Case No. 19-1330

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Board of County Commissioners of Boulder County, et al., v. Suncor Energy, et al.

PLAINTIFFS-APPELLEES' MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Plaintiffs-Appellees ("Plaintiffs") – Boulder County, San Miguel County, and the City of Boulder, Colorado – brought suit in Colorado state court against Suncor and Exxon Mobil entities for their wrongful actions in causing, contributing to, and exacerbating alteration of the climate, thus damaging Plaintiffs' property, and the health, safety, and welfare of their residents. Plaintiffs brought only claims under Colorado state law. *See* Exhibit 1 (Amended Complaint). Nonetheless, Defendants-Appellants ("Defendants") removed the case to federal court, claiming no less than seven grounds for federal jurisdiction. *See* Exhibit 2 (Defendants' Notice of Removal).

The district court properly rejected each of these grounds, remanding this case to state court. *See* Exhibit 3 (Remand Order). Ordinarily, that would be the end of the matter; reflecting Congress' strong intent to resolve removal issues quickly, remand orders are generally "not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But among the seven grounds for removal raised, one of them presents an exception to non-appealability: the federal officer removal statute, 28 U.S.C. § 1442. *See* 28 U.S.C. § 1447(d). Suncor and Exxon Mobil claimed that they were "acting under" officers of the United States pursuant to 28 U.S.C. § 1442(a)(1), even though they are private oil companies engaged in a private business.

Defendants have made clear that they intend their appeal to encompass not just Section 1442, but all of their grounds for removal. That sort of bootstrapping has been rejected by nearly every court that has considered it, including this Court in a prior unpublished decision. *Sanchez v. Onuska,* No. 93-2155, 1993 U.S. App. LEXIS 20722, at *3-4 (10th Cir. Aug. 13, 1993) (per curiam).

Neither the Court nor the parties should be burdened with briefing or consideration of issues beyond the sole appealable ground for removal – federal officer jurisdiction under Section 1442. Plaintiffs therefore bring this Motion to dismiss the appeal with respect to any other issue.

II. ARGUMENT

A. Defendants intend to appeal grounds for removal that are non-reviewable

Defendants raised seven grounds for removal, including that the claims arise under federal law, that they present a substantial federal issue under *Grable & Sons Menal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), that they fall under federal bankruptcy jurisdiction, and that they fall under the Outer Continental Shelf Lands Act. Removal on these bases does not provide any right to appeal. 28 U.S.C. § 1447(d).

In fact, as originally written, the removal statutes did not allow *any* appeal at all. This reflects "'Congress's longstanding policy of not permitting interruption of the litigation of the merits of a removed case.'" *Harvey v. Ute Indian Tribe of the*

Uintah & Ouray Reservation, 797 F.3d 800, 805 (10th Cir. 2015) (quoting *Powerex Corp. v. Reliant Energy Servs*., 551 U.S. 224, 238 (2007)). In the 1964 Civil Rights Act, however, Congress added one exception to non-appealability: civil rights cases removed under 28 U.S.C. § 1443. More recently, in 2011, Congress amended Section 1447 again, adding a right to appeal for cases removed under 28 U.S.C. § 1442, the federal officer removal statute.

Defendants argued removal under Section 1442, arguing that "federal officers exercised control over ExxonMobil through government leases issued to it. Under these leases, ExxonMobil contends that it was required to explore, develop, and produce fossil fuels." Exhibit 3 at 44.

The district court soundly rejected this argument, finding "that Defendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and Plaintiffs' claims." *Id.* at 45. In doing so, the court was in good company; three courts considering similar climate-related claims against fossil fuel companies have recently concluded that the same argument does not provide federal jurisdiction. *See Rhode Island v. Chevron Corp.*, No. 18-395 WES, 2019 U.S. Dist. LEXIS 121349, at *19-20 (D.R.I. July 22, 2019) ("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 removal[.]"); *Mayor & City Council of Baltimore v. BP P.L.C,* No. ELH-18-2357, 2019 U.S. Dist. LEXIS 97438, at *55 (D. Md. June 10, 2019) (holding that the "attenuated connection between the wide array of conduct for which defendants have been sued and the asserted official authority is not enough to support removal"); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (finding no "reasonable basis for federal officer removal, because the defendants have not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims"; referring to the defendants' "dubious assertion of federal officer removal").

Defendants have, however, indicated that they intend to raise *all* of their grounds for removal in this appeal. In a recent motion for a stay pending appeal, Defendants relied heavily on their other arguments in claiming that they may prevail on appeal. *See* Exhibit 4 (Defendants' Motion for Stay Pending Appeal).

