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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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GENERAL OF THE STATE OF NEW
JERSEY; NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION; and
CARI FAIS, ACTING DIRECTOR OF THE
NEW JERSEY DIVISION OF CONSUMER
AFFAIRS,

Plaintiffs,

v.

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

Civil Action No. 3:22-cv-06733-ZNQ-RLS

Hon. Zahid N. Quraishi, U.S.D.J.

Hon. Rukhsanah L. Singh, U.S.M.J.

(Document Electronically Filed)

**DEFENDANTS' BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION TO REMAND**

Return Date: June 5, 2023

Oral Argument is Requested

Defendants.

DEFENDANTS’ BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION TO REMAND¹

I. INTRODUCTION

Defendants recognize, and plainly acknowledged in their Notice of Removal (“NOR”), Dkt. 1, that the removal grounds they assert are currently foreclosed under Third Circuit precedent. Indeed, Defendants transparently stated in the introduction to the NOR that “Defendants recognize that the removal grounds asserted here are the same as those that were recently rejected by the Third Circuit in two similar climate change-related cases.” NOR at 4. But Plaintiffs gloss over the unique circumstances of these cases—there are now *six certiorari petitions pending before the Supreme Court* (including a petition to review the Third Circuit’s decision) that present the question whether cases like this one, which seek damages for the alleged effects of global climate change, belong in federal court. The Supreme Court is poised to rule on the petitions later this month or in May. If the Supreme Court grants certiorari and reverses, there will be federal jurisdiction over these cases, and they will proceed in federal court.

Faced with the prospect that the Supreme Court will overturn the Third Circuit, Defendants removed this case to federal court within thirty days after service of the Complaint—otherwise, they might have lost their ability to do so, even if the Supreme Court ultimately determines that these types of climate cases do belong in federal court. *See, e.g., Horak v. Color Metal of Zurich,*

¹ In filing this brief, Defendants do not waive, and expressly preserve, any right, defense, affirmative defense, or objection, including, without limitation, lack of personal jurisdiction, insufficient process, and/or insufficient service of process. A number of Defendants contend that personal jurisdiction in New Jersey is lacking over them, and these Defendants intend to preserve that defense and move to dismiss for lack of personal jurisdiction at the appropriate time.

Switzerland, 285 F. Supp. 603, 605 (D.N.J. 1968) (holding that where “plaintiff’s complaint . . . state[d] a removable case, . . . defendants’ failure to petition for removal within thirty days of service of the complaint upon them precludes them from removing the case to this court at the present time”). Accordingly, Defendants explained in the NOR: “Defendants assert these removal grounds here to preserve their arguments while these critical and threshold issues of federal jurisdiction remain on appeal and may be addressed by the U.S. Supreme Court in the near future.” NOR at 4. And Defendants further explained: Given the “pending certiorari petitions and the significant likelihood of Supreme Court review, Defendants remove this action despite the decision of the Third Circuit in order to avoid waiving their right to do so in the future.” *Id.* at 6.

Defendants were open and transparent about their reasons for removing this case and can hardly be faulted for doing so under these circumstances. At the time of removal, and still now, the jurisdictional future of these cases is highly unsettled, and removal was proper in order to preserve Defendants’ right to litigate these claims in federal court. It was for this very reason that Defendants proposed that briefing on the remand and removal issues in this case be stayed until the Supreme Court decided whether to grant review. But not only did Plaintiffs refuse, they insisted that briefing commence even *before* the Court had the opportunity to rule on Defendants’ Motion to Stay. Nevertheless, Plaintiffs now complain that they had to file a Motion to Remand that they easily could have avoided; and the 30-page brief Plaintiffs filed was completely unnecessary, particularly given that they devote the bulk of their arguments to the uncontested point that current Third Circuit precedent forecloses Defendants’ removal arguments. It is therefore Plaintiffs who bear responsibility for any unnecessary fees or costs they may have incurred briefing remand, and their request for attorneys’ fees is, therefore, unwarranted.

II. ARGUMENT

A. The Supreme Court may soon decide whether federal jurisdiction exists over these types of climate change-related cases.

