From: Bannister, Susan (AG) on behalf of Keenan, Kelly (AG)
To: Manning, Peter (AG); Pruss, Stanley (AG-Contractor); matt@sheredling.com
Subject: Climate Litigation

Meeting with

Kelly Keenan

Skip Pruss

Peter Manning

Matthew Edling of Sher Edling

Conference Call Information:

+1 248-509-0316 <tel:+1%20248-509-0316,,198996399#> United States, Pontiac (Toll)

Conference ID: 198 996 399#

Local numbers <https://dialin.teams.microsoft.com/95e14c4b-c14d-430f-a556-75831bdf54bf?id=198996399> | Reset PIN <https://mysettings lync.com/pstnconferencing> | Learn more about Teams <https://aka.ms/JoinTeamsMeeting> | Meeting options <https://teams microsoft.com/meetingOptions/?organizerId=12d3fa94-b844-48e0-b855-58c74e09aa96&tenantId=d5fb7087-3777-42ad-966a-892ef47225d1&threadId=19_meeting_ZWFkMmZiNWEtOTdlMi00MDg4LTlkYjMtYTI5ZTFhNjMxNGFi@thread.v2&messageId=0&language=en-US>

From: Nessel, Dana (AG)
To: Keenan, Kelly (AG)
Subject: Re: per our conversation
Date: Tuesday, May 21, 2019 10:03:43 PM

Ok. Please meet with her. I don't need to be part of these initial conversations.

Sent from my iPad

On May 21, 2019, at 9:29 PM, Keenan, Kelly (AG) <KeenanK@michigan.gov> wrote:

> I had an interesting conversation with Lisa Wozniak today. She got the message loud and clear on Spanolia.
>
> She also wondered if we would be open to a meeting with an interesting attorney she met at a conference who is bringing some unique climate change cases. I told her I would be happy to talk to him and if it seemed to have possibilities to set up a meeting with. Below are some links she sent regarding the attorney and litigation.
>
> ---
>
> **From:** Lisa Wozniak <lisa@michiganlcv.org>
> **Sent:** Tuesday, May 21, 2019 4:16 PM
> **To:** Keenan, Kelly (AG)
> **Subject:** per our conversation
>
> Kelly,
>
> Per our conversation, here are a few links to the kinds of things happening on climate. I'll be in touch.
>
> Thanks,
> Lisa
>
> > Washington Post, the Courts
> >
> > https://www.washingtonpost.com/world/europe/climate-change-activists-worldwide-look-to-courts-as-a-powerful-new-ally/2019/04/23/b4403420-5e1d-11e9-98d4-844088d135f2_story.html?noredirect=on&utm_term=.010d94efdbbe

New York Times

https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html?searchResultPosition=3

How Private Lawsuits Could Save the Climate

2018 in Climate Liability: When a Trend Became a Wave

Pay Attention to the Growing Wave of Climate Change Lawsuits

The Climate Litigation Threat is Getting Credible

--
Lisa Wozniak, Executive Director
Michigan League of Conservation Voters / Michigan LCV Education Fund

SE Michigan Office: 3029 Miller Rd., Ann Arbor, MI 48103
Office: 734-222-9650

Join the fight for Michigan's clean air, clean water and healthy communities.
Your land. Your air. Your water. Your *VOTE*.

From: Skip Pruss
To: Keenan, Kelly (AG)
Subject: Climate Litigation
Date: Wednesday, May 22, 2019 7:44:59 PM

Kelly,

Lisa Wozniak called yesterday evening after talking to you. I have been tracking the same. I won't be able to drill down further until the weekend. I relayed this to DN today at the GLC conference. Let me know if you want to chat.

Sent from my iPhone

From: Nessel, Dana (AG)
To: Manning, Peter (AG)
Cc: Keenan, Kelly (AG); Moody, Laura (AG); Sonneborn, Suzanne (AG); Skip Pruss
Subject: Re: Exxon lawsuit
Date: Tuesday, May 28, 2019 2:51:09 PM

I will leave that to you to decide, Peter.

Sent from my iPhone

On May 28, 2019, at 2:47 PM, Manning, Peter (AG) <ManningP@michigan.gov> wrote:

> I spoke to Skip on Friday and he mentioned his conversation with Lisa Wozniak regarding the lawsuits against Exxon for failure to disclose the impacts of its activities on climate change. I am happy to be part of a meeting with the League of Conservation Voters. Attorney Client Privilege
>
> [redacted]
>
> Peter

From: Skip Pruss
To: Manning, Peter (AG)
Subject: RE: Exxon lawsuit
Date: Wednesday, May 29, 2019 10:55:01 AM

Peter – I hope to talk to you about this and a path forward during our Friday morning call. Do you want me to call you? If so, what number?

From: Manning, Peter (AG) <ManningP@michigan.gov>
Sent: Tuesday, May 28, 2019 2:48 PM
To: Nessel, Dana (AG) <NesselD34@michigan.gov>; Keenan, Kelly (AG) <KeenanK@michigan.gov>; Moody, Laura (AG) <MoodyL@michigan.gov>; Sonneborn, Suzanne (AG) <SonnebornS@michigan.gov>
Cc: Skip Pruss <pruss@5lakesenergy.com>
Subject: Exxon lawsuit

I spoke to Skip on Friday and he mentioned his conversation with Lisa Wozniak regarding the lawsuits against Exxon for failure to disclose the impacts of its activities on climate change. I am happy to be part of a meeting with the League of Conservation Voters. [redacted]

Peter

From: Skip Pruss
To: Manning, Peter (AG)
Subject: Re: follow up
Date: Friday, May 31, 2019 3:41:26 PM

Of course.

Sent from my iPhone

On May 31, 2019, at 2:45 PM, Manning, Peter (AG) <ManningP@michigan.gov> wrote:

> Thanks. Will you please include me when you set something up with them.
>
> Peter
>
> ---
>
> **From:** Skip Pruss <pruss@5lakesenergy.com>
> **Sent:** Friday, May 31, 2019 1:38 PM
> **To:** Manning, Peter (AG) <ManningP@michigan.gov>
> **Subject:** FW: follow up
>
> Keeping you in the loop.
>
> ---
>
> **From:** Chuck Savitt <chuck@sheredling.com>
> **Sent:** Friday, May 31, 2019 1:30 PM
> **To:** Skip Pruss <pruss@5lakesenergy.com>
> **Subject:** Re: follow up
>
> Thank you Skip for keeping this moving. Will look forward to that conversation.
>
> ---
>
> **From:** Skip Pruss <pruss@5lakesenergy.com>
> **Date:** Friday, May 31, 2019 at 1:28 PM
> **To:** Vic Sher <vic@sheredling.com>
> **Cc:** matt edling <matt@sheredling.com>, Chuck Savitt <chuck@sheredling.com>, "Kelly Keenan (keenank@michigan.gov)" <keenank@michigan.gov>
> **Subject:** RE: follow up
>
> Vic,
>
> We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,
Thanks for your call.
I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.
Best,
Chuck

Charles C. Savitt
Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

From: Manning, Peter (AG)
To: Keenan, Kelly (AG)
Cc: Skip Pruss
Subject: Potential litigation against Exxon
Date: Friday, May 31, 2019 11:46:37 AM

I spoke to Skip this morning. I understand he is going to reach out to the firm handling the Exxon matters and arrange for a discussion after the PFAS RFP process is completed. Will you be following up with the AG to explain the situation?

Peter

From: Skip Pruss
To: Keenan, Kelly (AG)
Subject: FW: follow up
Date: Friday, May 31, 2019 1:32:24 PM

From: Chuck Savitt <chuck@sheredling.com>
Sent: Friday, May 31, 2019 1:30 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Subject: Re: follow up

Thank you Skip for keeping this moving. Will look forward to that conversation.

From: Skip Pruss <pruss@5lakesenergy.com>
Date: Friday, May 31, 2019 at 1:28 PM
To: Vic Sher <vic@sheredling.com>
Cc: matt edling <matt@sheredling.com>, Chuck Savitt <chuck@sheredling.com>, "Kelly Keenan (keenank@michigan.gov)" <keenank@michigan.gov>
Subject: RE: follow up

Vic,

We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the

Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,

Thanks for your call.

I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.

Best,

Chuck

Charles C. Savitt
Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

From: Matt Edling
To: Skip Pruss; Vic Sher
Cc: Keenan, Kelly (AG)
Subject: RE: follow up
Date: Friday, September 27, 2019 2:09:18 PM

Thanks Skip. Same to you.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, September 27, 2019 7:16 AM
To: Matt Edling <matt@sheredling.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Matt,

We will get back to you next week on this. Have a good weekend.

Skip

From: Matt Edling <matt@sheredling.com>
Sent: Thursday, September 26, 2019 4:32 PM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Skip,

We hope you are well. Would you and Deputy Attorney General Keenan like to pick up the conversation?

Sincerely,

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, May 31, 2019 10:29 AM
To: Vic Sher <vic@sheredling.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>; Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Vic,

We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,

Thanks for your call.

I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.

Best,

Chuck

Charles C. Savitt
Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

From:	Matt Edling
To:	Skip Pruss; Vic Sher
Cc:	Keenan, Kelly (AG)
Subject:	RE: follow up
Date:	Tuesday, October 1, 2019 3:42:24 PM
Attachments:	Order.pdf

Skip –

Some very recent news you might be interested in. The Fourth Circuit just denied the climate defendants' motion for stay pending appeal in Baltimore's case.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Matt Edling
Sent: Friday, September 27, 2019 11:09 AM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Thanks Skip. Same to you.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, September 27, 2019 7:16 AM
To: Matt Edling <matt@sheredling.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Matt,

We will get back to you next week on this. Have a good weekend.

Skip

From: Matt Edling <matt@sheredling.com>

Sent: Thursday, September 26, 2019 4:32 PM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Skip,

We hope you are well. Would you and Deputy Attorney General Keenan like to pick up the conversation?

Sincerely,

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, May 31, 2019 10:29 AM
To: Vic Sher <vic@sheredling.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>; Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Vic,

We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in

understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,
Thanks for your call.
I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.
Best,
Chuck

Charles C. Savitt
Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

FILED: October 1, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1644
(1:18-cv-02357-ELH)

MAYOR AND CITY COUNCIL OF BALTIMORE

Plaintiff - Appellee

v.

BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CROWN CENTRAL LLC; CROWN CENTRAL NEW HOLDINGS LLC; CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL, PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; SPEEDWAY LLC; HESS CORP.; CNX RESOURCES CORPORATION; CONSOL ENERGY, INC.; CONSOL MARINE TERMINALS LLC

Defendants - Appellants

and

LOUISIANA LAND & EXPLORATION CO.; PHILLIPS 66 COMPANY; CROWN CENTRAL PETROLEUM CORPORATION

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Supporting Appellant

NATIONAL LEAGUE OF CITIES; U. S. CONFERENCE OF MAYORS; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; PUBLIC CITIZEN, INC.; SHELDON WHITEHOUSE; EDWARD J. MARKEY; STATE OF MARYLAND; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON; MARIO J. MOLINA; MICHAEL OPPENHEIMER; BOB KOPP; FRIEDERIKE OTTO; SUSANNE C. MOSER; DONALD J. WUEBBLES; GARY GRIGGS; PETER C. FRUMHOFF; KRISTINA DAHL; NATURAL RESOURCES DEFENSE COUNCIL; ROBERT BRULLE; CENTER FOR CLIMATE INTEGRITY; CHESAPEAKE CLIMATE ACTION NETWORK; JUSTIN FARRELL; BEN FRANTA; STEPHAN LEWANDOWSKY; NAOMI ORESKES; GEOFFREY SUPRAN; UNION OF CONCERNED SCIENTISTS

Amici Supporting Appellee

O R D E R

Upon review of submissions relative to the motion for stay pending appeal, the court denies the motion.

Entered at the direction of Judge Wynn with the concurrence of Chief Judge Gregory and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

From:	Manning, Peter (AG)
To:	Bannister, Susan (AG); Pruss, Stanley (AG-Contractor); Keenan, Kelly (AG)
Subject:	RE: Climate change litigation
Date:	Wednesday, October 2, 2019 4:56:17 PM

I just touched based with Skip. An internal meeting/call is what we want initially.

From: Bannister, Susan (AG) <BannisterS@michigan.gov>
Sent: Wednesday, October 2, 2019 2:40 PM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; Keenan, Kelly (AG) <KeenanK@michigan.gov>
Subject: RE: Climate change litigation

I can do that, will both of you be attending by phone or in person?

Susan Bannister
Executive Assistant to
Deputy Attorney General Kelly Keenan
Office of Attorney General Dana Nessel
Direct: (517) 335-0770
Mobile: (517) 449-7686

From: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Sent: Wednesday, October 2, 2019 2:39 PM
To: Bannister, Susan (AG) <BannisterS@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; Keenan, Kelly (AG) <KeenanK@michigan.gov>
Subject: Re: Climate change litigation

Susan,

It works for me. If it works for others, then Matt Edling from Sher Edling needs to be scheduled in.

Thanks,

Skip

Matthew K. Edling

matt@sheredling.com

SHER EDLING LLP

100 Montgomery St., Ste. 1410

San Francisco CA 94104

From: Bannister, Susan (AG) <BannisterS@michigan.gov>
Sent: Wednesday, October 2, 2019 2:32 PM
To: Manning, Peter (AG) <ManningP@michigan.gov>; Keenan, Kelly (AG) <KeenanK@michigan.gov>
Cc: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Subject: RE: Climate change litigation

I have an opening on Friday at 11:00 am. Does that work for your schedules?

Susan Bannister
Executive Assistant to
Deputy Attorney General Kelly Keenan
Office of Attorney General Dana Nessel
Direct: (517) 335-0770
Mobile: (517) 449-7686

From: Manning, Peter (AG) <ManningP@michigan.gov>
Sent: Wednesday, October 2, 2019 1:27 PM
To: Keenan, Kelly (AG) <KeenanK@michigan.gov>
Cc: Bannister, Susan (AG) <BannisterS@michigan.gov>; Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Subject: Climate change litigation

Kelly,

Skip and I would like a half an hour of your time to discuss the above. If Susan can schedule something in the next few days that would be helpful.

Thanks,

Peter

From: Keenan, Kelly (AG)
To: Nessel, Dana (AG)
Subject: Fw: per our conversation
Date: Tuesday, May 21, 2019 9:29:36 PM

I had an interesting conversation with Lisa Wozniak today. She got the message loud and clear on Spanolia.

She also wondered if we would be open to a meeting with an interesting attorney she met at a conference who is bringing some unique climate change cases. I told her I would be happy to talk to him and if it seemed to have possibilities to set up a meeting with. Below are some links she sent regarding the attorney and litigation.

From: Lisa Wozniak <lisa@michiganlcv.org>
Sent: Tuesday, May 21, 2019 4:16 PM
To: Keenan, Kelly (AG)
Subject: per our conversation

Kelly,

Per our conversation, here are a few links to the kinds of things happening on climate. I'll be in touch.

Thanks,
Lisa

Washington Post, the Courts
https://www.washingtonpost.com/world/europe/climate-change-activists-worldwide-look-to-courts-as-a-powerful-new-ally/2019/04/23/b4403420-5e1d-11e9-98d4-844088d135f2_story.html?noredirect=on&utm_term=.010d94efdbbe

New York Times
https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html?searchResultPosition=3

_How Private Lawsuits Could Save the Climate

2018 in Climate Liability: When a Trend Became a Wave

Pay Attention to the Growing Wave of Climate Change Lawsuits

The Climate Litigation Threat is Getting Credible

--
Lisa Wozniak, Executive Director
Michigan League of Conservation Voters / Michigan LCV Education Fund
SE Michigan Office: 3029 Miller Rd., Ann Arbor, MI 48103
Office: 734-222-9650

Join the fight for Michigan's clean air, clean water and healthy communities.
Your land. Your air. Your water. Your *VOTE*.

Wendling-Richards, Christy (AG)

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Wednesday, May 22, 2019 7:45 PM
To: Keenan, Kelly (AG)
Subject: Climate Litigation

Kelly,

Lisa Wozniak called yesterday evening after talking to you. I have been tracking the same. I won't be able to drill down further until the weekend. I relayed this to DN today at the GLC conference. Let me know if you want to chat.

Sent from my iPhone

Wendling-Richards, Christy (AG)

From: Nessel, Dana (AG)
Sent: Tuesday, May 28, 2019 2:51 PM
To: Manning, Peter (AG)
Cc: Keenan, Kelly (AG); Moody, Laura (AG); Sonneborn, Suzanne (AG); Skip Pruss
Subject: Re: Exxon lawsuit

I will leave that to you to decide, Peter.

Sent from my iPhone

On May 28, 2019, at 2:47 PM, Manning, Peter (AG) <ManningP@michigan.gov> wrote:

> I spoke to Skip on Friday and he mentioned his conversation with Lisa Wozniak regarding the lawsuits against Exxon for failure to disclose the impacts of its activities on climate change. I am happy to be part of a meeting with the League of Conservation Voters. But I understand the focus of the AG activity related to Exxon has been on consumer protection actions, so it may make sense to have Joe Potchen or DJ involved as well.
>
> Peter

Wendling-Richards, Christy (AG)

From: Manning, Peter (AG)
Sent: Wednesday, May 29, 2019 11:00 AM
To: Skip Pruss
Subject: RE: Exxon lawsuit

Sure. You can call my direct line at 335-1470. We can also walk through a couple of Line 5 issues we will want to raise with the AG at the 11:00 meeting.

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Wednesday, May 29, 2019 10:55 AM
To: Manning, Peter (AG) <ManningP@michigan.gov>
Subject: RE: Exxon lawsuit

Peter – I hope to talk to you about this and a path forward during our Friday morning call. Do you want me to call you? If so, what number?

From: Manning, Peter (AG) <ManningP@michigan.gov>
Sent: Tuesday, May 28, 2019 2:48 PM
To: Nessel, Dana (AG) <NesselD34@michigan.gov>; Keenan, Kelly (AG) <KeenanK@michigan.gov>; Moody, Laura (AG) <MoodyL@michigan.gov>; Sonneborn, Suzanne (AG) <SonnebornS@michigan.gov>
Cc: Skip Pruss <pruss@5lakesenergy.com>
Subject: Exxon lawsuit

I spoke to Skip on Friday and he mentioned his conversation with Lisa Wozniak regarding the lawsuits against Exxon for failure to disclose the impacts of its activities on climate change. I am happy to be part of a meeting with the League of Conservation Voters. But I understand the focus of the AG activity related to Exxon has been on consumer protection actions, so it may make sense to have Joe Potchen or DJ involved as well.

Peter

SAAG Invoice

Stanley Pruss . SAAG Hours June 11 – July 11, 2019

June 11

- Review [redacted] 2.2
- [redacted] call [redacted] .7
- [redacted] call .2

June 12

- Research [redacted] 1.7
- Call with [redacted] .7

June 13

- Review [redacted] research 1.7

7-29-19
Approved
K Keenan

SAAG Invoice

Stanley Pruss . SAAG Hours June 11 – July 11, 2019

June 11

- Review [redacted]; prepare outline of [redacted] 2.25
- Line 5 call with D. Nessel and Team .75
- PFAS Team call .25

June 12

- Research on NYU State Impact Center; not to Nessel and Keenan 1.75
- Call with David Hayes, ED, NYU SIC .75

June 13

7-8-19
Approved to pay
Kelly Keenan

SAAG Invoice

Stanley Pruss SAAG Hours May 11 – June 10, 2019

May 13

- Review new federal PFAS legislation .50
- Review [redacted]; memo to P. Manning et al re scope of [redacted] 1.25

May 14

- PFAS Call; call prep .50

May 15

- Call with K. Keenan re [redacted] .25
- Call with P. Manning re GLC meeting .50
- GLC call with MI delegation; review by-laws and Compact 2.00

May 16

- Prep for [redacted] .75
- Call on [redacted] .50

May 21

- Call with T. Dobson & D. Fredricks re [redacted] 1.25
- Call with L. Wozniak re [redacted] .25

Approved to pay
Kelly Keenan

SAAG Invoice

Stanley Pruss SAAG Hours May 11 – June 10, 2019

May 13

- Review new federal PFAS legislation .50
- Review [redacted]; memo to P. Manning et al re scope of [redacted] 1.25

May 14

- PFAS Call; call prep .50

May 15

- Call with K. Keenan re [redacted] .25
- Call with P. Manning re GLC meeting .50
- GLC call with MI delegation; review by-laws and Compact 2.00

May 16

- Prep for [redacted] .75
- Call on [redacted] .50

May 21

- Call with T. Dobson & D. Fredricks re [redacted] 1.25
- Call with L. Wozniak re [redacted] .25

May 22

- GLC Meeting 8.00

May 23

- GLC Meeting 5.00
- Mileage - April 12; Northport to Ann Arbor and return; hotel; GLC conference fee 548 miles
- View [redacted] video .25

May 24

- Call with P. Manning re GLC meeting; [redacted] .50

May 28

- Review and comment on Reichel draft of [redacted]; background research and document review. 2.25
- Research [redacted]; call with L. Wozniak 1.25

May 29

- Call with Chuck Savitt, Sher Edling re [redacted] .50

May 30

- Research re Sher Edling; note Nessel et al re [redacted] 1.50
- Call with L. Barbash-Riley re [redacted] .50

October 23

- Call with [redacted] .50
- Call wit [redacted] .25

October 25

October 23

- Call with Sher Edling re [redacted] .50
- Call wit K. Keenan and P. Manning re [redacted] .25

October 25

- Climate notes for AG call with S. Abramsky .75

December 19

- Review climate litigation briefs 1.75
- Review [redacted] 1.00
- [redacted] research 2.25

December 20

- Review motion for Enbridge stay .25

Total Hours **30.50** ✓

Total Due @ $80/h **$2440.00** ✓

From: Skip Pruss
To: Stafford, Amy (AG)
Subject: FW: Climate Litigation
Date: Wednesday, February 5, 2020 3:05:53 PM

-----Original Message-----
From: Skip Pruss
Sent: Wednesday, May 22, 2019 7:45 PM
To: Kelly Keenan <keenank@michigan.gov>
Subject: Climate Litigation

Kelly,

Lisa Wozniak called yesterday evening after talking to you. I have been tracking the same. I won't be able to drill down further until the weekend. I relayed this to DN today at the GLC conference. Let me know if you want to chat.

Sent from my iPhone

From:	Skip Pruss
To:	Stafford, Amy (AG)
Subject:	FW: time to touch base
Date:	Wednesday, February 5, 2020 3:05:13 PM

From: Lisa Wozniak <lisa@michiganlcv.org>
Sent: Tuesday, May 21, 2019 6:32 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Subject: Re: time to touch base

Ill try to call in about 40 min

Lisa Wozniak, Executive Director
Michigan League of Conservation Voters
734-222-9650 office

Sent from my iPhone

On May 21, 2019, at 6:09 PM, Skip Pruss <pruss@5lakesenergy.com> wrote:

> Lisa - I'm driving for the next 3 hours and could talk. If not today how about tomorrow afternoon?
>
> Sent from my iPhone
>
> On May 21, 2019, at 4:18 PM, Lisa Wozniak <lisa@michiganlcv.org> wrote:
>
> > Skip,
> > If you have a moment, I'd love to touch base with you on a subject I broached with Kelly Keenan today. Let me know if there might be a time for us to hop on the phone for a few minutes.
> >
> > Thanks!
> > Lisa
> >
> > --
> > Lisa Wozniak, Executive Director
> > Michigan League of Conservation Voters / Michigan LCV Education Fund
> > SE Michigan Office: 3029 Miller Rd., Ann Arbor, MI 48103
> > Office: 734-222-9650

Join the fight for Michigan's clean air, clean water and healthy communities.

Your land. Your air. Your water. Your *VOTE*.

From:	Skip Pruss
To:	Manning, Peter (AG)
Subject:	FW: follow up
Date:	Wednesday, October 2, 2019 12:52:27 PM

From: Matt Edling <matt@sheredling.com>
Sent: Tuesday, October 1, 2019 4:26 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Subject: RE: follow up

Skip –

At the risk of information overload, Vic and I will be at the Univ. of Minnesota Law School on the 15th speaking about the litigation – Vic is a panelist. If you are interested we would be happy to shoot over the following day.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Matt Edling
Sent: Tuesday, October 1, 2019 12:42 PM
To: 'Skip Pruss' <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: 'Kelly Keenan (keenank@michigan.gov)' <keenank@michigan.gov>
Subject: RE: follow up

Skip –

Some very recent news you might be interested in. The Fourth Circuit just denied the climate defendants' motion for stay pending appeal in Baltimore's case.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Matt Edling
Sent: Friday, September 27, 2019 11:09 AM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Thanks Skip. Same to you.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, September 27, 2019 7:16 AM
To: Matt Edling <matt@sheredling.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Matt,

We will get back to you next week on this. Have a good weekend.

Skip

From: Matt Edling <matt@sheredling.com>
Sent: Thursday, September 26, 2019 4:32 PM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Skip,

We hope you are well. Would you and Deputy Attorney General Keenan like to pick up the conversation?

Sincerely,

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, May 31, 2019 10:29 AM
To: Vic Sher <vic@sheredling.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>; Kelly Keenan

(keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Vic,

We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,
Thanks for your call.

I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.

Best,

Chuck

Charles C. Savitt
Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

From: Skip Pruss
To: Manning Peter (AG)
Subject: Fwd: EPA Emissions Policy Change Faces Skeptical DC Circ.
Date: Tuesday, October 8, 2019 7:34:17 AM

FYI - RI remand; 1st Circuit. Is someone scheduling a call with Sher Edling?

Sent from my iPhone

Begin forwarded message:

From: Energy Law360 <news-q@law360.com>
Date: October 8, 2019 at 3:18:53 AM CDT
To: pruss@5lakesenergy.com
Subject: EPA Emissions Policy Change Faces Skeptical DC Circ.

Law360 Energy

ENERGY

Tuesday, October 8, 2019

TOP NEWS

EPA Emissions Policy Change Faces Skeptical DC Circ.

Two D.C. Circuit judges appeared concerned Monday that a new U.S. Environmental Protection Agency emissions regulation would make it easier for polluters to violate national air quality standards, saying it offers little or no guidance to ensure new or modified projects that emit air pollution are properly screened before receiving permits.

Read full article »

Calif. Utility Loses Bid For High Court Review Of Liability Law

The U.S. Supreme Court on Monday refused to review a California utility's constitutional challenge to a state inverse condemnation law that holds utilities liable for wildfire damage caused by their equipment, regardless of any actual negligence.

Read full article »

Enviros Want DC Review Of 'Once In, Always In' Panel Ruling

Environmentalists and California have asked the D.C. Circuit to reconsider a split panel ruling that courts can't review a U.S. Environmental Protection Agency memorandum rescinding its "once in, always in" air pollution permitting policy.

Petition attached | Read full article »

1st Circ. Clears Way For Climate Change Suit's Remand To RI

A suit brought by the state of Rhode Island against a slew of energy companies over climate change-related costs is set to return to state court later this week after the First Circuit rejected a request by BP PLC on Monday to block a lower court's remand order.

2 documents attached | Read full article »

High Court Won't Review Pipeline Land Grab Challenge

The U.S. Supreme Court on Monday declined to hear a landowner's challenge of a ruling that allows Mountain Valley Pipeline LLC to quickly condemn land so it can begin construction on its $5 billion gas pipeline.

Read full article »

RISING STARS

Rising Star: Earthjustice's Kim Smaczniak

Law360 Pro Say Podcast

Listen to our new podcast here

COMPANIES

ASARCO LLC
Alon USA Energy Inc.
Altman Weil Inc.
Amazon.com Inc.
American Federation of State, County and Municipal Employees
American Fuel & Petrochemical Manufacturers
American Petroleum Institute Inc.
American Trucking Associations Inc.
Andeavor Corp.
Apache Corp.
Apple Inc.
BMO Capital Markets Corp.
BP p.l.c.
Boardwalk Pipeline Partners LP
Center for Biological Diversity
Chevron Corp.
City of Hope National Medical Center
Clayton Dubilier & Rice LLC

Earthjustice's Kim Smaczniak helped engineer a successful pushback to a Trump administration plan to bail out struggling coal-fired and nuclear power plants as she built out a federal clean energy focus for the group, earning her a spot among the energy attorneys under age 40 honored by Law360 as Rising Stars.

Read full article »

PETROLEUM

Frac Sand Shipper Defends $49M Win Over Alleged Copycat

An attempt to undo a $49 million judgment after a jury found a container manufacturer had stolen proprietary designs for frac sand shipping containers amounts to "a remarkable exercise in willful ignorance," an oil industry shipper told a Texas appellate court.

☐ *Brief attached* | Read full article »

Refiner Says 'False' Price-Fixing Claims Warrant Sanctions

Alon USA Energy Inc. has urged a California federal judge to jettison it from parallel, proposed price-fixing class actions against BP, Exxon and other oil companies, arguing it's still in the case because fuel buyers have repeated "false allegations" about the closure of one of its refineries — falsities that warrant sanctions.

☐ *1 document attached* | Read full article »

Ecuador Wants $448M Oil Profits Award Axed

Ecuador has asked the International Centre for Settlement of Investment Disputes to annul a $448.82 million arbitration award issued recently to a Bahamas-incorporated oil company in a dispute over the allocation of profits from two oil blocks in the Amazon.

Read full article »

Pa. Atty Fights Landowners' DQ Bid In Gas Royalties Suit

An attorney accused of filing fraudulent bills while representing a class of landowners who claim Range Resources Corp. shortchanged them on natural gas royalties has pushed back against a suit filed in Pennsylvania federal court by a dissident group of plaintiffs who want the lawyer disqualified.

☐ *3 documents attached* | Read full article »

Montana Wants In On New Keystone XL Pipeline Suit

Montana's attorney general on Monday said millions off dollars in state tax revenue is at risk because of an environmental group's challenge to a permit allowing the construction of the Keystone XL Pipeline and asked to intervene in the case.

☐ *2 documents attached* | Read full article »

High Court Passes Over Sunoco $306M Tax Refund Fight

Sunoco won't get a $306 million tax refund, as the U.S. Supreme Court declined Monday to hear its arguments that it should be able to deduct costs that were offset by green fuel tax credits.

☐ *Order List attached* | Read full article »

Chancery Retains Part Of Boardwalk Pipeline Class Suit

A Delaware vice chancellor on Monday refused to toss three of six counts in a proposed class challenge to Boardwalk Pipeline LP's $1.5 billion public unit buyout in 2018, ruling the class has shown it is “reasonably conceivable” the deal was unfair to minority unitholders.

☐ *Decision attached* | Read full article »

Texas High Court To Hear 'Anti-Washout' Lease Fight

The Texas Supreme Court has agreed to hear a test of the power of "anti-washout" clauses, which are intended to protect oil and gas ownership royalty interests from lapsing, in a Texas Panhandle lease fight involving Apache Corp.

Read full article »

Consolidated Edison Inc.
Edison Electric Institute Inc.
Environmental Defense Fund Inc.
Environmental Integrity Project
Exxon Mobil Corp.
FMC Corp.
Fordham University
Human Rights Campaign
Illinois Tool Works Inc.
Implats
International Business Machines Corp.
International Centre for Settlement of Investment Disputes
International Finance Corp.
KPMG International
Loews Corp.
NantKwest Inc.
Natural Resources Defense Council
NextEra Energy Inc.
Nokia Corporation
North American Palladium Ltd.
PG&E Corp.
Phillips 66
Planned Parenthood Federation
QUALCOMM Inc.
Quill Corp.
Range Resources Corp.
Royal Dutch Shell PLC
San Diego Gas & Electric Co.
Sierra Club
Solus Alternative Asset Management LP
Southern California Edison
Summit Power Group LLC
Sunoco LP
Teekay
TransCanada Corporation
United Steelworkers

LAW FIRMS

Abrams & Bayliss
Akin Gump
Arnold & Porter
Baker McKenzie
BakerHostetler
Ballard Spahr
Beck Redden
Bingham Greenebaum
Clifford Chance
Cohen & Grigsby
Cravath Swaine
Crowley Fleck
Davis Gerald & Cremer
Davis Polk
Debevoise & Plimpton

UTILITIES & POWER

Wildfire Victims Say PG&E's Ch. 11 Plan Won't Cut It

Pacific Gas and Electric Co.'s Chapter 11 reorganization plan won't make Northern California wildfire victims whole again, their attorneys told a U.S. bankruptcy judge Monday, urging him to terminate PG&E's exclusivity period to allow them to move ahead with an alternative plan that caps liabilities $6 billion higher than PG&E's proposal.

Read full article »

Japan's JERA Plugs $330M Into Bangladesh Power Producer

Japanese energy company JERA has agreed to pay $330 million for a 22% stake in Bangladeshi power producer Summit Power, the companies said Monday.

Read full article »

METALS & MINING

3 Firms Weld $751M Deal For PE-Backed Canadian Mining Co.

South African metals refiner Impala Platinum has agreed to buy private equity-backed Canadian mining company North American Palladium for total consideration of roughly CA$1 billion ($751 million), the companies said Monday, in a deal guided by Stikeman Elliott LLP, Webber Wentzel and Baker McKenzie.