B. Only Defendants' federal officer removal is appealable

Defendants' attempt at bootstrapping non-reviewable grounds for removal through their questionable federal officer argument must be denied, and the appeal dismissed as to those grounds. The federal courts of appeals are nearly unanimous in ruling that an appeal under Section 1442 or Section 1443 does not entitle an appellant to bring in otherwise non-reviewable grounds for removal.

The statute makes clear that appeals are only permissible for federal officer removals under Section 1442 or civil rights removals under Section 1443:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d). This statute was not intended to allow a litigant to appeal other issues, let alone to add in a baseless Section 1442 or 1443 argument to manufacture appellate jurisdiction.

1. The clear weight of authority demonstrates that only federal officer removal is appealable

At least eight federal circuits have issued published opinions concluding that appeals under Section 1442 or 1443 are limited to those bases for removal, and this Court has done so in an unpublished opinion. The Seventh Circuit stands nearly alone in holding to the contrary. Because Section 1442 appeals were only authorized in 2011, most of this caselaw concerns Section 1443, but this makes little difference; both statutes are treated identically as to the right to appeal.

In *Sanchez v. Onuska*, No. 93-2155, 1993 U.S. App. LEXIS 20722, at *3-4 (10th Cir. Aug. 13, 1993) (per curiam), this Court held that it lacks jurisdiction to review "the portion of [a] remand order" that concerns a basis for removal not expressly excepted from Section 1447(d). In a case involving civil rights removal

under 28 U.S.C. § 1443, *Sanchez* held that other grounds for removal were "not reviewable" on appeal. *Id.*

Sanchez joined the near-unanimous position of the other circuits. At least eight other courts of appeal have held appellate jurisdiction is limited to the portion of the remand order tied to an express exception in Section 1447(d). *See City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 (5th Cir. 2017) (the federal officer exception does not allow the court "to review the entire remand order"); *Jacks v. Meridian Res. Co., LLC,* 701 F.3d 1224, 1229 (8th Cir. 2012) (the appellate court had jurisdiction to review district court's remand order as to federal officer removal, but under § 1447(d), "lack[ed] jurisdiction to review the . . . determination concerning the availability of federal common law"); *see also State Farm Mutual Auto. Ins. Co. v. Baasch,* 644 F.2d 94, 96, 97 (2d Cir. 1981) (appellate jurisdiction was limited to § 1443 grounds for removal); *Davis v. Glanton,* 107 F.3d 1044, 1047 (3d Cir. 1997) (same); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) (same); *see also Lee v. Murraybey,* 487 F. App'x 84, 85 (4th Cir. 2012); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970); *Patel v. Del Taco Inc,* 446 F.3d 996, 998 (9th Cir. 2006) (same); *Alabama v. Conley,* 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (same). *Accord Baltimore*, 2019 U.S. Dist. LEXIS 128168 at *15 (noting majority rule in holding that "only

the issue of federal officer removal would be subject to review on defendants' appeal of the remand").

Against this weight of authority, the Seventh Circuit disagreed, holding that litigants should be entitled to convert their otherwise non-reviewable grounds for removal into appealable issues simply by asserting removal under Section 1442 or 1443. *Lu Junhong v. Boeing Co.,* 792 F.3d 805, 811 (7th Cir. 2015). Yet the *Lu Junhong* panel was apparently unaware of the existing body of case law – including an unpublished Seventh Circuit case – addressing the exact same question with respect to the analogous exception for Section 1443. *See, e.g. City of Jeffersonville, Ind. v. Wright,* No. 93-1055, 1994 U.S. App. LEXIS 7661 (7th Cir. Mar. 14 1994) (jurisdiction to review remand order was limited to Section 1443, and did not include other aspects of order).

While decisions in the Fifth and Sixth Circuits seem, at first blush, to have followed *Lu Junhong*, they are readily distinguishable. In *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017), the court cited *Lu Junhong*, but held only that a remand based on a procedural defect (such as timeliness) was reviewable in its entirety where it included a Section 1442 argument. *Id.* at 296. *Decatur* acknowledged that where – as here – remand was based on lack of subject matter jurisdiction under Section 1447(c), appellate review is limited to the specific Section 1442 or 1443 grounds for removal. *Id.* at 296-97 (citing *Robertson*

v. Ball, 534 F.2d 63, 65 (5th Cir. 1976)). And the Fifth Circuit's more recent decision, *City of Walker*, harmonized *Decatur* and expressly noted that the court had previously "rejected" the argument "that the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order." 877 F.3d at 566 n.2.

