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

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| STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Civil Action No. 20-cv-01429-LPS |

**REPLY BRIEF IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL**

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## INTRODUCTION

This Court's remand order presents several issues of first impression in the Third Circuit regarding federal court jurisdiction to resolve disputes involving physical harms allegedly caused by the worldwide phenomenon of global climate change. Where, as here, a district court's holding resolves novel questions of first impression, a stay pending appeal is proper.

Plaintiff does not dispute any of this. Instead, Plaintiff argues that the Court should deny a stay because a number of district courts in other jurisdictions have rejected Defendants' removal arguments. D.I. 131 ("Opp.") at 1. Yet, many of those same courts granted the relief Defendants seek here and stayed their remand orders pending appeal. As the District of Minnesota explained, "it makes sense for all parties to allow the [court of appeals] to address these weighty jurisdictional issues prior to commencing litigation in state court." *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at *4 (D. Minn. Aug. 20, 2021). Similarly, in the climate action brought by Connecticut, the Second Circuit reversed the district court and issued a stay of the remand order pending appeal, finding that the defendant "ha[d] made a sufficient showing that it is entitled to a stay" under the Supreme Court's standard in *Nken v. Holder*, 556 U.S. 418, 434–35 (2009)—the same standard that applies here. *Connecticut v. Exxon Mobil Corp.*, No. 21-1446, Dkt. 80 (2d Cir. Oct. 5, 2021).

Plaintiff's contention that a stay is unwarranted because other courts have rejected Defendants' removal arguments is especially unpersuasive given that, prior to the Supreme Court's decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1533 (2021), appellate review of climate change-related cases had generally been limited to only one ground—federal officer removal. Post-*Baltimore*, multiple appellate courts, including the First, Second, Third, Fourth, Eighth, Ninth, and Tenth Circuits, are now considering many of Defendants' other removal grounds for the *very first time*. The Third Circuit will soon address all of Defendants'

grounds for federal jurisdiction over a climate change-related case in *Hoboken* and in this case. There can be no doubt then that, because "the legal landscape is shifting," permitting the remand order to take effect before the Third Circuit can weigh in on these issues "would result in a decision by this Court with the proverbial half a deck." *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021) (granting motion to stay); *see also Minnesota*, 2021 WL 3711072, at *2 ("[T]his action raises weighty and significant questions that intersect with rapidly evolving areas of legal thought."). Plaintiff largely glosses over or outright ignores the bevy of district courts that have stayed their remand orders pending appeal, and remarkably asserts that the "cases Defendants cite" are "nothing like this one." Opp. at 10. But that is untrue; multiple district courts have stayed remand orders in nearly identical climate change-related cases. Indeed, Judge Vasquez in the District of New Jersey recently stayed execution of the remand order in the *Hoboken* case pending appeal of that order to the Third Circuit. To this, Plaintiff offers no meaningful response.

A failure to stay the remand order also poses the threat of irreparable injury to Defendants, who would be forced to simultaneously litigate in two different forums. If Defendants prevail in their appeal, there may be no way to undo the state-court proceedings, as "dispositive resolution of the claims pending full appellate review would constitute a *concrete and irreparable injury*." *Minnesota*, 2021 WL 3711072, at *3 (emphasis added). To "prematurely return[] [a] case to the state court would defeat the very purpose of permitting an appeal and leave a defendant who prevails on appeal holding an empty bag." *Forty Six Hundred LLC v. Cadence Education, LLC*, 15 F.4th 70, 79 (1st Cir. 2021).

On the other side of the ledger, Plaintiff faces no meaningful harm from a short stay. Plaintiff seeks only monetary damages to defray the potential costs associated with responding to

the alleged physical impacts of climate change. But it is black-letter law that the delayed recovery of monetary damages is not a meaningful harm. D.I. 127 ("Mot.") at 19 (citing *Minard Run Oil Co. v. Forest Service*, 670 F.3d 236, 255 (3d Cir. 2011)). In fact, as the District of Minnesota explained, the "public also has an interest in conserving resources by avoiding unnecessary or duplicative litigation, particularly where, as here, the [court of appeals] will be addressing for the first time whether the state court has jurisdiction to resolve the claims and redress the injuries alleged at all." *Minnesota*, 2021 WL 3711072, at *4. Plaintiff does not dispute any of this either, arguing instead that it would be improper to issue an "indefinite stay." Opp. at 19. But a temporary stay while the Third Circuit addresses these issues is not indefinite.

