



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Plaintiff,

v.

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

Defendants.

C.A. No. N20C-09-097-AML CCLD

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY

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I. INTRODUCTION

Defendants respectfully request that the Court stay this matter pending resolution of the currently pending petitions for writs of certiorari to the United States Supreme Court in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (U.S.) (“*Suncor*”), and *Mayor & City Council of Baltimore v. BP*, No. 22-361 (U.S.) (“*Baltimore*”), as well as the forthcoming petition for a writ of certiorari seeking review of the Third Circuit’s decision in this action.

Notably, last month the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on the petition for a writ of certiorari in *Suncor*. This development substantially increases the likelihood that the Supreme Court will grant certiorari and address whether cases like this one, which seek damages for alleged harms from global climate change, belong in federal court, rather than state court. Accordingly, as multiple state courts have concluded in circumstances nearly identical to those presented here, a stay until that question is decided is in the interest of justice and will promote judicial efficiency.

Over the past five years, more than twenty States and municipalities have filed similar actions against select energy companies, seeking redress for alleged past and future harms allegedly stemming from countless sources, including entities that sold and consumed fossil fuel products around the world, resulting in undifferentiated

global emissions. Plaintiff’s claims are necessarily and exclusively governed by federal law because the alleged injuries are all based on the purported effects of global climate change arising from interstate and international emissions of greenhouse gases that have been accumulating worldwide since the Industrial Revolution.

As a matter of constitutional structure, Plaintiff’s claims necessarily “arise under” federal law, and this case belongs in federal court. The Supreme Court has stated that “the basic scheme of the Constitution . . . demands” that “federal common law” govern disputes involving “air and water in their ambient or interstate aspects.” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (“*AEP*”); *see also City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (explaining that “[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively ‘exacerbate global warming’—that the [plaintiff] is seeking damages.” (emphasis in original)). “[O]ur federal system does not permit [a] controversy [of this sort] to be resolved under state law.” *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Indeed, “state law cannot be used” at all. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also City of New York*, 993 F.3d at 98 (finding federal common law governs climate change-related claims “because state law cannot be used”). Because these claims necessarily arise under federal law, this case, and cases like it, belong in federal court.

The District Court and the Third Circuit disagreed and remanded this case to state court. But these questions have now been presented to the Supreme Court, and it makes good sense for this Court to stay proceedings so that the Supreme Court can address the question of whether this case, and cases like it, are governed by federal common law and thus belong in federal court. A stay pending the ultimate resolution of the federal jurisdiction question by the Supreme Court is in the interest of justice and judicial economy because, if the Supreme Court determines that removal was proper, this case would immediately return to federal court and any further proceedings in this Court would be entirely unnecessary.

There is a very real possibility that the Supreme Court will grant certiorari and address this issue. There is currently a split among the federal courts of appeals on the threshold question of whether federal common law applies to these types of climate change-related claims. The Second Circuit held that federal common law necessarily governs such claims, whereas the Fourth Circuit declined to apply federal common law. *Compare City of New York*, 993 F.3d at 92, 95 (holding that “[s]uch a sprawling case [as this one] is simply beyond the limits of state law” and that these types of claims “must be brought under federal common law”) *with Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 202 (4th Cir. 2022) (finding “no reason to fashion any federal common law.”). The Fourth Circuit further held that it “defies logic” to conclude that federal common law would continue to exist

after being displaced by the Clean Air Act. *Baltimore*, 31 F.4th at 206. The Second Circuit, however, held that federal common law governed plaintiff’s claims and that reaching the opposite conclusion—*i.e.*, that displacement “gives birth to new state-law claims”—would be “too strange to seriously contemplate.” *City of New York*, 993 F.3d at 99. Given these clear and direct circuit conflicts, the Supreme Court may very well grant review and ultimately conclude that actions (including this one) were properly removed on the basis of federal question jurisdiction. If so, this Court would be divested of jurisdiction, and the action would proceed in federal court.

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*, a petition involving a nearly identical set of climate change-related cases that were also remanded to state court. As explained below, this development substantially increases the likelihood that the Supreme Court will grant certiorari. In fact, as a result of the Supreme Court’s Order, the District of Maryland recently granted a stay of execution of its order remanding a similar case to state court—thereby keeping 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).

