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

CITY OF ANNAPOLIS, MARYLAND, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	CASE NO.: 21-cv-00772 SAG

DEFENDANTS' MOTION TO STAY PROCEEDINGS

Defendants move for an order staying proceedings in this case, pending defendants' forthcoming petition for a writ of certiorari to the Supreme Court in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 and any subsequent merits review by that Court. In support of their Motion to Stay Proceedings, Defendants rely upon and incorporate by reference their supporting Memorandum of Law.

DATED: May 25, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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CITY OF ANNAPOLIS, MARYLAND, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	CASE NO.: 21-cv-00772 SAG

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROCEEDINGS

I. INTRODUCTION AND BACKGROUND[1]

Plaintiff, the City of Annapolis, filed this action against a select group of Defendants in the energy industry in the Circuit Court for Anne Arundel County seeking to use state law to impose tort liability for past and future harms allegedly attributable to global climate change. Defendants removed the case to this Court on five independent grounds. *See* Dkt. 1. On April 23, 2021, Plaintiff moved to remand to state court. Dkt. 118. After the motion to remand was filed, but before Defendants' opposition to that motion, this Court stayed proceedings pending the Fourth Circuit's decision in *Mayor and City Council of Baltimore v. BP p.l.c.*, No. 19-1644, a "strikingly similar" case removed on many, but not all, of the grounds asserted in this case. *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469, at *1 (D. Md. May 19, 2021). In so doing, this Court joined trial courts across the country that have deferred further proceedings in climate change-related actions while federal appellate courts review the merits of removal.[2] On April 7, 2022, the Fourth Circuit affirmed remand in *Baltimore*. Defendants will soon be filing a petition for a writ of certiorari to the Supreme Court.

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

[2] *See, e.g.*, *Delaware ex rel. Jennings v. BP Am. Inc.*, C.A. No. 20-1429-LPS, 2022 WL 605822, at *1 (D. Del. Feb. 8, 2022); Order, *City of Hoboken v. Exxon Mobil Corp.*, Civ. No. 20-14243 (D.N.J. Dec. 15, 2021), Dkt. 133; *Minnesota v. Am. Petroleum Ins.*, Civ. No. 20-1636, 2021 WL 3711072, at *2 (D. Minn. Aug. 20, 2021); Stipulation & Order Staying Proceedings, *Anne Arundel Cnty. v. BP P.L.C.*, Civ. No. 21-01323 (D. Md. June 1, 2021), Dkt. 19; Order, *City of Charleston v. Brabham Oil Co.*, Civ. No. 20-3579 (D.S.C. May 27, 2021), Dkt. 121; Order, *Pac. Coast Fed'n of Fishermen's Assocs., Inc. v. Chevron Corp.*, Civ. No. 18-07477 (N.D. Cal. Jan. 2, 2019), Dkt. 91; Order, *Bd. of Cnty. Comm'rs of San Miguel Cnty. v. Suncor Energy (USA) Inc.*, Civ. No. 21-150 (Colo. Dist. Ct. July 14, 2021); Order, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (USA) Inc.*, Civ. No. 18-30349 (Colo. Dist. Ct. June 29, 2021); Order Staying Case & Pending Motions, *Mayor & City Council of Baltimore v. BP P.L.C.*, Civ. No. 18-4219 (Md. Cir. Ct. May 25, 2021).

Defendants respectfully submit that it would be most efficient and prudent to continue to stay proceedings in this case until the Supreme Court has the opportunity to consider the removal issues and questions of federal jurisdiction presented in *Baltimore*, which may have a direct and significant impact on this case. Indeed, if the Supreme Court were to reverse and find that removal was proper on any of the grounds presented by the defendants in *Baltimore*, removal here would necessarily be proper, and the time and effort spent by the Court and the parties in the interim would have been unnecessary. For example, if the Supreme Court determines that claims seeking redress for the alleged consequences of global climate change arise under federal law (as it has previously held on multiple occasions), removal would be warranted here.

A stay pending the ultimate resolution of the federal jurisdiction question—*i.e.*, whether this case should proceed in federal or state court—by the Supreme Court is in the interests of justice and judicial economy, as this Court previously recognized by staying this case and the related *Anne Arundel County* case pending appeal to the Fourth Circuit. Indeed, the Supreme Court's determinations "in the *Baltimore* case will have a direct bearing on defendants removal arguments here" and "[n]o one in this case—neither the parties nor the Court—wishes to see months of effort rendered obsolete by the [Supreme Court's decision]." *Annapolis*, 2021 WL 2000469, at *4. "Such an outcome," this Court explained, "is easily prevented by a stay." *Id.* In short, the same logic that justified the prior stay continues to apply, and the stay should remain in place to preserve the *status quo* and allow the appellate process to reach its conclusion. As this Court and other federal district courts considering similar climate change-related cases have explained in granting stays pending appellate review, the "legal landscape is shifting beneath [our] feet," *id.*, and these actions raise "weighty and significant questions that intersect with rapidly

evolving areas of legal thought," *Minnesota v. Am. Petroleum Inst.*, 2021 WL 3711072, at *2 (D. Minn. Aug. 20, 2021).