The reason for a stay here is simple: The Third Circuit will issue a decision on matters of first impression in this Circuit that will have a significant, if not dispositive, impact on the threshold issue of federal jurisdiction. A short pause to determine the correct forum for this litigation would not result in any harm to Plaintiff and is the most sensible path. Indeed, the First Circuit recently encouraged district courts "to help prevent a removed case from becoming a shuttlecock, batted back and forth between a state court and a federal court" by not "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*, 15 F.4th at 81. The Court should do that here and grant a stay of its remand order pending appeal. At a minimum, the Court should grant a temporary stay to preserve Defendants' right to seek a stay from the Third Circuit. *See id.*[1]

## ARGUMENT

### I. Defendants Are Likely To Succeed On Appeal

Plaintiff acknowledges that, to show a likelihood of success on appeal, Defendants need

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

only demonstrate "'a reasonable chance, or probability, of winning.'" Opp. at 4 (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015)). Plaintiff also does not dispute that a stay is appropriate where the trial court's holding "is novel, or resolves a question of first impression." *St. Claire v. Cuyler*, 482 F. Supp. 257, 258 (E.D. Pa. 1979); *see also*, *Nw. Airlines v. E.E.O.C.*, 1980 WL 4650, at *1 (D.C. Cir. Nov. 10, 1980) (per curiam).

Here, each of Defendants' grounds for removal presents a question of first impression on which Defendants have at least "a reasonable chance, or probability of winning." *In re Revel*, 802 F.3d at 568. And in light of the Supreme Court's decision in *Baltimore*, the Third Circuit will have the opportunity to consider all those grounds in this case and in *Hoboken*.[2] Multiple courts since *Baltimore* have recognized that it is appropriate to stay execution of a remand order until the courts of appeals have had the opportunity to consider these important and novel questions. Plaintiff does not—and cannot—dispute this.

Plaintiff inexplicably argues that "[t]he cases Defendants cite . . . [are] nothing like this one," Opp. at 6, ignoring the *many* similar climate change-related cases in which district courts have stayed their own remand orders. It is these stay orders, not the remand orders, that are relevant to the Court's inquiry here. The question for purposes of a stay is not whether removal was proper as an initial matter, a question on which this Court has already rendered its decision. *See, e.g.*, *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. Sept. 18, 2010) (staying order pending appeal where "there is no doubt that the plaintiffs' appeal presents an issue of first impression," even though "the Court remain[ed] confident in the soundness of the reasons" for its decision). Rather, the question here is only whether there is a reasonable possibility that the Third

[2] Upon docketing the appeal in this case, the Third Circuit issued an order acknowledging that the appeal "may raise issues similar to those raised in [*Hoboken*]" and directing that any motion to stay the appeal pending *Hoboken* be filed "promptly." Dkt. 3, at 1 (No. 22-1096).

Circuit might accept one or more of Defendants' arguments on any one of the complex issues of first impression before it. The answer to that question is indisputably "yes."

***First***, there is a reasonable chance that the Third Circuit will hold that removal is proper under the Court's federal-question jurisdiction because, as the Second Circuit recently held, Plaintiff's "claims must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021). Plaintiff's Opposition ignores this authority, which explicitly rejected one of Plaintiff's primary arguments against federal-question jurisdiction—that its claims are governed entirely by *state* law.

The District of Minnesota recently confirmed that *City of New York* favors entering a stay pending appeal, finding that the decision "provides a legal justification for addressing climate change injuries through the framework of federal common law and thus at least slightly increases the likelihood that Defendants will prevail on their efforts to keep this, and similar actions, in federal court." *Minnesota*, 2021 WL 3711072, at *2. Although Plaintiff insists that *Minnesota* is incorrect on other grounds, Plaintiff can muster no authority—or even an argument—that rebuts *Minnesota*'s rationale for entry of a stay on federal question grounds.

