

No.

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
PETITIONERS

v.

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1447(d) of Title 28 of the United States Code generally precludes appellate review of an order remanding a removed case to state court. But Section 1447(d) expressly provides that an “order remanding a case * * * removed pursuant to” the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443, “shall be reviewable by appeal or otherwise.” Some courts of appeals have interpreted Section 1447(d) to permit appellate review of any issue encompassed in a district court’s remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes; other courts of appeals, including the Tenth Circuit in this case, have held that appellate review is limited to the federal-officer or civil-rights ground for removal. The question presented, which is also presented in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (to be argued Jan. 19, 2021), is as follows:

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court’s order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioners are Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation.

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

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

Respondents are the Board of County Commissioners of Boulder County; the Board of County Commissioners of San Miguel County; and the City of Boulder.

RELATED PROCEEDINGS

United States District Court (D. Colo.):

Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc., et al., Civ. No. 18-1672 (Sept. 5, 2019)

Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc., et al., Civ. No. 18-1672 (Oct. 7, 2019) (order denying motion for stay of the remand order pending appeal)

United States Court of Appeals (10th Cir.):

Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc., et al., No. 19-1330 (July 7, 2020)

Board of County Commissioners of Boulder County, et al. v. Suncor Energy (U.S.A.) Inc., et al., No. 19-1330 (Oct. 17, 2019) (order denying motion for stay of the remand order pending appeal)

United States Supreme Court:

Suncor Energy (U.S.A.) Inc., et al. v. Board of County Commissioners of Boulder County, et al., No. 19A428 (Oct. 22, 2019) (order denying application for recall of the remand order)

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PETITION FOR A WRIT OF CERTIORARI

Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-58a) is reported at 965 F.3d 792. The opinion of the district court (App., *infra*, 59a-113a) is reported at 405 F. Supp. 3d 947.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1447(d) of Title 28 of the United States Code provides:

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.

STATEMENT

This case presents the identical question as *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, on materially identical facts. As in *BP*, petitioners are energy companies that produce or sell fossil fuels; respondents are municipal governments that filed a complaint in state court asserting claims to recover for harms that they allege they have sustained and will sustain from the global operations of petitioners due to global climate change. As in *BP*, petitioners removed the case to federal court pursuant to the federal-officer removal statute and other removal statutes; the district court remanded the case to state court, and the court of appeals held that 28 U.S.C. 1447(d) deprived it of appellate jurisdiction to consider any of petitioners' grounds for removal except for the federal-officer ground. The question presented here, as in *BP*, is whether Section 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes.

Because this Court has already granted review in *BP* and has scheduled oral argument for January 19, 2021, the petition for a writ of certiorari in this case should be held pending the decision there. And for the reasons set forth

in the petitioners' merits brief in *BP*, the Court should hold in *BP* that Section 1447(d) authorizes a court of appeals to review the district court's entire remand order, including all grounds for removal asserted, in a case removed in part on federal-officer or civil-rights grounds. See Pet. Br. at 16-37, *BP*, *supra*. The Court should then grant the petition in this case and dispose of it as is appropriate.

A. Background

In the Judiciary Act of 1789, Congress permitted defendants to remove certain actions initially brought in state courts to the newly created federal courts. See ch. 20, § 12, 1 Stat. 79-80. Since then, Congress has established various grounds for removal and detailed procedures for removing cases. See 28 U.S.C. 1441-1455.

A defendant in state court removes an action by filing a "notice of removal" in the relevant federal district court. 28 U.S.C. 1446(a). The "notice of removal" must contain a "short and plain statement of the grounds for removal"—that is, the bases on which the defendant asserts that the district court has subject-matter jurisdiction over the action. *Ibid.*; see 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3733, at 702-704 (4th ed. 2018). The district court must then determine whether it has subject-matter jurisdiction. See 28 U.S.C. 1447(c). If it determines that it does not, it must remand the case to state court. See *ibid.*

Federal courts of appeals have limited jurisdiction to review an order remanding a removed action to state court. The general rule, set forth in the first clause of 28 U.S.C. 1447(d), is that "an order remanding a case to [state court] is not reviewable on appeal or otherwise." But the second clause of Section 1447(d) expressly provides that any "order remanding a case to the [s]tate court

from which it was removed pursuant to” the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443, is “reviewable by appeal or otherwise.”

The provisions expressly permitting appellate review of remand orders arose from separate legislation. Congress enacted the provision permitting appeals of cases removed under the civil-rights removal statute as part of the Civil Rights Act of 1964. See Pub. L. No. 88-352, § 901, 78 Stat. 266. Congress enacted the provision permitting appeals of cases removed under the federal-officer removal statute as part of the Removal Clarification Act of 2011. See Pub. L. No. 112-51, § 2(d), 125 Stat. 546. Those provisions, now codified together in 28 U.S.C. 1447(d), permit review “by appeal or otherwise” of the district court’s “order remanding [the] case” to state court.

B. Facts And Procedural History

1. In 2017, a number of state and local governments began filing lawsuits in state courts against various energy companies, most of them nonresidents of the forum States. The plaintiffs alleged that the companies’ worldwide production, sale, and promotion of fossil fuels led to the emission of greenhouse gases and thereby contributed to global climate change. The plaintiffs have primarily asserted that the production, sale, and promotion of fossil fuels violate various state-law duties, including common-law nuisance; they have sought compensatory and punitive damages as well as equitable relief.