Read full article »

Justices Won't Probe Arbitrator's Labor Contract Tweak

The U.S. Supreme Court declined Monday to hear a mining company's challenge to a Ninth Circuit decision letting an arbitrator rewrite part of its collective bargaining agreement with the United Steelworkers, despite contract language barring arbitrators from making such tweaks.

Read full article »

Blackhawk's Follow-Up $35M DIP Loan Gets Lenders' OK

Kentucky-based coal mining operation Blackhawk Mining LLC received interim approval Monday in Delaware to tap a portion of a $35 million debtor-in-possession loan that will help bridge gaps in the company's receipts after its Chapter 11 plan was confirmed in August.

Read full article »

EXPERT ANALYSIS

Cybersecurity Issues To Consider In Oil And Gas M&A

Cybersecurity is a key risk factor in mergers and acquisitions generally, but executives and directors contemplating an acquisition in the oil and gas sector must note the industry's unique cybersecurity challenges in order to properly assess transaction risks and value target companies, say attorneys at Skadden.

Read full article »

LEGAL INDUSTRY

By The Numbers

Precedent And The Roberts Court In 4 Charts

Every U.S. Supreme Court nominee vows to be guided by stare decisis. But respect for precedent rarely seems so straightforward once their title changes to "justice." In this In-Depth special report, Law360 looks at the precedents the high court has altered or overruled since John Roberts took the helm.

Read full article »

Alito Makes Crack About Liberals' Lectures On Precedent

U.S. Supreme Court Justice Samuel Alito Jr. lightly chided his liberal

Dechert
Dentons
Dinsmore & Shohl
Earthjustice
Gibson Dunn
Gilbert & Sackman
Hawxhurst Harris
Hogan Lovells
Irell & Manella
Jones Day
Kirkland & Ellis
Latham & Watkins
Linklaters
Milbank LLP
Miller & Chevalier
Morgan Lewis
Nelson Mullins
Norton Rose
O'Melveny & Myers
Orrick
Paul Weiss
Potter Anderson
Quinn Emanuel
Reed Smith
Richards Layton
Riney & Mayfield
Robbins Arroyo
Robbins Geller
Roetzel & Andress
Sher Edling
Sidley Austin
Skadden
Steptoe & Johnson LLP
St keman Elliott
Sullivan & Cromwell
Susman Godfrey
Templeton Smithee
Weil Gotshal
Wilson Turner
Winston & Strawn
Young Conaway
Zabel Freeman

GOVERNMENT AGENCIES

Army Corps of Engineers
California Public Utilities Commission
California Supreme Court
Delaware Court of Chancery
European Union
Federal Energy Regulatory Commission
Federal Trade Commission
Internal Revenue Service
Securities and Exchange Commission
Texas Supreme Court

colleagues at oral arguments Monday in a case from a convicted Louisiana murder defendant seeking to overturn precedent, pointing out that "last term, the majority was lectured pretty sternly in a couple of dissents about the importance of stare decisis," the Latin term for respecting precedent.
Read full article »

Quinn's Urquhart, 72, Hailed As Firm's Unrivaled Ambassador

A. William "Bill" Urquhart, a bet-the-company litigator who helped grow Quinn Emanuel Urquhart & Sullivan LLP from a Los Angeles boutique to one of the most profitable firms in BigLaw, died Friday at age 72.
Read full article »

7 BigLaw Firms Step Up In Litigation Push For LGBTQ Rights

Seven large law firms have committed to dedicate pro bono resources to a litigation campaign aimed at achieving equality for members of the LGBTQ community, in a joint effort recently announced by nonprofit organization Human Rights Campaign.
Read full article »

Amazon, Law Firms Partner In New 'IP Accelerator' Program

Amazon.com Inc. has announced that it is partnering with law firms in a new program called "IP Accelerator," which aims to provide intellectual property protection to sellers that use participating firms to help with their trademark-related legal needs.
Read full article »

Justices Question USPTO's Bold Pursuit Of Atty Fees

The U.S. Supreme Court appeared skeptical Monday of the U.S. Patent and Trademark Office's recent practice of seeking attorney fees from parties that take the agency to court, given that the USPTO paid for its own lawyers for more than a century.
Read full article »

Winston & Strawn Can't Win High Court Review In Bias Suit

The U.S. Supreme Court on Monday denied review of a California appeals court ruling that Winston & Strawn's arbitration requirement with a former firm attorney was unenforceable, restarting her state court sex discrimination suit.
Read full article »

High Court Stays Out Of W.Va. Judicial Impeachment Row

The U.S. Supreme Court on Monday declined to review a decision by West Virginia's highest court that halted impeachment proceedings by lawmakers against the state's then-chief justice and effectively blocked similar cases against two other justices.
Read full article »

Interview

15 Minutes With FMC's General Counsel

In a recent interview with Law360, the agricultural sciences company's general counsel shared his thoughts on the benefits of rising through the ranks in one legal department, the evolving role of the general counsel and alternative billing arrangements.
Read full article »

Dentons To Combine With 2 US Firms In 13th Merger This Year

Dentons said Monday that it is planning to combine with two midsize U.S. law firms, the latest in a long string of recent acquisitions for the legal giant.
Read full article »

U.S. Army
U.S. Bankruptcy Court for the District of Delaware
U.S. Bankruptcy Court for the Northern District of California
U.S. Court of Appeals for the District of Columbia Circuit
U.S. Court of Appeals for the First Circuit
U.S. Department of Energy
U.S. Department of Justice
U.S. Department of State
U.S. District Court for the Southern District of California
U.S. District Court for the Western District of Pennsylvania
U.S. Environmental Protection Agency
U.S. Patent and Trademark Office
U.S. Supreme Court
United States District Court for the District of Montana
Virginia State Senate
World Bank Group

IP Associate (Stamford, CT Office)
McCarter & English, LLP
Stamford, Connecticut

POWER GROUP ATTORNEY
Los Angeles Department of Water & Power (LADWP)
Los Angeles, California

From: Manning, Peter (AG)
To: Pruss, Stanley (AG-Contractor)
Subject: RE: follow up
Date: Wednesday, October 16, 2019 11:58:00 PM

It appears Susan is expecting you to reach out to the Sher Edling folks.

From: Bannister, Susan (AG) <BannisterS@michigan.gov>
Sent: Wednesday, October 16, 2019 8:34 AM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>
Subject: RE: follow up

Skip or Peter,

Were one of you going to check with the other parties for this meeting?

Susan Bannister
Executive Assistant to
Deputy Attorney General Kelly Keenan
Office of Attorney General Dana Nessel
Direct: (517) 335-0770
Mobile: (517) 449-7686

From: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Sent: Monday, October 14, 2019 12:06 PM
To: Bannister, Susan (AG) <BannisterS@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>
Subject: Re: follow up

Susan, I can do all the dates except 10/17 at 2 pm.

Matt Edling is the one requesting the call.

Matthew K. Edling

matt@sheredling.com

SHER EDLING LLP

100 Montgomery St., Ste. 1410

San Francisco CA 94104

(628) 231-2520 | sheredling.com

From: Bannister, Susan (AG) <BannisterS@michigan.gov>
Sent: Monday, October 14, 2019 10:53 AM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>
Subject: RE: follow up

Peter and Skip,

Below is a list of Mr. Keenan's availability for this call over the next couple of weeks. I have put a hold on these dates, however calendar space is a premium these days so if you could get back to me sooner rather than later that would be great.

Also, can you confirm who from Sher Edling I would need to include in this phone conference?

10/15 @ 11am
10/17 @ 1:00 pm or 2:00 pm
Depending on another meeting may have availablity on 10/21
10/22 @ 2:30 pm or 3:00 pm
10/23 @ 11:00 am

Susan Bannister
Executive Assistant to
Deputy Attorney General Kelly Keenan
Office of Attorney General Dana Nessel
Direct: (517) 335-0770
Mobile: (517) 449-7686

From: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Sent: Wednesday, October 9, 2019 9:36 PM
To: Bannister, Susan (AG) <BannisterS@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>
Subject: Re: follow up

That's fine. Have a good weekend.

From: Bannister, Susan (AG) <BannisterS@michigan.gov>
Sent: Wednesday, October 9, 2019 5:14 PM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>

Subject: Re: follow up

Skip,

I am out of the office until Monday. I can get it scheduled then. If not I can ask one of the other executive secretaries to work on it.

Susan Bannister
Executive Assistant
Deputy Attorney General Kelly Keenan
Direct: (517) 335-0770
Mobile: (517) 449-7686

From: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Sent: Wednesday, October 9, 2019 4:26:43 PM
To: Manning, Peter (AG) <ManningP@michigan.gov>
Cc: Bannister, Susan (AG) <BannisterS@michigan.gov>
Subject: Re: follow up

Peter - I'll be in the GLC meeting Friday. I think we are looking to next week. Can Susan schedule for a time that works for you and Kelly? I have the most flexibility.

From: Manning, Peter (AG) <ManningP@michigan.gov>
Sent: Tuesday, October 8, 2019 11:17 AM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Subject: RE: follow up

I was going to forward this to Susan but I was thinking about taking a couple of hours off on Friday, which would be difficult with a Pacific time call (for them). Can you check on dates and times next week?

Thanks,

Peter

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Tuesday, October 8, 2019 9:09 AM
To: Manning, Peter (AG) <ManningP@michigan.gov>
Subject: Fwd: follow up

FYI

Sent from my iPhone

Begin forwarded message:

From: Matt Edling <matt@sheredling.com>
Date: October 8, 2019 at 7:58:49 AM CDT
To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Vic Sher <vic@sheredling.com>
Subject: Re: follow up

Skip -
Just following up. Same time slots are free below except I am booked from 9:30-10 pacific as well.

We look forward to connecting.

Matt Edling
Sher Edling LLP

On Oct 1, 2019, at 2:05 PM, Matt Edling <matt@sheredling.com> wrote:

> Thursday unfortunately is out. Next Friday we are free all day from 9 am pacific on except 12-1:00 pacific. Let us know if you prefer a presentation (zoom) or just a call. We look forward to it.
>
> Sincerely,
>
> **Matthew K. Edling**
>
> **SHER EDLING LLP**
> 100 Montgomery St., Ste. 1410
> San Francisco CA 94104
> (628) 231-2520 | sheredling.com
>
> ---
>
> **From:** Skip Pruss <pruss@5lakesenergy.com>
> **Sent:** Tuesday, October 1, 2019 1:30 PM
> **To:** Matt Edling <matt@sheredling.com>
> **Subject:** Re: follow up
>
> Matt,
>
> Still working on the logistics of the call at our end. Can you provide some times you are available Thursday and Friday or next week?
>
> Skip
>
> Sent from my iPhone

On Oct 1, 2019, at 3:42 PM, Matt Edling <matt@sheredling.com> wrote:

> Skip –
> Some very recent news you might be interested in. The Fourth Circuit just denied the climate defendants' motion for stay pending appeal in Baltimore's case.
>
> **Matthew K. Edling**
>
> **SHER EDLING LLP**
> 100 Montgomery St., Ste. 1410
> San Francisco CA 94104
> (628) 231-2520 | sheredling.com
>
> ---
>
> **From:** Matt Edling
> **Sent:** Friday, September 27, 2019 11:09 AM
> **To:** Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
> **Cc:** Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
> **Subject:** RE: follow up
>
> Thanks Skip. Same to you.
>
> **Matthew K. Edling**
>
> **SHER EDLING LLP**
> 100 Montgomery St., Ste. 1410
> San Francisco CA 94104
> (628) 231-2520 | sheredling.com
>
> ---
>
> **From:** Skip Pruss <pruss@5lakesenergy.com>
> **Sent:** Friday, September 27, 2019 7:16 AM
> **To:** Matt Edling <matt@sheredling.com>; Vic Sher <vic@sheredling.com>
> **Cc:** Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
> **Subject:** RE: follow up
>
> Matt,
>
> We will get back to you next week on this. Have a good weekend.

Skip

From: Matt Edling <matt@sheredling.com>
Sent: Thursday, September 26, 2019 4:32 PM
To: Skip Pruss <pruss@5lakesenergy.com>; Vic Sher <vic@sheredling.com>
Cc: Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Skip,

We hope you are well. Would you and Deputy Attorney General Keenan like to pick up the conversation?

Sincerely,

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Skip Pruss <pruss@5lakesenergy.com>
Sent: Friday, May 31, 2019 10:29 AM
To: Vic Sher <vic@sheredling.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>; Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>
Subject: RE: follow up

Vic,

We would like to pick up this conversation after the process relating to the selection of outside counsel for PFAS-related litigation is completed. At that point, Deputy Attorney General Kelly Keenan will join the discussion.

Thanks for your interest in this matter.

Skip Pruss

From: Vic Sher <vic@sheredling.com>
Sent: Wednesday, May 29, 2019 1:34 PM

To: Skip Pruss <pruss@5lakesenergy.com>
Cc: Matt Edling <matt@sheredling.com>; Chuck Savitt <chuck@sheredling.com>
Subject: RE: follow up

Skip,

I thought you might find the attached slides from a presentation I gave recently helpful in understanding the current wave of climate change cases by public entities. Our firm represents the plaintiffs in nine of the twelve pending cases, including the State of Rhode Island, as well as in the Dungeness Crab Fishermen's case (PCFFA). Please follow up with me if you have any questions about these cases or how they fit into the overall climate litigation landscape.

Vic

Vic Sher
Partner

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

From: Chuck Savitt
Sent: Wednesday, May 29, 2019 8:40 AM
To: pruss@5lakesenergy.com
Cc: Vic Sher <vic@sheredling.com>; Matt Edling <matt@sheredling.com>
Subject: follow up

Hi Skip,
Thanks for your call.
I have copied Vic Sher and Matt Edling so you have their contact information for future discussions.
Best,
Chuck

Charles C. Savitt

Director of Strategic Client Relationships

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(202) 236-0494 | sheredling.com

<Order.pdf>

From:	Matt Edling
To:	Keenan, Kelly (AG); Manning, Peter (AG); Pruss, Stanley (AG-Contractor)
Cc:	Vic Sher
Subject:	RE: Climate Litigation
Date:	Friday, October 18, 2019 12:52:18 PM
Attachments:	Application (as filed).pdf Order Denying Mtn for Stay.pdf 2019-10-17 Response to Application.pdf Application to Stay Remand Order.pdf

---

Kelly, Peter, Skip –

In advance of our call next week, I include the attached and information below as background.

1. House Oversight Subcommittee hearing on climate deception next Wed, Oct 23: https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=110126
2. 1St Circuit Briefing Schedule in RI action
    a. 11/20/2019 for appellants
    b. 12/20/19 response
    c. 1/10/20 reply
3. City of Baltimore / Fourth Circuit – Defs' Request for Stay to Supreme Court
    a. Defendants' brief - attached
    b. Our Opposition to Emergency Stay filed last night – attached
4. 10th Circuit
    a. Order denying stay - attached
    b. Defendants request recall of District Order. Attached.
5. Anticipated new filing
    a. MA AG - https://news.bloombergenvironment.com/environment-and-energy/documents-show-massachusetts-ag-ready-to-file-climate-case-against-exxon
6. News/Other
    a. Bloomberg Overview of Lawsuits: https://news.bloombergenvironment.com/environment-and-energy/can-climate-test-cases-move-forward-its-up-to-supreme-court
    b. Guardian re: fossil fuel companies jacking up production: https://www.theguardian.com/environment/2019/oct/10/oil-firms-barrels-markets
    c. Shell CEO says "no choice" but to continue with fossil fuels: https://www.reuters.com/article/us-shell-climate-exclusive-idUSKBN1WT2JL?utm_campaign=Carbon%20Brief%20Daily%20Briefing&utm_medium=email&utm_source=Revue%20newsletter

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

-----Original Appointment-----
From: BannisterS@michigan.gov <BannisterS@michigan.gov> **On Behalf Of** Keenan, Kelly (AG)
Sent: Friday, October 18, 2019 8:54 AM
To: Manning, Peter (AG); Pruss, Stanley (AG-Contractor); Matt Edling
Subject: Climate Litigation
When: Wednesday, October 23, 2019 11:00 AM-11:30 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Conference Call

Meeting with
Kelly Keenan
Skip Pruss
Peter Manning
Matthew Edling of Sher Edling

Conference Call Information:

+1 248-509-0316 United States, Pontiac (Tol)

Conference ID 198 996 399#

Local numbers | Reset PIN | Learn more about Teams | Meeting options

---

No.

IN THE SUPREME COURT OF THE UNITED STATES

SUNCOR ENERGY (U.S.A.) INC., SUNCOR ENERGY SALES INC., SUNCOR ENERGY INC., AND EXXON MOBIL CORPORATION, APPLICANTS

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY, AND CITY OF BOULDER

APPLICATION FOR RECALL OF THE REMAND ORDER PENDING APPEAL

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
NORA AHMED
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

KANNON K. SHANMUGAM
WILLIAM T. MARKS
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223 7300
kshanmugam@wc.com

COLIN G. HARRIS
FAEGRE BAKER DANIELS LLP
1470 Walnut Street,
Suite 300
Boulder, CO 80302

HUGH QUAN GOTTSCHALK
EVAN B. STEPHENSON
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202

Pursuant to 28 U.S.C. 2106 and Supreme Court Rule 22, Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc., and Exxon Mobil Corporation apply to recall the order of the dis trict court remanding this case to state court. The remand order is currently on appeal to the United States Court of Appeals for the Tenth Circuit.

1. Respondents in this action are three local governments in Colorado: the Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder. Applicants are four energy companies: Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc., and Exxon Mobil Corporation. In April 2018, respondents filed the underlying complaint against applicants in Colorado state court, alleging that applicants have contributed to global climate change, which in turn has caused harm in Colorado. The complaint pleads a variety of claims, which respondents argue arise under state law. Several similar cases filed by state and municipal governments against various energy companies are pending in courts across the country. See, e.g., Rhode Island v. Shell Oil Products Co., No. 19 1818 (1st Cir.); City of New York v. B.P. P.L.C., No. 18 2188 (2d Cir.); Mayor & City Council of Baltimore v. BP P.L.C., No. 19 1644 (4th Cir.); County of San Mateo v. Chevron Corp., No. 18 15499 (9th Cir.) (consolidated with three similar cases); City of Oakland v. B.P. P.L.C., No. 18 16663 (9th Cir.).

In June 2018, applicants removed this case to federal court. Applicants contended that federal jurisdiction over respondents' climate change claims is present on several grounds, including that claims asserting harm from global climate change necessarily arise under federal common law and that the allegations in the complaint pertain to actions that applicants took under the direction of federal officers. Respondents moved to remand the case to state court.

On September 5, 2019, the district court granted respondents' motion to remand. App. 57a, infra. The court entered a temporary stay of the remand order while the parties briefed whether a longer stay pending appeal was warranted. D. Ct. Dkt. 71.

On October 7, 2019, the district court denied applicants' motion for stay. App. 74a, infra. The next morning, applicants filed an emergency motion for a temporary stay of the remand order with the Tenth Circuit. Applicants also asked the district court to stay issuance of the remand order pending resolution of the appellate stay motion. But the district court denied that motion the same day and directed the clerk to remand the case to state court "forthwith." D. Ct. Dkt. 82.

Earlier today, October 17, 2019, the court of appeals denied applicants' motion for a stay. App. 2a, infra.

2. Currently pending before the Chief Justice and Justice Breyer are applications for stays of remand orders in two other

climate change lawsuits filed by state or local governments against energy companies. See BP P.L.C. v. Mayor & City Council of Baltimore, No. 19A368 (docketed Oct. 2, 2019; response due Oct. 18, 2019); BP P.L.C. v. Rhode Island, No. 19A391 (docketed Oct. 8, 2019). The arguments in favor of a recall of the remand order in this case are materially similar to the arguments in favor of stays of the remand orders in those cases, and this application should be disposed of in the same manner as the applications in those cases. For the reasons set forth in those applications, applicants respectfully request that the remand order of the district court in this case be recalled pending resolution of the appeal before the Tenth Circuit and any additional proceedings before this Court.

Respectfully submitted,

HUGH QUAN GOTTSCHALK
EVAN B. STEPHENSON
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street,
Suite 4500
Denver, CO 80202

Counsel for applicants
Suncor Energy (U.S.A.) Inc.,
Suncor Energy Sales Inc.,
and Suncor Energy Inc.

KANNON K. SHANMUGAM
WILLIAM T. MARKS
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223 7300
kshanmugam@wc.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
NORA AHMED
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

COLIN G. HARRIS
FAEGRE BAKER DANIELS LLP
1470 Walnut Street,
Suite 300
Boulder, CO 80302

Counsel for applicant
Exxon Mobil Corporation

OCTOBER 17, 2019

INDEX TO THE APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

October 17, 2019

Elisabeth A. Shumaker
Clerk of Court

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs - Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants - Appellants.

No. 19-1330
(D.C. No. 1:18-CV-01672-WJM-SKC)
(D. Colo.)

ORDER

Before **LUCERO** and **McHUGH**, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(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) (internal quotation marks omitted). The decision

whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 18-cv-01672-WJM-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

ORDER

Plaintiffs brought Colorado common law and statutory claims in Boulder County, Colorado District Court for injuries occurring to their property and citizens of their jurisdictions, allegedly resulting from the effects of climate change. Plaintiffs sue Defendants in the Amended Complaint ("Complaint") "for the substantial role they played and continue to play in causing, contributing to and exacerbating climate change." (ECF No. 7 ¶ 2.) Defendants filed a Notice of Removal (ECF No. 1) on June 29, 2018. Plaintiffs filed a Motion to Remand (ECF No. 34) on July 30, 2018.

For the reasons explained below, the Court grants Plaintiffs' Motion to Remand. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67), is denied as the Court finds that a hearing is not necessary.

I. BACKGROUND

Plaintiffs assert six state law claims: public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. The Complaint alleges that Plaintiffs face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. (ECF No. 7 ¶¶ 1–4, 11, 221–320.) Plaintiffs allege that Defendants substantially contributed to the harm through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers. (*Id*. ¶¶ 2, 5, 13–18, 321–435.) The fossil fuel activities have raised the emission and concentration of greenhouse gases ("GHGs") in the atmosphere. (*Id*. ¶¶ 7, 15, 123–138, 321–38.)

As a result of the climate alterations caused and contributed to by Defendants' fossil fuel activities, Plaintiffs allege that they are experiencing and will continue to experience rising average temperatures and harmful changes in precipitation patterns and water availability, with extreme weather events and increased floods, drought, and wild fires. (ECF No. 7 ¶¶ 145–179.) These changes pose a threat to health, property, infrastructure, and agriculture. (*Id*. ¶¶ 1–4, 180–196.) Plaintiffs allege that they are sustaining damage because of services they must provide and costs they must incur to mitigate or abate those impacts. (*Id*. ¶¶ 1, 4–5, 221–320.) Plaintiffs seek monetary damages from Defendants, requiring them to pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct. (*Id*. at ¶ 6.) Plaintiffs do not ask the Court to stop or regulate Defendants' emissions of fossil fuels (*id*. at ¶¶ 6, 542), and do not seek injunctive relief.

Defendants' Notice of Removal asserts the following: (1) federal question jurisdiction— that Plaintiffs' claims arise under federal common law, and that this action necessarily and unavoidably raises disputed and substantial federal issues that give rise to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) ("*Grable*"); (2) complete preemption; (3) federal enclave jurisdiction; (4) jurisdiction because the allegations arise from action taken at the direction of federal officers; (5) jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b); and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings.

While there are no dispositive cases from the Supreme Court, the United States Court of Appeals for the Tenth Circuit, or other United States Courts of Appeal, United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case. *Compare California* v. *BP p.l.c.* ("*CA I*"), 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c. ("CA II*), 325 F. Supp. 3d 1017 (N.D. Cal. June 25, 2018); *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. July 19, 2018) with *State of Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D. R.I. July 22, 2019); *Mayor and City Council of Baltimore v. BP P.L.C.* ("*Baltimore*"), 2019 WL 2436848 (D. Md. June 10, 2019), *appeal docketed*, No. 19-1644 (4th Cir. June 18, 2019); and *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

II. LEGAL STANDARD

Plaintiffs' Motion to Remand is brought pursuant to 28 U.S.C. § 1447(c). The Motion to Remand asserts that the Court lacks subject matter jurisdiction over the claims in this case, which Plaintiffs contend are state law claims governed by state law.

Federal courts are courts of limited jurisdiction, "possessing 'only that power authorized by Congress and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citation omitted). Thus, "[f]ederal subject matter jurisdiction is elemental." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1022 (10th Cir. 2012). "It cannot be consented to or waived, and its presence must be established" in every case in federal court. *Id*.

Here, Defendants predicate removal on the ground that the federal court has original jurisdiction over the claims. 28 U.S.C. § 1441(a). Diversity jurisdiction has not been invoked. Removal is appropriate "if, but only if, 'federal subject-matter jurisdiction would exist over the claim.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). If a court finds that it lacks subject matter jurisdiction at any time before final judgment is entered, it must remand the case to state court. 28 U.S.C. § 1447(c).

The burden of establishing subject matter jurisdiction is on the party seeking removal to federal court, and there is a presumption against its existence. *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014). "Removal statutes are to be strictly construed,. . . and all doubts are to be resolved against removal." *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). The party seeking removal must show that jurisdiction exists by a preponderance of the evidence. *Dutcher v. Matheson*, 840 F.3d 1183, 1189 (10th Cir. 2016).

III. ANALYSIS

A. Federal Question Jurisdiction

Defendants first argue that federal question jurisdiction exists. Federal question jurisdiction exists for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether such jurisdiction exists, a court must "look to the 'face of the complaint'" and ask whether it is "'drawn so as to claim a right to recover under the Constitution and laws of the United States'[.]" *Firstenberg*, 696 F.3d at 1023 (quoting *Bell v. Hood*, 327 U.S. 678, 681 (1946)).

"[T]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule', which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Under this rule, a case arises under federal law 'only when the plaintiff's statement of his own cause of action shows that it is based' on federal law." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1202 (10th Cir. 2012) (citation omitted). The court need only examine "the well-pleaded allegations of the complaint and ignore potential defenses. . . ." *Id*. (citation omitted).

The well-pleaded complaint rule makes "the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392; *see also Devon Energy*, 693 F.3d at 1202 ("By omitting federal claims from a complaint, a plaintiff can generally guarantee an action will be heard in state court.") (internal quotation marks omitted). While the plaintiff may not circumvent

federal jurisdiction by artfully drafting the complaint to omit federal claims that are essential to the claim, *Caterpillar*, 482 U.S. at 392, the plaintiff "can elect the judicial forum–state of federal" depending on how the plaintiff drafts the complaint. *Firstenberg*, 696 F.3d at 1023. "Neither the plaintiff's anticipation of a federal defense nor the defendant's assertion of a federal defense is sufficient to make the case arise under federal law." *Id*. (internal quotation marks omitted).

For a plaintiff's well-pleaded complaint to establish that the claims arise under federal law within the meaning of § 1331, it "must establish one of two things: 'either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal law.'" *Firstenberg*, 696 F.3d at 1023 (citation omitted). The "creation' test" in the first prong accounts for the majority of suits that raise under federal law." *See Gunn*, 568 U.S. at 257. However, where a claim finds its origins in state law, the Supreme Court has identified a "'special and small category' of cases" in which jurisdiction lies under the substantial question prong as they "implicate significant federal interests." *Id*. at 258; *see also Grable*, 545 U.S. at 312.

Defendants argue that both prongs of federal question jurisdiction are met. The Court will address each of these arguments in turn.

1. Whether Federal Law Creates the Cause of Action

Defendants first assert that federal question jurisdiction exists because Plaintiffs' claims arise under federal law; namely, federal common law, such that federal law creates the cause of action. The Supreme Court has "held that a few areas, involving

'uniquely federal interests,' . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citations omitted); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 850 (1985). The issue must involve "an area of uniquely federal interest", and federal common law will displace state law only where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' . . or the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle*, 487 U.S. at 507 (citations omitted).

Defendants assert that this case belongs in federal court because it threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. They note that two courts have held that claims akin to those brought by Plaintiffs are governed by federal common law, citing the decisions in *CA I*, *CA II*, and *City of New York*.[1]

a. *Relevant Case Law*

Defendants state over the past century that the federal government has recognized that a stable energy supply is critical for the preservation of our economy

[1] Notably, in another case ExxonMobil appeared to argue the opposite of what it argues here: that there is no uniquely federal interest in this type of case and a suit does not require "'the application of federal common law, merely because the conflict is not confined within the boundaries of a single state.'" (*See* ECF No. 50-1 at 55–60) (citation omitted). Instead, it asserted that "only suits by [states] *implicating a sovereign interest* in abating interstate pollution give rise to federal common law." (*Id*. at 58–60) (emphasis added).

and national security, taken steps to promote fossil fuel production, and worked to decrease reliance on foreign oil. The government has also worked with other nations to craft a workable international framework for responding to global warming. This suit purportedly challenges those decisions by requiring the court to delve into the thicket of the "worldwide problem of global warming"— the solutions to which Defendants assert for "sound reasons" should be "determined by our political branches, not by our judiciary." *See CA II*, 2018 WL 3109726, at *9.

Plaintiffs thus target *global* warming, and the transnational conduct that term entails. (ECF No. 7 ¶¶ 125–38.) Defendants contend that the claims unavoidably require adjudication of whether the benefits of fossil fuel use outweigh its costs—not just in Plaintiffs' jurisdictions, or even in Colorado, but on a global scale. They argue that these claims do not arise out of state common law. Defendants further assert that this is why similar lawsuits have been brought in federal court, under federal law, and why, when those claims were dismissed, the plaintiffs made no effort to pursue their claims in state courts. *See, e.g.*, *Am. Elec. Power Co., Inc.* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011); *Kivalina* v. *ExxonMobil Corp.* ("*Kivalina*"), 696 F.3d 849 (9th Cir. 2012). Defendants thus contend that the court has federal question jurisdiction because federal law creates the cause of action.

The Court first addresses the cases relied on by Defendants that address similar claims involving injury from global warming, beginning its analysis with the Supreme Court's decision in *AEP*. The *AEP* plaintiffs brought suit in federal court against five domestic emitters of carbon dioxide, alleging that by contributing to global warming,

they had violated the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418 (citation omitted). They brought both federal and state claims, and asked for "a decree setting carbon-dioxide emission for each defendant." *Id*. The plaintiffs did not seek damages.

The Court in *AEP* stated what while there is no federal general common law, there is an "emergence of a federal decisional law in areas of national concern", the "new" federal common law. 564 U.S. at 421 (internal quotation marks omitted). This law "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id*. (citation omitted). The Court found that environmental protection is "undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id*. (internal quotation marks omitted). It further stated that when the court "deal[s] with air and water in their ambient or interstate aspects, there is federal common law.'" *Id*. (*quoting Illinois v. City of Milwaukee*, 406 US. 91, 103 (1972)).

AEP also found that when Congress addresses a question previously governed by federal common law, "'the need for such an unusual exercise of law-making by federal courts disappears.'" 564 U.S. at 423 (citation omitted). The test for whether congressional legislation excludes the declaration of federal common law is "whether the statute 'speak[s] directly to [the] questions at issue." *Id*. at 424 (citation omitted). The Court concluded that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from

fossil-fuel fired power plants," *i.e.,* the Clean Air Act spoke directly "to emissions of carbon dioxide from the defendants' plants." *Id*. Since it found that federal common law was displaced, *AEP* did not decide the scope of federal common law, or whether the plaintiffs had stated a claim under it. *Id.* at 423 (describing the question as "academic"). It also did not address the state law claims. *Id*. at 429.

In *Kivalina*, the plaintiffs alleged that massive greenhouse gas emissions by the defendants resulted in global warming which, in turn, severely eroded the land where the City of Kivalina sat and threatened it with imminent destruction. 696 F.3d at 853. Relying on *AEP*, the Ninth Circuit found that the Clean Air Act displaced federal common law nuisance claims for damages caused by global warming. *Id*. at 856. It recognized that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id*. at 855 (citing *City of Milwaukee*, 406 US. at 103). Thus, *Kivalina* stated that "federal common law can apply to transboundary pollution suits," and noted that most often such suits are, as in that case, founded on a theory of public nuisance. *Id*. The *Kivalina* court found that the case was governed by *AEP* and the finding that Congress had "directly addressed the issue of greenhouse gas commissions from stationary sources," thereby displacing federal common law. *Id*. at 856. The fact that the plaintiffs sought damages rather than an abatement of emissions did not impact the analysis, according to *Kivalina*, because "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id*. at 857. The *Kivalina* court affirmed the district court's dismissal of plaintiffs' claims. *Id*. at 858.

Both *AEP* and *Kivalina* were brought in federal court and asserted federal law claims. They did not address the viability of state claims involving climate change that were removed to federal court, as is the case here. This issue was addressed by the United States District Court for the Northern District of California in *CA I* and *CA II*. In the *CA* cases, the Cities of Oakland and San Francisco asserted a state law public nuisance claim against ExxonMobil and a number of other worldwide producers of fossil fuels, asserting that the combustion of fossil fuels produced by the defendants had increased atmospheric levels of carbon dioxide, causing a rise in sea levels with resultant flooding in the cities. *CA I*, 2018 WL 1064293, at *1. Like the instant case, the plaintiffs did not seek to impose liability for direct emissions of carbon dioxide. Instead, they alleged "that—despite long-knowing that their products posed severe risks to the global climate—defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being." *Id*. The plaintiffs sought an abatement fund to pay for infrastructure necessary to address rising sea levels. *Id*.