The possibility that the Supreme Court will grant a writ of certiorari is more than theoretical. There is currently a split between the federal courts of appeals on the threshold question of whether federal common law applies to claims, like those asserted here, that seek damages from injuries allegedly caused by global climate change. Given the clear and direct conflicts between the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021), and the Fourth Circuit's decision in *Baltimore*, the Supreme Court may very well grant review to resolve that conflict, and the Court ultimately could conclude that *Baltimore*, and thus this action, "arise[s] under" federal law and thus is removable.

A further stay would simply preserve the *status quo* until the federal appellate process is completed. To lift the stay and continue proceedings now, while the appellate process remains ongoing, would risk wasting significant judicial and party resources. It makes little sense to brief the issues of remand and removal or for the Court to consider that briefing now. At best, the parties would need to file supplemental briefs to address further Supreme Court decisions. At worst, this action might be erroneously remanded to state court in violation of Defendants' right to a federal forum. Moreover, because "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes" that Plaintiff alleges caused its harm, *Annapolis*, 2021 WL 2000469, at *4, Plaintiff cannot plausibly claim any meaningful harm from a brief stay, whereas a premature and potentially erroneous remand could substantially prejudice Defendants. For these reasons, this Motion should be granted and the requested stay should be entered.

II. LEGAL STANDARD

"A district court has broad discretion to stay proceedings as part of its inherent power to control its own docket." *Navigators Specialty Ins. Co. v. Med. Benefits Adm'rs of MD, Inc.*, 2014 WL 1918710, at *1 (D. Md. May 12, 2014) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted." *Annapolis*, 2021 WL 2000469, at *3; *accord Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018).

III. ARGUMENT

A. A Stay Will Conserve Judicial Resources And Promote Judicial Economy.

"When assessing judicial resources, a court should determine whether a stay would avoid the 'needless duplication of work and the possibility of inconsistent rulings.'" *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Securities Corp.*, 2015 WL 222312, at *4 (E.D. Va. Jan. 14, 2015) (citation omitted); *see also Yearwood v. Johnson & Johnson, Inc.*, 2012 WL 2520865, at *4 (D. Md. June 27, 2012); *In re Mutual Funds Investment Litig.*, 2011 WL 3819608, at *1 (D. Md. Aug. 25, 2011) (granting stay pending appeal of related case because stay "would both promote judicial efficiency and avoid the possibility of inconsistent rulings"). Here, given the substantial overlap between this case and *Baltimore*, a stay would indisputably conserve judicial resources.

"The main features of the *Baltimore* case, at its inception, are strikingly similar to those of this case," and many of Defendants' grounds for removal here were asserted in *Baltimore*.[3] *Annapolis*, 2021 WL 2000469, at *1; *compare* Dkt. 2, Ex. 1, *with Mayor & City Council of Baltimore*, No. 18-cv-2357, Dkt. 2, Ex. A. As a result, the final decision on removal in *Baltimore* could be dispositive here—for example, if the Supreme Court agrees with petitioners' argument that the plaintiff's claims necessarily arise under federal law. Such a ruling would completely obviate the need for the parties to brief the propriety of removal here and for this Court to decide these issues.

Even if *Baltimore* does not fully resolve the issue of this Court's jurisdiction, the substantial overlap in legal issues provides sufficient grounds for a stay. *See Stone v. Trump*, 356 F. Supp. 3d 505, 518 (D. Md. 2018) (finding that a "stay would promote judicial economy" due to the "significant overlap" between the issues presented below and on appeal); *Gross v. Pliva USA, Inc.*, 2011 WL 13223899, at *1 (D. Md. Apr. 7, 2011) (staying proceedings where, "regardless of which way the Supreme Court comes down, its opinion" in a pending case would "provide guidance as to the . . . arguments available to the Parties" and to the legal issues at play); *United States v. McClelland*, 2020 WL 901821, at *2 (W.D.N.C. Feb. 25, 2020) (ordering a stay to "conserv[e] the Court's resources" because of the "substantial overlap between the legal issues present here and those that the Fourth Circuit may itself soon decide"). Among other things, the Supreme Court in

[3] Defendants have asserted multiple bases for removal here that were not presented or addressed by the Fourth Circuit in *Baltimore*. These include: (1) federal officer removal on a significantly more robust evidentiary record than was before the *Baltimore* panel; (2) removal under the Outer Continental Shelf Lands Acts on a significantly more robust evidentiary record than was before the *Baltimore* panel; and (3) jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), because, to the extent Plaintiff's claims are based on alleged misrepresentations, such claims necessarily include affirmative constitutional elements imposed by the First Amendment.

