, alleging seven grounds for removal, including federal officer removal pursuant to 28 U.S.C. § 1442(a)(1), and federal question jurisdiction. *See* ER 145–47; No. 18-cv-00450 (N.D. Cal.) ECF No. 1; No. 18-cv-00458 (N.D. Cal.) ECF No. 1; No. 18-cv-00732 (N.D. Cal.) ECF No. 1. The district court (Chhabria, J.) granted Plaintiffs' motions to remand, rejecting each of Defendants' arguments in turn, including their "dubious assertion of federal officer removal." ER 1, 3–8.

On May 26, 2020, this panel affirmed the district court's remand order. The Court held that, under 28 U.S.C. § 1447(d), it could only review the district court's remand order to the limited extent the court rejected federal-officer jurisdiction as a basis for removal, and lacked appellate jurisdiction to review Defendants' other grounds for

removal. The panel further held that Defendants had failed to carry their burden to show that removal was proper under the federal-officer statute. On August 4, 2020, the full Court unanimously denied Defendants' petition for rehearing en banc. Dkt. No. 235.

ARGUMENT

An applicant moving for stay of the mandate pending Supreme Court review "bears a heavy burden." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010). The Supreme Court will only stay the mandate pending its review of a petition for writ of certiorari where: (1) there is a reasonable probability that certiorari will be granted, (2) there is a significant possibility that the order below will be reversed after a grant of certiorari, and (3) assuming the movant's position on the merits is correct, there is a likelihood of irreparable harm if the judgment is not stayed. *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991). Likewise, under Federal Rule of Appellate Procedure 41(d)(1), where "[a] party . . . move[s] to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court," the motion "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). In the Ninth Circuit, a stay of mandate pending petition to the Supreme Court "will not be granted as a matter of course . . . ." 9th Cir. Rule 41-1. Here, Defendants fail to show that their proposed Petition will raise a substantial question or that good cause exists for the requested stay.

A. Substantially Similar Motions to Stay Have Been Rejected by the Supreme Court and Appellate and District Courts Across the Country.

The arguments raised in Defendants' Motion are not new and have been rejected many times before. Following remand orders in other courts in substantially similar climate-impact, most of the Defendants here (and their co-defendants) unsuccessfully filed motions for stays pending appeal, including in the District of Rhode Island, the District of Maryland, the District of Colorado, the First Circuit, the Fourth Circuit, the Tenth Circuit, and the United States Supreme Court. Declaration of Victor M. Sher in Support of Pls.' Opposition to Defendants' Motion to Stay the Mandate ("Decl.") Exs. 1–7. In each of those cases, as here, the defendants argued that they were likely to succeed on the merits and that they would suffer irreparable harm absent a stay, because they would be forced to litigate in state court. *Id.* In each of those cases, the defendants' stay motions were denied.[2]

The instant motion is no different, and should be denied for the same reasons.

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[2] *See BP P.L.C. v. Mayor and City Council of Baltimore*, 140 S.Ct. 449 (Oct. 22, 2019); *Bd. of Cty. Commissioners of Boulder County v. Suncor Energy, Inc.*, 10th Cir. Case No. 19-1330, Doc. No. 10687694 (Oct. 17, 2019) (Decl. Ex. 8); *Mayor and City Council of Baltimore v. BP P.L.C.*, 4th Cir. Case No. 19-1644, Doc. No. 116 (Oct. 1, 2019) (Decl. Ex. 9); *State of Rhode Island v. Shell Oil Products Company, LLC*, 1st Cir., Case No. 19-1818, Doc. No. 00117499123 (Oct. 7, 2019) (Decl. Ex. 10); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066 (D. Colo. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, No. ELH-18-2357, 2019 WL 3464667 (D. Md. July 31, 2019); *State of Rhode Island v. Shell Oil Prods. Co.*, D.R.I., Case No. 18-cv-00395-WES-LDA, Doc. No. 40 (Sep. 10, 2019) (Decl. Ex. 11).

B. Defendants' Petition Does Not Present a Substantial Question.

1. This Court's Construction of 28 U.S.C. § 1447(d) is Consistent with the Law of all but One Circuit.

Defendants' proposed Petition does not raise a substantial question, and the Supreme Court is highly unlikely to grant review. This Court was correct that its construction of Section 1447(d) is consistent with the nearly "unanimous judicial interpretation of [the statute]," *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 597 (9th Cir. 2020), and the most recent circuit court decisions are fully in accord with the panel's analysis and conclusions.

The Fourth and Tenth Circuits are the most recent examples of other circuit courts rejecting the Defendants' construction of Section 1447(d) in a similar context. The Fourth Circuit in *Baltimore I* rejected the identical argument that Defendants advance here—that under the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), Section 1447(d) must be construed to require appellate review of *every* jurisdictional argument rejected by a district court if the defendants cited federal-officer or civil-rights jurisdiction as one possible ground for removal. *Baltimore I*, 952 F.3d at 459–61. The Tenth Circuit agreed with that analysis in *Boulder*, 965 F.3d at 809, embracing on first impression the prevailing view that "when a district court issues a remand order premised on a § 1447(c) ground, [the court of appeals is] empowered to review that order only to the extent it addresses the removal bases explicitly excepted from § 1447(d)—in this case, removal under 28 U.S.C. § 1442," *id.*

at 819. In reaching this conclusion, the Tenth Circuit performed a thorough analysis of the text, context, history, and purposes of Section 1447(d), which led it to conclude that "the proper construction of the statute is the narrower one adopted by the majority of federal circuits." *Id.* at 802–19.

The Second, Third, Fifth, Sixth, Eighth, and Eleventh Circuits have also each adopted this same interpretation, putting those courts' precedents squarely in line with this Court and the Fourth and Tenth Circuits.[3]

In contrast to this overwhelming weight of authority, only the Seventh Circuit in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), has issued a published precedential decision reaching the opposite result. In *Lu Junhong*, the Seventh Circuit held that when a lawsuit is removed pursuant to 28 U.S.C. § 1442 and is later remanded, Section 1447(d) authorizes "appellate review of the whole order, not just of particular issues or reasons." 792 F.3d at 811. In reaching this conclusion, the Seventh Circuit

[3] *See State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981) (per curiam); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Pennsylvania ex rel. Gittman v. Gittman*, 451 F.2d 155, 157 (3d Cir. 1971); *City of Walker v. Louisiana through Dep't of Transp. & Dev.*, 877 F.3d 563, 566 n.2, 567 n.4 (5th Cir. 2017); *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976); *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567–68 (6th Cir. 1979); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Thornton v. Holloway*, 70 F.3d 522, 524 (8th Cir. 1995); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *but see Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017) (reviewing procedural defect in removal where removal jurisdiction premised in part on Section 1442); *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (reviewing remand order as to removal under Section 1441 and 1442).

relied on *Yamaha*, which involved a materially different statutory scheme. But this Court, like the Fourth and Tenth Circuit, squarely rejected *Lu Junhong*'s analysis, including its reliance on *Yamaha* as a guide to construing Section 1447(d). *Cty. of San Mateo*, F.3d at 597; *Baltimore I*, 952 F.3d at 459–61; *Boulder*, 965 F.3d at 809.[4] Although two cases from other circuits have adopted the holding of *Lu Junhong*, neither contained any reasoned analysis of Section 1447(d) and both conflict with their own circuits' binding authority—meaning they have no precedential value even within their own circuits.[5]

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[4] Although the Seventh Circuit has subsequently cited *Lu Junhong* four times, none of those cases involved a dispute over the scope of appellate jurisdiction under Section 1447(d), and each of them would have been decided the same way under the prevailing construction of Section 1447(d) at issue here. *See Betzner v. Boeing Co.*, 910 F.3d 1010, 1014 (7th Cir. 2018); *Hammer v. U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 525 (7th Cir. 2018), *reh'g denied* (Nov. 21, 2018); *Panther Brands, LLC v. Indy Racing League, LLC*, 827 F.3d 586, 590 (7th Cir. 2016); *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 642 (7th Cir. 2016).

[5] Only two cases outside of the Seventh Circuit followed *Lu Junhong*'s application of *Yamaha*—the Sixth Circuit in *Mays*, 871 F.3d 437, and the Fifth Circuit in *Decatur Hosp. Authority*, 854 F.3d 292. In *Mays*, the Sixth Circuit applied *Lu Junhong* with no analysis, 871 F.3d at 442, and overlooked that circuit's binding precedent in *Detroit Police Association*, 597 F.2d at 567–68, which adopted the prevailing view and held that Section 1447(d) limits review to federal officer and civil rights grounds for removal only. *Decatur Hospital Authority*, 854 F.3d 292, arose in a unique procedural context, includes internally inconsistent language concerning Section 1447(d), and is also in conflict with earlier Fifth Circuit authority, *Robertson*, 534 F.2d at 65, which adopted the prevailing view of Section 1447(d). A more recent Fifth Circuit opinion, *City of Walker*, explained that *Lu Junhong* was "in tension" with *Robertson*, and cited both *Robertson* and *Decatur Hospital Authority* for the proposition that the Fifth Circuit had "rejected . . . in the past" the argument that "the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order." 877 F.3d at 569, 566 nn.2–3.

2. Defendants' Petition Does Not Raise a Dispositive Issue Because Defendants' Other Grounds for Removal Are Also Meritless.

Even if the Supreme Court were to grant certiorari and reverse, and even if it were to conclude that this Court should have exercised jurisdiction to review Defendants' other, non-federal-officer grounds for removal, the result would be the same. Defendants' principal argument in support of removal has always been that Plaintiffs' claims are necessarily governed by federal common law. Mot. at 5. This panel squarely rejected that argument in *Oakland*, 960 F.3d 570, *opinion amended and superseded on denial of reh'g sub nom.*, 2020 WL 4678380. Except for the district court in that case, *every* court to have considered Defendants' removal arguments in every pending climate-impact case has rejected them.[6]

C. There is No Good Cause for A Stay.

Defendants' stay motion must be denied for a second, independent reason, namely that they have failed to show good cause. There is no evidence that any Defendant will suffer any irreparable harm if the case is remanded to state court pending

[6] *See Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (granting motion to remand), *as amended* June 20, 2019, *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (same), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) (same), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020); *Massachusetts v. Exxon Mobil Corp.*, __ F. Supp. 3d __, No. CV 19-12430-WGY, 2020 WL 2769681 (D. Mass. May 28, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) (same), *appeal docketed*, No. 19-1818 (1st Cir. Aug. 20, 2019).

resolution of their Petition. Moreover, any further delay in the prosecution of these nearly three-year-old cases will substantially prejudice the public-entity plaintiffs.

The mere fact that litigation may proceed in the absence of a stay is far from enough to cause irreparable harm. Even if an erroneous remand created some form of cognizable injury, it is not the kind of serious injury that warrants this Court's intervention. *See, e.g.*, 15A Wright & Miller, *Fed. Prac. & P.* § 3914.11 (2d ed.) ("[A]s important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate."). Congress has made clear that the strong public policy favoring expeditious consideration of the merits outweighs the limited harm of a mistaken remand. Indeed, the reason Section 1447(d) makes remand orders generally unreviewable "on appeal or otherwise," is "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 310 (2d Cir. 2005) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)). The possibility that a state court could resolve a private party's federal defenses—even defenses that could have been adjudicated in federal court—does not constitute an emergency. Not surprisingly, Defendants have been unable to identify any case, at any level of the federal judiciary, where the mere act of implementing a remand order has been deemed irreparable harm.

Where a case is in its early stages procedurally, as here, "the risk of harm to [defendants] 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). 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).

In the unlikely event the remand order is reviewed and reversed by the Supreme Court, the state court proceedings would be suspended, the cases would return to the federal court, and discovery and other pre-trial proceedings would presumably pick up where they left off and Defendants would still be required to respond to the same discovery. In the meantime, 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*, 2019 WL 3464667, at *6 (order denying stay pending appeal of remand order in substantially similar climate-impact case).

In contrast to the absence of irreparable harm to Defendants, it is clear that a further stay of these proceedings would cause significant harm to Plaintiffs and the public interest because it would further delay their efforts—and their right—to seek prompt redress of their claims on behalf of the People of the State of California. This is another reason Defendants' stay motion should be denied, "particularly given the seriousness of the [Plaintiffs'] allegations and the amount of damages at stake." *Id.*

Defendants' improper removal and multiple appeals have delayed these proceedings for almost three years. The public interest and balance of equities strongly weigh against Defendants' continued interference with the Plaintiffs' exercise of their right to proceed in 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"). These cases again have been ordered back to state courts where they belong. No further delay in these proceedings should be countenanced.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants' motion to stay the mandate.

Respectfully submitted,

Dated: August 20, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation of Circuit Rules 27(d)(2). This brief contains 3,364 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f), and is in response to a longer joint brief.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

/s/ Victor M. Sher
Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Victor M. Sher
Victor M. Sher

Nos. 18-15499, 18-15502, 18-15503, 18-16376

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DECLARATION OF VICTOR M. SHER IN SUPPORT OF OPPOSITION TO MOTION TO STAY MANDATE

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I, Victor M. Sher, hereby declare as follows:

1. I am a member in good standing of the State Bar of California, a partner at the law firm of Sher Edling LLP, and one of the counsel of record for Plaintiffs-Appellees The County of San Mateo, The City of Imperial Beach, The County of Marin, The County of Santa Cruz, The City of Santa Cruz, and The City of Richmond in the above-captioned appeals. I submit this Declaration in support of Plaintiffs-Appellees' Opposition to Motion to Stay Mandate. I have personal knowledge of the facts set forth below, and if called upon to testify, I could and would competently testify to them.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Defendants' Expedited Motion for a Stay Pending Appeal filed on September 13, 2019 with the United States Court of Appeals for the First Circuit for case no. 19-1818.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Defendants' Motion to Stay Pending Appeal filed on August 9, 2019 with the United States Court of Appeals for the Fourth Circuit for case no. 19-1644.

4. Attached hereto as **Exhibit 3** is a true and correct copy of Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal filed on October 8, 2019 with the United States Court of Appeals for the Tenth Circuit for case no. 19-1330.

5. Attached hereto as **Exhibit 4** is a true and correct copy of the Defendants' Motion for a Stay of the Remand Order Pending Appeal filed on September 13, 2019 with the United States District Court for the District of Colorado for case no. 1:18-cv-1672-WJM-SKC.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the Conditional Motion to Stay Execution of Remand Order Should the Court Grant the Pending Motion to Remand filed on April 3, 2019 with the United States District Court for the District of Maryland for case no. 1:18-cv-02357-ELH.

7. Attached hereto as **Exhibit 6** is a true and correct copy of the Memorandum of Law in Support of Defendants' Motion to Extend the Stay of the Remand Order Pending Appeal filed on August 9, 2019 with the United States District Court for the District of Rhode Island for case no. 1:18-cv-00395-WES-LDA.

8. Attached hereto as **Exhibit 7** is a true and correct copy Defendants' Application to Stay Remand Order of the United States District Court for the District of Maryland Pending Appeal and Immediate Administrative Stay filed on October 1, 2019 with the Supreme Court of the United States.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the Order Denying Stay issued by the United States Court of Appeals for the Tenth Circuit on October 17, 2019 for case no. 19-1330.

10. Attached hereto as **Exhibit 9** is a true and correct copy of the Order Denying Stay issued by the United States Court of Appeals for the Fourth Circuit on October 1, 2019 for case no. 19-1644.

11. Attached hereto as **Exhibit 10** is a true and correct copy of the Order Denying Stay issued by the United States Court of Appeals for the First Circuit on October 7, 2019 for case no. 19-1818.

12. Attached hereto as **Exhibit 11** is a true and correct copy of the text Order Denying Stay issued by the United States District Court for the District of Rhode Island on September 10, 2019 for case no. 1:18-cv-00395-WES-LDA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of August, 2020.

SHER EDLING LLP

By: */s/ Victor M. Sher*
Victor M .Sher
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Victor M. Sher
Victor M. Sher

EXHIBIT 1

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* C*anterbury 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

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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.

Dated: September 13, 2019

Respectfully submitted,

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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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EXHIBIT 2

No. 19-1644

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C., et al.,

Defendants-Appellants.

Appeal from the United States District Court
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(The Honorable Ellen L. Hollander)

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INTRODUCTION[1]

This Court should enter a stay pending appeal of the district court's order granting the motion of Mayor and City Council of Baltimore ("Plaintiff") to remand this action to state court. Fed. R. App. P. 8(a)(2)(ii).[2] This case is one of thirteen nearly identical cases currently pending in federal courts around the country in which various government entities have asserted global warming claims against companies in the fossil fuel industry.[3] All but one of these actions were filed in state court and removed to federal court, and all of them are now either on appeal before a U.S. Court of Appeals or stayed. Defendants have argued in each case 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

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[1] Pursuant to Local Rule 27(a), counsel for Plaintiff was informed of Defendants' intent to file this motion. Plaintiff opposes the motion.

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

[3] *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.); *City and Cty. of San Francisco v. BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.); *State of Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP P.L.C.*, No. 18-cv-00182-JFK (S.D.N.Y.).

district judges agreed, holding that global warming claims arise under federal law, regardless of whether the plaintiffs affix 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). A third district judge held that federal common law does *not* govern plaintiffs' global warming claims, defeating removal, *see County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018)—but that judge stayed the remand pending appeal to ensure that the defendants' appellate rights were not rendered meaningless by intervening state court proceedings. A fourth district judge remanded global warming claims for similar reasons as the district court in this case, but stayed the remand for 60 days to allow the "parties time to brief and the Court to decide whether a further stay pending appeal is warranted." *Rhode Island v. Chevron Corp.*, 2019 WL 3282007, at *6 (D. R.I. July 22, 2019).

These divergent district court orders confirm that Defendants' appeal raises serious legal questions about which reasonable jurists can disagree. Furthermore, Defendants have a statutory right to appeal because they removed these cases under, *inter alia*, 28 U.S.C. §1442(a), the federal officer removal statute. That right would be rendered meaningless absent a stay because Defendants would be forced to litigate this case in state court for the entire pendency of the appeal. Courts routinely stay remand orders pending appeal to prevent the "rats nest of comity and federalism

issues" that would result from the reversal of a remand order after months (or even 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 to relieve the parties of the substantial burden of litigating this case on parallel tracks.

STATEMENT OF FACTS

On July 20, 2018, Plaintiff filed a complaint in Maryland state court against 26 energy companies, alleging that Defendants' worldwide "extraction, refining, and/or formulation of fossil fuel products … is a substantial factor in causing [global warming]," which Plaintiff claims is causing it ongoing injury. Ex.A ¶193; *id.* ¶195. The complaint purports to assert Maryland state law causes of action for public and private nuisance, strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violation of the Maryland Consumer Protection Act. Ex.A ¶¶218-98. Plaintiff seeks, among other things, compensatory and punitive damages, disgorgement of profits, and equitable relief to abate the alleged nuisance. *Id.* Prayer for Relief at 130.

Defendants Chevron Corp. and Chevron U.S.A., Inc. removed this action to the Federal District Court for the District of Maryland on July 31, 2018. Ex.B. The notice of removal asserted that Plaintiff's claims are removable because they: (1) "are governed by federal common law," *id.* at 4; (2) "raise[] disputed and substantial

federal questions," *id.* at 6; (3) "are completely preempted by the CAA and/or other federal statutes and the United States Constitution," *id.* at 6-7; (4) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1349, *id.* at 7; (5) arise out of conduct undertaken at the direction of federal officers, *id.*; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.*; (7) "are related to cases under Title 11 of the United States Code," *id.*; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333," *id.* at 8.

Plaintiff moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion without hearing argument. Ex.C. Pursuant to the parties' stipulation, the district court stayed the remand for thirty days. *Id.* at 3. On June 12, 2019, Defendants filed a notice of appeal. Ex.D.

On June 23, 2019, Defendants filed a motion in the district court to stay the remand pending appeal, No. 18-cv-02357, ECF No. 183, and the parties stipulated to stay the remand until the district court had resolved that motion. *Id.*, ECF No. 184. The stipulation also provided that the remand would be stayed pending resolution of any motion to stay filed in this Court. *Id.*

On July 31, 2019, the district court denied Defendants' motion to stay. Ex.E. Although the district court "agree[d] that the removal of this case based on the application of federal law presents a complex and unsettled legal question," *id.* at 5,

it concluded that §1447(d) authorizes review *only* of the federal officer removal question, *id.* at 5-9. And it concluded that Defendants' appeal did not present a serious legal question as to the propriety of removal on that ground. *Id.* at 8-9. The court also concluded that the other stay factors did not justify a stay. *Id.* at 9-11.

