Nos. 22-2082, 22-2101

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANNE ARUNDEL COUNTY MARYLAND,
PLAINTIFF-APPELLEE,
v.

BP P.L.C., ET AL.
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-01323-SAG
(The Honorable Stephanie A. Gallagher)

CITY OF ANNAPOLIS, MARYLAND,
PLAINTIFF-APPELLEE,
v.

BP P.L.C., ET AL.
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-00772-SAG
(The Honorable Stephanie A. Gallagher)

PLAINTIFFS-APPELLEES' MOTION TO SUBMIT ON THE PAPERS

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INTRODUCTION

Plaintiffs-Appellees Anne Arundel County and the City of Annapolis ("Plaintiffs") hereby move, pursuant to Fed. R. App. P. 34(a)(2) and Local Rule 34(e), to forego oral argument and submit this appeal on the briefs. Plaintiffs' counsel has conferred with counsel for Defendants-Appellants ("Defendants") concerning this Motion, and Defendants indicate they oppose the relief requested herein. *See* Loc. R. 27(a).

Defendants appeal the district court's orders remanding these cases to state court, and present four theories of federal removal jurisdiction in their Opening Brief ("OB"). *See* Doc. 99 at 5–6. Defendants concede that this Court recently "decided the third and fourth issues" in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore IV*"), *cert. denied*, 143 S. Ct. 1795 (2023), and Defendants raise them again here only to "preserve them for further review." *See* OB at 6. Those two theories are based on the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b) ("OCSLA"), and Defendants' contention that "claims for injuries allegedly stemming from global climate change necessarily and exclusively arise under federal law" for purposes of federal question jurisdiction under 28 U.S.C. § 1331. *See* OB at 6. This

Court rejected those theories in *Baltimore IV*, as have the First, Third, Eighth, Ninth, and Tenth Circuits in materially similar cases involving many of the same defendants.[1] Defendants' OCSLA and federal question arguments have thus "been authoritatively decided" such that "oral argument is unnecessary." *See* Fed. R. App. P. 34(a)(2)(B).

The two jurisdictional theories Defendants contend are not foreclosed by circuit precedent are based on the federal officer removal statute, 28 U.S.C. § 1442(a), and the "substantial federal question" doctrine elucidated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) ("*Grable*"). "Both are variations on theories this Court [also] rejected in *Baltimore [IV]*," *see* Plaintiffs-Appellees' Response Brief ("RB"), Doc. 102, at 2, and both have recently been rejected as bases for removal jurisdiction by the Third, Eighth, and Ninth Circuits, in three of the same materially similar

[1] *See Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 1796 (2023); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *cert. denied*, 143 S. Ct. 2483 (2023); *Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703 (8th Cir. 2023), *cert. petition filed*, No. 23-168 (U.S. Aug. 22, 2023); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1797 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023).

cases.[2] As discussed in detail in Plaintiffs' Response Brief, those opinions considered identical legal arguments and the same factual record Defendants rely on here—including the "new evidence" Defendants say distinguishes this case from *Baltimore IV*, which held federal officer removal based on a "more limited record." *See, e.g.*, OB at 2–3; RB at 7–8. The "facts and legal arguments" pertinent to Defendants' federal officer and *Grable* theories "are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C).

"The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)). Plaintiffs filed these cases in state court more than two years ago, and since then litigation on the merits has not proceeded at all. Defendants will file motions to dismiss in both actions on October 2, 2023; no Defendant has answered either complaint and no

[2] *See Honolulu*, 39 F.4th 1101 (9th Cir.); *Hoboken*, 45 F.4th 699 (3d Cir.); *Minnesota*, 63 F.4th 703 (8th Cir.).

discovery has been propounded or responded to. *See* Declaration of Victor M. Sher, ¶¶ 3–4 & Ex. A. Because Defendants' jurisdictional arguments are all either foreclosed by circuit precedent or plainly meritless based on the written record, Plaintiffs request that the Court limit further delay and resolve this appeal on the briefs.