CA I found that the plaintiffs' state law "nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law," citing *AEP*, *City of Milwaukee*, and *Kivalina*. *CA I*, 2018 WL 1064293, at *2–3. It stated that, as in those cases, "a uniform standard of decision is necessary to deal with the issues," explaining:

> If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes [including] the combustion of fossil fuels. The range of consequences is likewise universal—warmer weather in some places that may benefit agriculture but worse weather in others, . . . and—as here specifically alleged the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. . . . [T]he scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

Id. at *3.

The *CA I* court also found that federal common law applied despite the fact that "plaintiffs assert a novel theory of liability," *i.e.,* against the *sellers* of a product rather than direct *dischargers* of interstate pollutants. *CA I*, 2018 WL 1064293, at *3 (emphasis in original). Again, that is the situation in this case. The *CA I* court stated that "the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution," which is no " less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally." *Id*. The court found, however, that federal common law was not displaced by the Clean Air Act and the EPA as in *AEP* and *Kivalina* because the plaintiffs there sought only to reach domestic conduct, whereas the plaintiffs' claims in *CA I* "attack behavior worldwide." *Id*. at 4. It stated that those "foreign emissions are outside of the EPA and Clean Air Acts' reach." *Id*. Nonetheless, as the claims were based in federal law, the court found that federal jurisdiction existed and denied the plaintiffs' motions to remand. *Id*. at 5.

In *CA II*, the court granted the defendants' motion to dismiss. 325 F. Supp. 3d at 1019. It reaffirmed that the plaintiffs' nuisance claims "must stand or fall under federal common law," including the state law claims. *CA II*, 325 F. Supp. 3d at 1024. It then held that the claims must be dismissed because they ran counter to the presumption against extraterritoriality and were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." *Id*. at 1024–25. The *CA II* court concluded that "[i]t may seem peculiar that an earlier order refused to remand this action to state court on the ground that plaintiffs' claims were necessarily governed by federal law, while the current order concludes that federal common law should not be extended to provide relief." *Id*. at 1028. But it found "no inconsistency," as "[i]t remains proper for the scope of plaintiffs' claims to be decided under federal law, given the international reach" of the claims. *Id*. at 1028–29.

The *City of New York* case followed the rationale of *CA I* and *CA II*, and dismissed New York City's claims of public and private nuisance and trespass against multinational oil and gas companies related to the sale and production of fossil fuels. 325 F. Supp. 3d at 471–76. On a motion to dismiss, the court found that the City's claims were governed by federal common law, not state tort law, because they were "based on the 'transboundary' emission of greenhouse gases" which "require a uniform standard of decision." *Id*. at 472 (citing *CA I*, 2018 WL 10649293, at *3). It also found that to the extent the claims involved domestic greenhouse emissions, the Clean Air Act displaced the federal common law claims pursuant to *AEP. Id.* To the extent the claims implicated foreign greenhouse emissions, they were "barred by the presumption

against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'" *Id*. at 475 (citation omitted). The court in *City of New York* did not address federal jurisdiction or removal jurisdiction.

In summary, the above cases suggest that claims related to the emission or sale, production, or manufacture of fossil fuels are governed by federal common law, even if they are asserted under state law, but may displaced by the Clean Air Act and the EPA. At first blush these cases appear to support Defendants' assertion that Plaintiffs' claims arise under federal law and should be adjudicated in federal court, particularly given the international scope of global warming that is at issue.

However, the Court finds that *AEP* and *Kivalina* are not dispositive. Moreover, while the *CA I* decision has a certain logic, the Court ultimately finds that it is not persuasive. Instead, the Court finds that federal jurisdiction does not exist under the creation prong of federal question jurisdiction, consistent with *San Mateo* and the two most recent cases that have addressed the applicable issues, as explained below.

The Court first notes that in *AEP* and *Kivalina*, the plaintiffs expressly invoked federal claims, and removal was neither implicated nor discussed. Moreover, both cases addressed interstate emissions, which are not at issue here. Finally, the cases did not address whether the state law claims were governed by federal common law. The *AEP* Court explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. 564 U.S. at 429. Thus, "[f]ar from holding (as the defendants bravely assert) that state claims related to global warming are superseded

by federal common law, the Supreme Court [in *AIG*] noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve)." *San Mateo*, 294 F. Supp. 3d at 937.

Moreover, while *AEP* found that federal common law governs suits brought by a state to enjoin emitters of pollution in another state, it noted that the Court had never decided whether federal common law governs similar claims to abate out-of-state pollution brought by "political subdivisions" of a State, such as in this case. 564 U.S. at 421–22. Thus, *AEP* does not address whether state law claims, such as those asserted in this case and brought by political subdivisions of a state, arise under federal law for purposes of removal jurisdiction. The Ninth Circuit in *Kivalina* also did not address this issue.

The Court disagrees with the finding in *CA I* that removal jurisdiction is proper because the case arises under federal common law. *CA I* found that the well-pleaded complaint rule did not apply and that federal jurisdiction exists "if the claims necessarily arise under federal common law. 2018 WL 1064293, at *5. It based this finding on a citation to a single Ninth Circuit case, *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184–85 (9th Cir. 2002). *Id*. *Wayne*, however, recognized the well-pleaded complaint rule, and did not address whether a claim that arises under federal common law is an exception to the rule. 294 F.3d at 1183-85. Moreover, *Wayne* cited *City of Milwaukee* in support of its finding that federal jurisdiction would exist if the claims arose under federal law. *City of Milwaukee* was, however, filed in federal court and

invoked federal jurisdiction such that the well-pleaded complaint rule was not at issue.

Thus, *CA I* failed to discuss or note the significance of the difference between removal jurisdiction, which implicates the well pleaded complaint rule, and federal jurisdiction that is invoked at the outset such as in *AEP* and *Kivalina*. This distinction was recognized by the recent decision in *Baltimore*, which involved similar state law claims as to climate change that were removed to federal court. 2019 WL 2436848, at *1. *Baltimore* found *CA I* was "well stated and presents an appealing logic," but disagreed with it because the court looked beyond the face of the plaintiffs' well pleaded complaint. *Id*. at *7–8. It also noted that *CA I* "did not find that the plaintiffs' state law claims fell within either of the carefully delineated exceptions to the well-pleaded complaint rule—*i.e.*, that they were completely preempted by federal law or necessarily raised substantial, disputed issues of federal law." *Id*. at *8. *Baltimore* found that the well-pleaded complaint rule was plainly not satisfied in that case because the City did not plead any claims under federal law. *Id*. at *6.

b. *The Well-Pleaded Complaint Rule as Applied to Plaintiffs' Claims*

In a case that is removed to federal court, the presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which gives rise to federal jurisdiction only when a federal question is presented on the face of the complaint. *Caterpillar*, 482 U.S. at 392. The Tenth Circuit has held that to support removal jurisdiction, "the required federal right or immunity must be an essential element of the plaintiff's cause of action, and . . . the federal controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for

removal." *Fajen*, 683 F.2d at 333 (citation and internal quotation marks omitted).

In this case, the Complaint on its face pleads only state law claims and issues, and no federal law or issue is raised in the allegations. While Defendants argue that the Complaint raises inherently federal questions about energy, the environment, and national security, removal is not appropriate under the well-pleaded complaint rule because these federal issues are not raised or at issue in Plaintiffs' claims. A defendant cannot transform the action into one arising under federal law, thereby selecting the forum in which the claim will be litigated, as to do so would contradict the well-pleaded complaint rule. *Caterpillar*, 489 U.S. at 399. Defendants, "in essence, want the Court to peek beneath the purported state-law facade of the State's public nuisance claim, see the claim for what it would need to be to have a chance at viability, and convert it to that (i.e., into a claim based on federal common law) for purposes of the present jurisdiction analysis." *State of Rhode Island*, 2019 WL 3282007, at *2. That court found nothing in the artful-pleading doctrine which sanctioned the defendants' desired outcome. *Id*.

Defendants cite no controlling authority for the proposition that removal may be based on the existence of an unplead federal common law claim—much less based on one that is questionable and not settled under controlling law. Defendants rely on the Supreme Court's holding that the statutory grant of jurisdiction over cases arising under the laws of the United States "will support claims founded upon federal common law." *Nat'l I Farmers Union Ins. Cos.*, 471 U.S. at 850–53. However, the plaintiffs invoked federal jurisdiction in that case. The same is true in other cases cited by Defendants,

including *City of Milwaukee* and *Boyle*, both of which were filed by plaintiffs in federal court and invoked federal jurisdiction. *See, e.g.*, *State of Rhode Island*, 2019 WL 3282007, at *2 n. 2 (*Boyle* "does not help Defendants" as it "was not a removal case, but rather one brought in diversity"); *Arnold by and Through Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 737 (S.D. Tex. 1997) (*Boyle* did not address removal jurisdiction, nor did it modify the *Caterpillar* rule that federal preemption of state law, even when asserted as an inevitable defense to a . . . state law claim, does not provide a basis for removal"), *overruled on other grounds*, *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1997). Removal based on federal common law being implicated by state claims was not discussed or sanctioned in Defendants' cases.

A thoughtful analysis of the limits that removal jurisdiction poses on federal question jurisdiction was conducted in *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384 (S.D.N.Y. 1998). That court noted that removal jurisdiction is "a somewhat different animal than original federal question jurisdiction—i.e., where the plaintiff files originally in federal court." *Id*. at 389. It explained:

> When a plaintiff files in federal court, there is no clash between the principle that the plaintiff can control the complaint—and therefore, the choice between state and federal forums—and the principle that federal courts have jurisdiction over federal claims; the plaintiff, after all, by filing in a federal forum is asserting reliance upon both principles, and the only question a defendant can raise is whether plaintiff has a federal claim.
>
> On the other hand, when a plaintiff files in state court and purports to only raise state law claims, for the federal court to assert jurisdiction it has to look beyond the complaint and partially recharacterize the plaintiffs' claims—which places the assertion of jurisdiction directly at odds with the principle of plaintiff as the master of the complaint. It is for this reason that removal jurisdiction must be viewed with a somewhat more skeptical eye; the

> fact that a plaintiff in one case chooses to bring a claim as a federal one and thus invoke federal jurisdiction does not mean that federal *removal* jurisdiction will lie in an identical case if the plaintiff chooses not to file a federal claim.

Id. at 389–90. The Court agrees with this well-reasoned analysis.

The cases cited by Defendants from other jurisdictions that found removal of state law claims to federal court was appropriate because the claims arose under or were necessarily governed by federal common law are not persuasive. *See Wayne*, 294 F.3d at 1184–85; *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *CA I*, 2018 WL 1064293, at *2; *Blanco v. Fed. Express Corp*., No. 16-561, 2016 WL 4921437, at *2–3 (W.D. Okla. Sept. 15, 2016). Those cases contradict *Caterpillar* and the tenets of the well-pleaded complaint rule. They also fail to cite any Supreme Court or other controlling authority authorizing removal based on state law claims implicating federal common law. While many of those cases relied on *City of Milwaukee* as authority for their holdings, the plaintiff in that case invoked federal common law and federal jurisdiction. *City of Milwaukee* does not support a finding that a defendant can create federal jurisdiction by re-characterizing a state claim.

c. *Ordinary Preemption*

Ultimately, Defendants' argument that Plaintiffs' state law claims are governed by federal common law appears to be a matter of ordinary preemption which—in contrast to complete preemption, which is discussed in Section III.B, *infra*,–would not provide a basis for federal jurisdiction. *See Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1352

(11th Cir. 2003) (cited with approval in *Devon Energy*, 693 F.3d at 1203).[2] "Ordinary preemption 'regulates the interplay between federal and state laws when they conflict or appear to conflict . . . .'" *Baltimore*, 2019 WL 2436848, at *6 (citation omitted). The distinction between ordinary and complete preemption "is important because if complete preemption does not apply, but the plaintiff's state law claim is arguably preempted . . . the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption." *Colbert v. Union Pac. R. Co.*, 485 F. Supp. 2d 1236, 1243 (D. Kan. 2007) (internal quotation marks omitted).

When ordinary preemption applies, the federal court "'lacks the power to do anything other than remand to the state court where the preemption issue can be addressed and resolved.'" *Colbert*, 485 S. Supp. 2d at 1243 (citation omitted). Ordinary preemption is thus a defense to the complaint, and does not render a state-law claim removable to federal court. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1221 (10th Cir. 2011); *see also Caterpillar*, 482 U.S. at 392–93 (under the well-pleaded complaint rule, courts must ignore potential defenses such as preemption).

Thus, the fact that a defendant asserts that federal common law is applicable "does not mean the plaintiffs' state law claims 'arise under' federal law for purposes of jurisdictional purposes." *E. States Health*, 11 F. Supp. 2d at 394. As that court explained, "[c]ouch it as they will in 'arising under' language, the defendants fail to explain why their assertion that federal common law governs . . . is not simply a

---

[2] The three forms of preemption that are frequently discussed in judicial opinions—express preemption, conflict preemption, and field preemption—are characterized as ordinary preemption. *Devon Energy*, 693 F.3d at 1203 n. 4.

preemption defense which, while it may very well be a winning argument on a motion to dismiss in the state court, will not support removal jurisdiction." *Id*.

This finding is consistent with the decision in *Baltimore*. The court there found the defendants' assertion that federal question jurisdiction existed because the City's nuisance claim "is in fact 'governed by federal common law'" was "'a cleverly veiled [ordinary] preemption argument." *Baltimore*, 2019 WL 2436848, at *6 (citing *Boyle*, 487 U.S. at 504). As the *Baltimore* defendants' argument amounted to an ordinary preemption defense, it did "not allow the Court to treat the City's public nuisance claim as if it had been pleaded under federal law for jurisdictional purposes." *Id*. The court also found that the *CA I* ruling was "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction." *Id*. at *8.

Because an ordinary preemption defense does not support remand, Defendants' federal common law argument could only prevail under the doctrine of complete preemption. Unlike ordinary preemption, complete preemption "is so 'extraordinary' that it 'converts an ordinary state law common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (citation omitted).

2. Whether Plaintiffs' Right to Relief Necessarily Depends on Resolution of a Substantial Question of Federal Law (*Grable* Jurisdiction)

Defendants also argue that federal jurisdiction exists under the second prong of the "arising under" jurisdiction, as Plaintiffs' claims necessarily depend on a resolution of a substantial question of federal law under *Grable*. They contend that the Complaint

raises federal issues under *Grable* "because it seeks to have a court determine for the entire United States, as well as Canada and other foreign actors, the appropriate balance between the production, sale, and use of fossil fuels and addressing the risks of climate change." (ECF No. 1 ¶ 37.) Such an inquiry, according to Defendants, "necessarily entails the resolution of substantial federal questions concerning important federal regulations, contracting, and diplomacy." (*Id*.) Thus, they assert that the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing . . . federal and state judicial responsibilities." *Grable*, 545 U.S. at 313–14.

The substantial question doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. To invoke this branch of federal question jurisdiction, the Defendants must show that "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.

Jurisdiction under the substantial question doctrine "is exceedingly narrow—a special and small category of cases." *Firstenberg*, 696 F.3d at 1023 (citation and internal quotation marks omitted). "[M]ere need to apply federal law in a state-law claim will not suffice to open the 'arising under' door" of jurisdiction. *Grable*, 545 U.S. at 313. Instead, "'federal jurisdiction demands not only on a contested federal issue, but a

substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'" *Id*. (citation omitted).

a. *Necessarily Raised*

The Court finds that the first prong of substantial question jurisdiction is not met because Plaintiffs' claims do not necessarily raise or depend on issues of federal law. The discussion of this issue in *Baltimore* is instructive. In that case, the defendants contended that *Grable* jurisdiction existed because the claims raised a host of federal issues. *Baltimore*, 2019 WL 2436848, at *9. For example, the defendants asserted that the claims "'intrude upon both foreign policy and carefully balanced regulatory considerations at the national level, including the foreign affairs doctrine.'" *Id*. (citation omitted). They also asserted that the claims "'have a significant impact on foreign affairs,' 'require federal-law-based cost-benefit analyses,'" and "'amount to a collateral attack on federal regulatory oversight of energy and the environment.'" *Id*. (citation omitted). These allegations are almost identical to what Defendants assert in this case. (*See* ECF No. 48 at 22—"Plaintiffs' claims gravely impact foreign affairs"; 24—"Plaintiffs' claims require reassessment of cost-benefit analyses committed to, and already conducted by the Government"; 26—the claims "are a collateral attack on federal regulatory oversight of energy and the environment").

Baltimore found that these issues were not "'necessarily raised' by the City's claims, as required for *Grable* jurisdiction." 2019 WL 2436848, at *9–10. As to the alleged significant effect on foreign affairs, the court agreed that "[c]limate change is certainly a matter of serious national and international concern." *Id*. at *10. But it found

that defendants did "not actually identify any foreign policy that was implicated by the City's claims, much less one that is necessarily raised." *Id*. "They merely point out that climate change '*has* been the subject of international negotiations for decades.'" *Id*. *Baltimore* found that "defendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is 'essential to resolving' the City's state law claims." *Id*. (citation omitted).

The Court finds the analysis in *Baltimore* equally persuasive as to Defendants' reliance on foreign affairs in this case, as they point to no specific foreign policy that is essential to resolving the Plaintiffs' claims. Instead, they cite only generally to non-binding, international agreements that do not apply to private parties, and do not explain how this case could supplant the structure of such foreign policy arrangements. Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs' claims. *Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012).

The *CA I* and *City of New York* decisions do not support Defendants' argument that the foreign policy issues raise substantial questions of law. Defendants note, for example, that the *City of New York* court dismissed the claims there on the merits "for severely infring[ing] upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." 325 F. Supp. 3d at 476. But as Defendants have acknowledged, at least at this stage of these proceedings, the Court is not considering the merits of Plaintiffs' claims or whether they would survive a motion to dismiss, only whether there is a basis for federal jurisdiction. (*See* ECF No. 1

¶ 20.) While *CA I* and *City of New York* may ultimately be relevant to whether Plaintiffs' claims should be dismissed, they do not provide a basis for *Grable* jurisdiction. *See Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (federal law that is alleged as a barrier to the success of a state law claim "is not a sufficient basis from which to conclude that the questions are 'necessarily raised'") (citation omitted).

Baltimore also rejected cost-benefit analysis and collateral attack arguments as a basis for *Grable* jurisdiction, finding that they "miss[ ] the mark." 2019 WL 2436848, at *10. This is because the nuisance claims were, as here, based on the "extraction, production, promotion, and sale of fossil fuel products without warning consumers and the public of their known risks", and did "not rely on any federal statutes or regulations" or violations thereof. *Id*. "Although federal laws and regulations governing energy production and air pollution may supply potential defenses," the court found that federal law was "plainly not an element" of the City's state law nuisance claims. *Id*.

The same analysis surely applies here. Plaintiffs' state law claims do not have as an element any aspect of federal law or regulations. Plaintiffs do not allege that any federal regulation or decision is unlawful, or a factor in their claims, nor are they asking the Court to consider whether the government's decisions to permit fossil fuel use and sale are appropriate.

As to jurisdiction under *Grable*, the Baltimore court concluded that, "[t]o be sure, there are federal *interests* in addressing climate change." 2019 WL 2436848, at *11 (emphasis in original). "Defendants have failed to establish, however, that a federal

issue is a 'necessary element' of the City's state law claims." *Id*. (citation omitted) (emphasis in original). Thus, even without considering the remaining requirements for *Grable* jurisdiction, the *Baltimore* court rejected the defendants' assertion that the case fell within "the 'special and small category' of cases in which federal question jurisdiction exists over a state law claim. *Id*. (citation omitted).

Two other courts have recently arrived at the same conclusion. The court in *State of Rhode Island* found that the defendants had not shown that federal law was "'an element and an essential one, of the [State]'s cause[s] of action.'" 2019 WL 3282007, at *4 (citation omitted). Instead, the court noted that the State's claims "are thoroughly state-law claims", and "[t]he rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." *Id*. The court concluded:

> By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues that they may press in the course of this litigation, but that are not perforce presented by the State's claims. . . .These are, if anything, premature defenses, which even if ultimately decisive, cannot support removal.

Id. (internal citations omitted).

Similarly, the court in *San Mateo* found that the defendants had not pointed to a specific issue of federal law that necessarily had to be resolved to adjudicate the state law claims. 294 F. Supp. 3d at 938. Instead, "the defendants mostly gesture to federal law and federal concerns in a generalized way." *Id*. The court found that "[t]he mere potential for foreign policy implications", the "mere existence of a federal regulatory regime", or the possibility that the claims involved a weighing of costs and benefits did

not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. *Id*. *San Mateo* concluded, "[o]n the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable", and "*Grable* does not sweep so broadly." *Id*.

The Court agrees with the well-reasoned analyses in *Baltimore*, *State of Rhode Island*, and *San Mateo*, and adopts the reasoning of those decisions. To the extent Defendants raise other issues not addressed in those cases, the Court finds that they also are not necessarily raised in Plaintiffs' Complaint.

Defendants here assert that Plaintiffs' claims raise a significant issue under *Grable* because they attack the decision of the federal government to enter into contracts with Defendant ExxonMobil to develop and sell fossil fuels. (ECF No. 1 ¶ 43.) Further, they argue that the Complaint seeks to deprive the federal government of a mechanism for carrying out vital governmental functions, and frustrates federal objectives. (*Id*. ¶ 44.)

Plaintiffs' claims, however, assert no rights under the contracts referenced by Defendants. Nor do they challenge the contracts' validity, or require a court to interpret their meaning or importance. The Complaint does not even mention the contracts. Defendants' argument appears to be based solely on their unsupported speculation about the potential impact that Plaintiffs' success would have on the government's ability to continue purchasing fossil fuels. (*Id*. ¶¶ 43–44.) Even if Defendants' speculation was well-founded, this would be relevant only to the substantiality prong of the *Grable* analysis. *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (10th Cir.

2007). Defendants have not established the first requirement—that the issue is necessarily raised by the Plaintiffs.

b. *Substantiality*

The Court also finds that the second prong, substantiality, is not met. To determine substantiality, courts "look[] to whether the federal law issue is central to the case." *Gilmore*, 694 F.3d at 1175. Courts distinguish "between 'a nearly pure issue of law' that would govern 'numerous' cases and issues that are 'fact-bound and situation-specific.'" *Id*. at 1174 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh,* 547 U.S. 677, 700–11 (2006)). When a case "'involve[s] substantial questions of state as well as federal law,' this factor weighs against asserting federal jurisdiction." *Id.* at 1175 (citation omitted).

The Court finds that the issues raised by Defendants are not central to Plaintiffs' claims, and the claims are "rife with legal and factual issues that are not related" to the federal issues. *See Stark-Romero v. Nat'l R.R. Passenger Co. (Amtrak)*, No. CIV-09-295, 2010 WL 11602777, at *8 (D.N.M. Mar. 31, 2010). This case is quite different from those where jurisdiction was found under the substantial question prong of jurisdiction. For example, in *Grable*, "the meaning of the federal statute . . . appear[ed] to be the only legal or factual issue contested in the case." 545 U.S. at 315. Similarly, in a Tenth Circuit case finding jurisdiction under *Grable*, "construction of the federal land grant" at issue "appear[ed] to be the only legal or factual issue contested in the case." *Nicodemus v. Union Pac. Corp.,* 440 F.3d 1227, 1236 (10th Cir. 2006). Here, it is plainly apparent that the federal issues raised by Defendants are not the only legal or

factual issue contested in the case. Plaintiffs' claims also do not involve a discrete legal question, and are "fact-bound and situation-specific," unlike *Grable*. *See Empire Healthchoice Assurance*, 547 U.S. at 701; *Bennett*, 484 F.3d at 910–11. Finally, the case does not involve a state-law cause of action that "is 'brought to enforce' a duty created by [a federal statute]," where "the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, U.S. , 136 S. Ct. 1562, 1570 (2016).

The cases relied upon by Defendants are distinguishable, as Plaintiffs have shown in their briefing. For example, while Defendants cite *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), that case involved preemption under the Supremacy Clause because of a conflict between a state law and Congress's imposition of sanctions. It did not address *Grable* jurisdiction, and thus does not support Defendants' assertion that it is "irrelevant" to the jurisdictional issue that the "foreign agreements are not 'essential elements of any claim.'" (ECF No. 48 at 23.)

Based on the foregoing, the Court finds that federal jurisdiction does not exist under the second prong of the "arising under" jurisdiction, because Plaintiffs' claims do not necessarily depend on a resolution of a substantial question of federal law. As Defendants have not met the first two prongs of the test for such jurisdiction under *Grable*, the Court need not address the remaining prongs.

B. Jurisdiction Through Complete Preemption

Defendants also rely on the doctrine of complete preemption to authorize removal. Defendants argue that Plaintiffs' claims are completely preempted by the

government's foreign affairs power and the Clean Air Act, which they claim govern the United States' participation in worldwide climate policy efforts and national regulation of GHG emissions.

The complete preemption doctrine is an "independent corollary'" to the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Id*. The complete preemption exception to the well-pleaded complaint rule is "quite rare," *Dutcher*, 733 F.3d at 985, representing "extraordinary pre-emptive power." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). The Supreme Court and the Tenth Circuit have only recognized statutes as the basis for complete preemption. *See, e.g.*, *Caterpillar*, 482 U.S. at 393 (the doctrine "is applied primarily in cases raising claims pre-empted by § 301 of the" Labor Management Relations Act ("LMRA")); *Devon Energy*, 693 F.3d at 1204–05 (complete preemption is "so rare that the Supreme Court has recognized compete preemption in only three areas: § 301 of the [LMRA], § 502 of [the Employee Retirement Income Security Act]," and actions for usery under the National Bank Act).

Complete preemption is ultimately a matter of Congressional intent. Courts must decipher whether Congress intended a statute to provide the exclusive cause of action. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003); *Metro. Life Ins. Co.*, 481 U.S. at 66 ("the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense, but the intent of Congress"). If

Congress intends preemption "completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire Healthchoice Assurance*, 547 U.S. at 698.

"Thus, a state claim may be removed to federal courts in only two circumstances": "when Congress expressly so provides,. . . or when a federal statute wholly displaces the state law cause of action through complete pre-emption." *Beneficial Nat'l Bank*, 539 U.S. at 8. The court must ask, first, whether the federal question at issue preempts the state law relied on by the plaintiff and, second, whether Congress intended to allow removal in such a case, as manifested by the provision of a federal cause of action. *Devon Energy*, 693 F.3d at 1205.

1. Complete Preemption Based on Emissions Standards

Defendants argue that Congress allows parties to seek stricter nationwide emissions standards by petitioning the EPA, which is the exclusive means by which a party can seek such relief. *See* 42 U.S.C. § 7426(b). They assert that Plaintiffs' claims go far beyond the authority that the Clean Air Act reserves to states to regulate certain emissions within their own borders; Plaintiffs seek instead to impose liability for global emissions. Because these claims do not duplicate, supplement, or supplant federal law, *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004), Defendants argue they are completely preempted.

The Court rejects Defendants' argument. First, Defendants mischaracterize Plaintiffs' claims. Plaintiffs do not challenge or seek to impose federal emissions regulations, and do not seek to impose liability on emitters. They are also not seeking

review of EPA regulatory actions related to GHGs, even those emissions created by the burning of Defendants' products, and are not seeking injunctive relief. Plaintiffs sue for harms caused by Defendants' sale of fossil fuels. The Clean Air Act is silent on that issue; it does not remedy Plaintiffs' harms or address Defendants' conduct. And neither EPA action, nor a cause of action against EPA, could provide the compensation Plaintiffs seek for the injuries suffered as a result of Defendants' actions.

For a statute to form the basis for complete preemption, it must provide a "replacement cause of action" that "substitute[s]" for the state cause of action. *Schmeling v. NORDAM*, 97 F.3d 1336, 1342–43 (10th Cir. 1996). "[T]he federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy*, 693 F.3d at 1207. The Clean Air Act provides no federal cause of action for damages, let alone one by a plaintiff claiming economic losses against a private defendant for tortious conduct. Moreover, the Clean Air Act expressly preserves many state common law causes of action, including tort actions for damages. *See* 42 U.S.C. § 7604(e) ("Nothing in this section shall restrict any right . . . under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"). From this, it is apparent that Congress did not intend the Act to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine.

To the extent Defendants rely on *AEP*, the Supreme Court there held only that the Clean Air Act displaced federal common law nuisance action related to climate change; it did not review whether the Clean Air Act would preempt state nuisance law.

564 U.S. at 429. In fact, the Court stated that "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law," and the Court thus left "the matter open for consideration" by the state court on remand. *Id*. Every court that has considered complete preemption in this type of climate change case has rejected it, including the Baltimore, *State of Rhode Island*, and *San Mateo* courts.

In *Baltimore*, the court stated that while the Clean Air Act provides for private enforcement in certain situations, there was "an absence of any indication that Congress intended for these causes of action . . . to be the exclusive remedy for injuries stemming from air pollution." 2019 WL 2436848, at *13. To the contrary, it noted that the Clean Air Act "contains a savings clause that specifically preserves other causes of action." *Id*.

Similarly, the *State of Rhode Island* court stated, "statutes that have been found to completely preempt state-law causes of action . . . all do two things: They 'provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" 2019 WL 3282007, at *3 (citation omitted). The court found that the defendants failed to show that the Clean Air Act does these things, and stated that "[a]s far as the Court can tell, the [Act] authorizes nothing like the State's claims, much less to the exclusion of those sounding in state law." *Id*. Further, it noted that the Act "itself says that controlling air pollution is 'the primary responsibility of States and local governments,'" and that the Act has a savings clause for citizen suits. *Id*. at *3–4 (citation omitted). The court concluded:

> A statute that goes so far out of its way to preserve state prerogatives cannot be said to be an expression of Congress's 'extraordinary pre-emptive power' to convert state-law claims into federal-law claims. *Metro. Life Ins. Co.*, 481 U.S. at 65. No court has so held, and neither will this one.

Id. at *4.

Finally, the *San Mateo* court noted that the defendants did "not point to any applicable statutory provision that involves complete preemption." 294 F. Supp. 3d at 938. To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes 'to be exclusive.'" *Id*. (citations omitted).

Other courts have held similarly, rejecting federal jurisdiction on the basis of complete preemption of state law claims by the Clean Air Act. The United States District Court for the Southern District of New York held that the Clean Air Act did not completely preempt the plaintiffs' state law claims for temporary nuisance, trespass, and negligence arising from alleged contamination from a steel mill, and thus did not provide a basis for federal jurisdiction. *Keltner v. SunCoke Energy, Inc.*, 2015 WL 3400234, at *4–5 (S.D. Ill. May 26, 2015). Similarly, the Northern District of Alabama found that federal jurisdiction did not exist because the Clean Air Act did not completely preempt the plaintiff's state law claims arising out of the operation of a coke plant. *Morrison v. Drummond Co.*, 2013 WL 1345721, at *3–4 (N.D. Ala. Mar. 23, 2015). *See also Cerny v. Marathon Oil Corp.*, 2013 WL 5560483, at *3–8 (W.D. Tex. Oct. 7, 2013) (complete preemption did not apply to the plaintiffs' state law claims arising from the

defendants' oil field operations so as to create federal jurisdiction).

While Defendants argue that Plaintiffs are attempting to do indirectly what they could not do directly, *i.e.,* "regulate the conduct of out-of-state sources," *Int'l Paper Co. v. Oulette*, 479 U.S. 481, 495 (1987), that is not an accurate characterization of the Plaintiffs' claims. Plaintiffs do not seek to regulate the conduct of the Defendants or their emissions, nor do they seek injunctive relief to induce Defendants to take action to reduce emissions. Defendants also rely on *Oulette* in arguing that suits such as this seeking damages, whether punitive or compensatory, can compel producers to "adopt different or additional means of pollution control" than those contemplated by Congress's regulatory scheme. 479 U.S. at 498 n.19. For these reasons, Defendants assert that the Supreme Court recognized in *Oulette* that damages claims against producers of interstate products would be "irreconcilable" with the Clean Water Act (which Defendants analogize to the Clean Air Act), and the uniquely federal interests involved in regulating interstate emissions. *Id.*

Oulette appears to involve only ordinary preemption, however, as there is no discussion of complete preemption.[3] The same is true of another case relied on by Defendants, *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). Indeed, the Fourth Circuit stated that it "need not hold flatly that Congress has entirely preempted the field of emissions regulation." *Id*. at 302. Moreover, *Oulette* allowed state law claims based on the law of the source state under the saving clause, since the

[3] "Complete preemption is a term of art for an exception to the well-pleaded complaint rule." *Meyer v. Conlon*, 162 F.3d 1264, 1268 n. 2 (10th Cir. 1998). The Tenth Circuit has held that the doctrines of ordinary and complete preemption are not fungible. *Id*.

Clean Water Act expressly allows source states to enact more stringent standards. 479 U.S. at 498–99.

