No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,
PLAINTIFFS-APPELLEES

v.

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (CIV. NO. 18-1672) (THE HONORABLE WILLIAM J. MARTINEZ, J.)

OPPOSITION OF APPELLANTS TO APPELLEES' MOTION FOR PARTIAL DISMISSAL

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CORPORATE DISCLOSURE STATEMENT

Appellant Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellant Suncor Energy Sales Inc. is wholly owned by appellant Suncor Energy (U.S.A.) Inc., which is wholly owned by Suncor Energy (U.S.A.) Holdings Inc., which is wholly owned by appellant Suncor Energy Inc. Suncor Energy Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In their pending motion for partial dismissal of this appeal, appellees ask the Court to resolve the scope of appellate review of a remand order under 28 U.S.C. § 1447(d). That important question of law lies at the heart of this appeal and is the subject of an entrenched conflict among the federal courts of appeals. This Court has not yet taken a position on that issue in a published opinion. Nevertheless, appellees invite quick resolution of the issue by a motions panel, seeking to prevent a merits panel from engaging in comprehensive analysis of the issue following full merits briefing and oral argument. The Court should decline appellees' efforts to decide a central issue in this appeal without merits briefing.

While Section 1447(d) generally precludes appellate review of remand orders, it also provides an express exception for review of an "order remanding a case" that was removed on certain grounds, including the federal-officer removal provision set forth in 28 U.S.C. § 1442. Appellees do not dispute that this Court has jurisdiction over this appeal by way of that exception. They contest only the *scope* of that jurisdiction, contending that appellate review is limited to review of the federal-officer ground for removal and does not extend to other grounds for removal encompassed in the district court's remand order.

That contention should be addressed in a binding decision by a merits panel—not in a procedural order at this early stage. A motion for dismissal is not a vehicle for narrowing the merits arguments for appeal. It is a vehicle for removing cases from a court of appeals' docket over which the court lacks jurisdiction. Indeed, this Court's rules do not even authorize motions for *partial* dismissal, but only motions to dismiss "the entire case" for lack of appellate jurisdiction.

Even if the motion were procedurally proper, the prudent course would be to refer the motion to the merits panel to resolve the important question of law it presents. That is precisely what the Ninth Circuit recently did on a nearly identical motion. *See County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir. Aug. 20, 2018) (Dkt. 58). Contrary to appellees' suggestion, early resolution of the motion would not actually reduce the merits panel's workload in this appeal, because the merits panel could reexamine any conclusions reached by the motions panel.

For the foregoing reasons, appellees' motion should be denied. At a minimum, the motion should be referred to the merits panel for resolution following full briefing and oral argument on the issues presented by this appeal.

STATEMENT

1. As a general matter, 28 U.S.C. § 1447(d) precludes appellate review of an order remanding a case to state court, reflecting "Congress's

longstanding policy of not permitting interruption of the litigation of the merits of a removed case." *Powerex Corp.* v. *Reliant Energy Services*, 551 U.S. 224, 238 (2007) (internal quotation marks omitted). But as part of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, Congress amended Section 1447(d) to add an exception for civil rights cases removed under 28 U.S.C. § 1443. Subsequently, in the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, Congress again amended Section 1447(d), permitting appellate review of cases removed under 28 U.S.C. § 1442, the federal-officer removal statute. Section 1447(d) now provides that "an order remanding a case to the State court from which it was removed pursuant to 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

2. Plaintiffs in this action are three local governments in Colorado: the Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder. Defendants are four energy companies: Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., Suncor Energy Inc., and Exxon Mobil Corporation. In April 2018, plaintiffs filed the underlying complaint against defendants in Colorado state court, alleging that defendants have contributed to global climate change, which in turn has caused harm in Colorado. *See* D. Ct. Dkt. No. 6. The complaint pleads a variety of claims, which appellees argue arise under state law. *See id.* Several similar cases filed by state and municipal governments against

various energy companies are pending across the country. *See, e.g.*, *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *City of New York* v. *B.P. p.l.c.*, No. 18-2188 (2d Cir.); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, No. 19-1644 (4th Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.) (consolidated with three similar cases); *City of Oakland* v. *B.P. p.l.c.*, No. 18-16663 (9th Cir.).

