IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, Plaintiff, v. EXXON MOBIL CORP., *et al.*, Defendants.	Civil Action No. 1:20-cv-01932-TJK

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL

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INTRODUCTION

To preserve the meaningfulness of Defendants' appellate rights and spare the parties and the D.C. Superior Court from what could be a substantial amount of unnecessary and ultimately futile litigation, Defendants respectfully request that the Court stay execution of its Remand Order (Dkt. 117) until the D.C. Circuit has had the opportunity to determine whether this action was properly removed to federal court. Defendants filed their notice of appeal on November 28, 2022. *See* Dkt. 120. Defendants have the right to appeal the remand order because one of the grounds for removal was the federal officer removal statute, 28 U.S.C. § 1447(d), and the D.C. Circuit will be able to consider all of Defendants' grounds for removal on appeal. *See BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1540, 1542 (2021). Defendants' appeal will present serious legal questions of first impression in the D.C. Circuit. Indeed, the D.C. Circuit has not yet considered the propriety of removing climate change-related actions like this one on any of the grounds asserted by Defendants. It would be prudent to await a decision from the D.C. Circuit because the propriety of removal turns on issues of first impression that the D.C. Circuit (like the U.S. Supreme Court) has not yet addressed, but will soon address, and staying the case pending appeal will preserve both the parties' and the courts' resources.

This case presents several substantial legal questions, including whether Plaintiff's purportedly state-law claims arise under federal law. The Second Circuit held in a similar climate change-related case that "suit[s] over global greenhouse gas emissions" "must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91, 95 (2d Cir. 2021). Because "[g]lobal warming presents a uniquely international problem of national concern," the Second Circuit explained that "[i]t is therefore not well-suited to the application of state law." *Id.* at 85–86. This case also raises the propriety of removing claims under the federal officer removal

statute, the Outer Continental Shelf Lands Act ("OCSLA"), and federal enclave jurisdiction—issues that the D.C. Circuit has *never* addressed in the context of a climate change-related suit.

Moreover, the question of whether claims seeking redress for injuries allegedly caused by global warming are governed by federal law, and are therefore removable to federal court on that basis, has now been presented to the Supreme Court in three petitions for writs of certiorari—in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (U.S.) ("*Suncor*"), *Mayor & City Council of Baltimore*, No. 22-361 (U.S.), and *Chevron Corp. v. Cnty. of San Mateo*, No. 22A196 (U.S.). And additional petitions for writs of certiorari in substantially similar climate change-related cases—*Rhode Island v. Shell Oil Prod. Co.*, No. 22A233 (U.S.), *City & Cnty. of Honolulu v. Sunoco LP*, No. 22A239 (U.S.), and *City of Hoboken v. Chevron Corp.*, No. _____ (U.S.)—are due to be filed this year. If the Supreme Court determines that removal was proper, this case would remain in federal court and proceedings in the D.C. Superior Court would be unnecessary.

There is a very real possibility that the Supreme Court will grant certiorari and address this issue. There is currently a split between the federal courts of appeals on the threshold question of whether federal common law applies to these types of claims. And, *critically*, on October 3, 2022, the Supreme Court issued an Order inviting the Solicitor General to file a brief expressing the views of the United States on the petition for a writ of certiorari in *Suncor*, which *substantially increases* the likelihood that the Supreme Court will grant the certiorari petition. This makes a stay even more appropriate. Indeed, because of the Supreme Court's Order, the District of Maryland recently granted a stay of execution of its remand order and kept the case in federal court because "litigation in the state court now has potential to do more harm than good." *City of Annapolis v. BP P.L.C.*, 2022 WL 15523629, at *5 (D. Md. Oct. 27, 2022). The same is true here.

A stay is necessary to preserve the *status quo* while the D.C. Circuit and the Supreme Court resolve the question of where lawsuits like this one should proceed. To send this case back to the D.C. Superior Court now, while the appellate process remains ongoing, would risk wasting significant judicial and party resources because if the Supreme Court or the D.C. Circuit determines removal was proper, any time and effort spent by the Superior Court and the parties in municipal court would be for naught. A brief stay now, rather than rushing into potentially unnecessary litigation, is the most efficient, reasonable, and logical course of action.