Here, Defendants have not cited to any portion of the Clean Air Act or other statute that regulates the conduct at issue or allows states to enact more stringent regulations, such that similar restrictions on application of state law would apply. And Plaintiffs note that there no federal programs that govern or dictate how much fossil fuel Defendants produce and sell, or whether they can mislead the public when doing do. Plaintiffs assert that the EPA does not determine how much fossil fuel is sold in the United States or how it is marketed, nor does it issue permits to companies that market or sell fossil fuels. Rather, the EPA regulates sources that emit pollution and sets emission "floors," which states can exceed. *See* 42 U.S.C. § 7416. Defendants have not shown that the conduct alleged in this case conflicts with any of those efforts.

Plaintiffs' claims also do not relate to or impact Defendants' emissions, and the claims for monetary relief presents no danger of inconsistent state (or state and federal) emission standards. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n. 7 (2008) ("private claims for economic injury do not threaten similar interference with federal regulatory goals," unlike cases where nuisance claims seeking injunctive relief amounted to arguments for discharge standards different that those provided by statute). In any event, the issues raised by Defendants need to be resolved in connection with an ordinary preemption defense, a matter that does not give rise to federal jurisdiction.

2. Complete Preemption Based on the Foreign Affairs Doctrine

Defendants also argue that complete preemption is appropriate based on the foreign affairs doctrine. They assert that litigating inherently transnational activities intrudes on the government's foreign affairs power. See *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 418 (2003) ("[S]tate action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state [action], and hence without any showing of conflict.").

Defendants also cite *California v. GMC*, 2007 WL 2726871, at *14 (N.D. Cal. Sept. 17, 2007) (dismissing claims where the government "ha[d] made foreign policy determinations regarding the [U.S.'s] role in the international concern about global warming," and stating, a "global warming nuisance tort would have an inextricable effect on . . . foreign policy"); *CA II*, 2018 WL 3109726, at *7 ("[n]uisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus."); and *New York City*, 2018 WL 3475470, at *6 ("[T]he City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of serious foreign policy consequences."). Complete preemption is implicated, according to Defendants, because the government has exclusive power over foreign affairs.

The Court finds that Defendants' argument is without merit. First, none of the above cases cited by Defendants dealt with or addressed complete preemption, and they do not support Defendants' arguments. The Supreme Court in *Garamendi* discussed only conflict or field preemption. 539 U.S. at 419. As the *Baltimore* court

noted, those types of preemption are "forms of ordinary preemption that serve only as federal defenses to a state law claim." 2019 WL 2436848, at *5 (internal quotation marks omitted). In addition, the *GMC, CA II*, and *City of New York* cases did not address preemption at all, and certainly not complete preemption as providing a basis for removal jurisdiction.

Moreover, *Garamendi* is distinguishable. It dealt with the executive authority of the President to decide the policy regarding foreign relations and to make executive agreements with foreign countries or corporations. 539 U.S. at 413–15. The Court found that federal executive power preempted state law where, as in that case, "there is evidence of clear conflict between the policies adopted by the two." *Id*. at 420–21. The Court stated, "[t]he question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'" *Id*. at 427 (citation omitted). Here, no executive action is at issue, and Defendants have not demonstrated a clear conflict between Plaintiffs' claims and any particular foreign policy.

Accordingly, Defendants have not met their burden of showing that complete preemption applies based on the foreign affairs doctrine. While they suggest there might be an unspecified conflict with some unidentified specific policy, they have not shown that Congress expressly provided for complete preemption under the foreign-affairs doctrine, or that a federal statute wholly displaces the state law cause of action on this issue. *Beneficial Nat'l Bank*, 539 U.S. at 8.

The Court's finding that the foreign affairs doctrine does not completely preempt

Plaintiffs' claims is also supported by the *Baltimore* and *State of Rhode Island* cases. In *Baltimore*, the court held that the foreign affairs doctrine is "inapposite in the complete preemption context." 2019 WL 2436848, at *12. It explained that "complete preemption occurs only when Congress intended for federal law to provide the 'exclusive cause of action' for the claim asserted." *Id*. "That does not exist here." *Id*. "That is, there is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action." *Id*. The *State of Rhode Island* court also rejected complete preemption under the foreign affairs doctrine, relying on *Baltimore* and finding the argument to be "without a plausible legal basis." 2019 WL 3282007, at *4 n. 3.

3. Complete Preemption Under Federal Common Law

Finally, while Defendants do not rely on federal common law as the basis for their complete preemption argument, federal common law would not provide a ground for such preemption. As one court persuasively noted, "[w]hen the defendant asserts that federal common law preempts the plaintiff's claim, there is no congressional intent which the court may examine—and therefore congressional intent to make the action removable to federal court cannot exist." *Merkel v. Fed. Express Corp.*, 886 F. Supp. 561, 566 (N.D. Miss. 1995) (emphasis omitted); *see also Singer v. DHL Worldwide Express, Inc.*, No. 06-cv-61932, 2007 U.S. Dist. LEXIS 37120, at *13-14 (S.D. Fla. May 22, 2007) (same).

Based on the foregoing, the Court rejects complete preemption as a basis for federal jurisdiction.

C. Federal Enclave Jurisdiction

Causes of action "which arise from incidents occurring in federal enclaves" may also be removed as a part of federal question jurisdiction. *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998). "The United States has power and exclusive authority 'in all Cases whatsoever . . . over all places purchased' by the government 'or the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.'" *Id*. (quoting U.S. Const. art. I, § 8, cl. 17.) These are federal enclaves within which the United States has exclusive jurisdiction. *Id*.

Here, Plaintiffs seek relief for injuries occurring "within their respective jurisdictions" (ECF No. 7 ¶ 4), and allege that they "do not seek damages or abatement relief for injuries to or occurring on federal lands." (*Id.* at ¶ 542.) Plaintiffs assert that ends the inquiry. *See, e.g.*, *Washington v. Monsanto Co.,* 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (because plaintiff "assert[ed] that it does not seek damages for contamination to waters and land within federal territory, . . . none of its claims arise on federal enclaves").

Defendants argue, however, that Plaintiffs have alleged injuries in federal enclaves including: (i) an insect infestation across Rocky Mountain National Park (ECF No. 7 ¶183), that Defendants assert is partially within Boulder County; (ii) increased flood risk in the San Miguel River in San Miguel County (*id.* ¶¶ 31, 236), which Defendants assert is located in the Uncompahgre National Forest ("Uncompahgre"); and (iii) "heat waves, wildfires, droughts, and floods" which Defendants assert occur in Rocky Mountain National Park and Uncompahgre (*id.* ¶¶ 3, 162–63). Plaintiffs do not

dispute that Rocky Mountain National Park and Uncompahgre are federal enclaves, but argue that the injury they have alleged did not occur there such that there is no federal enclave jurisdiction.

The Court finds that Defendants have not met their burden of showing that subject matter jurisdiction exists under the federal enclave doctrine. Uncompahgre National Forest is not mentioned in the Complaint. Rocky Mountain National Park is referenced only as a descriptive landmark (*see* ECF No. 7 ¶¶ 20, 30, 35), and to provide an example of the regional trends that have resulted from Defendants' climate alteration. (*Id.* ¶ 183.) The actual injury for which Plaintiffs seek compensation is injury to "their property" and "their residents," occurring "within their respective jurisdictions." (*See, e.g., id*. ¶¶ 1-4, 10, 11, 532-33.) They specifically allege that they "**do not** seek damages or abatement relief for injuries to or occurring to federal lands." (*Id*. ¶ 542 (emphasis in original).)

"[T]he location where Plaintiff was injured" determines whether "the right to removal exists." *Ramos v. C. Ortiz Corp.*, 2016 WL 10571684, at *3 (D.N.M. May 20, 2016). It is not the defendant's conduct, but the injury, that matters. *See Akin,* 156 F.3d at 1034–35 & n.5 (action against chemical manufacturers fell within enclave jurisdiction where the claimed exposure to the chemicals, not their manufacture or sale, "occurred within the confines" of U.S. Air Force base); *Baltimore*, 2019 WL 2436848, at *15 ("courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there").

Federal enclave jurisdiction thus does not exist here because Plaintiffs' claims

and injuries are alleged to have arisen exclusively on non-federal land. That the alleged climate alteration by Defendants may have caused similar injuries to federal property does not speak to the nature of Plaintiffs' alleged injuries for which they seek compensation, and does not provide a basis for removal. *See State of Rhode Island*, 2019 WL 3282007, at *5 (finding no federal enclave jurisdiction because while federal land that met the definition of a federal enclave in Rhode Island and elsewhere "may have been the site of Defendants' activities, the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands"); *Baltimore*, 2019 WL 2436848, at *15 ("The Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and in fact, it expressly defines the scope of injury to exclude any federal territory . . . . [I]t cannot be said that federal enclaves were the 'locus' in which the City's claims arose merely because one of the twenty-six defendants . . . conducted some operations on federal enclaves for some unspecified period of time.").

D. Federal Officer Jurisdiction

Defendants also argue that removal is appropriate under 28 U.S.C. § 1442 because the conduct that forms the basis of Plaintiffs' claims was undertaken at the direction of federal officers. Section 1442(a)(1) provides that a civil action that is commenced in a State Court may be removed to the district court of the United States if the suit is "against or directed to . . . the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agent thereof in an official or individual capacity, for or related to any act under color of such

office. . . ."

For § 1442(a)(1) to constitute a basis for removal, a private corporation must show: "(1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims." *Greene v. Citigroup, Inc.*, 2000 WL 647190, at *6 (10th Cir. May 19, 2000). "The words 'acting under' are broad," and § 1442(a)(1) must be construed liberally. *Watson* v. *Phillip Morris Co., Inc.*, 551 U.S. 142, 147 (2007). "At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969).

Thus, the federal officer removal statute should not be read in a "narrow" manner, nor should the policy underlying it "be frustrated by a narrow, grudging interpretation." *Willingham*, 395 U.S. at 406; *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Under the statute, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 431. Such jurisdiction is thus an exception to the rule that the federal question ordinarily must appear on the face of a properly pleaded complaint. *Id*. "Federal jurisdiction rests on a 'federal interest in the matter', . . . the very basic interest in the enforcement of federal law through federal officials." *Willingham*, 395 U.S. at 406.

Private actors invoking the statute bear a special burden of establishing the

official nature of their activities. *See Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002). The federal officer removal statute "authorizes removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." *Watson*, 551 U.S. at 151 (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). "That relationship typically involves 'subjection, guidance, or control.'" *Id*. (citation omitted). "[T]he private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id*. at 152 (emphasis in original). This "does *not* include simply *complying* with the law." *Id*. (emphasis in original). As the *Watson* court stated:

> it is a matter of statutory purpose. When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court "prejudice.". . . . Nor is a state-court lawsuit brought against such a company likely to disable federal officials from taking necessary action to enforce federal law. . . . Nor is such a lawsuit likely to deny a federal forum to an individual entitled to assert a federal claim of immunity.

Id. (internal citations omitted).

Here, Defendants assert that the conduct at issue in Plaintiffs' claims was undertaken, in part, while acting under the direction of federal officials. Specifically, Defendants assert that federal officers exercised control over ExxonMobil through government leases issued to it. (*See* ECF No. 1 ¶¶ 60, 69, 70–73, Exs. B and C.) Under these leases, ExxonMobil contends that it was required to explore, develop, and produce fossil fuels. (ECF No 1, Ex. C § 9.)

For example, Defendants assert that leases related to the outer Continental

Shelf ("OCS") obligated ExxonMobil to diligently develop the leased area, which included—under the direction of Department of the Interior ("DOI") officials—carrying out exploration, development, and production activities for the express purpose of maximizing the ultimate recovery of hydrocarbons from the leased area.[4] Defendants argue that those leases provide that ExxonMobil "*shall*" drill for oil and gas pursuant to government-approved exploration plans (ECF No. 1, Ex. C § 9), and that the DOI may cancel the leases if ExxonMobil does not comply with federal terms governing land use. Given these directives and obligations, Defendants submit that ExxonMobil has acted under a federal officer's direction within the meaning of § 1442(a)(1).

The Court rejects Defendants' argument, finding that Defendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and Plaintiffs' claims. The federal leases were commercial leases whereby ExxonMobil contracted "for the exclusive right to drill for, develop, and produce oil and gas resources. . . ." (*See* ECF No. 1, Ex. B, p. 1) While the leases require that ExxonMobil, like other OCS lessees, comply with federal law and regulations (*see* ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), compliance with federal law is not enough for "acting under" removal, even if the company is "subjected to intense regulation." *Watson*, 551 U.S. at 152-53. Defendants also point to the fact that the leases require the timely drilling of wells and production

---

[4] Defendants cite *California* v. *Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981) (the Outer Continental Shelf Lands Act "has an objective—the expeditious development of OCS resources"). They further note that the Secretary of the Interior must develop serial leasing schedules that "he determines will best meet national energy needs for the five-year period" following the schedule's approval. 43 U.S.C. §1344(a).

(ECF No. 1, Ex. B ¶ 10, Ex. C §§ 10, 11), but the government does not control the manner in which Defendants drill for oil and gas, or develop and produce the product.

Similarly, Defendants have not shown that a federal officer instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case. They also have not shown that federal officer directed them to market fossil fuels at levels they knew would allegedly cause harm to the environment. At most, the leases appear to represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not in issue in this case) in exchange for the right to use government-owned land for their own commercial purposes. Defendants have not shown that this is sufficient for federal officer jurisdiction. Defendants have also not shown that this lawsuit is "likely to disable federal officers from taking necessary action designed to enforce federal law", or "to deny a federal forum to an individual entitled to assert a federal claim of immunity." *Watson*, 551 U.S. at 152.

To the extent Defendants claim there is jurisdiction because ExxonMobil is "helping the government to produce an item that it needs," *Watson*, 551 U.S. at 153, this also does not suffice to provide jurisdiction in this Court. Federal officer jurisdiction requires an "unusually close" relationship between the government and the contractor. In *Watson*, the Supreme Court noted an example of a company that produced a chemical for the government for use in a war. *Id*. (discussing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). As *Winters* explained in more detail, the Defense Department contracted with chemical companies "for a specific

mixture of herbicides, which eventually became known as Agent Orange"; required the companies to produce and provide the chemical "under threat of criminal sanctions"; "maintained strict control over the development and subsequent production" of the chemical; and required that it "be produced to its specifications." 149 F.3d at 398–99. The circumstances in *Winters* were far different than the circumstances in this case, and Defendants have thus not shown an unusually close relationship between ExxonMobil and the government.

Defendants also cite no support for their assertion that the government "specifically dictated much of ExxonMobil's production, extraction, and refinement of fossil fuels" (ECF No. 48 at 35), much less that it rises to the level of government control set forth in *Winters*. As Plaintiffs note, under Defendants' argument, "any state suit against a manufacturer whose product has at one time been averted and adapted for [government] use . . . would potentially be subject to removal, seriously undercutting the power of state courts to hear and decide basic tort law." *See Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

Baltimore also counsels against finding federal jurisdiction under the federal officer removal statute. It found that the defendants failed plausibly to show that the charged conduct was carried out "for or relating to" the alleged official authority, as they did not show "that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Baltimore*, 2019 WL 2436848, at *17. The court concluded, "[c]ase law makes clear

that this attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal under § 1442(a)." *Id*.; *see also State of Rhode Island*, 2019 WL 3282007, at *5 (finding no causal connection between any actions Defendants took while "acting under" federal officers or agencies, and thus no grounds for federal-officer removal); *San Mateo*, 294 F. Supp. 3d at 939 (defendants failed to show a "causal nexus" between the work performed under federal direction and the plaintiffs' claims for injuries stemming from climate change because the plaintiffs' claims were "based on a wider range of conduct").

E. Jurisdiction Under the Outer Continental Shelf Lands Act

Defendants next argue that Plaintiffs' claims arise out of Defendants' operations on the OCS. Federal courts have jurisdiction "of cases and controversies rising out of, or in connection with (A) any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals. . . ." 43 U.S.C. § 1349(b)(1). When assessing jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), courts consider whether "(1) the activities that caused the injury constituted an operation conducted on the [OCS] that involved the exploration and production of minerals, and (2) the case arises out of, or in connection with the operation." *In Re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (internal quotation marks omitted).

Here, Defendants assert that jurisdiction is established because the case arises

out of or in connection with an operation conducted on the OCS in connection with the OCSLA leasing program in which ExxonMobil participated. Plaintiffs seek potentially billions of dollars in abatement funds that inevitably would, according to Defendants, discourage OCS production and substantially interfere with the congressionally mandated goal of recovery of the federally-owned minerals. ExxonMobil has participated in the OCSLA leasing program for decades, and continues to conduct oil and gas operations on the OCS. By making all of Defendants' conduct the subject of their lawsuit, Defendants argue that Plaintiffs necessarily sweep in ExxonMobil's activities on the OCS. Plaintiffs purportedly do not dispute that ExxonMobil operates extensively on the OCS, and Plaintiffs' claims do not distinguish between fossil fuels extracted from the OCS and those found elsewhere. Thus, Defendants assert that at least some of the activities at issue arguably came from an operation conducted on the OCS. The Court rejects Defendants' argument, as they have not shown that the case arose out of, or in connection with an operation conducted on the OCS.

The Court agrees with Plaintiffs that for jurisdiction to lie, a case must arise directly out of OCS operations. For example, courts have found OCSLA jurisdiction where a person is injured on an OCS oil rig "exploring, developing or producing oil in the subsoil and seabed of the continental shelf." *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009); where oil was spilled from such a rig, *Deepwater Horizon*, 745 F.3d at 162, or in contract disputes directly relating to OCS operations, *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985); *cf. Fairfield Indus., Inc. v. EP Energy E&P Co.*,

2013 WL 12145968, at *5 (S.D. Texas May 2, 2013) (finding claims involving performance of contracts "would not influence activity on the OCS, nor require either party to perform physical acts on the OCS", and that the claims thus did not "have a sufficient nexus to an operation on the OCS to fall within the jurisdictional reach of OCSLA"). The fact that some of ExxonMobil's oil was apparently sourced from the OCS does not create the required direct connection.

As the *Baltimore* court found, "[e]ven under a 'broad' reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit [in *Deepwater Horizon*], defendants fail to demonstrate that OCSLA jurisdiction exists." 2019 WL 2436848, at *16. "Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS." *Id*. "Rather, the City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally." *Id*. The defendants there offered "no basis to enable th[e] Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." *Id.*; *see also San Mateo*, 294 F. Supp. 3d at 938–39 ("Removal under OCSLA was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf" (emphasis in original)).

Defendants cite no case authority holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OCSLA jurisdiction.

The cases cited by Defendants instead involved a more direct connection. *See*, *e.g., Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (finding that the exercise of take-or-pay rights, minimum-take rights, or both, by Sea Robin necessarily and physically had an immediate bearing on the production of the particular well at issue, "certainly in the sense of the volume of gas actually produced", and would have consequences as to production of the well).

Moreover, as Plaintiffs note, jurisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the OCS. No court has read OCSLA so expansively. Defendants' argument would arguably lead to the removal of state claims that are only "tangentially related" to the OCS. *See Plains Gas Solutions, LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Texas 2014) (recognizing that the "but-for" test articulated by the Fifth Circuit in the *Deepwater Horizon* case "is not limitless," and that "a blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS"; "Defendants' argument that the 'but-for' test extends jurisdiction to any claim that would not exist but for offshore production lends itself to absurd results").

The downstream impacts of fossil fuels produced offshore also does not create jurisdiction under OCSLA because Plaintiffs do not challenge conduct on any offshore "submerged lands." 43 U.S.C. § 1331(a). Defendants' argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury would, again, dramatically expand the statute's scope. Any spillage of oil or

gasoline involving some fraction of OCS-sourced oil—or any commercial claim over such a commodity—could be removed to federal court. It cannot be presumed that Congress intended such an absurd result. Plaintiffs' claims concern Defendants' overall conduct, not whatever unknown fraction of their fossil fuels was produced on the OCS. No case holds removal is appropriate if some fuels from the OCS *contribute* to the harm. A case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed. *See Amoco Prod. Co.*, 844 F.2d at 1222–23. Accordingly, the Court does not have jurisdiction under OCSLA.

F. Jurisdiction as the Claims Relate to Bankruptcy Proceedings

Finally, Defendants argue that this Court has jurisdiction and this action is removable because Plaintiffs' claims are related to bankruptcy proceedings within the meaning of 28 U.S.C. §§ 1452(a). Subject to certain exceptions, that statute allows a party to remove any claim or cause of action in a civil action . . . to the district court where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Section 1334(b) of the Bankruptcy Code states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

The Tenth Circuit has held that an action is "related to" bankruptcy if it "'could conceivably have any effect on the estate being administered in bankruptcy.'" *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990) (citation omitted). "Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor''s rights, liabilities, options, or

freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate." *Id*. Removal is proper even after a bankruptcy plan has been confirmed if the case would impact a creditor's recovery under the reorganization plan. *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998).

Defendants assert that Plaintiffs' claims relate to ongoing bankruptcy proceedings because they could impact the estates of other bankrupt entities that are necessary and indispensable parties to this case. They note in that regard that 134 oil and gas producers filed for bankruptcy in the United States between 2015 and 2017. Peabody Energy and Arch Coal ("Peabody"), in particular, is alleged to have emerged from Chapter 11 bankruptcy in 2016. Defendants argue that the types of claims brought by Plaintiffs are irreconcilable with the "implementation," "execution," and "administration" of Peabody's "confirmed plan," citing *In Re Wiltshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013). Defendants thus assert that this case is related to a bankruptcy proceeding and is therefore removable.

The Court, too, rejects Defendants' final argument. As the Ninth Circuit noted in the *Wiltshire Courtyard* case, "'to support jurisdiction, there must be a close nexus connecting a proposed [bankruptcy proceeding] with some demonstrable effect on the debtor or the plan of reorganization.'" 729 F.3d at 1289 (citation omitted). "[A] close nexus exists between a post-confirmation matter and a closed bankruptcy proceeding sufficient to support jurisdiction when the matter 'affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan.'" *Id*. (citation omitted).

Here, none of the Defendants have filed for bankruptcy. To the extent Defendants argue that this case may effect other oil and gas producers who filed for bankruptcy, including Peabody or other unspecified bankrupt entities, this is entirely speculative. Defendants have not shown any nexus, let alone a close nexus, between the claims in this case and a bankruptcy proceeding. Thus, Defendants offer no evidence of how Plaintiffs' claims relate to any estate or affect any creditor's recovery, including Peabody. Defendants suggest bankrupt entities are indispensable parties, but joint tortfeasors are not indispensable. *See Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). Nor would it matter if Defendants have third-party claims against bankruptcy estates. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984); *Union Oil Co. of California v. Shaffer*, 563 B.R. 191, 198–200 (E.D. La. 2016). Plaintiffs do not seek any relief from a debtor in bankruptcy, advantage over creditors, or to protect any interest in the debtor's property. *City & Cnty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1124–25 (9th Cir. 2006). Thus, Defendants have failed to show that jurisdiction is proper under the bankruptcy removal statute.

As discussed in *Baltimore*, "Defendants fail to demonstrate that there is a 'close nexus' between this action and any bankruptcy proceedings . . . at most, defendants have only established that some day a question *might* arise as to whether a previous bankruptcy discharge precludes the enforcement of a portion of the judgment in this case against" the defendant. 2019 WL 2436848, at *19 (emphasis in original). "This remote connection does not bring this case within the Court's "related to" jurisdiction under 28 U.S.C. § 1334(b). *Id*.

Moreover, one of the exceptions to removal are proceedings "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452(a). *Baltimore* noted that an action such as this where the plaintiffs "assert claims for injuries stemming from climate change" are actions "on behalf of the public to remedy and prevent environmental damage, punish wrongdoers, and deter illegal activity." 2019 WL 2436848, at *19. It found that "[a]s other courts have recognized, such an action falls squarely within the police or regulatory exception to § 1452." *Id*. *See also Rhode Island*, 2019 WL 3282007, at *5; *San Mateo*, 294 F. Supp. 3d at 939. This Court agrees and adopts the *Baltimore* court's analysis on this point. Accordingly, removal is also inappropriate because this case is a proceeding "by a governmental unit to enforce such governmental unit's police or regulatory powers." 28 U.S.C. § 1452.

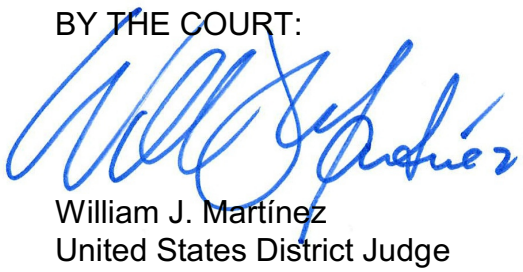
IV. CONCLUSION

Plaintiffs' claims implicate important issues involving global climate change caused in part by the burning of fossil fuels. While Defendants assert, maybe correctly, that this type of case would benefit from a uniform standard of decision, they have not met their burden of showing that federal jurisdiction exists. Accordingly, the Court ORDERS as follows:

1. Defendants' Motion to Reschedule Oral Argument on Plaintiffs' Motion to Remand (ECF No. 67) is DENIED.
2. Plaintiffs' Motion to Remand (ECF No. 34) is GRANTED; and
3. The Clerk shall REMAND this case to Boulder County District Court, and shall terminate this action.

Dated this 5th day of September, 2019.

BY THE COURT:



William J. Martínez
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 18-cv-01672-WJM-SKC

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

ORDER

This matter is before the Court on Defendants' Motion for a Stay of the Remand Order Pending Appeal filed September 13, 2019 (ECF No. 75). Defendants seek to stay this Court's Order of September 5, 2019 (ECF No. 69) that granted Plaintiffs' Motion to Remand and ordered that the case be remanded to Boulder County District Court, Colorado. Plaintiffs filed a response to the motion on September 19, 2019 (ECF No. 77), and Defendants filed a Reply on September 23, 2019 (ECF No. 78). For the reasons explained below, Defendants' Motion for a Stay of the Remand Order Pending Appeal is denied.

I. BACKGROUND

Plaintiffs filed suit in Boulder County asserting state law claims of public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado

Consumer Protection Act, and civil conspiracy. The claims arise from Plaintiffs' contention that they face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration. Plaintiffs allege that Defendants substantially contributed to climate alteration through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers. Plaintiffs seek monetary damages from Defendants, requiring them to pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct.

Defendants filed a Notice of Removal (ECF No. 1) on June 29, 2018. Plaintiffs filed a Motion to Remand (ECF No. 34) on July 30, 2018.

The Court recognized in its Order granting Plaintiffs' Motion to Remand that Plaintiffs' claims implicate important issues involving climate change caused in part by the burning of fossil fuels. (ECF No. 69 at 55.) It found, however, that Defendants did not meet their burden of showing that federal jurisdiction exists on the six grounds upon which they based their removal: (1) federal question jurisdiction—that Plaintiffs' claims arise under federal common law, and that this action necessarily and unavoidably raises disputed and substantial federal issues that give rise to jurisdiction under *Grable & Sons Metal Products, Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); (2) complete preemption; (3) federal enclave jurisdiction; (4) jurisdiction because the allegations arise from action taken at the direction of federal officers; (5) jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b); and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings.

Defendants assert that the Court should stay its remand order pending an appeal to the United States Court of Appeals for the Tenth Circuit. They note that courts have disagreed about whether climate change tort claims necessarily arise under federal common law, permitting removal to federal court. They further note that after the filing of the notice of appeal in this case, cases presenting this disputed question are now pending in four federal courts of appeals.

Defendants argue in support of their motion that the conflict of authority on this complex legal question and the state of climate change litigation nationwide justify the entry of a stay of this Court's remand order pending the appeal. Such a stay will protect Defendants' appellate rights while providing the Tenth Circuit with an opportunity to weigh in on issues that other federal courts of appeals are considering. Defendants argue that the lack of a stay, by contrast, will irreparably harm them because they will be subject to duplicative proceedings in federal and state court, and could effectively lose their right to appeal. Finally, Defendants argue that given the nature of Plaintiffs' claims related to climate change and the public interests involved, the balance of harms tilts decidedly in Defendants' favor.

II. ANALYSIS

A. The Jurisdictional Grounds Subject to Appellate Review

"Generally speaking, federal courts of appeals may not review district court remand orders." *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1032 (10th Cir. 2010). This is mandated by 28 U.S.C. § 1447(d), which states that "[a]n order remanding a case to the State court from which is was removed is not reviewable on

appeal or otherwise." Section 1447(d) "generally prohibits appellate review of remand orders based on a district court's lack of subject matter jurisdiction," as here. *City and Council of Baltimore v. BP P.L.C.* [*"Baltimore"*], 2019 WL 3464667, at *3 (D. Md. July 31, 2019) (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 230 (2007)). Congress's purpose in limiting appellate review of remand orders in § 1447(d) "is to avoid 'prolonged litigation on threshold nonmerits questions.'" *Id*. (quoting *Powerex*, 551 U.S. at 237.) As the *Baltimore* court noted, "[t]his rule is strict; it bars review 'even if the remand order is manifestly, inarguably erroneous,' . . . and even if the 'erroneous remand[ ] has undesirable consequences' for federal interests." *Id*. (quoting *Powerex Corp.*, 551 U.S. at 237; *In Re Norfolk S. Ry. Co.*, 756 F.3d 282, 287 (4th Cir. 2014)).

Based on the foregoing, appellate review would be foreclosed as to almost every basis under which Defendants relied in their Notice of Removal based on the Court's finding of lack of subject matter jurisdiction. Section 1447(d) does, however, contain exceptions to the bar of appellate review for claims brought under 28 U.S.C. §§ 1442 and 1443. Here, since Defendants asserted federal officer jurisdiction under § 1442, an appeal of the remand order is appropriate on that ground. Defendants argue that since an appeal is appropriate as to federal officer jurisdiction, the United States Court of Appeals of the Tenth Circuit may review the entire order and all grounds for removal addressed there. Plaintiffs argue, on the other hand, that the remaining grounds for removal other than federal officer jurisdiction are plainly unreviewable pursuant to § 1447(d).

There is a split of authority on that issue, and the Tenth Circuit has not definitively decided the issue. Eight Circuits have found, consistent with Plaintiffs' argument, that appellate jurisdiction is limited to the portion of the remand order tied to an express exception in § 1447(d).[1] *Accord Baltimore*, 2019 WL 3464667, at *4 (noting majority rule in holding that "only the issue of federal officer removal would be subject to review on defendants' appeal of the remand"). The Tenth Circuit also found to this effect in an unpublished decision. *Sanchez v. Onuska*, 1993 WL 307897, at *1 (10th Cir. 1993) ("the portion of the remand order in this case concerning the § 1441(c) removal is not reviewable and must be dismissed for lack of jurisdiction"). Only the Sixth and Seventh Circuits have found that the entire order is reviewable in that instance.[2] This Court finds it likely that the Tenth Circuit will follow the weight of authority and find that the only ground subject to appeal is federal officer jurisdiction under § 1442, consistent with its unpublished opinion in *Sanchez*.

---

[1] *See City of Walker v. Louisiana*, 877 F.3d 563, 567 n.2 (5th Cir. 2017); *Jacks v. Meridian Res. Co., LLC,* 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley,* 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *State Farm Mutual Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96, 97 (2d Cir. 1981); *Davis v. Glanton,* 107 F.3d 1044, 1047 (3d Cir. 1997); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970); *Patel v. Del Taco Inc,* 446 F.3d 996, 998 (9th Cir. 2006).

[2] *See Lu Junhong v. Boeing Co*., 792 F.3d 805, 813 (7th Cir. 2015); *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017). The Sixth Circuit in *Mays* did not, however, acknowledge a previous Sixth Circuit decision in *Appalachian Volunteers, Inc. v. Clark*, 432 F.3d 530, 534 (6th Cir. 1970), that followed the majority rule, and the parties conceded in *Mays* that the entire remand order was reviewable. Another decision cited by Defendants, *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017), does not necessarily support their argument. *Decatur* held only that a remand based on a *procedural defect* (timeliness) was reviewable in its entirety where it included a Section 1442 argument. *Id.* at 296. *Decatur* acknowledged that the court "cannot review a remand order (or a portion thereof) expressly based on a Section 1447(c) ground when the basis for removal is a statute that, like Section 1441, Section 1447(d) does not specifically exempt from Section 1447(c)'s bar."

Defendants rely, however, on the Tenth Circuit's decision in *Coffey v. Freeport McMoran Copper & Gold,* 581 F.3d 1240, 1247 (10th Cir. 2009), arguing it "strongly suggests" the Tenth Circuit would review the Court's "entire order" (ECF No. 75 at 6). They also rely on the Supreme Court's decision in decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). The Court finds these cases unpersuasive.

Unlike *Sanchez,* which turned on the Tenth Circuit's reading of Section 1447(d), *Coffey* analyzed the language in the Class Action Fairness Act ("CAFA"). CAFA provides that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." 581 F.3d at 1247 (quoting 28 U.S.C. § 1453(c)(1)). *Coffey* observed that § 1453(c)(1) contained "no language limiting the court's consideration solely to the CAFA issues in the remand order," and expressly authorized appellate review. *Id*. Here, by contrast, the plain language of Section 1447(d) makes remand orders "not reviewable," with two narrow exceptions.