In the Sixth Circuit, the panel in *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017), followed *Lu Junhong* without analysis. *Id.* at 442. But *Mays* is not persuasive, because the issue was not actually litigated. The appellees did not contest that the entire remand order was reviewable by virtue of a Section 1442 argument. *See* Pls.-Appellees' Corrected Br. at 1, *Mays v. City of Flint*, No. 16-2484, Dkt. 50 (6th Cir. Feb. 1, 2017). The failure to litigate the issue may be the reason that *Mays* apparently failed to recognize that a prior Sixth Circuit decision, *Appalachian Volunteers*, *supra*, had already come to the opposite conclusion. Even absent a conflict with prior Sixth Circuit law, the fact that the scope of appellate jurisdiction was not challenged renders the decision in *Mays* non-precedential. *See KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936).

Thus, the overwhelming weight of authority indicates that Defendants' appeal, made possible only by their invocation of Section 1442, is limited to that potential basis for removal.

2. Allowing appeal of all grounds for removal would frustrate Congress' intent.

Even if this Court were writing on a blank slate, without the benefit *Sanchez* and numerous decisions of sister circuits, it should decide that appeal is limited to the federal officer issue. Any other rule would encourage parties to advance baseless Section 1442 or Section 1443 arguments merely to obtain appellate review, and would not serve Congress' intent to ensure that determination of jurisdiction is a quick process that does not unduly delay substantive litigation.

The Supreme Court addressed a very similar question in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). The Court considered whether an appealable denial of qualified immunity also made a denial of summary judgment as to liability appealable, even though the latter otherwise would not be appealable. *Id.* at 43-44. The argument in favor of appealability was primarily a matter of "judicial economy." *Id.* The Court disagreed. It cited, among others things, a prior decision considering the appealability of a double-jeopardy ruling in a criminal case, finding that the scope of such appeals must be limited to the double-jeopardy issue: "'Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.'" *Id.* at 49 (quoting *Abney v. United States*, 431 U.S. 651, 663 (1977)). This reasoning applies with equal force here: allowing review of other

removal issues would encourage removing parties to assert frivolous federal officer claims in order to bring otherwise nonappealable removal arguments to the court of appeals.

The Seventh Circuit's decision in *Lu Junhong*, however, essentially ignored these concerns. While it acknowledged the risk that "litigants may cite §1442 or §1443 in a notice of removal when all they really want is a hook to allow appeal of some different subject," it dismissed this concern by noting that "a frivolous removal leads to sanctions." 792 F.3d at 813. But the Supreme Court itself – in *Swint*, *Abney*, and other cases – gave far more weight to this sort of risk.

The Seventh Circuit also acknowledged "that §1447(d) was enacted to prevent appellate delay in determining where litigation will occur," but it suggested that adding in more issues to an appeal already underway would only add "marginal delay" to the proceedings. 792 F.3d at 813. That is not obvious on its face; a court of appeals may be able to summarily dispose – even in an expedited manner – of a weak argument under Section 1442 (such as present here), while it may require more time to consider a range of other, more complex federal jurisdiction issues. Moreover, this ignores the fact that a party with a weak Section 1442 or 1443 argument may forego an appeal entirely if it knows that only that ground will be at issue, and that courts may be more likely to allow litigation to proceed in state court notwithstanding such an appeal.

The Seventh Circuit's analysis gives insufficient weight to Congress' concerns for rapid resolution of removal issues. In *Powerex Corp.*, for example, the Supreme Court emphasized the strength of these concerns, even in the context of suits against foreign sovereigns: "Section 1447(d) reflects Congress's longstanding 'policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.' Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem." 551 U.S. at 237-38 (internal citation omitted).

The Seventh Circuit also relied heavily on the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), in which the Court considered the scope of interlocutory appeals under 28 U.S.C. § 1292(b). *Yamaha* held that once the district court certifies that its order includes a significant question, the entire order is appealable. 516 U.S. at 205. But this rule does not present a similar moral hazard problem as the scope of a remand appeal. In the interlocutory appeal context, litigants cannot ensure themselves of appealability by including a substantial question in the district court's opinion, when they really want the court of appeals to review other questions that would not qualify for certification. There is little, if any, risk that the Section 1292(b) rule will cause litigants to try to manufacture appealability, because both the district court and the

court of appeals can preclude appeal and thus serve as gatekeepers. In the current context, however, that risk is great, because under *Lu Junhong*, the Defendant alone determines appellate jurisdiction.

