UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE PARISH OF PLAQUEMINES,	*	**CIVIL ACTION**
	*	**NO. 2:18-CV-05217**
Plaintiff,	*	
	*	**JUDGE MARTIN L.C. FELDMAN**
VERSUS	*	
	*	
RIVERWOOD PRODUCTION COMPANY, CHEVRON U.S.A. INC., EXXON MOBIL CORPORATION, CONOCOPHILLIPS COMPANY, THE ESTATE OF WILLIAM G. HELIS, AND GRAHAM ROYALTY, LTD.,	*	**MAGISTRATE JUDGE MICHAEL NORTH**
	*	
	*	
	*	
	*	
	*	
Defendants.	*	

Defendants' Memorandum in Support of Motion to Stay Remand Order Pending Appeal

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INTRODUCTION

On May 28, 2019, this Court granted Plaintiffs' motion for remand. In doing so, the Court noted that Defendants would appeal and recognized that its order "addresses controlling issues of law as to which there might be substantial ground for difference of opinion." Remand Order, ECF No. 79, at 64 (E.D. La. May 28, 2019). Defendants respectfully request that this Court stay its remand order pending Defendants' appeal of the order to the Fifth Circuit.[1]

The factors governing stays pending appeal all support a stay here. Defendants have a substantial case on the merits of the serious jurisdictional questions raised by this case, which is the first of 42 similar coastal land loss cases to address those jurisdictional issues. And the balance of equities weighs heavily in favor of a stay. Because this case was removed under the federal officer removal statute, 28 U.S.C. § 1442, Defendants have a right to appeal under 28 U.S.C. § 1447(d). If the Fifth Circuit ultimately determines that federal officer jurisdiction is proper, the failure to enter a stay will have deprived Defendants during the intervening period of the federal forum Congress intended to provide. Allowing state court litigation to proceed during the appeal would impose significant costs and burdens on the courts and the parties, and it could implicate potentially complex questions of federalism and comity if the Fifth Circuit holds that the case belongs in federal court. In addition, given the large number of similar lawsuits pending before this Court and multiple judges in the Eastern District of Louisiana, a stay pending appeal will help avoid a tangle of simultaneous litigation before multiple courts at the state and federal levels. A stay will not prejudice Plaintiffs, will avoid irreparable harm to Defendants, will conserve judicial resources, and will serve the interests of judicial efficiency by allowing the Fifth Circuit to address the important question of where this case should be litigated, *before* the case proceeds further.

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[1] Plaintiffs have advised that they oppose this motion to stay and intend to file a response.

ARGUMENT

The relevant removal statute provides an appeal of right to the Fifth Circuit, and this Court retains authority to stay remand pending appeal of its decision. The factors governing a stay pending appeal all support a stay.

I. THE REMAND ORDER IS APPEALABLE AS OF RIGHT.

As this Court recognized,[2] Defendants have a clear right to appeal the Court's remand order because this case was removed under the federal officer removal statute, 28 U.S.C. § 1442. This Court further ruled that its order "addresses controlling issues of law as to which there might be substantial ground for difference of opinion."[3] Although 28 U.S.C. § 1447(d) generally bars appeal of remand orders, it provides an important exception: "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). The statute's unmistakable language makes clear that when the federal officer removal statute is invoked, Congress wanted parties to have an immediate right of appeal given the important federal interests at stake.

The right to appeal extends to this Court's determination that removal was untimely. In *Decatur Hospital Authority v. Aetna Health, Inc.*, the Fifth Circuit reviewed an order remanding on timeliness grounds a case removed under 28 U.S.C. §§ 1442 and 1441. 854 F.3d 292, 296 (5th Cir. 2017). The Fifth Circuit held that, although untimeliness is generally a non-reviewable section 1447(c) ground for remand, "the fact that [Defendants] relied upon the federal officer removal statute in [their] notice of removal permits appellate review" of the order. *Id.*; *see also Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 607 & n.9 (5th Cir. 2018) (same). In reaching this conclusion, the Fifth Circuit recognized that "Congress has, when it wished, expressly made 28

[2] Remand Order, ECF No. 79, at 63-64 (E.D. La. May 28, 2019).
[3] *Id.* at 64.