ARGUMENT

In considering a motion to stay pending appeal, the Court must weigh whether (1) Movants can show they will likely prevail on the merits of the appeal, (2) Movants will suffer irreparable injury if the stay is denied, (3) a stay will not substantially harm other parties, and (4) a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (same). Where, as here, the government is the opposing party, the third and fourth factors "merge" and should be considered together. *Nken*, 556 U.S. at 435.

I. Defendants Are Likely to Succeed on the Merits of Their Appeal

To establish that they are "likely to succeed on the merits," Defendants must "establish[] sufficiently that their appeal presents a substantial legal question on the merits." *Brinkman v. John Crane, Inc.*, 2015 WL 13424471, at *1 (E.D. Va. Dec. 14, 2015); *see also Wash. Speakers Bureau v. Leading Authorities, Inc.*, 49 F. Supp. 2d 496, 499 (E.D. Va. 1999) (same). The likelihood of success factor is thus satisfied when "there is a distinct possibility a panel of judges on the Fourth Circuit may reach

a different conclusion than [the district court] on some of th[e] difficult issues" in the case. *Zhenli Ye Gon v. Holt*, 2014 WL 202112, at *1 (W.D. Va. Jan. 17, 2014). That standard is satisfied here.

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

Defendants removed this case under the federal officer removal statute, 28 U.S.C. §1442(a), and thus have a statutory right to appeal. *See* 28 U.S.C. §1447(d); *Northrop Grumman Technical Servs., Inc. v. DynCorp Int'l, LLC*, 865 F.3d 181, 186 n.4 (4th Cir. 2017). 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). 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). 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." *Id.* at 254.

Plaintiff alleges that Defendants' extraction and production of fossil fuels have contributed to the global warming-based injuries it asserts. Ex.A ¶193. At least some of the Defendants extracted, produced, and sold fossil fuels at the

direction of federal officers. *See* Ex.B ¶¶61-64, ECF No. 74 ("JA") at 246 §1.a; JA.250 §4(b)); JA.234 §9. 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, 151, 153 (2007).

The district court assumed that Defendants could meet the first two requirements, but held that removal was improper because Defendants' conduct under federal direction was not sufficiently connected to Plaintiff's claims. Ex.C at 36-37 (holding that Defendants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels."). But to satisfy the nexus requirement, a defendant must show "only that the charged conduct *relate[s]* to an act under color of federal office." *Sawyer*, 860 F.3d at 258 (emphasis added). Other courts have held that the type of contractual obligations established by Defendants support federal officer removal, even when only a portion of the allegedly tortious activity occurred under the direction of federal officers. *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 produced by the defendant over a 35-year period); *Lalonde v. Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (defendant's work

under the direction of the government for eleven years established a "causal connection" between the claims and the defendants' conduct, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer). There is thus a substantial legal question as to whether there is a causal nexus between Plaintiff's alleged injuries and the conduct that some Defendants undertook at the direction of federal officers.

The district court also held that federal officer removal was improper because the government did not direct Defendants "to conceal the hazards of fossil fuels or prohibit[] them from providing warnings to consumers." Ex.C at 36. But Plaintiff has asserted claims for public and private nuisance, strict liability and negligent design defect, and trespass—causes of action that turn on Defendants' alleged extraction and production, not their promotional or lobbying activities. Ex.A ¶¶218-36, 249-69, 282-90. There is, at minimum, a serious legal question as to whether removal is proper where one of the primary "acts for which [Defendants] have been sued," Ex.C at 37, was taken in part at the direction of federal officers.

The district court's reliance on two other decisions rejecting removal of similar claims under §1442 also does not support a stay. Ex.E at 8 (citing *San Mateo*, 294 F. Supp. 3d at 939; *Rhode Island*, 2019 WL 3282007, at *5)). Both courts asserted that removal under §1442 was improper because some of the challenged conduct—such as Defendants' promotion—was not controlled by federal officers.

But as this Court has explained, "there need be only 'a *connection or association* between the act in question and the federal office.'" *Sawyer*, 860 F.3d at 258 (emphasis in original).

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

Defendants' notice of removal also asserted that Plaintiff's global warming claims arise under federal common law and thus are removable under 28 U.S.C. §1441. The district court agreed that this basis for removal raises a serious legal question, but denied a stay because, *inter alia*, it believed that this Court would limit its review to the federal officer removal ground. Ex.E at 5-8. But the plain text of 28 U.S.C. §1447(d) makes remand *orders*—not particular grounds for removal—reviewable on appeal where, as here, a case is removed under §1442. *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 or 1443 of this title *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, Michigan*, 871 F.3d 437, 442 (6th Cir. 2017) (following *Lu Junhong*); 15A Wright et al., Fed. Prac. & P. §3914.11 (2d ed.).

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), supports 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. As a result, "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 an appeal—just as a controlling question of law is a necessary predicate for an appeal under §1292(b)—once this predicate is satisfied, the court of appeals has jurisdiction to review the whole "order." Accordingly, Defendants' federal common law argument—as well as every other ground for removal—is squarely presented on appeal.

The district court concluded that this plain-text interpretation of §1447(d) was barred by Fourth Circuit precedent. Ex.E at 7 (citing *Noel v. McCain*, 538 F.2d 633

(4th Cir. 1976)). To be sure, *Noel* stated that "[j]urisdiction to review remand of a §1441(a) removal is not supplied by also seeking removal under §1443(1)," 538 F.2d at 635 (citing *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), but *Noel* predated *Yamaha* and the Removal Clarification Act of 2011, in which 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). Pub. L. No. 112-51, 125 Stat. 545 (2011). And *Noel* relied on the Sixth Circuit's decision in *Appalachian Volunteers* to reach its jurisdictional conclusion, but the Sixth Circuit has recently taken the opposite view. *See Mays*, 871 F.3d at 442.

The Ninth Circuit's treatment of the jurisdictional issue also supports a stay here. In *San Mateo*, the plaintiffs moved to dismiss the appeal in part for lack of jurisdiction, citing a Ninth Circuit decision that, like *Noel*, predated the Removal Clarification Act. A motions panel referred the appellate-jurisdiction issue to the panel assigned to decide the merits of the appeal. *See* Order, No. 18-15499, ECF No. 58 (9th Cir. Aug. 20, 2018). Similarly, here, the scope of appellate review under the current version of §1447(d) presents a substantial question warranting full briefing and oral argument. This Court should grant a stay to preserve the status quo pending a decision both on that issue and on the presence of federal jurisdiction over Plaintiff's claims.

Finally, to the extent *Noel* is still binding, Defendants' motion should still be granted because *Noel* is part of a circuit split on the issue of appellate jurisdiction in cases removed under §1442. *See* Ex.E at 7-8 (collecting cases). That is reason alone to grant a stay. *See In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007) (granting stay where "there [was] a substantial circuit split on [a] jurisdictional issue"). Given the likelihood that the Supreme Court will resolve the circuit split regarding the scope of appellate jurisdiction under §1447(d), Defendants request that, if the Court declines to grant a stay pending appeal, it extend the stay currently in effect for 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

1. Defendants' appeal presents a substantial legal question as to whether Plaintiff's global warming claims arise under federal common law.

With the whole remand order under review, a stay is plainly warranted because, as the district court agreed, the federal common law ground of removal "presents a complex and unsettled legal question, as evidenced by the diverging opinions reached by other district courts that have considered the issue." Ex.E at 5; *see BP*, 2018 WL 1064293; *City of New York*, 325 F. Supp. 3d 466; *San Mateo*, 294 F. Supp. 3d 934; *Rhode Island*, 2019 WL 3282007.

In *BP*, the court denied a motion to remand global-warming claims filed by the City of Oakland and the City and County of San Francisco against five energy

producers—all of which are Defendants here. Similar to Plaintiff here, the plaintiffs in *BP* argued that the well-pleaded complaint rule barred removal because they had nominally asserted their claims under state law. 2018 WL 1064293, at *5. The court disagreed, holding that the "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). In reaching that conclusion, the court relied on a line of Supreme Court decisions holding that federal common law applies "to an interstate nuisance claim." *Id.*[4] It held that the well-pleaded complaint rule was no barrier to removal because the plaintiffs' "claims necessarily arise under federal common law." *Id.* at *5; *see Milwaukee I*, 406 U.S. at 100.

The court in *City of New York* reached a similar conclusion, where the plaintiff purported to assert state-law claims against the same five energy producers seeking

[4] *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 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.").

"damages for global-warming related injuries resulting from greenhouse gas emissions." 325 F. Supp. 3d at 472. The 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.* (emphasis added). Although the City of New York filed its action in federal court on the basis of diversity, the district court's conclusion that plaintiff's purportedly state-law claims arose under federal common law was critical to its decision to dismiss.

In *San Mateo*, by contrast, the court granted the plaintiffs' remand motion, but for very different reasons than the district court adopted here. Whereas the district court below concluded that Defendants' removal arguments were barred by the well-pleaded complaint rule *regardless* of whether federal common law governs the claims, Ex.C at 12-19, the court in *San Mateo* remanded because it concluded that "federal common law does *not* govern" the claims. *San Mateo*, 294 F. Supp. 3d at 937.[5] Although the *San Mateo* court granted the plaintiffs' remand motion, it *sua sponte* certified its order for interlocutory review because it recognized that the

[5] The court in *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 does not affect subject matter jurisdiction, but only the availability of a *remedy*. ECF No. 73 at 31.

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 the remand pending appeal to the Ninth Circuit. *Id.*

In *Rhode Island*, the court agreed that "transborder air and water disputes are one of the limited areas where federal common law survived *Erie R. Co. v. Tompkins*," 304 U.S. 64 (1938), but concluded that "whether displaced or not, 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." 2019 WL 3282007, at *3. However, the court granted a 60-day stay of its remand order. *Id.* at *6. As a result, none of the other cases involving global warming claims nominally asserted under state law are currently proceeding in state court.

These conflicting decisions—which will be reviewed by the First, Second, and Ninth Circuits—confirm that Defendants' appeal to *this* Court presents serious legal questions about which reasonable jurists can disagree. *See United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 271 (E.D. Va. 1995).

In "declin[ing] to endorse" removal based on federal common law, the district court also recognized "the absence of any controlling authority." Ex.C at 17; *see Holt*, 2014 WL 202112, at *1 (staying case where "the law on at least some of [the]

issues is unsettled or is not subject to any recent authority directly on point"). Accordingly, Defendants have shown a "substantial case on the merits," as their appeal "raises a number of complex questions and novel legal theories which the Fourth Circuit has yet to evaluate, and the case has potentially large downstream precedential consequences." *Northrop Grumman*, 2016 WL 3346349, at *3; *see Goldstein v. Miller*, 488 F. Supp. 156, 175 (D. Md. 1980) (granting stay where "there is little doubt that at least some of the issues raised in these cases present serious questions of first impression").

Defendants' appeal also presents a "substantial case on the merits" because this case addresses "matters of substantial national importance," such as whether federal or state courts are the appropriate forum for addressing claims based on global warming allegedly caused by worldwide conduct. *Project Vote/Voting for Am., Inc. v. Long*, 275 F.R.D. 473, 474 (E.D. Va. 2011).

2. Defendants' appeal presents serious legal questions as to whether removal was proper on several other grounds.

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

First, there is a legitimate issue as to whether Plaintiff's claims are removable under the "common-sense" inquiry set forth in *Grable & Sons Metal Products, Inc.*

v. Darue Engineering & Manufacturing, 545 U.S. 308, 312-13 (2005), which held that federal jurisdiction over a state law claim exists if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Id.* at 313-14. Plaintiff's nuisance claims require a determination as to the "reasonableness" of Defendants' conduct, but federal law governs the cost-benefit analysis required by Plaintiff's nuisance claims, and several federal agencies have already concluded that Defendants' conduct is reasonable. *See* ECF No. 73 at 33-37.

Second, Defendants have a substantial argument that Plaintiff's claims were properly removed under the OCSLA, which extends federal jurisdiction to "cases and controversies arising out of, or in connection with … any operation conducted on the outer Continental Shelf which involves exploration, development, or production of … minerals." 43 U.S.C. § 1349(b)(1). *See* ECF No. 73 at 43-46. Plaintiff seeks to hold Defendants liable for *all* of their exploration for and production of oil and gas, and some defendants extracted a substantial portion of the oil and gas they produced on the OCS. Ex.B ¶¶ 55-56. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (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 courts have held is sufficient for 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, the other removal grounds asserted by Defendants also raise substantial questions. *See* ECF No. 73 at 46-54.

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

Once the remand takes effect—*i.e.*, after the Clerk of Court for the District of Maryland mails the certified copy of the Remand Order to the Circuit Court for Baltimore City—"[t]he State Court may thereupon proceed with [the] case." 28 U.S.C. §1447(c). Even if this appeal can be resolved before the state court enters a final judgment, the district court would need to untangle any state court rulings made during the pendency of the appeal if this Court reverses, creating a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. These rulings would likely include multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings under state law.

Courts routinely grant motions to stay remand orders to avoid this exact risk. *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. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could reach a final judgment before Defendants' appeal is finally resolved—especially if this Court follows *Noel*, the Supreme Court grants review and adopts the Seventh Circuit's interpretation of §1447(d), and this Court then reviews the entire remand order. *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.").[6]

An immediate remand also would force Defendants—and Plaintiff—to spend substantial time and resources litigating in state court. The litigation costs Defendants will incur in state court proceedings cannot be recovered if this Court

[6] The district court asserted that an appeal being rendered moot does not constitute irreparable injury, Ex.E. at 9 (citing *Rose v. Logan*, 2014 WL 3616380 (D. Md. July 21, 2014)), but in *Rose* the Appellant's own conduct was "the cause of the irreparable injury he [was] claiming." 2014 WL 3616380, at *3. Not so here.

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 and noting that 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. Here, a stay would not prejudice Plaintiff's ability to seek relief or meaningfully exacerbate Plaintiff's injuries. Indeed, according to Plaintiff, the harm is already "locked in" and will occur in the future "even in the absence of any future emissions." *See, e.g.*, Ex.A ¶¶7-8, 179-180, 196. A stay would also benefit Plaintiff by avoiding costly and potentially wasteful state court litigation should the Fourth Circuit ultimately conclude that this action belongs in federal court. *See Brinkman*, 2015 WL 13424471, at *1 (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.

A stay while the appeal is pending would also conserve judicial resources and promote judicial economy by unburdening the state court of potentially unnecessary

litigation. *See United States v. 2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015). The district court speculated that "interim proceedings in state court may well advance the resolution of the case in federal court," Ex.E at 11, but the threshold question on appeal is *which law governs* Plaintiff's claims—federal common law or state law. Any state court ruling addressing the viability of the claims under Maryland law 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

For these reasons, Defendants respectfully request that the Court extend the stay of the Remand Order pending resolution of their appeal. At minimum, the Court should extend the stay by 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

August 9, 2019

Respectfully submitted,

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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 5,200 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

I hereby certify that on August 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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EXHIBIT 3

No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,
PLAINTIFFS-APPELLEES

v.

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (CIV. NO. 18-1672) (THE HONORABLE WILLIAM J. MARTINEZ, J.)

MOTION OF APPELLANTS FOR AN EMERGENCY STAY OF THE REMAND ORDER PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Appellant Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant Suncor Energy Sales Inc. is wholly owned by appellant Suncor Energy (U.S.A.) Inc., which is wholly owned by Suncor Energy (U.S.A.) Holdings Inc., which is wholly owned by appellant Suncor Energy Inc. Suncor Energy Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

As the district court recognized in its order remanding this climate-change tort case to state court, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state-law claims related to climate change." D. Ct. Dkt. No. 69, at 3. In particular, district courts have disagreed about whether climate-change tort claims necessarily arise under federal common law, permitting removal to federal court. After the filing of the notice of appeal in this case, cases presenting the question whether federal common law governs climate-change tort claims are now pending in four federal courts of appeals.

The conflict of authority on that complex legal question and the state of climate-change litigation nationwide amply justify the entry of a stay of the district court's remand order pending appeal. Defendants have a statutory right to appeal the order, and this Court has jurisdiction to address all of the grounds for removal that the remand order encompasses. A stay pending appeal will thus protect defendants' appellate rights while providing this Court with an opportunity to weigh in on issues that other federal courts of appeals are considering. The lack of a stay, by contrast, will irreparably harm defendants. At best, defendants would be subject to duplicative proceedings in federal and state court; at worst, defendants could effectively lose their right to appeal. And given the nature of plaintiffs' claims and the public interests involved, the balance of harms tilts decidedly in defendants' favor. A stay of the remand order pending appeal is therefore warranted.

STATEMENT

1. Plaintiffs in this action are three local governments in Colorado: the Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder. Defendants are four energy companies: Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc., and Exxon Mobil Corporation. In April 2018, plaintiffs filed the underlying complaint against defendants in Colorado state court, alleging that defendants have contributed to global climate change, which in turn has caused harm in Colorado. *See* D. Ct. Dkt. No. 6. The complaint pleads a variety of claims, which appellees argue arise under state law. *See id.* Several similar cases filed by state and municipal governments against various energy companies are pending across the country. *See, e.g.*, *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *City of New York* v. *B.P. p.l.c.*, No. 18-2188 (2d Cir.); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 19-1644 (4th Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.) (consolidated with three similar cases); *City of Oakland* v. *B.P. p.l.c.*, No. 18-16663 (9th Cir.).

In June 2018, appellants removed this case to federal court. Appellants contended that federal jurisdiction over appellees' climate-change claims is present on several grounds, including that claims asserting harm from global climate change necessarily arise under federal common law, and that the alle-

gations in the complaint pertain to actions that defendants took under the direction of federal officers. *See* D. Ct. Dkt. No. 1, at 6-12, 30-33. Appellees moved to remand the case to state court.

In September 2019, the district court granted appellees' motion to remand. *See* D. Ct. Dkt. No. 69, at 55. The court entered a temporary stay of the remand order, however, while the parties briefed whether a longer stay pending appeal was warranted. *See* D. Ct. Dkt. No. 71. Yesterday evening, the district court denied defendants' motion for stay. *See* D. Ct. Dkt. No. 80.

ARGUMENT

Federal courts have inherent authority to stay the enforcement of an order pending appeal. *See Nken* v. *Holder*, 556 U.S. 418, 421 (2009). Courts assess whether to issue a stay pending appeal by considering four traditional factors: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest." *FTC* v. *Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003); *see Nken*, 556 U.S. at 434. Each of those favors supports a stay of the remand order pending review by this Court.

A. Defendants Are Sufficiently Likely To Prevail On Appeal To Warrant A Stay Of The Remand Order

The first of the traditional stay factors is likelihood of success on the merits. This case easily satisfies that factor. Defendants have a statutory right to appeal the remand order because defendants removed the case under

the federal-officer removal statute. This Court, moreover, has appellate jurisdiction to consider all of the grounds for removal that defendants asserted—including removal based on federal common law. Defendants are likely to prevail on that issue and others.