Further, even though the Tenth Circuit in *Coffey* found it had discretion to review the whole order, it declined to do so, reasoning that since there would have been no appellate jurisdiction over the remand order absent the CAFA issue, review of the non-CAFA issue would "not fit within the reasons behind §1453(c)(2)," *i.e.* to "develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." *Id. Accord Parson v. Johnson & Johnson*, 749 F.3d 879, 892-93 (10th Cir. 2014) (declining to exercise discretion to review non-CAFA basis of remand order in part because "absent our jurisdiction over the CAFA remand order, there would have

been no freestanding appellate jurisdiction to review the district court's ruling on diversity jurisdiction"). Thus, *Coffey* suggests the Tenth Circuit would be unlikely to review aspects of a remand order that would otherwise be unreviewable.

In *Yamaha*, the Supreme Court addressed the question whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court of appeals could review only the particular question certified by the district court, or could instead address any issue encompassed in the district court's certified order. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Yamaha*, 516 U.S. at 205. It observed that "the text of § 1292(b) indicates" that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id*. It is questionable whether this analysis would apply to § 1447(d), as § 1292(b) expressly authorizes appellate review of orders certified by the district court, while § 1447(d) explicitly bars review of any kind, with only two specified, narrow exceptions.

Also, as the Tenth Circuit noted in *Coffey*, *Yamaha*'s holding that appellate jurisdiction extended to the entire order certified for interlocutory appeal (rather than the particular issue certified) was discretionary. *Coffey*, 581 F.3d at 1247 ("the appellate court *may* address any issue fairly included within the certified order") (quoting *Yamaha,* 516 U.S. at 205) (emphasis added). So even if Defendants are correct that *Yamaha* authorizes the Tenth Circuit to review issues beyond the federal officer statute, *Yamaha* does not require such consideration. And *Coffey* suggests that the Tenth Circuit is unlikely to go beyond review of the issue that gives it jurisdiction. That suggestion

seems particularly apt in this case given the fact that there are so many substantive arguments for jurisdiction which would need to be addressed. Unlike the situation in *Junhong*, where 'the marginal delay from adding an extra issue to case where the time for briefing, argument, and decision has already been accepted" would be small, 792 F.3d at 813, the time needed to address the numerous additional jurisdictional issues presented in this case would be significant.

B. Whether a Stay of the Remand Order is Appropriate

The power to grant a stay pending review of an appeal has been described as "part of a court's 'traditional equipment for the administrative of justice.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). It is "'firmly imbedded in our judicial system,' . . . and 'a power as old as the judicial system.'" *Id.* (citation omitted). Similarly, the power to "hold an order in abeyance" is "inherent", and allows a court "to act responsibly." *Id*. at 426–27.

On the other hand, a court "may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at 427. "A stay is an 'intrusion into the ordinary processes of administrative and judicial review' . . . and accordingly 'is not a matter of right, even if irreparable injury might otherwise result. . . .'" *Id*. (internal and external citations omitted). "The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders. . . ." *Id*.

A stay is ultimately "'an exercise of judicial discretion,' and '[t]he propriety of its

issue is dependent upon the circumstances of the particular case.'" *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*.

A court must consider four factors in determining whether a stay is warranted under the standard test: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicable will be irreparably injured absent a stay; (3) whether issuance of the say will substantially injure the other parties interested in the proceeding; and (4) where the public risk lies.'" *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. at 770 (1987)). The Supreme Court noted in *Nken* that there is substantial overlap between these and the factors governing preliminary injunctions "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id*.; *see also Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015).

The first two factors are the most critical. *Nken*, 556 U.S. at 434. Defendants argue that "[i]n cases where the appealing party demonstrates that 'the three 'harm' factors tip decidedly in its factor,' it need only show that the appeal will raise issues 'so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" (ECF No. 75 at 3 (quoting *F.T.C. v. Mainstream Mktg. Servs., Inc.* ("*Mainstream II*"), 345 F.3d 850, 852 (10th Cir. 2003) (internal quotation marks omitted)).) The Tenth Circuit has recently clarified in

connection with the appeal of a preliminary injunction that "any modified test which relaxes one of the prongs" and "thus deviates from the standard test is impermissible." *Diné Citizens Against Ruining Our Env't v. Jewell,* 839 F.3d 1276, 1282 (10th Cir. 2016). This holding has been interpreted to also apply to a stay pending an appeal, given the substantially same standards governing grants of preliminary injunctions and stays pending appeal. *Grogan v. Renfrow*, 2019 WL 2764404, at *4 (N.D. Okla. July 2, 2019); *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1113–15 (D.N.M. 2017).

1. Likelihood of Success on the Merits

The Court turns to the first factor—whether Defendants have made a strong showing of likelihood of success on the merits. To satisfy this standard it is "not enough that the chance of success on the merits be "'better than negligible.'" *Nken*, 556 U.S. at 434 (citation omitted). The Court finds that Defendants have not made such a showing as to federal officer jurisdiction under 28 U.S.C. § 1442.

While Defendants argue that this case raises "complex and novel questions regarding jurisdiction" that have "divided multiple district courts" (ECF No. 75 at 7), this is not true as to the issue of federal officer removal jurisdiction. Defendants have cited no case that has accepted this argument in the context of climate change claims against companies, such as Defendants, that market and sell fossil fuels. Moreover, in the cases cited by Defendants, federal control was obvious for substantial periods of time, and the defendants in those cases established the necessary causal nexus between a significant period of federal control and the claims that is wholly absent here. The cases demonstrate the high degree of federal control needed to provide jurisdiction

under this statute. *See, e.g., Fina Oil & Chem. Co.,* 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde v. Delta Field Erection*, 1998 U.S. Dist. LEXIS 23946, at *29-30, 20 (M.D. La. Aug. 5, 1998). Defendants' essentially "attempt to re-hash the same argument(s)" as to why they believe they have a substantial basis for federal officer jurisdiction, which "does not demonstrate a likelihood of success on appeal." *Mainstream Mktg. Servs., Inc. v. F.T.C.* ("*Mainstream I*"), 284 F. Supp. 2d 1266, 1275 (D. Colo. 2003).

It is a closer question as to whether Defendants have demonstrated a likelihood of success if the Tenth Circuit were to review the other bases for federal jurisdiction, particularly in regard to the issue of whether Plaintiffs' claims arise under federal common law. This is the one jurisdictional ground that federal district courts are divided on, with two courts finding that jurisdiction exists on this basis and three courts finding that jurisdiction does not. *Compare California* v. *BP p.l.c.* ("*CA I*"), 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland v. BP p.l.c. ("CA II*), 325 F. Supp. 3d 1017 (N.D. Cal. June 25, 2018); *and City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. July 19, 2018); *with State of Rhode Island v. Chevron Corp.*, 2019 WL 3282007 (D. R.I. July 22, 2019); *Mayor and City Council of Baltimore v. BP P.L.C.* ("*Baltimore*"), 2019 WL 2436848 (D. Md. June 10, 2019), *appeal docketed*, No. 19-1644 (4th Cir. June 18, 2019); *and Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

Given this split of authority, Defendants may have shown that this issue is so "'serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and

deserving of more deliberate investigation.'" *Mainstream II*, 345 F.3d at 852. However, the Court finds that Defendants have not shown a strong likelihood of success on the merits on this issue, which is the applicable test. *Nken*, 556 U.S. at 434. The United States District Court for the Northern District of California that decided *CA I* and *CA II* (and which the *City of Oakland* court relied on) cited *American Electric Power Co., Inc. v. Connecticut,* 564 U.S. 410 (2011), and *Kivalina v. Exxon Mobil Corp.,* 696 F.3d 849 (9th Cir. 2012), in support of its finding of federal question jurisdiction. However, the plaintiffs in those cases expressly invoked federal claims, unlike this case which involves only state law claims asserted in state court, and those cases appear to be inapplicable. Moreover, as noted in this Court's Order of Remand, *CA I*, *CA II*, and *City of Oakland* did not address the well pleaded complaint rule, under which this Court found that federal jurisdiction did not exist. Defendants have not made any new argument that suggests they have a strong likelihood of success on the merits on this issue. Defendants also do not make any meaningful showing that there is federal question jurisdiction under *Grable,* or on any of the other grounds upon which they assert federal jurisdiction, and no cases have found jurisdiction under such arguments.

2. Irreparable Injury

"To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). "Irreparable harm is not harm that is merely 'serious or substantial.'" *Id*. (citation omitted). "[S]imply showing some 'possibility of irreparable injury'" also fails to show irreparable injury. *Nken*, 556 U.S. at 434–35 (citation omitted).

The Court finds that Defendants have failed to establish this element. Defendants first argue that they will suffer irreparable harm if a stay is not granted because they will be forced to litigate this same case before the Tenth Circuit and in Colorado state court, and could face burdensome discovery in state court. The Court rejects this argument. The Supreme Court has made clear that "injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm. *Sampson v. Murray,* 415 U.S. 61, 90 (1974); *see also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"); *Washington v. Monsanto Co.*, 2018 U.S. Dist. LEXIS 48501 (W.D. Wash. Mar. 23, 2018) (finding in a similar case where a private corporation was arguing removability under the federal officer statute that there was no irreparable injury even though "Defendants will incur some additional costs of pursuing an appeal without a stay").

Defendants also argue that state court proceedings could be potentially duplicative, mooted or otherwise wasteful if the Tenth Circuit rules in their favor. Similarly, they assert that the appeal could become moot if the state court enters judgment before the appeal is resolved, meaning that they would lose their appeal rights. Again, these arguments are "simply too speculative to rise to the level of 'irreparable injury.'" *Phoenix Glob. Ventures, Inc. v. Phoenix Hotel Assocs*., Ltd., 2004 WL 24079, at *8 (S.D.N.Y. Nov. 23, 2004) (quoting *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995)); *see also Baltimore*, 2019 WL 3464667, at *5; *Hall v. Dixon,* 2011 WL

767173, at *8-9 (S.D. Tex. Feb. 25, 2011).

Similarly, Defendants' argument that discovery could be unduly burdensome in state court is speculative. Moreover, Defendants would be subject to similar discovery if they were proceeding in federal court, and "the interim proceedings in state court may well advance the resolution of the case in federal court." *Baltimore*, 2019 WL 3464667, at *6; *see also Cesca Therapeutics, Inc. v. SynGen Inc.,* 2017 WL 1174062, at *4–5 (E.D. Cal. Mar. 30, 2017) (finding that an argument as to "the loss of financial resources and time spent on discovery during the pendency" of the appeal "is not convincing", and noting that where, as here, a case is "in its earliest stages," "the risk of harm" to Defendants "if discovery proceeds is low").

Nor would state court rulings present "issues of comity." (*See* ECF No. 75 at 9.) It is not unusual for cases to be removed after substantial state litigation. 28 U.S.C. § 1450 recognizes this, and provides that "[a]ll injunctions, orders and other proceedings" in state court prior to removal remain in force unless "dissolved or modified" by the district court.

Finally, Defendants argue irreparable injury because "it is not entirely clear 'how procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it.'" (ECF No. 75 at 10 (quoting *Barlow v. Colgate Palmolive Co*, 772 F.3d 1001, 1014 n. 2 (4th Cir. 2014) (Wynn J., concurring in part and dissenting in part)).) This argument is rejected. Justice Wynn's partial concurring opinion made no finding that returning from the state court to federal court would actually offend the Anti-Injunction Act or the notions of comity; he only noted that the

majority opinion had not addressed the issue or the procedure for how the case would make its way back to state court. *Barlow*, 772 F.3d at 1014. It is this Court's view that federal courts are fully capable of ensuring that the proceeding in state court returns to federal court if a remand order is vacated, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand. *See Bryan v. BellSouth Communcs., Inc.,* 492 F.3d 231, 240 (4th Cir. 2007); *In re Meyerland Co.,* 910 F.2d 1257, 1263 (5th Cir. 1990).[3]

3. Whether Plaintiffs Would Be Substantially Injured if a Stay is Entered and the Public Risk

The last two factors merge and are considered together when the party opposing a stay is a governmental body, as here. *See Nken*, 556 U.S. at 435. Defendants argue that a stay will not permanently deprive Plaintiffs of access to state court, it will only delay the vindication of their claim. They also argue that the Complaint demonstrates the lack of harm, as a substantial portion of the damages Plaintiffs seek stems from purported costs that they have not yet incurred and may not incur for decades. Defendants assert that this does not counsel against a stay. Defendants also assert that Plaintiffs "'would actually be served by granting a stay,' because they would not 'incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued.'" (ECF No. 75 at 11 (quoting *Raskas v. Johnson & Johnson*, 2013 WL

[3] The Tenth Circuit's decision in *Chandler v. O'Bryan,* 445 F.2d 1045 (10th Cir. 1971), cited by Defendants, does not say otherwise. It held only that the Tenth Circuit could not enjoin a case that had been remanded to state court in a prior federal proceeding. *Id*. at 1057–58. Similarly, the First Circuit's decision in *FDIC* v. *Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979), is inapposite, as it held only that a district court cannot enjoin a state court proceeding once it has remanded the case to state court as it lacks jurisdiction.

1818133, at *2 (E.D. Mo. Apr. 29, 2013)).)

The Court disagrees, finding that the last two factors also weigh against a stay. As the District of Maryland found in the *Baltimore* case, "[t]his case is in its earliest stages and a stay pending appeal would further delay litigation on the merits" of the claims. 2019 WL 3464667, at *6. Plaintiffs' claims in this case were filed over a year ago. The Court agrees with *Baltimore*'s finding that "[t]his favors denial of a stay, particularly given the seriousness of the [Plaintiffs'] allegations and the amount of damages at stake." *Id*. Moreover, the public interest is furthered by the timely conclusion of legal disputes, *Desktop Images v. Ames,* 930 F. Supp. 1450, 1452 (D. Colo. 1996), and not by the interference with state court proceedings, *Maui Land & Pineapple Co. v. Occidental Chem. Corp.,* 24 F. Supp. 2d 1083, 1087 (D. Haw. 1998).

III. CONCLUSION

Based on the foregoing, Defendant's request for a stay of the remand order is denied. Defendants have not shown a likelihood of success or irreparable injury, or that the other factors weigh in favor of a stay. Accordingly, the Court ORDERS as follows:

1. Defendant's Motion for Stay of Remand Pending Appeal filed September 13, 2019 (ECF No. 75) is DENIED; and
2. The Clerk shall REMAND this case to Boulder County District Court, and shall terminate this action.

Dated this 7th day of October, 2019.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

No.

SUNCOR ENERGY (U.S.A.) INC., SUNCOR ENERGY SALES INC., SUNCOR ENERGY INC., AND EXXON MOBIL CORPORATION, APPLICANTS

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY, AND CITY OF BOULDER

CERTIFICATE OF SERVICE

I, William T. Marks, counsel for applicants and a member of the Bar of this Court, certify that, on October 17, 2019, one copy of the Application for Recall of the Remand Order Pending Appeal in the above captioned case was sent, by third party commercial carrier for delivery overnight and by electronic mail, to the following counsel:

Kevin S. Hannon, Esq.
The Hannon Law Firm, LLC
1641 Downing Street
Denver, CO 80218
khannon@hannonlaw.com

I further certify that all parties required to be served have been served.

William T. Marks

FILED
United States Court of Appeals
Tenth Circuit

October 17, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs - Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants - Appellants.

No. 19-1330
(D.C. No. 1:18-CV-01672-WJM-SKC)
(D. Colo.)

ORDER

Before **LUCERO** and **McHUGH**, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(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) (internal quotation marks omitted). The decision

whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

No. 19A368

IN THE
Supreme Court of the United States

BP P.L.C., ET AL.,

Applicants,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY OF REMAND ORDER PENDING APPEAL

Directed to the Honorable John G. Roberts,
Chief Justice of the United States
And Circuit Justice for the Fourth Circuit

Victor M. Sher
Sher Edling LLP
100 Montgomery St., Suite 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com

Andre M. Davis
Suzanne Sangree
Baltimore City Law Department
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
(443) 388-2190
andre.davis@baltimorecity.gov
suzanne.sangree2@baltimorecity.gov

Counsel for Plaintiff – Respondent Mayor and City Council of Baltimore

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

INTRODUCTION

Defendants–Applicants BP P.L.C. et al. (collectively "BP") seek to stay an order issued by the U.S. District Court for the District of Maryland that remanded to state court a case brought by Plaintiff-Respondent Mayor & City Council of Baltimore ("City" or "Baltimore"). The district and circuit courts both denied BP's motions to stay remand pending appeal, as have the First Circuit, the Tenth Circuit, and two other district courts considering identical requests to stay remand orders in cases raising similar issues. *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, No. 1:18-cv-00395-WES-LDA (Sept. 10, 2019) (denying motion to stay remand order pending appeal); *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, No. 19-1818 (1st Cir. Oct. 7, 2019) (same); *Bd. of Cty. Comm'rs of Boulder Cty. et al. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 18-CV-01672-WJM-SKC, 2019 WL 4926764, at *1 (D. Colo. Oct. 7, 2019) (same); Attachment 1, *Bd. of Cty. Comm'rs of Boulder Cty. et al. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir. Oct. 17, 2019) (same).

BP has not satisfied its heavy burden to obtain a stay, especially given the procedural posture of this case. The only question BP identifies that could conceivably warrant certiorari is the scope of review on appeals from remand orders where the removing party asserted a meritless federal officer jurisdiction argument to obtain appellate review of other, otherwise non-appealable grounds. BP offers no basis to think the Fourth Circuit's eventual determination of that issue will warrant certiorari review, let alone reversal. Indeed, this Court denied certiorari less than two

weeks ago in a case, also arising from the Fourth Circuit, presenting the exact circuit split on which BP relies. *See Rheinstein v. Attorney Grievance Commission of Maryland*, No. 19-140, *cert. denied*, __ S. Ct. __, 2019 WL 4922758 (Oct. 7, 2019) (denying certiorari as to the following Question Presented: "Whether, once an appeal of a remand order has been explicitly authorized by 28 U.S.C. § 1447(d), the appellate court has jurisdiction to review the entire order and all of the legal issues entailed in the decision to remand . . . ." *See* Petition for Cert., *Rheinstein v. Attorney General Grievance Comm'n of Maryland*, No. 19-140, 2019 WL 3496290 at *1 (July 26, 2019)). If the Fourth Circuit limits its review to the federal-officer ground for removal under § 1442 only, that ruling would be entirely consistent with the strong majority of precedent since at least 1970 construing the scope of appellate jurisdiction under § 1447(d). *See* Part C.1, *infra*.

There is no circuit conflict concerning any of BP's underlying theories of removal, and BP has not identified any legal question that would warrant review or reversal. *See* Part C.2, *infra*. BP's own arguments show that its eight purported grounds for removal are heavily fact-bound and idiosyncratic. BP asserts that the merits of the City's *causes of action*, and BP's various federal defenses, present issues of national importance. But none of those questions are presented in the pending Fourth Circuit appeal; the only issue on appeal is which court will adjudicate them. The City is aware of no case in which this Court has stayed a remand order and BP cites none.

A stay would be particularly inappropriate here in light of the district courts' near unanimous rejection of BP's various removal theories. Four district courts in four different circuits have granted plaintiffs' motions to remand state-law causes of action brought by cities, counties, and one State, alleging that fossil-fuel industry defendants knowingly and substantially contributed to the climate crisis through longstanding tortious conduct.[1] The one district court that denied remand did not analyze or discuss the primary issue on which BP asserts certiorari will likely be granted—federal officer jurisdiction—and has been roundly criticized.[2] The weight of authority strongly suggests that reversal in this Court is unlikely. *See* Part D, *infra*.

BP's irreparable harm arguments are equally meritless. *See* Part E, *infra*. BP asserts that a stay is imperative pending its appeal of the remand order, because otherwise it will face the "potentially irrevocable consequences" of being "forced to answer in state court," which may "waste substantial time and resources" if the Fourth Circuit reverses. Appl. at 30–33. The appeal in the Fourth Circuit is fully briefed, and oral argument is tentatively scheduled to occur in less than two months. *See* Tentative Calendar Order, *Mayor & City Council of Balt. v. BP P.L.C.*, No. 19-

---

[1] *Bd. of Cty. Commissioners of Boulder Cty. et al. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *1 (D. Colo. Sept. 5, 2019) ("*Boulder*"); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 146 (D.R.I. 2019) ("*Rhode Island*"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *as amended* (June 20, 2019) ("*Baltimore* Remand Order"); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo*").

[2] *See City of Oakland v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*Oakland*"); *see also, e.g.*, Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 Mich. L. Rev. Online 25, 32–38 (2018) (describing *Oakland*'s holding as "unorthodox," "disregard[ing] the master of the complaint rule," and "out of step with prevailing doctrine").

1644, Dkt. 113 (4th Cir. Sept. 30, 2019). BP has not sought to expedite that appeal, despite its protestations of urgency here. In any event, the risk of prejudice or wasted resources during the brief period of the appeal in the Fourth Circuit is *de minimis* and would not demonstrate irreparable harm even if it were substantial. Even litigating the case in state court to judgment would not constitute irreparable harm, given the availability of this Court on certiorari to address any remaining substantial federal issues.

The balance of equities does not support a stay either. Granting a stay to avoid state court litigation costs for a few months would render the irreparable injury requirement a virtual nullity and would invite an unending stream of stay applications to this Court in completely ordinary cases. This potential for mischief further cautions against granting the stay.

For all these reasons, a stay is not warranted and the BP's Application should be denied.

ARGUMENT

A. Factual and Procedural Background

The City filed its complaint against multiple fossil-fuel industry defendants more than 15 months ago, asserting Maryland law causes of action in Maryland state court. *Baltimore* Remand Order, 388 F. Supp. 3d at 548–49. BP removed to the District of Maryland, alleging a "proverbial 'laundry-list' of [eight] grounds for removal." *Id.* at 550. The district court granted Baltimore's motion to remand to state court, rejecting every ground for removal in a comprehensive and thorough opinion, *id.* at 574, and denied BP's motion to stay the remand order pending appeal. *See*

Mayor & City Council of Baltimore v. BP P.L.C., Memorandum Denying Stay Pending Appeal, No. CV ELH-18-2357, 2019 WL 3464667, at *6 (July 31, 2019); Appl. Attach. D at 11. The Fourth Circuit also denied BP's motion to stay, permitting remand to proceed. *See* Appl. Attach. E.

Similar cases brought by public entities against fossil-fuel industry defendants asserting state law claims for injuries related to climate change are pending in several district and circuit courts. Relevant here, the District of Rhode Island, the First Circuit Court of Appeals, the District of Colorado, and the Tenth Circuit Court of Appeals have each denied motions by defendants (including many of the applicants here) to stay remand orders pending appeal. *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, No. 1:18-cv-00395-WES-LDA (Sept. 10, 2019); *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, No. 19-1818 (1st Cir. Oct. 7, 2019); *Bd. of Cty. Comm'rs of Boulder Cty. et al. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 18-CV-01672-WJM-SKC, 2019 WL 4926764, at *1 (D. Colo. Oct. 7, 2019); Attachment 1, *Bd. of Cty. Comm'rs of Boulder Cty. et al. v. Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir. Oct. 17, 2019) (same). In two cases related before the Northern District of California, the court denied the plaintiffs' motions to remand, and granted motions to dismiss under Fed. R. Civ. P. 12(b)(2) and 12(b)(6). *City of Oakland v. BP p.l.c.*, No. 17-cv-6011-WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*Oakland*"). In a separate set of cases related before a different judge in the Northern District of California, the court granted the plaintiffs' motions to remand, explaining its disagreement with the denial of remand in the *Oakland* cases (which are on appeal

in the Ninth Circuit). *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo*").[3]

B. Legal Standards

The typical stay application to a Circuit Justice arises after a court of appeals has ruled, pending a petition for certiorari. The governing standards are well-settled: First, "it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari . . . ." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Second, the Circuit Justice "must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below." *Id.* "Finally, an applicant must demonstrate that irreparable harm will *likely result* from the denial of equitable relief." *Id.* (emphasis added). "[A] district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (denying stay); *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) (same) (denying stay). Applying those standards, "[d]enial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (denying stay) (quoting *Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

[3] A similar case brought by the City of New York was filed in the District Court for the Southern District of New York and does not present any of the jurisdictional issues on appeal here. *City of New York v. BP P.L.C.*, No. 18-cv-182-JFK (S.D.N.Y.).

The applicant's burden is higher still, where, as here, it "does not come to [the Court] in the posture of the usual application" pending a petition for certiorari, but rather pending appeal to a circuit court. *See Heckler v. Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers); *see also Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1331 (1980) (Rehnquist, J., in chambers) (Rehnquist, J., in chambers) (applicants in such cases "bear an augmented burden"). Staying a case pending a circuit court's decision "should not be nearly as frequently done as in the case of a final judgment of the court of appeals." *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers). Instead, when "a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1013 (1993) (O'Connor, J., Souter, J.) (concurring in denial of stay) (quoting *O'Rourke v. Levine*, 80 S. Ct. 623 (1960) (Harlan, J., in chambers)); *see also, e.g.*, Shapiro, et al., SUPREME COURT PRACTICE 883 (10th ed. 2013) (remedy reserved for cases presenting the "most compelling and unusual circumstances") (collecting authorities). "As is often noted, 'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.'" *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J.) (collecting authorities).

Particularly when a circuit court has denied a stay pending appeal, overriding that determination "invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket," and as such, "a Circuit Justice's

interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer." *Certain Named & Unnamed Non-Citizen Children*, 448 U.S. at 1331 (denying application to vacate stay entered by circuit court).

Circumstances justifying a stay pending appeal to a circuit court are almost never presented in a "lawsuit between private litigants," and generally arise only upon "an improper intrusion by a federal court into the workings of a coordinate branch of the [federal] government" or of a state. *I.N.S. v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers); *see also, e.g.*, *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019) (per curiam); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam); *Atiyeh*, 449 U.S. at 1313 (Rehnquist, J.) (granting application by Governor of Oregon to stay, pending appeal, an injunction requiring immediate reduction in state prison population); *cf. United States v. U.S. Dist. Court for Dist. of Oregon*, 139 S. Ct. 1 (2018) (per curiam) (denying United States' application to stay discovery and trial pending petition for writ of mandamus to the Ninth Circuit); SUPREME COURT PRACTICE 883–84 (collecting additional examples).

C. It Is Unlikely That the Court Will Grant Certiorari if the Remand Order is Affirmed.

There is little likelihood that the Court would grant certiorari from an affirmance by the Fourth Circuit, regardless of whether or not that court limits the scope of its review or considers the entire remand order. A decision to limit review to federal officer jurisdiction under 28 U.S.C. § 1442 would be consistent with decades

of precedent interpreting § 1447(d) among the clear majority of the circuits. Even if the Fourth Circuit concludes that it is authorized by § 1447(d) to review all eight supposed grounds for removal (contrary to that court's own precedents), BP offers no reason to anticipate that the appellate court's analysis of any of those grounds would warrant certiorari review.

1. A Ruling on the Scope of Review Under 28 U.S.C. § 1447(d) Would Not Warrant Review.

The primary issue BP identifies as a basis for granting certiorari is a purported circuit split over the scope of appellate review under § 1447(d). Specifically, BP asserts that a conflict exists over "whether 28 U.S.C. § 1447(d) authorizes the appellate court to review the entire remand order where removal was based in part on the federal officer removal statute, 28 U.S.C. § 1442, or whether appellate jurisdiction is limited to reviewing only the federal officer issue." Appl. at 8. BP asserts that the Court "will likely grant certiorari to review that question if the Fourth Circuit adopts the narrow view of § 1447(d)." *Id.*

The Court denied certiorari just two weeks ago from another petition that sought review of a Fourth Circuit decision applying that "narrow view" of § 1447(d). In *Attorney Grievance Comm'n of Maryland v. Rheinstein*, 750 F. App'x 225 (4th Cir. 2019) (per curiam), the Fourth Circuit considered an appeal in a case removed on federal officer and other grounds. The Fourth Circuit affirmed the district court's remand to state court, rejecting the appellant's federal officer removal claim, and dismissed the remainder of the appeal for lack of jurisdiction pursuant to § 1447(d). *Id.* The removing party filed a petition for certiorari asking this Court to resolve

"[w]hether, once an appeal of a remand order has been explicitly authorized by 28 U.S.C. § 1447(d), the appellate court has jurisdiction to review the entire order and all of the legal issues entailed in the decision to remand." *See* Petition for Cert., *Rheinstein v. Attorney General Grievance Comm'n of Maryland*, No. 19-140, 2019 WL 3496290. The petitioner cited the identical alleged circuit conflicts that BP does here. *See id*. at 15–20. On October 7, 2019, this Court denied the petition. *See* 2109 WL 4922758.

The Court's denial of certiorari in *Rheinstein* is understandable. Fourth Circuit precedent limiting review of remand orders to only those bases for removal expressly enumerated in § 1447(d) dates back nearly fifty years and accords with the firm majority of circuit authority. *See Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) ("Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1). . . . Therefore, we dismiss this appeal for lack of jurisdiction insofar as it seeks review of the order remanding the cases for failure to raise federal

questions."). The Second,[4] Third,[5] Fifth,[6] Sixth,[7] Eighth,[8] Ninth,[9] and Eleventh[10] Circuits have likewise uniformly held that grounds for removal that Congress has

[4] *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981) (per curiam) ("Insofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a), it is dismissed for want of appellate jurisdiction. Insofar as it can be read as objecting to denial of removal under 28 U.S.C. § 1443, the order is affirmed.").

[5] *Davis v. Glanton*, 107 F.3d 1044 (3d Cir. 1997) (reviewing remand order as to § 1443, and holding that "insofar as the [appellants'] appeal challenges the district court's rulings under 28 U.S.C. § 1441, we must dismiss the appeal for want of appellate jurisdiction"); *Com. of Pa. ex rel. Gittman v. Gittman*, 451 F.2d 155, 157 (3d Cir. 1971) (affirming remand order where defendants "failed to make out a case for removal under Section 1443," and declining to consider other arguments because "a decision on removal under § 1441 is not appealable under 28 U.S.C. § 1447(d)").

[6] *Gee v. Texas*, 769 F. App'x 134 (5th Cir. 2019) (per curiam) ("Where a party has argued for removal on multiple grounds, we only have jurisdiction to review a district court's remand decision for compliance with [§§ 1442 or 1443]."); *City of Walker v. Louisiana through Dep't of Transportation & Dev.*, 877 F.3d 563, 566 n.2 & n.4 (5th Cir. 2017) (declining jurisdiction to review bases for removal other than § 1442, and noting: "Appellants do not argue that the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order. This court has rejected similar arguments in the past."); *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976) (affirming remand order as to removal under § 1443, and dismissing appeal for lack of jurisdiction "[a]s to the part of the remand order dealing with § 1441(b) removal"); *but see Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (accepting jurisdiction to review entire remand order, not only arguments under § 1442).

[7] *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567 (6th Cir. 1979) (affirming remand of case removed pursuant to § 1443, and holding that "to the extent that removal is based upon Section 1441, the remand order of the district court is not reviewable on appeal"); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), *abrogated on other grounds by Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423 (1974) (reviewing "the District Judge's ruling on the appropriateness of removal under 28 U.S.C. § 1443," and holding "we do not have jurisdiction to review" other asserted bases for removal jurisdiction)

[8] *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) ("[W]e do lack jurisdiction to review the district court's determination concerning the availability of federal common law to resolve this suit, given the above analysis regarding § 1447(d), as it is a remand based upon the court's determination that it lacked subject matter jurisdiction. Nonetheless, we retain jurisdiction to review the district court's remand on the issue of whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), applies."); *Thornton v. Holloway*, 70 F.3d 522, 524 (8th Cir. 1995) ("To the extent that the District Court's order is based on its construction of 28 U.S.C. § 1441, the appeal is dismissed, and the petition for writ of mandamus denied, for want of jurisdiction in this Court. To the extent that the District Court's order reflects its rejection of the Holloways' reliance on 28 U.S.C. § 1443, the order is

declared unreviewable cannot be transformed into appealable issue by the expedient of combining them with non-meritorious federal-officer or civil-rights arguments under §§ 1442 or 1443. The Tenth Circuit has no published authority on the issue, but has applied the majority rule in unpublished cases.[11]

As BP notes, the Seventh Circuit has held otherwise. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015).[12] As far as the City can tell, the Seventh Circuit

---

affirmed, and the petition for writ of mandamus is dismissed.").

[9] *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) ("The district court determined that removal was not proper under either 28 U.S.C. § 1441 or § 1443(1). We lack jurisdiction to review the remand order based on § 1441."); *Clark v. Kempton*, 593 F. App'x. 667, 668 (9th Cir. 2015); *Carter v. Evans*, 601 F. App'x. 527, 528 (9th Cir. 2015); *McCullough v. Evans*, 600 F. App'x. 577, 578 (9th Cir. 2015); *U.S. Bank Nat'l Ass'n. v. Azam*, 582 F. App'x. 710, 711 (9th Cir. 2014).

[10] *Alabama v. Conley*, 245 F.3d 1292, 1293 (11th Cir. 2001) ("An order remanding a civil action to state court for lack of subject matter jurisdiction pursuant to §§ 1441 and 1447(c) is not reviewable. . . . Hence, in a prior order of this Court, we dismissed Conley's appeal to the extent it challenges the district court's remand order based on §§ 1441 and 1447(c), but allowed Conley's appeal to proceed to the extent he is challenging the district court's implicit determination that removal based on § 1443 was improper." (citations omitted))

[11] *See Sanchez v. Onuska*, 2 F.3d 1160 (Table), 1993 WL 307897 (10th Cir. 1993) (where a defendant removes under both §§ 1441 and 1443, "the portion of the remand order . . . concerning the § 1441(c) removal is not reviewable and must be dismissed for lack of jurisdiction").