U.S.C. § 1447(d) inapplicable to particular remand *orders*." 854 F.3d at 296 (emphasis in original) (quoting *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006)). The Fifth Circuit explained that "[l]ike the Seventh Circuit" it "'[took] both Congress and [the Supreme Court in] *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.'" *Id.* (quoting *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 812 (7th Cir. 2015)).

Under this same reasoning, even apart from this Court's § 1292(b) certification, the Fifth Circuit may consider all bases for removal disposed of by the remand order, including whether federal question jurisdiction exists. The plain language of 28 U.S.C. § 1447(d) authorizes review of the *order* remanding a case removed under section 1442. 28 U.S.C. § 1447(d); *see also Kircher*, 547 U.S. at 641 n.8; *Decatur*, 854 F.3d at 296; *Lu Junhong*, 792 F.3d at 812. As the Seventh Circuit explained in *Lu Junhong v. Boeing Co.*, "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 813. Thus, "'[r]eview should . . . be extended to all possible grounds for removal underlying the order.'" *Decatur*, 854 F.3d at 296 (quoting 15A Wright et al., Federal Practice & Procedure § 3914.11 (2d ed.)); *accord Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1557 (Apr. 16, 2018); *cf. Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (interlocutory appeal of an "order" certified to the court of appeals under 28 U.S.C. § 1292 allows review of "any issue fairly included within the certified order").[4]

[4] In *Decatur*, the Fifth Circuit acknowledged that it had earlier "declined to review 'the part of [a] remand order' expressing a Section 1447(c) ground . . . for rejecting a party's reliance upon a

II. THIS COURT HAS JURISDICTION TO STAY ITS REMAND ORDER PENDING APPEAL.

This Court has jurisdiction to stay its remand order pending appeal. For reviewable remand orders like this one, the court retains jurisdiction over the remand order even after the Clerk of Court certifies the order and mails it to the state court. "'[A]n appellate court has jurisdiction to review the remand order, and *a district court has jurisdiction to review its own order, and vacate or reinstate that order*.'" *In re Shell Oil Co.*, 932 F.2d 1523, 1528 (5th Cir. 1991) (emphasis added) (quoting *In re Shell Oil Co.*, 631 F.2d 1156, 1158 (5th Cir. 1980)); *see also Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994) (holding that, "[w]ith regard to the district court's ability to reconsider its earlier [discretionary] remand order, the remand order is treated like any other final judgment," such that "a district court retains jurisdiction until the time for filing an appeal has expired or until a valid notice of appeal is filed").

District courts in the Fifth Circuit have exercised jurisdiction to entertain requests to stay appealable remand orders. *See, e.g.*, *Humphries v. OneBeacon Am. Ins. Co.*, No. 13-cv-5426, 2014 WL 1330034, at *1 (E.D. La. Apr. 2, 2014) (finding jurisdiction to consider motion for stay of a

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portion of the general removal statute, Section 1441(b)." 854 F.3d at 296 (quoting *Robertson v. Ball*, 534 F.2d 63, 64–65 (5th Cir. 1976)). But it explained that *Robertson* "implies only that we 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." *Id.* It further explained that *Robertson* supports the view that the "Section 1442 basis for removal (which supports appellate review)" takes precedence "over the district court's articulation of a Section 1447(c) ground for remand (which would ordinarily foreclose appellate review)." *Id.* at 296-97. Here, because Defendants relied on a reviewable ground (Section 1442) as a basis for removal, "'[r]eview should . . . be extended to all possible grounds for removal underlying the order.'" *Id.* at 296 (quoting 15A Wright et al., Federal Practice & Procedure § 3914.11 (2d ed.)). The Fifth Circuit's decisions in *City of Walker v. Louisiana*, 877 F.3d 563 (5th Cir. 2017), and *Gee v. Texas*, No. 18-11186, 2019 WL 1958740 (5th Cir. Apr. 30, 2019) (per curiam), do not alter this conclusion. In neither case did appellants argue that the exception for federal officer jurisdiction allowed the Court to review the entire remand order. *See Walker*, 877 F.3d at 566 n.2; *Gee*, 2019 WL 1958740. Moreover, *Gee*, an unpublished decision that followed *Walker*, did not address the Fifth Circuit's earlier binding *Decatur* decision.