Baltimore could narrow the issues before this Court and guide the parties and the Court in deciding the threshold question of federal jurisdiction. Indeed, the *Baltimore* action "will shape the outcome of—or, at least, the arguments made in support of and in opposition to—the Remand Motion here." *Annapolis*, 2021 WL 2000469, at *4; *see also Wilt v. Household Life Ins. Co.*, 2015 WL 5501751, at *2 (S.D. W.Va. Sept. 16, 2015) (granting stay where concurrent procedures "will guide the future of this litigation before this Court," and "narrow the issues" before the court).

The Supreme Court may very well grant review of the Fourth Circuit's decision because it has entrenched a split among the circuit courts of appeals. Moreover, the Fourth Circuit's decision is irreconcilable with the Supreme Court's decisions regarding the application of federal common law to controversies concerning interstate pollution.

The Fourth Circuit clearly and unambiguously expressed its disagreement with the Second Circuit's decision, refusing to "follow *City of New York*," and holding that federal common law does not govern plaintiff's claims. *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 203 (4th Cir. 2022). "Applying the Supreme Court's precedents in this area," the Second Circuit held in *City of New York* that claims seeking redress for injuries allegedly caused by the contribution of global greenhouse-gas emissions to global climate change presented "the quintessential example of when federal common law is most needed." 993 F.3d at 92. The Fourth Circuit, by contrast, concluded that the Second Circuit "evad[ed] the careful analysis that the Supreme Court requires" to determine whether federal common law applies, held that the Second Circuit's analysis in *City of New York* "suffers from the same *legal flaw* as [d]efendants' argument[s]" in favor of removal, and saw "no reason to fashion any federal common law for [d]efendants." *Baltimore*, 31 F.4th at 202–03 (emphasis added). The Fourth Circuit's explicit disagreement with the Second Circuit's conclusion as to the governing law for these types of

claims creates a clear circuit split, which weighs in favor of Supreme Court review. *See* U.S. S. Ct. R. 10(a).

In addition, the Fourth Circuit's decision on such an important federal question cannot be reconciled with Supreme Court precedent. *See* U.S. S. Ct. R. 10(c). The Supreme Court has consistently recognized that "the basic scheme of the Constitution . . . demands" that federal law govern interstate or international pollution claims, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011), and that "state law cannot be used" where, as here, a plaintiff's claims target out-of-state emissions, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). Because of these clear conflicts with the law of sister Circuits and Supreme Court precedent, the Supreme Court may very well grant further review and reverse the panel's judgment.

Notably, two Colorado state courts in similar climate change-related cases recently granted motions to stay pending defendants' forthcoming petition for a writ of certiorari to the Supreme Court after the Tenth Circuit affirmed remand. *See* Order, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 2018CV03049, Filing ID 2110BB3949408 (Colo. Dist. Ct. Mar. 25, 2022); *see also* Order, *Bd. of Cnty. Comm'rs of San Miguel Cnty. v. Suncor Energy (U.S.A.) Inc. et al.*, No. 2021CV150, Filing ID 3F398BF58DFEB (Colo. Dist. Ct. Mar. 25, 2022). This Court should do the same. Those motions were premised on the same reasoning as this motion—that it makes eminent sense to continue to stay proceedings until the federal appellate process is concluded and the question of federal jurisdiction is finally resolved. Both courts granted the motions to stay *just one day* after briefing was complete, with one explicitly finding that there was "good cause" to grant a stay and that "no undue prejudice" would result.

B. Plaintiff Will Not Be Prejudiced By A Stay.

In considering prejudice to the non-moving party, "courts have evaluated the progress of the case, the presence of pending motions, [and] the length of delay proposed." *Virginia ex rel. Integra Rec*, 2015 WL 222312, at *4. These considerations weigh decisively in favor of a stay.

