

IN THE
Supreme Court of the United States

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

v.

MAYOR & CITY COUNCIL OF BALTIMORE, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

SUPPLEMENTAL BRIEF OF RESPONDENT

Victor M. Sher, *Counsel of Record*

Matthew K. Edling

Martin D. Quiñones

Sher Edling LLP

100 Montgomery St., Suite 1410

San Francisco, CA 94104

(628) 231-2500

vic@sheredling.com

matt@sheredling.com

marty@sheredling.com

Dana P. Moore

Suzanne Sangree

Baltimore City Law Department

100 N. Holliday Street, Suite 109

Baltimore, MD 21202

(443) 388-2190

law.danapmoore@baltimorecity.gov

suzanne.sangree2@baltimorecity.gov

Counsel for Respondent – Mayor & City Council of Baltimore

SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Supreme Court Rule 15.8, Respondent Mayor & City Council of Baltimore (“City”) submits this Supplemental Brief to inform the Court of the recent decision of the United States Court of Appeals for the Tenth Circuit in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, __ F. 3d __, No. 19-1330, 2020 WL 3777996 (10th Cir. July 7, 2020) (“*Boulder*”). The opinion in *Boulder* issued after Respondent City submitted its Brief in Opposition to the Petition for Certiorari, and is discussed briefly in Petitioners’ Reply Brief. Reply Br. 3–5, 7.

The Tenth Circuit in *Boulder* embraced the prevailing view, now shared by nine circuits, that “when a district court issues a remand order premised on a § 1447(c) ground, [the court of appeals is] empowered to review that order only to the extent it addresses the removal bases explicitly excepted from § 1447(d)—in this case, removal under 28 U.S.C. § 1442.” 2020 WL 3777996 at *17. The *Boulder* decision further supports Respondent City’s showing that there is no “real or substantial split of authority sufficient to warrant certiorari review” concerning the limited scope of appellate jurisdiction under 28 U.S.C. § 1447(d). See Br. in Opp. 4; see also *id.* at 9–19. Because there is no significant split of authority requiring this Court’s intervention, the Petition should be denied.

1. The *Boulder* defendants, which included Petitioner ExxonMobil Corp., removed the case from Colorado state court asserting seven separate grounds for removal, including jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442. 2020 WL 3777996 at *2. The district court granted the plaintiffs’ motion to

remand pursuant to 28 U.S.C. §1447(c), rejecting all seven jurisdictional grounds for removal and finding that subject-matter jurisdiction was lacking. *Id.* The defendants appealed, asking the Tenth Circuit to consider all their rejected grounds for federal subject-matter jurisdiction rather than solely their federal-officer removal arguments under Section 1442. *Id.*¹ The Tenth Circuit thus faced the precise question presented by Petitioners: whether “the exception in § 1447(d) permitting review of federal officer removal under 28 U.S.C. § 1442 creates appellate jurisdiction to consider all of [the defendants’ other] asserted removal bases.” *Id.*

The Tenth Circuit first noted that although the majority of circuits “hold that a remand order premised on a § 1447(c) ground is reviewable only to the extent it addresses a § 1442 (federal officer) or 1443 (civil rights) removal argument,” “the Seventh Circuit fractured this unanimity on the scope of appellate review created by § 1447(d)” and permitted broad review of the entire remand order in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015). *Boulder*, 2020 WL 3777996 at *4.² The court

¹ The *Boulder* defendants sought a stay of the remand order pending appeal, by motion to the Tenth Circuit and by Application to Justice Sotomayor as Circuit Justice for the Tenth Circuit, both of which were denied. *See Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. Oct. 17, 2019) (denying stay pending appeal); *Suncor Energy (U.S.A.), Inc. v. Bd. of Cty. Commissioners of Boulder Cty.*, No. 19A428 (Oct. 22, 2019) (same).

² The court also acknowledged cases in the Fifth and Sixth Circuits applying the rule from *Lu Junhong*, which it observed were inconsistent with other case law from those same circuits. *See id.* at *4 n.7; *Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017); *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017). As Respondent City explained in its opposition brief, the *Decatur Hospital Authority* and *Mays* cases are of questionable validity at best and have no precedential weight even within the Fifth and Sixth Circuits, because they contradict prior settled authority within those circuits. *See Br. in Opp.* 15–18. The law in the Fifth and Sixth Circuits follows the prevailing view, not the position that Petitioners advocate.

then performed a thorough analysis of the text, context, history, and purposes of Section 1447(d), *see id.* at *5–*17, and concluded that “the proper construction of the statute is the narrower one adopted by the majority of federal circuits,” which extends appellate jurisdiction only to those grounds for removal explicitly exempted from the statute’s general bar on review. *Id.* at *17. The court repeatedly cited the opinion of the Fourth Circuit in this case, *see id.* at *3, *4, *8, *9, *14, *16, finding its “analysis persuasive,” *id.* at *9, and adopting it over the outlier reasoning in *Lu Junhong*.

2. The *Boulder* ruling makes clear that this Court’s intervention is not needed to resolve the Question Presented. In the three months since Petitioners filed their Petition, two more circuit courts of appeal squarely addressed the Question Presented in this case, and the unanimous panels in both cases fully agreed with the Fourth Circuit here. *See Boulder*, 2020 WL 3777996 at *17; *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 595–98 (9th Cir. 2020) (applying prevailing review and dismissing appeal “for lack of jurisdiction to the extent” it challenged “the district court’s ruling as to other bases for subject-matter jurisdiction” than federal officer removal). The Fourth Circuit’s holding in this case is identical to the holdings of nine of the ten circuits to have addressed the issue, three of which have now specifically rejected the reasoning of the Seventh Circuit’s outlier 2015 decision. There is no true split of authority to resolve, and no reason for this Court to grant the Petition.

Dated: July 22, 2020

Respectfully Submitted,

/s/ Victor M. Sher

Victor M. Sher