UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND, Plaintiff, vs. BP P.L.C.; *et al.*, Defendants.	Case Number: 21-cv-00772-SAG

PLAINTIFF CITY OF ANNAPOLIS'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Less than three weeks ago, this Court granted the City's motion to remand and denied Defendants' motion to stay proceedings. *See* Order, Doc. 175 ("Remand Order"); *City of Annapolis v. BP P.L.C., et al.*, No. SAG-21-772, 2022 WL 4548226, at *4–5 (D. Md. Sept. 29, 2022).[1] Although the Court granted a short stay to give Defendants "an opportunity to appeal," the Court warned that it was "not amenable to further staying its remand order on the present record," explaining that none of the stay factors weighed in Defendants' favor. *City of Annapolis*, 2022 WL 4548226, at *4–5, *10.

Defendants now renew their motion to stay based on a materially identical record. *See generally* Doc. 178-1 ("Memo. ISO Stay Mot."). Indeed, the only "changed" circumstance that Defendants can identify, *id.* at 1, is the Supreme Court's request for the views of the United States on the pending certiorari petition in another climate deception case, *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 ("*Boulder*"). Defendants insist that "this development substantially increases the likelihood that the Supreme Court will grant the certiorari petition and therefore warrants a stay of remand in this case." Memo. ISO Stay Mot. at 1. Like their first motion to stay, then, their second "motion depends on the grant of a petition for certiorari." *City of Annapolis*, 2022 WL 4548226, at *4. It therefore fails for the same reasons.

As this Court already explained, even "[a]ssuming Defendants successfully petition for certiorari, their track record across the country fails to prove a likelihood of success on the merits sufficient to warrant a stay." *Id.* Indeed, the *Boulder* petition *only* concerns Defendants' novel federal-common-law theory of removal jurisdiction. *See* Memo. ISO Stay Mot. at 2. And that exact

[1] This Court entered the same remand opinion in this action and a related one, *Anne Arundel County v. BP P.L.C., et al.* The opinion is indexed on Westlaw at *City of Annapolis v. BP P.L.C.*, 2022 WL 4548226 (D. Md. Sept. 29, 2022).

same theory has been unanimously rejected by eleven district courts and five appellate courts, including the Fourth Circuit in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 199 (4th Cir. 2022) ("*Baltimore*") ("[W]e resoundingly agree with Baltimore and reject Defendants' attempts to invoke federal common law.").[2]

The outcome of the *Boulder* petition cannot, moreover, change the fact that "[t]here is . . . no irreparable injury to Defendants in proceeding with the [City's] case." *City of Annapolis*, 2022 WL 4548226, at *4. Nor can it lessen the harms to the City that would result from "further delay [in] reaching the merits of the case," *id.*, which was filed in state court nearly 20 months ago and yet still has not progressed to responsive pleadings, discovery, or initial disclosures. There will remain, moreover, "substantial public interest in moving these cases towards disposition," *id.* at *5, irrespective of the Solicitor General's views on the *Boulder* petition. Indeed, execution of this Court's remand order would directly advance "Congress's longstanding policy of not permitting interruption of the merits of a removed case by prolonged litigation of questions of jurisdiction." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 238 (2007). Because nothing material

[2] *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 31 F.4th 178 (4th Cir. 2022); *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618 (D. Del. 2022), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 2021), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd*, 25 F.4th 1238 (10th Cir. 2022); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019), *aff'd sub nom. Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *aff'd*, 39 F.4th 1101 (9th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd*, 32 F.4th 733 (9th Cir. 2022); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom. Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City of Annapolis*, 2022 WL 4548226.

has changed since the Court last denied Defendants' motion to stay, it should do so again, execute the remand order, and send the City's case back to state court where it belongs.

II. LEGAL STANDARD

Where, as here, a party seeks a stay pending resolution of a certiorari petition in another case, courts in the Fourth Circuit apply the standards for resolving a motion to stay pending appeal. *See, e.g.*, *Gadsden v. United States*, 294 F. Supp. 3d 516, 519 (E.D. Va. 2018). Such a stay "is not a matter of right," *Nken v. Holder*, 556 U.S. 418, 433 (2009), and the moving party bears "the heavy burden for making out a case for such extraordinary relief," *Winston-Salem/Forsyth Cnty. Bd. of Ed. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers).

