NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7163

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,
PLAINTIFF-APPELLEE,

V.

EXXON MOBIL CORPORATION, *et al.*,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA'S OPPOSITION TO APPELLANTS' MOTION FOR AN EMERGENCY STAY OF THE REMAND ORDER PENDING APPEAL

Over two years ago, the District of Columbia filed a complaint in the Superior Court of the District of Columbia against defendants, several oil and gas companies. The District alleges that defendants violated the District's Consumer Protection Procedures Act by engaging in false and misleading advertising campaigns in the District that misled District consumers for decades about the primary role their products had in causing climate change. Defendants removed the case to federal district court, but the district court correctly rejected their theories of federal jurisdiction and granted the District's motion to remand. The district court is in good

company. At least eleven other district courts have remanded similar state-law deception complaints against fossil fuel companies to state courts. The First, Third, Fourth, Ninth, and Tenth Circuits have affirmed those opinions on appeal.[1] No Circuit has disagreed.

Defendants now seek the extraordinary remedy of a stay pending appeal of the same issues in this Court. But their application has two fatal flaws. First, they fail to show irreparable harm—a requirement to obtain a stay. Their speculative injuries about litigating in state court are merely a complaint about the expenditure of resources in litigation, which cannot constitute irreparable injury. Second,

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[1] *See 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, Maryland v. BP P.L.C.*, No. CV SAG-21-00772, 2022 WL 4548226 (D. Md. Sept. 29, 2022).

defendants fail to show a likelihood of success on the merits. Their primary argument—that this consumer-protection lawsuit is governed by federal common law—fails even to raise serious legal questions on the merits. And defendants are certainly not likely to succeed on the merits where they have failed to succeed in every other Circuit to have addressed these same questions.

Finally, given the seriousness of the District's allegations, the public interest is harmed by further delaying this litigation, which has already languished for over two years without any responsive pleading, discovery, or other steps towards a final resolution. Further delay serves only defendants' efforts to avoid liability. There is no basis to grant a stay, and the motion should be denied.

BACKGROUND

1. The District files a state-law complaint, defendants remove the case, and the district court remands, finding no basis for federal jurisdiction.

In June 2020, the District filed a four-count complaint in Superior Court alleging violations of the District of Columbia Consumer Protection Procedures Act ("Act"), D.C. Code § 28-3901 *et seq*. The District alleges that defendants knew for decades that their fossil fuel products caused greenhouse gas pollution resulting in climate change and catastrophic consequences to communities, the ecosystem, and the economy. Compl. ¶¶ 11-14. Despite defendants' knowledge of the role their products play in causing climate change, they intentionally misled consumers to increase profit. Compl. ¶¶ 1-14. The District alleges that defendants'

misrepresentations, omissions of material information, and disinformation campaign violate the Act. Compl. at 67-77 (Counts I to IV).

In July 2020, defendants removed the state-law claims to the district court, setting forth seven theories of federal subject matter jurisdiction. Record Document ("RD") 1 at 11-12. In November 2022, the district court rejected each of those theories and remanded the complaint to the Superior Court. RD 118.

2. The district court denies a stay because there is no irreparable injury.

In December 2022, the district court denied defendants' motion for a stay pending appeal because defendants failed to show that a stay would cause them irreparable harm. RD 126 at 1-2. The district court found defendants' arguments "unavailing" because litigation costs are not an irreparable injury. RD 126 at 2. And the court found it "unlikely" that Superior Court litigation will outpace this Court's decision on appeal. RD 126 at 2, 3 (noting "that mere possibility does not satisfy this Circuit's certainty and imminence requirements for irreparable injury").

DISCUSSION

A "stay pending appeal is always an extraordinary remedy." *Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). It is the movant's obligation to satisfy "the stringent requirements" to justify the relief. *Citizens for Resp. & Ethics in Washington v. Fed.*

Election Comm'n, 904 F.3d 1014, 1016 (D.C. Cir. 2018). To justify a stay, defendants must satisfy four factors:

> (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 v. Holder, 556 U.S. 418, 434 (2009). The first two factors "are the most critical," and it is not sufficient for a party to show they merely have a *chance* of success or a *possibility* of irreparable injury. *Id.*; *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

I. Litigating In The Superior Court Is Not An Irreparable Injury.

"This [C]ourt has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The party seeking the stay must show injury that is "both certain and great," and it "must be actual and not theoretical." *Wis. Gas Co. v. Fed. Energy Regul. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The "injury complained of" must also be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (internal quotation marks omitted); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (same). And the "injury must be beyond remediation." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. "Mere injuries," even if "substantial[] in terms of money, time and

energy necessarily expended in the absence of a stay[,] are not enough" to show *irreparable* harm. *Wis. Gas Co.*, 758 F.2d at 674 (quoting *Virginia Petroleum Jobbers Assn. v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)).