Even *before* the Supreme Court’s Order, multiple state courts issued stays in circumstances nearly identical to those presented here. Recognizing the likelihood

that further state court proceedings may be rendered unnecessary by the Supreme Court, two Colorado state courts and a Maryland state court presiding over similar cases granted motions to stay pending defendants’ petitions for writs of certiorari. Those stay motions were premised on the same reasoning underlying this motion—it makes eminent sense to stay proceedings in state court until the federal appellate process is concluded and the question of federal jurisdiction is finally resolved. The Colorado courts granted the motions to stay *just one* day after briefing concluded, with one explicitly finding that there was “good cause” to grant a stay and that “no undue prejudice” would result. See **Exhibit A**, 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 **Exhibit B**, 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). Similarly, the Maryland court ordered that state court proceedings be stayed pending “resolution of a petition for certiorari to the Supreme Court of the United States.” **Exhibit C**, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Balt. City. Cir. Ct. July 22, 2022). Defendants respectfully submit that this Court should do the same.

In short, a stay would preserve the *status quo* until the federal appellate process is completed and there is a final determination of where this action will

proceed, and a stay would not prejudice Plaintiff. A brief stay, rather than rushing into potentially unnecessary and wasteful litigation in what may turn out to be the wrong forum, is the most efficient, reasonable, and logical course of action.

II. BACKGROUND

Plaintiff seeks relief for injuries allegedly suffered as a result of global climate change allegedly exacerbated by Defendants' production, promotion, and sale of fossil fuel products. Plaintiff argues that its claims are governed by Delaware law.¹

Defendants timely removed this action to the U.S. District Court for the District of Delaware. *See* Notice of Removal, *Delaware v. BP America Inc., et al.*, No. 20-1429, D.I. 1 (D. Del. Oct. 23, 2020). Defendants asserted numerous grounds for removal, including that (i) Plaintiff's climate change-related claims are necessarily governed by federal common law, warranting federal question jurisdiction; and (ii) Defendants are being sued for acts taken under the direction of federal officers, permitting federal officer removal jurisdiction. *See id.* The District of Delaware granted Plaintiff's motion to remand, *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618, 625 (D. Del. 2022), and the Third Circuit affirmed, *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 706 (3d Cir. 2022). Defendants intend to petition the Supreme Court for a writ of certiorari, which is currently due by December 29,

¹ Defendants submit this motion subject to, and without waiver of, any jurisdictional objections.

2022. *See* U.S. Sup. Ct. R. 13.

The appeal of this action is just one of the many climate change-related appeals across the country. Similar climate change-related cases brought by plaintiffs in various other jurisdictions are all at the same stage—seeking Supreme Court review of the federal jurisdiction question. At this time, the petition for a writ of certiorari in *Suncor* is briefed, and the Supreme Court recently issued an Order calling for the views of the Solicitor General on that petition. The petition in *Baltimore* has been filed, and petitions are due to be filed this year in *Chevron Corp. v. Cnty. of San Mateo*, No. 22A196 (U.S.), *Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022), and *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022).

III. ARGUMENT

Delaware courts have the inherent authority to manage their dockets and to stay proceedings to ensure that cases are disposed of efficiently. The power to stay proceedings is “incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1123 (Del. Ch. 1985) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)). Courts regularly stay proceedings pending the outcome of other, related proceedings when efficiency and justice counsel doing so. *See, e.g., In re HCA Inc.*, 2006 WL 3480273, at *1

(Del. Ch. Nov. 20, 2006) (proceedings stayed pending termination of a parallel action on the same subject); *Kingsland Holdings Inc. v. Fulvio Bracco*, 1996 WL 422340, at *8 (Del. Ch. July 22, 1996) (staying Delaware action in favor of parallel Netherlands action to conserve party resources); *see also Evans v. Buchanan*, 435 F. Supp. 832, 849 (D. Del. 1977) (staying proceedings pending Supreme Court disposition of certiorari petition).