Courts consider four "traditional" factors to determine if a moving party has met this high bar: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (citation omitted); *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 2022 WL 986994, at *1 (4th Cir. Mar. 31, 2022) (describing the *Nken* factors as "the applicable legal requirements for a stay pending appeal"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251, 256 (4th Cir. 2020) (applying *Nken* factors to determine whether to stay an agency action). "The first two factors . . . are the most critical." *Nken*, 556 U.S. at 434.

III. ARGUMENT

A. Defendants Still Fail to Show They Will Likely Suffer Irreparable Harm Absent a Stay.

No stay may issue without a showing that the threatened harm to the moving party is irreparable and at least probable, not merely possible. *Nken*, 556 U.S. at 434–35. Defendants again

fail to satisfy this "critical" factor, which is an independently sufficient ground to deny their Stay Motion. *See id.*

Defendants first rehash old assertions that litigation in state court could be "costly and burdensome" and result in "needlessly expending substantial sums of money." *See* Memo. ISO Stay. Mot. at 5–6. But as this Court previously explained, "mere injuries, however substantial, in terms of money, time, and energy necessarily expended" absent a stay do not suffice to warrant such an extraordinary remedy. *City of Annapolis*, 2022 WL 4548226, at *4 (quoting *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970)).

Pivoting, Defendants insist that execution of the remand order might deny them "their right to a federal forum." Memo. ISO Stay. Mot. at 5. Courts across the country have rejected that line of argument, however, and for good reason: Absent a stay, Defendants' appeal "would only be rendered moot in the unlikely event that a final judgment is reached in state court before the resolution of their appeal," which merely amounts to "speculative harm [that] does not constitute an irreparable injury." *Mayor & City Council of Baltimore v. BP P.L.C.*, No. ELH-18-2357, 2019 WL 3464667, at *5 (D. Md. July 31, 2019); *accord Stanley v. Babu*, No. GJH-19-489, 2021 WL 878356, at *6 (D. Md. Mar. 9, 2021); *see also City & Cnty. of Honolulu v. Sunoco LP*, Nos. 21-15313, 21-15318, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) ("[T]he theoretical possibility that the state court could irrevocably adjudicate the parties' claims and defenses while these appeals are pending also falls short of meeting the demanding irreparable harm standard."); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1074 (D. Colo. 2019) (rejecting arguments that defendants might lose their appeal rights as "simply too speculative to rise to the level of irreparable injury" (internal quotation marks and citations omitted)). Indeed, assuming the *Boulder* petition is granted, the Supreme Court will likely rule this

term or next. And given the slow pace of the litigation to date (largely attributable to Defendants' delay tactics), the City's case might—at most—proceed to motions to dismiss and early discovery in state court. Case in point: The climate deception lawsuit in *Honolulu* was remanded to state court in March 2021, yet the defendants only just filed their answers to the complaint in September 2022. *See City & Cnty. of Honolulu v. Sunoco LP, et al.*, No. 20-163-DKW-RT, Doc. 147 (D. Haw. Mar. 15, 2021) (transmitting case back to Hawaii state court following remand); Defendants Chevron Corporation and Chevron U.S.A. Inc.'s Answer to the First Amended Complaint, *City & Cnty. of Honolulu v. Sunoco LP, et al.*, 20-380-LWC, Docs. 748, 752 (Sept. 12, 2022) (defendants' answer to the operative complaint filed in state court nearly 18 months later).

In a similar vein, Defendants speculate that a federal court could not "un-ring the bell of the state court's intervening rulings" if this Court remanded the City's case to state court and the Supreme Court later reversed the Fourth Circuit's decision in *Baltimore*. Memo. ISO Stay Mot. at 6. Not so. If the case ultimately returns to federal court, "[a]ll 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 (emphasis added). Accordingly, a federal court could modify or dissolve any prior state court orders issued between remand and a second removal, if necessary. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 437 (1974) ("[F]ederal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal."); *Boulder*, 423 F. Supp. 3d at 1074–75 ("It is not unusual for cases to be removed after substantial state litigation. 28 U.S.C. § 1450 recognizes this . . . ."). And the possibility that a federal court would ever need to invoke Section 1450 is rendered more speculative still because, in "[o]ur system of cooperative judicial federalism," state courts are presumptively "competent to apply federal and state law."