For these reasons, and as described in Defendants' Emergency Motion to Stay, Dkt. 119 at 5–7, multiple federal courts have granted stays of remand orders in similar climate change-related cases while their respective circuits considered these questions of first impression—even *before* the Supreme Court called for the views of the Solicitor General in *Suncor*. For example, the District of Minnesota stayed execution of its remand order pending appeal because "[c]onsiderations 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." *Minnesota v. American Petroleum Institute*, 2021 WL 3711072, at *4 (D. Minn. Aug. 20, 2021). Similarly, the District of Delaware stayed execution of its remand order while the Third Circuit considered the matter because Defendants' right to appeal "could be effectively eliminated (or at least seriously jeopardized) by a premature remand, causing irreparable harm." *Delaware v. BP Am. Inc.*, 2022 WL 605822, at *2 (D. Del. Feb. 8, 2022). And the District of New Jersey likewise stayed remand because "[g]iven Defendants' clear right to have the [court of appeals] review the Remand Order, returning the case now could defeat the very purpose of appellate review." *City of Hoboken v. Exxon Mobil Corp., et al.*, No. 20-cv-14243, Dkt. 133 at 5 (D.N.J. Dec. 15, 2021). The First Circuit has similarly cautioned that "allowing a

district court to render the permitted appeal nugatory by prematurely returning the 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" and explained that "[n]either Supreme Court precedent nor our own case law demands so illogical a result." *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 79 (1st Cir. 2021). Indeed, just last month, the Northern District of California stayed execution of its remand order *sua sponte* (and without briefing from the parties) "*until all appeals are exhausted*." *City of Oakland v. BP p.l.c.*, 2022 WL 14151421, at *9 (N.D. Cal. Oct. 24, 2022) (emphasis added).

As these decisions—from *federal courts across the country* in similar climate cases—make clear, it is appropriate for a court to stay remand pending appeal where doing so will avoid the "rat's nest of comity and federalism issues" that could arise upon the reversal of a remand order after months (or even years) of litigation in state court, during which time the state court could have invested substantial time and resources and made numerous rulings. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Moreover, remanding to allow state court litigation to proceed while the parties are before the D.C. Circuit on appeal would undermine and potentially frustrate Defendants' appellate rights, needlessly impose costs and burdens on the courts and parties alike, and unduly complicate this litigation. Staying the Remand Order, on the other hand, would not prejudice Plaintiff and would avoid irreparable harm to Defendants, conserve judicial resources, and serve the interests of judicial efficiency. Accordingly, the Court should stay execution of the Remand Order, including directing the Clerk to refrain from certifying and mailing the Remand Order to the D.C. Superior Court, pending the outcome of Defendants' appeal. At a minimum, the Court should enter a stay

of the Remand Order to provide sufficient time for Defendants to seek a stay pending appeal from the D.C. Circuit and for the D.C. Circuit to rule on that application.

PROCEDURAL BACKGROUND

On June 25, 2020, Plaintiff District of Columbia filed a Complaint in D.C. Superior Court. *See D.C. v. Exxon Mobil Corp. et al.*, No. 2020 CA 002892 B (D.C. Super. Ct.). On July 17, 2020, Defendants removed the case pursuant to 28 U.S.C. §§ 1331, 1332(a), 1332(d), 1441(a), 1442(a), 1446, 1453(b), and 1367(a) and 43 U.S.C. § 1349(b)(1). *See* Dkt. 1. Plaintiff filed a motion to remand, which the Court granted on November 12, 2022. *See* Dkt. 117. Defendants filed an emergency motion to stay execution of the remand order pending appeal on November 13, 2022, Dkt. 119, which the Court granted. Defendants filed their notice of appeal on November 28, 2022. *See* Dkt. 120.