1. This Court Has Jurisdiction To Review The District Court's Entire Remand Order

As a general matter, 28 U.S.C. § 1447(d) precludes appellate review of an order remanding a case to state court. But Section 1447(d) also contains an express exception: "[A]n order remanding a case to the State court from which it was removed pursuant to 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). Defendants removed this case in part under 28 U.S.C. § 1442, the federal-officer removal statute, providing the court of appeals with jurisdiction to review this Court's "order remanding [the] case" to state court. *Id.*

In denying defendants' motion for a stay, the district court concluded that this Court's review would be limited to the federal-officer ground for removal. D. Ct. Dkt. No. 80, at 5. Appellees advance a similar argument in their motion for partial dismissal filed in this Court. Both the district court and appellees are incorrect.

a. In an appeal of a remand order in a case removed under the federal-officer removal statute, the court of appeals is not limited to reviewing the federal-officer ground for removal. The text of Section 1447(d) demonstrates why. "To 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). Looking "beyond the text of § 1447(d) to the reasons that led to its enactment" leads to "the same conclusion." *Id.* at 813. Section 1447(d) "was enacted to prevent appellate delay in determining where litigation will occur" when a case is removed to federal court. *Id.*; *see Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006). "But once Congress has authorized appellate review of a remand order . . . a court of appeals has been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 813. "The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), provides additional support. In *Yamaha*, the Court faced the question whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court of appeals could review only the particular *question* certified by the district court, or could instead address any issue encompassed in the district court's certified *order*. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Id.* at 205. The Court observed that "the text of § 1292(b) indicates" 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.*

The same reasoning applies here. Section 1447(d) authorizes appellate review of remand "order[s]" in cases removed under the federal-officer removal statute. 28 U.S.C. § 1447(d). The court of appeals can thus address "any issue fairly included within the certified order." *Yamaha Motor Corp.*, 516 U.S. at 205. Lest any doubt remain, Congress first authorized appellate review of cases removed under the federal-officer removal statute in the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545—after the decision in *Yamaha*. Congress of course is presumed to be aware of judicial interpretations of relevant statutory text. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 697-698 (1979); *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017). Thus, as the leading treatise on federal jurisdiction suggests, appellate review of a remand order under Section 1447(d) "should . . . be extended to all possible grounds for removal underlying the order." 15A Charles A. Wright et al., *Federal Practice & Procedure* § 3914.11 (2d ed. West 2019).

To be sure, the question of the scope of appellate review under Section 1447(d) is the subject of a conflict among the federal courts of appeals.[1] But

[1] *Compare Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (permitting review of entire order); *Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (same); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015) (same), *with Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012) (limiting review to specific exception in Section 1447(d)); *Patel* v. *Del Taco, Inc.*, 446 F.3d 996, 1000 (9th Cir. 2006) (same); *Alabama* v. *Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (same); *Davis* v. *Glanton*, 107 F.3d 1044, 1052 (3d Cir. 1997) (same); *State Farm Mutual Automobile Insurance Co.* v. *Baash*, 644 F.2d 94, 97 (2d Cir. 1981) (same); *Noel* v.

all of the cases reaching a contrary conclusion predate the Seventh Circuit's comprehensive analysis in *Lu Junhong*, *supra*, and all but one of them predate the Removal Clarification Act.

This Court has never addressed the issue of the scope of appellate review in appeals authorized by Section 1447(d) in a published opinion. But the decision in *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (2009), counsels in favor of review of the district court's entire order, not simply the ground that permitted appeal. In *Coffey*, this Court addressed an appeal under the removal provisions of the Class Action Fairness Act (CAFA). CAFA provides that, "notwithstanding [S]ection 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). Because that language did not limit the court of appeals to review of the removal grounds under CAFA, the court concluded that it could review the alternative grounds for removal asserted by the defendant and addressed in the district court's order. *Coffey*, 581 F.3d at 1247; *accord Parson* v. *Johnson & Johnson*, 749 F.3d 879, 893 (10th Cir. 2014). The same conclusion follows here, where the relevant statutory text also does not limit the scope of appellate review and indeed affirmatively authorizes review of the entire "order" appealed. *See* 28 U.S.C. § 1447(d).

McCain, 538 F.2d 633, 635 (4th Cir. 1976) (same); *Appalachian Volunteers, Inc.* v. *Clark*, 432 F.2d 530, 534 (6th Cir. 1970) (same).

b. The district court concluded that appellate review was likely limited to the federal-officer grounds for removal. The reasons it offered for that determination are unpersuasive.

The district court first relied on this Court's unpublished decision in *Sanchez* v. *Onuska*, No. 93-2155, 1993 WL 307897 (Aug. 13, 1993), which refused to consider other grounds for removal in a case removed under 28 U.S.C. § 1443. But "it goes without saying" that, because *Sanchez* was unpublished, it is not binding. *United States* v. *Hansen*, 929 F.3d 1238, 1268 (10th Cir. 2019). Nor is *Sanchez* persuasive, and this Court routinely declines to follow its unpublished decisions when they fail to persuade. *See, e.g.*, *Allen* v. *United Services Automobile Ass'n*, 907 F.3d 1230, 1239 n.5 (2018); *Lexington Insurance Co.* v. *Precision Drilling Co.*, 830 F.3d 1219, 1224 (2016) (Gorsuch, J.). *Sanchez* contravenes the plain text of Section 1447(d), *see Lu Junhong*, 792 F.3d at 811, and is inconsistent with this Court's more recent decision in *Coffey*. *Sanchez* also predates the Supreme Court's decision in *Yamaha* and Congress's subsequent enactment of the Removal Clarification Act.

The district court rejected the applicability of *Yamaha* and *Coffey*, reasoning that the appellate review at issue in both cases was discretionary in nature. *See* D. Ct. Dkt. No. 80, at 7. The problem with that argument is that neither of those decisions relies on the discretionary nature of the appellate review when determining the scope of appellate jurisdiction. Instead, both cases turn on the meaning of the word "order," with the court in *Coffey* rea-

soning that the definition from *Yamaha* "applie[d] equally" to a different jurisdictional statute. *Coffey*, 581 F.3d at 1247; *see Yamaha*, 516 U.S. at 205. So too here.

In distinguishing *Coffey*, the district court also concluded that the text of Section 1447(d) expressly limits the scope of appellate review, whereas this Court in *Coffey* found that "no language" in the statute at issue there did. *See* D. Ct. Dkt. No. 80, at 6. That is a false distinction. The Court in *Coffey* concluded that, because the statute spoke in terms of *orders*, there was no reason to limit review to particular *issues* within that order. Section 1447(d) operates in the same way. It generally precludes review of remand *orders*; it does not speak in terms of *issues* addressed within an order. Accordingly, when a remand order is reviewable, no language in Section 1447(d) limits the *issues* subject to review.

c. For the foregoing reasons, this Court is likely to review this Court's entire remand order on appeal. This Court should therefore consider the merits of all of defendants' grounds of removal when assessing likelihood of success on the merits under the first stay factor. And the presence of a conflict of authority on the scope of appellate review under Section 1447(d) itself supports a stay. *See Community Television of Utah, LLC* v. *Aereo, Inc.*, 997 F. Supp. 2d 1191, 1210 (D. Utah 2014); *In re Cintas Corp. Overtime Pay Arbitration Litigation*, Civ. No. 06-1781, 2007 WL 1302496, at *2-*3 (N.D. Cal. May 2, 2007).

2. The Merits of Defendants' Removal Arguments Satisfy The First Stay Factor

This case raises complex and novel questions regarding federal jurisdiction that have already divided multiple district courts and warrant further review by this Court.

a. As the district court observed in its remand order, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case." D. Ct. Dkt. No. 69, at 3. In particular, two district courts (in three cases) have ruled that tort claims related to global climate change necessarily arise under federal common law. *See California* v. *BP p.l.c.*, Civ. No. 17-6011, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). While disagreeing with those rulings, the district court recognized that one of the decisions in particular "has a certain logic." D. Ct. Dkt. No. 69, at 14 (discussing *California*, *supra*). Four district courts have ruled that federal jurisdiction does not exist over climate-change tort claims, but have done so based on differing rationales. The district court in this case and two others have ruled that the well-pleaded complaint rule forbids removal based on defendants' argument that climate-change tort claims necessarily arise under federal common law. *See* D. Ct. Dkt. No. 69, at 16-19; *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 388 F. Supp. 3d 538, 554-558 (D. Md. 2019); *Rhode Island* v. *Chevron Corp.*, Civ. No.

18-395, 2019 WL 3282007, at *2 (D.R.I. July 22, 2019). The fourth court, however, ruled that plaintiffs' claims could not arise under federal common law because the Clean Air Act displaced any federal common law that would otherwise exist. *See County of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018). As the district court recognized, there are "no dispositive cases" on the issue from the Supreme Court or this Court. D. Ct. Dkt. No. 69, at 3. The lack of binding authority and the conflicting district-court decisions—each currently on appeal to the First, Second, Fourth, Ninth, and now Tenth Circuits—confirm that defendants' appeal presents serious legal questions worthy of further appellate review.

Defendants' appeal also presents the substantial question whether the federal-officer removal statute provides jurisdiction over this action. As defendants explained at length in their briefing below, *see* D. Ct. Dkt. No. 48, at 32-35, they extracted, produced, and sold fossil fuels at the direction of federal officers. *See* D. Ct. Dkt. No. 69, at 42-48. That more than satisfies the requirements for removal.

The district court concluded that "[d]efendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and [p]laintiffs' claims." D. Ct. Dkt. No. 69, at 45. That may be true with respect to *some* of defendants' conduct that plaintiffs alleged caused them injury. But not *all* of the relevant activities need take place under the control of federal officers to permit removal under the federal-officer removal statue. *See, e.g.*, *Reed* v. *Fina Oil &*

Chemical Co., 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde* v. *Delta Field Erection*, Civ. No. 96-3244, 1998 WL 34301466, at *4-*6 (M.D. La. Aug. 6, 1998).

Defendants additionally raise a legitimate dispute as to whether plaintiffs' claims necessarily present a federal issue by, among other things, calling into question the balance struck by the federal government between environmental and energy-related concerns. *See Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 312-313 (2005); D. Ct. Dkt. No. 48, at 21-27. Resolution of plaintiffs' claims necessarily requires courts to determine whether federal agencies implementing various environmental statutes struck the proper balance between promoting energy production and energy security while ensuring compliance with existing environmental statutes. *See* D. Ct. Dkt. No. 48, at 21-29.

For all of the foregoing reasons, and for the additional reasons asserted at greater length in defendants' opposition to plaintiffs' motion to remand, D. Ct. Dkt. No. 48, at 29-40, have shown a sufficient likelihood of success on the merits. The first stay factor is therefore satisfied.

b. The district court disagreed, but in doing so it imposed an impossible-to-satisfy standard for parties seeking a stay pending appeal. The court reasoned that defendants did not prove a likelihood of success on the merits because they raised the same arguments that the court previously rejected. But "common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal." *Canterbury Liquors & Pantry*

v. *Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). After all, if the district court had "thought an appeal would be successful," it "would not have ruled as [it] did in the first place." *Westefer* v. *Snyder*, Civ. No. 00-162, 2010 WL 4000599, at *3 (S.D. Ill. Oct. 12, 2010) (citation omitted). "[A] party seeking a stay" thus "need not show that it is more than 50% likely to succeed on appeal; otherwise, no district court would ever grant a stay." *Id.*; *accord Singer Management Consultants, Inc.* v. *Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). At most, defendants need only show a "reasonable likelihood of success" on the merits. *Diné Citizens Against Ruining Our Environment* v. *Jewell*, 839 F.3d 1276, 1282 (2016). Defendants more than clear that hurdle.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

The second stay factor is whether defendants will likely suffer "irreparable harm" in the absence of a stay. *Mainstream Marketing*, 345 F.3d at 852. The answer here is yes.

a. If defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part). This Court has held that,

once a remand order becomes final and is dispatched to the state court, a federal court cannot enjoin the state proceedings. *See Chandler* v. *O'Bryan*, 445 F.2d 1045, 1057-1058 (10th Cir. 1971); *see also, e.g.*, *FDIC* v. *Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979). This case of course involves different circumstances: namely, that defendants have a statutory right to appeal the remand order. But if this Court rejected that ground for distinction, the absence of a stay could potentially "destroy appellants' rights to secure meaningful review." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979). That strongly counsels in favor of a stay. *See id.*

The district court rejected this concern, citing two cases in support. *See* D. Ct. Dkt. No. 80, at 14-15. Neither case provides defendants with much solace. In the first case—*Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231 (4th Cir. 2007)—the court did *not* hold that a district court could, consistent with the Anti-Injunction Act, enjoin state-court proceedings simply because the remand order had been vacated on appeal. Instead, the court of appeals called the issue "difficult" and expressly chose not to resolve it. *See id.* at 241-242. In the second case—*In re Meyerland Co.*, 910 F.2d 1257 (5th Cir. 1990)—the panel opinion that the district court cited was superseded after rehearing en banc, and the en banc opinion did not address whether an injunction of state-court proceedings was permissible. *See* 960 F.2d 512 (5th Cir.

1992). Absent binding authority from this Court or the Supreme Court guaranteeing that defendants will not lose their right to appeal if the remand order is dispatched, the order should be stayed.[2]

b. In addition, once the state court receives the remand order, this case will likely proceed there while defendants' appeal is pending. Defendants would then simultaneously have to brief and argue federal jurisdictional issues in the Tenth Circuit while litigating plaintiffs' claims in Colorado state court. That would be unnecessarily burdensome for defendants and the courts involved alike. *See Lafalier* v. *Cinnabar Service Co.*, Civ. No. 10-5, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010). Especially so if discovery occurs in state court and defendants prevail on appeal: "[t]he cost of proceeding with discovery [in state court]—and potentially relitigating discovery issues in federal court—is likely to be high." *Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017). Although litigation costs generally do not constitute irreparable injury, *see Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), courts have held that such costs constitute irreparable harm where, as here, they would be duplicative

[2] Below, appellees attempted to concede that the district court could enjoin state proceedings if appellants prevailed on appeal. *See* D. Ct. Dkt. No. 77, at 14. But that concession would not bind any court if the Anti-Injunction Act is jurisdictional—an issue this Court has not resolved. *See Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751 (2014).

and unrecoverable. *See, e.g.*, *Citibank*, 2017 WL 4511348, at *2-3; *Ewing Industries Co.* v. *Bob Wines Nursery, Inc.*, Civ. No. 13-931, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015); *Wilcox* v. *Lloyds TSB Bank, PLC*, Civ. No. 13-508, 2016 WL 917893, at *5-*6 (D. Haw. Mar. 7, 2016).

In addition, interim state court rulings on substantive issues would create "significant issues of comity" that the parties and the court would have to address if the case returned to federal court. *Bryan*, 492 F.3d at 241; *see, e.g.*, *Anderson* v. *Wilco Life Insurance Co.*, Civ. No. 19-8, 2019 WL 3225837, at *2 (S.D. Ga. July 17, 2019); *Northrop Grumman Technical Services, Inc.* v. *DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *3-*4 (E.D. Va. June 16, 2016).

The need to avoid unnecessary state-court proceedings is particularly salient in cases removed under the federal-officer removal statute. The federal courts' "unusual ability to review a remand order" in that class of cases "reflects the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *See Decatur*, 854 F.3d at 295-296. A stay is thus necessary "to prevent rendering the statutory right to appeal 'hollow.' " *Northrop Grumman*, 2016 WL 3346349, at *3; *Laborers & Hod Carriers Pension Fund* v. *Renal Care Group, Inc.*, Civ. No. 05-451, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (similar); *Vision Bank* v. *Bama Bayou, LLC*, Civ. No. 11-568, 2012 WL 1592985, at *2 (S.D. Ala. May 7, 2012) (similar).

C. The Balance Of Harms Favors Defendants

Where, as here, governmental entities are the parties opposing the entry of a stay pending appeal, the third and fourth stay factors—harm to the opposing party and the public interest—"merge" and are considered together. *See Nken*, 556 U.S. at 435. Considering those factors together, a stay will not significantly harm plaintiffs. To begin with, "a stay w[ill] not permanently deprive [plaintiffs] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. "The only potential injury faced by [plaintiffs] is delay in vindication of its claim," which does not counsel against the entry of a stay. *Weingarten Realty Investors* v. *Miller*, 661 F.3d 904, 913 (5th Cir. 2011). Plaintiffs' own complaint in fact demonstrates the lack of harm from any delay pending appeal. A substantial portion of the damages that plaintiffs seek stems from purported costs that it has not yet incurred and may not incur for decades. *See, e.g.*, D. Ct. Dkt. No. 7, ¶¶ 3, 147, 149. Nor will any delay impair plaintiffs' request for equitable relief to "abate[] harms" that they claim are "to some degree [] irreversible." *Id.* ¶¶ 135, 532, 534. Plaintiffs "would actually be served by granting a stay," because they would not "incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued." *Raskas* v. *Johnson & Johnson*, Civ. No. 12-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

The public will benefit from a stay as well. First, given the repercussions that this lawsuit could have on federal economic, environmental, and energy policy, there is a public interest in settling the questions of what law governs

and where this case should be litigated before the state court begins to consider whether to hold the energy industry responsible for alleged harm caused by climate change. A stay pending appeal would also "conserv[e] judicial resources and promot[e] judicial economy" by "avoid[ing] potentially duplicative litigation in the state courts and federal courts." *Raskas*, 2013 WL 1818133, at *2; *see United States* v. *2366 San Pablo Avenue*, Civ. No. 13-2027, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

* * * * *

A stay of the district court's remand order pending appeal is amply warranted. Defendants have a statutory right to appeal the order, and this Court has jurisdiction to consider all of the grounds for removal addressed in that order. Those grounds include the argument that appellees' claims necessarily arise under federal common law—an issue that the district court recognized has divided federal courts across the country. Absent a stay pending appeal, defendants' appellate rights could be hampered or effectively eliminated, and appellees will suffer little harm from any delay. All of the traditional stay factors are therefore satisfied, and a stay pending appeal should issue.

CONCLUSION

The motion for a stay of the remand order pending appeal should be granted.

Respectfully submitted,

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OCTOBER 8, 2019

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the attached Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal is proportionally spaced, has a typeface of 14 points or more, and contains 4,467 words.

/S/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 8, 2019

CERTIFICATE OF DIGITAL SUBMISSION AND ANTIVIRUS SCAN

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the attached Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal, as submitted in digital form via the Court's ECF system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2019.10.07.12, updated Oct. 7, 2019) and, according to that program, the document is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically.

/S/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 8, 2019

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on October 8, 2019, the attached Motion of Appellants for an Emergency Stay of the Remand Order Pending Appeal was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and CITY OF BOULDER, Plaintiffs, v. SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; and EXXON MOBIL CORPORATION, Defendants.	Case No. 1:18-cv-1672-WJM-SKC

DEFENDANTS' MOTION FOR A STAY OF THE REMAND ORDER PENDING APPEAL[*]

As this Court recognized in its order remanding this climate-change tort case to state court, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state-law claims related to climate change." ECF No. 69, at 3. In particular, district courts have disagreed about whether climate-change tort claims necessarily arise under federal common law, permitting removal to federal court. After the filing of the notice of appeal in this case, cases presenting the question whether federal common law governs climate-change tort claims are now pending in four federal courts of appeals.

[*] Defendants submit this motion subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

The conflict of authority on that complex legal question and the state of climate-change litigation nationwide amply justify the entry of a stay of this Court's remand order pending appeal. Defendants have a statutory right to appeal the order, and the Tenth Circuit will have jurisdiction to address all of the grounds for removal that the remand order encompasses. A stay pending appeal will thus protect defendants' appellate rights while providing the Tenth Circuit with an opportunity to weigh in on issues that other federal courts of appeals are considering. The lack of a stay, by contrast, will irreparably harm defendants. At best, defendants would be subject to duplicative proceedings in federal and state court; at worst, defendants could effectively lose their right to appeal. And given the nature of plaintiffs' claims and the public interests involved, the balance of harms tilts decidedly in defendants' favor. A stay of the remand order pending appeal is therefore warranted.

ARGUMENT

Federal district courts have inherent authority to stay the enforcement of an order pending appeal. *See Nken* v. *Holder*, 556 U.S. 418, 421 (2009). Courts assess whether a stay pending appeal is warranted by considering four traditional factors: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest." *FTC* v. *Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003); *see Nken*, 556 U.S. at 434. Each of those favors supports a stay of this Court's remand order pending review by the Tenth Circuit.

A. Defendants Are Sufficiently Likely To Prevail On Appeal To Warrant A Stay Of The Remand Order

The first of the traditional stay factors is likelihood of success on the merits. In cases where the appealing party demonstrates that "the three 'harm' factors tip decidedly in its favor," it need only show that the appeal will raise issues "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Mainstream Marketing*, 345 F.3d at 852-853.

Applying those standards here, this case easily satisfies the first stay factor. Defendants have a statutory right to appeal this Court's remand order because defendants removed the case under the federal-officer-removal statute. The court of appeals, moreover, has appellate jurisdiction to consider all of the grounds for removal that defendants asserted—including removal based on federal common law. Defendants are likely to prevail on that issue and others, or at a minimum have shown the presence of "serious, substantial, difficult, and doubtful" issues regarding the grounds on which it removed this case from state court. *Mainstream Marketing*, 345 F.3d at 852-853.