McKesson v. Doe, 141 S. Ct. 48, 51 (2020) (quotations omitted); 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.11.1 (3d ed. Sept. 2022 update) ("[A]s important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate."). If anything, then, "the interim proceedings in state court may well advance resolution of the case in federal court." *Baltimore*, 2019 WL 3464667, at *6; *accord Boulder*, 423 F. Supp. 3d at 1074.

Defendants' reliance on *Minnesota* is misplaced. *See* Memo. ISO Stay Mot. at 5 (citing *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 3711072 (D. Minn. Aug. 20, 2021)). In that case, the district court granted the defendants' motion to stay because the Eighth Circuit had not yet considered the defendants' purported bases for removing a climate deception case. *See Minnesota*, 2021 WL 3711072, at *4 ("[T]he Eighth Circuit will be addressing for the first time whether the state court has jurisdiction to resolve the claims and redress the injuries alleged at all."). The Fourth Circuit, by contrast, has already considered and rejected Defendants' asserted bases for removal, including the federal-common-law theory of removal that is the subject of the *Boulder* petition. *See Baltimore*, 31 F.4th at 199 ("[W]e resoundingly agree with Baltimore and reject Defendants' attempts to invoke federal common law."). *Delaware* is even less helpful to Defendants. *See* Memo. ISO Stay Mot. at 6 (citing *State of Delaware v. BP America, Inc., et al.*, No. 20-1429-LPS, Doc. 134, at 5–6 (D. Del. Feb. 9, 2022)). Although the district court granted the defendants' motion to stay pending appeal of its remand order, the Third Circuit not only affirmed the remand order, but denied the defendants' motion to stay the mandate pending their certiorari petition to the Supreme Court. *See City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022) (affirming remand order); *City of Hoboken v. Chevron Corp., et al.*, No. 21-2728, Doc. 146 (3d Cir. Oct. 12, 2022) (denying motion to stay).

Finally, regardless of whether the Solicitor General recommends denial or grant of the *Boulder* petition, that recommendation will not affect—in any way—the likelihood of irreparable harm to Defendants. *See Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) ("Relief is not warranted unless the other factors [including irreparable harm] also counsel in favor of a stay. The Court's invitation to the Solicitor General does not lead me to depart from my previous assessment of those factors."). Indeed, even in cases where the Supreme Court has already granted certiorari review, "the extraordinary relief" of a stay is inappropriate if, as here, the movant fails to demonstrate likely irreparable harm. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301–02 (2014). As a result, nothing in the last three weeks has unsettled this Court's earlier conclusion that "[t]here is . . . no irreparable injury to Defendants in proceeding with the case." *City of Annapolis*, 2022 WL 4548226, at *4. And on that basis alone, the Court can—and should—deny Defendants' renewed Stay Motion.

B. Defendants Still Fail to Show a Strong Likelihood of Success on the Merits.

To satisfy the other "critical" factor of the stay standard, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434 (cleaned up). Even if Defendants could show any probable irreparable harm, their motion must be denied because they do not—and cannot—demonstrate the required strong likelihood of success on the merits. *See id.* As this Court previously found, "[a]ssuming Defendants successfully petition for certiorari, their track record across the country [including in the Fourth Circuit] fails to prove a likelihood of success on the merits sufficient to warrant a stay." *City of Annapolis*, 2022 WL 4548226, at *4. Nothing that has occurred since the Court's order changes that calculus.

1. The Circuit Courts Are Unanimous in Rejecting Defendants' Removal Arguments.

The Fourth Circuit and every other circuit court to consider the issue have held that removal jurisdiction does not exist in similar climate deception cases, including because the plaintiffs' state law claims are not governed by federal common law.[3] *See Baltimore*, 31 F.4th at 199–208; *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 53–56 (1st Cir. 2022); *City of Hoboken*, 45 F.4th 699, 707–13 (3d Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 746–48 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1257–61 (10th Cir. 2022).

