No. 21-15318

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC., et al.

Defendants-Appellants.

Appeal From The United States District Court for the District of Hawaii,
Case No. 20-cv-00470

The Honorable Derrick K. Watson

PLAINTIFF–APPELLEE'S RESPONSE TO DEFENDANTS–APPELLANTS' EMERGENCY MOTION TO STAY THE DISTRICT COURT'S REMAND ORDER

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INTRODUCTION

Plaintiff-Appellee the County of Maui ("County") respectfully opposes Defendants' Emergency Motion to Stay the District Court's Remand Order pending appeal ("Motion," Dkt. 18). Defendants do not and cannot satisfy the requirements for a stay, and this Court should prevent further delay by denying the Motion and allowing the case to proceed in state court, where it belongs.

STATEMENT OF FACTS

The County filed this action in Hawai'i state court on October 12, 2020, asserting Hawai'i common law claims for public nuisance, private nuisance, strict liability failure to warn, negligent failure to warn, and trespass. The County seeks redress for its local injuries caused by Defendants' decades-long campaign to discredit the science of global warming, conceal the dangers posed by their fossil-fuel products, and misrepresent their role in combatting the climate crisis. Defendants removed, asserting a litany of jurisdictional arguments that misrepresented both the contents of the County's complaint and the controlling law.

This Court has recently squarely rejected the bulk of Defendants' removal arguments in two factually analogous cases where local governments assert state-law claims against fossil-fuel companies based on harms suffered from Defendants' disinformation and deception campaign. The Court disposed of Defendants' arguments and held that state law claims closely analogous to the County's are not

removable because they do not "necessarily arise under federal common law"; do not "necessarily raise disputed and substantial federal issues" under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); and are not "completely preempted by federal law." *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020) (vacating order denying motion to remand), *opinion amended and superseded on denial of reh'g sub nom.*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"), *petition for cert. filed* No. 20-1089 (U.S. Feb. 9, 2021). The Court further rejected Defendants' theories based on federal officer removal under 28 U.S.C. § 1442 in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"), *petition for cert. filed*, No. 20-884 (U.S. Jan. 4, 2021). Many Defendants here were parties to *Oakland* and *San Mateo II*, and their virtually identical arguments have no newfound merit.

On February 12, 2021, the District Court remanded this case to state court. *See* Dist. Dkt. 99 ("Remand Order").[1] The district court recognized that, as "Defendants themselves acknowledge," Defendants' jurisdictional arguments based on federal common law, *Grable*, and complete preemption were "recently rejected"

[1] *County of Maui v. Chevron U.S.A. Inc.*, No. 20-cv-00470, 2021 WL 531237 (D. Haw. Feb. 12, 2021). In the same order, the district court remanded a similar action brought by the City and County of Honolulu. *See City & County of Honolulu v. Sunoco LP*, No. 20-cv-00163, Dkt. 128 (D. Haw. Feb. 12, 2021), *appeal filed*, No. 21-15313 (9th Cir.). The parties' arguments in this case and in the pending motion to stay in the *Honolulu* appeal are virtually the same.

in *Oakland*, and thus were necessarily foreclosed here "in light of binding Ninth Circuit authority." *Id*. at 6 n.8. The district court also rejected federal officer jurisdiction, finding, among other things, that Defendants' purportedly "new" evidence did not distinguish this case from *San Mateo II*, where this Court held that otherwise identical theories did not justify removal. *See* Remand Order at 14 ("This Court is unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding that the leases do not give rise to an unusually close relationship with the federal government for purposes of Section 1442(a)(1)."). The court also rejected Defendants' removal arguments based on the Outer Continental Shelf Lands Act ("OCSLA") and the federal enclaves doctrine. The district court's decision five other district courts in four circuits that have remanded substantially similar cases, four of which decisions have been affirmed in relevant part on appeal.[2]

