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CITY OF HOBOKEN

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

Civil Action
CBLP Action

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY

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INTRODUCTION

Plaintiff urges this Court to rush to start proceedings, and disregard the likelihood that the Supreme Court will soon provide substantial—if not dispositive—guidance on the fundamental and threshold question of whether federal courts have jurisdiction over these types of climate change-related cases. In doing so, Plaintiff disregards the significance of the Supreme Court's October 3, 2022 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 Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 ("*Suncor*"). The Supreme Court's Order is a material and significant development that substantially increases the likelihood the Supreme Court will grant certiorari and resolve these issues in Defendants' favor. Plaintiff also disregards the real and irreparable harms Defendants likely will suffer absent a stay and the inefficiencies and waste of resources the parties and the Court would incur by proceeding now without the Supreme Court's guidance. Moreover, because the Supreme Court's decision on whether to grant these petitions will likely be issued in the next several months, Plaintiff cannot plausibly claim any meaningful harm from a stay. This Court should follow its sister state courts in Colorado and Maryland and enter a stay pending the Supreme Court's resolution of the threshold question whether this action will return to federal court.

Plaintiff argues that Defendants have no likelihood of succeeding on the merits of their removal arguments before the Supreme Court. But Plaintiff does not dispute, nor could it, that the likelihood the Supreme Court will grant defendants' petition in *Suncor* is, statistically speaking, now *more than 46 times greater* than it is for the typical petition where the Supreme Court does not invite the Solicitor General's

views.[1] An order requesting the views of the Solicitor General is exceedingly uncommon and demonstrates that at least four Justices have a serious interest in the issues presented *and* believe them to be worthy of further consideration by the Court. Thompson & Wachtell, *supra* note 1, at 242 n.22. In fact, Plaintiff ignores that, of the nearly 1,000 petitions addressed by the Court in its October 3, 2022 Order List, the Court sought the Solicitor General's views in *only four* cases. *See* Order List, 598 U.S. ___ (Oct. 3, 2022), available at https://www.supremecourt.gov/orders/courtorders/100322zor_fcgj.pdf. It is for this reason that Judge Stephanie A. Gallagher of the District of Maryland recently stayed execution of her remand order, explaining that, in light of the Supreme Court's order, "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). Defendants' contention that there is a meaningful chance the Supreme Court will grant certiorari in one of the pending cases is therefore much more than "speculative." It makes eminent good sense to pause now and wait briefly to see whether the Supreme Court does so, rather than rushing into litigation that may ultimately prove to be unnecessary and a waste of judicial and party resources.

Perhaps recognizing the merits and substantial benefits of a stay while the Supreme Court addresses these important issues, Plaintiff takes the remarkable position that this Court lacks discretion to manage its own docket and address case management issues. But New Jersey law is unambiguous on this point: "The authority to stay a proceeding is . . . within the sound discretion of the trial court." *Procopio v. Gov't Emps. Ins. Co.*, 433 N.J. Super. 377, 380 (App. Div. 2013). The cases Plaintiff cites involving a heightened standard apply only when a party seeks a stay pending the appeal of the judgment or order adjudicating the *merits* of the case. But here, of course, Defendants are not appealing a judgment or order of this Court. In fact, this is the first motion the Court will consider in this case—and it simply asks the

[1] 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).

Court to exercise its "sound discretion . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).

This may also be why Plaintiff *completely ignores* that multiple state courts have stayed proceedings in nearly identical climate change-related cases under the same circumstances presented here. *See* Mot. at 8. In those cases, the state trial courts exercised their inherent discretion to manage their dockets by granting a stay until Supreme Court proceedings are concluded and the question of federal jurisdiction is finally resolved. This Court should do the same here.

