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December 2, 2019

Via ECF

Patricia S. Connor
Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Re: *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, No. 19-1644

Dear Ms. Connor,

Plaintiff-Appellee Mayor and City Council of Baltimore writes pursuant to Fed. R. App. P. 28(j) to notify the Court of the United States Supreme Court's recent order denying certiorari in *Rheinstein v. Attorney Grievance Comm'n of Maryland*, 140 S. Ct. 226 (Mem), 2019 WL 4922758 (2019) (Ex. A). The order is relevant to the threshold issue of whether this Court's appellate jurisdiction extends to all bases for removal asserted by Defendants-Appellants and rejected by the district court, or is limited to reviewing their federal officer removal arguments pursuant to 28 U.S.C. §§ 1442 & 1447(d).

In *Attorney Grievance Comm'n of Md. v. Rheinstein*, 750 F. App'x 225, 226 (4th Cir. 2019) (per curiam) (unpublished) (Ex. B), the court affirmed in part a district court order "remanding for lack of subject matter jurisdiction under the federal officer removal statute," and dismissed for lack of appellate jurisdiction as to other alleged bases for removal. *Id.* (citing 28 U.S.C. § 1447(d)).

The defendant petitioned for certiorari, seeking review of:

> Whether, once an appeal of a remand order has been explicitly authorized by 28 U.S.C. § 1447(d), the appellate court has jurisdiction to review the entire order and all of the legal issues entailed in the decision to remand, . . . or whether the appellate court's jurisdiction to review a remand order is limited to the portion of the remand order addressing particular issues as the Fourth Circuit held in this case.

Petition for Cert., *Rheinstein v. Attorney Grievance Com'n. of Maryland*, No. 19-140, 2019 WL 3496290 (U.S., Jul 25, 2019) (Ex. C at 3). The first issue presented by Defendants-Appellants' Opening Brief here asks the same question. *See* Doc. 73 at 3 (July 29, 2019).

On Oct. 9, 2019, the Supreme Court denied certiorari. *See Rheinstein*, 140 S. Ct. 226 (Mem), 2019 WL 4922758. The Fourth Circuit decision is unpublished, but represents the

reasoned position upholding this Court's longstanding rule that remand orders are only reviewable to the extent expressly permitted by § 1447(d). *See Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976). The Court should apply that rule here.

Respectfully submitted,

/s/ Victor M. Sher
Victor M. Sher
Sher Edling LLP

Counsel for Plaintiff-Appellee

cc: All Counsel of Record (via ECF)

EXHIBIT A

140 S.Ct. 226
Supreme Court of the United States.

Jason Edward RHEINSTEIN, Petitioner,
v.
ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

No. 19-140
|
October 7, 2019

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

All Citations

140 S.Ct. 226 (Mem)

End of Document

EXHIBIT B

750 Fed.Appx. 225 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, Plaintiff-Appellee,
v.
Jason Edward RHEINSTEIN, Defendant-Appellant.

No. 17-2127
|
Submitted: January 28, 2019
|
Decided: February 5, 2019

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:17-cv-02550-MJG)

Attorneys and Law Firms

Jason E. Rheinstein, Appellant Pro Se. Brian E. Frosh, Attorney General of Maryland, Michele J. McDonald, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

Before WILKINSON and MOTZ, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Opinion

Dismissed in part and affirmed in part by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jason Edward Rheinstein appeals the district court's orders granting the Attorney Grievance Commission of Maryland's motion to remand for lack of federal jurisdiction and denying Rheinstein's emergency motion to stay remand pending appeal or for reconsideration or for appropriate relief. We dismiss in part and affirm in part the district court's orders denying the notice of removal and remanding the case to state court and denying Rheinstein's emergency motion.

"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 [28 U.S.C. §§ 1442 or 1443 (2012)] shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (2012). Rheinstein removed the action pursuant to the federal officer removal statute, 28 U.S.C. § 1442, and, pursuant to 28 U.S.C. §§ 1331, 1441 a (2012), on the ground that it presented a federal question.