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[2] *See Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) ("*San Mateo I*") (granting remand), *aff'd in part, appeal dismissed in part*, *San Mateo II*, 960 F.3d 586 (9th Cir. 2020); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, 141 S.Ct. 222 (Oct. 2, 2020); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed*, No. 20-783 (U.S. Dec. 4, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *petition for cert. filed*, No. 20-900 (U.S. Dec. 30, 2020); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

On March 5, 2021, the district court denied Defendants' motion to stay execution of the remand order pending appeal, holding that each of the four factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009), weighed against a stay. *See* Dist. Dkt. 111 ("Stay Order").[3]

STANDARD OF REVIEW

A stay pending appeal "is not a matter of right," but "is instead 'an exercise of judicial discretion,'" with the "party requesting a stay bear[ing] the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 423, 433–34 (citations omitted). The moving party bears a "heavy burden" in seeking this "extraordinary relief." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971).

The Court must weigh four factors: "(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 harmed 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." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken*, 556 U.S. at 434). Courts in this circuit weigh these factors on a sliding scale that requires the moving party to demonstrate probable irreparable

[3] *County of Maui v. Chevron U.S.A. Inc.*, No. 20-cv-00470, 2021 WL 839439 (D. Haw. Mar. 5, 2021).

harm and either "(a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and the balance of hardships tips sharply in the [applicant's] favor." *Id.* at 970.

No stay may issue without a finding that the threatened harm to the moving party is truly "irreparable" and that such irreparable harm is at least probable. *See Nken*, 556 U.S. at 430 (the "possibility standard is too lenient"); *id.* at 434–35. "A showing of a probability, not just possibility, of harm is the 'bedrock requirement,' and 'stays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.'" *Tacey Goss P.S. v. Barnhart*, No. C13-800MJP, 2013 WL 4761024, at *4 (W.D. Wash. Sept. 4, 2013) (quoting *Leiva-Perez*, 640 F.3d at 965); *see Nken*, 556 U.S. at 434–35 ("Although [deportation] is a serious burden for many aliens, it is not categorically irreparable."). Because the bar for "irreparable" harm is so high, a court "cannot base stay decisions on assumptions and 'blithe assertions'" by the moving party. *Leiva-Perez*, 640 F.3d at 970 (quoting *Nken*, 556 U.S. at 436).

ARGUMENT

Federal courts around the country have denied motions to stay pending appeal in factually similar cases. In *Baltimore*, the district court found that a stay was not warranted because any appellate review would be limited to federal officer removal, and defendants did not demonstrate "a substantial likelihood of success on the merits

of th[at] issue." *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *4 (D. Md. July 31, 2019). Even if the remand order were reviewable in its entirety, the court found that a stay still was not warranted because the defendants also failed to show that the remaining three factors supported a stay. *Id*. at *5. The Fourth Circuit followed suit, *see* Ex. 1, as did the Supreme Court, *BP p.l.c. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019).

Similarly, the district court in *Boulder* denied the defendants' motion to stay pending appeal, holding that defendants had not made a strong showing of likelihood of success on their federal officer, federal common law, or *Grable* arguments, and did not demonstrate irreparable injury. *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1072–74 (D. Colo. 2019).

The district court in *Rhode Island* also denied the defendants' motion to stay there without discussion, as did the First Circuit and Supreme Court. *See* Ex. 2, Text Order, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 1:18-cv-395-WES-LDA (D.R.I. Sept. 10, 2019); Ex. 3, Order of Court, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818 (1st Cir. Oct. 7, 2019); *BP p.l.c. v. Rhode Island*, No. 19A391 (U.S. Oct. 22, 2019). This Court should reach the same result.

A. Defendants Have Not Come Close to Showing a Likelihood of Success on the Merits of Their Appeal.

The first *Nken* factor asks "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. This Court

has recognized that "courts routinely use different formulations to describe this factor," but "many of these formulations, including 'reasonable probability,' 'fair prospect,' 'substantial case on the merits,' and 'serious legal questions raised,' are largely interchangeable." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (cleaned up). Each of them requires "that, at a minimum, a petitioner must show that there is a substantial case for relief on the merits." *Id.* (citations omitted). This factor thus asks "in essence, whether the stay petitioner has made a strong argument on which he could win." *Leiva-Perez*, 640 F.3d at 968.