remand order in a case removed under § 1442); *McDermott Int'l, Inc. v. Underwriters at Lloyd's London*, No. 91-cv-0841, 1991 WL 121216, at *1 (E.D. La. June 21, 1991) (finding that "the court . . . has jurisdiction to address" the defendant's motion to stay pending appeal of the remand order because "where an exception to non-reviewability exists . . . a district court has jurisdiction to review its own order"); *cf. Linton v. Airbus Industrie*, 30 F.3d 592, 595 (5th Cir. 1994) (noting that the "district court stayed its remand order pending resolution of this appeal"); *Whitaker v. Carney*, 778 F.2d 216, 219 (5th Cir. 1985) (noting in a case removed under 28 U.S.C. § 1443 that the defendant "sought and obtained from the district court a stay of the remand order pending appeal").[5] Likewise, the Fifth Circuit has also stayed remand orders pending appeal. *See, e.g.*, *Humphries v. Elliott Co.*, 760 F.3d 414, 416 (5th Cir. 2014); *Cox v. Louisiana*, 348 F.2d 750, 750–51 (5th Cir. 1965). This Court thus retains jurisdiction over its remand order and may grant a stay of that order pending appeal.

[5] *Schexnayder v. Entergy LA Inc.*, No. 03-2766, 2003 WL 25735531, at *1 & n.1 (E.D. La. Dec. 19, 2003), is distinguishable both legally and factually. First, that case did not involve an order remanding a case that was removed pursuant to either 28 U.S.C. §§ 1442 or 1443, the removal statutes for which Congress provided a right of appeal. Second, that case addressed a district court's authority to stay a remand order pending appeal pursuant to Fed. R. Civ. P. 62, but did not address the Court's inherent authority to stay its orders. Here, whether or not Rule 62 provides a basis for a stay, Defendants ask this Court to enter a stay pursuant to "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see Texas Trading & Transp. Inc. v. Laine Constr. Co. Inc.*, No. CIV. A. 98-1473, 1998 WL 814615, at *1 (E.D. La. Nov. 18, 1998) (while "'Federal Rule of Civil Procedure 62 sets forth the procedure for staying proceedings to enforce a judgment[,] . . . stays prior to judgment, to await a decision on another forum, or for some other purpose . . . are left to the inherent power of the court'") (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2901 (West 2d ed. 1995)); *see also Rhines v. Weber*, 544 U.S. 269, 276 (2005) ("District courts do ordinarily have authority to issue stays . . . ."). And, as noted above, the Fifth Circuit has acknowledged, seemingly without disapproval, that district courts have entered stays of appealable remand orders. Third, *Schexnayder* is procedurally distinguishable from this case, because there the motion to stay was filed nearly a month after the Court issued its remand decision.

III. ALL RELEVANT CONSIDERATIONS WEIGH HEAVILY IN FAVOR OF A STAY.

A stay of the remand order is necessary to allow the important jurisdictional questions at stake to be resolved by the Fifth Circuit *before* further litigation occurs. In determining whether to grant a stay pending appeal, courts typically consider four factors: "(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 other parties interested in the proceedings; and (4) [whether] public interest [favors a stay]." *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011) (alterations in original) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 770–71 (1987)); *see also Mazurek v. United States*, No. 99-2003, 2001 WL 260064, at *1 (E.D. La. Jan. 11, 2001). In seeking a stay, "the movant need not always show a 'probability' of success on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). A "movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014).

The stay factors are not applied "in a rigid . . . [or] mechanical fashion." *Id.* (alterations in original). Rather, the determination of whether to grant "a stay requires an individual assessment of the case before [the court] and an analysis of the circumstances attendant to the particular stay request." *Id.* Thus, the factors "do not function as 'prerequisites' but as 'interrelated considerations that must be balanced together.'" *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, No. 18-cv-23, 2018 WL 1202893, at *2 (M.D. La. Mar. 8, 2018). "The weight accorded each factor is not necessarily the same, and no one factor is determinative." *Id.*

A. Defendants Present a Substantial Case on the Merits of Serious Legal Questions About the Federal Courts' Jurisdiction.

