

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

STATE OF DELAWARE, *ex rel.*  
KATHLEEN JENNINGS, Attorney General of  
the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON  
CORPORATION,  
CHEVRON U.S.A. INC., CONOCOPHILLIPS,  
CONOCOPHILLIPS COMPANY, PHILLIPS  
66, PHILLIPS 66 COMPANY, EXXON  
MOBIL CORPORATION, EXXONMOBIL  
OIL CORPORATION, XTO ENERGY INC.,  
HESS CORPORATION, MARATHON OIL  
CORPORATION, MARATHON OIL  
COMPANY, MARATHON PETROLEUM  
CORPORATION, MARATHON  
PETROLEUM COMPANY LP, SPEEDWAY  
LLC, MURPHY OIL CORPORATION,  
MURPHY USA INC.,  
ROYAL DUTCH SHELL PLC, SHELL OIL  
COMPANY, CITGO PETROLEUM  
CORPORATION, TOTAL S.A., TOTAL  
SPECIALTIES USA INC., OCCIDENTAL  
PETROLEUM CORPORATION, DEVON  
ENERGY CORPORATION, APACHE  
CORPORATION, CNX RESOURCES  
CORPORATION, CONSOL ENERGY INC.,  
OVINTIV, INC., and AMERICAN  
PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 20-cv-01429-LPS

**DEFENDANTS' EMERGENCY MOTION FOR A  
TEMPORARY STAY OF EXECUTION OF REMAND ORDER**

Defendants respectfully move this Court to temporarily stay the execution of its order granting Plaintiff's motion to remand (the "Order"), D.I. 121, to allow Defendants time to file a formal motion to stay remand pending appeal, which Defendants will file within ten days or as soon as the Court requests.<sup>1</sup> Defendants further request that the Court instruct the Clerk not to send a certified copy of the Order to the Delaware Superior Court, in order to preserve the status quo until such time as Defendants' request for a stay pending appeal has been fully resolved.<sup>2</sup>

At 4:50 p.m. today, the Court issued its Opinion, D.I. 120, explaining the basis for the Court's decision to remand and issued the Order a few minutes later. Defendants will soon appeal this decision to the Third Circuit, and also intend to file in this Court a motion to stay execution of the remand order pending the appeal. Defendants have a right to appeal the Order because they removed this case in part under the federal officer removal statute. While generally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal," 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). The Supreme Court recently made clear that on appeal a court is to review "any issue fairly encompassed within" a remand order of a case removed pursuant to the federal officer removal statute. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1540, 1542 (2021).

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<sup>1</sup> 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.

<sup>2</sup> In accordance with Local Rule 7.1.1, Defendants attempted through Delaware counsel to confer orally with Plaintiff's Delaware counsel and reach agreement on the subject of this motion. Plaintiff's Delaware counsel indicated by email that Plaintiff will oppose this motion.

A temporary stay is warranted here to preserve Defendants’ appellate rights and to spare the parties and the Delaware Superior Court from what could be a substantial amount of unnecessary and ultimately futile litigation. If the Clerk were to transmit the remand order to the Delaware Superior Court, “[t]he State court may thereupon proceed with such case.” 28 U.S.C. § 1447(c). As will be explained further in Defendants’ forthcoming motion to stay remand pending appeal, Defendants’ appeal will present serious legal issues, including many questions that have not been addressed by the Third Circuit. Indeed, the Third Circuit has not yet considered the propriety of any of the grounds for removal asserted by Defendants in a climate change-related action, and will be able to consider all of Defendants’ grounds for removal on appeal. *See Baltimore*, 141 S. Ct. at 1540, 1542.<sup>3</sup> Absent a stay, Defendants face irreparable harm, whereas a stay would cause Plaintiff no prejudice and, in fact, would serve the public interest and the interests of judicial economy. For these reasons, in a similar climate change-related case, Judge Vazquez of the District of New Jersey recently granted Defendants’ request for a temporary stay of his remand order to provide time for Defendants to file a formal motion to stay pending appeal. *See Order, City of Hoboken v. Exxon Mobil Corp., et al.*, No. 20-14243, Dkt. 127 (D.N.J. Sept. 9, 2021). Judge Vazquez found that “granting Defendants’ request is prudent to preserve resources and in light of considerations of judicial economy. Specifically, the Third Circuit will be presented with matters of first impression that could potentially impact this Court’s remand Order.” *Id.* at 2.