***Second***, there is a reasonable chance that the Third Circuit will hold that this action was properly removed under the federal officer removal statute. As the Fourth Circuit has recently explained, defendants "act[] under" federal direction or control when they contract with the government to provide a product or service subject to contracts that are "extensively governed by various federal statutes and regulations." *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 249 (4th Cir. 2021). Defendants have met that standard by, among other things, providing billions of dollars in highly specialized jet fuel to the Department of Defense over the course of decades, a basis for federal officer jurisdiction that was not before the

Fourth Circuit in *Baltimore*. There is also a serious legal question whether Plaintiff can avoid federal jurisdiction by trying to disclaim all alleged climate-related injuries arising from Defendants' provision of fossil fuel products to the federal government, a question no court of appeals has addressed yet in a climate change case. Plaintiff's contention that "*Arlington* does not undermine the *Baltimore* decision from the same court just a year earlier," Opp. at 6, ignores the substantially different factual record that is currently on appeal to the Third Circuit.

Plaintiff urges the Court to disregard the law and facts in this case and simply defer to other courts that have purportedly "rejected these same arguments." Opp. at 7. But Plaintiff ignores that a much more robust record is presented here. Only two courts, the Districts of Hawaii and New Jersey, have considered the propriety of federal officer removal on a factual record analogous to this one, and in declining to exercise jurisdiction, the District of Hawaii "assume[d] Defendants acted under a federal officer" but stated that it was constrained by the "tinged canvas" upon which it wrote in light of the Ninth Circuit's previous rejection of federal officer removal (on a far sparser record). *City & County of Honolulu v. Sunoco LP*, 2021 WL 531237, at *4–*5 (D. Haw. Feb. 12, 2021) (citing *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598–603 (9th Cir. 2020)). Importantly, no court of appeals has yet considered this more robust record, though multiple courts are poised to do so in short order.[3] Moreover, the District of New Jersey stayed execution of its remand order pending appeal. *See Hoboken*, No. 20-cv-14243, Dkt. 133.

***Third***, Defendants are reasonably likely to succeed on the merits of their appeal, because the Third Circuit has never considered whether OCSLA confers federal jurisdiction over climate change-related cases, and both the plain statutory text and the Supreme Court's recent decision in

[3] The Ninth Circuit is scheduled to hear oral argument in the *Honolulu* and *Maui* cases on February 18, 2022. Briefing is complete before the Third Circuit in *Hoboken*, with oral argument yet to be scheduled.

*Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), confirm that but-for causation is not necessary to establish OCSLA jurisdiction. *Ford* is not "entirely irrelevant," as Plaintiff asserts, Opp. at 8—indeed it is highly relevant because the Supreme Court established in *Ford* that a sufficient "connection" between a plaintiff's claims and a defendant's conduct can be established for jurisdictional purposes without but-for causation. That same rationale should be applied in interpreting OCSLA's "connection" requirement.

***Fourth***, Defendants' appeal presents a serious question of first impression under *Grable*, and Plaintiff's contention that "[e]very court that has considered Defendants' *Grable* arguments has rejected them," Opp. at 8, ignores key aspects of Defendants' *Grable* arguments not set forth in prior cases—for example, that Plaintiff's claims include federal constitutional elements. Additionally, the majority of appellate courts that have addressed remand orders in climate change-related cases have yet to opine on the *Grable* ground, only addressing federal officer removal prior to the Supreme Court's decision in *Baltimore*.

Standing alone, each of the foregoing grounds for removal presents serious legal questions of first impression in this Circuit that establish a reasonable chance of success on the merits and justify a stay pending appeal. The collective force of these grounds is demonstrated by the multiple courts that have stayed remand of related climate change cases pending appeal, including other district courts that stayed their own remand orders on this basis. Defendants urge the Court to similarly stay its remand of this case pending appeal.

## II. Defendants Will Suffer Irreparable Harm Absent a Stay

Plaintiff argues that a stay is improper because the injuries Defendants present are "speculative" and "neither likely nor irreparable." Opp. at 9. But Plaintiff misconstrues the irreparable harms Defendants face. For example, Plaintiff brushes aside concerns about conflicting court decisions and comity issues, because 28 U.S.C. § 1450 provides that "'[a]ll

injunctions, orders and other proceedings in state court prior to removal remain in force until dissolved or modified by the district court.'" Opp. at 15. But this provision on its face does not address a post-removal remand that is then overturned, so it merely exacerbates the uncertainty that would be created absent a stay. And even if Section 1450 or some similar procedure were to be followed, some orders, such as compelled discovery of sensitive materials, cannot be so easily erased. Moreover, should Defendants eventually succeed in their appeal, any state court orders would need to be evaluated and potentially dissolved or modified by *this Court*. Contrary to Plaintiff's assertions, this would be tremendously inefficient and unnecessary, and present a real "risk of wasting *federal* judicial resources." *Id.* at 19. As multiple courts have held in similar cases, "[c]onsiderations of judicial economy and conservation of resources also weigh in favor of staying execution of the remand order." *Minnesota*, 2021 WL 3711072, at *2. In fact, Judge Vazquez expressly rejected the very argument Plaintiff advances here, *i.e.*, that concurrent litigation in state and federal court would be a mere "'inconvenience,'" and held that "[f]orcing the parties to litigate" in this manner could "require a state court (and the parties) to needlessly expend resources." *Hoboken*, No. 20-cv-14243, Dkt. 133 at 5.