ARGUMENT

Federal Rule of Appellate Procedure 34(a)(2) provides that

> [o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
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> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

See also Local Rules 34(e) & 34.2; *Tabor v. Freightliner of Cleveland, LLC*, 388 F. App'x 321, 323 (4th Cir. 2010) ("We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process."). Here, two of the issues presented in Defendants'

Opening Brief "have been authoritatively decided," and the other two lack merit and "are adequately presented in the briefs and record."

Plaintiffs filed these cases in March and May 2021, in state court. *See, e.g.*, OB at 4. Defendants removed, and Plaintiffs moved to remand. The district court granted those motions in an opinion applying to both cases. RB at 6; J.A.1467–1486. The district court explained that this Court rejected all of Defendants' same removal theories in *Baltimore IV*. J.A.1472. The court nonetheless considered Defendants' arguments not presented in *Baltimore IV*, namely their (1) "expanded evidentiary record in support of federal officer jurisdiction" and (2) "new argument for *Grable* jurisdiction" based on their anticipated First Amendment defenses. J.A.1473 (cleaned up). The expanded evidentiary record included additional information regarding Defendants' extraction of fossil fuels from the outer Continental Shelf ("OCS") and operations at the Elk Hills Petroleum Reserve in California, plus evidence that they produced and sold fossil fuels to the federal government during World War II and the Korean War, have sold "specialized" fuels to the U.S. military at various times, and have supplied oil to the Strategic Petroleum Reserve. *See* J.A.1479. As to their second theory, Defendants

argued Plaintiffs' claims are removable under *Grable* because they necessarily incorporate unspecified federal-law elements related to the First Amendment. *See* J.A.1484.

The district court rejected Defendants' federal-officer removal theory because "[n]one of [their] new examples of federal authority relates to the alleged concealment of the harms of fossil fuel products," which is the basis for liability alleged in both Plaintiffs' respective complaints. J.A.1479–1483. As discussed in Plaintiffs' Response Brief, the district court held that "Defendants' expanded factual record does not correct the relational legal deficiency identified [by this Court] in *Baltimore* [*IV*]." J.A.1483. The Third and Ninth Circuits have likewise found Defendants' same expanded record does not satisfy the federal officer removal statute. *See Honolulu*, 39 F.4th at 1106–10; *Hoboken*, 45 F.4th at 712–13. Since briefing closed in this appeal, the Eighth Circuit reached the same conclusion, again on the same record. *See Minnesota*, 63 F.4th at 715 (concluding that "the connection between Minnesota's claims and military fuel production, OCS operations, or participation in the strategic petroleum infrastructure is still too remote" to support jurisdiction).

The district court here also rejected Defendants' "expansive assertion of *Grable* jurisdiction" based on their own First Amendment defenses, noting that "Defendants fail[ed] to point to a single case that has relied on *Grable* to support federal jurisdiction in this way." J.A.1483–1486. The court granted remand, joining the unanimous "district and circuit courts around the country to conclude that these state law claims for private misconduct belong in state court." J.A.1486–1487; *see also* J.A.3135. Again as discussed in Plaintiffs' Response Brief, the Third Circuit rejected an identical First Amendment *Grable* argument in a closely analogous case, as have at least five other district courts, including most recently the District of South Carolina. *See* RB at 55; *Hoboken*, 45 F.4th at 709; *City of Charleston v. Brabham Oil Co.*, No. 2:20-cv-03579-RMG, Dkt. 154, at *10 (D.S.C. July 5, 2023) (finding "no clear reason to deviate from the clear weight of authority" rejecting First Amendment theory) (Sher Decl. Ex. B). Defendants have not cited any case from any court exercising federal question jurisdiction over state law claims on the basis that "[p]laintiffs cannot prevail without demonstrating that [a defendant's] alleged mis-representations are not protected by the First Amendment." *See* OB at 61; RB 56–57.

The Court can and should resolve this appeal on the record before it. Oral argument would not aid the decisional process, and would add nothing to what is in the papers. Plaintiffs therefore respectfully request to submit the case on the briefs so the Court may rule with minimal further delay.

Dated: September 20, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this motion complies with the applicable typeface, type-style, and type-volume limitations. This motion was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this motion contains 1,509 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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