As explained in Defendants' NOR, at the time of removal there were two petitions for writs of certiorari pending in similar climate change-related cases, *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (U.S.) ("*Suncor*"), and *BP P.L.C. v. Mayor and City Council of Baltimore*, No. 22-361 (U.S.) ("*Baltimore*"). Since Defendants removed this action, four more similar petitions for writs of certiorari have been filed: *Chevron Corp. v. City of Hoboken*, 22-821 (U.S.) ("*Hoboken*"); *Chevron Corp. v. San Mateo Cnty.*, No. 22-495 (U.S.) ("*San Mateo*"); *Shell Oil Prod. Co. v. Rhode Island*, No. 22-524 (U.S.) ("*Rhode Island*"); and *Sunoco LP v. City & Cnty. of Honolulu*, No. 22-523 (U.S.) ("*Honolulu*"). All told, there are now six pending certiorari petitions, all of which raise the important threshold jurisdictional question whether claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse gas emissions on the global climate are governed by federal law and belong in federal court. If the Supreme Court agrees, this case will remain in federal court.

Concrete reasons exist here that create a very substantial possibility that the Supreme Court will do just that. For one, the federal courts of appeals are currently divided over whether claims seeking damages for the effects of global climate change are governed exclusively by federal common law. Some circuits, including the First, Fourth, and Tenth Circuits, have held that federal common law does not govern these types of claims.² On the other hand, the Second Circuit

² *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 50–51 (1st Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 238 (4th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1246 (10th Cir. 2022).

squarely held that claims, like those asserted here, seeking redress for injuries allegedly caused by global climate change are “federal claims” that “must be brought under federal common law.” *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021). 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. In so holding, the Second Circuit relied on a “mostly unbroken string” of U.S. Supreme Court precedent that “has applied federal law to disputes involving interstate air . . . pollution.” *Id.* For example, the Supreme Court has held that “the basic scheme of the Constitution . . . demands” that “federal common law” govern disputes involving “air and water in their ambient or interstate aspects.” *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (“*AEP*”). And even courts that have affirmed remand have done so with great hesitation. Indeed, the concurring opinion in *Minnesota v. American Petroleum Institute* recognized that these climate-change cases “seek[] a global remedy for a global issue,” thereby “present[ing] a clash over regulating worldwide greenhouse gas emissions and slowing global climate change.” __F.4th__, 2023 WL 2607545, at *9 (8th Cir. Mar. 23, 2023) (Stras, J., concurring) (internal quotation marks omitted). Because these cases involve certain States seeking to regulate a global matter, “this is, in effect, an interstate dispute,” and “conflicts between [S]tates” of this sort “can only be resolved at the federal level because of the unique federal interests involved.” *Id.* at *10.

There is also a conflict among the federal courts of appeals over whether federal common law provides a basis for removing claims purportedly asserted under state law. Multiple courts have answered this question in the affirmative. For example, in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), the Fifth Circuit held that “removal is proper” when nominally state law claims in fact “ar[i]se under federal common law.” *Id.* at 924. Other circuits, however,

including the Third Circuit, have held the opposite—in fact, in *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 708 (3d Cir. 2022), the Third Circuit expressly declined to “follow” the approach adopted by these other circuits and rejected the Fifth Circuit’s decision in *Sam L. Majors Jewelers*. These circuit splits and the impact that these cases will have on crucial federal interests weigh strongly in favor of Supreme Court review.

In addition, and *significantly*, the Supreme Court’s order in *Suncor* inviting the Solicitor General to provide the views of the United States demonstrates that the Supreme Court is specifically interested in the questions presented and is giving focused consideration to granting certiorari. Indeed, petitions as to which the Court calls for the Solicitor General’s views are “*over 46 times more likely to be granted*” than the average petition.³ An order requesting the views of the United States is exceedingly uncommon and demonstrates that at least four Justices—the same number sufficient to grant certiorari—have a serious interest in the issues *and* believe them worthy of the Court’s further consideration.⁴

The Solicitor General filed her brief on March 16, 2023, which means that the Supreme Court will likely issue its decision on whether to grant certiorari in late April or May. Although the Solicitor General expressed the view that the Supreme Court should deny the certiorari petition in *Suncor*, “the [Supreme] Court is likely to still grant a petition . . . even if the [Solicitor General] has recommended denying” it.⁵ In fact, the Solicitor General’s position here may actually increase the odds of the Court granting the petition, because the United States has now taken conflicting

³ 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) (emphasis added).