Defendants present "a substantial case on the merits" as to "serious legal questions." *Bryant*, 773 F.3d at 57. Indeed, the Court recognized that its order "addresses controlling issues of law as to which there might be substantial ground for difference of opinion." Order at 64. Those questions include whether the case was timely removed, whether federal officer jurisdiction exists under 28 U.S.C. § 1442, and whether federal question jurisdiction exists under 28 U.S.C. § 1331. Defendants appreciate that the Court carefully considered the parties' arguments in making its ruling, and will not exhaustively repeat those arguments here, but will briefly summarize the bases for its appeal.

1. Timeliness

First, Defendants' appeal will require the Fifth Circuit to determine whether the case was timely removed based on Plaintiffs' Expert Report.[6] Whether federal courts have jurisdiction to consider claims by plaintiffs who, under the guise of state law, seek to hold defendants liable for decades of federally-directed and federally-authorized activities, without divulging the federal theories of their case until years after filing suit, is a "serious legal question." The answer to that question will have far-reaching impacts in this case, the other 41 pending parish cases, and countless future cases where plaintiffs—through artful pleading and delay—attempt to conceal the federal nature of their claims to avoid a federal forum.

[6] Defendants refer to Plaintiff The Parish of Plaquemines, Plaintiff-Intervenor the State of Louisiana through the Louisiana Department of Natural Resources, and Plaintiff-Intervenor the State of Louisiana, ex. rel. Jeff Landry, Attorney General, collectively as "Plaintiffs."

Defendants at a minimum have a "substantial case on the merits" of this serious legal question.[7] The Court determined that the removal was untimely on the basis of the Petition's general assertions that Plaintiffs' claims "involved" pre-1980 activities. Defendants will contend on appeal that such general assertions did not permit Defendants to ascertain the specific removal grounds revealed in the Expert Report.

A notice of removal must be filed within 30 days of the initial pleading "only when that pleading affirmatively reveals on its face" the basis for removal jurisdiction. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). Here, nothing in Plaintiffs' pleadings, motions, or other filings before the April 30 Expert Report revealed that they intended to show that *particular activities* by Defendants were not "lawfully commenced or established" because Defendants should have carried out those activities in ways that would have been contrary to federal government directives during World War II. Nor did the Petition reveal that Plaintiffs were challenging pre-1980 activities that were governed exclusively by federal law on the basis that those activities were carried out in "bad faith" because Defendants purportedly failed to follow "prudent practices" or that the activities had "changed impacts" after 1980. Defendants could not have articulated the federal questions raised here with the requisite level of specificity without knowing about these specific theories of liability, which were revealed for the first time in the Expert Report.

[7] As noted above, Defendants need only present a substantial case on the merits of a serious legal question where the balance of equities weighs heavily in favor of a stay. *Bryant*, 773 F.3d at 57. In any event, Defendants also respectfully maintain that, for the reasons explained herein, they have likewise shown a probability of success on the merits.

2. Federal Officer Jurisdiction

Second, Defendants have a substantial case on the merits of the serious legal question of whether federal officer jurisdiction exists where Plaintiffs seek to impose liability for federally-directed wartime activities, based on the theory that those activities were conducted "unlawfully" and in "bad faith." Jurisdiction over claims against oil and gas companies for activities conducted under the direction of the federal government to support United States war efforts is particularly serious, given "the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *Decatur*, 854 F.3d at 295–96; *see also Delancey v. Gen. Elec. Co.*, No. 04-431, 2004 WL 3247173, at *1 (E.D. La. Mar. 31, 2004) ("The importance of removal under Section 1442 is that a federal court be given the opportunity to determine the validity of the federal defense."). Indeed, the Fifth Circuit's recent grant of rehearing en banc in *Latiolais v. Huntington Ingalls, Inc*., 918 F.3d 406 (5th Cir. 2019), underscores the seriousness of legal questions involving federal officer removal.