[12] BP asserts that the Sixth Circuit applies the same rule. *See* Appl. 9 (citing *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied sub nom. Cook v. Mays*, 138 S. Ct. 1557 (2018)). But *Mays* overlooked earlier circuit precedent applying the contrary rule. *See Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567 (6th Cir. 1979) (affirming remand of case removed pursuant to § 1443, and holding that "to the extent that removal is based upon Section 1441, the remand order of the district court is not reviewable on appeal"); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), *abrogated on other grounds by Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423 (1974) (reviewing "the District Judge's ruling on the appropriateness of removal under 28 U.S.C. § 1443," and holding "we do not have jurisdiction to review" other asserted bases for removal jurisdiction). In the Sixth Circuit, that earlier precedent controls. *See Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001).

has yet to apply *Lu Junhong*'s interpretation of § 1447(d) in any other case. BP speculates, however, that the Fourth Circuit and several others might reconsider their circuit precedent in light of *Lu Junhong*. It is equally possible, if not more likely, that the Seventh Circuit will reconsider its *Lu Junhong* holding *en banc* and join the majority as it is that other circuits will diverge from established precedent. Either way, it indicates that further percolation is appropriate before consideration by this Court might be justified. It is thus premature to predict the results of such cases and the present lop-sided conflict does not warrant review.

2. The Substantive Remand Issues BP Presents Do Not Satisfy Any of the Court's Traditional Criteria for Certiorari.

BP further asserts that certiorari will likely be granted based on the substance of its subject matter jurisdiction arguments, but it makes no serious effort to show how those issues satisfy any of the Court's certiorari criteria. *See* Appl. 11–15. To the contrary, there is no dispute over the applicable standards governing removal under § 1442, which are well settled and not genuinely in dispute. Rather, BP, like many unsuccessful petitioners for certiorari, simply insists that an adverse decision from the Fourth Circuit would be incorrect. But, of course, this Court is not a court of error.

Beginning with federal officer jurisdiction, BP cites no conflicting circuit authority this Court should resolve respecting whether federal officers directed BP's tortious conduct. It instead baldly asserts that its supposed entitlement to a federal forum "is of great national importance because Applicants extracted a significant amount of fossil fuels for the military." Appl. 11. But the only facts it cites show that one of the 26 defendants, and another defendant's predecessors in interest, once had

contracts with the Navy. Appl. at 11. BP admits, moreover, that its federal-officer analysis turns on fact-bound considerations. *See* Appl. at 19 (inviting the Court to examine a 70 year-old contract between Standard Oil and the Navy, and a defunct diesel fuel supply contract between CITGO and the Navy).

BP makes no attempt to explain why it would be prevented from obtaining a fair trial due to "local interests or prejudice," or anti-government "political harassment" resulting from a few attenuated, bygone relationships with the military, let alone how the litigation might "needlessly hamper" federal operations. Appl. 11–12. And every court that has considered BP's position in similar cases has rejected it.[13] The notion that a state court will be biased because of BP's limited connection with the military is fanciful at best. Certiorari to review BP's substantive federal officer removal arguments would be unwarranted.

BP's second position, that certiorari will be granted to decide whether "federal common law, not state law, necessarily governs claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production," Appl. at 12, is meritless. As the district court here recognized, "Defendants' assertion that the City's public nuisance claim under Maryland law is in fact 'governed by federal common law' is a cleverly veiled preemption argument," 388 F. Supp. 3d at 555, which cannot provide subject matter jurisdiction and is within the competence of the state courts to resolve on remand. *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391–92

[13] *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *18–21; *Rhode Island*, 393 F. Supp. 3d at 152; *Baltimore* Remand Order, 388 F. Supp. 3d at 567–69; *San Mateo*, 294 F. Supp. 3d at 939.

(1987) ("[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption . . . ."). The issue on appeal to the Fourth Circuit, however, and the potential question presented on certiorari, is not whether Baltimore has stated a claim, nor whether BP might prevail on potential federal preemption defenses. BP has in fact not answered the Complaint; only remand has been briefed in the district court. The only question before the Fourth Circuit is *which court* will hear those claims and defenses after BP answers or moves to dismiss. Both Maryland and federal courts are competent to do so. Whether Baltimore's claims are adjudicated in state or federal court is not an issue of national importance.

To be sure, BP's various arguments that federal common law "controls," "governs," or "necessarily applies" to the City's claims may, hypothetically, raise *merits* preemption questions that could someday conceivably justify certiorari, after the issues crystalize. But those matters have not been briefed to any court in this case, let alone decided. BP points to several instances where certiorari was granted to consider merits issues in cases related to global warming, but each of them differs in fundamental ways—factually, procedurally, and legally—from this case.[14] None involved any removal jurisdiction questions, or even federal subject matter

[14] *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 313–14 (2014) (considering challenges by "[n]umerous parties, including several States" to EPA rulemaking concerning regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (considering Second Circuit's reversal of dismissal of federal common law claims "ask[ing] for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually"); *Massachusetts v. E.P.A.*, 549 U.S. 497, 505 (2007) (considering "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute").

jurisdiction, and all reached the Court after the merits were fully litigated below. No appellate court, state or federal, has ruled on the merits issues BP points to here. Nor could those questions reach the Court on certiorari from an affirmance of the remand order, which properly did not address them. Certiorari on those points would be inappropriate.

D. There is No Fair Prospect that the Court will Reverse the Remand Order.

BP has not shown, and cannot show, a fair prospect of reversal on any issue. As noted above, if the Fourth Circuit affirms as to the lack of federal officer jurisdiction only, it would be in accord with decades of precedent in the majority of circuits, which this Court has never suggested should be reconsidered. On all the other various bases for removal BP alleges, each has been rejected unanimously by multiple district courts, except for the lone decision in the *Oakland* cases, which denied remand on the theory that the plaintiffs' claims arose under federal common law. There is no reason to believe this Court would reverse the eventual decision of the Fourth Circuit, even though BP may disagree with the results.

Scope of Review: BP has not made any showing that there is a fair prospect of reversal if the Fourth Circuit limits its review to federal officer jurisdiction under § 1442. As noted in Part D.1 *supra*, the firm majority of circuit authority going back nearly 50 years supports a narrow scope of review under § 1447(d), which is in concert with Congress's intention that appeals from remand determinations should be generally unavailable.

The contrary holding that BP cites from *Lu Junhong* relied on an analogy to this Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).[15] *Yamaha* held that when a circuit court accepts appeal from an interlocutory order under 28 U.S.C. § 1292, the court may review all issues reasonably encompassed within the order appealed from, not merely the specific controlling question of law certified by the district court. *Id.* at 204–05.

Yamaha's reasoning makes sense with respect to § 1292(b), which authorizes district courts to certify almost any non-final order that presents a "controlling question of law" for expedited, interlocutory review. In that context, giving the circuit court discretion to review related issues in the same order advances the statutory purpose of efficient and expeditious resolution of cases on the merits. *See* 28 U.S.C. § 1292(b) (authorizing certification only where "immediate appeal from the order may materially advance the ultimate termination of the litigation"). Congress's clear intent expressed in § 1447(d), by contrast, was to limit appellate review of remand orders to two theories of removal only: civil rights under § 1443, and federal officer

[15] As noted above, the Sixth Circuit in *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) held that it had jurisdiction to review an entire remand order and not only federal officer removal, but did so because all parties conceded jurisdiction was proper and did not brief the scope of review. *Mays*, moreover, did not address the Sixth Circuit's own longstanding decisions in *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566 (6th Cir. 1979) and *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970), which applied the majority rule.

Likewise, the Fifth Circuit's decision in *Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (accepting jurisdiction to review entire remand order, not only arguments under § 1442) relied on the same inapposite analogy as *Lu Junhong*, and is contrary to multiple decisions of that court applying the majority rule, before and since. *Gee v. Texas*, 769 F. App'x 134 (5th Cir. 2019) (per curiam); *City of Walker v. Louisiana,* 877 F.3d 563, 566 n.2 & n.4 (5th Cir. 2017); *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976).

under § 1442. Congress did not grant courts of appeal discretionary powers akin to those available under § 1292(b), to reject certification and to review issues beyond the certified question if certification is accepted. Section 1447(d) "bars review 'even if the remand order is manifestly, inarguably erroneous.'" *In re Norfolk S. Ry. Co.*, 756 F.3d 282, 287 (4th Cir. 2014) (quoting *Lisenby v. Lear*, 674 F.3d 259, 261 (4th Cir. 2012)). Relatedly, § 1292(b) does not make otherwise non-appealable questions reviewable, but rather permits appellate scrutiny of important reviewable issues earlier than final judgment. That is, § 1292(b) governs *when* an appellate court may within its discretion review a particular question, while § 1447(d) strictly limits *which* issues are "reviewable on appeal or otherwise." Defendants' interpretation of § 1447(d) would mandate appellate review of issues that are ordinarily prohibited from review *at all*.

BP's proposed rule of expanded appellate review would encourage defendants to assert and appeal baseless federal officer removal claims in order to "to bring . . . otherwise nonappealable questions to the attention of the courts of appeals," a risk this Court has found intolerable in related contexts. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43–51 (1995) (rejecting claims of "pendent party" or "pendent appellate jurisdiction" on appeal in case under 42 U.S.C. § 1983 and finding circuit court lacked jurisdiction to review order denying summary judgment beyond certain issues related to one party's purported qualified immunity defense) (quoting *Abney v. United States*, 431 U.S. 651, 663 (1977)). "These arguments drift away from the statutory

instructions Congress has given to control" the appellate process. *Swint*, 514 U.S. at 45.[16]

Federal Officer Jurisdiction: BP has not shown any prospect of reversal of the district court's judgment that its federal officer removal arguments are meritless. To prove that it was acting under a federal officer within the meaning of § 1442(a)(1), a defendant must establish both that it was "involve[d in] an effort to *assist*, or to help *carry out*, the duties or tasks of [a] federal superior" and that its relationship with the federal superior "involve[d] 'subjection, guidance, or control.'" *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 151–52 (2007). It must then establish a "sufficient connection or association" between the acts it performed under the government's direction and the plaintiff's claims and present a colorable federal defense. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017). The unremarkable contractual relationships cited by BP do not satisfy its burden.

To demonstrate some conduct at the direction of a federal officer, BP points to a seventy year-old contract between Standard Oil and the Navy governing joint ownership of a petroleum reserve, an expired diesel fuel supply contract between CITGO and the Navy, and boilerplate mineral leases with the Department of the

[16] The Removal Clarification Act of 2011, Pub L. No. 112-51, 125 Stat. 545, does not change the calculus. The only actual change that Act made to § 1447(d) was to add the words "1442 or" to the clause "an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." Congress is presumed to be aware of courts' interpretations of its laws when amending them, and in 2011 the circuit courts overwhelmingly applied the "narrow view" of § 1447(d). *See* footnotes 4–11, *supra*, and cases cited therein. The Removal Clarification Act's small change to § 1447(d) cannot reasonably be understood as undoing the decades of precedent narrowly construing appellate jurisdiction over remand orders absent clear instruction.

Interior for exploration and extraction on the outer continental shelf. Appl. at 19. None of these contracts show the kind of subjection, guidance, and control that defines the federal officer relationship, and none of the City's claims arise from conduct specific to those contracts.[17] Every court that has considered BP's argument has rejected it, and there is no reason to believe reversal is likely. *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *20 (". . . Defendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and Plaintiffs' claims."); *Rhode Island*, 393 F. Supp. 3d at 152 ("No causal connection between any actions Defendants took while 'acting under' federal officers or agencies and the allegations supporting the State's claims means there are not grounds for federal-officer

[17] As just one example, the unit production contract BP cites between Standard Oil and the Navy concerning the Elk Hills petroleum reserve did not "require" Standard Oil to produce a minimum amount of oil as BP argues. Although the contract *permitted* Standard to receive a certain amount of oil from the reserve and allowed the Navy to *restrict* Standard's production in order to protect its share of the pool, nothing in the contract *required* Standard to extract any oil at all. The Navy and Standard Oil stated as much describing the unit production contract to the Northern District of California in the 1970s:

> The Unit Plan Contract here involved, however, is unusual because its purpose was not to produce currently, and its effect was to conserve as much of the hydrocarbons in place as was feasible until needed for an emergency. . . . This required curtailing production of Standard's hydrocarbons along with that of Navy, for which Standard would have to receive compensation. Accordingly, the parties agreed that in consideration for Standard curtailing its production plus giving up certain other rights, Standard would be allowed to take up to 25,000,000 barrels of Shallow Oil Zone oil or until it had taken one-third of its participating percentage Shallow Oil Zone oil, whichever was less. The period during which Standard was receiving this Shallow Oil Zone oil is referred to in the Unit Plan Contract as the 'primary period.' After the primary period, production was to stop, except to the extent necessary to cover Standard's out-of-pocket expenses in connection with operating the Reserve.

United States v. Standard Oil Co. of Cal., 545 F.2d 624, 627–28 (9th Cir. 1976) (quoting joint background statement provided to trial court).

removal."); *Baltimore* Remand Order, 388 F. Supp. 3d at 569 ("[R]emoval based on the federal officer removal statute is not proper because defendants have failed to plausibly assert that the acts for which they have been sued were carried out 'for or relating to' the alleged federal authority . . . ."); *San Mateo*, 294 F. Supp. 3d at 939 (finding defendants had presented no "reasonable basis for federal officer removal," which argument the court characterized as "dubious").

Federal Common Law: BP's argument that "global warming claims" necessarily "arise under federal common law," and thus provide federal question jurisdiction, Appl. at 21, is baseless, and has been rejected by four of the five courts that have considered it. *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *4–10; *Rhode Island*, 393 F. Supp. 3d at 148–50; *Baltimore* Remand Order, 388 F. Supp. 3d at 569; *San Mateo*, 294 F. Supp. 3d at 937. These rulings correctly applied the 150-year-old well-pleaded complaint rule, which "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 391–92.

The district court here correctly recognized BP's argument that the City's state law claims "are necessarily governed by federal common law," *see* Appl. at 27, as "a cleverly veiled preemption argument." *Baltimore* Remand Order, 388 F. Supp. 3d at 555; *Rhode Island*, 393 F. Supp. 3d at 148 (same); *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *9 (same). Of course, it has long been "settled law that 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*, 482 U.S. at 393.[18]

The only decision accepting BP's position as a basis for removal, *Oakland*, 2018 WL 1064293, at *1–3, is a district court order that was criticized and expressly rejected in *Baltimore*, *Rhode Island*, *San Mateo*, and *Boulder*, and has been accurately characterized as "out of step with prevailing doctrine." *See* Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 Mich. L. Rev. Online 25, 32–35 (2018). Regardless, any federal common law that may have existed that would govern "climate change claims" was displaced by the Clean Air Act, as this Court has unambiguously held. *See AEP*, 564 U.S. at 424. Against this backdrop, there is no reasonable prospect of reversal.

Tellingly, almost none of the various cases BP cites in support of its federal common law argument involved any dispute over removal jurisdiction, nor even any state law claims. In almost all of them, the plaintiff pleaded claims under federal law in federal court in the first instance, or did not contest federal jurisdiction. Those cases that did involve state law fail to support BP's position. *See Connecticut v. Am.*

[18] A narrow exception to the rule expressed in *Caterpillar* is the doctrine of "complete preemption," which applies when "[w]hen [a] federal *statute* completely pre-empts the state-law cause of action," such that "a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003) (emphasis added). But, to remove an action on the basis of complete preemption, a defendant must show that Congress intended federal law to provide the "exclusive cause of action" for the claim asserted. *Id.* at 9. There is no basis to argue, and BP in fact does not argue, that Congress intended an undefined body of federal common law to provide a sole cause of action for the harms Baltimore alleges. BP argued in the district court that the Clean Air Act (rather than federal common law) completely preempts Baltimore's state-law claims, but does not argue here that the Court is likely to grant certiorari as to that question.

Elec. Power Co., 582 F.3d 309, 314–15 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011) (filed in federal district court "under federal common law"); *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 381–83 (7th Cir. 2007) (breach of contract claim filed in federal district court, governed by federal common law of common carriers); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126, 130 (2d Cir. 1999) (affirming dismissal of breach of contract claim filed in federal district court because claims were not governed by federal common law of defense procurement contracts); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997) (plaintiff's claims for breach of contract and negligence against common carrier were governed by federal common law, and plaintiff "did not contest removal"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981) (Sherman Act claims brought in federal district court); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302 (1947) (negligence claims asserted by federal government under federal common law in federal district court); *State of Missouri v. State of Illinois*, 200 U.S. 496, 517 (1906) (federal common law claims by State of Missouri against State of Illinois in original jurisdiction of Supreme Court).[19] None of these cases have any relevance to the jurisdictional issues presented here, where the City has alleged state law causes of action in state court.

The few cases BP relies on that considered whether removal jurisdiction existed over state law claims supposedly arising under federal common law do not

[19] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) was pleaded under Vermont state law, but was filed in federal district court in the first instance. The Court there did not consider any of the jurisdictional questions presented in this appeal.

support BP's position either. *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002), observed that federal jurisdiction exists over claims that arise under federal common law, but found that the plaintiff's claims did *not* arise under federal common law, and ordered the case remanded to state court. The court in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954 (9th Cir. 1996), held that a nominally state law claim against a government contractor arose under federal common law of government procurement contracts and was therefore removable. But that case preceded this Court's clarification in *Grable & Sons Metal Prod., Inc. v. Darue Eng.'g & Mfg*, 545 U.S. 308 (2005), and *Gunn v. Minton*, 568 U.S. 251 (2013), of the standards for determining whether well-pleaded state law claims "arise under" federal law for removal jurisdiction purposes. The *New SD* case has since been roundly criticized as inconsistent with *Grable* and *Gunn*. *See Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, No. 13-CV-5093-TOR, 2013 WL 5724465, at *4 (E.D. Wash. Oct. 21, 2013) (the premise of *New SD* is "no longer sound" after *Grable*); *Raytheon Co. v. Alliant Techsystems, Inc.*, No. CIV 13-1048-TUC-CKJ, 2014 WL 29106, at *4 (D. Ariz. Jan. 3, 2014) (same). Even if *Wayne* and *New SD* remain good law after *Grable*, neither involved the types of state law claims at issue here, and neither indicates a fair prospect of reversal.

Finally, as explained above, the issues here are not ripe for decision in the Fourth Circuit, let alone by this Court. The question presented concerning the scope of the appeal under § 1447(d) creates a vehicle problem for reviewing BP's separate arguments that federal common law "governs" certain state law claims and provides

an independent basis for removal. Specifically, even if BP's argument were correct that removal was proper because federal common law "controls," the district court's rejection of that argument would remain precluded from review "on appeal or otherwise" under § 1447(d). The absence of any circuit court decisions considering BP's federal common law theory strongly suggests, moreover, that once the Fourth Circuit eventually rules on it, a period of percolation remains the best policy before this Court considers exercising its discretion on certiorari. *See, e.g.*, *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J.) ("[B]ecause further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now . . . .") (concurring in denial of certiorari); *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Other Grounds for Removal: The two other bases for removal BP highlights are equally unlikely to be reversed (BP does not even mention four of the eight arguments in its notice of removal). BP asserts that when analyzed under *Grable* and its progeny, the City's state law claims "rais[e] questions" relating to fossil fuel use, are "inextricably linked" to various national interests, and "implicate" certain federal policies, all of which supposedly provides jurisdiction. Appl. at 29. Under *Grable*, however, a state law cause of action arises under federal law only when a federal

question is "necessarily raised," "actually disputed," "substantial," and "capable of resolution in federal court without disrupting capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See Gunn*, 568 U.S. at 258. In turn, "a federal question is 'necessarily raised' for purposes of § 1331 only if it is a 'necessary element of one of the well-pleaded state claims.'" *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 13 (1983)).

It is not enough that a well-pleaded state law claim "implicate[s]," "raises questions" about, or is "linked" to some topic that is important to the federal government. BP failed in the district court to show that any necessary element of any of the City's claims presents a federal question, thus losing on *Grable*'s first element, and does not even attempt to do so here. Every court that has considered BP's *Grable* arguments has rejected them. *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *9–13; *Rhode Island*, 393 F. Supp. 3d at 150–51; *Baltimore* Remand Order, 388 F. Supp. 3d at 558–61; *San Mateo*, 294 F. Supp. 3d at 938. There is simply no fair prospect of reversal on this issue.

As to jurisdiction under OCSLA, BP fares no better. Every court that has considered BP's position has rejected it. *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *21–22; *Rhode Island*, 393 F. Supp. 3d at 151–52; *Baltimore* Remand Order, 388 F. Supp. 3d at 566–67; *San Mateo*, 294 F. Supp. 3d at 938–39. The contours of OCSLA jurisdiction are not well developed outside the Fifth Circuit, but even under a maximally broad reading of OCSLA's jurisdictional provisions, Baltimore's claims

fall outside of it. Under such an interpretation, federal jurisdiction lies in cases where the plaintiff's injuries would not have arisen but for "operations" on the outer continental shelf, meaning "the doing of some physical act" there. *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). The method and location of BP's fossil fuel extraction is immaterial to the City's claims, and the highly attenuated relationship between its claims and BP's operations on the outer continental shelf does not justify removal under either the letter or the spirit of the Act. Importantly, moreover, and contrary to BP's assertions, the City does not and will not seek relief in the form of "abatement . . . of oil and gas production," through emissions caps or anything else, that would threaten mineral recovery on the outer continental shelf. *See* Appl. at 29. BP's speculation that the local nuisance abatement relief the City seeks would have tangential negative effects on its business does not show a fair prospect of reversal, and no court has accepted it. *Cf. Plaquemines Par. v. Palm Energy Offshore, LLC*, No. CIV.A. 13-6709, 2015 WL 3404032, at *5 (E.D. La. May 26, 2015) (rejecting jurisdiction where it would "open the floodgates to cases that could invoke OCSLA jurisdiction far beyond its intended purpose")

In sum, BP has not shown a fair prospect of reversal on any of its numerous theories for federal jurisdiction, and has not even defended half of the rejected theories raised in its notice of removal. A stay pending appeal would be pointless.

E. BP's Irreparable Harm Arguments Lack Merit, Precluding a Stay.

Ultimately, the substance of BP's certiorari and reversal arguments are beside the point, because BP has not come close to showing a likelihood of irreparable harm.

"An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus*, 463 U.S. at 1317.

The principles outlining what constitutes irreparable harm are well-settled:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974). The Court's "frequently reiterated standard requires" a party seeking a stay "to demonstrate that irreparable injury is *likely* in the absence" of the requested relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). "The propriety of a stay is dependent upon the circumstances of the particular case, and the traditional stay factors contemplate individualized judgments in each case." *See Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (denying application for stay pending appeal) (per curiam) (citation and internal punctuation omitted); *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that removal "is a serious burden for many aliens" but "is not categorically irreparable" and does not *per se* satisfy irreparable harm factor for applicants seeking stay of removal) (Roberts, C.J.).

Applying that standard to stay applications, "Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially

irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1203–04 (1972) (Powell, J., in chambers).

1. Entry of the Remand Order Cannot Alone Cause Irreparable Harm.

BP's principal argument that "being forced to answer in state court" is itself irreparable harm, Appl. at 31, finds no support in the law or in the circumstances of this case. That state courts may adjudicate federal defenses is a common and accepted feature of our constitutional system. The well-pleaded complaint rule has provided for more than 150 years that federal defenses do not give rise to federal subject-matter jurisdiction, and that state courts are equally competent to adjudicate them.[20] Even if an erroneous remand created some form of cognizable injury, it is hardly the kind of serious injury that warrants this Court's intervention. *See, e.g.*, 15A Wright & Miller, *Fed. Prac. & P.* § 3914.11 (2d ed.) ("[A]s important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate.").

Congress has made clear that the systemic interests in proceeding to the merits expeditiously outweighs the limited harm of a wrongful remand. Section 1447(d) makes remand orders generally unreviewable "on appeal or otherwise," precisely "to

[20] *See, e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) ("The 'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts. . . . Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court."); *Gully v. First Nat. Bank*, 299 U.S. 109, 116 (1936) ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby."); *Little York Gold Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1877) ("A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States.").

prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 310 (2d Cir. 2005) (quoting *Thermtron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336, 351 (1976)). Even where a district court incorrectly finds that it lacks jurisdiction, "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006). The possibility that a state court could resolve a private party's federal defenses—even if those defenses could have been adjudicated in federal court—is hardly an emergency. The City has been unable to identify any case, at any level of the federal judiciary, where the very act of implementing a remand order has been deemed irreparable harm, and BP cites none.

BP's reliance on the Removal Clarification Act of 2011's legislative history are unavailing. *See* Appl. at 31. BP notes the potential harms Congress intended to prevent by amending 28 U.S.C. §§ 1442 and 1447—namely to protect federal officers from political reprisal or anti-federal-government bias in state proceedings related to federally-directed conduct. The City of Baltimore fully agrees that BP is entitled to pursue its federal officer challenge in the Fourth Circuit. Consequently, BP is receiving precisely those protections that Congress prescribed: no more and no less.

BP cites no authority for the further proposition that a supposedly erroneous rejection of its federal officer jurisdiction allegations, without more, creates irreparable harm. As already discussed, BP's entitlement to federal officer removal is at best "dubious," *San Mateo*, 294 F. Supp. 3d at 939, and has been rejected by every court to consider it. *Boulder*, No. 18-CV-01672-WJM-SKC, 2019 WL 4200398, at *18–

21; *Rhode Island*, 393 F. Supp. 3d at 152; *Baltimore* Remand Order, 388 F. Supp. 3d at 567–69. BP has made no effort to show how or why *actual* "political harassment," anti-government bias, or interference with federal operations are likely if the case proceeds in Maryland state court. Appl. 19. No reasonable juror would conflate BP with the federal government or any political actor. BP's argument that remanding this case to state court would *ipso facto* constitute irreparable harm simply ignores the black-letter requirement that a movant in equity make a particularized showing of harm.

2. The Risk of Wasted Time and Resources is *De Minimis* and Cannot Constitute Irreparable Harm in Any Event.

BP's second argument, that state court litigation would "waste substantial time and resources" if the remand order is reversed by the Fourth Circuit, Appl. at 31, also does not demonstrate irreparable harm. As BP correctly concedes, "[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). BP argues that "duplicative and unrecoverable" costs are sometimes considered irreparable harm, relying on three unpublished district court decisions. *See id.* But BP make no effort to explain why "duplicative" and "unrecoverable" litigation costs it foresees should be treated differently than "substantial and unrecoupable" ones. *See Renegotiation Bd.*, 415 U.S. at 24. The actual injury—

dedicating resources to litigation that would have been unnecessary if remand were denied—is the same no matter what words are used to describe it.

Even if potentially duplicative litigation costs could constitute irreparable harm, the likelihood of expensive proceedings pending appeal here are small. There is every reason to believe the pendency of appeal will be short; the appeal is fully briefed in the Fourth Circuit, and oral argument is tentatively calendared for the court's December 10 through December 12 argument session. *See* Tentative Calendar Order, *Mayor & City Council of Balt. v. BP P.L.C.*, No. 19-1644, Dkt. 113 (4th Cir. Sept. 30, 2019). BP could, of course, move the Fourth Circuit to expedite the appeal pursuant to Fourth Circuit Local Rule 12(c), but has thus far elected not to.

Even in the unlikely event that the state court case reaches judgment before resolution of the jurisdictional issues presented here, this Court would remain available on certiorari to address any remaining significant federal issues. Under any of these circumstances, however, a stay would be unwarranted for all the reasons stated herein.

3. No Irreparable Harm Would Arise in the Course of Returning the Case to Federal Court if the Appeal Succeeds.

BP suggests there would be difficult comity and federalism problems in "untangling" rulings that may occur in state court if the remand order is reversed, causing irreparable harm. Appl. at 32. To the extent this is anything more than an elaboration of BP's "wasted resources" argument, it has no merit.

First, while BP claims that the procedure for returning the case to federal court in the event of reversal "is not entirely clear," Appl. at 33 n.6, there is no actual doubt

that the case could and would return to the district court if the Fourth Circuit vacates the remand order on appeal. In one of the cases BP cites, for example, the Fourth Circuit affirmed a district court's order enjoining state court proceedings after reversal and vacation of a remand order. *See Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231 (4th Cir. 2007). The court held that the vacatur "return[ed] the parties to their original positions, before the now-vacated order was issued," meaning the remand order had effectively never been entered and the district court never lost jurisdiction. *Id.* at 240. The court therefore affirmed the district court's injunction against further proceedings in state court, finding it "consistent with the All Writs Act, the Anti–Injunction Act, and the Full Faith and Credit Clause." *Id.*

The footnote BP cites from Judge Wynn's concurring and dissenting opinion in *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014), merely observed that the *procedure* following reversal of the remand order below was "[a]n unaddressed question in th[at] appeal." The full *en banc* court in that case necessarily recognized that some such procedure was available, however, because it remanded the case to the district court with instructions to consider vacating its remand order as a sanction for fraud in obtaining it. *See id.* at 1012–13. Both *Barlow* and *Bryan* illustrate that returning improperly remanded cases to federal court is neither a novel nor unusually thorny issue.

Second, there is no risk of prejudice because federal courts will not be bound by interlocutory rulings in the state court. After a case is transferred from state to federal court, "it is settled that federal rather than state law governs the future course

of proceedings, notwithstanding state court orders issued prior to removal." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 437 (1974) (describing issue as settled in *Ex parte Fisk*, 113 U.S. 713 (1885)). In such instances, Congress has expressly "recogniz[ed] the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal." *Id.* (citing 28 U.S.C. § 1450).

Nor is the process of deciding whether to revisit state court rulings unusual or especially harmful. The same issues frequently arise even when removal is uncontested, particularly if the grounds for removal are not apparent until substantial proceedings have already taken place in state court. *See, e.g.*, *Hopkins v. Buffalo Pumps, Inc.*, No. C.A. 09-181 S, 2009 WL 4496053, at *1 (D.R.I. Dec. 1, 2009) (case removed after multiple months of discovery when discovery responses revealed basis for federal jurisdiction). Especially given the respect due to co-equal state courts, BP cannot reasonably maintain that irreparable harm will result because the district court might find a state court ruling persuasive and retain it as its own.

4. The Odds of Final Judgment Being Entered Before the Appeal is Resolved Are Small, And Final Judgment Would Not Cause Irreparable Harm in Any Event.

Finally, and least persuasively, BP speculates that there is a "risk" the "state court could reach a final judgment before Applicants' appeal is resolved." Appl. 33. As noted above, the prospect that a Maryland court will enter final judgment against BP before the Fourth Circuit rules is remote at best. The appeal is fully briefed and oral argument is tentatively scheduled for mid-December. Even in the unlikely event the state court does reach final judgment, there is no irreparable harm. BP implies,

but does not state outright, that a final judgment could "render the appeal meaningless" and constitute a "[l]oss of appellate rights." Appl. at 33. That position is meritless. Upon final judgment, BP could seek a stay of the judgment from the Maryland courts pending appeal, and if denied could seek another stay of before this Court. If eventually unsatisfied with its results in the Maryland court of last resort, they could petition for certiorari here. In any of these scenarios, there is no risk of loss of appellate rights.

The cases BP cites for the proposition that important non-monetary interests can be irrevocably lost absent a stay are plainly distinguishable. In *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), for example, the FBI challenged a decision ordering it to disclose highly confidential documents concerning illegal wiretaps to the Providence Journal newspaper. The court found a stay was warranted in part because "[o]nce the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time." *Id.* Disclosure of the documents could thus have caused irreparable harm because "[t]he status quo could never be restored." *Id.* No analogous concerns exist here.

F. The Court Need Not Weigh the Equities of a Stay, But if Weighed, They Favor the City.

"The conditions that are *necessary* for issuance of a stay are not necessarily *sufficient.* Even when they all exist, sound equitable discretion will deny the stay when a decided balance of convenience, . . . does not support it." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304–05 (1991)

(Scalia, J., in chambers). Thus, "[i]n appropriate cases" where the three elements necessary for a stay are satisfied, a Circuit Justice should look to equitable considerations "to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas*, 486 U.S. at 1304 (Kennedy, J., in chambers). Because BP has not come close to showing a likelihood certiorari will be granted, a fair prospect it will secure reversal, or any conceivable irreparable harm, the inquiry need go no further. But if the equities are weighed, they favor the City.