A stay is appropriate here because it would promote judicial economy and would not cause undue prejudice to Plaintiff. This Court should exercise its inherent discretion and authority to stay proceedings until the Supreme Court decides whether to grant certiorari and resolve whether removal was proper. *See id.* at *2 (noting that a stay is within the Court's discretion). Because removability is a threshold jurisdictional question, efficiency and justice counsel in favor of staying proceedings—rather than engaging in potentially wasteful litigation in the interim—until that issue has been resolved. Further, a stay will neither cause undue prejudice to Plaintiff, nor cause any undue delay. By contrast, *failing* to stay this action will cause great prejudice to Defendants.

Staying this action pending resolution of the threshold federal jurisdiction question is the most efficient and sensible path forward. If the Supreme Court grants certiorari and determines that this case was properly removed, as Defendants maintain it was, then proceedings in this Court would end immediately and the case

would return to federal court, meaning that the time and effort spent by this Court and the parties in the interim would have been needlessly wasted. There is simply no need to rush to proceed here now, when the Supreme Court may soon decide to resolve this issue and hold that these climate change-related cases must instead proceed in federal court and under federal law.

A. A Stay Will Promote Judicial Efficiency.

A stay in this action will promote the interest of judicial efficiency. Delaware courts stay proceedings “[i]n the interest of judicial economy” where other forthcoming legal developments may “moot some or all of the issues in th[e] litigation.” *Osborne v. City of Wilmington*, 2009 WL 608536, at *2 (Del. Ch. Feb. 25, 2009); *see also Post v. Peters*, 1976 WL 1706, at *4 (Del. Ch. Apr. 29, 1976) (granting stay where “the decision in the action not stayed would be expected to render moot the controlling issue in the stayed action.”). If the Supreme Court grants review and holds that this action was properly removed, this Court would immediately be divested of jurisdiction, and this action would proceed in federal court. Without a stay in the interim, this Court may spend considerable time resolving issues that could ultimately be held to be outside its jurisdiction, and the parties would likely engage in costly litigation that they may be forced to redo from scratch in federal court. That would be a waste of this Court’s and the parties’ resources. There is simply no need to engage in such litigation until after the

Supreme Court decides whether to resolve the outstanding, threshold question whether federal courts have jurisdiction over this action. It was precisely for these reasons that *multiple* state courts in Maryland and Colorado stayed proceedings in nearly identical cases pending the final determination of the jurisdictional questions by the Supreme Court—even before the Court asked the Solicitor General for the views of the United States on these issues. *See* Exs. A–C.

Absent a stay of proceedings, the parties will “face the burden of having to simultaneously litigate” both federal appellate proceedings “and the underlying case in state court,” a concern to which trial courts are appropriately “sensitive.” *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int’l LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). All Defendants intend to move to dismiss for failure to state a claim, and many Defendants intend to move to dismiss for lack of personal jurisdiction. The considerable party and judicial resources that would be spent briefing, and potentially arguing and deciding, those motions in this Court would be rendered null and pointless if the Supreme Court grants certiorari and determines that these climate change-related cases must be decided in federal court. Indeed, any ruling by this Court would then be void for lack of jurisdiction, and all of the parties’ and this Court’s work would have been for naught. *See, e.g., Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (“Without jurisdiction the court cannot proceed at all in any cause.”); *Ruhrgas AG v. Marathon Oil Co.*, 526

U.S. 574, 584 (1999) (holding that without jurisdiction the court is “powerless to proceed to an adjudication” (quoting *Emps. Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)); *Fam. Ct. of the State of Del. v. Tucker*, 2014 WL 4794407, at *1 (Del. Super. Ct. Sept. 25, 2014) (“[A] decision is legally void” when the decisionmaker “did not have jurisdiction.”). Untangling those rulings would create a “rat’s nest of comity and federalism issues,” which courts generally seek to avoid. *Northrop Grumman*, 2016 WL 3346349, at *4. Moreover, even if the Supreme Court determines that there is not federal jurisdiction, its reasoning may provide important guidance on several issues relevant to Defendants’ motions to dismiss, including, for example, whether Plaintiff’s claims are governed by federal law. To prevent conflicting decisions on these critical jurisdictional, merits, and choice-of-law issues, this Court should grant the requested stay.