LEGAL STANDARD

District courts have the authority to stay entry of an order or judgment in proceedings pending before them. *See* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."). This includes the authority to stay remand orders pending appeal. *See*, *e.g.*, *Michigan Gambling Opposition v. Norton*, 2007 WL 9771122, at *3 (D.D.C. Mar. 5, 2007). In deciding whether to enter a stay, courts consider the following factors: "(1) whether the party seeking the stay is likely to succeed on the merits; (2) whether the moving party will be irreparably harmed if the stay is denied; (3) whether third parties will be harmed if the stay is denied; and (4) whether the public interest favors granting the stay. *Population Institute v. McPherson*, 254 U.S. App. D.C. 395, 797 F.2d 1062, 1078 (D.C. Cir. 1986). "The first two factors . . . are the most critical." *Confederated Tribes of Chehalis Rsrv. v. Mnuchin*, 2020 WL 3791874, at *2 (D.D.C. July 7, 2020) (quoting

Nken v. Holder, 556 U.S. 418, 434 (2009)). Importantly, to establish Defendants are "likely to succeed on the merits," Defendants "need *not* demonstrate that it is more likely than not that they will win on the merits"—rather, they need show only that the appeal raises "serious legal questions." *Leiva-Perez v. Holder*, 640 F.3d 962, 966–68 (9th Cir. 2011) (emphasis added).

ARGUMENT

I. Defendants' Appeal Raises Serious Legal Questions About Federal Jurisdiction Over Climate Change-Related Claims.

Defendants have a substantial likelihood of success on the merits of their appeal because it will present issues of first impression for the D.C. Circuit. It is well established that questions of first impression raised in an appeal *or* issues causing a split in legal authority warrant a stay. *See, e.g.*, *Nw. Airlines v. E.E.O.C.*, 1980 WL 4650, at *1 (D.C. Cir. Nov. 10, 1980) ("The stay is ordered in light of the questions of first impression raised by this appeal."); *Delisle v. Speedy Cash*, 2019 WL 7755931, at *2 (S.D. Cal. Oct. 3, 2019) ("A 'substantial case' exists where the applicant's claims raise 'serious legal questions,' i.e., 'issue[s] of first impression' or issues causing a split in legal authority." (quoting *Wilson v. Huuuge, Inc.*, 2019 WL 998319, at *2 (W.D. Wash. Mar. 1, 2019))); *In re Pacific Fertility Ctr. Litig.*, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019) ("Courts . . . have found that the following constitute serious legal issues: issues of first impression . . . ."); *In re Friedman*, 2011 WL 1193470 (D. Ariz. Mar. 29, 2011) ("Appellants have a reasonable chance of prevailing on appeal" given a "split of trial court authority"). Both are present in this case.

First, Defendants have a reasonable probability of demonstrating that removal was proper because Plaintiff's claims are necessarily and exclusively governed by federal common law. The Supreme Court has consistently admonished that, "where there is an overriding federal interest in the need for a uniform rule of decision," *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)

("*Milwaukee I*"), "state law cannot be used," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Interstate pollution is one such area: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court explained, "[f]ederal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9.

Citing this "mostly unbroken string of cases . . . appl[ying] federal law to disputes involving interstate air or water pollution," the Second Circuit held that similar climate change-related claims were necessarily governed by federal law, even though they were pleaded under state law. *City of New York*, 993 F.3d at 91. The court reasoned that climate change "presents a uniquely international problem of national concern [and] is therefore not well-suited to the application of state law," *id.* at 86–87, such that the plaintiff's claims "must be brought under federal common law," *id.* at 95. The plaintiff in *City of New York* filed its complaint in federal court, but the Second Circuit's rationale for dismissing the claims on the merits—because they were necessarily governed by federal law—supports removal of these types of cases. Specifically, the court concluded that claims seeking redress for injuries allegedly caused by interstate emissions, although pleaded under state law, are "federal claims." *Id.* at 95. Such claims, like Plaintiff's claims here, thus arise under federal law for purposes of 28 U.S.C. § 1331 and are removable under 28 U.S.C. § 1441.

The Second Circuit expressly rejected the plaintiff's attempt to reframe its case as focused on anything other than interstate and international greenhouse gas emissions:

> Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages. Put differently, the City's complaint whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of the City's harm. But the City cannot have it both ways.

Id. at 91.