1. The Court Of Appeals Has Jurisdiction To Review This Court's Entire Remand Order

As a general matter, 28 U.S.C. § 1447(d) precludes appellate review of an order remanding a case to state court. But Section 1447(d) also contains an express exception: "[A]n order remanding a case to the State court from which it was removed pursuant to 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). Defendants removed this case in part under 28 U.S.C. § 1442, the federal-officer-removal statute, providing the court of appeals with jurisdiction to review this Court's "order remanding [the] case" to state court. *Id.*

Plaintiffs may contend that the Tenth Circuit's jurisdiction is limited to reviewing this Court's decision regarding removal under the federal-officer-removal statute—meaning that no other ground for removal would be reviewable. But that would be incorrect, and the text of Section 1447(d) demonstrates why. "To 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). Looking "beyond the text of § 1447(d) to the reasons that led to its enactment" leads to "the same conclusion." *Id.* at 813. Section 1447(d) "was enacted to prevent appellate delay in determining where litigation will occur" when a case is removed to federal court. *Id.*; *see Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006). "But once Congress has authorized appellate review of a remand order . . . a court of appeals has been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 813. "The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), provides additional support. In *Yamaha*, the Court faced the question whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court of appeals could review only the particular *question* certified by the district court, or could instead address any issue encompassed in the district court's certified *order*. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Id.* at 205. The Court observed that "the text of § 1292(b) indicates" 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.*

The same reasoning applies here. Section 1447(d) authorizes appellate review of remand "order[s]" in cases removed under the federal-officer-removal statute. 28 U.S.C. § 1447(d). The court of appeals can thus address "any issue fairly included within the certified order." *Yamaha Motor Corp.*, 516 U.S. at 205. Lest any doubt remain, Congress first authorized appellate review of cases removed under the federal-officer-removal statute in 2011—after the decision in *Yamaha*. Congress of course is presumed to be aware of judicial interpretations of relevant statutory text. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 697-698 (1979); *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017). Thus, as the leading treatise on federal jurisdiction suggests, appellate review of a remand order under Section 1447(d) "should . . . be extended to all possible grounds for removal underlying the order." 15A Charles A. Wright et al., *Federal Practice & Procedure* § 3914.11 (2d ed. West 2019).

To be sure, the question of the scope of appellate review under Section 1447(d) is the subject of a conflict among the federal courts of appeals. Two courts of appeals have held that they may review the district court's entire remand order under Section 1447(d). *Lu Junhong*, 792 F.3d at 813; *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017). Five courts of appeals have held that appellate review is limited to the specific ground for removal that triggered the exception in Section 1447(d), although only three of those courts have so held since the Supreme Court's decision in *Yamaha*. *See Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama* v. *Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mutual Automobile Insurance Co.* v. *Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976). Another circuit has

authority going both ways. *Compare Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), *with City of Walker* v. *Louisiana ex rel. Department of Transportation & Development*, 877 F.3d 563, 566 (5th Cir. 2017).

The Tenth Circuit has never squarely addressed the issue of the scope of appellate review in appeals authorized by Section 1447(d). But its decision in *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (2009), strongly suggests that it would review the district court's entire order, not simply the ground that permitted appeal. In *Coffey*, the Tenth Circuit addressed an appeal under the removal provisions of the Class Action Fairness Act (CAFA). CAFA provides that, "notwithstanding [S]ection 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). Because that language did not limit the court of appeals to review of the removal grounds under CAFA, the court concluded that it could review the alternative grounds for removal asserted by the defendant and addressed in the district court's order. *Coffey*, 581 F.3d at 1247; *accord Parson* v. *Johnson & Johnson*, 749 F.3d 879, 893 (10th Cir. 2014). The same conclusion follows here, where the relevant statutory text also does not limit the scope of appellate review and indeed affirmatively authorizes review of the entire "order" appealed. *See* 28 U.S.C. § 1447(d).

For the foregoing reasons, the Tenth Circuit is likely to review this Court's entire remand order on appeal. This Court should therefore consider the merits of all of defendants' grounds of removal when assessing likelihood of success on the merits under the first stay factor. And the presence of a conflict of authority on the scope of appellate review under Section 1447(d) itself supports a stay. *See Community Television of Utah, LLC* v. *Aereo, Inc.*, 997 F. Supp. 2d 1191,

1210 (D. Utah 2014); *In re Cintas Corp. Overtime Pay Arbitration Litigation*, Civ. No. 06-1781, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007).

2. The Merits of Defendants' Removal Arguments Satisfy The First Stay Factor

This case raises complex and novel questions regarding federal jurisdiction that have already divided multiple district courts and warrant further review by the Tenth Circuit.

a. As this Court observed in its remand order, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case." ECF No. 69, at 3. In particular, two district courts (in three cases) have ruled that tort claims related to global climate change necessarily arise under federal common law. *See California* v. *BP p.l.c.*, Civ. Nos. 17-6011 & 17-6012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). While disagreeing with those rulings, this Court recognized that one of the decisions in particular "has a certain logic." ECF No. 69, at 14 (discussing *California*, *supra*). Four district courts have ruled that federal jurisdiction does not exist over climate-change tort claims, but have done so based on differing rationales. This Court and two others have ruled that the well-pleaded-complaint rule forbids removal based on defendants' argument that climate-change tort claims necessarily arise under federal common law. *See* ECF No. 69, at 16-19; *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 388 F. Supp. 3d 538, 554-558 (D. Md. 2019); *Rhode Island* v. *Chevron Corp.*, Civ. No. 18-395, 2019 WL 3282007, at *2 (D.R.I. July 22, 2019). The fourth court, however, ruled that plaintiffs' claims could not arise under federal common law because the Clean Air Act displaced any federal common law that would otherwise exist. *See County of San Mateo* v. *Chevron Corp.*,

294 F. Supp. 3d 934, 937 (N.D. Cal. 2018). As this Court recognized, there are "no dispositive cases" on the issue from the Supreme Court or the Tenth Circuit. ECF No. 69, at 3. The lack of binding authority and the conflicting district-court decisions—each currently on appeal to the First, Second, Fourth, Ninth, and now Tenth Circuits—confirm that defendants' appeal presents serious legal questions worthy of further appellate review.

b. Defendants' appeal also presents the substantial question whether the federal-officer-removal statute provides jurisdiction over this action. As defendants have previously explained, ECF No. 48, at 32-35, they extracted, produced, and sold fossil fuels at the direction of federal officers. *See* ECF No. 69, at 42-48. That more than satisfies the requirements for removal.

This Court concluded that "[d]efendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and [p]laintiffs' claims." ECF No. 69, at 45. That may be true with respect to *some* of defendants' conduct that plaintiffs alleged caused them injury. But not *all* of the relevant activities need take place under the control of federal officers to permit removal under the federal-officer-removal statue. *See, e.g.*, *Reed* v. *Fina Oil & Chemical Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde* v. *Delta Field Erection*, Civ. No. 96-3244, 1998 WL 34301466, at *4-6 (M.D. La. Aug. 6, 1998).

c. Defendants additionally raise a legitimate dispute as to whether plaintiffs' claims necessarily present a federal issue by, among other things, calling into question the balance struck by the federal government between environmental and energy-related concerns. *See Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 312-313 (2005); ECF No. 48, at 21-27. Resolution of plaintiffs' claims necessarily requires courts to determine

whether federal agencies implementing various environmental statutes struck the proper balance between promoting energy production and energy security while ensuring compliance with existing environmental statutes. *See* ECF No. 48, at 21-29.

For all of the foregoing reasons, and for the additional reasons asserted at greater length in defendants' opposition to plaintiffs' motion to remand, ECF No. 48, at 29-40, defendants are likely to prevail on appeal. At a minimum, the appeal presents "serious, substantial, difficult, and doubtful" questions that the Tenth Circuit should have an opportunity for review. *Mainstream Marketing*, 345 F.3d at 852-853. The first stay factor is therefore satisfied.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

The second stay factor is whether defendants will likely suffer "irreparable harm" in the absence of a stay. *Mainstream Marketing*, 345 F.3d at 852. The answer here is yes. Once the clerk mails the certified copy of the remand order to the state court, this case will likely proceed there while defendants' appeal is pending. *See* 28 U.S.C. § 1447(c). Defendants would then simultaneously have to brief and argue federal jurisdictional issues in the Tenth Circuit while litigating plaintiffs' claims in Colorado state court. That would be unnecessarily burdensome for defendants and the courts involved alike. *See Lafalier* v. *Cinnabar Service Co.*, Civ. No. 10-5, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010). Especially so if discovery occurs in state court and defendants prevail on appeal: "[t]he cost of proceeding with discovery [in state court]—and potentially relitigating discovery issues in federal court—is likely to be high," and "such costs are irreparable." *See Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017). Interim state court rulings on substantive issues would also create "significant issues of comity" that the parties and the court would have to address if the case returned to federal

court. *Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007); *see, e.g.*, *Anderson* v. *Wilco Life Insurance Co.*, Civ. No. 19-8, 2019 WL 3225837, at *2 (S.D. Ga. July 17, 2019); *Northrop Grumman Technical Services, Inc.* v. *DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *3-4 (E.D. Va. June 16, 2016).

The need to avoid unnecessary state-court proceedings is particularly salient in cases removed under the federal-officer-removal statute. The federal courts' "unusual ability to review a remand order" in that class of cases "reflects the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *See Decatur*, 854 F.3d at 295-296. Accordingly, a stay is necessary "to prevent rendering the statutory right to appeal 'hollow.' " *Northrop Grumman*, 2016 WL 3346349, at *3; *Laborers & Hod Carriers Pension Fund* v. *Renal Care Group, Inc.*, Civ. No. 05-451, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (similar); *Vision Bank* v. *Bama Bayou, LLC*, Civ. No. 11-568, 2012 WL 1592985, at *2 (S.D. Ala. May 7, 2012) (similar).

Indeed, if defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part). The Tenth Circuit has held that, once a remand order becomes final and is dispatched to the state court, a federal court cannot enjoin the state proceedings. *See Chandler* v. *O'Bryan*, 445 F.2d 1045, 1057-1058 (10th Cir. 1971); *see also, e.g.*, *FDIC* v. *Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979). This case of course involves

different circumstances—namely, that defendants have a statutory right to appeal the remand order. But if the Tenth Circuit rejected that ground for distinction, the absence of a stay could potentially "destroy appellants' rights to secure meaningful review." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979). That strongly counsels in favor of a stay. *See id.*

C. The Balance Of Harms Favors Defendants

Where, as here, governmental entities are the parties opposing the entry of a stay pending appeal, the third and fourth stay factors—harm to the opposing party and the public interest—"merge" and are considered together. *See Nken*, 556 U.S. at 435. Considering those factors together, a stay will not significantly harm plaintiffs. To begin with, "a stay w[ill] not permanently deprive [plaintiffs] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. "The only potential injury faced by [plaintiffs] is delay in vindication of its claim," which does not counsel against the entry of a stay. *Weingarten Realty Investors* v. *Miller*, 661 F.3d 904, 913 (5th Cir. 2011). Plaintiffs' own complaint in fact demonstrates the lack of harm from any delay pending appeal. A substantial portion of the damages that plaintiffs seek stems from purported costs that it has not yet incurred and may not incur for decades. *See, e.g.*, ECF No. 7, ¶¶ 3, 147, 149. Nor will any delay impair plaintiffs' request for equitable relief to "abate[] harms" that they claim are "to some degree [] irreversible." *Id.* ¶¶ 135, 532, 534. Plaintiffs "would actually be served by granting a stay," because they would not "incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued." *Raskas* v. *Johnson & Johnson*, Civ. Nos. 12-2174 et al., 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

The public will benefit from a stay as well. First, given the repercussions that this lawsuit could have on federal economic, environmental, and energy policy, there is a public interest in

settling the questions of what law governs and where this case should be litigated before the state court begins to consider whether to hold the oil-and-gas industry responsible for alleged harm caused by climate change. A stay pending appeal would also "conserv[e] judicial resources and promot[e] judicial economy" by "avoid[ing] potentially duplicative litigation in the state courts and federal courts." *Raskas*, 2013 WL 1818133, at *2; *see United States* v. *2366 San Pablo Ave.*, Civ. No. 13-2027, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

* * * * *

A stay of this Court's remand order pending appeal is amply warranted. Defendants have a statutory right to appeal the order, and the court of appeals will have jurisdiction to consider all of the grounds for removal addressed in that order. Those grounds include the argument that plaintiffs' claims necessarily arise under federal common law—an issue that this Court recognized has divided federal courts across the country. Absent a stay pending appeal, defendants' appellate rights could be hampered or effectively eliminated, and plaintiffs will suffer little harm from any delay. All of the traditional stay factors are therefore satisfied, and a stay pending appeal should issue.

CONCLUSION

Defendants' motion for a stay of the remand order pending appeal should be granted. In the alternative, the Court should enter an additional temporary stay of the remand order to allow defendants to apply to the Tenth Circuit for a stay pending appeal and the Tenth Circuit to rule on that application. If this motion is denied, defendants plan to file a stay motion with the Tenth Circuit within 14 days of the Court's ruling on this motion.

Respectfully submitted,

September 13, 2019

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CERTIFICATE OF EFFORTS TO CONFER

Pursuant to Local Rule 7.1(a), I, Kannon K. Shanmugam, certify that, on September 12 and 13, 2019, counsel for defendants contacted counsel for plaintiffs in an attempt to confer regarding the filing of this motion. Counsel for defendants could not reach counsel for plaintiffs.

/s/ Kannon K. Shanmugam
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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, certify that on September 13, 2019, the foregoing document was filed through the Court's CM/ECF system and was therefore served on all registered participants identified on the Notice of Electronic Filing.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, v. BP P.L.C. et al., Defendants.	Case No. 1:18-cv-02357-ELH

CONDITIONAL MOTION TO STAY EXECUTION OF REMAND ORDER SHOULD THE COURT GRANT THE PENDING MOTION TO REMAND[1]

Pursuant to Federal Rules of Civil Procedure 7 and 62(a), Defendants respectfully request that, should the Court grant Plaintiff's pending Motion to Remand (ECF No. 111), the Court issue an Order staying execution of the remand order for thirty days. In support thereof, Defendants state:[2]

1. On July 20, 2018, Plaintiff the Mayor & City Council of Baltimore ("Plaintiff") filed a complaint in the Circuit Court for Baltimore City.

2. On July 31, 2018, Defendants timely and properly removed the case pursuant to 28 U.S.C. §§ 1441, 1442, 1446, 1452 and 1367(a) and 43 U.S.C. § 1349. (ECF No. 1). 28 U.S.C. § 1442 permits removal based on actions of federal officers.

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

[2] Defendants requested a temporary stay of any remand order in their Opposition to Plaintiff's Motion to Remand, *see* ECF No. 124 at 70 n. 37, and reiterate that request here out of an abundance of caution.

3. On September 11, 2018, Plaintiff moved to remand the case ("Remand Motion"). (ECF No. 111). Defendants opposed Plaintiff's Remand Motion (ECF No. 124), and Plaintiff filed a Reply. (ECF No. 133). Thus, Plaintiff's Remand Motion is fully briefed.

4. Defendants file this Conditional Motion to Stay now, before a ruling on Plaintiff's Remand Motion, so that, if the Court were to grant the Remand Motion, it could concurrently rule on this stay motion and grant a 30-day stay within which Defendants may exercise their appeal rights and seek a further stay pending appeal in an orderly manner.

5. Plaintiff initially requested a hearing on its Remand Motion. *See* ECF No. 111 at p. 1. On February 20, 2019, Defendants also requested a hearing on the Remand Motion. (ECF No. 154). Plaintiff then opposed Defendants' request and withdrew its own request for a hearing. (ECF No. 155). Defendants' Request for a Hearing is pending.

6. The pending Remand Motion should be denied for the reasons stated in Defendants' Opposition (ECF No. 124). Should the Court grant Plaintiff's Remand Motion, Defendants plan to appeal to the United States Court of Appeals for the Fourth Circuit, as expressly permitted by 28 U.S.C. § 1447(d).[3]

7. Defendants' right to appeal could be compromised if a remand order were executed too soon by the Clerk of Court mailing the remand order to the Clerk of the Circuit Court for Baltimore City. Pursuant to Fed. R. Civ. P. 62(a), Defendants thus request that, in the event the Court grants the Remand Motion, the Court stay its Order for 30 days and direct the Clerk of Court not to mail the certified remand order to the Clerk of the Circuit Court for

[3] Remand orders in cases removed under 28 U.S.C. § 1442 are immediately appealable. 28 U.S.C. § 1447(d) (remand orders in cases removed pursuant to § 1442 "shall be reviewable by appeal"); *see also Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l, LLC*, 865 F. 3d 181, 189 n.4 (4th Cir. 2017) ("although orders remanding cases to state court generally are not reviewable on appeal, we may review such an order when, as here, the removal was made pursuant to the federal officer removal statute 28 U.S.C. § 1442") (citation omitted); *Wood v. Crane Co.*, 764. F.3d 316, 320 (4th Cir. 2014) ("This case was originally removed pursuant to §1442(a)(1) and is thus reviewable").

Baltimore City during that period.[4] The 30-day stay will provide Defendants sufficient time to file a substantive motion to stay pending appeal that addresses the reasoning of any remand order the Court may enter. Imposition of a stay would avoid needless conflicts that might arise from the creation of concurrent jurisdiction with the Circuit Court for Baltimore City while Defendants exercise their statutory right to appeal.

8. In consolidated cases involving virtually identical removal issues and alleged global warming claims brought against many of the defendants named herein (and in which plaintiffs are represented by the same San Francisco law firm that represents Plaintiff here), Judge Chhabria of the United States District Court for the Northern District of California similarly stayed his remand order before the Clerk of the Court mailed it to the originating California state courts.[5] Judge Chhabria noted that such a stay was "appropriate" to "sort out whether a longer stay pending appeal [was] warranted." *See* Case Nos. 17-cv-04929-VC, ECF No. 223 (N.D. Cal.); 17-cv-04934-VC, ECF No. 207 (N.D. Cal.); 17-cv-04935-VC, ECF No. 208 (N.D. Cal.). Those California cases remain in federal court and stayed while the Ninth Circuit's review is pending.

9. This approach has been adopted within, and endorsed by, the Fourth Circuit as well. *See Northrup Grumman Tech. v. DynCorp Int'l, LLC*, 2016 WL 3180775 (E.D. Va. June 7, 2016) (directing Clerk of Court to "refrain from executing the Court's Order remanding the case back to the Circuit Court."), *aff'd* 865 F.3d 181 (4th Cir. 2017). The stay in *Northrup Grumman*

[4] *See* Fed R. Civ. P. 62(a) ("execution on a judgment, and proceedings to enforce it are stayed for 30 days after its entry, unless the Court orders otherwise"); *see also* Fed R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies").

[5] District Judge Alsup denied a motion to remand in a similar climate change case against many of the defendants in this action and dismissed the case on the merits. *See* Case Nos. 17-cv-06011-WHA, ECF No. 287; 17-cv-06012-WHA, ECF No. 239 (N.D. Cal.) The appeal of that decision is also pending in the Ninth Circuit. *See* Case No. 18-16663 (9th Cir.).

caused the district court to retain jurisdiction and allowed the parties to brief a stay of the remand order pending appeal to the Fourth Circuit.

For all the foregoing reasons, Defendants respectfully request that this Honorable Court stay the execution of any remand order that the Court may enter in this case, by either entering the conditional stay in the text of the remand order itself, or by concurrently entering the proposed Order to that effect, which is attached.[6]

Respectfully submitted,

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[6] Prior to filing this Conditional Motion, Defendants sought Plaintiff's position on the relief requested herein but Plaintiff indicated it did not consent.