In June 2018, appellants removed this case to federal court. Appellants contended that federal jurisdiction over appellees' climate-change claims is present on several grounds, including that claims asserting harm from global climate change necessarily arise under federal common law, and that the allegations in the complaint pertain to actions that defendants took under the direction of federal officers. *See* D. Ct. Dkt. No. 1, at 6-12, 30-33. Appellees moved to remand the case to state court.

In September 2019, the district court granted appellees' motion to remand. *See* D. Ct. Dkt. No. 69, at 55. The court entered a temporary stay of the remand order, however, while the parties briefed whether a longer stay pending appeal was warranted. *See* D. Ct. Dkt. No. 71. Briefing on appellants' motion for a stay is now complete, and the parties are awaiting a decision from the district court.

3. Defendants appealed. *See* D. Ct. Dkt. 73. Appellees subsequently filed a motion styled a "motion for partial dismissal" of the appeal. In that

motion, appellees contend that this Court should enter an order stating that it lacks jurisdiction to determine whether removal was proper on any ground other than removal under the federal-officer removal statute.

ARGUMENT

A. Appellees' Motion For Partial Dismissal Is Not Permitted By This Court's Rules

Tenth Circuit Rule 27.3(A) governs motions to dismiss appeals in this Court. Under the plain text of that rule, "[a] party may file only" four types of "dispositive motions." 10th Cir. R. 27.3(A)(1)(a). As is relevant here, Rule 27.3(A) permits a party to move to "dismiss *the entire case* for lack of appellate jurisdiction" or for another reason permitted by statute or rule. *Id.* (emphasis added). The only other types of motions permitted by the rule are motions for summary disposition because of an intervening change of law or mootness; motions for remand for additional proceedings; and motions by the government to enforce appeal waivers. *See id.*

This Court's rules do not permit a party to move for partial dismissal on the ground that the Court lacks jurisdiction over only a portion of the arguments anticipated in an appellant's briefing. And for good reason: partial dismissal would simply waste judicial resources. Consideration by the merits panel of at least some of the issues in an appeal would still be necessary, and that panel could also reexamine any conclusions reached by the motions panel. *See, e.g.*, *Mann* v. *Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007).

Appellees have nevertheless filed a "motion for partial dismissal" that seeks only piecemeal resolution of the appeal—not to dispose of the appeal altogether, as is contemplated by Rule 27.3(A). Because appellees' motion is plainly not permitted by this Court's rules, the motion should be denied.

Appellees contend (Mot. 13) that a motion for partial dismissal is the "appropriate course" in this case, but they cite no rule to support that assertion. Instead, they rely on this Court's unpublished decision in *Sanchez* v. *Onuska*, No. 93-2155, 1993 WL 307897 (Aug. 13, 1993). But that case involved a motion to dismiss the *entire* appeal for lack of appellate jurisdiction. *Id.* at *1. While the panel granted only a portion of that motion, it did so in an order that disposed of the case entirely; the order dismissed the appeal in part and affirmed "[i]n all other respects." *Id.* at *2. *Sanchez* in no way supports the proposition that an appellee is entitled to seek piecemeal resolution of a portion of the issues in the appeal prior to merits briefing on the remaining issues. In any event, unlike the current version of Rule 27.3(A), the version in place at the time of *Sanchez* did not expressly limit motions to dismiss for lack of jurisdiction to motions seeking to dismiss the *entire* appeal; rather, the rule permitted motions to dismiss "on the ground that the appeal is not within the jurisdiction of this court." 10th Cir. R. 27.2.1 (1993).