As this Court recognized, the federal government during World War II was "intensely" involved in the oil and gas industry's activities, including by issuing directives on vertical drilling, well spacing, centralized tank batteries, and use of materials necessary for steel tanks and road construction—the very activities identified by Plaintiffs in their Expert Report as establishing "bad faith." Remand Order, ECF No. 79, at 39. Through these directives, the federal government exercised substantial control over Defendants' activities that allegedly gave rise to Plaintiffs' injuries Additionally, because of this federal government control, Defendants have substantial federal defenses, including defenses premised on federal preemption and immunity, federal due process, federal authorizations, and Plaintiffs' failure to exhaust administrative remedies. Defendants thus contend that federal officer jurisdiction exists, and respectfully submit that its arguments on that point are "substantial."

3. Federal Question Jurisdiction

Third, whether Plaintiffs' claims necessarily raise substantial federal questions is a serious legal question, particularly because Plaintiffs' claims target virtually the entire industry and call into question decades of federal laws, regulations, permits, and agency decisions authorizing Defendants' activities, including the Rivers and Harbors Act, the Clean Water Act, and permits and regulations issued by the U.S. Army Corps of Engineers. Questions concerning the validity, interpretation, and application of those federal laws and decisions should be heard in federal court. *See Bd. of Comm'rs of Se. Louisiana Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 724 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 420 (Oct. 30, 2017) (where the validity of plaintiffs' claims "would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law," "[t]he implications for the federal regulatory scheme . . . would be significant, and thus the [federal] issues are substantial"); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005) (federal question jurisdiction "vindicate[s]" the "serious federal interest in claiming the advantages thought to be inherent in a federal forum").

Defendants have a substantial case on the merits of federal question removal. Defendants contend that Plaintiffs' "bad faith" and "changed impacts" theories necessarily turn on interpretations of federal law. Plaintiffs must establish as part of their affirmative case that Defendants were required to obtain permits under SLCRMA for their pre-1980 activities. Plaintiffs' "bad faith" theory attempts to show that permits were required because the pre-1980 activities were not "lawfully commenced," but instead were commenced in "bad faith" due to an alleged failure to apply industry best practices. Because Defendants' pre-1980 dredging activities were governed solely by federal law, Plaintiff's "bad faith" theory requires them to show that federal law imposed a duty of good faith and that that duty (if it exists) was violated by a failure

to use industry best practices. It also requires them to show that the alleged "best practices" could have been implemented by Defendants under federal law. Plaintiffs' "changed impacts" theory—that Defendant's pre-1980 activities had significantly changed impacts after 1980 and therefore required a state coastal use permit—also necessitates interpretation of federal law. Specifically, it requires interpreting federal permits and authorizations to determine the baseline from which any change in impact must be measured. These federal questions arise as part of Plaintiffs' affirmative case, which requires them to show that a coastal use permit was required for these activities, even though the activities occurred before Louisiana enacted SLCRMA. *See* La. R.S. § 49.214.36(E) ("A court may impose civil liability and assess damages . . . for uses conducted within the coastal zone without a coastal permit *where a coastal permit is required*."). Plaintiffs' claims therefore necessarily raise substantial disputed questions of federal law, and a stay is warranted while the Fifth Circuit considers these serious legal questions.

B. The Balance of the Equities Heavily Favors a Stay.

The balance of the equities weighs heavily in favor of a stay. Absent a stay, this case will almost certainly proceed in state court while Defendants' appeal is pending. *See* 28 U.S.C. § 1447(c) (after mailing of the remand order, "[t]he State Court may thereupon proceed with [the] case"). The parties would then have to proceed simultaneously along multiple tracks: they would (1) brief and argue the appeal of federal jurisdictional issues in the Fifth Circuit; while (2) litigating Plaintiffs' claims in this case in state court; while (3) also litigating the other parish cases that raise the same legal grounds for removal and are currently pending before eight district court judges in the Eastern District of Louisiana. Allowing the claims against Defendants to proceed in state court risks improperly depriving Defendants of the federal forum Congress sought to ensure through federal officer jurisdiction. And given the numerous parties and the breadth of the claims—which span a wide geographic area, time period, and range of alleged conduct—having the case proceed

in state court now, while the ultimate forum remains uncertain, would impose unnecessary burdens on the parties and the courts. *See Lafalier v. Cinnabar Serv. Co.*, No. 10-cv-0005, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010) (requiring defendant to simultaneously proceed with discovery in state court and pursue appeal of remand order "would impose an unfair burden"). A stay is thus required to avoid needlessly wasting significant time, resources, and efforts—and creating a significant risk of inconsistency and confusion—if the Fifth Circuit's decision ultimately terminates those state court proceedings.