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CERTIFICATE OF SERVICE

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/s/ Ty Kelly
Ty Kelly

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND, Plaintiff, v. CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; 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 No. 1:18-cv-395-WES-LDA

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXTEND THE STAY OF THE REMAND ORDER PENDING APPEAL

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I. INTRODUCTION

This case—which targets worldwide conduct, and which arises at the intersection of national and global economic, environmental, and energy policy—should not proceed in Rhode Island state court until the First Circuit has an opportunity to determine what law (state or federal) applies and whether a federal forum is required. Defendants' appeal will present serious legal issues and Defendants face irreparable harm without a stay. A stay will not injure Plaintiff but will serve the public interest and interests of judicial economy. Granting a stay will ensure that the critical questions of what law applies and where this case should be litigated are settled before the state court begins addressing myriad substantive and jurisdictional motions upon remand concerning whether the state court may or should hold foreign and domestic oil and gas companies liable for climate change.[1]

On July 22, 2019, this Court granted Plaintiff's motion to remand, but stayed its decision for 60 days to allow "the parties to brief and the Court to decide whether a further stay pending appeal is warranted." ECF No. 122, at 17 (D.R.I. July 22, 2019) ("Remand Order"). Defendants now respectfully request that the Court extend the stay and refrain from certifying and mailing the Remand Order to state court, pending the outcome of Defendants' appeal of the order to the First Circuit. *See Marquis v. Fed. Deposit Ins. Corp.*, 965 F.2d 1148, 1154–55 (1st Cir. 1992); Fed. R. App. P. 8(a); ECF No. 125 (Notice of Appeal). Defendants have an appeal as of right because they removed this case under, *inter alia*, the federal officer removal statute, 28 U.S.C. § 1442. *See* 28 U.S.C. § 1447(d). Their appeal will present serious legal issues that would, as this Court has recognized, benefit from appellate review. *See* Remand Hr'g Tr., ECF No. 113, at 59:25–60:3 ("[The Court]: There's a certain appeal to this idea of getting it to the First Circuit one way or the other maybe as quickly as possible.").

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

All of the relevant factors support granting a stay. This case presents novel and complex jurisdictional questions relevant to several climate change-related lawsuits filed in multiple jurisdictions around the nation. These questions include whether Plaintiff's claims: (1) are necessarily governed by federal common law; (2) raise disputed and substantial federal questions; (3) involve conduct taken at the direction of federal officers and on federal enclaves and the Outer Continental Shelf; (4) are completely preempted; and (5) are within the district court's bankruptcy and admiralty jurisdiction. The federal common law ground for removal, in particular, raises serious legal questions that have divided courts. *Compare City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018) (Keenan, J.), *and California v. BP P.L.C.*, No. 17-CV-6011, 2018 WL 1064293, at *2–3 (N.D. Cal. Feb. 27, 2018) (Alsup, J.), *with Mayor & City Council of Balt. v. BP P.L.C.*, No. 18-CV-2357, 2019 WL 2436848, at *6–9 (D. Md. June 10, 2019), *as amended* (June 20, 2019) (Hollander, J.), *and Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (Chhabria, J.). Notably, the two district court judges who concluded that the claims were not governed by federal common law reached this result based on different rationales.

Allowing state court litigation to proceed—while the parties are before the First Circuit on appeal—would threaten to render Defendants' appeal meaningless. At the same time, it would needlessly impose costs and burdens on the courts and the parties and unduly complicate this litigation. Courts often stay remand orders pending appeal to avoid the "rat's nest of comity and federalism issues" that would arise upon the reversal of a remand order after months (or even years) of litigation in state court, during which time the state court could make numerous rulings. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). This case is one of thirteen nearly identical cases currently pending in federal courts across the country, including in California, Maryland, New York, and Washington. A stay

pending appeal will help avoid a tangle of simultaneous litigation before multiple courts—at the state and federal levels—while appellate courts, and possibly ultimately the U.S. Supreme Court, resolve the threshold issue of whether state or federal courts should hear these cases. Moreover, because this case was removed under the federal officer removal statute, it is especially important to ensure that defendants are not improperly deprived of a federal forum. Congress sought to prevent this outcome by guaranteeing a statutory right to appeal remand orders issued in cases removed under the federal officer statute. A stay will not prejudice Plaintiff and will avoid irreparable harm to Defendants, conserve judicial resources, and serve the interests of judicial efficiency by allowing the First Circuit to decide what law applies and where this case should proceed before the case is litigated further.

II. ARGUMENT

Because this case was removed under the federal officer removal statute, the entire Remand Order is subject to appellate review. The novel and complex issues presented by Defendants' appeal should be reviewed by the First Circuit before the case proceeds in state court.

A. The Entire Remand Order Is Appealable as of Right

Defendants have a statutory right to appeal the Remand Order because the case was removed under the federal officer removal statute, 28 U.S.C. § 1442. ECF No. 1 at 1. Although 28 U.S.C. § 1447(d) generally bars appeal of remand orders, it provides an important exception applicable here: "[a]n *order* remanding a case to the State court from which it was removed pursuant to 1442 or 1443 of this title *shall* be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (emphases added). Under the plain text of the statute, for cases "removed pursuant to section 1442 or 1443," the "*order* remanding [the] case" is "reviewable by appeal." *Id.* (emphasis added).

While the First Circuit has not interpreted § 1447(d) to determine whether all removal grounds are reviewable in cases removed under the federal officer removal statute, the plain meaning of the statutory text and relevant case law make clear that all grounds are within the scope of appellate review.[2] As the Seventh Circuit explained, "[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) (Easterbrook, J.). Looking "beyond the text of § 1447(d) to the reasons that led to its enactment," the court reached "the same conclusion." *Id.* at 813. Section 1447(d) "was enacted to prevent appellate delay in determining where litigation will occur." *Id.* at 813 (citing *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640 (2006)). "But once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum. The marginal delay from adding an extra issue to a case where the time for briefing, argument and decision has already been accepted is likely to be small." *Id.*

[2] The First Circuit has taken a broad view of the scope of appellate review when it comes to removal issues. In *American Policyholders Insurance Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1258 (1st Cir. 1993), a defendant removed a case from state court under 28 U.S.C. § 1442 because of her claimed status as a federal officer. The district court dismissed claims against that defendant and remanded the claims against the remaining defendants to state court. *Am. Policyholders*, 989 F.2d at 1258. On appeal, the First Circuit requested "supplemental briefing on whether this action was properly removed to federal court." *Id.* at 1258. The court concluded that the case was improperly removed on federal-officer grounds. *Id.* at 1261. Even after finding that removal was improper on this basis, however, the court determined that "principles of equity, as well as the law, compel us to explore whether [the] action falls within the federal district court's original jurisdiction." *Id.* Accordingly, the First Circuit proceeded to examine whether the plaintiff's claims gave rise to a federal question so as to support removal under 28 U.S.C. § 1441. *Id.* at 1261–64. Because *American Policyholders*, the plain text of § 1447(d), and Supreme Court precedent support a broad scope of appellate review (as discussed below), the First Circuit is likely to review the entire remand order.

The Fifth Circuit has adopted the Seventh Circuit's reasoning: "Like the Seventh Circuit, '[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons *for* an order, but the order itself." *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (quoting *Lu Junhong*, 792 F.3d at 812). And the Sixth Circuit similarly held that where an "appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the . . . Defendant[] removed the case under 28 U.S.C. § 1442[,]" the scope of appellate review "encompasses . . . the district court's decision on the alternative ground[s] for removal [such as] 28 U.S.C. § 1441." *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (citing *Lu Junhong*, 792 F.3d at 811–13). Likewise, the leading treatise on federal jurisdiction agrees that appellate review of a remand order made reviewable under § 1447(d) "should . . . be extended to all possible grounds for removal underlying the order." 15A Wright et al., Fed. Practice & Procedure § 3914.11 (2d ed.).

The Supreme Court has reached the same conclusion in the analogous context of interlocutory review under 28 U.S.C. § 1292(b). *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). In *Yamaha*, the Court observed that "the text of § 1292(b) indicates" 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.* Applying the statutory language, the Court explained that 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 Federal Practice ¶ 110.25[1], p. 300 (2d ed. 1995)); *see also* 16C Wright et al., Fed. Practice & Procedure § 3929 (1977) ("[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question."). The

Court's reasoning in *Yamaha* applies with equal force to § 1447(d), which likewise authorizes appellate review of remand "orders" in cases removed under § 1442.

Congress first authorized appellate review of cases removed under § 1442 in the Removal Clarification Act of 2011. That Congress did not limit the language of § 1447(d)—even after the Supreme Court's decision in *Yamaha*—is dispositive. Congress "is presumed to be aware of . . . judicial interpretation of" relevant statutory text. *See Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 488 (1st Cir. 2016) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 697–98 (1979) ("[W]e are especially justified in presuming both that [Congress was] aware of the prior interpretation of Title VI and that that interpretation reflects [its] intent with respect to Title IX."). By retaining § 1447(d)'s reference to reviewable "orders" after *Yamaha*, Congress confirmed that it intended to authorize plenary review of such orders.

While some other courts have confined the scope of appellate review to the grounds asserted under § 1442 or, in other cases, § 1443, all but one of these cases predated the Removal Clarification Act of 2011. *See, e.g.*, *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976).[3] None of these courts had the benefit of Judge Easterbrook's in-depth analysis in *Lu Junhong*. Nor did any of the circuit courts on this side of the split undertake a similarly thorough analysis. The Eighth Circuit's opinion in *Jacks*, the only decision postdating the Removal Clarification Act of 2011, deserves little weight

[3] As discussed below, Judge Hollander relied on *Noel* in concluding that only the federal officer removal ground was subject to appellate review. *See infra* at 9 n.4.

because it cited "nothing" to support its holding, and "neither [party] had cited authority or made a coherent argument." *Lu Junhong*, 792 F.3d at 805 (distinguishing *Jacks*, 701 F.3d at 1229). This issue is pending before the Fourth Circuit and the Ninth Circuit in related global warming actions. *See Cty. of San Mateo, et al., v. Chevron Corp., et al.*, No. 18-15499 (9th Cir.), ECF No. 77 at 19–26; *Mayor and City Council of Balt. v. BP P.L.C.*, No. 19-1644 (4th Cir.), ECF No. 73 at 9–13. And in one of those actions, the district court stayed its remand orders pending appeal and *sua sponte* certified the removal issues for interlocutory appeal. *Cty. of San Mateo*, No. 17-CV-4929 (N.D. Cal.), ECF No. 240 (finding that the remand issues involved "controlling questions of law as to which there is substantial ground for difference of opinion"); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-CV-450, ECF No. 142 (staying remand orders pending the outcome of the appeals in *County of San Mateo, et al*.).

Even if this Court were not convinced that the First Circuit would follow the Seventh, Sixth, and Fifth Circuits, and the Supreme Court's guidance in *Yamaha*, and review the whole remand order, the existence of a Circuit split on this issue itself supports a stay. *See In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2–3 (N.D. Cal. May 2, 2007) (granting stay pending appeal where "there [was] a substantial circuit split on [a] jurisdictional issue").

B. This Court Should Stay Its Remand Order Pending Appeal

Here, the Remand Order should be stayed pending appeal because (1) Defendants can make a strong showing that they are likely to succeed on the merits of their appeal and, at a minimum, their appeal raises serious legal questions in an area where the law is unclear; (2) Defendants will be irreparably injured absent a stay; (3) a stay will not substantially injure Plaintiff; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Rio Grande Cmty. Health Ctr., Inc. v. Armendariz*, 792 F.3d 229, 231 (1st Cir. 2015) (quoting *Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of P.R.*, 818 F.2d 1034, 1039 (1st Cir. 1987)) (same four factors).

To satisfy the first factor, Defendants must demonstrate that their appeal raises "serious and difficult questions of law in an area where the law is somewhat unclear." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). Defendants "need *not* show an absolute probability of success" or "persuade the court that it is likely to be reversed on appeal." *Id.* at 149–50 (emphasis added). Thus, this factor is not "interpreted or applied literally, even by the Courts of Appeals." *Id.* at 149. This standard is satisfied where the questions at issue are "neither elementary nor well-established," *Bos. Taxi Owners Ass'n v. City of Bos.*, 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)); *cf. Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (granting stay pending appeal where there were "serious legal questions presented").

The second and third prongs—irreparable injury to the proponent of the stay and substantial injury to the opponent—"require a balancing of harms to the parties." *Exxon Corp. v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997). Where, as here, a government opposes the stay, the third and fourth factors—substantial injury to the opponent of the stay and public-interest considerations—merge and should be considered together. *Nken*, 556 U.S. at 435. "The strength of any of these factors can outweigh a weaker showing on any other factor." *Veracode, Inc. v. Appthority, Inc.*, 137 F. Supp. 3d 17, 98 (D. Mass. 2015).

1. Defendants Are Likely to Succeed on the Merits and, at a Minimum, Their Appeal Presents Serious Legal Questions Where the Law Is Unclear

Defendants' appeal raises complex and novel jurisdictional questions that have already divided multiple district courts. At a minimum, Defendants' appeal will present "serious and difficult questions of law in an area where the law is somewhat unclear." *Canterbury Liquors &*

Pantry, 999 F. Supp. at 149–50. These issues are "neither elementary nor well-established." *Bos. Taxi Owners Ass'n*, 187 F. Supp. 3d at 342. Courts can disagree (and have disagreed) about whether Plaintiff's claims—which emanate from the nationwide and worldwide use and promotion of fossil fuels and which threaten to commandeer national and global economic, environmental, and energy policy—give rise to federal issues that deserve to be litigated in a federal forum, rather than in numerous state courts throughout the country.

First, there is a substantial legal question regarding whether Plaintiff's global warming nuisance claims arise under federal common law. As this Court noted in its Remand Order, two district courts determined that "a state's public-nuisance claim premised on the effects of climate change is '*necessarily* governed by federal common law.'" Remand Order at 5 (quoting *California v. BP*, 2018 WL 1064293, at *2) (emphasis added)); *accord City of New York,* 325 F. Supp. 3d at 471–72. Similarly, another district court recently 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."[4] *Mayor & City Council of Balt.*, No. 18-cv-2357, ECF No. 192 at 5 (D. Md. July 31, 2019); *see also Cty. of San Mateo*, 294 F. Supp. 3d at 939 (noting that plaintiffs' claims "raise national and perhaps global questions"). A fourth district court stayed its remand orders pending appeal and *sua sponte* certified them for interlocutory review because it recognized that the defendants' removal arguments involved "controlling questions of law as to which there is substantial ground for

[4] Although Judge Hollander ultimately denied defendants' motion to stay her remand order pending appeal (a decision under review by the Fourth Circuit), she did so after concluding that Fourth Circuit precedent dictated that appellate review was limited to whether removal under the federal officer removal statute was proper. *See Mayor & City Council of Balt. v. BP P.L.C.*, No. 18-CV-2357, ECF No. 192 at 7 (D. Md. July 31, 2019) (citing *Noel*, 538 F.2d at 635). Because no First Circuit authority would support this conclusion, the entire Remand Order should be subject to appellate review, including the complex and unsettled question whether Plaintiff's claims arise under federal common law. *See supra* Section IIA.

difference of opinion." *Cty. of San Mateo*, No. 17-cv-4929 (N.D. Cal.), ECF No. 240. These decisions—which are currently being reviewed by the Second, Fourth, and Ninth Circuits—confirm that Defendants' appeal presents serious legal questions about which reasonable jurists can disagree (and *have* disagreed).

Indeed, even those courts that have rejected removal based on federal common law had different rationales for doing so. In *San Mateo*, Judge Chhabria did not conclude—as this Court did and as Judge Hollander did in the Baltimore case—that Defendants' removal arguments conflicted with the well-pleaded complaint rule. Rather, he concluded that, in light of the Supreme Court's decision in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), the Clean Air Act displaces federal common law and there was no "possibility that state law claims could be superseded by [displaced] federal common law." *Cty. of San Mateo*, 294 F. Supp. 3d at 937.

Given that the Supreme Court, the Ninth Circuit, and two other district courts have concluded that transboundary pollution claims, like Plaintiff asserts here, necessarily arise under federal common law,[5] Defendants' appeal will present "serious and difficult questions of law in an area where the law is somewhat unclear." *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); *In re Friedman*, 2011 WL 1193470, at *1 (D. Ariz. Mar. 29, 2011) ("Appellants have a reasonable chance of prevailing on appeal" given "split of trial court

[5] *See Am. Elec. Power Co.*, 564 U.S. at 421–22 (reaffirming that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects'") (citation omitted); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855–56 (9th Cir. 2012) ("[F]ederal common law can apply to transboundary pollution suits."); *City of New York*, 325 F. Supp. 3d at 472 ("[T]he City's claims 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."); *California v. BP*, 2018 WL 1064293, at *2 ("Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law.").

authority[.]"); Defendants' Opposition to Plaintiff's Motion to Remand to State Court, ECF No. 87 ("Opp.") at 9–14.

Second, some Defendants extracted, produced, and sold fossil fuels at the direction of federal officers, authorizing removal under § 1442(a)(1). *See* Remand Order at 15; Opp. at 59-62. This Court concluded that a causal connection was lacking because these Defendants failed to show that their sale and promotion of fossil fuels was "justified by [their] federal duty." Remand Order at 15 (quoting *Mesa v. California*, 489 U.S. 121, 131–32 (1989)). But the fact that *some* of their activities took place outside the control of federal officers does not preclude the requisite "causal nexus" between Plaintiff's claims and conduct undertaken at the direction of federal officers. *See, e.g.*, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) (the "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 produced by the defendant over a 35-year period); *see also Lalonde v. Delta Field Erection*, 1998 WL 34301466 (M.D. La. Aug. 6, 1998) (the defendant's work under the direction of the government for eleven years established a "causal connection" between the claims and the defendants' conduct, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer).

Moreover, in 2011, Congress amended the statute "to encompass suits 'for *or relating to* any act under color of [federal] office.'" *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015) (quoting 28 U.S.C. § 1442(a)(1)) (emphasis added). In another context, the Supreme Court has construed the newly added "relating to" language broadly, as meaning "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). This standard does not require a strong causal nexus and

is met when there is a mere "'connection' or 'association' between the act in question and the federal office." *Id.* There is a serious legal question as to whether the extraction and sales activities that Defendants carried out at the direction of federal officers satisfies this standard.

Third, Defendants raise a legitimate dispute as to whether Plaintiff's claims necessarily present a federal issue by, among other things, calling into question the balance struck by the federal government between environmental and energy-related concerns. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005); Opp. at 27–42. Resolution of Plaintiff's claims necessarily requires interpreting federal statutes governing Defendants' conduct, and adjudicating whether federal agencies implementing those statutes struck the proper balance between promoting energy production and energy security, on the one hand, and protecting the environment, on the other. *See* Opp. at 31–35. Additionally, Plaintiff's allegations that Defendants misled regulators about the dangers of fossil fuels necessarily require the adjudication of Defendants' disclosure obligations to those regulators under various federal statutes. *See* Opp. at 39–40.

Fourth, Defendants present a substantial argument that federal jurisdiction exists under the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1349(b)(1); Opp. at 49–53. Plaintiff seeks to hold Defendants liable for *all* of their (and their subsidiaries' and affiliates') exploration and production of minerals, and some defendants conducted a substantial portion of that extraction on the Outer Continental Shelf ("OCS"). As the Supreme Court recently affirmed, "[u]nder the OCSLA, all law on the OCS is federal law," and "OCSLA denies States any interest in or jurisdiction over the OCS." *Parker Drilling Mgmt. Svcs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019).

The Court rejected OCSLA jurisdiction because it concluded that Defendants did not show that the alleged "injuries would not have occurred but for [their OCS] operations." Remand Order

at 15. Other courts, however, have allowed removal where, as here, a defendant's OCS operations are alleged to have merely contributed to the plaintiff's injuries. *See Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (removal proper where "at least part of the work that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with Shell's OCS operations"). OCSLA jurisdiction is also present where claims, like those at issue here, would "threaten[] to impair the total recovery of the federally-owned minerals." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994). Plaintiff could have attempted to exclude OCS production and conduct from its pleading, but it did not. Because "[a]ll law applicable to the [OCS] is federal law," Rhode Island law "does not provide the rule of decision" for Plaintiff's claims. *Parker*, 139 S. Ct. at 1891, 1893. Accordingly, Plaintiff's federal claims were properly removed under OCSLA.