The City filed this case, under its police authority delegated from the State of Maryland, to protect its infrastructure and residents from serious harm. More than 15 months later, it remains undetermined which court its claims will proceed in. As the City has alleged in its Complaint, the area in which Baltimore sits has already suffered substantial harms from flooding, storms, and increasing heat, which it has and will address through emergency response measures as well as planning and adaptation. *See, e.g.*, Complaint, Appl. Attach. A, at ¶8 ("the City has already spent significant funds to study, mitigate, and adapt to the effects of global warming"); ¶¶212–217 (outlining impacts of climate change on Baltimore and necessary responsive measures). Future injuries to the City and its residents can occur suddenly and unpredictably, and the public interest strongly supports expeditiously advancing the City's claims to mitigate those injuries.[21]

[21] BP argues that delaying a judgment and monetary award in the City's favor is "the antithesis of irreparable harm." Appl. at 34. But, of course, it is BP that is required to demonstrate irreparable harm, not the City. The City need only show that if BP satisfies the three elements necessary to obtain a stay—which it has not—the "balance of convenience" in equity nonetheless counsels against granting the stay. *Barnes* 501 U.S. at 1304–05 (Scalia, J., in chambers).

In addition, the public interest here favors allowing the City's action to be returned to the Maryland Circuit Court, both out of due respect for the courts of the sovereign states, and for the inherently limited jurisdiction of the federal courts. *See Browning v. Navarro*, 743 F.2d 1069, 1079 n. 26 (5th Cir. 1984) (declining to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity"); *Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (D. Haw. 1998) (refusing to stay remand order pending appeal because, in part, "the public interest at stake in this case is the interference with state court proceedings"). While BP suggests that a stay would in fact benefit the City by saving it litigation costs, Appl. at 34–35, the potential for some undefined litigation cost savings if the remand order is reversed are outweighed by the cost of unnecessary and unjustified delay in the more likely event that remand is affirmed.

CONCLUSION

BP has not met its burden on any of the elements necessary to obtain a stay pending appeal of the district court's remand order to the Fourth Circuit. The Mayor and City Council of Baltimore therefore respectfully requests that Your Honor deny the application and allow the District of Maryland to implement its remand order and return jurisdiction to the Maryland Circuit Court.

Dated: October 17, 2019

Respectfully Submitted,

/s/ Victor M. Sher

Victor M. Sher
vic@sheredling.com
Sher Edling LLP

100 Montgomery Street, Suite 1410
San Francisco, CA 94104
Tel: (628) 231-2500

Andre M. Davis
andre.davis@baltimorecity.gov
Suzanne Sangree
suzanne.sangree2@baltimorecity.gov
Baltimore City Law Department
100 N. Holliday Street, Suite 109
Baltimore, MD 21202
Tel: (443) 388-2190

Attorneys for Plaintiff-Respondent, The Mayor and City Council of Baltimore

ATTACHMENT 1

FILED
United States Court of Appeals
Tenth Circuit

October 17, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs - Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants - Appellants.

No. 19-1330
(D.C. No. 1:18-CV-01672-WJM-SKC)
(D. Colo.)

ORDER

Before **LUCERO** and **McHUGH**, Circuit Judges.

Appellants request an emergency stay of the district court's remand order pending this court's determination of their appeal. In deciding whether to grant a stay pending appeal, this court considers, "(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) (internal quotation marks omitted). The decision

whether to grant a stay involves "an exercise of judicial discretion," *id.* at 433 (internal quotation marks omitted), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," *id.* at 433-34.

Upon consideration, we conclude that Appellants have not made the necessary showing to warrant entry of a stay pending appeal. Accordingly, the motion for stay is denied. The deadline for Appellees to file a response to the motion is vacated, and Appellants' motion for clarification is denied as moot.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

No. 19A-

IN THE

Supreme Court of the United States

BP P.L.C., ET AL.,
Applicants,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND PENDING APPEAL

AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable John G. Roberts,
Chief Justice of the United States
And Circuit Justice for the Fourth Circuit

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
jlipshutz@gibsondunn.com

THEODORE J. BOUTROUS, JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Applicants
[*Additional counsel listed on signature page*]

TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

The Mayor and City Council of Baltimore seek to hold 26 multinational energy companies (the "Applicants") accountable—in Maryland state court—for allegedly causing global climate change. Applicants seek to litigate these claims in a federal forum, where they belong, and thus removed the suit to the United States District Court for the District of Maryland. Applicants' notice of removal invoked numerous grounds for federal jurisdiction, including federal officer removal under 28 U.S.C. § 1442, but the district court granted the Respondent's motion to remand the suit back to Maryland state court. Applicants have an appeal as of right under 28 U.S.C. § 1447(d), and asked both the district court and Fourth Circuit to stay the remand pending appeal. Both courts denied Applicants' request for a stay.

Applicants respectfully request that this Court stay the district court's remand order pending this appeal and, if the Fourth Circuit affirms the order remanding this case, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, in light of the potentially irrevocable consequences of a remand, applicants request that the Court enter a temporary emergency stay of the remand order until the Court decides whether to grant this application. This suit—like a dozen other related suits that have been filed around the country and removed to federal court, and which are now pending in various postures in five of the Courts of Appeals—raises claims that necessarily arise under

federal common law, implicate oil and gas production activities performed at the direction of federal officers and on federal lands, and require resolution in a federal forum. The two district courts that have reached the merits of these global warming claims have dismissed, concluding that federal common law does not provide a remedy. These inherently federal cases should not be resolved piecemeal in state court under state law.

There is a likelihood of irreparable harm in the absence of a stay because even if the action returns to federal court before the state court enters a final judgment, Applicants would be unable to recover the cost and burdens of duplicative litigation, and the district court would need to untangle any state court rulings made during the pendency of the appeal, creating significant comity and federalism issues. In contrast, and with respect to the balance of equities, Respondent will suffer no harm from a stay.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation. BP Products North America Inc. is also a 100% wholly

owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP Products North America is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petroleos de Venezuela S.A. No publicly held corporation owns ten percent or more of CITGO's stock;

CNX Resources Corporation is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns ten percent or more of CNX Resources Corporation's stock.

CONSOL Energy Inc. is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors, which is a subsidiary of publicly held BlackRock, Inc., owns ten percent or more of CONSOL Energy Inc.'s stock.

CONSOL Marine Terminals LLC is a wholly owned subsidiary of CONSOL Energy Sales Company LLC, which is a wholly owned subsidiary of CONSOL Energy Inc., a publicly held corporation. No other publicly held corporation owns ten percent or more of CONSOL Marine Terminals LLC's stock.

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns ten percent or more of ConocoPhillips's stock. ConocoPhillips Company is a wholly owned operating subsidiary of ConocoPhillips.

Crown Petroleum Corporation no longer exists. In 2005, it was merged into Crown Central LLC. Crown Central LLC's sole member is Crown Central New Holdings, LLC. The sole member of Crown Central New Holdings, LLC is Rosemore Holdings, Inc., which is a wholly owned subsidiary of Rosemore, Inc.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns ten percent or more of Exxon Mobil Corporation's stock. ExxonMobil Oil Corporation is wholly owned by Mobil Corporation, which is wholly owned by Exxon Mobil Corporation.

Hess Corporation is a publicly traded corporation and it has no corporate parent. There is no publicly held corporation that owns ten percent or more of Hess Corporation's stock.

Applicant the Louisiana Land & Exploration Company is defunct and has merged into The Louisiana Land and Exploration Company, LLC, which is not a party to this action and did not appear during proceedings below.

Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation. Marathon Oil Corporation has no parent corporation. Based on the Schedule 13G/A filed with the SEC on July 10, 2019, BlackRock, Inc., through itself and as the parent holding company or control person over certain subsidiaries, beneficially owns ten percent or more of Marathon Oil Corporation's stock.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Marathon Petroleum Corporation's stock.

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns ten percent or more of Phillips 66's stock. Applicant Phillips 66 Company is not a party to this appeal, as it was never served with the underlying lawsuit and thus did not appear before the United States District Court for Maryland.

Royal Dutch Shell plc, a publicly held UK company, has no parent corporation, and there is no publicly held corporation that owns ten percent or more of Royal Dutch Shell plc's stock. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate parent is Royal Dutch Shell plc.

Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation. No other publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

ATTACHMENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This case is one of fourteen nearly identical cases pending in federal courts around the country in which various state and local government entities have sought to hold energy companies liable for the alleged effects of global climate change.[1] Plaintiffs filed all but one of these actions in state court, and defendants have removed all of the state-court actions to federal court. Defendants have argued in each case that federal law—not state law—necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil fuel production.

These arguments have divided the lower courts. Two courts agreed that global warming claims arise under federal law, regardless whether plaintiffs affix state-law labels to their claims, and dismissed on the merits. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018). A third held that federal common law does *not* govern plaintiffs' global warming claims, reasoning erroneously that Congressional displacement of federal common law makes state law operative and thus defeats removal. *See Cty. of San Mateo* v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal.

[1] *See Cty. of San Mateo* v. *Chevron Corp*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach* v. *Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin* v. *Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond* v. *Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland* v. *BP P.L.C.*, No. 17-cv-6011 (N.D. Cal.); *City and Cty. of San Francisco* v. *BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns* v. *Chevron Corp.*, No. 3:18-cv-7477 (N.D. Cal.); *State of Rhode Island* v. *Chevron Corp.*, No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County* v. *BP P.L.C.*, No. 2:18-cv-758-RSL (W.D. Wash.); *City of New York* v. *BP P.L.C.*, No. 18-cv-182-JFK (S.D.N.Y.); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, No. 18-cv-1672 (D. Colo.).

2018). And three other courts, including the district court in this case, held that the well-pleaded complaint rule bars removal of claims nominally asserted under state law, regardless of whether the claims are governed by federal common law. *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July, 22, 2019); *Mayor and City Council of Baltimore* v. *BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. June 10, 2019); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019). Each of those suits is on appeal before the federal circuit courts,[2] and several other related cases are stayed pending those appeals.

In this case, the district court remanded to state court, and both the district court and the Fourth Circuit denied Applicants' request for a stay pending appeal. But a stay is amply justified.

First, this case implicates a well-developed circuit split over the scope of appellate jurisdiction under 28 U.S.C. § 1447(d). Section 1447(d) generally bars appellate review of district court orders remanding cases back to state court, but contains an exception where a basis for removal is 28 U.S.C. § 1442, the federal officer removal statute, or 28 U.S.C. § 1443, the civil rights removal statute. Where, as here, a party has invoked § 1442 as a basis for removal, the Sixth and Seventh Circuits have held that the court of appeals may review every issue in the district court's

[2] *Rhode Island* v. *Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.); *City of New York* v. *BP P.L.C.*, No. 18-2188 (2d Cir.); *Mayor and City Council of Baltimore* v. *BP P.L.C., et al.*, No. 19-1644 (4th Cir.); *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.) (consolidated with Nos. 18-15502, 18-15503, 18-16376); *City of Oakland* v. *BP P.L.C., et al*., No. 18-16663 (9th Cir.); *Bd. of Cty. Comm'rs of Boulder Ct., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

remand order. In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that the court of appeals may consider *only* whether removal was proper under § 1442 or § 1443. The Fifth Circuit has precedent going both ways. The First and Ninth Circuits (like the Fourth Circuit in this case) are currently considering the issue. That split requires resolution by this Court to ensure appellate jurisdiction is applied consistently across the nation.

Second, this Court has repeatedly granted review to address issues related to climate change because of their national and global importance. *See, e.g.*, *Am. Elec. Power Co.,* v. *Connecticut* ("*AEP*"), 564 U.S. 410 (2011). It is difficult to imagine claims that more clearly implicate substantial questions of federal law and require uniform disposition than the claims at issue here, which seek to transform the nation's energy, environmental, national security, and foreign policies by punishing energy companies for lawfully supplying necessary oil and gas resources. Respondent wants a Maryland state court to declare Applicants' historical energy production and promotional activities across the United States and abroad to be a public nuisance, thereby regulating interstate and international energy production in the name of global warming. This Court has long held that lawsuits like this one targeting interstate pollution and related issues necessarily implicate uniquely federal interests and should be resolved under federal common law, not state law. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987); *AEP*, 564 U.S. 410.

Third, this case implicates a host of federal jurisdiction-granting statutes designed to protect federal interests by ensuring a federal forum, including the federal officer removal statute, 28 U.S.C. § 1442(a)(1), because Applicants extracted and sold oil and gas at the direction of federal officers; and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*., because Respondent's claims seek to limit oil and gas extraction on the Outer Continental Shelf, which is the subject of exclusive federal jurisdiction. This Court's intervention is required to prevent important federal interests from being adjudicated inconsistently—and protected unevenly—in the various state courts.

A stay of the district court's remand order pending appeal is the only way to avoid the significant burden that would be placed on the parties if they are forced to litigate this case on parallel tracks, and the recognized comity and federalism issues that would result from the reversal of a remand order after months (or years) of litigation in state court. The Fourth Circuit's failure to implement a stay requires this Court's intervention. This Court should stay the remand order pending appeal and, if necessary, pending review by this Court.[3] In addition, Applicants request an immediate administrative stay of the remand order pending the Court's consideration of this application.

[3] If this Application is referred to the full Court, applicants request that an interim stay be issued pending a response by Respondent and pending further order of this Court. *E.g.*, *In re U.S.*, 139 S. Ct. 16 (Mem.) (2018) (Roberts, C.J., in chambers).

STATEMENT

1. On July 20, 2018, the Mayor and City Council of Baltimore filed a complaint against more than two dozen American and foreign energy companies, alleging that Applicants' worldwide "extraction, refining, and/or formulation of fossil fuel products" is a "substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height." Attachment A at 98 ¶ 193. The complaint further alleges that this increase in global temperatures has led to rising sea levels, severe weather events, and other environmental changes that have injured or will injure the City of Baltimore. *Id.* at 98-99 ¶¶ 193-95. The complaint purports to assert Maryland state law causes of action. Respondent claims, for example, that Applicants' conduct in extracting and selling fossil fuel products around the world has caused a public and private nuisance, *id.* at 107-15 ¶¶ 218-36, and it asks the Maryland state court to "enjoin[] [Applicants] from creating future common-law nuisances." *Id.* at 111 ¶ 228. Respondent also purports to bring state law claims for strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violation of the Maryland Consumer Protection Act. *Id.* 115-30 ¶¶ 237-98.

2. Applicants removed this action to the U.S. District Court for the District of Maryland on July 31, 2018. Attachment B. The notice of removal asserted that the Respondent's claims are removable because they: (1) "are governed by federal common law," *id.* at 4; (2) "raise[ ] disputed and substantial federal questions," *id.* at 6; (3) "are completely preempted by the [Clean Air Act] and/or other federal statutes

and the United States Constitution," *id.* at 6-7; (4) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under OCSLA, 43 U.S.C. § 1331 *et seq.*, *id.* at 7; (5) arise out of conduct undertaken at the direction of federal officers, *id.*; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.*; (7) "are related to cases under Title 11 of the United States Code," *id.* at 7-8; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333," *id.* at 8.

Respondent moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion without hearing argument. Attachment C. Pursuant to the parties' stipulation, the district court stayed the remand for thirty days. *Id.* at 3. On June 12, 2019, Applicants filed a notice of appeal in the United States Court of Appeals for the Fourth Circuit. That appeal is fully briefed, and oral argument is tentatively calendared for the week of December 10-12, 2019. On June 23, 2019, the Applicants filed a motion in the district court to stay the remand pending appeal, and the parties stipulated to stay the remand until the district court had resolved that motion. The stipulation also provided that the remand would be stayed pending resolution of any motion to stay filed in the Fourth Circuit.

On July 31, 2019, the district court denied Applicants' motion to stay. Attachment D. Although the district court "agree[d] that the removal of this case based on the application of federal law presents a complex and unsettled legal question," *id.* at 5, it concluded that § 1447(d) authorizes appeal *only* of the federal officer removal question, *id.* at 5-9. And it concluded that Applicants' appeal did not

present a serious legal question regarding that basis for removal. *Id.* at 8-9. The district court concluded that the other stay factors did not justify a stay. *Id.* at 9-11.

On October 1, 2019, the Fourth Circuit denied Applicants' motion for a stay pending appeal. Attachment E.

REASONS TO GRANT THE STAY

To grant a stay, a Justice must find "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (internal quotation marks and alterations omitted). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2012) (per curiam); *accord, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Simply put, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans For Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1302-1303 (2006) (Kennedy, J., in chambers). A stay is warranted here.

I. There Is More Than A Reasonable Probability This Court Will Grant Review If The Fourth Circuit Affirms The Remand Order.

There is a substantial probability that the Court will grant certiorari if the Fourth Circuit affirms the district court's remand order. At a minimum, certiorari is necessary to resolve an important issue of appellate jurisdiction that has divided the circuits—whether 28 U.S.C. § 1447(d) authorizes the appellate court to review the *entire* remand order where removal was based in part on the federal officer removal statute, 28 U.S.C. § 1442, or whether appellate jurisdiction is limited to reviewing only the federal officer issue. The Court will likely grant certiorari to review that question if the Fourth Circuit adopts the narrow view of § 1447(d). Alternatively, if the Fourth Circuit reviews the entire remand order and affirms, this Court is likely to grant certiorari on a different question: whether federal law necessarily governs common-law claims based on the alleged effects of worldwide greenhouse-gas emissions and fossil-fuel production—an issue of national importance that has divided the lower courts and is on appeal in the First, Second, and Ninth Circuits.

A. The Court Should Resolve the Conflict Among the Circuits Regarding the Scope of Review Under 28 U.S.C. § 1447(d).

Section 1447(d) generally bars appellate courts from reviewing district court orders remanding cases to state court, but it contains an exception providing that "an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights cases] of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). The circuit courts are divided over whether § 1447(d) authorizes appellate review of the entire

remand "order" when § 1442 provided one of the bases for removal, or whether appellate review is limited to considering a single *issue—i.e.*, the propriety of removal under § 1442. The Sixth and Seventh Circuits have held that § 1447(d) confers appellate jurisdiction over every issue in the remand order. *See Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (holding, in a case where the defendant removed under § 1441 and § 1442, that "[o]ur jurisdiction to review the remand order also encompasses review of the district court's decision of the alternative ground for removal under 28 U.S.C. § 1441"); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) ("Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442," and "once an appeal of a remand 'order' has been authorized by statute, the court of appeals may consider *all* of the legal issues entailed in the decision to remand.") (emphasis added).

In contrast, the Second, Third, Fourth, Eighth, and Ninth Circuits have held that § 1447(d) authorizes the appellate court to review *only* whether a case was properly removed under § 1442 or § 1443. *See State Farm Mut. Auto. Ins. Co.* v. *Baasch*, 644 F.2d 94, 96-97 (2d Cir. 1981) (per curiam) ("dismiss[ing] for want of appellate jurisdiction" "[i]nsofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a)," while addressing "denial of removal under 28 U.S.C. § 1443" on the merits); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Jacks* v. *Meridian Resource Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) ("[W]e do lack jurisdiction to review the district court's determination concerning the availability of federal common law to resolve this

suit . . . as it is a remand based upon [§ 1441]. Nonetheless, we retain jurisdiction to review the district court's remand on the issue of whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), applies."); *Patel* v. *Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (reviewing merits of remand decision addressing removal under § 1443 but dismissing the appeal as to all other removal grounds because the court "lack[ed] jurisdiction to review the remand order based on § 1441").[4]

The Fifth Circuit, meanwhile, has recent precedent going both directions. In *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), the court noted that "[a]lthough § 1447(d) allows review of the 'order remanding the case,' it has been held that review is limited to removability under [§ 1442 or §1443]." *Id.* at 296. The court rejected that view, concluding that "[r]eview should instead be extended to all possible grounds for removal underlying the order." *Id.* ("Like the Seventh Circuit, '[w]e take both Congress and *Kircher* at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons *for* an order, but the order itself.") (quoting *Lu Junhong*, 792 F.3d at 812). A few months later, however, a different panel held that § 1447(d) authorized review only of those grounds of removal specifically enumerated—*i.e.*, § 1442 and § 1443. *City of Walker* v. *Louisiana ex rel. Dep't of Transp. and Dev.,* 877

[4] In a parallel global warming case, the Ninth Circuit is considering the significance, *vel non*, of *Patel* given that the scope of appellate jurisdiction under § 1447(d) was not briefed, analyzed, or squarely decided in that case. *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (consolidated with Nos. 18-15502, 18-15503, 18-16376) (9th Cir.). In *San Mateo*, the district court stayed the remand pending appeal and *sua sponte* certified the remand order for interlocutory review. *Cty. of San Mateo* v. *Chevron Corp.*, No. 17-cv-4929 (N.D. Cal.), ECF No. 240.

F.3d 563, 566 (5th Cir. 2017).

A majority of circuits have thus weighed in on the precise issue presented by this appeal, and they are intractably divided.[5] There is more than a reasonable probability that this court will grant certiorari to address this important question of appellate jurisdiction.

B. Any Petition for Certiorari Will Present Important Substantive Questions of Federal Jurisdiction.

1. Whether Global Warming Claims Based Substantially on Conduct that Occurred at the Direction of Federal Officers are Removable Under the Federal Officer Removal Statute Is a Question of Great National Importance.

The question whether Applicants properly invoked the federal officer removal statute will be worthy of this Court's review. Indeed, whether global warming claims targeting fossil-fuel production are removable under § 1442 when a substantial portion of the allegedly tortious production occurred at the direction of federal officers is an important question of federal law given the interests at stake and the likelihood of additional climate-change related litigation. This Court—like the Fourth Circuit—has jurisdiction to reach that issue regardless of how it rules on the scope of appellate review under § 1447(d), because Applicants invoked § 1442 in their Notice of Removal. *See* Attachment B at 7. The answer to that question is of great national importance because Applicants extracted a significant amount of fossil fuels for the military. *See*

[5] The First Circuit will consider this issue in a parallel global warming case involving many of the same Applicants. *See Rhode Island* v. *Shell Oil Products Co., LLC*, No. 19-1818 (1st Cir.). The Tenth Circuit may also consider the issue. *See Bd. of Cty. Comm'rs of Boulder Cty., et al.* v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (10th Cir.).

infra at II.B. This Court is likely to review whether state courts are authorized to adjudicate claims seeking to deem conduct essential for national defense a public nuisance, and seeking to label products critical to the military "unreasonably dangerous," without input from the military.

2. Whether Global Warming Claims Based on Worldwide Greenhouse-Gas Emissions Necessarily Arise Under Federal Law Is a Question of Great National Importance.

This Court is also likely to grant certiorari if the Fourth Circuit concludes it has jurisdiction to review the entire remand order but affirms the district court's remand decision. The question presented in that scenario—whether global warming claims asserted against energy producers based on worldwide greenhouse-gas emissions must be resolved in federal court under federal law, or can instead be litigated in state courts under 50 different state laws—is one of utmost national importance that has divided the lower courts.

Thirteen virtually identical cases are now pending in federal courts across the country—six different district courts in four different circuits. All but one were filed in state court and subsequently removed to federal court. Applicants in each case argued that federal common law, not state law, necessarily governs claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production. The district courts are split as to whether these claims arise under federal or state law. *Compare California* v. *BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*") (holding that federal-question jurisdiction was present), *and City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (same), *with Cty. of San Mateo*

v. *Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (holding that federal-question jurisdiction was not present), *Rhode Island* v. *Chevron Corp.*, -- F. Supp. 3d -- 2019 WL 3282007, at *6 (D. R.I. July 22, 2019) (claims do not arise under federal common law because plaintiff asserted only state law claims and well-pleaded complaint rule bars removal); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, -- F. Supp. 3d – 2019 WL 4200398 (D. Colo. Sep. 5, 2019) (same), *and Mayor and City Council of Baltimore* v. *BP*, *P.L.C.*, [App C] (same). The two federal district courts that have reached the merits of these global warming claims have dismissed on the ground that federal common law does not provide a remedy; *see City of Oakland*, 325 F. Supp. 3d at 1026 (dismissing global warming nuisance suits because "questions of how to appropriately balance the[] worldwide negatives [of greenhouse gas emissions] against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world, demand the expertise of our environmental agencies; our diplomats; our Executive, and at least the Senate"); *City of New York*, 325 F. Supp. 3d at 473 (dismissing claims because "Congress has expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act"). This is not an issue that can wait for further percolation in the lower courts; the parties in these cases need to know whether the claims will be litigated under a uniform federal standard or subject to a "patchwork of fifty different answers to the same fundamental global issue[.]" *BP*, 2018 WL 1064293, at *3.

Few issues touch upon as many uniquely federal interests as global climate

change and energy production. The relief sought by the Respondent in these cases—ranging from an order enjoining Applicants' worldwide fossil-fuel production to a massive damages award—implicates a wide range of federal interests, including national security, energy policy, environmental policy, and foreign affairs. The question whether such claims warrant resolution in a federal forum under federal law presents a monumentally "important question of federal law." Sup. Ct. R. 10(c). Indeed, the issue is of such importance that the United States filed a district-court amicus brief in one of the cases, and appeared for oral argument in that court, to highlight the case's "potential to shape and influence broader policy questions concerning domestic and international energy production and use." Br. for the United States as Amicus Curiae at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-6011, ECF No. 245 (N.D. Cal. May 10, 2018). The United States filed a similar amicus brief in the Second Circuit, noting that "international negotiations related to climate change regularly consider whether and how to pay for the costs to adapt to climate change and whether and how to share costs among different countries and international stakeholders," and argued that "[a]pplication of *state* nuisance law . . . would substantially interfere with the ongoing foreign policy of the United States." Br. of for the United States as Amicus Curiae at 15-16, *City of New York* v. *BP P.L.C.*, No. 18-2188, ECF No. 210 (2d Cir. Mar. 7, 2019). Given the proliferation of global warming suits seeking to hold energy producers liable for the alleged effects of global warming, this Court's review is urgently needed to clarify whether federal law necessarily applies to such claims.

Certiorari is especially likely here given this Court's history of reviewing decisions involving claims predicated on global-warming based injuries. In *AEP*, 564 U.S. at 419-20, this Court granted review to address whether a nuisance cause of action against greenhouse-gas emitters could be maintained under federal common law, even though there was no circuit split on the issue. In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court granted review to address whether the Environmental Protection Agency has statutory authority to regulate greenhouse gas emissions from new motor vehicles because of "the unusual importance of the underlying issue," notwithstanding "the absence of any conflicting decisions." *Id.* at 505-06. And in *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), the Court again granted review in the absence of a split to review EPA's assertion of regulatory authority over stationary-source greenhouse-gas emissions.

Whether the Fourth Circuit takes a narrow view of its own jurisdiction to review the remand order, or reviews the entire remand order and affirms, this Court is likely to grant certiorari. For the reasons set forth below, a reversal is likely in either scenario.

II. There is a Significant Likelihood that this Court Will Reverse.

If the Fourth Circuit holds that § 1447(d) limits the scope of appellate review to the propriety of removal under § 1442, this Court is likely to reverse and hold that the plain text of § 1447(d) authorizes review of the entire remand order. The Court is also likely to reverse if the Fourth Circuit affirms the district court's remand order after reviewing *only* the federal officer issue, because much of Defendants' allegedly

tortious fossil-fuel extraction and production occurred at the direction of federal officers. If the Fourth Circuit reviews the entire remand order but affirms the district court's conclusion that global warming claims based on worldwide greenhouse-gas emissions and fossil-fuel production do *not* arise under federal law, this Court is likely to reverse that decision as well.

A. Section 1447(d) Authorizes Review of the Entire Remand Order in Cases Removed Under § 1442.

Section 1447(d) provides that "*an order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. §1447(d) (emphasis added). Applicants removed this case under § 1442 and have appealed the district court's rejection of removal on that ground. The plain text of § 1447(d) thus makes the entire remand *order*—not particular grounds for removal—reviewable on appeal.

As the Seventh and Sixth Circuits recently recognized in determining the scope of review under § 1447(d), "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong*, 792 F.3d at 811; *accord Mays*, 871 F.3d at 442; 15A Wright et al., *Fed. Prac. & P.* §3914.11 (2d ed.). "In general, the purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute, solely to contest a decision disallowing removal." *See* 14C Wright & Miller, *Fed. Prac. & P.* § 3740 (Rev. 4th ed.). But, as Judge Easterbrook has explained, "once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has

been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 811. In such cases, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*; *accord* 15C Wright et al., *Fed. Prac. & P.* § 3914.11 (2d ed.) ("Once an appeal is taken there is very little to be gained by limiting review.").

This Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), confirms that interpretation of § 1447(d). *Yamaha* involved similar language in 28 U.S.C. § 1292(b), which provides that when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion," the court of appeals may "permit an appeal to be taken from such order." This Court held that once review is granted, "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id*. at 205. As a result, "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (quoting 9 J. Moore & B. Ward, Moore's Fed. Prac. ¶110.25[1], p. 300 (2d ed. 1995)).

Respondent has argued below that adopting Applicants' proposed interpretation of § 1447(d) would encourage litigants to frivolously invoke § 1442 as a means of guaranteeing appellate review. But "sufficient sanctions are available to deter frivolous removal arguments[.]" 15A Wright et al., *Fed. Prac. & P*. § 3914.11*; see also Lu Junhong*, 792 F.3d at 813 ("[A] frivolous removal leads to sanctions[.]"); *see, e.g.*, *Wong* v. *Kracksmith*, 764 F. App'x 583 (9th Cir. 2019) (Mem.) (affirming

remand and district court's imposition of sanctions for filing "a frivolous notice of removal" under § 1443). "What's more, a court may resolve frivolous interlocutory appeals summarily[,]" and a "district judge may, after certifying that an interlocutory appeal is frivolous, proceed with the litigation (including a remand)." *Lu Junhong*, 792 F.3d at 813 (citations omitted). There are no good policy reasons for ignoring the plain text of § 1447(d), which authorizes appellate review of a remand "*order*" in cases removed under § 1442.

If the Fourth Circuit dismisses Applicants' appeal in part on the ground that it lacks jurisdiction to review the whole remand order, this Court will likely grant certiorari and reverse.

B. Applicants Properly Removed This Case Under the Federal Officer Removal Statute Because Much of Applicants' Fossil-Fuel Extraction Occurred at the Direction of Federal Officers.

Reversal is also likely—regardless of how the Court rules on the scope of appellate review under § 1447(d)—because Applicants properly removed this action under 28 U.S.C. § 1442, the federal officer removal statute. Section 1442 authorizes removal of suits brought against "any person acting under" a federal officer "for *or relating to* any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added). This Court has already made clear that "[t]he words 'acting under' are broad," and that "the statute must be liberally construed." *Watson* v. *Philip Morris Co.*, 551 U.S. 142, 147 (2007). And by adding the words "or relating to" in the Removal Clarification Act of 2011, Pub L. No. 112-51, 125 Stat. 545, Congress rendered this already "broad" grant of federal jurisdiction even more expansive. *See Sawyer* v. *Foster Wheeler LLC*,

860 F.3d 249, 255, 258 (4th Cir. 2017) (quoting H.R. Rep. 112-17, at 6, 2011 U.S.C.C.A.N. 420, 425). Following the Removal Clarification Act, a party seeking federal officer removal need only demonstrate that (1) it acted under a federal officer; (2) it has a colorable federal defense; and (3) the charged conduct was carried out for or in relation to the asserted official authority. *Id.* at 254. A private contractor "acts under" the direction of a federal officer when it "help[s] the Government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson*, 551 U.S. at 153, 151.

Applicants satisfy that broad standard. The complaint alleges that all of applicants' extraction and production of fossil fuels contributed to Respondent's climate-change-based injuries. At least some of the Applicants extracted, produced, and sold fossil fuels "act[ing] under a federal officer" that sought to procure fuel. *See* Attachment B at 35-39 ¶¶ 61-64. Standard Oil—a predecessor of applicant Chevron—extracted oil pursuant to a contract with the U.S. Navy that *required* it to produce "not less than 15,000 barrels of oil per day." *Mayor and City Council of Baltimore* v *BP P.L.C.*, No. 19-1644, ECF No. 74 ("Joint Appendix") at 250. Applicant CITGO also contracted with the U.S. Navy to supply and distribute gasoline and diesel fuels needed for naval operations between 1998 and 2012. *Id.* at 318-19. Thus, the reasonableness of Applicants' production directly turns on the orders of federal officials who contractually obligated Applicants to deliver fuels at specified levels. And other Applicants extracted oil pursuant to OCSLA and strategic petroleum reserve leases with the federal government. *Id.* at 212-13.

The district court assumed that at least some Applicants were "act[ing] under a federal officer" and could raise colorable federal defenses, but held that removal was improper because their conduct under federal direction was not sufficiently connected to Respondent's claims. Attachment C at 36 (Applicants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels"). But to satisfy the nexus requirement, a defendant must show "only that the charged conduct relate[s] to an act under color of federal office." *Sawyer*, 860 F.3d at 258 (emphasis added). Thus, "the hurdle erected by [the causal-connection] requirement is quite low." *In re Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017). Indeed, courts have regularly allowed removal of suits under the federal officer removal statute even when only a fraction of the allegedly tortious activity occurred under the direction of federal officers. *See, e.g.*, *Reed* v. *Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) (holding the "ten years" plaintiff worked under federal direction was "sufficient to support § 1442(a)(1) removal" even though plaintiff alleged harm due to exposure to a chemical produced by the defendant over a 35-year period); *Lalonde* v. *Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (holding defendant's work with the federal government for 11 years established a "causal connection" warranting removal, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer).