Undeterred, Defendants attempt to manufacture a circuit split over their theory of federal-common-law removal, based primarily on the Second Circuit's opinion in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). *See* Memo. ISO Stay Mot. at 4. But in *Baltimore*, the Fourth Circuit already considered and distinguished *City of New York* on the basis of its "completely different procedural posture." 31 F.4th at 202–03. And every other circuit to consider the question has reached the same conclusion. *See City of Hoboken*, 45 F.4th at 708 ("But [*City of New York*] involved another ordinary-preemption defense to a case first filed in federal court."); *Rhode Island*, 35 F.4th at 55 ("*City of New York*, after all, is distinguishable in at least one key respect. There, unlike here, the government 'filed suit in *federal court* in the *first instance*[.]'"); *Boulder*, 25 F.4th at 1262 ("[T]he issues before the district court and the circuit [in

[3] Defendants rest their likelihood of success on the merits on a single potential ground for removal: that federal common law purportedly governs the City's state law claims. *See* Memo. ISO Stay Mot. at 2–5. They do not even attempt to show a likelihood of success on the merits as to any of the other grounds for removal they raised before this Court. Because Defendants effectively concede that they cannot make the required showing as to any other proffered ground for removal, the City's opposition addresses the sole ground argued by Defendants in the instant motion.

City of New York] were not within the context of removal."). That is not surprising because the Second Circuit itself disavowed any conflict between its holding in *City of New York* and the "fleet of cases" remanding climate-related lawsuits to state court. 993 F.3d at 94.

In short, courts are just as unanimous today as they were three weeks ago in their rejection of Defendants' removal arguments. In light of this "track record across the country," the Court should deny Defendants' second motion to stay for failure to demonstrate a sufficient "likelihood of success on the merits," just as it did with their first motion. *City of Annapolis*, 2022 WL 4548226, at *4.[4]

2. The Supreme Court's Call for the Solicitor General's Views Does Not Help Defendants.

The only changed circumstance Defendants identify since the Court's denial of their last stay motion—the Supreme Court's call for the views of the Solicitor General in *Boulder*—does not counsel a different result. In fact, the Third Circuit rejected this very argument in denying motions to stay two climate deception cases pending petitions for certiorari. *See* Defendants-Appellants' Citation of Supplemental Authorities, *City of Hoboken v. Chevron Corp., et al.*, No. 21-2728, Doc. 144, at 1–2 (Oct. 4, 2022) (arguing that the Supreme Court's call for the views of the Solicitor General "makes clear that the question is substantial" and renders the petition for certiorari far more likely to be granted, in part because of a purported conflict between "the United States' position and that of [the Third Circuit] (and the Tenth Circuit)" (internal quotation marks

[4] Defendants cite two cases for the proposition that a case is removable when state law claims are governed by federal common law. Memo. ISO Stay Mot. at 4 (citing *In Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997) and *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740 (E.D. Va. 2014)). But Defendants cited these exact cases before the Fourth Circuit in *Baltimore*, and the former before the Third Circuit in *City of Hoboken*, to no avail. Both appellate courts held that state law claims such as those at issue here do not arise under federal common law for purposes of jurisdiction. *Baltimore*, 31 F.4th at 199–208; *City of Hoboken*, 45 F.4th at 707–09.

and citations omitted)); *City of Hoboken*, No. 21-2728, Doc. 146 (3d Cir. Oct. 12, 2022) (order denying motions to stay mandates). This Court should do the same for at least four reasons.

First, "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000); *see also Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016) ("One panel's decision is binding, not only upon the district court, but also upon another panel of this court—unless and until it is reconsidered *en banc*." (cleaned up)). As Defendants concede, the *Boulder* petition only concerns their federal-common-law theory of removal jurisdiction. *See* Memo. ISO Stay Mot. at 2. And there is no question that the Fourth Circuit "resoundingly" rejected that theory in *Baltimore*, 31 F.4th at 199. Accordingly, this Court can—and should—disregard the *Boulder* petition when resolving Defendants' Stay Motion.

Second, even according to the outdated empirical analyses on which Defendants rely, the Supreme Court denies certiorari petitions in about two thirds of cases in which it seeks the views of the United States, and the likelihood of denial increases to about 80 percent when the United States recommends denying certiorari review. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 276, 295 (2009) (analyzing data from 1998 to 2004). A request for the Solicitor General's views is therefore "hardly dispositive of an application to block implementation of a Court of Appeals' judgment." *Conkright*, 556 U.S. at 1403.

Third, Defendants presume that the Solicitor General will recommend granting certiorari review in *Boulder* based on past *amicus* briefs filed in other cases. *See* Memo. ISO Stay Mot. at

3–4. But that assumption is unfounded. The United States has never taken a position on the cert-worthiness of Defendants' novel federal-common-law theory of removal.[5] *See* U.S. Sup. Ct. R. 10 (outlining the main factors considered by the Supreme Court in granting or denying certiorari review). And even if it had, the Solicitor General is free to revisit and modify previous positions taken by the United States as *amicus curiae*. Here, in the past year alone, five circuits have unanimously ruled against Defendants on the question presented in the *Boulder* petition; the Solicitor General has ample reason to take a fresh look at the issue.