Finally, the other removal grounds asserted by Defendants also raise serious legal questions. Some of the allegedly tortious activity—fossil-fuel extraction—indisputably occurred on federal enclaves, and some courts have determined that federal jurisdiction can exist when only a portion of the pertinent events occurred on federal enclaves. *See* Opp. at 53–55 (citing cases). A substantial question also exists as to whether Plaintiff's claims are completely preempted by the Clean Air Act ("CAA"). *See* Opp. at 43–48. Although this Court concluded that the CAA does not provide an exclusive cause of action for the Plaintiff's claims and therefore fails to completely preempt them, Remand Order at 10–11, the CAA's cooperative federalism approach allows states to establish standards applicable only within their own boundaries—not nationwide. *See* Opp. at 44–47.[6] In

[6] The Sixth Circuit's decision in *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989) (cited at Remand Order at 11), involved an effort under Michigan law to impose pollution requirements on a garbage incineration plant in Detroit, Michigan more stringent than those required by the relevant federal permit. The court held that plaintiff's state law claims were not preempted because the CAA's savings clause indicated that Congress did not intend to completely preempt such claims. *Id.* at 342–44. But the plaintiff in that case sought to use state law to challenge in-state emissions, whereas here Plaintiff is not seeking redress for in-

addition, reasonable jurists could disagree as to whether Plaintiff's claims have a "close nexus" to one or more confirmed bankruptcy plans, as there is a serious legal question as to whether the State can invoke the public-safety exception to the bankruptcy removal statute when it is demanding untold sums of compensatory and punitive damages and disgorgement of profits for conduct that has been authorized and encouraged by federal and state law for decades. *See* Compl. ¶ 247; *id.*, Prayer for Relief; Opp. at 65–66. Finally, reasonable jurists could dispute whether the Venue Clarification Act of 2011, as well as a host of relevant federal district, appellate, and Supreme Court decisions, provides a basis for removal under admiralty jurisdiction, particularly where a substantial portion of the worldwide fossil-fuel production that Plaintiff claims caused its alleged injuries was conducted by vessels on navigable waters. *See* Opp. at 67–68.

2. Defendants Will Suffer Irreparable Harm Absent a Stay

Defendants will be irreparably harmed absent a stay. Once the clerk mails the certified copy of the Remand Order to the state court, this case may proceed there while Defendants' appeal is pending. *See* 28 U.S.C. § 1447(c) (after mailing of the remand order, "[t]he State court may thereupon proceed with [the] case"). The parties would then have to litigate simultaneously along multiple tracks: They would (1) brief and argue federal jurisdictional issues in the First Circuit; (2) while litigating Plaintiff's claims in Rhode Island state court; (3) while also litigating nearly identical cases in the Second, Fourth, and Ninth Circuits, where the same set of issues are pending on appeal, with (4) the potential for one or more of the appeals to reach the U.S. Supreme Court. Having this case proceed in Rhode Island state court now—while the fundamental questions of what law applies and of where these cases should be heard are litigated in the First Circuit (and three other U.S. Courts of Appeals, and possibly later in the U.S. Supreme Court)—would be unnecessarily burdensome and

state emissions in Rhode Island, but to punish Defendants for their nationwide—and worldwide—operations and the resulting worldwide greenhouse gas emissions.

wasteful. *See Lafalier v. Cinnabar Serv. Co.*, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010) (requiring defendant to simultaneously proceed with discovery in state court and pursue appeal of remand order "would impose an unfair burden").

While Defendants' appeal is pending, the state court would likely rule on motions to dismiss and discovery motions (if discovery is not stayed) under state standards. If the First Circuit agrees that Plaintiff's claims must be litigated in federal court under federal common law, all of this will have been for naught. Upon return to federal court, any motion practice that took place in state court will have to be redone. And, if the case returns to federal court and is dismissed for failure to state a claim (as two district judges did with almost identical claims in other cases, *see City of New York*, 325 F. Supp. 3d at 472–76; *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–26 (N.D. Cal. 2018)), then any discovery that defendants were ordered to produce in state court will have been a burdensome and unnecessary undertaking. *See Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) ("The cost of proceeding with discovery [in state court]—and potentially relitigating discovery issues in federal court—is likely to be high. And such costs are irreparable . . . .").

Moreover, interim state court rulings would create "comity and federalism" issues that the parties and the court would have to untangle upon return to federal court. *See Northrop Grumman*, 2016 WL 3346349, at *4; *cf. Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007) (noting that "when a case has moved from the federal to the state court system, significant issues of comity arise"). District courts often grant motions to stay remand orders pending appeal to avoid the risk of inconsistent outcomes and other burdens posed by simultaneous state and federal court litigation. *See, e.g.*, *Northrop Grumman*, 2016 WL 3346349, at *3–4 (collecting cases); *Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013) (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while the case is pending" on

appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential of inconsistent outcomes if the state court rules on any motions while the appeal is pending"). A stay pending appeal would also be consistent with the stays presently in place in eight other cases involving nearly identical claims. *See, e.g.*, *Cty. of San Mateo*, No. 17-cv-4929 (N.D. Cal.), ECF No. 240 at 1–2 ("The motions to stay the remand orders in these three cases pending appeal are granted.").

Indeed, the importance of avoiding ultimately unnecessary state-court proceedings is heightened in cases removed under the federal officer removal statute. Courts' "'unusual ability to review a remand order'" in such cases "'reflects the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer.'" *See Decatur*, 854 F.3d at 295–96 (quoting *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 460 (5th Cir. 2016)); *Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992) (describing the "chief purpose" of § 1442 as "prevent[ing] federal officers who simply comply with a federal duty from being punished by a state court for doing so"); *see also* Removal Clarification Act of 2011, Pub. L. No. 112-51 § 2(d), 125 Stat. 545 (adding § 1442 as an exception to non-reviewability in § 1447(d)). Absent a stay, if the First Circuit ultimately determines that remand was improper, Defendants will have been deprived of a federal forum during the intervening period—a scenario that Congress sought to avoid by providing a statutory right of appeal. *See Northrop Grumman*, 2016 WL 3346349, at *3 ("Several other courts have recognized that where the pending appeal addresses remand of a case initially removed pursuant to 28 U.S.C. § 1442, a stay is appropriate to prevent rendering the statutory right to appeal 'hollow.'"); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Grp., Inc.*, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (same); *Vision Bank v. Bama Bayou, LLC*, 2012 WL 1592985, at *2 (S.D. Ala. May 7, 2012) (same).

Defendants' right to appeal the Remand Order could also become meaningless if this Court declines to stay this action pending appeal. "Meaningful 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 (emphasis added). But, without a stay, the state court could reach a final judgment before Defendants' appeal is resolved. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2010 WL 11565166, at *4 (S.D. W. Va. May 4, 2010) (finding that because "remand . . . would, as a practical matter, moot [defendants'] respective appeals . . . denial of the [defendants'] appellate rights constitutes a sufficient substantive loss to tip the balance in favor of a stay"); *Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardships tipped in favor of granting stay because right to appeal an order to disclose information "would become moot" absent a stay). This scenario is an acute possibility here given the stakes of this litigation and the Circuit split on the scope of appellate review under 28 U.S.C. § 1447(d). Because an "intervening state court judgment or order could render the appeal meaningless," Defendants face "severe and irreparable harm if no stay is issued." *Northrop Grumman*, 2016 WL 3346349, at *4.

3. The Balance of Harms Tilts Decisively in Defendants' Favor

"Where, as here, the Government is the opposing party," the third and fourth stay factors (*i.e.*, harm to opposing party and the public interest) "merge" and should be considered together. *Nken*, 556 U.S. at 435; *see also Devitri v. Cronen*, 289 F. Supp. 3d 287, 297 (D. Mass. 2018) (same). Here, Plaintiff will not be substantially harmed by a stay. If Plaintiff is correct that this suit belongs in state court, "a stay w[ill] not permanently deprive [it] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. Although proceedings will be delayed, any relief that Plaintiff obtains in this case will not be diminished because of that delay. *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," but would harm the plaintiff "only to the extent that it postpones the moment of

disclosure"); *see also Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 913 (5th Cir. 2011) (finding that 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").

This is especially true given that a substantial portion of the damages that Plaintiff seeks stems from purported costs that it has not yet incurred and which it may not incur for decades. *See, e.g.*, Compl. ¶ 7 (sea level rise "*will* occur" (emphasis added)), *id.* ¶ 8 (flooding, storms, and drought "*will* become more frequent" (emphasis added)). Any delay will not substantially harm Plaintiff in its pursuit of equitable relief to "abate[]" harms, *id.*, Prayer for Relief, which "will occur even in the absence of any future emissions," *id.* ¶ 7, and which cannot be measurably exacerbated during a stay.

Moreover, a stay would also shield Plaintiff from the risks of potentially inconsistent outcomes and needlessly wasted resources in a state court proceeding that ultimately may be nullified. *See Chang*, 107 F.R.D. at 345 ("[T]he delay of an additional eight months or so seems a small price to pay to achieve a markedly greater degree of certainty and predictability."); *Raskas*, 2013 WL 1818133, at *2 ("[P]laintiffs' interests would actually be served by granting a stay" because "[n]either party would be required to incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued").

Further, given the repercussions that this lawsuit could have on national and global economic, environmental, and energy policy, there is a public interest in settling the questions of what law governs and where this case should be litigated before the state court begins considering whether it may or should hold the oil and gas industry responsible for the climate change-related harms that Plaintiff alleges under Rhode Island tort law. Indeed, the First Circuit may conclude that Plaintiff's claims arise under federal common law (as two district courts have done, *see City of New York*, 325 F. Supp. 3d at 471–72; *California v. BP P.L.C.*, 2018 WL 1064293, at *2–3), which would render this inquiry unnecessary.

The public will also benefit from the efficiencies of avoiding potentially unnecessary and unquestionably resource-intensive state court proceedings. Courts have recognized the importance of this factor in stay decisions, noting in general that a stay while the appeal is pending would "conserve[e] judicial resources and promot[e] judicial economy" by "avoid[ing] potentially duplicative litigation in the state courts and federal courts." *Raskas*, 2013 WL 1818133, at *2; *see also U.S. v. 2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015) (finding "a cognizable public interest in promoting judicial economy, and avoiding duplicative litigation and inconsistent rulings"); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) ("[t]he public interest does not support the [Government's] expenditure of time, money, and effort" proceeding with efforts that might ultimately be rejected on appeal). Concern over the use of limited judicial resources could not be more warranted than in this case. While the appeal progresses, the Rhode Island state court would be consumed for months addressing preliminary jurisdictional and merits motions filed by Defendants (collectively and individually). These decisions might be academic, or at the very least subject to relitigation, if the Court of Appeals were to find that the removal of this case was appropriate, and would be meaningless if the First Circuit concludes that federal common law governs instead of state law.

III. CONCLUSION

For the foregoing reasons, the Court should grant this Motion and stay the remand order pending resolution of Defendants' appeal in the First Circuit. Alternatively, if the Court denies this Motion, Defendants request that the Court enter a further temporary stay of the Remand Order to allow the First Circuit to consider and decide a motion to stay pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2), which may extend beyond the 30-day stay to which the parties have stipulated (ECF No. 124).

Dated: August 9, 2019

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing document was filed through the ECF system on the 9th day of August, 2019, and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ *John A. Tarantino*

EXHIBIT 7

No. 19A-

IN THE

Supreme Court of the United States

BP P.L.C., ET AL.,
Applicants,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND PENDING APPEAL

AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable John G. Roberts,
Chief Justice of the United States
And Circuit Justice for the Fourth Circuit

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

The Mayor and City Council of Baltimore seek to hold 26 multinational energy companies (the "Applicants") accountable—in Maryland state court—for allegedly causing global climate change. Applicants seek to litigate these claims in a federal forum, where they belong, and thus removed the suit to the United States District Court for the District of Maryland. Applicants' notice of removal invoked numerous grounds for federal jurisdiction, including federal officer removal under 28 U.S.C. § 1442, but the district court granted the Respondent's motion to remand the suit back to Maryland state court. Applicants have an appeal as of right under 28 U.S.C. § 1447(d), and asked both the district court and Fourth Circuit to stay the remand pending appeal. Both courts denied Applicants' request for a stay.

Applicants respectfully request that this Court stay the district court's remand order pending this appeal and, if the Fourth Circuit affirms the order remanding this case, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, in light of the potentially irrevocable consequences of a remand, applicants request that the Court enter a temporary emergency stay of the remand order until the Court decides whether to grant this application. This suit—like a dozen other related suits that have been filed around the country and removed to federal court, and which are now pending in various postures in five of the Courts of Appeals—raises claims that necessarily arise under

federal common law, implicate oil and gas production activities performed at the direction of federal officers and on federal lands, and require resolution in a federal forum. The two district courts that have reached the merits of these global warming claims have dismissed, concluding that federal common law does not provide a remedy. These inherently federal cases should not be resolved piecemeal in state court under state law.

There is a likelihood of irreparable harm in the absence of a stay because even if the action returns to federal court before the state court enters a final judgment, Applicants would be unable to recover the cost and burdens of duplicative litigation, and the district court would need to untangle any state court rulings made during the pendency of the appeal, creating significant comity and federalism issues. In contrast, and with respect to the balance of equities, Respondent will suffer no harm from a stay.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation. BP Products North America Inc. is also a 100% wholly

owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP Products North America is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petroleos de Venezuela S.A. No publicly held corporation owns ten percent or more of CITGO's stock;

CNX Resources Corporation is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns ten percent or more of CNX Resources Corporation's stock.

CONSOL Energy Inc. is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors, which is a subsidiary of publicly held BlackRock, Inc., owns ten percent or more of CONSOL Energy Inc.'s stock.

CONSOL Marine Terminals LLC is a wholly owned subsidiary of CONSOL Energy Sales Company LLC, which is a wholly owned subsidiary of CONSOL Energy Inc., a publicly held corporation. No other publicly held corporation owns ten percent or more of CONSOL Marine Terminals LLC's stock.

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns ten percent or more of ConocoPhillips's stock. ConocoPhillips Company is a wholly owned operating subsidiary of ConocoPhillips.

Crown Petroleum Corporation no longer exists. In 2005, it was merged into Crown Central LLC. Crown Central LLC's sole member is Crown Central New Holdings, LLC. The sole member of Crown Central New Holdings, LLC is Rosemore Holdings, Inc., which is a wholly owned subsidiary of Rosemore, Inc.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns ten percent or more of Exxon Mobil Corporation's stock. ExxonMobil Oil Corporation is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Hess Corporation is a publicly traded corporation and it has no corporate parent. There is no publicly held corporation that owns ten percent or more of Hess Corporation's stock.

Applicant the Louisiana Land & Exploration Company is defunct and has merged into The Louisiana Land and Exploration Company, LLC, which is not a party to this action and did not appear during proceedings below.

Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation. Marathon Oil Corporation has no parent corporation. Based on the Schedule 13G/A filed with the SEC on July 10, 2019, BlackRock, Inc., through itself and as the parent holding company or control person over certain subsidiaries, beneficially owns ten percent or more of Marathon Oil Corporation's stock.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Marathon Petroleum Corporation's stock.

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns ten percent or more of Phillips 66's stock. Applicant Phillips 66 Company is not a party to this appeal, as it was never served with the underlying lawsuit and thus did not appear before the United States District Court for Maryland.

Royal Dutch Shell plc, a publicly held UK company, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Royal Dutch Shell plc's stock. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate parent is Royal Dutch Shell plc.

Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation. No other publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This case is one of fourteen nearly identical cases pending in federal courts around the country in which various state and local government entities have sought to hold energy companies liable for the alleged effects of global climate change.[1] Plaintiffs filed all but one of these actions in state court, and defendants have removed all of the state-court actions to federal court. Defendants have argued in each case that federal law—not state law—necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil fuel production.

These arguments have divided the lower courts. Two courts agreed that global warming claims arise under federal law, regardless whether plaintiffs affix state-law labels to their claims, and dismissed on the merits. *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, 471 (S.D.N.Y. 2018). A third held that federal common law does *not* govern plaintiffs' global warming claims, reasoning erroneously that Congressional displacement of federal common law makes state law operative and thus defeats removal. *See Cty. of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal.

[1] *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.); *City and Cty. of San Francisco* v. *BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns* v. *Chevron Corp.*, No. 3:18-cv-7477 (N.D. Cal.); *State of Rhode Island* v. *Chevron Corp.*, No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County* v. *BP P.L.C.*, No. 2:18-cv-758-RSL (W.D. Wash.); *City of New York* v. *BP P.L.C.*, No. 18-cv-182-JFK (S.D.N.Y.); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, No. 18-cv-1672 (D. Colo.).

2018). And three other courts, including the district court in this case, held that the well-pleaded complaint rule bars removal of claims nominally asserted under state law, regardless of whether the claims are governed by federal common law. *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July, 22, 2019); *Mayor and City Council of Baltimore* v. *BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. June 10, 2019); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019). Each of those suits is on appeal before the federal circuit courts,[2] and several other related cases are stayed pending those appeals.

In this case, the district court remanded to state court, and both the district court and the Fourth Circuit denied Applicants' request for a stay pending appeal. But a stay is amply justified.

First, this case implicates a well-developed circuit split over the scope of appellate jurisdiction under 28 U.S.C. § 1447(d). Section 1447(d) generally bars appellate review of district court orders remanding cases back to state court, but contains an exception where a basis for removal is 28 U.S.C. § 1442, the federal officer removal statute, or 28 U.S.C. § 1443, the civil rights removal statute. Where, as here, a party has invoked § 1442 as a basis for removal, the Sixth and Seventh Circuits have held that the court of appeals may review every issue in the district court's

[2] *Rhode Island* v. *Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.); *City of New York* v. *BP P.L.C.*, No. 18-2188 (2d Cir.); *Mayor and City Council of Baltimore* v. *BP P.L.C., et al.*, No. 19-1644 (4th Cir.); *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.) (consolidated with Nos. 18-15502, 18-15503, 18-16376); *City of Oakland* v. *BP P.L.C., et al.*, No. 18-16663 (9th Cir.); *Bd. of Cty. Comm'rs of Boulder Ct., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

remand order. In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that the court of appeals may consider *only* whether removal was proper under § 1442 or § 1443. The Fifth Circuit has precedent going both ways. The First and Ninth Circuits (like the Fourth Circuit in this case) are currently considering the issue. That split requires resolution by this Court to ensure appellate jurisdiction is applied consistently across the nation.

Second, this Court has repeatedly granted review to address issues related to climate change because of their national and global importance. *See, e.g.*, *Am. Elec. Power Co.,* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011). It is difficult to imagine claims that more clearly implicate substantial questions of federal law and require uniform disposition than the claims at issue here, which seek to transform the nation's energy, environmental, national security, and foreign policies by punishing energy companies for lawfully supplying necessary oil and gas resources. Respondent wants a Maryland state court to declare Applicants' historical energy production and promotional activities across the United States and abroad to be a public nuisance, thereby regulating interstate and international energy production in the name of global warming. This Court has long held that lawsuits like this one targeting interstate pollution and related issues necessarily implicate uniquely federal interests and should be resolved under federal common law, not state law. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987); *AEP*, 564 U.S. 410.

Third, this case implicates a host of federal jurisdiction-granting statutes designed to protect federal interests by ensuring a federal forum, including the federal officer removal statute, 28 U.S.C. § 1442(a)(1), because Applicants extracted and sold oil and gas at the direction of federal officers; and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*., because Respondent's claims seek to limit oil and gas extraction on the Outer Continental Shelf, which is the subject of exclusive federal jurisdiction. This Court's intervention is required to prevent important federal interests from being adjudicated inconsistently—and protected unevenly—in the various state courts.

A stay of the district court's remand order pending appeal is the only way to avoid the significant burden that would be placed on the parties if they are forced to litigate this case on parallel tracks, and the recognized comity and federalism issues that would result from the reversal of a remand order after months (or years) of litigation in state court. The Fourth Circuit's failure to implement a stay requires this Court's intervention. This Court should stay the remand order pending appeal and, if necessary, pending review by this Court.[3] In addition, Applicants request an immediate administrative stay of the remand order pending the Court's consideration of this application.

[3] If this Application is referred to the full Court, applicants request that an interim stay be issued pending a response by Respondent and pending further order of this Court. *E.g.*, *In re U.S.*, 139 S. Ct. 16 (Mem.) (2018) (Roberts, C.J., in chambers).

