In the United States Court of Appeals for the Tenth Circuit

No. 19-1330

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

v.

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

OPPOSITION OF APPELLANTS TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Almost two months ago, the Fourth Circuit issued its decision in *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 952 F.3d 452 (Mar. 6, 2020)—an appeal from a remand order in a climate-change lawsuit against several energy companies, including defendant Exxon Mobil Corporation (ExxonMobil) but not including any of the other defendants in this case. The Fourth Circuit held that it was bound by prior precedent to review only the validity of removal under the federal-officer removal statute, and it further held that removal under that statute was not permitted. *See id.* at 461-471. The defendants in that

case, including ExxonMobil, have since filed a petition for certiorari in the Supreme Court on the scope of appellate review of appealable remand orders. *See* No. 19-1189 (filed Mar. 31, 2019).

Now, on the eve of oral argument, plaintiffs in this case have filed a motion for summary affirmance based on the Fourth Circuit's decision, seeking to invoke the doctrine of offensive non-mutual issue preclusion. That motion is both untimely and meritless, and it should be denied.

1. "[G]ood cause" is necessary to file a motion for summary affirmance based on "a supervening change in law" more than 14 days after the notice of appeal is filed. *See* 10th Cir. R. 27.3(A)(1)(b), (3)(a). Relegating their justification to a footnote (Mot. 1 n.2), plaintiffs have not shown "good cause" for their last-minute filing. While it is true that the Fourth Circuit's decision was issued after briefing was complete, plaintiffs did not file this motion in the immediate aftermath of that decision. Instead, more than a month ago, plaintiffs filed a letter citing the decision as supplemental authority under Rule 28(j), in which they did not so much as mention the doctrine of issue preclusion. Plaintiffs do not explain why they could not have filed their motion for summary affirmance at that time; the most charitable explanation is that they only came up with the idea sometime thereafter. And because plaintiffs waited until the eve of oral argument, defendants have had to forgo the full allotted time

so as to file the response before the argument date. *See* 10th Cir. R. 27.3(A)(4). The Court should not countenance such gamesmanship.

2. Plaintiffs also face a forfeiture problem. Under plaintiffs' own reasoning (Mot. 2-4), there is no reason why the *district court's* orders in the *Baltimore* case would not also have had preclusive effect. The district court there rejected the defendants' federal-officer ground for removal, *see* 388 F. Supp. 3d 538, 567-569 (D. Md. 2019), and it also ruled, in denying the defendants' motion for a stay pending appeal, that "only the issue of federal officer removal would be subject to review" on appeal, D. Ct. Dkt. 192, 2019 WL 3464667, at *4 (July 31, 2019). Because "[t]he law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's holding," plaintiffs could have made exactly the same preclusion arguments based on those rulings in their briefing in this Court (or indeed in the district court). *Pharmacia & Upjohn Co.* v. *Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999); *see* 18A Charles A. Wright, et al., *Federal Practice and Procedure* § 4433, at 72 (3d ed. 2017) (Wright & Miller). Yet they never did—instead citing the district court's orders in *Baltimore* only as persuasive authority. *See* Br. of Appellees 4, 11, 17, 18, 22, 35, 39, 45, 50, 51; D. Ct. Dkt. 64.

By only now arguing that the outcome in *Baltimore* has preclusive effect, plaintiffs have forfeited the argument. Especially given that offensive issue preclusion is "not available as a matter of right," *Wallace B. Roderick*

Revocable Living Trust v. *XTO Energy, Inc.*, 725 F.3d 1213, 1221 (10th Cir. 2013), the Court should not exercise its discretion to affirm on this never-before-raised ground. *See Stillman* v. *Teachers Retirement Equities Fund*, 343 F.3d 1311, 1323 (10th Cir. 2003); *United States* v. *Hall*, 798 Fed. Appx. 215, 220 (10th Cir. 2019).