Defendants fall far short of meeting this Court's high standard. *First*, defendants speculate that this appeal could become moot if the Superior Court enters judgment before this Court issues a decision. Mot. 18-19. But emergency injunctive relief is unwarranted "against something merely feared as liable to occur at some indefinite time." *Wis. Gas Co.*, 758 F.2d at 674 ("Bare allegations of what is likely to occur are of no value."). Indeed, the Circuit courts agree that "the theoretical possibility" of mootness while an "appeal[] [is] pending . . . falls short of meeting the demanding irreparable harm standard." *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) (denying stay in similar case); *see Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *5 (D. Md. July 31, 2019) (considering "unlikely event that a final judgment is reached in state court before the resolution of [an] appeal" as "speculative harm [that] does not constitute an irreparable injury"); *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1074 (D. Colo. 2019) (similar).

Defendants offer no reason to believe the Superior Court—where litigation has yet to even begin—might fully resolve the case on the merits before this Court issues a decision on appeal. They rely on *Minnesota v. American Petroleum Institute*, No. CV 20-1636, 2021 WL 3711072 (D. Minn. Aug. 20, 2021). But the district court there concluded that, on account of an intervening Supreme Court decision altering the scope of the appeal, "the appellate proceedings" may "be prolonged and may exceed typical timelines for an appeal of th[at] nature." *Minnesota*, 2021 WL 3711072, at *3 (citing *BP p.l.c. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021)). Defendants make no effort to show that this case may be prolonged beyond typical timelines. Indeed, this Court routinely handles complex matters. Thus, the district court here reasonably found it "unlikely" that the Superior Court will outpace this Court, RD 126 at 2, a conclusion the data bears out. *Compare, e.g.*, D.C. Superior Court, *Case Management Plan* 20 (setting the performance standard to resolve a complex "Civil I" case on the merits at 36 months and less complex "Civil II" cases at 24 months),[2] *with* United States Courts, *Table N/A—U.S. Courts of Appeals Federal Court Management Statistics* 2 (June 30, 2022) (median time in D.C. Circuit from notice of appeal to case disposition was 11.6 months for period ending June 30, 2022).[3]

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2 *Available at* https://tinyurl.com/yh9e73d4.

3 *Available at* https://tinyurl.com/5edtj5kd.

Second, defendants argue that litigation on remand will be burdensome, with discovery and expenditure of resources that may be wasted if this Court rules in their favor. Mot. 19-20. But it is blackletter law that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see Sampson v. Murray*, 415 U.S. 61, 90 (1974) (similar); *see also Sunoco*, No. 21-15313, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) ("[I]ncreased litigation burdens . . . do not rise to the level of irreparable harm."); *Suncor*, 423 F. Supp. 3d at 1074 (similar).

In any event, contrary to defendants' assertion, discovery and other preliminary matters will not be wasted efforts. Regardless of the forum, the parties will next proceed with responsive pleadings and discovery. *See Mayor & City Council of Baltimore*, 2019 WL 3464667, at *6. And while defendants assert they might be subject to different rules and standards in Superior Court, they tellingly do not identify one meaningful difference. Nor could they. The Superior Court's Rules of Civil Procedures governing discovery, Rules 26 through 37, are substantially similar to those in the federal rules. *See* Editor's notes to D.C. Super. Ct. R. Civ. Pro. 26 to 37. Given the similarity in procedures, the proceedings before the Superior Court "may well advance the resolution of the case in federal court" in the unlikely event that the case returns to the district court. *Mayor & City Council of Baltimore*, 2019 WL 3464667, at *6; *see Suncor*, 423 F. Supp. 3d at 1074.

Defendants have simply failed to show any irreparable injury that would result absent a stay, and that is reason enough to deny their motion.

II. Defendants Have Not Shown A Likelihood Of Success On The Merits.

Defendants have also failed to carry their heavy burden of demonstrating that they have a substantial likelihood of success on the merits. The weakness of defendants' case is apparent from their effort to change the test under this factor, suggesting a less demanding standard that they present only "serious legal questions." Mot. 7. However, "the old sliding-scale approach to preliminary injunctions—under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa—is 'no longer controlling, or even viable.'" *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quoting *Am. Trucking Ass'ns. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)); *see Nken*, 556 U.S. at 438 (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other."). Consistent with Supreme Court precedent, this Court "read[s]" the decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), "at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement.'" *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (quoting *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring)).