There is no single, all-encompassing standard to determine whether a movant has shown a substantial case for relief, but courts have "found that the following constitute serious legal issues: issues of first impression within the Ninth Circuit, questions of constitutionality, splits in authority on important legal issues, and open questions as to whether a California Supreme Court case was preempted by" federal law. *See In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019) (citations omitted) (collecting cases).

None of those circumstances, or anything like them, is present here. The district court below was "particularly unpersuaded" that Defendants had made this showing, based on the state of play across analogous cases:

> [O]f all the cases involving subject matter similar to that here, Defendants have achieved one, fleeting success on the issue of removal. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018). Even that success,

> though, has now been overturned. *See* [*Oakland*], 969 F.3d 895 (9th Cir. 2020). A batting average of .000 does not suggest a substantial case exists.

Remand Order at 5 n.3.

1. Defendants Will Not Succeed on the Merits Here.

Federal Officer Removal: Defendants do not argue that there is a question of first impression, a split of authority, or any other relevant consideration that pertains to federal officer removal. Rather, as this Court (along with three other circuits[4]) has already rejected federal officer jurisdiction in this context, Defendants argue that they have presented "new evidence" that was not in the record in the *San Mateo* case, Motion at 9—an argument specifically rejected below. Courts routinely find no serious legal issue is presented where the movant does not challenge any applicable legal standard and instead merely "dispute[s] the Court's application of well-settled . . . Ninth Circuit law to the facts of this case." *See Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3. Defendants' argument that they have "fill[ed] the evidentiary gaps that this Court found lacking . . . in *San Mateo*" to satisfy § 1442's "acting under" requirement, *see* Motion at 9–11, boils down to a contention that the district court incorrectly applied the law to the facts. But Defendants' "rehash of arguments the Court previously considered and rejected at length fails to raise a serious legal question; otherwise, every time a party disagreed with a court's ruling,

[4] *See Rhode Island II*, 979 F.3d at 59–60; *Boulder II*, 965 F.3d at 820–27; *Baltimore II*, 952 F.3d at 462–71.

a serious question would exist." *Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3. Defendants' factual arguments thus fail.

The only *legal* argument Defendants present is that the district court did not sufficiently "credit" their "theory of the case," and that this alleged failure purportedly implicates a split of authority. *See* Motion at 11–12. That contention fails for multiple reasons. First, as the court below explained, Remand Order at 17–19, the Court need only credit a defendant's theory of the case with respect to the "causal nexus" and "colorable federal defense" elements of federal officer removal, not the "acting under" element. *See Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014); *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432 (1999). Because Defendants failed to make the threshold showing that they were acting under a federal superior when they engaged in their alleged tortious conduct here, they would not have a substantial likelihood of success even if the district court had misapplied the law on the other two elements, which it did not.

Second, the district court correctly held that "Defendants' theory of the case is not a theory for *this* case," and that their interpretation of *Acker* and *Leite* would permit them to "assert *any* theory of the case, however untethered to the claims of Plaintiffs," while "completely ignor[ing] the requirement that there must be a causal connection *with the plaintiff's claims*." Remand Order at 19. Defendants cite no authority for the proposition that they may recast the Complaint as they please to

reveal its supposed true basis, and instead repeat the proposition that their "theory" must be "credited." *See* Motion at 12. That does not present a serious legal issue.