In addition, because a final "state court judgment or order could render the appeal meaningless," Defendants face "*severe and irreparable harm* if no stay is issued." *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). As one court explained, "dispositive resolution of the claims pending full appellate review would constitute a *concrete and irreparable injur*y, particularly 'where a failure to enter a stay will result in a meaningless victory in the event of appellate success.'" *Minnesota*, 2021 WL 3711072, at *3 (emphasis added) (citation omitted); *see also Hoboken*, No. 20-cv-14243, Dkt. 133 at 5 (finding that "returning the case now could defeat the very purpose of appellate review").

Plaintiff argues that the stay here would be "indefinite," Opp. at 19, but also argues that Defendants should be forced to incur the unrecoverable expenses of litigating the same action in two forums simultaneously throughout the stay. This argument fails on multiple grounds. First, the stay in this case would be no more "indefinite" than any other stay pending appeal—the stay will end when the appeal is resolved, as is the case with all stays pending appeal. Second, even if "the cost of defending a case" will likely be incurred at some point, *id.* at 13, that cost need not be compounded by the additional costs and burdens of litigating both the appeal and the merits of the case in state court simultaneously. *Northrop Grumman*, 2016 WL 3346349, at *4 (explaining that the "nightmarish procedural complications arising from parallel proceedings in state and federal court . . . weighs in favor of a stay").

In short, Plaintiff's arguments, if credited, would all but preclude a finding of irreparable harm in *any* case remanded to state court. But courts *routinely* grant motions to stay remand orders pending appeal based on the likelihood that the defendant would suffer irreparable harm and, as detailed above, they have done just that in similar climate change cases. Indeed, in reversing the district court, the Second Circuit recently found a "sufficient showing" of irreparable harm based on arguments asserted by the defendant there that are functionally identical to those asserted by Defendants here.

## III. The Public Interest Favors A Stay

Plaintiff contends that the public interest weighs against a stay, because the public has an interest in "the effective and timely resolution of disputes in litigation." *Id.* at 20. But the public also has an interest in the *efficient* resolution of disputes in litigation, particularly where, as here, taxpayer dollars fund not only the judicial process but also the Attorney General's office prosecuting this litigation. Plaintiff's arguments to the contrary are meritless. Given that Plaintiff concedes it seeks only monetary damages and has asserted that "the outcome of this lawsuit cannot

turn back the clock on the atmospheric and ecologic processes" that allegedly caused global climate change, it cannot reasonably assert that a short stay to ensure efficient resolution of this dispute is against the public interest. *Id.* at 18. Any such argument also is belied by Plaintiff's decision to wait *more than three years* after the first similar climate change case was filed by the same counsel representing Delaware here before initiating this action. *See* Complaint, *County of San Mateo v. Chevron Corp. et al.*, No. 17CIV03222 (Cal. Super. Ct. July 17, 2017).

Plaintiff's attempt to downplay the benefits from a stay, including the conservation of both parties' and judicial resources, is dubious on its face—particularly given that Plaintiff is the government, and the wasted resources belong to the public. "Should the [Third] Circuit ultimately disagree with the Court's reasoning and find that remand was unwarranted, the public would be better served by concentrating resources and litigating these claims in the most appropriate forum." *Minnesota*, 2021 WL 3711072, at *4. Because Plaintiff's interests will not be prejudiced by a short pause in the proceedings and because Plaintiff's preference to avoid "delay" cannot overcome the obvious efficiencies of awaiting the Third Circuit's ruling, the public interest weighs in favor of a stay.

## CONCLUSION

For the foregoing reasons, execution of the Remand Order should be stayed pending appeal. If the Court declines to grant a stay pending appeal, Defendants respectfully request that it grant a temporary stay to preserve Defendants' right to seek a stay from the Third Circuit.

Respectfully submitted,

Dated: February 1, 2022

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