ARGUMENT

A. Defendants' Motion Seeks A Discretionary Stay

Plaintiff urges the court to apply an inapplicable standard to Defendants' motion, misstates the law, and attempts to undermine the Court's inherent authority to manage its docket by entering a discretionary stay. Plaintiff argues that Defendants' motion seeks a stay pending appeal, rather than a discretionary stay, and thus should be assessed under the factors set forth in *Crowe v. De Gioia*, 90 N.J. 126 (1982). But *Crowe*—a preliminary injunction case—set the standard for granting temporary relief from merits judgments and orders already entered by a court or agency in the same dispute. *See id.* at 132. Defendants do not seek a stay of any decision made by this Court, let alone an order on the merits. Indeed, this Court has not entered any orders from which Defendants could seek temporary relief. *Crowe* would apply if Defendants were seeking a stay pending appeal of an order of this Court, as in *Garden State Equality v. Dow*, 79 A.3d 1036, 1039 (2013) and Plaintiff's other cited cases. Opp. at 4. But Defendants seek only a *discretionary* stay, and merely ask the Court to exercise its inherent authority to manage its docket and stay proceedings during the pendency of appeals in other cases that are likely to have significant, if not dispositive, impact on this case. Plaintiff's reliance on an inapposite heightened standard cannot usurp the trial court's inherent authority to manage its own docket by exercising its discretion to

issue a stay.

New Jersey law, relying on U.S. Supreme Court precedent, is clear that:

> "[t]he authority to stay a proceeding is . . . within the sound discretion of the trial court. The [United States] Supreme Court has noted that 'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'"

Procopio, 433 N.J. Super. at 380 (citations omitted) (quoting *Landis*, 299 U.S. at 254–55). New Jersey trial courts have broad discretion over case management issues, including the authority to enter stays. As the Appellate Division explained: "The granting of a stay is discretionary with the trial court, limited only by special equities showing abuse of discretion in that injustice would be perpetrated on the one seeking the stay, and no hardship, prejudice or inconvenience would result to the one against whom it is sought." *Gosschalk v. Gosschalk*, 48 N.J. Super. 566, 579 (App. Div.), *aff'd*, 28 N.J. 73 (1958); *see also Sensient Colors Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 390 (2008) ("The determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court."). In any event, a stay is warranted here under any standard.

B. A Discretionary Stay Will Promote Judicial Efficiency And Is In The Interests Of The Parties And The Court

A discretionary stay is appropriate because it would conserve judicial resources and promote judicial economy, without prejudice to Plaintiff. *See Landis*, 299 U.S. at 254 (1936).

First, a stay will conserve judicial resources and promote judicial economy. A discretionary stay is appropriate when it will "promote[] judicial economy and efficiency by holding in abeyance expensive, time-consuming, and potentially wasteful" proceedings "that may be rendered moot by a favorable ruling" in another litigation. *Procopio*, 433 N.J. Super. at 381. That is clearly the case here. Indeed, Plaintiff does not—and cannot—dispute that if the Supreme Court grants review and holds that the lawsuit

brought by the City of Hoboken was properly removed, this Court would be divested of jurisdiction immediately, and this action would proceed in federal court, rendering any proceedings before this Court unnecessary and a waste of judicial resources.

Plaintiff resorts to claiming this potential outcome is a "long shot." Opp. at 13. But that is not the case and, at any rate, misses the point. A discretionary stay is warranted to see what the Supreme Court will do and the important guidance it may provide. As one court aptly observed in granting a stay in a similar climate change-related case: "I am not persuaded by the City's other arguments regarding judicial economy for a simple but important reason. The [appellate court's] ruling . . . is *not a foregone conclusion*." *City of Annapolis, Maryland v. BP P.L.C.*, 2021 WL 2000469, at *4 (D. Md. May 19, 2021) (emphasis added).

In any event, there is a very good chance that the Supreme Court will grant review, because the underlying Circuit Court decision in the *Suncor* case satisfies several of the Supreme Court's criteria for granting certiorari: it squarely "conflict[s] with the decision of another United States court of appeals on the same important matter," it "conflicts with relevant decisions of [the Supreme] Court" regarding the application of federal common law to controversies concerning interstate pollution; and it presents "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." Sup. Ct. R. 10(a), (c).