The district court also held that federal officer removal was improper because the government did not direct Applicants "to conceal the hazards of fossil fuels or

prohibit[] them from providing warnings to consumers." Attachment C at 36. But Respondent has asserted claims for public and private nuisance, strict liability and negligent design defect, and trespass—causes of action that turn on Applicants' alleged *extraction and production*, not their promotional or lobbying activities. Attachment A at 107-15 ¶¶ 218-36; *id.* at 117-23 ¶¶ 249-69; *id.*at 126-28 ¶¶ 282-90. There is, at the very least, a serious legal question as to whether removal is proper where one of the primary "acts for which [Applicants] have been sued," Attachment C at 37, was taken at the direction of federal officers.

There is thus a reasonable likelihood that this Court will reverse and hold that removal was proper under § 1442.

C. Respondent's Claims Arise Under Federal Common Law and Are Removable on Several Other Grounds.

If the Fourth Circuit reviews the whole remand order and affirms, this Court is likely to reverse that decision for several reasons.

1. To begin with, Applicants properly removed Respondent's global warming claims because the claims arise under federal common law, regardless of how they were pleaded.

To decide whether federal law governs Respondent's claims, the district court was required to determine whether Respondent's global warming claims implicate "uniquely federal interests" that require a uniform rule of federal decision, *Tex Indus.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), and thus fall within the ambit of federal common law. *See United States* v. *Standard Oil*, 332 U.S. 301, 307 (1947) (holding that "matters essentially of federal character" must be governed by federal

common law, but dismissing the claims because federal common law did not provide a remedy). The answer to that question is plainly yes, because Respondent's claims seek to label global fossil-fuel extraction and production—and the subsequent creation of greenhouse-gases—a public nuisance, thereby implicating "uniquely federal interests" in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing climate change. *Tex Indus.*, 451 U.S. at 640-41. Because federal common law must provide the rule of decision, Respondent's claims "arise under" federal law and are removable under 28 U.S.C. §§ 1331 and 1441.

The district court declined even to conduct this analysis, erroneously concluding that Applicants' argument regarding the application of federal common law was merely a "cleverly veiled preemption argument." Attachment C at 12. But the question of which law governs a cause of action—state or federal common law—is not merely a *defense* to Respondent's claims. On the contrary, for purposes of removal, this choice-of-law determination is a threshold jurisdictional question. As this Court has explained, "if the dispositive issues stated in the complaint require the application of federal common law," the "cause of action . . . 'arises under' federal law." *Milwaukee I*, 406 U.S. at 100.

Courts have long recognized that federal jurisdiction exists if a claim arises under federal common law. *Wayne* v. *DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also New SD, Inc.* v. *Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (upholding removal of contract claim nominally asserted under state law

because "contracts connected with the national security[] are governed by federal law"); *Treiber & Straub, Inc.* v. *U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law . . . is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co.* v. *Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts[.]"); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims . . . arise under federal common law.").

This Court has long recognized that "[f]ederal common law and not the varying common law of the individual states is . . . entitled and 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. Because "the regulation of interstate . . . pollution is a matter of federal, not state, law," the Court has held that cases involving interstate pollution "should be resolved by reference to federal common law." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (citing *Milwaukee I*, 406 U.S. at 107)). Indeed, "such claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut* v. *Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410; *see, e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496 (1906) (applying federal common law to interstate pollution dispute).

Global warming claims plainly involve interstate pollution because they are premised on harms allegedly caused by worldwide greenhouse gas emissions. This

Court has recognized that state law cannot apply to such claims. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming. *Id.* at 418. The Second Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance," and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In reviewing that decision, this Court reiterated that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects,'" and explained that "borrowing the law of a particular State" to resolve plaintiffs' global warming claims "would be inappropriate." *AEP*, 564 U.S. at 421-22; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855, 854 (9th Cir. 2012) (concluding that "federal common law" applied to a "transboundary pollution suit[]" brought by an Alaskan city asserting public claims under federal and state law for damages from "sea levels ris[ing]" and other alleged effects of defendants' "emissions of large quantities of greenhouse gases").

The claims asserted here must likewise be governed by federal common law because Respondent alleges injury from Applicants' contributions to interstate greenhouse-gas pollution. Although Respondent seeks to frame this case as being about Applicants' worldwide fossil-fuel production and promotion—rather than emissions—the Complaint alleges that Applicants created a nuisance by producing fossil fuels whose combustion released "at least 151,000 gigatons of CO2 between 1965 and 2015." Attachment A at 4 ¶ 7. This case, like *AEP*, thus turns on

greenhouse gas emissions, as three district courts adjudicating similar claims have recognized. *See City of New York*, 325 F. Supp. 3d at 472 (holding that even though plaintiff sought to hold defendants liable for producing "massive quantities of fossil fuels," "the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases"); *City of Oakland*, 325 F. Supp. 3d at 1024 (holding that although "defendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel," "the harm alleged . . . remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels"); *County of San Mateo*, 294 F. Supp. 3d at 937 (noting that plaintiffs' claims against energy producers were "nearly identical" to previous claims asserted against greenhouse-gas emitters because plaintiffs alleged "that the defendants' contributions to greenhouse gas emissions constituted a substantial and unreasonable interference with public rights."). This case is thus precisely the sort of transboundary pollution suit that "should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488.

The relief requested in the complaint—an injunction to abate the nuisance, compensatory and punitive damages, and disgorgement of profits—also implicates "uniquely federal interests" and thus requires a uniform rule of federal decision. *Texas Indus.*, 451 U.S. 630, 640 (1981). As the federal government recently emphasized in *BP*, "the United States has strong economic and national security interests in promoting the development of fossil fuels," the very conduct the Respondent seeks to label a public nuisance. *Amicus Curiae* Br. for the United States

at 1, *City of Oakland* v. *BP P.L.C.*, No. 17-cv-06011 (N.D. Cal. May 24, 2018). The government explained that these cases have "the potential to . . . disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." *Id.* at 2.

Adjudicating Respondent's nuisance claim would necessarily require determining "what amount of carbon-dioxide emissions is unreasonable" in light of what is "practical, feasible and economically viable." *AEP*, 564 U.S. at 428; *see City of New of York*, 325 F. Supp. 3d at 473 ("factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights); *California* v. *Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). Any judgment as to whether the alleged harm caused by Applicants' contribution to worldwide emissions "out-weighs any offsetting benefit," Attachment A at 107 ¶220, implicates the federal government's unique interests in setting national and international policy on matters involving energy, the environment, the economy, and national security. *See AEP*, 564 U.S. at 427.

For these reasons, two district courts have held that federal common law governs global-warming claims asserted against energy producers based on the worldwide production and combustion of fossil fuels. In *BP*, the district court denied a motion to remand global-warming claims filed by the City of Oakland and the City

and County of San Francisco against five energy producers, all of them Applicants here. Like Respondent, the *BP* plaintiffs argued that the well-pleaded complaint rule barred removal because they had nominally asserted claims under state law. 2018 WL 1064293, at *5. The court disagreed, holding that plaintiffs' "nuisance claims—which address the national and international geophysical phenomenon of global warming—*are necessarily governed by federal common law*." *Id.* at *2 (emphasis added). As the court explained, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global warming. *Id.* at *3. The court held that the "well-pleaded complaint rule does not bar removal of these actions" because "[f]ederal jurisdiction exists" if "the claims necessarily arise under federal common law." *Id.* at *5.

In *City of New York*, the court likewise concluded that claims pleaded under state law against the same five energy producers for "damages for global-warming related injuries" "are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims *arise under federal common law* and require a uniform standard of decision." 325 F. Supp. 3d at 472 (emphasis added).

Given the uniquely federal interests implicated by Respondent's claims, there is an "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. Allowing state law to govern would permit states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. As the U.S. Solicitor General explained in *AEP*, "resolving such claims would require each court . . . to determin[e] whether and

to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change." Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, No. 10-174 (S. Ct.), 2011 WL 317143, at *37. Proceeding under the nation's 50 different state laws is untenable, as this state-by-state approach could lead to "widely divergent results" based on "different assessments of what is 'reasonable.'" *Id.*

Because federal common law governs Respondent's global warming claims—and because the well-pleaded complaint rule does not bar removal of claims nominally pleaded under state law when those claims arise under federal common law—this Court is likely to reverse any decision by the Fourth Circuit affirming the district court's erroneous remand order.

2. Applicants removed Respondents' global warming claims on several other grounds, each of which also supports federal jurisdiction, and thus provides a basis for reversal.

First, even if Respondent were right that state law governs its claims, the claims would still give rise to federal jurisdiction under *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). In *Grable*, this Court held that "federal jurisdiction over a state law claim will lie if 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* v. *Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 313-314). Those elements are satisfied here. Respondent's nuisance claims, for instance, require a

reasonableness determination that raises questions about how to regulate and limit the nation's energy production and emissions levels. Those issues are inextricably linked to the "unique federal interests" in national security, foreign affairs, energy policy, economic policy, and environmental regulation. It is difficult to imagine a case that better implicates "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312.

Second, removal is warranted under OCSLA, which extends federal jurisdiction to a "broad range of legal disputes" in any way "relating to resource development on the Outer Continental Shelf," *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 569-570 (5th Cir. 1994), by extending federal jurisdiction to all "cases and controversies arising out of, or in connection with, . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of . . . minerals." 43 U.S.C. § 1349(b)(1). Respondent seeks to hold Applicants liable for *all* of their exploration for and production of oil and gas, and some of the Applicants extracted a substantial portion of the oil and gas they produced on the OCS. Attachment B at 32-35 ¶¶ 55-56. *See Parker Drilling Mgmt. Servs.* v. *Newton*, 139 S. Ct. 1881, 1886 (2019) ("Under the OCSLA, all law on the OCS is federal law."). Furthermore, the relief Respondent seeks—abatement of the alleged nuisance of oil and gas production—"threatens to impair the total recovery of the federally-owned minerals" from the OCS, which brings this case "within the

jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570; *see also United Offshore Co.* v. *S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (OCSLA jurisdiction extends to any matter where "the resolution of the dispute would affect the exploitation of minerals on the outer continental shelf"). This case was thus properly removed under OCSLA because plaintiff's claims, "though ostensibly premised on [state] law, arise under the 'law of the United States' under [43 U.S.C.] § 1333(a)(2)," such that "[a] federal question . . . appears on the face of [plaintiff's] well-pleaded complaint." *Ten Taxpayer Citizens Grp.* v. *Cape Wind Assoc., LLC*, 373 F.3d 183, 193 (1st Cir. 2004).

Given the numerous bases for federal jurisdiction, this Court is likely to reverse a decision by the Fourth Circuit affirming the remand order.

III. There Is a Likelihood of Irreparable Harm Absent a Stay.

Unless this Court stays the remand order, the Clerk of Court for the District of Maryland will promptly mail a certified copy of the remand order to the Circuit Court for Baltimore City, and "the State Court may thereupon proceed with [the] case." 28 U.S.C. §1447(c). This outcome would irreparably harm Applicants in four distinct ways.

First, it would force Applicants to answer in state court for conduct "relating to" an official federal act. 28 U.S.C. § 1442. This is an irreparable harm in and of itself. And it is precisely the harm that Congress sought to avoid in making denials of § 1442 removals immediately appealable. The legislative history of the Removal Clarification Act of 2011 reflects Congress's belief that "[f]ederal officers or agents . . .

should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." H.R. Rep. No. 112-17(I), pt. 1, at 3 (2011). Yet that is what remand would allow. Congress understood that even appearing before state courts could subject federal officials and their agents to "political harassment" that could "needlessly hamper[]" federal and federally-sanctioned operations. *Id.* For that reason, Congress sought to protect federal officers and their agents from biased "outcomes" at all stages of litigation from "pre-suit discovery" to final judgment. *See id.* at 2, 3-4; *see also* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 1442, 125 Stat 545 (expanding the scope of a removable "civil action" under § 1442 to include "any proceeding" in which "a subpoena for testimony or documents is sought or issued"). Remand would thwart that effort by allowing Applicants to be haled into state court for actions taken in relation to their role as federal agents. Because the harm is being forced to answer in state court—not just being subjected to ultimate liability in that court—the harm cannot be cured by a reversal on appeal.

Second, remand would force Applicants—and Respondent—to waste substantial time and resources on state court proceedings that will be rendered pointless when the district court's remand order is reversed. Although litigation costs generally do not constitute irreparable injury, *see Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974), courts have held that the such costs constitute irreparable harm where, as here, they would be duplicative and unrecoverable. *See, e.g.*, *Ewing Indus. Co.* v. *Bob Wines Nursery, Inc.*, No. 3:13-cv-931-J-39JBT, 2015 WL

12979096, at *3 (M.D. Fla. Feb. 5, 2015) ("[W]asteful, unrecoverable, and possibly duplicative costs are proper considerations" in the irreparable harm inquiry.); *see also Wilcox* v. *Lloyds TSB Bank, PLC*, No. 13-00508, 2016 WL 917893, at *5-6 (D. Haw. Mar. 7, 2016) (similar); *Citibank, N.A.* v. *Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (similar). Here, absent a stay, the parties will be forced to litigate before a state court applying the wrong law, while simultaneously litigating materially identical cases seeking the same relief before federal courts across the country. Avoidance of those costs alone justifies a stay pending appeal. *See Citibank*, 2017 WL 4511348, at *2-3 (granting motion to stay remand and noting that litigation costs would be avoided).

Third, even if this appeal can be resolved before the state court enters a final judgment, the district court would need to untangle any state court rulings made during the pendency of the appeal in the event of reversal. This would likely include rulings on multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings—all litigated under state law. Deciding how these rulings should apply once the case returns to federal court would involve a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. Courts routinely grant motions to stay remand orders to avoid this exact risk. *See, e.g.*, *id*. at *3 (collecting cases); *see also Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007) (noting "significant issues of comity" that arise when "a federal appeals court vacate[s]" a remand order and

"retroactively invalidates state court proceedings" that occurred during pendency of appeal).

Fourth, there is a risk that the state court could reach a final judgment before Applicants' appeal is resolved—an especially likely scenario given the high probability that this Court will grant review after the Fourth Circuit issues its initial decision. "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court *before* it becomes irrevocable." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could enter judgment against Applicants while their appeal is pending in federal court. *See Northrop Grumman*, 2016 WL 3346349, at *4 (defendant would suffer "severe and irreparable harm if no stay is issued" because an "intervening state court judgment or order could render the appeal meaningless"); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013) ("[L]oss of appellate rights alone constitutes irreparable harm.").[6]

IV. The Balance of Equities Decisively Favors the Applicants.

A stay would not prejudice Respondent's ability to seek relief or meaningfully exacerbate its injuries. Respondent's Complaint disclaims any desire "to restrain [Applicants] from engaging in their business operations," and merely "seeks to ensure that [Applicants] bear the costs of those impacts." Attachment A at 5 ¶12. Moreover,

[6] Indeed, if defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part).

according to Respondent, the harm alleged is already "locked in" and will occur "even in the absence of any future emissions." *See, e.g.*, *id.* at 4 ¶¶7-8; *id.* at 90 ¶¶ 179-180; *id.* at 99 ¶ 196. Respondent thus cannot point to harm reasonably likely to occur during a stay, but which denial of a stay could avoid. At most, its alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm.

Even if Respondent's jurisdictional arguments are correct, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. A stay would, however, benefit Respondent by avoiding costly and potentially wasteful state court litigation while the appeal is pending. *See Brinkman*, 2015 WL 13424471, at *1 (granting stay pending appeal so parties would not "face the burden of having to simultaneously litigate [the case] in state court and on appeal"). A stay would also conserve judicial resources and "promot[e] judicial economy" by unburdening the state court of potentially unnecessary litigation. *United States* v. *2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

The district court speculated that "interim proceedings in state court may well advance the resolution of the case in federal court," Attachment D at 11], but the threshold question on appeal is *which law governs* Respondent's claims—federal common law or state law. Any state court ruling addressing the viability of the claims under *Maryland* law is unlikely to assist the district court in determining whether the claims can proceed under *federal* law.

A stay could also avoid costly and needless discovery. Respondent has argued below that it will obtain discovery before dispositive motions are resolved regardless

of whether the case proceeds in state or federal court. But discovery in the district court does not commence until a scheduling order issues, and, generally, not until after Rule 12 motions are resolved. D. Md. L.R. 104.4; *see Wymes* v. *Lustbader*, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) ("On motion, it is not uncommon for courts to stay discovery pending resolution of dispositive motions."); *Stone* v. *Trump*, 335 F. Supp. 3d 749, 754 (D. Md. 2018) ("When a dispositive motion has the potential to dispose of the case, it is within the Court's discretion to stay discovery pending resolution of that motion."). Given the likelihood that the district court will dismiss Respondent's claims following reversal of the remand order, a stay could prevent the parties from engaging in discovery at all, saving both Respondent and the 26 Applicants enormous time and resources.[7]

CONCLUSION

Applicants respectfully request that this Court stay the district court's remand order pending the disposition of the appeal in the Fourth Circuit and, if that court affirms the remand order, pending the filing and disposition of a petition for a writ of certiorari in this Court. Applicants further request that the Court enter a temporary

[7] Federal and Maryland discovery standards and procedures also differ in important respects, raising the prospect that discovery rulings would need to be revisited if the remand order is reversed and the case returns to federal court. *Compare, e.g.*, Fed. R. Civ. P. 26(b)(1) (scope of discovery is limited to "any nonprivileged matter *relevant to any party's claim or defense*"), *with* Maryland R. Civ. P. 2-402(a) (allowing parties to obtain discovery "regarding any matter that is not privileged . . . if the matter sought is *relevant to the subject matter of the action*"); *compare* Fed. R. Civ. P. 37(e) (allowing court to impose evidentiary sanctions "only upon finding that the party acted with the *intent* to deprive another party of the information's use in the litigation"), *with* Maryland R. Civ. P. 2-433(b) (allowing sanctions for negligently failing to preserve electronic information).

emergency stay of the remand order until the Court decides whether to grant this application.

Dated: October 1, 2019

Respectfully submitted,

JOHN B. ISBISTER
JAIME W. LUSE
TYDINGS & ROSENBERG LLP
One East Pratt Street, Suite 901
Baltimore, MD 21202
Telephone: 410-752-9700
Facsimile: 410-727-5460
E-mail: jisbister@tydingslaw.com
E-mail: jluse@tydingslaw.com

PHILIP H. CURTIS
NANCY G. MILBURN
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Facsimile: (212) 836-8689
E-mail: philip.curtis@arnoldporter.com
E-mail: nancy.milburn@arnoldporter.com

MATTHEW T. HEARTNEY
JOHN D. LOMBARDO
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
E-mail: matthew.heartney@arnoldporter.com
E-mail: john.lombardo@arnoldporter.com

Attorneys for Applicants BP Products North America Inc., BP P.L.C., and BP American Inc.

THEODORE J. BOUTROUS, JR.
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8500

ANNE CHAMPION
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-5281
E-mail: achampion@gibsondunn.com

TY KELLY
JONATHAN BIRAN
BAKER DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
100 Light Street, 19th Floor
Baltimore, MD 21202
Telephone: (410) 862-1049
Facsimile: (410) 547-0699

Counsel for Applicants Chevron Corporation and Chevron U.S.A. Inc.

DAVID C. FREDERICK
JAMES M. WEBSTER, III
BRENDAN J. CRIMMINS
GRACE W. KNOFCZYNSKI
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
E-mail: dfrederick@kellogghansen.com
E-mail: jwebster@kellogghansen.com
E-mail: bcrimmins@kellogghansen.com
E-mail: gknofczynski@kellogghansen.com

DANIEL B. LEVIN
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Fiftieth Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
E-mail: daniel.levin@mto.com

Jerome C. Roth
Elizabeth A. Kim
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
E-mail: jerome.roth@mto.com
E-mail: elizabeth.kim@mto.com

Attorneys for Applicants Shell Oil Company and Royal Dutch Shell, plc.

CRAIG A. THOMPSON
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
E-mail: cathompson@venable.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND, WHARTON, Q GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3089
Facsimile: (212) 492-0089
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com
E-mail: jjanghorbani@paulweiss.com

KANNON SHANMUGAM
PAUL, WEISS, RIFKIND, WHARTON, Q GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Telephone: (202) 223-7325
Facsimile: (202) 224-7397
E-mail: kshanmugam@paulweiss.com

Attorneys for Applicants Exxon Mobil Corporation and ExxonMobil Oil Corporation.

WARREN N WEAVER
PETER SHEEHAN
WHITEFORD TAYLOR AND
PRESTON LLP
Seven Saint Paul St., Ste. 1400
Baltimore, MD 21202
Telephone: (410) 347-8757
Facsimile: (410) 223-4177
E-mail: wweaver@wtplaw.com
E-mail: pshehan@wtplaw.com

NATHAN P. EIMER, ESQ.
PAMELA R. HANEBUTT, ESQ.
RYAN WALSH, ESQ.
RAPHAEL JANOVE, ESQ.
EIMER STAHL LLP
224 South Michigan Ave., Ste. 1100
Chicago, IL 60604
Telephone: (312) 660-7600
Facsimile: (312) 692-1718
E-mail: neimer@EimerStahl.com
E-mail: phanebutt@EimerStahl.com
E-mail: rwalsh@EimerStahl.com
E-mail: rjanove@EimerStahl.com

Attorneys for Applicant Citgo Petroleum Corporation.

MARK S. SAUDEK
GALLAGHER EVELIUS & JONES LLP
218 North Charles Street, Suite 400
Baltimore, MD 21201
Telephone: (410) 347-1365
Facsimile: (410 468-2786
E-mail: msaudek@gejlaw.com

JAMES STENGEL
ORRICK, HERRINGTON & SUTCLIFFE, LLP
51 West 52nd Street
New York, NY 10019-6142
Telephone: (212) 506-5000
Facsimile: (212) 506-5151
E-mail: jstengel@orrick.com

Robert Reznick
ORRICK, HERRINGTON & SUTCLIFFE, LLP
1152 15th Street NW
Washington, DC 2005
Telephone: (202) 339-8400
Facsimile: (202) 339-8500
E-mail: rreznick@orrick.com

Attorneys for Applicants Marathon Oil Corporation and Marathon Oil Company.

MICHAEL A. BROWN, ESQ.
NELSON MULLINS RILEY &
SCARBOROUGH LLP
100 S. Charles Street, Suite 1200
Baltimore, Maryland 21202
Telephone: 443-392-9400
Facsimile: 443-392-9499
E-mail: mike.brown@nelsonmullins.com

STEVEN M. BAUER
MARGARET A. TOUGH
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

SEAN C. GRIMSLEY
JAMESON R. JONES
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3123
Facsimile: (303) 592-3140
E-mail: sean.grimsley@bartlit-beck.com
E-mail: jameson.jones@bartlit-beck.com

Attorneys for Applicants ConocoPhillips and ConocoPhillips Company.

JONATHAN CHUNWEI SU
LATHAM AND WATKINS LLP
555 Eleventh St NW, Ste 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
E-mail: jonathan.su@lw.com

STEVEN M. BAUER
MARGARET A. TOUGH
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

Attorneys for Applicant Phillips 66.

SHANNON S. BROOME
HUNTON ANDREWS KURTH LLP
50 California Street
San Francisco, CA 94111
Telephone: (415) 975-3718
Facsimile: (415) 975-3701
E-mail: SBroome@HuntonAK.com

SHAWN PATRICK REGAN
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 309-1046
Facsimile: (212) 309-1100
E-mail: SRegan@HuntonAK.com

ANN MARIE MORTIMER
HUNTON ANDREWS KURTH LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
Telephone: (213) 532-2103
Facsimile: (213) 312-4752
E-mail: AMortimer@HuntonAK.com

Attorneys for Applicants Marathon Petroleum Corporation and Speedway LLC.

SCOTT JANOE
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
Telephone: (713) 229-1553
Facsimile: (713) 229 7953
E-mail: scott.janoe@bakerbotts.com

MEGAN BERGE
EMILY WILSON
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave, NW
Washington, D.C. 20004
Telephone: (202) 639-7700
Facsimile: (202) 639-1171
E-mail: megan.berge@bakerbotts.com
E-mail: Emily.wilson@bakerbotts.com

Attorneys for Applicant Hess Corporation.

MICHELLE N. LIPKOWITZ
THOMAS K. PREVAS
SAUL EWING ARNSTEIN & LEHR LLP
Baltimore, MD 21202-3133
Telephone: (410) 332-8683
Facsimile (410) 332-8123
E-mail: michelle.lipkowitz@saul.com
E-mail: Thomas.prevas@saul.com

Attorneys for Applicants Crown Central LLC and crown Central New Holdings LLC.

KATHLEEN TAYLOR SOOY
TRACY ANN ROMAN
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116
E-mail: ksooy@crowell.com
E-mail: troman@crowell.com

HONOR R. COSTELLO
CROWELL & MORING LLP
590 Madison Avenue
New York, NY 10022
Telephone: (212) 223-4000
Facsimile: (212) 223-4134
E-mail: hcostello@crowell.com

Attorneys for Applicants CNX Resources Corporation, Consol Energy Inc., and Consol Marine Terminals LLC.

From: Keenan, Kelly (AG)
To: Manning, Peter (AG)
Subject: RE: Call
Date: Friday, October 18, 2019 12:06:00 PM

[redacted]

[redacted]

From: Manning, Peter (AG) <ManningP@michigan.gov>
Sent: Friday, October 18, 2019 11:40 AM
To: Bannister, Susan (AG) <BannisterS@michigan.gov>
Cc: Keenan, Kelly (AG) <KeenanK@michigan.gov>; Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Subject: FW: Call

Susan,

Does this date work for Kelly, and do you want to set up the call and send the meeting notice or have them set it up?

Thanks,

Peter

From: Matt Edling <matt@sheredling.com>
Sent: Friday, October 18, 2019 11:17 AM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Cc: Manning, Peter (AG) <ManningP@michigan.gov>; Vic Sher <vic@sheredling.com>
Subject: RE: Call

Skip –

10/23 at 11 am works. Let us know if you would like me to circulate a dial in. We look forward to it.

Matthew K. Edling

SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Sent: Friday, October 18, 2019 7:37 AM
To: Matt Edling <matt@sheredling.com>
Cc: Manning, Peter (AG) <ManningP@michigan.gov>

Subject: Call

Matt,

Are you available for a call at these times?

- 10/22 @ 2:30 pm or 3:00 pm
- 10/23 @ 11:00 am

Skip Pruss

From: Bannister, Susan (AG) on behalf of Keenan, Kelly (AG)
To: Manning, Peter (AG); Pruss, Stanley (AG-Contractor); matt@sheredling.com
Subject: Climate Litigation

Meeting with

Kelly Keenan

Skip Pruss

Peter Manning

Matthew Edling of Sher Edling

Conference Call Information:

+1 248-509-0316 <tel:+1%20248-509-0316,,198996399#> United States, Pontiac (Toll)

Conference ID: 198 996 399#

Local numbers <https://dialin.teams.microsoft.com/95e14c4b-c14d-430f-a556-75831bdf54bf?id=198996399> | Reset PIN <https://mysettings lync.com/pstnconferencing> | Learn more about Teams <https://aka.ms/JoinTeamsMeeting> | Meeting options <https://teams microsoft.com/meetingOptions/?organizerId=12d3fa94-b844-48e0-b855-58c74e09aa96&tenantId=d5fb7087-3777-42ad-966a-892ef47225d1&threadId=19_meeting_ZWFkMmZiNWEtOTdlMi00MDg4LTlkYjMtYTI5ZTFhNjMxNGFi@thread.v2&messageId=0&language=en-US>

From:	Matt Edling
To:	Keenan, Kelly (AG); Manning, Peter (AG); Pruss, Stanley (AG-Contractor)
Cc:	Vic Sher
Subject:	Supreme Court denied Defendants" Stay Application
Date:	Tuesday, October 22, 2019 1:38:45 PM
Attachments:	19A368 BP v. Mayor and City Council Baltimore Order.pdf

Kelly, Peter, Skip –

The Supreme Court just denied defendants' stay application in the Baltimore action. We look forward to speaking with you tomorrow.

Sincerely,

Matthew K. Edling
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Matt Edling
Sent: Friday, October 18, 2019 9:52 AM
To: Keenan, Kelly (AG) <KeenanK@michigan.gov>; Manning, Peter (AG) <ManningP@michigan.gov>; Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Cc: Vic Sher <vic@sheredling.com>
Subject: RE: Climate Litigation

Kelly, Peter, Skip –

In advance of our call next week, I include the attached and information below as background.

1. House Oversight Subcommittee hearing on climate deception next Wed, Oct 23: https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=110126
2. 1St Circuit Briefing Schedule in RI action
    a. 11/20/2019 for appellants
    b. 12/20/19 response
    c. 1/10/20 reply
3. City of Baltimore / Fourth Circuit – Defs' Request for Stay to Supreme Court
    a. Defendants' brief - attached
    b. Our Opposition to Emergency Stay filed last night – attached
4. 10th Circuit
    a. Order denying stay - attached
    b. Defendants request recall of District Order. Attached.
5. Anticipated new filing
    a. MA AG - https://news.bloombergenvironment.com/environment-and-energy/documents-show-massachusetts-ag-ready-to-file-climate-case-against-exxon
6. News/Other
    a. Bloomberg Overview of Lawsuits: https://news.bloombergenvironment.com/environment-and-energy/can-climate-test-cases-move-forward-its-up-to-supreme-court
    b. Guardian re: fossil fuel companies jacking up production: https://www.theguardian.com/environment/2019/oct/10/oil-firms-barrels-markets
    c. Shell CEO says "no choice" but to continue with fossil fuels: https://www.reuters.com/article/us-shell-climate-exclusive-idUSKBN1WT2JL?utm_campaign=Carbon%20Brief%20Daily%20Briefing&utm_medium=email&utm_source=Revue%20newsletter

Matthew K. Edling
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

-----Original Appointment-----
From: BannisterS@michigan.gov <BannisterS@michigan.gov> **On Behalf Of** Keenan, Kelly (AG)
Sent: Friday, October 18, 2019 8:54 AM
To: Manning, Peter (AG); Pruss, Stanley (AG-Contractor); Matt Edling
Subject: Climate Litigation

When: Wednesday, October 23, 2019 11:00 AM-11:30 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Conference Call

Meeting with
Kelly Keenan
Skip Pruss
Peter Manning
Matthew Edling of Sher Edling

Conference Call Information:

+1 248-509-0316 United States, Pontiac (Tol)

Conference ID 198 996 399#

Local numbers | Reset PIN | Learn more about Teams | Meeting options

---

(ORDER LIST: 589 U.S.)

TUESDAY, OCTOBER 22, 2019

ORDER IN PENDING CASE

19A368 BP P.L.C., ET AL. V. MAYOR AND CITY COUNCIL BALTIMORE

The application for stay presented to The Chief Justice and by him referred to the Court is denied. Justice Alito took no part in the consideration or decision of this application.

From:	Matt Edling
To:	Pruss, Stanley (AG-Contractor)
Cc:	Manning, Peter (AG); Keenan, Kelly (AG); Vic Sher
Subject:	RE: Call
Date:	Monday, October 28, 2019 1:13:55 PM
Attachments:	Complaint - Comm. v. Exxon Mobil Corporation - 10-24-19.pdf

Gentlemen –

You may have heard that Massachusetts last week filed its long-anticipated complaint against Exxon. It's attached for your reading pleasure. We think it is quite good – impressively researched and really well written.

Sincerely,

Matthew K. Edling
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From: Matt Edling
Sent: Wednesday, October 23, 2019 9:42 AM
To: Pruss, Stanley (AG-Contractor) <PrussS2@michigan.gov>
Cc: Manning, Peter (AG) <ManningP@michigan.gov>; Kelly Keenan (keenank@michigan.gov) <keenank@michigan.gov>; Vic Sher <vic@sheredling.com>
Subject: RE: Call

Kelly, Peter, Skip –

Thank you for your time. We look forward to connecting after you have had some time to reflect and would welcome an opportunity to show you some of the documents we have and present our analysis in a more interactive manner. Vic and I were discussing after the call that the best articulation of the theory of our cases may be Chief District Court Judge William Smith's remand decision in the State of Rhode Island case.

> Defendants understood the consequences of their activity decades ago, when transitioning from fossil fuels to renewable sources of energy would have saved a world of trouble. But instead of sounding the alarm, Defendants went out of their way to becloud the emerging scientific consensus and further delay changes — however existentially necessary — that would in any way interfere with their multibillion-dollar profits. All while quietly readying their capital for the coming fallout.
>
> *State of Rhode Island v. Chevron Corp.,* 2019 WL 3282007 at *1 (D.RI Jul. 22, 2019)

(You might enjoy seeing this dramatic reading of Judge Smith's opinion by Senator Sheldon Whitehouse– it's not common for a district court opinion to go viral. https://twitter.com/i/status/1157290669657993222)

Let us know how we can help your consideration of this important matter.

Matthew K. Edling
SHER EDLING LLP
100 Montgomery St., Ste. 1410
San Francisco CA 94104
(628) 231-2520 | sheredling.com

From:	Bannister, Susan (AG)
To:	Manning, Peter (AG); Pruss, Stanley (AG-Contractor); matt@sheredling.com; Keenan, Kelly (AG)
Subject:	Hold Climate Change Litigation
Start:	Friday, October 4, 2019 11:00:00 AM
End:	Friday, October 4, 2019 11:30:00 AM
Location:	Kelly Keenan"s office

Peter Manning
Skip Pruss (by phone)
Kelly Keenan
Matthew K. Edling from Sher Edling, LLP