Finally, to the extent Defendants attempt to argue that there need only be a "connection" or "association" between the act in question and the federal office to justify removal, *see* Motion at 12, that would not support a stay for two reasons. First, although some circuit courts have held that the Removal Clarification Act of 2011 relaxed the causal connection requirement by adding the words "or relating to" to 28 U.S.C. § 1442(a), *see, e.g.*, *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015), this Court's application of its "causally connected" standard, *San Mateo II*, 960 F.3d at 598, remains consistent with the language and purpose of § 1442 as amended. *See Ulleseit v. Bayer HealthCare Pharm. Inc.*, 826 F. App'x 627, 629 n.2 (9th Cir. 2020) ("We do not think there is a meaningful difference between the causal nexus requirement articulated by our pre-2011 cases and the requirement imposed by the amended statute."). Second, multiple courts in analogous cases, including the First and Fourth Circuits, applied the "relaxed" standard Defendants advocate, and still affirmed remand to state court. *See, e.g.*, *Rhode Island II*, 979 F.3d at 59–60; *Baltimore II*, 952 F.3d at 466–67. There is no serious legal issue presented here.

OCSLA: Defendants' argument that they have a substantial likelihood of success on appeal with respect to OCSLA approaches frivolity. First, as Defendants

concede, that issue is not reviewable. *See* Motion at 7–8; *San Mateo II*, 960 F.3d at 598 ("[W]e may review the district court's remand order only to the extent it addresses § 1442(a)(1)."). It is possible that the Supreme Court might reverse that precedent in *Baltimore* and hold that this Court "could . . . resolve" Defendants' OCSLA arguments. Motion at 7–8. Or it could simply affirm, which would also affirm this Court's ruling in *San Mateo II*. In any event, Defendants' position depends on the quadruple inference that the Supreme Court will overturn this Court's appellate jurisdiction jurisprudence interpreting 28 U.S.C. § 1447(d), and this Court will then exercise its discretion to review issues in the Remand Order beyond federal officer jurisdiction, adopt Defendants' preferred standard for OCSLA removal, and reverse the Remand Order. That is a long-shot at best, not a likelihood.

Second, just as with federal officer removal, every court that has considered Defendants' OCSLA jurisdiction arguments has rejected them. *See, e.g.*, *San Mateo I*, 294 F. Supp. 3d at 938–39; *Boulder I*, 405 F. Supp. 3d at 978; *Rhode Island I*, 393 F. Supp. 3d at 151–52; *Baltimore I*, 388 F. Supp. 3d at 566. Defendants have no meaningful likelihood of success.

Enclave Jurisdiction: Defendants' federal enclave arguments fail for the same reasons as their OCSLA arguments. They will first have to win in the Supreme Court before this Court could even consider it, and even if they do win *and* this Court decides to consider the issue, no court anywhere has agreed with their position. *See*

San Mateo I, 294 F. Supp. 3d at 939; *Boulder I*, 405 F. Supp. 3d at 974–975; *Rhode Island I*, 393 F. Supp. 3d at 152; *Baltimore I*, 388 F. Supp. 3d at 564–566. The two district court opinions they cite in their Motion were both presented to the district court, and "like every other court to have addressed this issue, the Court [found] that federal enclave jurisdiction does not exist over Plaintiffs' claims." Remand Order at 21. Defendants have no likelihood of succeeding on the merits of their enclave jurisdiction argument.

2. Other Pending Appeals Do Not Provide a Basis for a Stay.

The Supreme Court's pending decision in *Baltimore* and the pending certiorari petition in *San Mateo* do not warrant a stay because Defendants have not demonstrated a likelihood of success on the merits of that case. Given that eight circuit courts have rejected the *Baltimore* defendants' interpretation of 28 U.S.C. § 1447(d)—including this Court less than a year ago, *see San Mateo II*, 960 F.3d at 596—the Supreme Court is unlikely to overrule the Fourth Circuit's decision. *See Rhode Island II*, 979 F.3d at 55 ("Though this is not a popularity contest, Rhode Island counts among its friends nearly all of the circuits that have weighed in on the topic and have limited appellate review to federal officer or civil rights removal.") (collecting cases). Even in the unlikely event that the Supreme Court does reverse the jurisdictional holding in *Baltimore*, Defendants concede that such a decision will likely leave unresolved the merits of whether the *Baltimore* case was properly

removed. *See* Motion at 8 n.4. Rather, it will most likely give the defendants an opportunity to reargue their grounds for removal other than federal officer jurisdiction in the Fourth Circuit—grounds which have been rejected by every court that has considered them, with the exception of one district court decision that this Court reversed. *See* n.2, *supra* (collecting cases).