The Second Circuit unequivocally held that claims seeking damages from injuries allegedly caused by interstate emissions "demand the existence of federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021). As the Second Circuit explained, claims of this sort span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* Indeed, "a mostly unbroken string of cases has applied federal law to disputes involving interstate air . . . pollution." *Id.* The Second Circuit held that New York City's "sprawling" claims—

which, *like Plaintiff's here*, sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet,"—were "simply beyond the limits of state law." *Id.* at 93. Accordingly, even though the claims were pleaded purportedly under state law, the court held that they necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95. In fact, the Second Circuit held that these types of claims are "the quintessential example of when federal common law is most needed." *Id.* at 92.

The Second Circuit's decision conflicts sharply with the decisions of other courts of appeals. In *Suncor*, the Tenth Circuit found that whether federal common law applied to the plaintiff's claims was an "unsettled question," and, thus, refused to allow removal. *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1261 n.5 (10th Cir. 2022). The Fourth Circuit saw "no reason to fashion any federal common law for [d]efendants," and "reject[ed] [d]efendants' attempts to invoke federal common law." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 203 (4th Cir. 2022). In fact, the Fourth Circuit expressly refused to "follow *City of New York*," and it "decline[d] to create a federal rule of decision" to govern plaintiff's claims. *Id.*

Plaintiff attempts to explain away this clear circuit split as a "mirage" by pointing to the different procedural postures between *City of New York* and the other circuit decisions. Opp. at 2. But that *procedural* difference is irrelevant to the *substantive* difference in the opinions: the Tenth Circuit held that whether "the federal common law of interstate pollution covers suits brought against product sellers" was "an unsettled question of federal common law," *Suncor*, 25 F.4th at 1261 n.5, and the Fourth Circuit saw "no reason to fashion any federal common law for [d]efendants," *Baltimore*, 31 F.4th at 203, whereas the Second Circuit held that similar climate change-related claims "must be brought under federal common law," *City of New York*, 993 F.3d at 92, 95. The decisions are thus irreconcilable on that point of controlling law, and the resulting conflict warrants Supreme Court review. *See* Sup. Ct. R. 10(a).

Moreover, Supreme Court review is especially likely because the circuit court decisions rejecting federal jurisdiction over these climate change-related cases cannot be reconciled with Supreme Court precedent. Sup. Ct. R. 10(c). For more than a century, the Supreme Court has applied uniform federal common law rules of decision to claims seeking redress for interstate pollution. *See City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), the Supreme Court reasoned that "[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." *Id*. at 108 n.9 (citation omitted). In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court reaffirmed that "the regulation of interstate water pollution is a matter of federal, not state, law." *Id.* at 488. And in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), the Court reiterated that federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id*. at 421. This is because, as a matter of constitutional structure, claims based on interstate and international emissions are necessarily governed *exclusively* by federal law: "[T]he basic scheme of the Constitution . . . demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421; *see also Milwaukee I*, 406 U.S. at 105 n.6 (noting that "basic interests of federalism . . . demand[]" this result).

Importantly, the Supreme Court recently issued an order in *Suncor* inviting the Solicitor General to provide the views of the United States on these issues. This development is highly significant, because it shows that the Court is specifically interested in the questions presented and is giving focused consideration to a potential grant of certiorari. Plaintiff nevertheless asserts that this development "does not alter the analysis." Opp. at 10. But Plaintiff does not (because it cannot) dispute that petitions in which the Court seeks the Solicitor General's views are "*over 46 times more likely to be granted*" than the average

petition. Thompson & Wachtell, *supra* note 1 (emphasis added). Nor does Plaintiff deny that of the nearly 1,000 petitions on the October 3, 2022 Order List, the Court requested the Solicitor General's views in *only four cases*.