> A defendant seeking to remove a case under Section 1442 must establish (1) [he] is a federal officer or a person acting under that officer; (2) a colorable federal defense; and (3) the suit is for an act under color of office, which requires a causal nexus between the charged conduct and asserted official authority.

Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC, 865 F.3d 181, 186 (4th Cir. 2017) (internal citations and quotation ***226** marks omitted). Because Rheinstein failed to meet his burden of establishing that he met these criteria, we affirm the portion of the district court's orders remanding for lack of subject matter jurisdiction under the federal officer removal statute and denying the emergency motion. The remainder of the appeal must be dismissed because this court lacks jurisdiction to review the district court's order. *See* 28 U.S.C. § 1447(d).

We therefore dismiss the appeal in part and affirm in part. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED IN PART, AFFIRMED IN PART

All Citations

750 Fed.Appx. 225 (Mem)

EXHIBIT C

19-140

No. 19-____

In the Supreme Court of the United States

JASON EDWARD RHEINSTEIN,

Petitioner,

v.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, once an appeal of a remand order has been explicitly authorized by 28 U.S.C. § 1447(d), the appellate court has jurisdiction to review the entire order and all of the legal issues entailed in the decision to remand, as the majority of circuits to consider the issue had previously held, or whether the appellate court's jurisdiction to review a remand order is limited to the portion of the remand order addressing particular issues as the Fourth Circuit held in this case.

PARTIES INVOLVED

The style of the case identifies the parties involved. Petitioner Jason Edward Rheinstein is an individual Maryland resident who is an attorney licensed to practice law in Maryland and several other jurisdictions. Respondent Attorney Grievance Commission of Maryland is an administrative agency in the judicial branch of Maryland State Government, which regulates Maryland attorneys.[1]

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[1] This case involves the removal of a state court proceeding to federal court. In the state court proceedings, the Attorney Grievance Commission of Maryland is the "Petitioner" and Jason Edward Rheinstein is the "Respondent." There are documents in the Appendix from the state court proceedings. As they appear in the Appendix documents, the term "Petitioner" refers to the Attorney Grievance Commission of Maryland, and the term "Respondent" refers to Jason Edward Rheinstein.

LIST OF PROCEEDINGS

Attorney Grievance Commission of Maryland v. Jason Edward Rheinstein
United States District Court, Maryland
Civil Action No. 17-cv-2550
Decision Dates: September 20, 2017,
September 22, 2017

Attorney Grievance Commission of Maryland v. Jason Edward Rheinstein
United States Court of Appeals, Fourth Circuit
Case No. 17-2127
Decision Date: February 5, 2019
Date of Order Denying Petition for Rehearing and Rehearing *en banc*: March 11, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jason Edward Rheinstein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in this case.[2]

OPINIONS BELOW

The opinion of the Fourth Circuit (App.1a-3a) is unreported. *Atty. Griev. Comm'n. of Md. v. Rheinstein*, 750 Fed. Appx. 225 (4th Cir. 2019). The Fourth Circuit's order denying Petitioner's Petition for Rehearing or Rehearing En Banc (App.31a) is also unreported. The appeal was taken from unreported opinions of the United States District Court for the District of Maryland (the "District Court") entered on September 20, 2017 (App.9a-21a) and September 22, 2017 (App.4a-8a).[3]

JURISDICTION

The Fourth Circuit issued its panel decision on February 5, 2019. Petitioner timely filed a petition

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[2] In the Fourth Circuit, this case was styled as *Atty. Griev. Comm'n. of Md. v. Jason Edward Rheinstein*, No. 17-2127.

[3] An earlier unreported opinion of the District Court, which is referenced in the September 20, 2017 opinion, appears at App.23a-30a.

for panel rehearing or rehearing en banc, and the Fourth Circuit denied that petition on March 11, 2019. The Chief Justice extended the time for filing this petition to July 25, 2019. *See* No. 18A1285. This Court has jurisdiction to review the decision of the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

- **28 U.S.C. § 1447(d)**

  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.