So too here. *See* Remand Opinion at 16 (acknowledging that "the injuries the District[] alleges . . . trace back to fossil fuel usage"). And while the Second Circuit acknowledged other "recent opinions holding that 'state-law claim[s] for public nuisance [brought against fossil fuel companies] do[] not arise under federal law,'" *City of New York*, 993 F.3d at 93, that conflict simply confirms that a serious legal question exists and warrants a stay pending appeal.[1]

To the extent this Court's Remand Order depends on its interpretation of Plaintiff's Complaint as targeting "false advertising—not fossil fuel production," Remand Opinion at 16, that conclusion *itself* presents a substantial legal question. As the District of Minnesota observed in granting a stay in a similar action, although the Second Circuit case involved claims of "public and private nuisance related explicitly to environmental and infrastructure damage" (which the court considered "markedly different causes of action than the consumer protection and misrepresentation claims" at issue), the Second Circuit decision nevertheless "provides a legal justification for addressing climate change injuries through the framework of federal common law and 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.

[1] There is currently an appeal pending before the Second Circuit in *Connecticut v. Exxon Mobil Corp.*, No. 21-1446, involving climate change-related claims. Notably, the Second Circuit reversed the District of Connecticut's denial of 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." *Connecticut* v. *Exxon Mobil Corp.*, No. 21-1446 (2d Cir. Oct. 5, 2021), ECF No. 80.

Moreover, there is a reasonable probability that the D.C. Circuit will conclude that claims that are necessarily governed by federal common law are subject to federal jurisdiction. Claims are removable if a plaintiff could have invoked a federal court's jurisdiction and "filed its operative complaint in federal court." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). And it is "well settled" that 28 U.S.C. § 1331's "grant of 'jurisdiction will support claims founded upon federal common law.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citation omitted). Because Plaintiff's claims here are governed by federal common law and could have originally been brought in federal court, removal is appropriate. Multiple courts of appeals have also held that federal common law provides a "permissible basis for jurisdiction based on a federal question." *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997) (concluding that "removal [was] proper" because plaintiff's pleaded state-law claims "arose under federal common law").

Critically, the Supreme Court is now poised to consider and address these *very issues*. There is a substantial possibility that the Supreme Court will grant certiorari in *Suncor* and find that these climate change-related cases are governed by federal common law and therefore belong in federal court. *Suncor* involves a set of climate change-related cases seeking damages for purported localized injuries allegedly caused by global climate change from worldwide greenhouse gas emissions. In 2019, the U.S. District Court for the District of Colorado remanded the cases to state court, and the Tenth Circuit affirmed remand earlier this year. *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022). The defendants in those cases—including ExxonMobil, a Defendant in this case—filed a petition for a writ of certiorari on June 8, 2022, asking the Supreme Court to decide two questions:

(1) "[w]hether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate" and (2) "[w]hether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law." *Suncor* Petition for a Writ of Certiorari at i. The defendants in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 22-361 (U.S.) and *Chevron Corp. v. Cnty. of San Mateo*, No. 22A196 (U.S.)—including Defendants in this case—presented *these same issues* in their petitions for writs of certiorari to the Supreme Court, which were filed on October 14, 2022 and November 22, 2022, respectively. If the Supreme Court grants certiorari and answers these questions in the affirmative, removal would be appropriate here and remanding the case to state court would be improper.

The Supreme Court's recent order inviting the Solicitor General to provide the views of the United States on these issues in *Suncor* is significant because petitions for which the Court calls for the Solicitor General's views are "over 46 times more likely to be granted" than the average petition.[2] Moreover, the United States previously has taken the position that climate change-related claims similar to the ones asserted here are properly removable because "they are inherently and necessarily federal in nature." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189) (citing *City of Oakland v. B.P. p.l.c.*, No. 18-16663 (9th Cir.), Dkt. 198); *see also* Transcript of Oral Argument at 31:2-12, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189) (explaining that "potentially conflicting" state law is

[2] 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, 274 (2009).

inappropriate because the case "depends on alleged injuries . . . caused by emissions from all over the world"); *Oakland.*, Dkt. 198 at 2 ("A putative state-law claim is also removable if alleged in a field that is properly governed by federal common law such that a cause of action, if any, is necessarily federal in character."). And the United States, under the Obama Administration, warned of the risk that common-law suits targeting greenhouse gas emissions might interfere with federal regulations, noting that the "EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits" by "actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources of greenhouse gases will be regulated." Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners at 45–46, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (No. 10-174) (2011 WL 1393805). The conflict between the United States' position—that claims asserting injuries from global climate change are inherently federal—and the position of the Tenth Circuit in *Suncor* (and the Fourth and Ninth Circuits in *Baltimore* and *San Mateo*) further weighs in favor of Supreme Court review.