1. Absent a Stay, Defendants Will Be Irreparably Injured if the Litigation Advances in Potentially Unwarranted State Court Proceedings.

Defendants will be irreparably harmed absent a stay of the remand order. Requiring Defendants to litigate in state court while the question of jurisdiction is still being decided would undermine the rights provided under the federal officer removal statute. *See Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992) (describing the "chief purpose" of Section 1442 as "prevent[ing] federal officers who simply comply with a federal duty from being punished by a state court for doing so"); *see also Legendre v. Huntington Ingalls, Inc.*, 885 F.3d 398, 400 (5th Cir. 2018) ("unlike other removal doctrines," Section 1442 "is not narrow or limited"). It would also contradict Congress's intent in making these types of remand orders reviewable: to "provid[e] federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *See Decatur*, 854 F.3d at 295–96; *see also* Removal Clarification Act of 2011, Pub. L. No. 112-51 § 2(d), 125 Stat. 545 (adding § 1442 as an exception to non-reviewability in § 1447(d)). Absent a stay, if the Fifth Circuit ultimately determines that federal officer jurisdiction is proper, Defendants will have been deprived during the intervening period of the federal forum Congress sought to preserve by providing a right of appeal. *See Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, No. 16-cv-534, 2016 WL 3346349, at *4 (E.D.

Va. June 16, 2016) ("Several other courts have recognized that where the pending appeal addresses remand of a case initially removed pursuant to 28 U.S.C. § 1442, a stay is appropriate to prevent rendering the statutory right to appeal 'hollow.'"); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Grp., Inc*., No. 05-cv-0451, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (same); *Vision Bank v. Bama Bayou, LLC*, No. 11-cv-0568, 2012 WL 1592985, at *2 (S.D. Ala. May 7, 2012) (same).

Moreover, federal courts are uniquely qualified to address issues implicating federal interests like those raised here, and advancing the case in what ultimately may be determined to be the wrong forum would be wasteful. *See Grable*, 545 U.S. at 312 (recognizing "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues"). For example, a stay would preserve the District Court's role in defining the scope of discovery, which is particularly important given the complex questions of federal law and federal interests at stake; absent such a stay, the cases would likely proceed in state court under state standards before the federal jurisdictional questions are decided. *See* Fed. R. Civ. P. 26(b)(1) (requiring federal courts to determine whether Plaintiffs' discovery requests are "proportional to the needs of the case, considering the importance of the issues at stake in the action, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit"); *see also Citibank, N.A. v. Jackson*, No. 16-cv-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) ("The cost of proceeding with discovery [in state court]—and potentially re-litigating discovery issues in federal court—is likely to be high. And such costs are irreparable . . . ."). Interim state court rulings could also create serious comity and federalism issues with which the Court and the parties would be forced to wrestle upon return to federal court. *See Northrop Grumman*, 2016 WL 3346349, at *4.

In addition, a stay will avoid the burden on all parties "of having to simultaneously litigate the appeal before the [Fifth] Circuit and the underlying case in state court." *Id.*; *see also Dalton v. Walgreen Co.*, No. 13-cv-603, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to avoid simultaneous litigation in state trial court and federal court of appeals). A stay pending appeal would also be consistent with the stays presently in place in eleven of the twelve cases pending in the Western District of Louisiana, which direct that further briefing on the remand motions in those cases will proceed only after "*final resolution* of the pending motions to remand in [*Cameron v. Auster*]." *Cameron Parish v. Auster Oil and Gas, Inc.*, No. 18-677 (W.D. La.), Doc. 86 (Aug. 29, 2018 Order) (Kay, M.J.) (emphasis added).[8]

Finally, the inherent complications created by the sheer number of related cases weighs in favor of a stay. This is the first case to address the serious jurisdictional questions presented by the 42 related cases, and the Fifth Circuit's ruling in this case will affect all the pending cases. The Fifth Circuit should determine the proper forum before further litigation proceeds. A stay pending appeal in this case would contribute to that common-sense approach.