INTRODUCTION

This petition raises an exceptionally important and recurring question inuring to the jurisdiction of the courts of appeal to review remand orders that Congress has explicitly exempted from the general bar of 28 U.S.C. § 1447(d), namely remand orders in cases removed pursuant to § 1442 or § 1443. The circuits have split on the question as to whether, once an appeal of a remand order has been specifically authorized by § 1447(d), the appellate court has jurisdiction to review the entire order and all of the issues entailed in the decision to remand or whether the appellate court's juris-

diction is limited to a portion of the remand order pertaining to specific legal issues.

The issue in this case arises because the Petitioner removed this case from state court to federal court and asserted two bases for removal: federal officer jurisdiction pursuant to § 1442 and federal question jurisdiction pursuant to § 1441/§ 1331. The federal district court remanded the case, and the Petitioner appealed to the Fourth Circuit. The Fourth Circuit concluded that § 1442 did not support removal and that its jurisdiction to review the remand order was limited to that issue. As such, it dismissed the portion of Petitioner's appeal pertaining to federal question jurisdiction.

The Fourth Circuit's decision to dismiss the appeal in part was erroneous and inconsistent with prior decisions of this Court, the decisions of other circuits, and the plain language and intent of § 1447(d), The Fourth Circuit should have followed the approach of the Seventh Circuit in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015) and determined that "once an appeal of a remand "order" has been authorized by statute, the appellate court may consider all of the legal issues entailed in the decision to remand."[4] The Seventh Circuit's approach has been followed by two

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[4] Had the Fourth Circuit followed the approach of the Seventh Circuit, it would have reviewed the entire remand order and all the legal issues entailed in the decision to remand, including, whether federal question jurisdiction existed in this case. Ultimately, this Court should vacate the Fourth Circuit's decision, and remand the case to that Court for it to consider the entire remand order, and all the legal issues entailed in the decision to remand.

other circuits and it is entirely consistent with the plain language and intent of § 1447(d) as well as prior decisions of this Court. It is also the approach that has been advocated by the leading treatise on the subject of federal practice and procedure.

This case presents an ideal opportunity for the Court to articulate a uniform interpretation of § 1447(d) consistent with the plain language of that provision and resolve the circuit split on an issue that will undoubtedly recur in the future. Certiorari is warranted.

STATEMENT OF THE CASE[5]

A. Overview of Case and the Discovery Responses Leading to Petitioner's Removal of the Case

On February 17, 2016, Respondent initiated this case with the filing of a complaint (the "Complaint") in the Maryland state court alleging various violations of the then-extant Maryland Lawyers' Rules of Pro-

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[5] Citations to the Appendix to the Petition are provided herein in the form of (App.###) where "###" is the page number in the Appendix. Citations to the Joint Appendix filed in the Fourth Circuit (ECF No. 55) are provided herein in the form of (JA ####) where "####" is the cited page number. Citations to the Opening Brief of Appellant (ECF No. 83), which was filed by Petitioner in the Court below, appear as "Open. Br. at ##" where "##" is the cited page number. Citations to the Response Brief of Appellee (ECF No. 97), which was filed by Respondent in the Court below, appear as "Resp. Br. at ##" where ## is the cited page number. Citations to the Reply Brief of Appellant (ECF No. 126), which was filed by Petitioner in the Court below, appear as "Repl. Br. at ##" where "##" is the cited page number.

fessional Conduct (MLRPC) in connection with litigation involving Petitioner's former clients and the clients of an opposing counsel named Matthew G. Hjortsberg ("Hjortsberg"), who in March 2012, filed a grievance with the Respondent against Petitioner. (App.35a-61a).