These are precisely the types of "compelling reasons" that support a grant of certiorari by the Supreme Court. *See* Sup. Ct. R. 10. Indeed, the Supreme Court's order makes clear that the question is "of sufficient public concern" for the Court to consider the government's views "relevant to [its] consideration of the case." Stephen M. Shapiro et al., *Supreme Court Practice* 6-163 (11th ed. 2019). Accordingly, there is a significant probability that the Supreme Court will grant certiorari and decide the issues presented in *Suncor*, *Baltimore*, and *San Mateo*.

There is also a reasonable likelihood that the Supreme Court will reverse the Fourth, Ninth, and Tenth Circuits' decisions and find that these types of climate change-related cases are necessarily and exclusively governed by federal common law and, therefore, removable to federal

court. Although a number of circuits that have addressed these questions have concluded the opposite, those decisions stand in stark contrast to other court of appeals decisions. For example, as explained above, the Second Circuit has squarely held, in reliance on a long line of Supreme Court authority, that claims seeking redress for alleged injuries caused by global climate change are "federal claims" that "must be brought under federal common law." *City of New York v. Chevron Corp*., 993 F.3d 81, 92, 95 (2d Cir. 2021). If the Supreme Court were to adopt the Second Circuit's approach, the claims alleged here would be removable to federal court. *See*, *e.g.*, *In Sam L. Majors Jewelers v. ABX, Inc.,* 117 F.3d 922, 924, 928 (1997) (holding that "removal is proper" when nominally state law claims in fact "ar[i]se under federal common law"); *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 745 (E.D. Va. 2014) ("[A] case is properly removed if federal common law governs it."). And the fact that the Supreme Court has now issued an order seeking the views of the Solicitor General demonstrates that multiple Justices are interested in these issues and that the Court may reverse the Fourth, Ninth, and Tenth Circuits.

Second, Defendants have a reasonable probability of demonstrating that Plaintiff's claims involve a substantial and necessary federal element under *Grable* and thus that the D.C. Circuit will sustain *Grable* jurisdiction in light of the substantial federal issues that are actually disputed in this case. This is a question of first impression because the D.C. Circuit has never considered whether climate change-related actions are removable under *Grable*. Adjudicating Plaintiff's claims will require the court to balance the competing interests of environmental protection, on one hand, and economic growth and national security, on the other. And, to the extent Plaintiff's claims rely on allegations of a "disinformation campaign," they necessarily include affirmative federal-law elements governed by the First Amendment that must be addressed and resolved by the court.

Third, Defendants' appeal will present a serious question regarding the propriety of removal under the federal officer removal statute, which, again, is a question of first impression in the D.C. Circuit in the context of climate change-related cases. There is a reasonable likelihood that the D.C. Circuit will find that Defendants have presented sufficient evidence to support federal officer removal. In denying removal on this ground, this Court held that Defendants had not shown a sufficient "'nexus' . . . between 'the charged conduct and the asserted official authority.'" Remand Opinion at 16 (quoting *K&D LLC v. Trump Old Post Office, LLC*, 951 F.3d 503, 507 (D.C. Cir. 2020)). Evaluation of the nexus or "relating to" prong of federal officer removal presents a serious legal question. Whether Defendants' activities under the direction, supervision, and control of federal officers, including, but not limited to, Defendants' production of fossil fuels and development of specialized military products in support of multiple war efforts, "relate to" Plaintiff's claims has not been considered by the D.C. Circuit and presents a serious legal question of first impression. And there is a reasonable probability that the D.C. Circuit will find there is a sufficient nexus, particularly because a court is required to "credit [the defendant's] theory of the case," *Jefferson County v. Acker*, 527 U.S. 423, 432 (1999), and grant it the "benefit of all reasonable inferences from the facts alleged," *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020). Indeed, the D.C. Circuit has held that the nexus requirement requires only that Defendants' activities are "connected or associated with" Plaintiff's claims. *K&D LLC*, 951 F.3d at 506.