Plaintiff also ignores that the District of Maryland recently stayed execution of its remand order in a similar climate change-related case because of the Supreme Court's order, explaining that "litigation in the state court now has potential to do more harm than good." *City of Annapolis*, 2022 WL 15523629, at *5. At bottom, an order requesting the views of the Solicitor General is exceedingly uncommon and demonstrates that at least four Justices have a serious interest in the issues presented *and* believe the issues are worthy of further consideration by the Court. *See* Thompson & Wachtell, *supra* note 1, at 242 n.22.

Additionally, Plaintiff's suggestion that the Supreme Court's order is not material because the Solicitor General *might* not recommend that the Court grant certiorari also misses the mark. Opp. at 10. For starters, Plaintiff engages in the exact type of speculation about future events for which it criticizes Defendants. The United States may well take the same views on these issues that it has repeatedly taken in nearly identical cases. Indeed, Plaintiff does not, and cannot, dispute that the United States' positions on certiorari *and* the merits have aligned with Defendants' positions. For example, the United States has unequivocally stated that these types of climate change-related claims 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). Similarly, it has explained that applying "potentially conflicting" state law would be inappropriate because the case "depends on alleged injuries . . . caused by emissions from all over the world." 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).

Even more to the point, the United States has already told the Ninth Circuit that: "[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." *City of Oakland*, No. 18-16663, Dkt. 198 at 2 (emphasis added). Plaintiff speculates that the Solicitor General's office might change the government's position from that taken under previous administrations. But, even if it did, such a shift would itself weigh in favor of Supreme Court review, as the shifting positions would only underscore that these issues of federal jurisdiction are uncertain and unresolved, signaling that Supreme Court intervention and resolution is necessary in these cases of national importance. Thus, no matter the Solicitor General's response, there is a strong likelihood that the Supreme Court will grant certiorari.

It should be emphasized that multiple state courts in Colorado and Maryland stayed state court proceedings in similar climate change-related cases pending final determination by the U.S. Supreme Court of whether these cases should proceed in federal court—*even before* the Court asked the Solicitor General for the views of the United States. *See* HJS Cert. Exs. A–C. Plaintiff does not address these state court decisions at all because it has no meaningful response to them. This Court should follow its sister courts in Colorado and Maryland and exercise its inherent discretion to enter a stay to allow the Supreme Court to resolve these issues.

Finally, Plaintiff makes a last-ditch suggestion that allowing this case to proceed in state court while Supreme Court proceedings are pending presents no risk of unnecessary or inefficient litigation even if the Supreme Court ultimately determines that federal law governs its claims. That suggestion makes no sense. If the Supreme Court finds that these types of claims are governed by federal law, Plaintiff would have no remedy and its claims must be dismissed. This is because the Supreme Court has held that federal common law claims involving interstate air pollution have been displaced by the Clean Air Act ("CAA"). *AEP*, 564 U.S. at 423–29. Relying on this precedent, the Second Circuit dismissed New York City's climate change-related claims, holding that the "Clean Air Act displaces federal common law

claims concerned with greenhouse gas emissions." *City of New York*, 993 F.3d at 95. In fact, plaintiffs in other climate change-related cases have repeatedly conceded this point. In Delaware, for example, the plaintiff admitted "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law by the Clean Air Act."[2] Accordingly, if the Supreme Court concludes that Plaintiff's claims are governed by federal law, Plaintiff will have no remedies and its claims must be dismissed. Under these circumstances, it can hardly be disputed that a discretionary stay will serve judicial economy, and a stay is not only appropriate but is the most logical, reasonable, and efficient course of action. Indeed, if the Supreme Court determines there is federal jurisdiction, 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.").