3. In any event, the Court has effectively foreclosed the possibility of "summary" affirmance by carrying plaintiffs' motion with the merits of the appeal. *See* Order (Apr. 29, 2020). To the extent the Court now treats plaintiffs' motion as the equivalent of a supplemental brief, contending (belatedly) that the district court's remand order should be affirmed because the outcome in *Baltimore* has preclusive effect, the Court should reject that contention on the merits.

a. To begin with, non-mutual issue preclusion does not apply if the issue for which preclusion is sought is "one of law" and if "treating [the issue] as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based." *Pharmaceutical Care Management Association* v. *District of Columbia*, 522 F.3d 443, 446-447 (D.C. Cir. 2008); *see also* Restatement § 29(7); *Montana* v. *United States*, 440 U.S. 147, 162 (1979); *Chicago Truck Drivers Pension Fund* v. *Century Motor Freight, Inc.*, 125 F.3d 526, 531 (7th Cir. 1997). To hold otherwise "would prevent the court from performing its function of developing the law."

Pharmaceutical Care Management Association, 522 F.3d at 447 (citing Restatement § 29, cmt. i).

That rule applies with full force here. The question regarding the scope of this Court's appellate jurisdiction is a pure question of statutory interpretation. *See* 28 U.S.C. § 1447(d). And it would be particularly odd to afford preclusive effect here to the Fourth Circuit's decision on that question: there is no binding authority in this circuit on the question, and the Fourth Circuit resolved it simply by adhering to prior circuit precedent. *See Baltimore*, 952 F.3d at 459-461 (following *Noel* v. *McCain*, 538 F.2d 633 (4th Cir. 1976)). One circuit's respect for its precedent should not preclude a sister circuit from developing its own—particularly where, as here, there is a conflict among the courts of appeals on the question at issue. *See* Br. of Appellants 10-12.

The question of the merits of the federal-officer ground for removal is also a pure legal question not subject to non-mutual issue preclusion. The Fourth Circuit held that certain federal leases administered under the Outer Continental Shelf Lands Act (OCSLA) did not evidence the sort of 'unusually close' relationship that courts have previously recognized" as demonstrating that the removing party was "acting under" a federal officer—the first requirement for removal under the federal-officer removal statute. 952 F.3d at 465-466. The Fourth Circuit also held, based on its interpretation of the plaintiff's complaint, that the asserted claims lacked a sufficiently close connection

to the removing parties' activity under the leases—the second requirement for removal. *See id.* at 466-468. The Fourth Circuit's decision on each of those issues is appropriately characterized as "legal" for preclusion purposes because it concerns the "scope of the applicable legal rule" in the context of undisputed facts. Restatement § 28 cmt. b; *cf. Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1068 (2020); *Lenox MacLaren Surgical Corp.* v. *Medtronic, Inc.*, 847 F.3d 1221, 1230 (10th Cir. 2017).

b. In addition, while rulings on questions of jurisdiction are generally eligible for preclusive effect, *see, e.g.*, *Park Lane Resources Limited Liability Co.* v. *Department of Agriculture*, 378 F.3d 1132, 1136 (10th Cir. 2004), preclusion on those questions typically "takes the form of a direct estoppel against a second effort to assert the same basis of jurisdiction for the same claim." 18A Wright & Miller § 4436, at 149. Plaintiffs cite no case in which a federal court has permitted non-mutual offensive preclusion on an issue of subject-matter jurisdiction—and we are aware of none. *Cf. Davis* v. *Metro Productions, Inc.*, 885 F.2d 515, 518-519 (9th Cir. 1989) (declining to apply non-mutual offensive issue preclusion to prior determinations of personal jurisdiction). Indeed, as best we can tell, this Court has permitted jurisdictional issue preclusion only in actions "between the same parties." *Stewart Securities Corp.* v. *Guaranty Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979); *see Park Lane Resources*, 378 F.3d at 1136-1137; *Matosantos Commercial Corp.* v. *Applebee's International*,