Fourth, Defendants have a substantial argument that OCSLA confers federal jurisdiction over this action. OCSLA gives federal district courts original jurisdiction over actions that "aris[e] out of, or in connection with . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the

[OCS]." 43 U.S.C. § 1349(b)(1). While this Court held that OCSLA jurisdiction does not exist because Plaintiff's claims do not "arise out of, or in connection with" Defendants' activities on the Outer Continental Shelf, it acknowledged that the D.C. Circuit has never considered the scope of this jurisdictional phrase. *See* Remand Opinion at 13. As noted above, it is well established that a question of first impression is sufficient to justify a stay. *See supra* at 6.

Fifth, the propriety of federal enclave jurisdiction also presents a serious legal question. *See Jograg v. Enter. Servs., LLC*, 270 F. Supp. 2d 10, 16 (D.D.C. 2017) (explaining that the enclave clause has "generally [been] read" to "establish federal subject matter jurisdiction over tort claims occurring on federal enclaves."). Plaintiff does not dispute that Defendants conduct substantial fossil fuel production on federal enclaves. The Court noted that "the law in this area" is "*not entirely settled*," Remand Opinion at 12 (emphasis added), but declined to find enclave jurisdiction because "[t]he District alleges Defendants' false advertising affected consumers across the District of Columbia" and "the resulting injuries . . . occurred throughout the District of Columbia," *id.* at 13. Defendants argue, by contrast, that even if Plaintiff's claims are based *in part* on alleged misrepresentations that did not occur on federal enclaves, that does not defeat federal jurisdiction so long as "*some of the events* alleged . . . occurred on a federal enclave." *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (emphasis added); *see also Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012) ("A suit based on events occurring in a federal enclave . . . implicates federal question jurisdiction under § 1331."). The extent of activities on federal enclaves necessary to support federal enclave jurisdiction is an issue of first impression in the D.C. Circuit, and the resolution of this serious legal question may have a significant bearing on whether removal is proper in this case.

II. Defendants Will Suffer Irreparable Harm Absent a Stay.

Once the Court Clerk mails the certified copy of the Remand Order, "the State Court may thereupon proceed with such case." 28 U.S.C. § 1447(c). Thus, absent a stay of the Remand Order, the parties will be forced to proceed simultaneously along at least two tracks: they will brief and argue Defendants' appeal from the Remand Order in the D.C. Circuit while litigating Plaintiff's claims in the D.C. Superior Court.

Denying this Motion could render Defendants' right to appeal hollow if the municipal court undertakes to issue rulings on the merits. *Cf. Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."); *Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (finding that the balance of hardships tipped in favor of granting stay because the right to appeal an order to disclose information "would become moot" absent a stay). Because any "intervening state court judgment or order could render the appeal meaningless," Defendants face "severe and irreparable harm if no stay is issued." *Northrop Grumman*, 2016 WL 3346349, at *4. As the court in *Minnesota* recognized, "dispositive resolution of the claims pending full appellate review would constitute a concrete and irreparable injury, 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 (internal quotation marks omitted). The District of Delaware similarly found a likelihood of irreparable harm absent a stay, because the Defendants' right to appeal "could be effectively eliminated (or at least seriously jeopardized) by a premature remand, causing irreparable harm." *Delaware*, 2022 WL 605822, at *2.

As Judge Vazquez of the District of New Jersey explained in granting a stay in a similar case: "Given Defendants' clear right to have the Third Circuit review the Remand Order, returning the case now could *defeat the very purpose of appellate review*." *City of Hoboken v. Exxon Mobil Corp., et al.*, No. 20-cv-14243, Dkt. 133 at 5 (D.N.J. Dec. 15, 2021) (emphasis added). The First Circuit has similarly cautioned that "allowing a district court to render the permitted appeal nugatory by prematurely returning the 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" and explained that "[n]either Supreme Court precedent nor our own case law demands so illogical a result." *Forty Six Hundred LLC*, 15 F.4th at 79. Appellate review is particularly important here because, as the District of Minnesota explained in granting a stay, these climate change-related "action[s] raise[] weighty and significant questions that intersect with rapidly evolving areas of legal thought." *Minnesota*, 2021 WL 3711072, at *2.