STATEMENT

1. On July 20, 2018, the Mayor and City Council of Baltimore filed a complaint against more than two dozen American and foreign energy companies, alleging that Applicants' worldwide "extraction, refining, and/or formulation of fossil fuel products" is a "substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height." Attachment A at 98 ¶ 193. The complaint further alleges that this increase in global temperatures has led to rising sea levels, severe weather events, and other environmental changes that have injured or will injure the City of Baltimore. *Id.* at 98-99 ¶¶ 193-95. The complaint purports to assert Maryland state law causes of action. Respondent claims, for example, that Applicants' conduct in extracting and selling fossil fuel products around the world has caused a public and private nuisance, *id.* at 107-15 ¶¶ 218-36, and it asks the Maryland state court to "enjoin[] [Applicants] from creating future common-law nuisances." *Id.* at 111 ¶ 228. Respondent also purports to bring state law claims for strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violation of the Maryland Consumer Protection Act. *Id.* 115-30 ¶¶ 237-98.

2. Applicants removed this action to the U.S. District Court for the District of Maryland on July 31, 2018. Attachment B. The notice of removal asserted that the Respondent's claims are removable because they: (1) "are governed by federal common law," *id.* at 4; (2) "raise[ ] disputed and substantial federal questions," *id.* at 6; (3) "are completely preempted by the [Clean Air Act] and/or other federal statutes

and the United States Constitution," *id.* at 6-7; (4) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under OCSLA, 43 U.S.C. § 1331 *et seq.*, *id.* at 7; (5) arise out of conduct undertaken at the direction of federal officers, *id.*; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.*; (7) "are related to cases under Title 11 of the United States Code," *id.* at 7-8; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333," *id.* at 8.

Respondent moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion without hearing argument. Attachment C. Pursuant to the parties' stipulation, the district court stayed the remand for thirty days. *Id.* at 3. On June 12, 2019, Applicants filed a notice of appeal in the United States Court of Appeals for the Fourth Circuit. That appeal is fully briefed, and oral argument is tentatively calendared for the week of December 10-12, 2019. On June 23, 2019, the Applicants filed a motion in the district court to stay the remand pending appeal, and the parties stipulated to stay the remand until the district court had resolved that motion. The stipulation also provided that the remand would be stayed pending resolution of any motion to stay filed in the Fourth Circuit.

On July 31, 2019, the district court denied Applicants' motion to stay. Attachment D. Although the district court "agree[d] that the removal of this case based on the application of federal law presents a complex and unsettled legal question," *id.* at 5, it concluded that § 1447(d) authorizes appeal *only* of the federal officer removal question, *id.* at 5-9. And it concluded that Applicants' appeal did not

present a serious legal question regarding that basis for removal. *Id.* at 8-9. The district court concluded that the other stay factors did not justify a stay. *Id.* at 9-11.

On October 1, 2019, the Fourth Circuit denied Applicants' motion for a stay pending appeal. Attachment E.

REASONS TO GRANT THE STAY

To grant a stay, a Justice must find "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (internal quotation marks and alterations omitted). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2012) (per curiam); *accord, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Simply put, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans For Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1302-1303 (2006) (Kennedy, J., in chambers). A stay is warranted here.

I. There Is More Than A Reasonable Probability This Court Will Grant Review If The Fourth Circuit Affirms The Remand Order.

There is a substantial probability that the Court will grant certiorari if the Fourth Circuit affirms the district court's remand order. At a minimum, certiorari is necessary to resolve an important issue of appellate jurisdiction that has divided the circuits—whether 28 U.S.C. § 1447(d) authorizes the appellate court to review the *entire* remand order where removal was based in part on the federal officer removal statute, 28 U.S.C. § 1442, or whether appellate jurisdiction is limited to reviewing only the federal officer issue. The Court will likely grant certiorari to review that question if the Fourth Circuit adopts the narrow view of § 1447(d). Alternatively, if the Fourth Circuit reviews the entire remand order and affirms, this Court is likely to grant certiorari on a different question: whether federal law necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil-fuel production—an issue of national importance that has divided the lower courts and is on appeal in the First, Second, and Ninth Circuits.

A. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Review Under 28 U.S.C. § 1447(d).

Section 1447(d) generally bars appellate courts from reviewing district court orders remanding cases to state court, but it contains an exception providing 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) (emphasis added). The circuit courts are divided over whether § 1447(d) authorizes appellate review of the entire

remand "order" when § 1442 provided one of the bases for removal, or whether appellate review is limited to considering a single *issue—i.e.*, the propriety of removal under § 1442. The Sixth and Seventh Circuits have held that § 1447(d) confers appellate jurisdiction over every issue in the remand order. *See Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (holding, in a case where the defendant removed under § 1441 and § 1442, that "[o]ur jurisdiction to review the remand order also encompasses review of the district court's decision of the alternative ground for removal under 28 U.S.C. § 1441"); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) ("Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442," and "once an appeal of a remand 'order' has been authorized by statute, the court of appeals may consider *all* of the legal issues entailed in the decision to remand.") (emphasis added).

In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that § 1447(d) authorizes the appellate court to review *only* whether a case was properly removed under § 1442 or § 1443. *See State Farm Mut. Auto. Ins. Co.* v. *Baasch*, 644 F.2d 94, 96-97 (2d Cir. 1981) (per curiam) ("dismiss[ing] for want of appellate jurisdiction" "[i]nsofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a)," while addressing "denial of removal under 28 U.S.C. § 1443" on the merits); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Jacks* v. *Meridian Resource Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) ("[W]e do lack jurisdiction to review the district court's determination concerning the availability of federal common law to resolve this

suit . . . as it is a remand based upon [§ 1441]. Nonetheless, we retain jurisdiction to review the district court's remand on the issue of whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), applies."); *Patel* v. *Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (reviewing merits of remand decision addressing removal under § 1443 but dismissing the appeal as to all other removal grounds because the court "lack[ed] jurisdiction to review the remand order based on § 1441").[4]

The Fifth Circuit, meanwhile, has recent precedent going both directions. In *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), the court noted that "[a]lthough § 1447(d) allows review of the 'order remanding the case,' it has been held that review is limited to removability under [§ 1442 or §1443]." *Id.* at 296. The court rejected that view, concluding that "[r]eview should instead be extended to all possible grounds for removal underlying the order." *Id.* ("Like the Seventh Circuit, '[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons *for* an order, but the order itself.") (quoting *Lu Junhong*, 792 F.3d at 812). A few months later, however, a different panel held that § 1447(d) authorized review only of those grounds of removal specifically enumerated—*i.e.*, § 1442 and § 1443. *City of Walker* v. *Louisiana ex rel. Dep't of Transp. and Dev.*, 877

[4] In a parallel global warming case, the Ninth Circuit is considering the significance, *vel non*, of *Patel* given that the scope of appellate jurisdiction under § 1447(d) was not briefed, analyzed, or squarely decided in that case. *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (consolidated with Nos. 18-15502, 18-15503, 18-16376) (9th Cir.). In *San Mateo*, the district court stayed the remand pending appeal and *sua sponte* certified the remand order for interlocutory review. *Cty. of San Mateo* v. *Chevron Corp.*, No. 17-cv-4929 (N.D. Cal.), ECF No. 240.

F.3d 563, 566 (5th Cir. 2017).

A majority of circuits have thus weighed in on the precise issue presented by this appeal, and they are intractably divided.[5] There is more than a reasonable probability that this court will grant certiorari to address this important question of appellate jurisdiction.

B. Any Petition for Certiorari Will Present Important Substantive Questions of Federal Jurisdiction.

1. Whether Global Warming Claims Based Substantially on Conduct that Occurred at the Direction of Federal Officers are Removable Under the Federal Officer Removal Statute Is a Question of Great National Importance.

The question whether Applicants properly invoked the federal officer removal statute will be worthy of this Court's review. Indeed, whether global warming claims targeting fossil-fuel production are removable under § 1442 when a substantial portion of the allegedly tortious production occurred at the direction of federal officers is an important question of federal law given the interests at stake and the likelihood of additional climate-change related litigation. This Court—like the Fourth Circuit—has jurisdiction to reach that issue regardless of how it rules on the scope of appellate review under § 1447(d), because Applicants invoked § 1442 in their Notice of Removal. *See* Attachment B at 7. The answer to that question is of great national importance because Applicants extracted a significant amount of fossil fuels for the military. *See*

[5] The First Circuit will consider this issue in a parallel global warming case involving many of the same Applicants. *See Rhode Island* v. *Shell Oil Products Co., LLC*, No. 19-1818 (1st Cir.). The Tenth Circuit may also consider the issue. *See Bd. of Cty. Comm'rs of Boulder Cty., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

infra at II.B. This Court is likely to review whether state courts are authorized to adjudicate claims seeking to deem conduct essential for national defense a public nuisance, and seeking to label products critical to the military "unreasonably dangerous," without input from the military.

2. Whether Global Warming Claims Based on Worldwide Greenhouse-Gas Emissions Necessarily Arise Under Federal Law Is a Question of Great National Importance.

This Court is also likely to grant certiorari if the Fourth Circuit concludes it has jurisdiction to review the entire remand order but affirms the district court's remand decision. The question presented in that scenario—whether global warming claims asserted against energy producers based on worldwide greenhouse-gas emissions must be resolved in federal court under federal law, or can instead be litigated in state courts under 50 different state laws—is one of utmost national importance that has divided the lower courts.

Thirteen virtually identical cases are now pending in federal courts across the country—six different district courts in four different circuits. All but one were filed in state court and subsequently removed to federal court. Applicants in each case 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. The district courts are split as to whether these claims arise under federal or state law. *Compare California* v. *BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*") (holding that federal-question jurisdiction was present), *and City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (same), *with Cty. of San Mateo*

v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (holding that federal-question jurisdiction was not present), *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July 22, 2019) (claims do not arise under federal common law because plaintiff asserted only state law claims and well-pleaded complaint rule bars removal); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019) (same), *and Mayor and City Council of Baltimore* v. *BP*, *P.L.C.*, [App C] (same). The two federal district courts that have reached the merits of these global warming claims have dismissed on the ground that federal common law does not provide a remedy; *see City of Oakland*, 325 F. Supp. 3d at 1026 (dismissing global warming nuisance suits because "questions of how to appropriately balance the[] worldwide negatives [of greenhouse gas emissions] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies; our diplomats; our Executive, and at least the Senate"); *City of New York*, 325 F. Supp. 3d at 473 (dismissing claims because "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act"). This is not an issue that can wait for further percolation in the lower courts; the parties in these cases need to know whether the claims will be litigated under a uniform federal standard or subject to a "patchwork of fifty different answers to the same fundamental global issue[.]" *BP*, 2018 WL 1064293, at *3.

Few issues touch upon as many uniquely federal interests as global climate

change and energy production. The relief sought by the Respondent in these cases—ranging from an order enjoining Applicants' worldwide fossil-fuel production to a massive damages award—implicates a wide range of federal interests, including national security, energy policy, environmental policy, and foreign affairs. The question whether such claims warrant resolution in a federal forum under federal law presents a monumentally "important question of federal law." Sup. Ct. R. 10(c). Indeed, the issue is of such importance that the United States filed a district-court amicus brief in one of the cases, and appeared for oral argument in that court, to highlight the case's "potential to shape and influence broader policy questions concerning domestic and international energy production and use." Br. for the United States as Amicus Curiae at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The United States filed a similar amicus brief in the Second Circuit, noting that "international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders," and argued that "[a]pplication of *state* nuisance law . . . would substantially interfere with the ongoing foreign policy of the United States." Br. of for the United States as Amicus Curiae at 15-16, *City of New York* v. *BP P.L.C.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019). Given the proliferation of global warming suits seeking to hold energy producers liable for the alleged effects of global warming, this Court's review is urgently needed to clarify whether federal law necessarily applies to such claims.

Certiorari is especially likely here given this Court's history of reviewing decisions involving claims predicated on global-warming based injuries. In *AEP*, 564 U.S. at 419-20, this Court granted review to address whether a nuisance cause of action against greenhouse-gas emitters could be maintained under federal common law, even though there was no circuit split on the issue. In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court granted review to address whether the Environmental Protection Agency has statutory authority to regulate greenhouse gas emissions from new motor vehicles because of "the unusual importance of the underlying issue," notwithstanding "the absence of any conflicting decisions." *Id.* at 505-06. And in *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), the Court again granted review in the absence of a split to review EPA's assertion of regulatory authority over stationary-source greenhouse-gas emissions.

Whether the Fourth Circuit takes a narrow view of its own jurisdiction to review the remand order, or reviews the entire remand order and affirms, this Court is likely to grant certiorari. For the reasons set forth below, a reversal is likely in either scenario.

II. There is a Significant Likelihood that this Court Will Reverse.

If the Fourth Circuit holds that § 1447(d) limits the scope of appellate review to the propriety of removal under § 1442, this Court is likely to reverse and hold that the plain text of § 1447(d) authorizes review of the entire remand order. The Court is also likely to reverse if the Fourth Circuit affirms the district court's remand order after reviewing *only* the federal officer issue, because much of Defendants' allegedly

tortious fossil-fuel extraction and production occurred at the direction of federal officers. If the Fourth Circuit reviews the entire remand order but affirms the district court's conclusion that global warming claims based on worldwide greenhouse-gas emissions and fossil-fuel production do *not* arise under federal law, this Court is likely to reverse that decision as well.

A. Section 1447(d) Authorizes Review of the Entire Remand Order in Cases Removed Under § 1442.

Section 1447(d) provides that "*an order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. §1447(d) (emphasis added). Applicants removed this case under § 1442 and have appealed the district court's rejection of removal on that ground. The plain text of § 1447(d) thus makes the entire remand *order*—not particular grounds for removal—reviewable on appeal.

As the Seventh and Sixth Circuits recently recognized in determining the scope of review under § 1447(d), "[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*, 792 F.3d at 811; *accord Mays*, 871 F.3d at 442; 15A Wright et al., *Fed. Prac. & P.* §3914.11 (2d ed.). "In general, the purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal." *See* 14C Wright & Miller, *Fed. Prac. & P.* § 3740 (Rev. 4th ed.). But, as Judge Easterbrook has explained, "once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has

been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 811. In such cases, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*; *accord* 15C Wright et al., *Fed. Prac. & P.* § 3914.11 (2d ed.) ("Once an appeal is taken there is very little to be gained by limiting review.").

This Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), confirms that interpretation of § 1447(d). *Yamaha* involved similar language in 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." This Court held that once review is granted, "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. As a result, "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)).

Respondent has argued below that adopting Applicants' proposed interpretation of § 1447(d) would encourage litigants to frivolously invoke § 1442 as a means of guaranteeing appellate review. But "sufficient sanctions are available to deter frivolous removal arguments[.]" 15A Wright et al., *Fed. Prac. & P.* § 3914.11*; see also Lu Junhong*, 792 F.3d at 813 ("[A] frivolous removal leads to sanctions[.]"); *see, e.g.*, *Wong* v. *Kracksmith*, 764 F. App'x 583 (9th Cir. 2019) (Mem.) (affirming

remand and district court's imposition of sanctions for filing "a frivolous notice of removal" under § 1443). "What's more, a court may resolve frivolous interlocutory appeals summarily[,]" and a "district judge may, after certifying that an interlocutory appeal is frivolous, proceed with the litigation (including a remand)." *Lu Junhong*, 792 F.3d at 813 (citations omitted). There are no good policy reasons for ignoring the plain text of § 1447(d), which authorizes appellate review of a remand "*order*" in cases removed under § 1442.

If the Fourth Circuit dismisses Applicants' appeal in part on the ground that it lacks jurisdiction to review the whole remand order, this Court will likely grant certiorari and reverse.

B. Applicants Properly Removed This Case Under the Federal Officer Removal Statute Because Much of Applicants' Fossil-Fuel Extraction Occurred at the Direction of Federal Officers.

Reversal is also likely—regardless of how the Court rules on the scope of appellate review under § 1447(d)—because Applicants properly removed this action under 28 U.S.C. § 1442, the federal officer removal statute. Section 1442 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). This Court has already made clear that "[t]he words 'acting under' are broad," and that "the statute must be liberally construed." *Watson* v. *Philip Morris Co.*, 551 U.S. 142, 147 (2007). And by adding the words "or relating to" in the Removal Clarification Act of 2011, Pub L. No. 112-51, 125 Stat. 545, Congress rendered this already "broad" grant of federal jurisdiction even more expansive. *See Sawyer* v. *Foster Wheeler LLC*,

860 F.3d 249, 255, 258 (4th Cir. 2017) (quoting H.R. Rep. 112-17, at 6, 2011 U.S.C.C.A.N. 420, 425). Following the Removal Clarification Act, a party seeking federal officer removal need only demonstrate 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. *Id.* at 254. 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*, 551 U.S. at 153, 151.

Applicants satisfy that broad standard. The complaint alleges that all of applicants' extraction and production of fossil fuels contributed to Respondent's climate-change-based injuries. At least some of the Applicants extracted, produced, and sold fossil fuels "act[ing] under a federal officer" that sought to procure fuel. *See* Attachment B at 35-39 ¶¶ 61-64. Standard Oil—a predecessor of applicant Chevron—extracted oil pursuant to a contract with the U.S. Navy that *required* it to produce "not less than 15,000 barrels of oil per day." *Mayor and City Council of Baltimore* v *BP P.L.C.*, No. 19-1644, ECF No. 74 ("Joint Appendix") at 250. Applicant CITGO also contracted with the U.S. Navy to supply and distribute gasoline and diesel fuels needed for naval operations between 1998 and 2012. *Id.* at 318-19. Thus, the reasonableness of Applicants' production directly turns on the orders of federal officials who contractually obligated Applicants to deliver fuels at specified levels. And other Applicants extracted oil pursuant to OCSLA and strategic petroleum reserve leases with the federal government. *Id.* at 212-13.

The district court assumed that at least some Applicants were "act[ing] under a federal officer" and could raise colorable federal defenses, but held that removal was improper because their conduct under federal direction was not sufficiently connected to Respondent's claims. Attachment C at 36 (Applicants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels"). But to satisfy the nexus requirement, a defendant must show "only that the charged conduct relate[s] to an act under color of federal office." *Sawyer*, 860 F.3d at 258 (emphasis added). Thus, "the hurdle erected by [the causal-connection] requirement is quite low." *In re Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017). Indeed, courts have regularly allowed removal of suits under the federal officer removal statute even when only a fraction of the allegedly tortious activity occurred under the direction of federal officers. *See, e.g.*, *Reed* v. *Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) (holding 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 produced by the defendant over a 35-year period); *Lalonde* v. *Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (holding defendant's work with the federal government for 11 years established a "causal connection" warranting removal, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer).

The district court also held that federal officer removal was improper because the government did not direct Applicants "to conceal the hazards of fossil fuels or

prohibit[] them from providing warnings to consumers." Attachment C at 36. But Respondent has asserted claims for public and private nuisance, strict liability and negligent design defect, and trespass—causes of action that turn on Applicants' alleged *extraction and production*, not their promotional or lobbying activities. Attachment A at 107-15 ¶¶ 218-36; *id.* at 117-23 ¶¶ 249-69; *id.*at 126-28 ¶¶ 282-90. There is, at the very least, a serious legal question as to whether removal is proper where one of the primary "acts for which [Applicants] have been sued," Attachment C at 37, was taken at the direction of federal officers.

There is thus a reasonable likelihood that this Court will reverse and hold that removal was proper under § 1442.

C. Respondent's Claims Arise Under Federal Common Law and Are Removable on Several Other Grounds.

If the Fourth Circuit reviews the whole remand order and affirms, this Court is likely to reverse that decision for several reasons.

1. To begin with, Applicants properly removed Respondent's global warming claims because the claims arise under federal common law, regardless of how they were pleaded.

To decide whether federal law governs Respondent's claims, the district court was required to determine whether Respondent's global warming claims implicate "uniquely federal interests" that require a uniform rule of federal decision, *Tex Indus.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), and thus fall within the ambit of federal common law. *See United States* v. *Standard Oil*, 332 U.S. 301, 307 (1947) (holding that "matters essentially of federal character" must be governed by federal

common law, but dismissing the claims because federal common law did not provide a remedy). The answer to that question is plainly yes, because Respondent's claims seek to label global fossil-fuel extraction and production—and the subsequent creation of greenhouse-gases—a public nuisance, thereby implicating "uniquely federal interests" in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing climate change. *Tex Indus.*, 451 U.S. at 640-41. Because federal common law must provide the rule of decision, Respondent's claims "arise under" federal law and are removable under 28 U.S.C. §§ 1331 and 1441.