Finally, even if the Solicitor General were to recommend granting certiorari review of the *Boulder* petition, and even if the Solicitor General were to further recommend reversing the appellate court's judgment (two big "ifs"), there is no indication this would render Defendants' likelihood of success on the merits sufficient to warrant a stay—the actual question at issue here. The empirical analyses Defendants cite confirm as much, showing that "[t]he Court's ultimate decision on the merits is only loosely correlated with the [Solicitor General]'s recommendation on the outcome at the petition stage." Thompson & Wachtell, *supra*, at 278. Thus, soliciting the views of the United States does not, standing alone, satisfy Defendants' burden to make "a strong showing that [they are] likely to succeed on the merits." *See Nken*, 556 U.S. at 434.

At bottom, Defendants' argument as to the sole changed circumstance since the Court's denial of their last motion to stay depends on a dubious series of hopeful assumptions and what-ifs. *See City & Cnty. of Honolulu v. Sunoco LP*, No. 20-163-DKW-RT, 2021 WL 839439, at *2 (D. Haw. Mar. 5, 2021) ("Defendants' remaining assertions for why they enjoy a likelihood of

[5] Nor does the United States' position in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011)—a case in which the plaintiffs brought federal-common-law nuisance claims seeking to cap polluters' emissions—say anything about the Solicitor General's views as to the removability of state law climate deception suits like this one.

success on the merits depend, as Plaintiffs explain, on multiple contingencies" and would require them to "knock down multiple litigation pins."). But hopes and assumptions do not a strong likelihood of success make. Because Defendants have again failed to establish this critical factor of the stay analysis, the Court should deny their Stay Motion.

C. A Stay Would Substantially Prejudice the City and Its Residents and Contravene the Public Interest.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. Where, as here, the party opposing the stay is a government entity, "[t]hese factors merge." *Id.* Although the Court need not reach these factors because Defendants fail to satisfy their burden as to the first two "critical" factors, *id.* at 434, the remaining factors further counsel against a stay.

This Court previously recognized the City's arguments that a stay would further delay reaching the merits and risk losing discoverable evidence. *City of Annapolis*, 2022 WL 4548226, at *4. This reality remains unchanged. As the City explained in opposing Defendants' previous stay motion, a stay pending resolution of a certiorari petition poses a real risk of permanently thwarting the City's access to discovery from elderly witnesses, whose memories will likely fade, and in the form of documentary evidence dating back decades.[6] *See Nero v. Mosby*, No. MJG-16-

[6] Defendants misguidedly rely on *Northrop Grumman Technical Services, Inc. v. DynCorp Int'l LLC*, No. 16CV534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Memo. ISO Stay Mot. at 6. But there, the district court emphasized that the defendants' federal officer issues raised "novel" issues of "first impression," including "complex questions and novel legal theories which the Fourth Circuit has yet to evaluate." *Northrop Grumman Tech. Servs., Inc.*, 2016 WL 3346349, at *3. Moreover, the state court had scheduled trial a mere five weeks after the stay order. *Id.* at *4. Here, by contrast, the Fourth Circuit has "resoundingly agree[d] with Baltimore and reject[ed] Defendants' attempts to invoke federal common law" as a basis for removal jurisdiction. *Baltimore*, 31 F.4th at 199. Additionally, there are no trial dates or even any scheduling order entered in either this Court or the state court.

1288, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017) (denying stay in part as "Plaintiffs will suffer substantial harm. There will be an unnecessary delay in their gathering evidence. And, there will be a delay in their obtaining an adjudication . . . of their claims").