A brief stay will thus avoid the potential for waste, confusion, and irreparable harm to Defendants. *See Bryant*, 773 F.3d at 58 ("considerations of . . . uniformity and the avoidance of confusion" favored a stay pending appeal); *Raskas v. Johnson & Johnson*, No. 12-cv-2174, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013) ("[T]he likelihood that defendants will be irreparably harmed absent a stay, the burden of having to simultaneously litigate these cases in state court and on appeal to the . . . Circuit, as well as the potential of inconsistent outcomes if the state court rules

[8] In the Western District of Louisiana, a decision on remand is currently pending before Judge Summerhays in *Cameron Parish v. Auster Oil and Gas Inc.*, while the remaining 11 cases are presently stayed. Oral argument was held on January 16, 2019.

on any motions while the case is pending before the . . . Circuit, weigh in favor of granting the stays.").

2. A Stay Will Not Substantially Harm Plaintiffs, Who Will Retain the Ability to Pursue Their Claims.

In contrast, Plaintiffs will not be substantially harmed if a stay is granted. If Plaintiffs are correct that these suits belong in state court, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. Although proceedings will be delayed briefly, Plaintiffs' claimed ability to obtain the relief they seek will not be prejudiced by that delay. *Weingarten*, 661 F.3d at 913 (finding that this factor weighed in favor of a stay where "[t]he only potential injury faced by [the opposing party] is delay in vindication of its claim"). Moreover, Plaintiffs, too, will avoid the risks of potentially inconsistent outcomes and needlessly wasted resources in state court proceedings that ultimately may be nullified. *See Raskas*, 2013 WL 1818133, at *2 (holding that "plaintiffs' interests would actually be served by granting a stay" because "[n]either party would be required to incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued").

Considering that Plaintiffs waited decades to bring claims related to Defendants' alleged conduct that occurred well more than 70 years ago, this brief delay to determine the proper forum in the first instance makes particular sense. Indeed, while the thirty cases in the Eastern District have been pending in state court for several years, only five cases in Plaquemines Parish have advanced. Moreover, this particular case is still at an early stage. For instance, prior to removal, exceptions to the Petition had not even yet been filed. Against this background, a stay pending appeal would not injure Plaintiffs.

3. The Public Interest Will Be Served by Avoiding Potentially Unnecessary Proceedings and Vindicating the Rights Provided by Federal Officer Removal.

A stay will also serve the public interest. The public will benefit from the efficiencies of avoiding potentially unnecessary state court proceedings. *See Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) (holding that "[t]he public interest does not support the [Government's] expenditure of time, money, and effort" proceeding with efforts that might ultimately be rejected on appeal); *Raskas*, 2013 WL 1818133, at *2 ("[A]s to the fourth factor, public interest favors granting a stay because it would avoid potentially duplicative litigation in the state courts and federal courts, thereby conserving judicial resources and promoting judicial economy."). In addition, "concerns underlying the federal officer removal statute . . . are important matters of public concern." *Humphries*, 2014 WL 1330034, at *2. That public concern is particularly pronounced where, as here, federal officer jurisdiction is predicated on activities undertaken by Defendants at the direction, and for the benefit, of the United States government to support the nation's war efforts and common defense. The public interests in efficient resolution of these claims, and in the vindication of important federal interests, therefore weigh in favor of a stay as well.

CONCLUSION

For the reasons explained above, the interests of the parties, the public, and the courts will be best served by a stay of the remand order in this case while the Fifth Circuit considers the significant jurisdictional questions at issue. Defendants respectfully request that this Court grant Defendants' motion for a stay pending appeal.[9]

[9] If this Court were nonetheless inclined to deny a stay pending appeal, Defendants respectfully request that the Court grant a temporary stay of the remand order while Defendants seek a stay pending appeal from the Fifth Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, a copy of the above and foregoing Defendants' Memorandum in Support of Motion for Stay of Remand Order Pending Appeal was electronically filed with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Alexandra White
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