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

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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-

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[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

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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,

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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