There is a good chance that the Supreme Court will grant the petitions for writs of certiorari because there is a conflict among the federal courts of appeals. *Compare City of New York*, 993 F.3d at 91, 95 (holding the plaintiff’s “[a]rtful pleading” could not “transform [the] complaint into anything other than a suit over global greenhouse gas emissions[, which] . . . must be brought under federal common law”), *with Baltimore*, 31 F.4th at 204 (holding that claims were not governed by federal law because plaintiff attempted to plead its claims under state law). Whether “a United States court of appeals has entered a decision in conflict

with the decision of another United States court of appeals on the same important matter” is a key consideration in granting certiorari. U.S. S. Ct. R. 10(a). The conflict between the circuits over which law governs claims related to climate change is a “uniquely international problem of national concern.” *City of New York*, 993 F.3d at 85. That is a quintessential “question of exceptional importance” and an “important matter” that militates strongly in favor of further appellate review. Fed. R. App. P. 35(a)(2); U.S. S. Ct. R. 10(a).

Additionally, the Supreme Court’s recent 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* makes it significantly more likely that the Court will review and address these issues.² A petition for a writ of certiorari “is over 46 times more likely to be granted” once the Court has requested the Solicitor General’s views.³ And the

² *Suncor* involves a nearly identical 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 the remand earlier this year. *Bd. of Cnty. Comm’rs of Boulder Cnty. 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.

³ David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme*

Supreme Court’s Order makes clear that the question is “substantial,” Fed. R. App. P. 41(d)(1), and “of sufficient public concern” that the Court considers the government’s views “relevant to [its] consideration of the case,” Stephen M. Shapiro *et al.*, *Supreme Court Practice* 6-163 (11th ed. 2019). The defendants in *Baltimore*, No. 19-1644, presented *these same issues* in their petition for a writ of certiorari to the Supreme Court filed on October 14, 2022. And in this action, Defendants’ certiorari petition currently is due on December 29, 2022. Of course, if the Supreme Court grants certiorari and answers these questions in the affirmative, removal would be appropriate here as well.

B. A Stay Will Not Unduly Prejudice Plaintiff.

Plaintiff will not suffer any undue prejudice from a stay. Plaintiff’s claims are principally based on purported *historical* harm, rather than prospective harm. *See, e.g.*, Compl. ¶ 38 (discussing increases in “fossil fuel emissions . . . over the last fifty years”). Critically, Plaintiff does not seek to enjoin any of Defendants’ conduct; rather, it *seeks only monetary relief*. *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618, 626 n.4 (D. Del. 2022) (“Plaintiff seeks no injunctive relief ‘directed at [D]efendants’ forward-looking activities in any way.’” (alteration in original)). Accordingly, a stay would—at the very most—modestly delay Plaintiff’s ultimate

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).

recovery, if any. This cannot constitute any real prejudice to Plaintiff because monetary damages can, of course, be awarded at any time. Indeed, as the District of Maryland aptly recognized in staying a similar action pending the Fourth Circuit's decision on remand in *Baltimore*, "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." *Annapolis*, 2021 WL 2000469, at *4. And, as the *Boulder County* court recognized in quickly granting a stay pending Supreme Court proceedings, "no undue prejudice" would result from a stay. See **Exhibit A**.

A stay would, in fact, benefit Plaintiff by avoiding costly and potentially wasteful state court litigation. If Plaintiff is correct that these suits belong in state court, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. And Plaintiff's ability to seek the relief it desires will not be unduly prejudiced by a limited delay. By contrast, all Parties and the public interest in judicial economy would be prejudiced in the absence of a stay, as proceeding in this Court without a stay would needlessly increase the costs of litigation should the federal appellate courts determine that removal was proper.

IV. CONCLUSION

This Court should exercise its inherent discretion to stay further proceedings pending resolution of the petitions for writs of certiorari in this case and in *Suncor*, *Baltimore*, *San Mateo*, and *Rhode Island*, including any review on the merits.

Respectfully submitted,

Dated: November 28, 2022

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