

WRITER'S DIRECT DIAL NUMBER

202-223-7325

WRITER'S DIRECT FACSIMILE

202-204-7397

WRITER'S DIRECT E-MAIL ADDRESS

kshanmugam@paulweiss.com

April 10, 2020

VIA ELECTRONIC FILING

Christopher Wolpert
Clerk of Court
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Board of County Commissioners of Boulder County, et al.*
v. Suncor Energy (U.S.A.) Inc., et al., No. 19-1330

Dear Mr. Wolpert:

Pursuant to Federal Rule of Appellate Procedure 28(j), defendants-appellants write in response to plaintiffs-appellees' letter regarding the Fourth Circuit's decision in *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644, 952 F.3d 452, 2020 WL 1069444 (4th Cir. Mar. 6, 2020).

In affirming the district court's remand order, the Fourth Circuit concluded that it was bound by prior precedent to review only the federal-officer ground for removal. Notably, the appellants in the Fourth Circuit, including Exxon Mobil Corporation (one of the appellants here), have since filed a petition for a writ of certiorari with the United States Supreme Court on the question 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. *See* No. 19-1189 (docketed Mar. 31, 2020). This case presents that same question, and there is no binding precedent on the question in this Circuit. The response to the petition is currently due on April 30.

The Fourth Circuit also held that removal under the federal-officer removal statute was improper. That decision was incorrect. The court based its holding on

the erroneous conclusion that Baltimore had challenged only “the promotion and sale of fossil fuel products,” 2020 WL 1069444, at *9, and not the defendants’ production activities under federal oversight and control. Yet even accepting that some claims did focus on promotion and sales, the public-nuisance and trespass claims, as well as the injuries alleged, centered on production and combustion of fossil fuels. The Fourth Circuit itself acknowledged that it “might be inclined” to permit removal “[i]f production and sales went to the heart of Baltimore’s claims.” *Id.* at *10. Because production and sales were central to at least some of the claims, the Fourth Circuit erred in affirming the remand order.

We would appreciate it if you would circulate this letter to the panel at your earliest convenience.

Very truly yours,

/s/ Kannon K. Shanmugam

Kannon K. Shanmugam

cc: Counsel of record (via electronic filing)

**CERTIFICATE OF DIGITAL SUBMISSION,
ANTIVIRUS SCAN, AND PRIVACY REDACTIONS**

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the foregoing letter, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2020.04.08.07, updated April 8, 2020) and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

/s/ Kannon K. Shanmugam

Kannon K. Shanmugam

April 10, 2020