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<sup>3</sup> Following *Baltimore*, the First, Second, Third, Fourth, Eighth, Ninth, and Tenth Circuits will also soon address, for the first time, the propriety of several removal grounds asserted in climate change-related actions. *See Baltimore*, 141 S. Ct. at 1543; *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900, 2021 WL 2044535 (U.S. May 24, 2021); *Chevron Corp. v. County of San Mateo*, No. 20-884, 2021 WL 2044534 (U.S. May 24, 2021); *Suncor Energy, Inc. v. Board of County Commissioners of Boulder County*, No. 20-783, 2021 WL 2044533, at \*1 (U.S. May 24, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir.); *City of Hoboken v. Exxon Mobil Corp.*, No. 21-2728 (3d Cir.); *Minnesota v. Am. Petroleum Inst.*, No. 21-1752 (8th Cir.).

Over the past four years, over 20 other state and municipal entities have filed similar climate change actions in courts across the country, all of which involve significant national interests. In light of these significant national interests, this Court should allow Defendants time to seek a stay of remand pending appeal so that the Third Circuit can address these issues of first impression. As the First Circuit recently explained: “If a motion to remand is granted by the district court in a removed case and the remand order is appealable, the district court may wish to avoid immediately certifying the remand order and returning the case file to the state court until it believes the specter of shuttling has abated.” *Forty Six Hundred LLC v. Cadence Educ., LLC*, No. 20-1784, 2021 WL 4472684, at \*8 (1st Cir. Sept. 30, 2021). The First Circuit emphasized that a “district court would be well-advised, for example, to hold the matter in abeyance for a brief period or to direct the clerk of court to delay transmittal of the certified remand order. Either course of action would give the removing party an opportunity to move for a stay, to seek reconsideration, and/or to appeal the order and request a stay from the court of appeals.” *Id.*

That is exactly what multiple federal courts in prior climate change-related cases have done. Courts in New Jersey, Connecticut, Minnesota, Hawaii, Rhode Island, Maryland, and California, have all allowed defendants time to brief a motion to stay pending appeal after a grant of remand. *See, e.g.,* Order, *City of Hoboken v. Exxon Mobil Corp.*, No. 20-14243 (D.N.J. Sept. 9, 2021), ECF No. 127; Order, *Connecticut v. Exxon Mobil Corp.*, No. 20-1555 (D. Conn. June 11, 2021), ECF No. 56; Order, *Minnesota v. Am. Petroleum Inst.*, No. 20-1636 (D. Minn. Apr. 7, 2021), ECF No. 86; Order, *City & County of Honolulu v. Sunoco LP*, No. 20-163 (D. Haw. Feb. 16, 2021), ECF. No. 130; Order, *County of Maui v. Chevron U.S.A. Inc.*, No. 20-470 (D. Haw. Feb. 16, 2021), ECF. No. 101; Opinion and Order, *State of Rhode Island v. Chevron Corp. et al.*, No. 18-395 (D.R.I. July 22, 2019), ECF No. 122 at 16–17; Memorandum Opinion, *Mayor and*

*City Council of Baltimore v. BP P.L.C. et al.*, No. 18-2357 (D. Md. June 20, 2019), ECF No. 182 at 3; Order Granting Motions to Remand, *County of San Mateo v. Chevron Corp. et al.*, No. 17-4929 (N.D. Cal. Mar. 16, 2018), ECF No. 223 at 5–6.