Appellees also cite (Mot. 14) a handful of cases from other courts of appeals, which obviously have no bearing on the proper application of this

Court's rules. Like *Sanchez*, moreover, all of those cases involved circumstances in which courts of appeals partially dismissed appeals while simultaneously resolving the remainder of the appeal. *See, e.g.*, *Patel* v. *Del Taco, Inc.*, 446 F.3d 996, 1000 (9th Cir. 2006); *Davis* v. *Glanton*, 107 F.3d 1044, 1052 (3d Cir. 1997); *State Farm Mutual Automobile Insurance Co.* v. *Baash*, 644 F.2d 94, 97 (2d Cir. 1981); *Lee* v. *Murraybey*, 487 Fed. Appx. 84, 85 (4th Cir. 2012). They in no way support the sort of piecemeal resolution that appellees seek here.

B. Appellees' Motion Presents A Difficult Question Of Law That Should Be Resolved By A Merits Panel

Even if appellees' motion is not dismissed as procedurally improper, it should not be resolved at this stage. At issue is a difficult question of appellate jurisdiction appropriate for resolution only following full briefing and oral argument. The proper scope of appellate review under Section 1447(d) lies at the heart of this appeal, and it is an important question that has divided the courts of appeals. This Court, however, has not yet addressed the issue in a published opinion. Because this case presents an optimal opportunity for it to do so, plenary review of the issue is warranted.

1. As appellees concede (Mot. 5-8), the federal courts of appeals are divided over the appropriate scope of appellate review under the exception in Section 1447(d).

Six courts of appeals have held that appellate review is limited to the specific ground for removal that triggered the exception in Section 1447(d). *See Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Patel*, 446 F.3d at 998; *Alabama* v. *Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis*, 107 F.3d at 1047; *State Farm*, 644 F.2d at 96; *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976). None of those cases were resolved on motion.

More recently, three courts of appeals have held—all at the merits stage—that they may review a district court's entire remand order under Section 1447(d). *See Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015). As the Seventh Circuit explained, that conclusion is principally based on the plain text of Section 1447(d), which permits appellate review of any "order remanding a case to the State court from which it was removed pursuant to [S]ection 1442 or 1443." 28 U.S.C. § 1447(d). "To say that a district court's 'order' is reviewable," the court reasoned, "is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong*, 792 F.3d at 811.

In reaching that conclusion, the Seventh Circuit looked to the Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996). *See Lu Junhong*, 792 F.3d at 811-812. In *Yamaha*, the Court addressed whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court

of appeals could review only the particular *question* certified by the district court, or could instead address any issue encompassed in the district court's certified *order*. 516 U.S. at 204. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Id.* at 205. The Court observed that Section 1292(b)'s plain text made clear that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* Applying the logic of *Yamaha*, the Seventh Circuit reached a similar conclusion as to Section 1447(d). *Lu Junhong*, 792 F.3d at 811-813.

That conclusion, the Seventh Circuit noted, comports with the reason for the enactment of Section 1447(d)—namely, "to prevent appellate delay in determining where litigation will occur" when a case is removed to federal court. *Lu Junhong*, 792 F.3d at 813; *see Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006). Once Congress has permitted appellate review of a remand order, an appellate court "has been authorized to take the time necessary to determine the right forum," and "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Lu Junhong*, 792 F.3d at 813.

Appellees attempt to paint the Seventh Circuit's decision in *Lu Junhong* as an aberration that is out of step with the "near-unanimous position" of other

circuits. *See* Mot. 5-8. That is incorrect. Two other circuits have adopted the Seventh Circuit's rationale in recently published opinions. *See, e.g.*, *Decatur Hospital Authority*, 854 F.3d at 296; *Mays*, 871 F.3d at 442. And a leading treatise agrees that appellate review of a remand order under Section 1447(d) should "be extended to all possible grounds from removal underlying the order." 15A Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 3914.11, at 706 (2d ed. 2019).

All of the cases reaching a contrary conclusion predate the Seventh Circuit's comprehensive analysis in *Lu Junhong*, and all but one of them predate the Removal Clarification Act of 2011, which amended Section 1447(d) to make cases removed under the federal-officer removal statute reviewable on appeal. *See Patel*, 446 F.3d 996; *Davis*, 107 F.3d 1044; *State Farm*, 644 F.2d 94; *Noel*, 538 F.2d 633; *Appalachian Volunteers, Inc.* v. *Clark*, 432 F.2d 530, 534 (6th Cir. 1970). Because Congress is presumed to have been aware of the Supreme Court's decision in *Yamaha* when it made that amendment, its choice to retain the reference to reviewable "orders" in 2011 confirms that it intended to authorize plenary review on appeal. *See Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017).