⁴ *Id.* at 242 n.22.

⁵ *Id.* at 274.

positions on these issues. The Solicitor General conceded that the recommendation followed “the change in Administration,” as a result of which “the United States has reexamined its [prior] position.” Plaintiffs’ Ex. B at 7. The United States had previously taken the position that climate change-related claims similar to those asserted here are properly removable because “they are inherently and necessarily federal in nature” even when pleaded under state law. *See* 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). This unusual about-face weighs in favor of Supreme Court review, as it underscores that the issues of federal jurisdiction are uncertain and unresolved—and signals that the Supreme Court’s intervention and resolution are necessary in these cases of national importance. The Supreme Court often grants review when the government concedes that it is changing its position.⁶

And if the Supreme Court grants review, it will likely reverse the courts of appeals’ decisions and hold that these types of climate change-related cases are necessarily and exclusively governed by federal common law and, therefore, removable to federal court. Supreme Court precedents establish that the structure of the Constitution itself precludes the application of state law to claims seeking redress for harms allegedly caused by interstate pollution. In such disputes,

⁶ In several recent instances, the Supreme Court has granted review after receiving a brief from the United States recommending denial and reversing its prior position on a question presented by the petition. *See, e.g.*, Br. for U.S. as Amicus Curiae at 10, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Dec. 8, 2021), 2021 WL 9146629 (acknowledging change in position); Br. for U.S. in Opp. at 20, *Koons v. United States*, 138 S. Ct. 1783 (2018) (No. 17-5716), 2017 WL 6313955 (acknowledging change in position); Br. for U.S. at 29 n.2, *Beckles v. United States*, 580 U.S. 256 (2017) (No. 15-8544), 2016 WL 5116851 (acknowledging that the government has changed its view on the first question presented); Br. for U.S. as Amicus Curiae at 16–17, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (No. 06-179), 2007 WL 1511526 (repudiating position taken in previous invitation brief because government changed its view of the statute at issue).

“[t]he rule of decision [must] be[] federal,” *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 n.10 (1972), and “state law cannot be used” at all, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). As the United States explained in a similar case just a few years ago, such claims have “ar[isen] under federal common law” ever since the Nation’s founding, meaning that “state law cannot be used” to resolve them. U.S. Br. at 26-27, *BP, supra*. And because these claims arise under federal law they are removable to federal court. Indeed, the Supreme Court has observed that it is “well settled” that 28 U.S.C. § 1331’s “grant of jurisdiction will support claims founded upon federal common law.” *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (internal quotation marks omitted); *see also Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (holding that a defendant can remove any claim that a plaintiff “could have” originally filed in federal court).

B. Defendants properly removed this case to preserve their removal arguments in the event that the Supreme Court reverses *Hoboken*.

Given the posture of these climate change-related cases, and the fact that the Supreme Court will soon consider whether they belong in federal or state court, Defendants removed this case in order to preserve their arguments for a federal forum. If they did not remove promptly, they might have lost removal rights even if the Supreme Court ultimately determines that cases like this should proceed in federal court. As this Court has long held: “defendants’ failure to petition for removal within thirty days of service of the complaint upon them precludes them from removing the case” at a later time. *Horak*, 285 F. Supp. 603 at 605.