Nor is a stay warranted because of the pending *San Mateo* petition.[5] Defendants argue that "a stay in this case would ensure that [*San Mateo* and this case] proceed in a like manner," Motion at 8 n.4, but again, that argument rests on the unlikely premise that the Supreme Court will overrule the holdings of eight circuit courts. In any case, this Court will be obligated to rule on the federal officer arguments Defendants raise here regardless of the outcome of *Baltimore* or *San Mateo*; allowing the parties to brief those and any related issues while *Baltimore* is pending promotes efficiency.

Similarly, Defendants have not met their burden of demonstrating they will succeed on the merits of the *Oakland* appeal, where the relevant question presented

[5] The *San Mateo*, *Rhode Island*, and *Boulder* petitions all present the same question as *Baltimore*: whether 28 U.S.C. § 1447(d) authorizes appellate review of any issue encompassed in a remand order. *See* Petition for Certiorari at i in *County of San Mateo v. Chevron Corp.*, No. 20-884 (U.S. Jan. 4, 2021), *Rhode Island v. Chevron Corp.*, No. 20-900 (U.S. Dec. 30, 2020), & *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 20-783 (U.S. Dec. 4, 2020). This Court's decision to stay the mandate in *San Mateo*, No. 18-15499, Dkt. 240 (9th Cir.) is therefore unsurprising. It is also irrelevant to the case at bar, which is in an entirely different posture and must be heard by this Court regardless of the result in *Baltimore*.

in the pending petition is "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law." Petition for a Writ of Certiorari at i, *Chevron Corporation v. City of Oakland*, No. 20-1089 (U.S. Jan. 8, 2021). Defendants' "federal common law" theory is meritless for reasons district courts and this Court have repeatedly identified.

First, "the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution," and to the extent there were ever cognizable federal common law claims that resemble the County's claims here, they were "displaced by the Clean Air Act." *Oakland*, 969 F.3d at 906; *San Mateo I*, 294 F. Supp. 3d at 937 ("Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.").

Second, Defendants' theory is irreconcilable with the well-pleaded complaint rule and all its exceptions and applications, as this Court and multiple others have held. *See Oakland*, 969 F.3d at 906 ("Even assuming that the Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law, . . . the district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question."); *see also Baltimore I*, 388 F. Supp. 3d at 555; *Boulder I*, 405 F. Supp. 3d at 963; *Rhode Island I*, 393 F. Supp. 3d at 148.

In sum, as the district court explained, "the Ninth Circuit has already and only recently addressed the sole issue from which Defendants can appeal with certainty, and the Circuit has done so in a manner unfavorable to Defendants. There is, thus, nothing substantial to a question that has already been answered." Stay Order at 4 (citation omitted). This Court should deny the request for a stay.

B. Defendants Will Not Suffer Irreparable Harm Absent a Stay.

Defendants' irreparable harm arguments merely "rely on speculation on what may befall them if they have to litigate in State court." Stay Order at 5. They argue that proceeding in state court would *per se* injure them, and would cost money they might not get back. Motion at 16–17. But "as 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," 15A Wright & Miller, FED. PRAC. & P. § 3914.11 (2d ed.), and "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Spending money and litigating in state court are firmly within the category of everyday irritants that do not constitute irreparable harm.