Defendants fail to advance, and have thus forfeited, any argument that they satisfy this independent requirement. *See, e.g.*, Mot. 7 ("This case presents several serious questions."); Mot. 8 ("Among other substantial questions, this [case] raises the questions whether [the District's] claims . . . are governed by federal common law.").

Regardless, defendants cannot meet even a "less demanding sliding-scale analysis," assuming that test has any continued viability. *Sherley*, 644 F.3d at 393. Under a "sliding scale," a party "need only have raised a 'serious legal question' on the merits" when "*the other three factors so much favor*" a stay. *Id.* at 398 (emphasis added). Here, of course, the other three factors do not support a stay. *See* §§ 1, 3. Even if they did, defendants fail to show that this appeal raises serious legal questions on the merits.

A. Federal jurisdiction is limited and strictly construed.

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); 28 U.S.C. § 1441(a). One such set of cases is "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *Gunn v. Minton*, 568 U.S. 251, 256 (2013) ("Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." (internal quotation marks omitted)). A case in turn arises under the

laws of the United States "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020). "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393; *see Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44, 51 (1st Cir. 2022) (whether a complaint implicates a federal question "is 'determined from what necessarily appears' on the face of a plaintiff's complaint, 'unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). Defendants fail to satisfy this well-pleaded complaint rule, or any narrow exception to that rule.

B. Federal common law does not provide a basis for removal.

Defendants' main argument for jurisdiction is that the District's complaint arises under federal common law, even though it does not plead any federal common law causes of action. Mot. 10-14. It is "a well-known principle" that "'[t]here is no federal general common law.'" *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 200 (4th Cir. 2022) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). "[A]bsent some congressional authorization to formulate substantive rules

of decision," the Supreme Court has explained, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted).

Areas where federal common law exists are "few and restricted," *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997), because federal common law "plays a necessarily modest role under a Constitution that vests the federal government's legislative Powers in Congress and reserves most other regulatory authority to the States," *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (internal quotation marks omitted). Thus, "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Id.* Principally, (1) federal common law must be necessary to protect "uniquely federal interests," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), and (2) there must be "a 'significant conflict' . . . between an identifiable 'federal policy or interest and the [operation] of state law,'" *id.* at 507 (brackets in original) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

The district court assumed for purposes of its order that there are "uniquely federal interests" at issue but found that defendants had not shown a "'significant conflict' between the District's claims under the Act and a federal interest they

identify." RD 118 at 5. "Simply put, [defendants] do not engage with this prong of the federal common law test." RD 118 at 5. Defendants' failure to engage with this prong continues before this Court. They do not identify any conflict—let alone a significant conflict—between the District's claims and any federal interest to support the second prong. This failure is "fatal." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994); *Mayor & City Council of Baltimore*, 31 F.4th at 202 (rejecting similar argument).

In any event, defendants also fail to establish the first prong of identifying a uniquely federal interest in the state-law claims. Mot. 11-13. Instead, defendants mischaracterize the complaint, insisting that it seeks to interfere with and regulate global climate change policy, energy production, federal navigable waters, and foreign affairs. Not so. The District's complaint is based on defendants' "false and misleading statements" to District consumers in violation of the Act, which the District seeks to stop. Compl. 67-77; *see Mayor & City Council of Baltimore*, 31 F.4th at 203 ("[W]e find Baltimore's suit centers on Defendants' fossil-fuel products and misinformation campaign, not any federal common law."). Consumer protection laws implicate a traditional and "substantial" *state* interest in "ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). Defendants offer no reason that this consumer protection action, intended to protect District consumers from misleading marketing, implicates

"uniquely federal interests." *See Mass. v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (rejecting similar arguments in a consumer protection action).

Defendants' reliance on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is unavailing. Mot. 9, 11-14. As the Fourth Circuit reasoned, that case "does not pertain to the issues before" this Court. *Mayor & City Council of Baltimore*, 31 F.4th at 203. There, New York City's "nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions" was filed in federal court on diversity grounds. *City of New York*, 993 F.3d at 91. In reviewing an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Second Circuit expressly considered defendants' "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry" at issue in this appeal. *Id*. at 94. Nor did the Second Circuit provide any basis to think, as the Fourth Circuit observed, that there is "a significant conflict between the state-law [consumer protection] claims" here "and [any] federal interests at stake." *Mayor & City Council of Baltimore*, 31 F.4th at 203.

C. Defendants' other theories of jurisdiction are unlikely to succeed.

Defendants offer passing arguments on their next three theories of federal jurisdiction, and this Court should summarily reject them.