Inc., 245 F.3d 1203, 1210 (10th Cir. 2001). As the leading treatise on federal procedure notes, "[g]reat care should be taken in approaching nonmutual preclusion on a question of subject-matter jurisdiction or removability." 18A Wright & Miller § 4436, at 149 n.15. Particularly given the peculiar and untimely way in which plaintiffs have raised the preclusion issue, this is not the case for visiting such a delicate topic.

c. In all events, jurisdictional issue preclusion applies only to the "precise issue of jurisdiction" decided in the prior matter. *Matosantos*, 245 F.3d at 1209-1210 (citation omitted); *see also*, *e.g.*, *Lopez* v. *Pompeo*, 923 F.3d 444, 447 (5th Cir. 2019); *Jackson* v. *Office of Mayor of District of Columbia*, 911 F.3d 1167, 1171 (D.C. Cir. 2018); 18A Wright & Miller § 4436, at 147, 151. And the question of federal-officer jurisdiction in this case is not identical to the one resolved by the Fourth Circuit. In determining that the defendants in *Baltimore* were not "acting under" a federal officer pursuant to the OCSLA leases, the Fourth Circuit relied primarily on an unexecuted form lease from 2017. *See* 952 F.3d at 464-465 (citing J.A. 233-239). Here, however, defendants are relying on OCSLA leases executed in 1979 and 2016 by ExxonMobil-related entities, and those leases, while similar, are not identical to the form lease in *Baltimore*. *Compare*, *e.g.*, App. 50, § 10, *with* J.A. at 234, § 10, *Baltimore*, *supra* (4th Cir.). That lack of identity alone prevents preclusion.

The same is true of the Fourth Circuit's conclusion that there was an insufficient nexus for purposes of federal-officer removal between the leases and the plaintiff's claims. The Fourth Circuit based that holding on its interpretation of the plaintiff's complaint in that case as primarily targeting the promotion, and not the production, of fossil fuels. *See* 952 F.3d at 467; *see also id.* at 466 (relying on promotion-based allegations in analyzing the "acting under" prong). At the same time, the court admitted that it "might be inclined" to permit removal "[i]f production and sales went to the heart of Baltimore's claims," *id.* at 468—as is the case here. *See*, *e.g.*, App. 74, 76, 159-160. The Fourth Circuit's complaint-specific analysis strips that holding of any preclusive effect.

d. Finally, plaintiffs concede that issue preclusion "does not run against the Suncor [d]efendants." Mot. 4. Even if the Fourth Circuit's decision had preclusive effect against ExxonMobil, therefore, this Court would still need to resolve all of the issues in this appeal raised by the remaining defendants. While plaintiffs contend that the Suncor defendants cannot alone press the federal-officer ground for removal on appeal if ExxonMobil is precluded, they offer no support for that proposition, and they do not dispute that Suncor could argue that the Court has jurisdiction to review the district court's *entire* remand order. Nor do plaintiffs contend that, if this Court does have jurisdic-

tion to review all of defendants' grounds for removal, the district court's decision in *Baltimore* precludes litigation of the non-federal-officer grounds for removal on the merits—a prudent decision given the Fourth Circuit's holding that it could not review those grounds. *See*, *e.g.*, *Health Cost Controls of Illinois, Inc.* v. *Washington*, 187 F.3d 703, 708-709 (7th Cir. 1999); Restatement § 28(1). For those reasons, as well as the reasons set out above, the motion for summary affirmance should be denied.

CONCLUSION

The motion for summary affirmance should be denied.

Respectfully submitted,

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MAY 4, 2020

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 Summary Affirmance is proportionally spaced, has a typeface of 14 points or more, and contains 1,901 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

MAY 4, 2020

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 Summary Affirmance, as submitted in digital form via the Court's ECF system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2020.05.02.04, updated May 2, 2020) 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

MAY 4, 2020

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 May 4, 2020, the attached Opposition of Appellants to Appellees' Motion for Summary Affirmance 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

MAY 4, 2020