In addition, Defendants would be irreparably harmed if they were forced to litigate their federal appeal and the case in D.C. Superior Court simultaneously. Even if Defendants' appeal is expedited, during the appeal, the D.C. Superior Court could rule on various substantive and procedural motions, including dispositive motions on the parties' claims and defenses. It is also possible that it will decide discovery motions. And there is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, Plaintiff may argue that D.C. Superior Court has different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in state court would be different than in federal court. There is no way to un-ring the bell as a practical matter because Defendants are unlikely to recover much (if any) of their discovery costs from the governmental Plaintiff in this case—and the burden of having proceeded unnecessarily with discovery is

unrecoverable. This constitutes irreparable harm. *See Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting litigation costs would be avoided); *cf. Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1125 (9th Cir. 2008) (considering "otherwise avoidable financial costs" in irreparable harm analysis).

Moreover, if the D.C. Circuit ultimately concludes that Defendants properly removed this action, this Court would have to wrestle with the effects of any state court rulings made while the Remand Order was on appeal. Among other things, the Court would need to revisit the scope of any discovery orders, determine whether and to what extent any discovery that was improperly ordered may be clawed back or subjected to protective orders, evaluate the precedential or persuasive force of any intervening merits orders issued by the state court, and more. This would create a "rat's nest of comity and federalism issues" that would need to be untangled if the D.C. Circuit reverses. *Northrop Grumman*, 2016 WL 3346349, at *4.

"District courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal," *id.* at *3, and routinely grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens posed by simultaneous litigation in state and federal courts. *See, e.g.*, *id.* (entering stay because, "[i]f this order is not stayed, Plaintiff and Defendant will also both face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court"); *Raskas*, 2013 WL 1818133, at *2 (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while the case is pending" on appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential of inconsistent outcomes if the state court rules on any motions while the appeal is

pending"); Order Granting Motions to Stay. Dkt. 219, *Cnty. of San Mateo v. Chevron Corp.*, No. 17-cv-04929 (N.D. Cal. Apr. 9, 2018).

III. The Balance of Harms Tilts Sharply in Defendants' Favor.

"'Where, as here, the Government is the opposing party' the last two factors 'merge': 'the government's interest is the public interest.'" *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (quoting *Nken*, 556 U.S. at 435). Plaintiff will not be harmed if the Court grants Defendants' Motion. As the District of Maryland recently noted in granting a stay of proceedings in a parallel case, "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that defendants' activities have allegedly helped set in motion. The urgency of the threat of climate change writ large is distinct from plaintiff's interest in a speedy determination of federal jurisdiction in this suit." *City of Annapolis v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021).

In fact, Plaintiff will benefit from a stay. With a stay in place, Plaintiff—like Defendants—will avoid the same risk of harm from potentially inconsistent outcomes. *See Raskas*, 2013 WL 1818133 at *2. Similarly, a stay would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate Defendants' appeal without being saddled with simultaneous municipal court litigation. *See Dalton*, 2013 WL 2367837, at *2 ("[N]either party would be required to incur additional expenses from simultaneous litigation."). Moreover, "conserving judicial resources and promoting judicial economy" is a recognized ground for a stay, and a stay here would prevent the D.C. Superior Court from being burdened by potentially unnecessary litigation. *See Raskas*, 2013 WL 1818133 at *2; *see also United States v. Real Prop. & Improv. Located at 2366 San Pablo Ave., Berkeley, Cal.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015) (noting that there is "a cognizable public interest in promoting judicial economy"); *Citibank*, 2017 WL 4511348, at *3.