Appellees suggest (Mot. 8) that the Sixth Circuit's decision in *Mays*, which sided with the Seventh Circuit, carries no weight because the issue was

not briefed by the parties in that case. If that is appellees' position, then they cannot rely on *City of Walker* v. *Louisiana*, 877 F.3d 563 (5th Cir. 2017) and *Jacks*, *supra*—cases in which the parties did not fully brief the scope of appellate review under the exceptions in Section 1447(d). That explains why the Fifth Circuit in *Walker* limited its discussion of the issue to dicta buried in a footnote. *See* 877 F.3d at 566 n.2. In *Jacks*, the Eighth Circuit purported to rest its holding on the "plain language" of Section 1447(d), but offered no real rationale for its conclusion—neglecting *Yamaha* and the 2011 Removal Clarification Act altogether. *See* 701 F.3d at 1229. The Sixth Circuit's decision in *Mays*, by contrast, incorporated by reference *Lu Junhong*'s comprehensive analysis. *See Mays*, 871 F.3d at 442.

2. This Court is one of the few courts of appeals that has not yet addressed the scope of appellate review under Section 1447(d) in a published decision. This case presents a clear opportunity for it to do so with the full benefit of merits briefing and oral argument—not in the abbreviated fashion that appellees seek. As appellees' motion well illustrates (at 4-13), the unresolved question implicates analysis of statutory text, congressional intent, and policy-based arguments—exactly the sort of analysis in which merits panels engage when creating circuit precedent.

That fact illustrates the fundamental defect in appellees' assertion that the unsettled question of law should be resolved on a motion to dismiss. There

can be no dispute that, through its amendments to Section 1447(d), Congress created jurisdiction over certain remand orders, including the one underlying this appeal. Appellees' only contention concerns what merits arguments an appellate court may consider. But on appeal, a motion to dismiss is not an appropriate vehicle in which to narrow the merits arguments at an early stage. That is, a motion to dismiss an appeal is not like a district-court motion to dismiss a complaint, which can be used to narrow issues prior to discovery. Appellate courts review all issues encompassed in the orders over which they have jurisdiction. Because this Court plainly has jurisdiction over the remand order in this case, any argument about the scope of that jurisdiction should be resolved by a merits panel following full briefing and argument.

Appellees suggest (Mot. 2, 5-6) that this Court's decision in *Sanchez*, 1993 WL 307897, controls the scope of appellate review in this case. But "it goes without saying" that, because *Sanchez* was unpublished, it is not binding. *United States* v. *Hansen*, 929 F.3d 1238, 1268 (10th Cir. 2019).

Nor is *Sanchez* persuasive, and this Court routinely declines to follow its unpublished decisions when they fail to persuade. *See, e.g.*, *Allen* v. *United Services Automobile Ass'n*, 907 F.3d 1230, 1239 n.5 (2018); *Lexington Insurance Co.* v. *Precision Drilling Co.*, 830 F.3d 1219, 1224 (2016) (Gorsuch, J.). *Sanchez* contravenes the plain text of Section 1447(d), *see Lu Junhong*, 792 F.3d at 811, and is inconsistent with this Court's more recent decision in *Coffey*

v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (2009). *Sanchez* also predates the Supreme Court's decision in *Yamaha* and Congress's subsequent enactment of the Removal Clarification Act of 2011, which confirmed Congress's intent to authorize plenary review on appeal of orders denying removal under the federal-officer removal statute. *See* pp. 10-11, *supra*.

C. This Court Has Jurisdiction To Review The District Court's Entire Remand Order

If the Court chooses to address the merits of appellees' motion before merits briefing and oral argument, it should hold that a court of appeals has jurisdiction under Section 1447(d) to review all of the grounds for removal fairly encompassed in the district court's remand order.