Defendants' appeal of the Remand Order under 28 U.S.C. § 1447(d) would not become "hollow" without a stay. *See* Motion at 16. Nothing that occurs in state court after remand could moot or even affect Defendants' appeal. The cases on which Defendants primarily rely arose in a materially different context, where the

moving parties sought to stay orders to disclose sensitive documents that would be impossible to effectively claw back if released, thereby mooting any meaningful appeal from the trial courts' disclosure orders. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (once surrendered, "confidentiality will be lost for all time"); *Hiken v. Dep't of Def.*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (disclosure of information with "important national security implications" would moot appeal). There are no analogous considerations here.

The only Ninth Circuit case Defendants cite, *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1125 (9th Cir. 2008), is inapposite. There, the court identified the irreparable and "otherwise avoidable financial costs" to San Francisco citizens who would have lost healthcare coverage had the court not stayed its ruling—a far cry from "mere litigation expense," which in any event is not irreparable harm. *See Renegotiation Bd.*, 415 U.S. at 24.[6]

[6] *Northrop Grumman Tech. Serv., Inc. v. DynCorp Int'l LLC*, No. 1:16CV534, 2016 WL 3346349 (E.D. Va. June 16, 2016), provides no support for a stay. The court there emphasized that the defendants' federal officer arguments raised issues of "first impression," including "complex questions and novel legal theories which the Fourth Circuit has yet to evaluate." *Id.* at *3. Moreover, the state court had scheduled trial in a mere five weeks. *Id.* at *4. Here, Defendants' arguments are meritless, and there are no trial dates or even any scheduling orders. On remand, the case would simply proceed to motions to dismiss (which the state courts are as competent to hear as federal courts) and discovery (which would occur in either forum).

The mere fact that litigation may proceed in state court in the absence of a stay is insufficient to demonstrate irreparable harm. Defendants' own arguments prove the point: they state that considerations of costs and inconsistent results "have led numerous courts wrestling with climate change-related cases to stay remand orders pending further appeals." Motion at 18. They do not mention that at two of those orders, in the *Rhode Island* and *Baltimore* litigation, were entered *by state trial court judges after remand*. In fact, in both those cases the federal district courts, circuit courts, and Supreme Court *denied* stays pending appeal, but the defendants successfully moved the state courts to reserve ruling on motions to dismiss based on the specific equities in those matters. *See* Ex. 4, Order Deferring Motions, *Mayor & City Council of Baltimore v. BP P.L.C.*, Case No. 24-C-18-004219 (Md. Cir. Ct. Aug. 6, 2020); Order Delaying Further Proceedings, *State of Rhode Island v. Chevron Corp.*, C.A. No. PC-2018-4716, 2020 WL 4812764 (R.I. Super. Ct. Aug. 13, 2020). There are no procedural or substantive rights Defendants might lose if this case is remanded, even if the case proceeds in state court pending this appeal.

Lastly, despite Defendants' ominous invocation of comity and federalism, *see* Motion at 17, the procedure when a case is removed after substantive proceedings in state court is straightforward: "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450. Thus, "once a case has been

removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal," and "Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 437 (1974).

These circumstances arise routinely where, for example, the defendant discovers a basis for removal after conducting some discovery, or where a plaintiff voluntarily amends its state court complaint in a way that creates federal jurisdiction: "if the case stated by the initial pleading is not removable," the defendant may still remove "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3); *see also, e.g.*, *Nikollaj v. Fed. Ins. Co.*, 472 F. Supp. 3d 1138, 1140 (M.D. Fla. 2020) (denying motion to remand where discovery responses first revealed diversity jurisdiction was satisfied). Not only is there no irreparable harm in litigating in state court before removal, it is expressly contemplated in the United States Code. *See also Broadway Grill, Inc. v. Visa Inc.*, No. 16-CV-04040-PJH, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016) (denying stay of remand pending appeal) ("[I]f 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.").

Defendants have not demonstrated irreparable harm, and that reason alone is sufficient to deny Defendants' Motion. *See Leiva-Perez*, 640 F.3d at 965.