Second, **Plaintiff would not be prejudiced by a stay**. As an initial matter, Plaintiff concedes that it seeks only monetary damages for its alleged injuries, which can, of course, be awarded at any time. Opp. at 15. Moreover, Plaintiff cannot claim that climate change requires this case to proceed urgently, because "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." *City of Annapolis*, 2021 WL 2000469, at *4. Plaintiff also does not dispute that, where a case "is still in the very early stages of litigation, there is little prejudice to either side if the Court stays the case." Mot. at 8 (quoting *Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005)).

At the same time, the length of the requested stay will be relatively short. The *Suncor* petition is fully briefed and is merely awaiting the Solicitor General's submission of the views of the United States.

[2] Plaintiff-Appellee's Answering Brief at 6, *State of Delaware v. BP America Inc.*, No. 22-1096 (3d Cir. Apr. 14, 2022) (quoting *Boulder*, 25 F.4th at 1259–60, and *Baltimore*, 31 F.4th at 206).

Under these circumstances, a stay is appropriate: "[I]t is prudent to put this litigation on hold for a few months in order to benefit from any pertinent wisdom the Supreme Court may offer." *Mey v. Got Warranty, Inc.*, 2016 WL 1122092, at *3 (N.D. W.Va. Mar. 22, 2016); *see also Divine Fish House, Inc. v. BP, P.L.C.*, 2010 WL 2802505, at *2 (D.S.C. July 14, 2010) ("A delay of a few months . . . is, nonetheless, slight when compared to the hardship to the defendants and the interests of judicial economy.").

Moreover, Plaintiff's own actions belie any suggestion that it could be prejudiced by a stay of this sort. Indeed, Plaintiff waited until 2020 to bring this lawsuit even though it has long been on notice of the potential impacts on the global climate of emissions from fossil fuel products. In 1989, for example, New Jersey Governor Thomas Kean issued an Executive Order that described "emissions of carbon dioxide" as "a necessary byproduct of the combustion of fossil fuels and a major contributor to global climate change." State of New Jersey, "Executive Order #219," October 23, 1989, https://nj.gov/infobank/circular/eok219.htm. The Executive Order concluded that a "scientific consensus exists that emissions of certain gases . . . are causing significant changes in the composition of the Earth's atmosphere" and "that these emissions are likely to cause significant changes in the Earth's climate, including overall warming, increased drought, an increase in the intensity of hurricanes and other major storms, as well as increased incidence of harmful ultraviolet radiation." *Id.* Similarly, Former Representative Frank Guarini, while representing the citizens of Hoboken in Congress, co-sponsored the Global Climate Protection Act of 1992, which declared that "manmade emissions of carbon dioxide (CO_2) are dramatically increasing the natural concentrations of this greenhouse gas in the Earth's atmosphere; . . . [and] such a change in global climate could increase the frequency and severity of hurricanes and droughts, have disastrous impacts on the planet's agricultural productivity, flood coastal areas and wetlands, inundate drinking water supplies with salt water, devastate many of the planet's natural ecosystems, cause serious human health impacts, and threaten the habitability of the Earth." H.R. 4750, 102nd Cong. § 2 (1992).

In 1998, *more than two decades before this lawsuit was filed*, the New Jersey Department of Environmental Protection published a report stating: "Global warming of the atmosphere and ocean resulting from increasing concentrations of carbon dioxide and greenhouse gases (greenhouse gas warming) will control the rise of global sea level."[3] The report also found that "the prevailing scientific view is that continued and increased emissions of greenhouse gases will disrupt the Earth's climate in the foreseeable future." And in 2004, the State of New Jersey filed a complaint seeking to enjoin emissions from power companies, alleging that "[t]here is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion." Compl. ¶ 79, *Connecticut et al. v. Am. Elec. Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y. July 21, 2004), Dkt. 1. Given Plaintiff's long-held knowledge of the potential relationship between greenhouse gas emissions and the alleged injuries of which it now complains, it cannot seriously argue that it will be prejudiced by a stay pending Supreme Court proceedings.