While the Court has never squarely addressed that issue, its decision in *Coffey*, 581 F.3d 1240, strongly suggests that it would review the district court's entire order, not simply the ground permitting appeal. *Coffey* concerned an appeal under the removal provisions of the Class Action Fairness Act (CAFA). CAFA provides that, "notwithstanding [S]ection 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). Because that language did not limit the court of appeals to review of the removal grounds under CAFA, this Court, relying on *Yamaha*, concluded that it could review the alternative grounds for removal asserted by the defendant and

addressed in the district court's order. *Coffey*, 581 F.3d at 1247; *accord Parson* v. *Johnson & Johnson*, 749 F.3d 879, 892-893 (10th Cir. 2014).

The same conclusion follows here, where the relevant statutory text also does not limit the scope of appellate review and indeed affirmatively authorizes review of the entire "order" appealed. *See* 28 U.S.C. § 1447(d). Yet appellees ignore *Coffey* altogether.

Instead, appellees attempt to circumvent *Yamaha*, but those attempts are unpersuasive. Appellees argue (Mot. 13) that the rationale of *Yamaha* should be limited to the statute at issue in that case. But this Court in *Coffey* already applied *Yamaha*'s rationale to another statutory provision concerning removal—which contains statutory language that mirrors the language of Section 1447(d) in all relevant respects. *See Coffey*, 581 F.3d at 1247.

Appellees also argue (Mot. 9, 11-12) that Section 1447(d) presents a "moral hazard problem" not present in *Yamaha*—specifically, a "great" risk that removal defendants will "try to manufacture appealability" on federal-officer grounds to obtain the benefit of appellate review, in contravention of Congress's intent to "ensure that determination of jurisdiction is a quick process." But once there is some appellate review, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Lu Junhong*, 792 F.3d at 813. And to the extent that litigants attempt to use federal-officer

removal simply as "a hook to allow appeal of some different subject," those "frivolous" removals could "lead[] to sanctions," including fee-shifting under 28 U.S.C. § 1447(c). *Id.*; *see* Fed. R. App. P. 38.

Appellees' analogy (Mot. 9-10) to *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), is misguided. In *Swint*, the Supreme Court held that, under the collateral-order doctrine, an appellate court with interlocutory jurisdiction over a qualified-immunity ruling applicable only to some of the appellants did not have discretion to exercise pendent appellate jurisdiction over a separate non-final merits ruling applicable to the remaining appellants. *Id.* at 40-42, 50. To the extent that the Court rejected arguments sounding in judicial economy in *Swint*, it did so because those arguments "drift[ed] away from" the relevant statutory text. *Id.* at 45.

That is not this case. Here, only one order (applicable to all of the appellants) was appealed, and "nothing is 'pendent' when considering all of the issues that led to th[at] order." *Lu Junhong*, 792 F.3d at 812 (distinguishing *Swint*). In addition, unlike the statute at issue in *Swint*, the plain text of Section 1447(d) supports broad appellate review. *See* pp. 8-9, *supra*.

CONCLUSION

Appellees' motion for partial dismissal should be denied. In the alternative, the motion should be referred to the merits panel that will resolve this appeal.

Respectfully submitted,

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OCTOBER 3, 2019

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the attached Opposition of Appellants to Appellees' Motion for Partial Dismissal is proportionally spaced, has a typeface of 14 points or more, and contains 3,666 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 3, 2019

CERTIFICATE OF DIGITAL SUBMISSION AND ANTIVIRUS SCAN

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the attached Opposition of Appellants to Appellees' Motion for Partial Dismissal, as submitted in digital form via the Court's ECF system, has been scanned for viruses using Malwarebytes Anti-Malware (version 1.75.0.1300, updated Oct. 3, 2019) and, according to that program, the document is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 3, 2019

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on October 3, 2019, the attached Opposition of Appellants to Appellees' Motion for Partial Dismissal was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 3, 2019