Defendants clearly explained this was the reason for their removal in their NOR: “Defendants assert these removal grounds here to preserve their arguments while these critical and threshold issues of federal jurisdiction remain on appeal and may be addressed by the U.S. Supreme Court in the near future.” NOR at 4. And Defendants explained to Plaintiffs that

Defendants removed this action now “in order to avoid waiving their right to do so in the future.” *Id.* at 6. Plaintiffs largely ignore these points and instead mischaracterize Defendants’ position on removal, asserting that Defendants’ “apparent position [is] that this Court may ignore circuit precedent because a petition for certiorari is pending.” Mot. at 30. Defendants take no such position. To the contrary, in the NOR, Defendants recognized that the asserted removal grounds are currently foreclosed under prevailing Third Circuit precedent. NOR at 4. It is therefore baffling why Plaintiffs dedicated more than 22 pages of their 30-page Motion to Remand to attacking Defendants’ removal arguments, and failed to address the core issue: Defendants removed to preserve their removal rights while these very issues are being considered by the Supreme Court. Nor do Plaintiffs explain why they felt the need to rush forward with briefing their Motion to Remand, while Defendants’ Motion to Stay such briefing pending Supreme Court proceedings remains pending with this Court.⁷

C. An award of fees is not justified.

Plaintiffs’ request for an award of fees and expenses for the costs of litigating the instant Motion under the fee-shifting provision of 28 U.S.C. § 1447(c) is not appropriate here for multiple reasons. As explained above, Defendants removed in order to preserve their rights to removal, and it is absurd for Plaintiffs to even suggest that preserving an argument for appeal is “objectively unreasonable.” *See Luken v. Int’l Yacht Council, Ltd.*, 581 F. Supp. 2d 1226, 1240 & n.6 (S.D. Fla. 2008) (explaining that “because of a need to preserve issues for appeal, parties must often repeat or otherwise renew arguments . . . already rejected” even in the same action); *see also McKnight v. General Motors Corp.*, 511 U.S. 659, 660 (1994) (explaining that “[f]iling an appeal”

⁷ Defendants respectfully request that this Court order further briefing on the propriety of remand in the event that the Supreme Court in *Hoboken* reverses or vacates the Third Circuit’s decision.

is the “only way” a party can “preserve [an] issue pending a possible favorable decision by this Court.”).

Importantly, Plaintiffs have only themselves to blame for any unnecessary fees or costs they have incurred. Plaintiffs refused to defer briefing the remand issue until the Supreme Court resolved the petitions pending before it. Plaintiffs could have postponed or even avoided the costs of litigating remand entirely if they had been willing to wait for the Supreme Court’s decision, which Defendants have consistently maintained warrants staying proceedings to avoid what could be needless, costly litigation before this Court concerning remand (and, if remand is granted, in state court). Plaintiffs opposed such a stay, Dkt. 76, because they wanted to proceed without guidance from the Supreme Court, and they should not now be allowed to seek fees and costs flowing from their own strategic choice.

D. This case should be stayed pending the outcome of the certiorari petitions.

As Defendants explain in their Motion to Stay: “It makes eminent good sense to stay proceedings in this case and await guidance from the Supreme Court on whether these types of climate change cases should be litigated in federal or state court before briefing and deciding the removal issues here. Indeed, staying remand briefing pending the Supreme Court’s decisions will promote judicial efficiency by avoiding potentially unnecessary litigation in this Court. If the Supreme Court agrees with petitioners that federal jurisdiction exists in these cases and reverses the remand orders below, there will be no need for the Parties to brief (and this Court to decide) that issue here.” Dkt. 75 at 2. Defendants further explained: “It makes little sense for the Parties to brief the issues of federal jurisdiction now—before the Supreme Court addresses the same issues,” and the “Court should grant th[e Stay] Motion and avoid the potentially unnecessary expenditure of party and judicial resources addressing the removal and remand issues on which

the Supreme Court may provide important, if not dispositive, guidance in the near future.” *Id.* at 2–3.

A stay makes *even more* practical sense now. As explained above, the Solicitor General filed her brief expressing the views of the United States on these issues on March 16, 2023, which means that the Supreme Court will likely issue its decision on whether to review these cases by late April or May. With a decision so close, it makes sense to take a short pause and await guidance from the Supreme Court on this important issue of whether these types of climate change-related cases should proceed in federal or state court.

III. CONCLUSION

For these reasons, this Court should stay further proceedings in this case—including issuing a decision on Plaintiffs’ Motion to Remand—pending the outcome of the pending petitions for writs of certiorari to the Supreme Court and should deny Plaintiffs’ request for costs, including attorneys’ fees.

Dated: April 12, 2023

Respectfully submitted,

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