The Seventh Circuit claimed that its conclusion is required by the text of Section 1447(d), without regard to any legislative intent or policy concerns. But Section 1447(d) does not state that, where removal is based on multiple grounds including Section 1442 or 1443, *all* removal arguments are appealable. Instead, it treats Section 1442 and 1443 removal as distinct from other removals. *See* 28 U.S.C. § 1447(d) (referring to removals done "pursuant to section 1442 or 1443"). The statute does not expressly contemplate the situation in which removal is done pursuant to one of these sections *and* other grounds, and most certainly does not indicate that, in this unacknowledged circumstance, all other grounds for removal should also be subject to appeal. Instead, the overall thrust of Section 1447(d) is to impose one of the most categorical bars to reviewability found anywhere in federal law, with only two narrow exceptions. Read as a whole, the text clearly indicates that review should be limited to Section 1442 and Section 1443 issues.

Nor is the textual analogy to *Yamaha* particularly strong. In interpreting Section 1292(b), *Yamaha* pointed to the distinction between the "question" certified by the district court, and the "order" subject to appeal. 516 U.S. at 205. Section 1292(b) expressly indicates that the question is a subset of the order – it

refers to an "order [that] involves a controlling question of law" – and specifies that it is the *order*, not the *question*, that is appealable. 28 U.S.C. § 1292(b). But no similar distinction is present in Section 1447(d). It simply refers to "an order remanding a case to the state court from which it was removed pursuant to section 1442 or 1443" as being appealable. This formulation does not suggest that the appealable "order" at issue is the *entire* order, as opposed to considering the portion dealing with Section 1442 as one order, and the portion dealing with other arguments as another order. There is no indication, as with Section 1292(b), that the appealable order is broader than the matter that qualifies for appealability.

In short, *Lu Junhong* provides no compelling reason, textual or otherwise, to depart from this Circuit's prior decision in *Sanchez* and the overwhelming weight of authority.

C. Partial dismissal is the appropriate course

Where grounds for appeal are raised that do not give rise to appellate jurisdiction, the appropriate course is to dismiss the appeal as to those arguments. In this case, such dismissal at the early stage will avoid unnecessary burdens on the parties and the Court in briefing and arguing matters that ultimately are outside this Court's appellate jurisdiction, and will allow the parties to focus on the only properly appealable matter: jurisdiction under Section 1442.

That is precisely what this Court did in *Sanchez*: "A remand of a case removed pursuant to § 1441(c) is not reviewable and must be dismissed for lack of jurisdiction. Thus, the portion of the remand order in this case concerning the § 1441(c) removal is not reviewable and must be dismissed for lack of jurisdiction." 1993 U.S. App. LEXIS 20722 at *2-3. Other courts have done the same. *E.g.*, *State Farm,* 644 F.2d 94, 97 (2d Cir. 1981) ("Insofar as the appeal challenges denial of removal under 28 U.S.C. § 1441(a), it is dismissed for want of appellate jurisdiction."); *Davis*, 107 F.3d at 1047 (holding that "insofar as the . . . appeal challenges the district court's rulings under 28 U.S.C. § 1441," it must be dismissed); *Lee*, 487 F. App'x at 85 ("To the extent that the district court concluded it lacked subject matter jurisdiction under removal provisions other than § 1443, we dismiss the appeal."); *Patel*, 446 F.3d at 998 (9th Cir. 2006) (dismissing appeal of remand order based on § 1441 for lack of jurisdiction, but reviewing portion of order based on § 1443(1)).

Thus, partial dismissal is the appropriate course of action here as to all grounds for removal other than Section 1442.

III. CONCLUSION

"For over a century now, statutes have . . . limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640-41 (2006).

This case presents an attempt to ignore those limitations, which this Court should not countenance. The text of 28 U.S.C. § 1447(d), and nearly every decision applying it, demonstrate that only Defendants' federal officer removal argument is appealable here. Any other result would encourage litigants such as Defendants to include baseless Section 1442 or Section 1443 arguments in their removal papers, counting on the inevitable appeal to delay substantive litigation.

The parties – and the Court itself – will be greatly assisted by a swift decision defining the scope of this appeal. All issues other than Section 1442 should be dismissed for lack of appellate jurisdiction.

STATEMENT PURSUANT TO 10TH CIR. R. 27.1

Earlier today, Plaintiffs' counsel inquired of Defendants' counsel, by email, whether they have a position on this motion. As of the filing of this motion, Plaintiffs have not received a response.

Dated: September 20, 2019

Respectfully submitted,

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Dated: September 20, 2019

/s/ Kevin S. Hannon
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Dated: September 20, 2019

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I hereby certify that I electronically filed this document with the Clerk of the Court using the ECF system on September 20, 2019, which will automatically generate and serve by e-mail a Notice of Docket Activity on Attorney Filers under Fed. R. App. P. 25(c)(2).

Dated: September 20, 2019

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