Judge Chhabria of the Northern District of California, for example, stayed execution of his remand order to allow defendants an opportunity to file a motion to stay pending appeal and then, in granting defendants’ stay motion, explained: “The Court finds that the[r]e are controlling questions of law as to which there is substantial ground for difference of opinion and that their resolution by the court of appeals will materially advance the litigation.” Order Granting Motions to Stay, *County of San Mateo v. Chevron Corp. et al.*, No. 17-4929 (N.D. Cal. Apr. 9, 2018), ECF No. 240.

Similarly, Chief Judge Tunheim of the District of Minnesota granted defendants’ emergency motion for a temporary stay to allow the parties to brief a stay pending appeal. Order, *Minnesota v. American Petroleum Institute*, No. 20-01636 (D. Minn. Apr. 7, 2021), ECF No. 86. Following briefing, Chief Judge Tunheim stayed execution of his remand order pending appeal, concluding that “this action raises *weighty and significant questions* that intersect with rapidly evolving areas of legal thought.” *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at \*2 (D. Minn. Aug. 20, 2021) (emphasis added). More specifically, the court found that “the Second Circuit’s decision in *City of New York* provides a legal justification for addressing climate injuries through the framework of federal common law,” *id.*, and “the *Baltimore* decision increases the likelihood that an appellate court will determine that certain climate change claims arise exclusively under federal law,” *id.* at \*3. The Court also noted that this “is not a case of applying thoroughly developed law to well-tread factual patterns; when it comes to questions of the proper forum for adjudicating harms related to climate change, ‘the

legal landscape is shifting beneath [our] feet.” *Id.* at \*4. For these and other reasons, the court concluded: “Considerations of judicial economy and conservation of resources also weigh in favor of staying execution of the remand order as the Eighth Circuit determines whether the state or federal court has jurisdiction over this matter.” *Id.* The same is true here—given the shifting “legal landscape,” it makes eminent sense to stay the remand Order until the Third Circuit has the opportunity to weigh in on these important issues. *Id.*

In *Connecticut*, the Second Circuit reversed the lower court decision denying a stay and granted defendant’s motion to stay pending appeal, finding that the “Appellant has made a sufficient showing that it is entitled to a stay.”<sup>4</sup> *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Oct. 5, 2021), ECF No. 80.

And most recently, in *Hoboken*, the District of New Jersey granted defendants’ motion to stay pending appeal, recognizing that “[w]ithout a stay, the parties would be required to concurrently litigate this matter in both federal and state court,” which “might also require a state court (and the parties) to needlessly expend resources.” *City of Hoboken v. Exxon Mobil Corp. et al.*, No. 20-cv-14243 (D.N.J. Dec. 15, 2021), ECF No. 133 at 5. Judge Vazquez explained that, despite his view that the case should be remanded, “the matter is clearly complex both factually and legally” and “[a]ny reasonable estimation of discovery costs would result in a large dollar amount,” such that “two-track litigation” is more than “merely . . . an ‘inconvenience.’” *Id.* at 5–6.

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<sup>4</sup> The day after the Second Circuit issued its stay order in *Connecticut*, the district court in a materially similar climate action, *City of New York v. Exxon Mobil Corp.*, No. 21-4807 (S.D.N.Y.), ECF No. 55, ordered plaintiff to show cause why the court should not also issue a stay pending the Second Circuit’s decision in *Connecticut*. In its response, plaintiff acknowledged “that the Court may prefer to wait for further guidance in *Connecticut* before proceeding with the City’s pending motion to remand.” *Id.*, ECF No. 56. The district court thereafter entered the stay. *Id.*, ECF No. 58.

For these reasons, Defendants respectfully ask the Court to enter an order temporarily staying execution of the Order and instructing the Clerk not to send a certified copy of the Order to the Delaware Superior Court, pending resolution of Defendants' forthcoming motion to stay, which Defendants will file within ten days or as soon as the Court requests. Attached is a proposed order granting the requested relief.

Dated: January 5, 2022

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