Defendants make the baseless claim that a stay would benefit Annapolis. Memo. ISO Stay Mot. at 6. Quite the opposite. The local climate impacts caused by Defendants' tortious and deceptive conduct are growing by the day. *See* Complaint, Doc. 2 at 4–166, ¶¶ 236–42. Annapolis is already experiencing particularly fast sea level rise, which will continue to inundate local roads, increase the frequency and severity of flooding and storm surges, displace residents, and significantly impact the City's tourism and maritime industries, all while threatening its unique cultural and historical resources. *See id.* ¶ 238(a), (c). Extreme precipitation, heat, and other weather events are becoming more common, posing a heightened risk to low-income Annapolitans and communities of color. *See id.* ¶ 238(d). Air temperatures in and around Annapolis continue to rise at a faster-than-average rate, contributing to poorer air quality, more heat waves, and the attendant threats to human health as well as the area's native flora and fauna. *See id.* ¶ 238(e). As these environmental changes continue to increase in frequency and intensity, Annapolis's costs to mitigate and/or adapt to them increase accordingly. *See id.* ¶¶ 238(b), 240.

Staying this lawsuit would further delay the relief that Annapolis needed yesterday to protect its residents, infrastructure, and natural and historic resources, and to minimize the costs to respond to the environmental hazards proximately caused by Defendants' decades-long efforts to use deceit and disinformation to hyperinflate fossil fuel consumption[7]—all for the exceedingly slim probability that Defendants achieve success on the merits at the Supreme Court. Every day

[7] Defendants incorrectly assert that Annapolis "seeks only monetary damages for its alleged injuries." *See* Memo. ISO Stay Mot. at 6. Among numerous other remedies, Annapolis requests abatement of the alleged nuisances. *See* Complaint, Prayer for Relief ¶ 2.

of delay also gives Defendants more time to inundate consumers and the public with their climate disinformation campaigns, including by "greenwashing" their brands, which artificially inflates the market for fossil-fuel products and exacerbates the local climate harms facing Annapolis. *See id.* ¶¶ 60, 161–235. Given the increasing severity of local climate change impacts, time is of the essence to resolve the City's claims. *See Baltimore*, 2019 WL 3464667, at *6 (rejecting argument that a stay would not prejudice Baltimore because "a stay pending appeal would further delay litigation on the merits of the City's claims," which "favors denial of a stay, particularly given the seriousness of the City's allegations and the amount of damages at stake").

As such, there remains "a substantial public interest in moving th[is] case[] toward disposition." *City of Annapolis*, 2022 WL 4548226, at *5. Although the City filed this case in Maryland state court nearly 20 months ago, the case has yet to proceed beyond its initial stages as a result of Defendants' improper removal of this case. Particularly in light of the serious and ever-worsening climate impacts facing Annapolitans, there is a strong public interest in allowing this case to proceed to the merits without added delay. While Defendants have a right to appeal this Court's Remand Order, further delay in the prosecution of this case would undermine "Congress's longstanding policy of not permitting interruption of the merits of a removed case by prolonged litigation of questions of jurisdiction." *Powerex Corp.*, 551 U.S. at 238.

Finally, Defendants' purported concern with "unburdening the state court of potentially unnecessary litigation" should bear no weight in the Court's analysis. *See* Memo. ISO Stay Mot. at 6–7. Defendants may seek a stay of the litigation following remand to state court if they choose. The state court is eminently capable of managing its own resources and fully empowered to stay this case, should it exercise its discretion to do so. The public interest does not support Defendants' continued interference with state court proceedings. *See Browning v. Navarro*, 743 F.2d 1069,

1078 n.26 (5th Cir. 1984) (denying motion to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity").

D. The Court Should Deny Defendants' Unsupported Request to Enter a Stay to Enable Them to Seek a Stay From the Fourth Circuit.

The Court should also deny Defendants' alternative request for an additional stay of unspecified length to seek a stay from the Fourth Circuit. *See* Memo. ISO Stay Mot. at 7. The Fourth Circuit already denied the *Baltimore* defendants' motion to stay following the district court's denial of such a motion—as did the Supreme Court. *See Mayor & City Council of Baltimore v. BP P.L.C., et al.*, No. 19-1644, Doc. 116 (4th Cir. Oct. 1, 2019); *BP p.l.c. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019). There is no reason to believe the outcome would differ here, particularly given the slew of courts that have since rejected Defendants' removal arguments in analogous climate deception cases. Perhaps recognizing as much, Defendants advance not a single argument in support of this alternative request.

IV. CONCLUSION

The Court should deny Defendants' Stay Motion; deny their request for a stay to enable them to seek a stay from the Fourth Circuit; and transmit the City's case to state court, where it was filed and where it belongs.

Dated: October 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of October, 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.

/s/ Martin D. Quiñones
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