First, there is no jurisdiction under *Grable*. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). The *Grable* doctrine applies to a "slim

category" of state-law claims that may provide federal jurisdiction when "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. The district court found that defendants failed to identify a disputed federal issue necessary to resolve the District's consumer protection claims. RD 118 at 9-10. Defendants' failure continues here. Defendants mischaracterize the District's claims as seeking to regulate greenhouse gas emissions, which they argue "are the subject of numerous federal statutory regimes and international treaties." Mot. 15 (identifying none of those statutory regimes nor any claim in the complaint that seeks to regulate greenhouse gas emissions). The district court correctly found, however, that the complaint brings a consumer protection claim about whether defendants "misled consumers about the effects of fossil fuels," and it "can be adjudicated without a court resolving any questions of federal law." RD 118 at 10. Every court—including multiple Circuits—that has considered defendants' *Grable* argument in analogous cases has rejected it.[4]

Second, there is no jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442. The statute can be an exception to the well-pleaded complaint

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[4] *See, e.g.*, *Mayor & City Council of Baltimore*, 31 F.4th at 209; *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 747 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1266 (10th Cir. 2022); *Rhode Island*, 35 F.4th at 57.

rule, *see Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999), because it permits removal of a state complaint "that is against or directed to . . . any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office," 28 U.S.C. § 1442(a)(1). Removal under Section 1442(a)(1) is only appropriate for a private defendant, however, where the defendant shows a "colorable federal defense" to the plaintiff's claims, shows they were acting under the direction of the federal government, and shows "a nexus, a 'causal connection' between the charged conduct and asserted official authority." *Acker*, 527 U.S. at 431 (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)); *see K&D LLC*, 951 F.3d at 507 (defendant "must show a nexus, a causal connection between the charged conduct and asserted official authority").

Here, even assuming that any of defendants' fossil-fuel-related conduct was under federal direction, there is no causal connection between the conduct at issue—false advertising—and defendants' asserted federal authority related to the production of fossil fuels. RD 118 at 16. Defendants claim they have acted under the federal government's direction in the development, extraction, and production of fossil fuel products and that they are "operators and lessees of the Strategic Petroleum Reserve infrastructure." Mot. 16. But the conduct alleged here is defendants' concealment and misrepresentation of the products' known dangers. Thus, whether or not the statute requires a causal connection, or the "relaxed"

standard that defendants assert, Mot. 16-17, they fail to establish a likelihood of success. *See K&D LLC*, 951 F.3d at 507 n.1 (declining to decide the question). The only other Circuits that have reached the second prong of this test in similar cases have agreed that defendants' theory presents an insufficient connection to federal authority. *See Mayor & City Council of Baltimore*, 31 F.4th at 230; *Rhode Island*, 35 F.4th at 53 n.6.[5]

Third, defendants fail to establish jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349. Under OCSLA, as relevant here, federal district courts possess jurisdiction over cases arising "out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of minerals, of the subsoil and seabed of the outer Continental Shelf." *Id.* § 1349(b)(1); *see In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (requiring "but-for" connection between Outer Continental Shelf operation and injury). As the district court explained, defendants' "alleged false advertising and misleading information campaigns are not 'operation[s]' under OCSLA," and the District's asserted injury persists "as a result

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[5] Other Circuits have rejected the federal officer removal theory on the first prong because defendants were not "acting under" federal direction. *See Suncor*, 25 F.4th at 1251, 1254 ("Because Exxon has not established that it acted under a federal officer . . . we do not need to reach the remaining elements for federal officer removal"); *Cnty. of San Mateo*, 32 F.4th at 760 (similar). Defendants' reliance on federal officer removal fails for this reason too.

of that distinct marketing conduct," "irrespective of [d]efendants' technical operations on the [outer Continental Shelf]." RD 118 at 14 (brackets in original). Indeed, the other Circuits to have rejected the same argument required more than a "'mere connection' between the claims asserted and an OCS operation." *Bd. Of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1274 (10th Cir. 2022); *see, e.g.*, *Rhode Island*, 35 F.4th at 59-60; *Suncor*, 25 F.4th at 1272-75; *Cnty. Of San Mateo*, 32 F.4th at 751-55; *City & Cnty. Of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1112-13 (9th Cir. 2022); *Mayor & City Council of Baltimore*, 31 F.4th at 219-22. Defendants do not engage with the district court's analysis. They instead assert in one sentence that "because fossil-fuel production on the Outer Continental Shelf is part of the production about which defendants allegedly misled District of Columbia consumers," the "claims arise out of or in connection with" operations on the Outer Continental Shelf. Mot. 17 (internal quotation marks omitted). Courts have uniformly rejected that argument.