As then-Chief Judge Stark of the District of Delaware found in granting a stay in similar circumstances: "A stay pending appeal in this case will not substantially harm Plaintiff and will serve the public interest." *Delaware*, 2022 WL 605822, at *3. He found that "the limited stay authorized by [his] order [would] not 'indefinitely delay the case,'" as plaintiff argued. *Id.* Rather, "as Defendants persuasively observe[d], 'the stay in this case would be no more 'indefinite' than any other stay pending appeal" and "a relatively short pause of this likely lengthy litigation will not substantially harm Plaintiff's ability to prosecute its case." *Id*. He went on to explain that "[t]he interests of judicial economy and the conservation of public resources strongly favor a stay. The public interest would be best served by avoiding the possibility of unnecessary or duplicative litigation and concentrating resources on litigating Plaintiff's claims in the proper forum after the Third Circuit determines the jurisdictional issues presented in this case." *Id.* The same is true here.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and stay execution of the Remand Order pending appeal. At the very least, the Court should continue its temporary stay to preserve Defendants' right to seek a stay from the D.C. Circuit and allow the D.C. Circuit to rule on that application.

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Respectfully submitted,

By: */s/ Theodore V. Wells, Jr.*
Theodore V. Wells, Jr. (D.C. Bar No. 468934)
Daniel J. Toal (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

By: */s/ Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr., (D.C. Bar No. 420440)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
E-mail: tboutrous@gibsondunn.com

Tel: (212) 373-3000
Fax: (212) 757-3990
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com

Justin Anderson (D.C. Bar No. 1030572)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Tel: (202) 223-7321
Fax: (202) 223-7420
E-mail: janderson@paulweiss.com

Patrick J. Conlon, (D.C. Bar No. 414621)
EXXON MOBIL CORPORATION
22777 Springwoods Village Parkway
Spring, TX 77389
Tel: (832) 624-6336
E-mail: patrick.j.conlon@exxonmobil.com

Craig Thompson (D.C. Bar No. 500168)
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Tel: (410) 244-7605
Fax: (410) 244-7742
E-mail: cathompson@venable.com

Attorneys for Defendants EXXON MOBIL CORPORATION and EXXONMOBIL OIL CORPORATION

By: */s/ David C. Frederick*
David C. Frederick (D.C. Bar No. 431864)
Grace W. Knofczynski (D.C. Bar. No. 1500407)
Daniel S. Severson (D.C. Bar. No. 208807)
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036
Tel: (202) 326-7900
Fax: (202) 326-7999

Thomas G. Hungar (D.C. Bar No. 447783)
Joshua S. Lipshutz (D.C. Bar No. 1033391)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
Tel: (202) 955-8500
E-mail: thungar@gibsondunn.com
E-mail: jlipshutz@gibsondunn.com

Attorneys for Defendants CHEVRON CORP. and CHEVRON U.S.A.

By: */s/ James W. Cooper*
James W. Cooper (D.C. Bar. No. 421169)
Ethan Shenkman (D.C. Bar No. 454971)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
Tel: (202) 942-500
Fax: (202) 942-5999
E-mail: ethan.shenkman@arnoldporter.com
E-mail: james.w.cooper@arnoldporter.com

Nancy G. Milburn (*pro hac vice*)
Diana E. Reiter (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Tel: (212) 836-8000
Fax: (212) 836-8689
E-mail: nancy.milburn@arnoldporter.com
E-mail: diana.reiter@arnoldporter.com

John D. Lombardo (*pro hac vice*)
Matthew T. Heartney (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000
Fax: (213) 243-4199
E-mail: john.lombardo@arnoldporter.com
E-mail: matthew.heartney@arnoldporter.com

Jonathan W. Hughes (*pro hac vice*)

E-mail: dfrederick@kellogghansen.com
E-mail: gknofcynzski@kellogghansen.com
E-mail: dseverson@kellogghansen.com

Attorneys for Defendants SHELL PLC (F/K/A ROYAL DUTCH SHELL PLC) and SHELL USA, INC. (F/K/A SHELL OIL COMPANY)

ARNOLD & PORTER KAYE SCHOLER LLP
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Tel: (415) 471-3156
Fax: (415) 471-3400
E-mail: jonathan.hughes@arnoldporter.com

Attorneys for Defendants BP PLC and BP AMERICA INC.