The defendants removed those lawsuits to federal court. They asserted multiple bases for federal jurisdiction, including that the allegations in the complaints pertain to actions the defendants took at the direction of federal officers, see 28 U.S.C. 1442, and that the plaintiffs’ climate-change claims necessarily arise under federal

common law, see, e.g., *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). As of the filing of this petition, 19 related cases are pending in federal courts nationwide in which the parties are actively litigating the question of removal, either in district court or on appeal.¹

2. Petitioners are energy companies that produce or sell fossil fuels. In 2018, respondents filed a complaint in Colorado state court against petitioners, alleging that petitioners had caused or will cause harms by contributing to global climate change. App., *infra*, 2a-3a. Respondents assert similar claims and seek similar relief as in the other climate-change cases, including *BP*.

Petitioners removed this action to the United States District Court for the District of Colorado. In their notice of removal, petitioners raised many of the same bases for federal jurisdiction as have the defendants in other cli-

¹ See *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (to be argued Jan. 19, 2021); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (petition for cert. due Jan. 4, 2021) (appeal consolidating six actions); *City of Oakland v. BP p.l.c.*, 960 F.3d 570 (9th Cir. 2020) (petition for cert. due Jan. 11, 2021) (appeal consolidating two actions); *Rhode Island v. Shell Oil Products Co.*, 979 F.3d 50 (1st Cir. 2020) (petition for cert. due Mar. 29, 2021); *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.*, Civ. No. 18-7477 (N.D. Cal.); *Connecticut v. Exxon Mobil Corp.*, Civ. No. 20-1555 (D. Conn.); *Delaware v. BP America Inc.*, Civ. No. 20-1429 (D. Del.); *District of Columbia v. Exxon Mobil Corp.*, Civ. No. 20-1932 (D.D.C.); *City & County of Honolulu v. Sunoco LP*, Civ. No. 20-163 (D. Haw.); *County of Maui v. Sunoco LP*, Civ. No. 20-470 (D. Haw.); *Minnesota v. American Petroleum Institute*, Civ. No. 20-1636 (D. Minn.); *City of Hoboken v. Exxon Mobil Corp.*, Civ. No. 20-14243 (D.N.J.); *County of Charleston v. Brabham Oil Co.*, Civ. No. 20-3579 (D.S.C.). Two related cases are also pending in federal court. See *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir.); *King County v. BP p.l.c.*, Civ. No. 18-758 (W.D. Wash.).

mate-change lawsuits, including that removal was permissible under the federal-officer removal statute and because respondents' climate-change claims necessarily and exclusively arise under federal common law. App., *infra*, 3a-4a.

The district court remanded the case to state court based on a lack of subject-matter jurisdiction. App., *infra*, 59a-113a. With respect to the federal-officer ground for removal, the district court concluded that petitioners failed to show that they "acted under the direction of a federal officer" or that there was a sufficient "connection" between any such actions and respondents' claims. *Id.* at 103a. The district court also rejected petitioners' other grounds for removal, including the argument that respondents' claims arise under federal common law. *Id.* at 63a-100a, 106a-113a. Petitioners unsuccessfully sought a stay of the remand order in both the district court and in the court of appeals. *Id.* at 114a-130a (district court), 131a-132a (court of appeals); see also No. 19A428 (Oct. 22, 2019) (denying application for recall of the remand order).

3. The court of appeals affirmed the district court's remand order. App., *infra*, 1a-58a. The court of appeals began its analysis by considering whether it had "appellate jurisdiction to review the district court's entire remand order" or "just the portion dispensing with the federal officer removal argument." *Id.* at 9a. Petitioners argued that the plain text of Section 1447(d) allowed the court of appeals to review the entire order, but the court of appeals found Section 1447(d) to be "ambigu[ous]" because it did not "expressly contemplate the situation in which removal is done" on federal-officer or civil-rights grounds "*and* other grounds." *Id.* at 15a (citation omitted).

In the court of appeals' view, the "statutory context" favored review limited to a federal-officer or civil-rights

ground for removal because petitioners' interpretation would allow defendants to seek review of otherwise non-reviewable grounds for removal by "simply including a colorable [argument]" for federal-officer or civil-rights removal in the notice of removal. App., *infra*, 18a-19a. The court also concluded that its interpretation of Section 1447(d) was "confirm[ed]" by the presumption against federal jurisdiction, the prior-construction canon, and the broader purposes of Section 1447(d). *Id.* at 31a-42a. Accordingly, the court concluded that it was "empowered to review [the remand order] only to the extent it address[ed]" petitioners' argument for removal under the federal-officer removal statute. *Id.* at 42a.

The court of appeals proceeded to hold that the federal-officer removal statute did not permit removal of this case. App., *infra*, 42a-58a. The court reasoned that, to the extent that petitioners relied on activity taken pursuant to their contractual relationships with the federal government, petitioners were not acting under federal officers in carrying out those actions. *Ibid.*

REASONS FOR GRANTING THE PETITION

This petition presents the identical question as *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189: namely, whether 28 U.S.C. 1447(d) permits a court of appeals to review any ground for removal encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443. The Court granted review in *BP* and has scheduled oral argument for January 19, 2021.

Because the Court is poised to resolve the question presented here in *BP*, the Court should hold this petition pending the decision there. And for the reasons explained in the petitioners' brief in *BP*, the Court should hold in *BP*

that Section 1447(d) authorizes a court of appeals to review the district court's entire remand order, including all grounds for removal asserted, in a case removed in part on federal-officer or civil-rights grounds. See Pet. Br. at 16-37, *BP*, *supra*. The Court should then grant the petition in this case and dispose of it accordingly in light of its decision in *BP*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, and then disposed of accordingly.

Respectfully submitted.

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DECEMBER 2020