This case is still in its very early stages. The parties have not yet commenced discovery or filed dispositive motions; in fact, the only substantive filings to date are Defendants' notice of removal and Plaintiff's motion to remand. Where a case "is still in the very early stages of litigation, there is little prejudice to either side if the Court stays the case." *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005). Moreover, "preventing further, and potentially futile, expenditures of time and resources by the parties and the Court weighs *in favor* of granting [a stay] at this stage of the litigation." *NAS Nalle Automation Sys., LLC v. DJS Sys., Inc.*, 2011 WL 13141594, at *1 (D.S.C. Nov. 23, 2011) (emphasis added). It is therefore no surprise that this Court and others routinely grant stays at such an early juncture. *See, e.g.*, *Mitchell v. Lonza Walkersville*, Inc., 2013 WL 3776951, at *3 (D. Md. July 17, 2013) (granting stay of proceedings where "discovery has not commenced" and "a trial date has not been set"); *Exopack-Tech., LLC v. Graphic Packaging Holding Co.*, 2012 WL 13008353, at *1 (D.S.C. Feb. 29, 2012) ("Here, the litigation is in its early stages. Graphic has yet to file an answer, no discovery has taken place, and the court has not yet . . . set a trial date."); *Virginia ex rel. Integra Rec*, 2015 WL 222312, at *5 ("[T]he Commonwealth can claim little prejudice" where the action has "only just commenced[,] [n]o answers have been filed, no discovery has begun, and no trial date has been set.").

Plaintiff cannot credibly assert that it will suffer any harm from a brief stay. As an initial matter, Plaintiff seeks only monetary damages for its alleged injuries, which can, of course, be awarded at any time. As courts have explained, a "[p]laintiff will not suffer undue prejudice . . .

from a stay [where] it can be fully compensated if necessary with money damages." *Univ. of Va. Patent Found. v. Hamilton Co.*, 2014 WL 4792941, at *3 (W.D. Va. Sept. 25, 2014). Indeed, as this Court opined in staying this action pending the Fourth Circuit's review in *Baltimore*, "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly help set in motion." *Annapolis*, 2021 WL 2000469, at *4.

Moreover, Plaintiff's own actions in waiting *years* to file the present lawsuit undercut any arguments of harm from a stay. In fact, Plaintiff waited *more than two and a half years* after the City of Baltimore filed its substantially similar lawsuit, to file this action. Yet, remarkably, Plaintiff asks this Court to move forward immediately on Plaintiff's motion to remand, ignoring that the Supreme Court may further review—and, indeed, finally resolve—the propriety of a number of Defendants' grounds for removal.

In short, a brief stay while awaiting the completion of the appellate process will not injure Plaintiff, but will instead conserve the parties' resources and promote judicial economy and the public interest by avoiding potentially duplicative briefing on issues that will soon be in front of the Supreme Court.

C. Defendants Face Serious Hardship Absent A Stay.

In contrast, Defendants face substantial hardship if proceedings in this case move forward now. Defendants will be required to litigate remand issues in this Court prior to the ultimate resolution of the federal jurisdiction question—an exercise that may turn out to be entirely unnecessary if the Supreme Court concludes that there is federal jurisdiction over actions alleging harms from global climate change. And worse, if this Court grants Plaintiff's motion to remand, proceedings in Maryland state court could immediately resume. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."). Absent a stay, the parties may be forced

to proceed simultaneously along at least two tracks: (1) an appeal to the Fourth Circuit of the entire remand order, and (2) proceedings in state court.

That would pose a particularly profound risk to Defendants. If the appeal confirms that federal jurisdiction exists and removal was proper, but this Court remands this case to state court, Defendants will have been denied their right to a federal forum for many months. During this time, the parties may engage in substantive motion practice and possibly some discovery, which this Court would then have to untangle. Such dual proceedings would raise a "rat's nest of comity and federalism issues" if the Supreme Court ultimately determines that removal was proper after months of litigation in state court, during which time the state court might have invested substantial time and resources and made substantive rulings. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l*, LLC, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Courts routinely find irreparable harm where, as here, there is a substantial "risk of [the] inefficient use of the parties' time and resources," *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016), and where the parties may incur "wasteful, unrecoverable, and possibly duplicative costs," *Ewing Indus. Co. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015). Finally, on top of the harm to the parties, denying a stay of further proceedings risks harm to the judicial process more generally—including the risk of inconsistent rulings if this Court enters a remand order that ultimately proves irreconcilable with the disposition in *Baltimore*.

IV. CONCLUSION

For these reasons, the Court should continue to stay further proceedings in this case pending defendants' forthcoming petition for a writ of certiorari to the Supreme Court in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644 and any subsequent merits review by that Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May 2022, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

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