C. A Stay Pending Appeal Is Warranted Under Any Standard

Even if the Court assesses Defendants' motion to stay under the standard for stays pending appeals of orders issued by the trial court (which it should not), a stay is warranted because: (1) Defendants' position has a reasonable likelihood of success; (2) absent a stay, Defendants will likely suffer irreparable harm; and (3) the balance of equities favors a stay.

First, Defendants' position has a reasonable probability of succeeding on the merits. As discussed above, the forthcoming petition for a writ of certiorari in this case, like those pending in parallel cases, raises conflicts among the federal courts of appeals and with established Supreme Court precedent. The Supreme Court has consistently admonished that, "where there is an overriding federal interest in the

[3] Sugarman, Peter, "Sea Level Rise in New Jersey," New Jersey Department of Environmental Protection, October 1998.

need for a uniform rule of decision," *Milwaukee I*, 406 U.S. at 105 n.6, "state law cannot be used," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981). The Supreme Court has recognized that 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." *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103). As the Supreme Court explained, "Federal 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. This line of Supreme Court cases conflicts with the decisions underlying the pending certiorari petitions, supports Defendants' continued pursuit of appellate review, and establishes a reasonable probability of success on the merits of the appeals. That the Court has requested the Solicitor General's views only reinforces this conclusion.

Second, Defendants face irreparable harm absent a stay. If this action remains erroneously remanded to state court, Defendants will be denied their right to a federal forum—the potential consequences of which could be significant. For example, Plaintiff's Opposition implies an intent to seek discovery from Defendants during the pendency of the certiorari petitions. Opp. at 15. But, if such discovery is propounded in state court with state rules governing discovery, and later it is determined that the case and any discovery is governed by federal law and should be conducted in federal court, that discovery could not readily be undone. Indeed, documents produced and deposition testimony elicited in state court could already have been made available to the world in public filings and, thus, could not be clawed back. And even as to discovery materials that had not become public, there is no practical way that a court could prevent a party from using the information it had learned from those documents and testimony.

Plaintiff's assertion that a federal court could "adopt or modify this Court's rulings" if the Supreme Court concludes there is federal jurisdiction is misleading. Opp. at 11. At a minimum, the federal court

would need to reconsider each and every state court ruling and decide whether those rulings should remain in effect. Courts routinely find irreparable harm where, as here, there is a substantial "risk of [the] inefficient use of the parties' time and resources," *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016), and where the parties may incur "wasteful, unrecoverable, and possibly duplicative costs," *Ewing Indus. Co. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015).

Moreover, 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 Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). As the District of Minnesota recognized in a similar climate change-related case, "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 v. Am. Petroleum Inst.*, 2021 WL 3711072, at *3 (D. Minn. Aug. 20, 2021) (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 ex rel. Jennings v. BP Am. Inc.*, 2022 WL 605822, at *3 (D. Del. Feb. 8, 2022).

Third, the balance of harms reveals that a greater harm would result if a stay is not granted. 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*, 2021 WL 2000469, at *4.

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 v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013). Similarly, a stay would conserve Plaintiff's resources—financial and otherwise—by allowing it to litigate Defendants' appeal without being saddled with simultaneous state court litigation. *See Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) ("[N]either party would be required to incur additional expenses from simultaneous litigation.").

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*. Indeed, "[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 [Supreme Court] determines the jurisdictional issues presented in this case." *Id.* The same is true here.

CONCLUSION

Defendants respectfully submit that this Court should exercise its inherent discretion to stay further proceedings in this case pending the Supreme Court's resolution of the petitions for writs of certiorari in *Suncor* and *Baltimore*, as well as the forthcoming certiorari petition in this action, and any further related proceedings before the Supreme Court.

Dated: January 24, 2023
Florham Park, New Jersey

By: */s/ Herbert J. Stern*
Herbert J. Stern

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