C. Issuance of a Stay Will Substantially Injure the County and Is Not in the Public Interest.

A stay would prevent the County from seeking prompt redress of its claims, to its detriment and the detriment of its residents. The County filed its complaint five months ago, and there have been no substantive developments since then. As the district court held, "[s]taying these cases will only add, potentially significantly, to this delay. No matter what may happen with these cases on the merits in the future, the Court cannot discern any public interest in such delay." Stay Order at 6. Defendants argue that a stay would avoid costly and potentially duplicative litigation, but it is their newly pending appeal that more likely will be "a fruitless exercise, costing the parties time and money that could otherwise be spent litigating the merits." *See SFA Grp., LLC v. Certain Underwriters at Lloyd's London*, No. CV 16-4202-GHK(JCX), 2017 WL 7661481, at *2 (C.D. Cal. Jan. 6, 2017).

The public interest does not support Defendants' continued interference with state court proceedings, either. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (D. Haw. 1998) (denying motion to stay remand order pending appeal because, in part, "the public interest at stake in this case is the

interference with state court proceedings"); *see also Browning v. Navarro*, 743 F.2d 1069, 1079 n.26 (5th Cir. 1984) (declining to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity").

Because Defendants have not demonstrated a strong likelihood of success on the merits, they must show both that their appeal raises serious legal questions and that the balance of hardships "tips sharply" in their favor. *See Leiva-Perez*, 640 F.3d at 971. Defendants have made none of those showings.

CONCLUSION

Defendants' Emergency Motion to Stay the District Court's Remand Order should be denied.

DATED: March 10, 2021 By: */s/ Victor M. Sher*

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached motion is proportionately spaced, has a typeface of 14 point, and complies with the word limits set forth in Fed. R. App. P. 27(d) because it has 5,190 words as calculated by Microsoft Word 2016.

/s/ Victor M. Sher
Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2021, 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

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 2

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

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

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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1:18-cv-00395-WES-LDA Notice has been delivered by other means to:

EXHIBIT 3

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 4

MAYOR AND CITY COUNCIL OF BALTIMORE,	*	IN THE
	*	CIRCUIT COURT
Plaintiff,		
v.	*	FOR
BP P.L.C., et al.,	*	BALTIMORE CITY
Defendants.	*	Case No.: 24-C-18-004219

* * * * * * * * * * * *

ORDER DEFERRING DEFENDANTS' JOINT MOTION FOR PROTECTIVE ORDER (#91) AND DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (#66)

Upon review and consideration of Defendants' Motion to Defer Hearing on Defendants' Joint Motion for Protective Order (#116), any opposition thereto, and any further reply, it is on this 6th day of August 2020, by the Circuit Court for Baltimore City, Part 33 hereby:

ORDERED, that Defendants' Motion to Defer Hearing on Defendants' Joint Motion for Protective Order (#116) is **GRANTED**; and it is further

ORDERED, that a hearing on Defendants' Joint Motion for Protective Order (#91) is **DEFERRED** pending the decision on the pending petition for writ of certiorari by the United States Supreme Court and pending the decision in the cases captioned *Ford Motor Co. v. Montana Eighth Dist. Ct.*, No. 19-368 and *Ford Motor Co. v. Bandemer*, No. 19-369 by the United States Supreme Court; and it is further

ORDERED, that, upon its own initiative, the court rules that the Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Request for Hearing (#66) is **DEFERRED** pending the decision on the pending petition for writ of certiorari by the United States Supreme Court and pending the decision in the cases captioned *Ford Motor Co. v. Montana Eighth Dist. Ct.*, No. 19-368 and *Ford Motor Co. v. Bandemer*, No. 19-369 by the United States Supreme Court; and it is further

ORDERED, that the parties shall notify the court of the United States Supreme Court's decision in the pending matters noted above.

Judge Videtta A. Brown
Judge's Signature appears on the original document

Judge Videtta A. Brown

CC: CLERK IS TO SERVE COPIES TO ALL PARTIES

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY
1983