D. Defendants' remaining arguments lack merit.

Defendants' remaining arguments fail to raise "serious legal questions" on the merits, and certainly do not show a likelihood of success on the merits. *See City & Cnty. Of Honolulu v. Sunoco LP*, Nos. 20-163 & 20-470, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) (noting that in "all the cases involving subject matter

similar to that here," the fossil fuel defendants possess "[a] batting average of .000," which "does not suggest a substantial case exists").

First, defendants seek to manufacture a circuit split, relying on a supposed conflict between *City of New York* and the First, Third, Fourth, Ninth, and Tenth Circuit decisions affirming remand orders in cases like this one. *See supra* n.1. But the split is imagined. The Second Circuit expressly "reconcile[d]" its decision with "the parade of recent opinions" granting or affirming remand, explaining that "their reasoning does not conflict with our holding." *City of New York*, 993 F.3d at 93, 94; *see supra* § II.B (discussion of *City of New York*).

Next, defendants say a stay is appropriate because this case is novel. Mot. 1 (referring to it as a case of first impression). They cite no authority that novel issues require a stay. Nor could they, because that result would turn the standard for issuing stays on its head, making them routine rather than extraordinary relief.

Finally, defendants cite the petition for certiorari pending in *Suncor*, arguing that because the Supreme Court sought the views of the Solicitor General, the Court will "likely . . . grant review." Mot. 8. But the Court itself has said a "request for the Solicitor General's view . . . is hardly dispositive" of a stay request, and "the Court denies certiorari in such cases more often than not." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, in chambers). In any event, the argument is

speculative at best because only about 1% of petitions for certiorari are granted.[6] Indeed, the Third Circuit rejected this very argument in denying motions to stay two climate-deception cases. *See City of Hoboken v. Chevron Corp.*, No. 21-2728, Doc. 146 (3d Cir. Oct. 12, 2022) (denying motions to stay mandate). This Court should likewise reject the notion that a pending certiorari petition on its own warrants emergency injunctive relief.

III. The District And Public Will Be Prejudiced By Delay.

If a party "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 the opposing party is the government, "[t]hese factors merge." *Id*. Here, defendants have failed to satisfy the first two critical factors. A review of the final factors only underscores that a stay should be denied.

Simply stated, delay will harm the District and public. This removal litigation has persisted for more than two years. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 238 (2007) ("Congress[has a] longstanding policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is

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[6] *See* FAQs - General Information, Supreme Court of the United States, https://www.supremecourt.gov/about/faq_general.aspx (last accessed Jan. 12, 2023) ("The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term" and "grants and hears oral argument in about 80 cases.").

removed." (internal quotation marks omitted)). In that time, the parties have not advanced the merits—no responsive pleadings have been filed, no discovery has been planned or conducted, no preliminary matters have been addressed, and there is no litigation schedule, let alone a trial date. Further delay may cause loss of evidence needed to establish defendants' decades-long disinformation campaigns. And the harm to District consumers continues unabated. To this day, consumers are flooded with defendants' disinformation, including by "greenwashing" their brands, which artificially inflates the market for fossil-fuel products and exacerbates the local climate harms in the District. *See* Compl. ¶¶ 98-169; *see also Baltimore*, 2019 WL 3464667, at *6 (rejecting stay that "would further delay litigation on the merits of the City's claims").

Defendants' argument on the public interest is the same failed argument they make on irreparable harm: that resources will be spent litigating this case in state court. But as explained, a stay will not save litigation expenses. It will merely delay them while increasing the risk of prejudice and prolonging the harm to the public. This Court should not endorse such a result.

CONCLUSION

The Court should deny defendants' requested emergency stay.

Respectfully submitted,

HASSAN A. ZAVAREEI
(Bar No. 47750)
ANNA C. HAAC
(Bar No. 62817)
TYCKO & ZAVAREEI, LLP
2000 Pennsylvania Avenue NW,
Suite 1010
Washington, DC 20006
(202) 973-0900 (phone)
(202) 973-0950 (fax)
hzavareei@tzlegal.com
ahaac@tzlegal.com

VICTOR M. SHER
SHER EDLING LLP
100 Montgomery St., Ste 1410
San Francisco, CA 94104
(628) 231-2510
vic@sheredling.com

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

/s/ Lucy E. Pittman
LUCY E. PITTMAN
Senior Assistant Attorney General
Bar Number 483416
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-3881 (phone)
(202) 741-5925 (fax)
lucy.pittman@dc.gov

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(1) because the motion contains 5,177 words, excluding exempted parts. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

/s/ Lucy E. Pittman
LUCY E. PITTMAN