The district court declined even to conduct this analysis, erroneously concluding that Applicants' argument regarding the application of federal common law was merely a "cleverly veiled preemption argument." Attachment C at 12. But the question of which law governs a cause of action—state or federal common law—is not merely a *defense* to Respondent's claims. On the contrary, for purposes of removal, this choice-of-law determination is a threshold jurisdictional question. As this Court has explained, "if the dispositive issues stated in the complaint require the application of federal common law," the "cause of action . . . 'arises under' federal law." *Milwaukee I*, 406 U.S. at 100.

Courts have long recognized that federal jurisdiction exists if a claim arises under federal common law. *Wayne* v. *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also New SD, Inc.* v. *Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (upholding removal of contract claim nominally asserted under state law

because "contracts connected with the national security[] are governed by federal law"); *Treiber & Straub, Inc.* v. *U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law . . . is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co.* v. *Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts[.]"); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims . . . arise under federal common law.").

This Court has long recognized that "[f]ederal common law and not the varying common law of the individual states is . . . 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 sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. Because "the regulation of interstate . . . pollution is a matter of federal, not state, law," the Court has held that cases involving interstate pollution "should be resolved by reference to federal common law." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (citing *Milwaukee I*, 406 U.S. at 107)). Indeed, "such claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut* v. *Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410; *see, e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute).

Global warming claims plainly involve interstate pollution because they are premised on harms allegedly caused by worldwide greenhouse gas emissions. This

Court has recognized that state law cannot apply to such claims. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming. *Id.* at 418. The Second Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance," and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In reviewing that decision, this Court reiterated that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects,'" and explained that "borrowing the law of a particular State" to resolve plaintiffs' global warming claims "would be inappropriate." *AEP*, 564 U.S. at 421-22; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855, 854 (9th Cir. 2012) (concluding that "federal common law" applied to a "transboundary pollution suit[]" brought by an Alaskan city asserting public claims under federal and state law for damages from "sea levels ris[ing]" and other alleged effects of defendants' "emissions of large quantities of greenhouse gases").

The claims asserted here must likewise be governed by federal common law because Respondent alleges injury from Applicants' contributions to interstate greenhouse-gas pollution. Although Respondent seeks to frame this case as being about Applicants' worldwide fossil-fuel production and promotion—rather than emissions—the Complaint alleges that Applicants created a nuisance by producing fossil fuels whose combustion released "at least 151,000 gigatons of CO2 between 1965 and 2015." Attachment A at 4 ¶ 7. This case, like *AEP*, thus turns on

greenhouse gas emissions, as three district courts adjudicating similar claims have recognized. *See City of New York*, 325 F. Supp. 3d at 472 (holding that even though plaintiff sought to hold defendants liable for producing "massive quantities of fossil fuels," "the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases"); *City of Oakland*, 325 F. Supp. 3d at 1024 (holding that although "defendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel," "the harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels"); *County of San Mateo*, 294 F. Supp. 3d at 937 (noting that plaintiffs' claims against energy producers were "nearly identical" to previous claims asserted against greenhouse-gas emitters because plaintiffs alleged "that the defendants' contributions to greenhouse gas emissions constituted a substantial and unreasonable interference with public rights."). This case is thus precisely the sort of transboundary pollution suit that "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488.

The relief requested in the complaint—an injunction to abate the nuisance, compensatory and punitive damages, and disgorgement of profits—also implicates "uniquely federal interests" and thus requires a uniform rule of federal decision. *Texas Indus.*, 451 U.S. 630, 640 (1981). As the federal government recently emphasized in *BP*, "the United States has strong economic and national security interests in promoting the development of fossil fuels," the very conduct the Respondent seeks to label a public nuisance. *Amicus Curiae* Br. for the United States

at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-06011 (N.D. Cal. May 24, 2018). The government explained that these cases have "the potential to . . . disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." *Id.* at 2.

Adjudicating Respondent's nuisance claim would necessarily require determining "what amount of carbon-dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428; *see City of New of York*, 325 F. Supp. 3d at 473 ("factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights); *California* v. *Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Any judgment as to whether the alleged harm caused by Applicants' contribution to worldwide emissions "out-weighs any offsetting benefit," Attachment A at 107 ¶220, implicates the federal government's unique interests in setting national and international policy on matters involving energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427.

For these reasons, two district courts have held that federal common law governs global-warming claims asserted against energy producers based on the worldwide production and combustion of fossil fuels. In *BP*, the district court denied a motion to remand global-warming claims filed by the City of Oakland and the City

and County of San Francisco against five energy producers, all of them Applicants here. Like Respondent, the *BP* plaintiffs argued that the well-pleaded complaint rule barred removal because they had nominally asserted claims under state law. 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). As the court explained, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global warming. *Id.* at *3. The court held that the "well-pleaded complaint rule does not bar removal of these actions" because "[f]ederal jurisdiction exists" if "the claims necessarily arise under federal common law." *Id.* at *5.

In *City of New York*, the court likewise concluded that claims pleaded under state law against the same five energy producers for "damages for global-warming related injuries" "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." 325 F. Supp. 3d at 472 (emphasis added).

Given the uniquely federal interests implicated by Respondent's claims, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Allowing state law to govern would permit states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. As the U.S. Solicitor General explained in *AEP*, "resolving such claims would require each court . . . to determin[e] whether and

to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, No. 10-174 (S. Ct.), 2011 WL 317143, at *37. Proceeding under the nation's 50 different state laws is untenable, as this state-by-state approach could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*

Because federal common law governs Respondent's global warming claims—and because the well-pleaded complaint rule does not bar removal of claims nominally pleaded under state law when those claims arise under federal common law—this Court is likely to reverse any decision by the Fourth Circuit affirming the district court's erroneous remand order.

2. Applicants removed Respondents' global warming claims on several other grounds, each of which also supports federal jurisdiction, and thus provides a basis for reversal.

First, even if Respondent were right that state law governs its claims, the claims would still give rise to federal jurisdiction under *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). In *Grable*, this Court held that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313-314). Those elements are satisfied here. Respondent's nuisance claims, for instance, require a

reasonableness determination that raises questions about how to regulate and limit the nation's energy production and emissions levels. Those issues are inextricably linked to the "unique federal interests" in national security, foreign affairs, energy policy, economic policy, and environmental regulation. It is difficult to imagine a case that better implicates "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312.

Second, removal is warranted under OCSLA, which extends federal jurisdiction to a "broad range of legal disputes" in any way "relating to resource development on the Outer Continental Shelf," *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 569-570 (5th Cir. 1994), by extending federal jurisdiction to all "cases and controversies arising out of, or in connection with, . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of . . . minerals." 43 U.S.C. § 1349(b)(1). Respondent seeks to hold Applicants liable for *all* of their exploration for and production of oil and gas, and some of the Applicants extracted a substantial portion of the oil and gas they produced on the OCS. Attachment B at 32-35 ¶¶ 55-56. *See Parker Drilling Mgmt. Servs.* v. *Newton*, 139 S. Ct. 1881, 1886 (2019) ("Under the OCSLA, all law on the OCS is federal law."). Furthermore, the relief Respondent 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 brings this case "within the

jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570; *see also United Offshore Co.* v. *S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (OCSLA jurisdiction extends to any matter where "the resolution of the dispute would affect the exploitation of minerals on the outer continental shelf"). This case was thus properly removed under OCSLA because plaintiff's claims, "though ostensibly premised on [state] law, arise under the 'law of the United States' under [43 U.S.C.] § 1333(a)(2)," such that "[a] federal question . . . appears on the face of [plaintiff's] well-pleaded complaint." *Ten Taxpayer Citizens Grp.* v. *Cape Wind Assoc., LLC*, 373 F.3d 183, 193 (1st Cir. 2004).

Given the numerous bases for federal jurisdiction, this Court is likely to reverse a decision by the Fourth Circuit affirming the remand order.

III. There Is a Likelihood of Irreparable Harm Absent a Stay.

Unless this Court stays the remand order, the Clerk of Court for the District of Maryland will promptly mail a certified copy of the remand order to the Circuit Court for Baltimore City, and "the State Court may thereupon proceed with [the] case." 28 U.S.C. §1447(c). This outcome would irreparably harm Applicants in four distinct ways.

First, it would force Applicants to answer in state court for conduct "relating to" an official federal act. 28 U.S.C. § 1442. This is an irreparable harm in and of itself. And it is precisely the harm that Congress sought to avoid in making denials of § 1442 removals immediately appealable. The legislative history of the Removal Clarification Act of 2011 reflects Congress's belief that "[f]ederal officers or agents . . .

should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." H.R. Rep. No. 112-17(I), pt. 1, at 3 (2011). Yet that is what remand would allow. Congress understood that even appearing before state courts could subject federal officials and their agents to "political harassment" that could "needlessly hamper[]" federal and federally-sanctioned operations. *Id.* For that reason, Congress sought to protect federal officers and their agents from biased "outcomes" at all stages of litigation from "pre-suit discovery" to final judgment. *See id.* at 2, 3-4; *see also* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 1442, 125 Stat 545 (expanding the scope of a removable "civil action" under § 1442 to include "any proceeding" in which "a subpoena for testimony or documents is sought or issued"). Remand would thwart that effort by allowing Applicants to be haled into state court for actions taken in relation to their role as federal agents. Because the harm is being forced to answer in state court—not just being subjected to ultimate liability in that court—the harm cannot be cured by a reversal on appeal.

Second, remand would force Applicants—and Respondent—to waste substantial time and resources on state court proceedings that will be rendered pointless when the district court's remand order is reversed. Although litigation costs generally do not constitute irreparable injury, *see Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), courts have held that the such costs constitute irreparable harm where, as here, they would be duplicative and unrecoverable. *See, e.g.*, *Ewing Indus. Co.* v. *Bob Wines Nursery, Inc.*, No. 3:13-cv-931-J-39JBT, 2015 WL

12979096, at *3 (M.D. Fla. Feb. 5, 2015) ("[W]asteful, unrecoverable, and possibly duplicative costs are proper considerations" in the irreparable harm inquiry.); *see also Wilcox* v. *Lloyds TSB Bank, PLC*, No. 13-00508, 2016 WL 917893, at *5-6 (D. Haw. Mar. 7, 2016) (similar); *Citibank, N.A.* v. *Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (similar). Here, absent a stay, the parties will be forced to litigate before a state court applying the wrong law, while simultaneously litigating materially identical cases seeking the same relief before federal courts across the country. Avoidance of those costs alone justifies a stay pending appeal. *See Citibank*, 2017 WL 4511348, at *2-3 (granting motion to stay remand and noting that litigation costs would be avoided).

Third, even if this appeal can be resolved before the state court enters a final judgment, the district court would need to untangle any state court rulings made during the pendency of the appeal in the event of reversal. This would likely include rulings on multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings—all litigated under state law. Deciding how these rulings should apply once the case returns to federal court would involve a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. Courts routinely grant motions to stay remand orders to avoid this exact risk. *See, e.g.*, *id*. at *3 (collecting cases); *see also Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007) (noting "significant issues of comity" that arise when "a federal appeals court vacate[s]" a remand order and

"retroactively invalidates state court proceedings" that occurred during pendency of appeal).

Fourth, there is a risk that the state court could reach a final judgment before Applicants' appeal is resolved—an especially likely scenario given the high probability that this Court will grant review after the Fourth Circuit issues its initial decision. "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court *before* it becomes irrevocable." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could enter judgment against Applicants while their appeal is pending in federal court. *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.").[6]

IV. The Balance of Equities Decisively Favors the Applicants.

A stay would not prejudice Respondent's ability to seek relief or meaningfully exacerbate its injuries. Respondent's Complaint disclaims any desire "to restrain [Applicants] from engaging in their business operations," and merely "seeks to ensure that [Applicants] bear the costs of those impacts." Attachment A at 5 ¶12. Moreover,

[6] Indeed, if defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part).

according to Respondent, the harm alleged is already "locked in" and will occur "even in the absence of any future emissions." *See, e.g.*, *id.* at 4 ¶¶7-8; *id.* at 90 ¶¶ 179-180; *id.* at 99 ¶ 196. Respondent thus cannot point to harm reasonably likely to occur during a stay, but which denial of a stay could avoid. At most, its alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm.

Even if Respondent'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. A stay would, however, benefit Respondent by avoiding costly and potentially wasteful state court litigation while the appeal is pending. *See Brinkman*, 2015 WL 13424471, at *1 (granting stay pending appeal so parties would not "face the burden of having to simultaneously litigate [the case] in state court and on appeal"). A stay would also conserve judicial resources and "promot[e] judicial economy" by unburdening the state court of potentially unnecessary litigation. *United States* v. *2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

The district court speculated that "interim proceedings in state court may well advance the resolution of the case in federal court," Attachment D at 11], but the threshold question on appeal is *which law governs* Respondent's claims—federal common law or state law. Any state court ruling addressing the viability of the claims under *Maryland* law is unlikely to assist the district court in determining whether the claims can proceed under *federal* law.

A stay could also avoid costly and needless discovery. Respondent has argued below that it will obtain discovery before dispositive motions are resolved regardless

of whether the case proceeds in state or federal court. But discovery in the district court does not commence until a scheduling order issues, and, generally, not until after Rule 12 motions are resolved. D. Md. L.R. 104.4; *see Wymes* v. *Lustbader*, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) ("On motion, it is not uncommon for courts to stay discovery pending resolution of dispositive motions."); *Stone* v. *Trump*, 335 F. Supp. 3d 749, 754 (D. Md. 2018) ("When a dispositive motion has the potential to dispose of the case, it is within the Court's discretion to stay discovery pending resolution of that motion."). Given the likelihood that the district court will dismiss Respondent's claims following reversal of the remand order, a stay could prevent the parties from engaging in discovery at all, saving both Respondent and the 26 Applicants enormous time and resources.[7]

CONCLUSION

Applicants respectfully request that this Court stay the district court's remand order pending the disposition of the appeal in the Fourth Circuit and, if that court affirms the remand order, pending the filing and disposition of a petition for a writ of certiorari in this Court. Applicants further request that the Court enter a temporary

[7] Federal and Maryland discovery standards and procedures also differ in important respects, raising the prospect that discovery rulings would need to be revisited if the remand order is reversed and the case returns to federal court. *Compare, e.g.*, Fed. R. Civ. P. 26(b)(1) (scope of discovery is limited to "any nonprivileged matter *relevant to any party's claim or defense*"), *with* Maryland R. Civ. P. 2-402(a) (allowing parties to obtain discovery "regarding any matter that is not privileged . . . if the matter sought is *relevant to the subject matter of the action*"); *compare* Fed. R. Civ. P. 37(e) (allowing court to impose evidentiary sanctions "only upon finding that the party acted with the *intent* to deprive another party of the information's use in the litigation"), *with* Maryland R. Civ. P. 2-433(b) (allowing sanctions for negligently failing to preserve electronic information).

emergency stay of the remand order until the Court decides whether to grant this application.

Dated: October 1, 2019

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EXHIBIT 8

FILED
United States Court of Appeals
Tenth Circuit

October 17, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs - Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants - Appellants.

No. 19-1330
(D.C. No. 1:18-CV-01672-WJM-SKC)
(D. Colo.)

ORDER

Before **LUCERO** and **McHUGH**, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). The decision

whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

EXHIBIT 9

FILED: October 1, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1644
(1:18-cv-02357-ELH)

MAYOR AND CITY COUNCIL OF BALTIMORE

Plaintiff - Appellee

v.

BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CROWN CENTRAL LLC; CROWN CENTRAL NEW HOLDINGS LLC; CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL, PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; SPEEDWAY LLC; HESS CORP.; CNX RESOURCES CORPORATION; CONSOL ENERGY, INC.; CONSOL MARINE TERMINALS LLC

Defendants - Appellants

and

LOUISIANA LAND & EXPLORATION CO.; PHILLIPS 66 COMPANY; CROWN CENTRAL PETROLEUM CORPORATION

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Supporting Appellant

NATIONAL LEAGUE OF CITIES; U. S. CONFERENCE OF MAYORS; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; PUBLIC CITIZEN, INC.; SHELDON WHITEHOUSE; EDWARD J. MARKEY; STATE OF MARYLAND; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON; MARIO J. MOLINA; MICHAEL OPPENHEIMER; BOB KOPP; FRIEDERIKE OTTO; SUSANNE C. MOSER; DONALD J. WUEBBLES; GARY GRIGGS; PETER C. FRUMHOFF; KRISTINA DAHL; NATURAL RESOURCES DEFENSE COUNCIL; ROBERT BRULLE; CENTER FOR CLIMATE INTEGRITY; CHESAPEAKE CLIMATE ACTION NETWORK; JUSTIN FARRELL; BEN FRANTA; STEPHAN LEWANDOWSKY; NAOMI ORESKES; GEOFFREY SUPRAN; UNION OF CONCERNED SCIENTISTS

Amici Supporting Appellee

O R D E R

Upon review of submissions relative to the motion for stay pending appeal, the court denies the motion.

Entered at the direction of Judge Wynn with the concurrence of Chief Judge Gregory and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

EXHIBIT 10

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.; EXXONMOBIL 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.

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

ORDER OF COURT

Entered: October 7, 2019

Defendants-appellants request a stay pending appeal of the district court's July 22, 2019, Opinion and Order remanding the underlying action to Rhode Island state court. D. Ct. Dkt. #122. The motion is denied. The Clerk of Court will set a briefing schedule in the ordinary course. Any party intending to seek expedited review should so move promptly.

By the Court:

Maria R. Hamilton, Clerk

cc:
Rebecca Tedford Partington, Neil F. X. Kelly, Corrie J. Yackulic, Matthew Kendall Edling, Victor Marc Sher, David Charles Frederick, Robert David Fine, Douglas Jay Emanuel, Brendan J. Crimmins, Elizabeth Ann Kim, Jerome C. Roth, Grace W. Knofczynski, Neal S. Manne, Gerald J. Petros, Robin-Lee Main, Joshua S. Lipshutz, Theodore J. Boutrous Jr., Matthew Thomas Oliverio, Kannon K. Shanmugam, William Thomas Marks, Daniel J. Toal, Theodore V. Wells Jr., Jaren Janghorbani, John A. Tarantino, Patricia K. Rocha, Nicole J. Benjamin, Nancy Gordon Milburn, Philip H. Curtis, Matthew T. Heartney, John E. Bulman, Stephen John MacGillivray, Lisa S. Meyer, Nathan P. Eimer, Pamela R. Hanebutt, Raphael Janove, Ryan Walsh, Michael J. Colucci, Robert G. Flanders Jr., Timothy K. Baldwin, Jameson R. Jones, Margaret Tough, Sean C. Grimsley, Steven Mark Bauer, Robert P. Reznick, Stephen M. Prignano, James L. Stengel, Jeffrey B. Pine, Shawn Patrick Regan, Shannon S. Broome, Ann Marie Mortimer, Jason Christopher Preciphs, Jacob Scott Janoe, Lauren Motola-Davis, Samuel A. Kennedy-Smith

EXHIBIT 11

From:	cmecf@rid.uscourts.gov
To:	cmecfnef@rid.uscourts.gov
Subject:	Activity in Case 1:18-cv-00395-WES-LDA State of Rhode Island v. Shell Oil Products Company, LLC et al Order on Motion to Remand to State Court
Date:	Tuesday, September 10, 2019 8:09:26 AM

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U.S. District Court

District of Rhode Island

Notice of Electronic Filing

The following transaction was entered on 9/10/2019 at 11:08 AM EDT and filed on 9/10/2019
Case Name: State of Rhode Island v. Shell Oil Products Company, LLC et al
Case Number: 1:18-cv-00395-WES-LDA
Filer:
WARNING: CASE CLOSED on 09/10/2019
Document Number: No document attached

Docket Text:
TEXT ORDER granting [40] Motion to Remand to State Court; denying [126] Motion to Stay: The Court DENIES Defendants' Motion to Stay Remand Order Pending Appeal (ECF No. 126). Therefore, the Temporary Stay of the Execution of the Remand Order (ECF No. 128) is VACATED and the Court's Order granting Plaintiff's Motion to Remand to State Court shall be ENTERED (ECF No. 122). Certified copy of order sent to the Clerk of Court for the state court in accordance with 28 U.S.C. 1447(c). So Ordered by Chief Judge William E. Smith on 9/10/2019. (Jackson, Ryan)

1:18-cv-00395-WES-LDA Notice has been electronically mailed to:

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