During the state court proceedings, Petitioner obtained discovery from Respondent in the form of deposition testimony (App.70a-75a) and interrogatory responses (App.62a-64a) conclusively establishing the facts that, *inter alia*, Respondent is asserting (i) a claim that Petitioner violated MLRPC 3.1[6] by developing and filing a *qui tam* case, in which two of Hjortsberg's clients were defendants (hereinafter "*Qui Tam* I")[7], in the District Court on June 20, 2012

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[6] MLRPC 3.1 provides

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

[7] The interrogatory responses attached, and incorporated by reference, a document called "Schedule A," which purported to show each rule that was allegedly violated by each of the respective actions of Petitioner that were enumerated in the Complaint. *See* App.65a-69a. Schedule A was consistent with the deposition testimony of Respondent's designee, and with respect to the filing of *Qui Tam* I, revealed that Respondent alleges Petitioner violated, *inter alia*, MLRPC 3.1. (App.70a-74a). The deposition testimony and Schedule A revealed the exact same thing with respect to the filing of the second *qui tam* case at issue. (App.74a-75a).

(hereinafter "Operative Claim No. 1"); and (ii) a claim that Respondent violated MLRPC 3.1 by developing and filing a second *qui tam* case in which several of Hjortsberg's clients were defendants (hereinafter "*Qui Tam* II"),[8] in the District Court on July 13, 2012 (hereinafter "Operative Claim No. 2").[9] The fact that the Respondent was asserting the Operative Claims was significant because it necessarily meant that the Respondent was placing the merits of the *Qui Tam* Cases at issue in this case, since a claim that a case is "frivolous" (and therefore that its filing violated MLRPC 3.1) is inherently a claim about the merits of the case.[10]

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[8] Hereinafter, *Qui Tam* I and *Qui Tam* II are sometimes collectively referred to as the "*Qui Tam* Cases." The *Qui Tam* Cases both related to real estate transactions involving FHA-insured mortgages that were alleged to have been fraudulently procured and to have resulted in losses to the Government. (*See* JA 346-61). The *Qui Tam* Cases remained under seal for nearly 2.5 years after which time the Government declined intervention in both cases in November 2014. (App.58a, ¶ 66). However, with respect to the transactions and scheme at issue in *Qui Tam* I, the Government pursued and ultimately obtained guilty pleas from defendants in three parallel criminal cases (the "QTI Parallel Criminal Cases"). *See Open. Br.* at 15-16.

[9] Hereinafter, Operative Claim No. 1 and Operative Claim No. 2 are sometimes collectively referred to as the "Operative Claims." It is irrefutable that no court has ever found any filing by Petitioner to be "frivolous" or sanctionable. (JA 17-18).

[10] *See Repl. Br.* at 29 n. 20 (citing *Atty. Griev. Comm'n. v. Donnelly*, 458 Md. 237, 314 (2018)). Petitioner sought to have the matter tried in the federal court in order to, *inter alia*, guarantee the availability of critical witnesses and information necessary to resolve the Operative Claims. *Repl. Br.* at 21-22.

B. Removal to the District Court

In accordance with 28 U.S.C. § 1446(b)(3), within 30 days after receiving the aforementioned discovery from Respondent establishing the fact that Respondent was asserting the Operative Claims,[11] on September 1, 2017, Petitioner filed a timely notice of removal and removed this case to the District Court pursuant to 28 U.S.C. § 1442(a)(1),[12] and in the alternative, 28 U.S.C. § 1441 (the general removal statute) and 28 U.S.C. § 1331. (JA 8-38).[13]

1. Asserted Basis for Removal Under § 1442(a)(1) (Federal Officer Jurisdiction)

Petitioner asserted that, with respect to the Operative Claims, he satisfied all three elements for removal under the FORS. *Open. Br.* at 42-78; *Repl. Br.* at 4-27.[14]

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[11] It is notable that, at the beginning of the case in May 2016, Petitioner attempted removal based upon the face of the Complaint itself, but the Respondent effectively denied the fact it was asserting the Operative Claims, and the District Court determined the fact could not be ascertained from the face of the Complaint itself. *See* App.28a ("The ethical misconduct claims asserted by the AGC Complaint are not based on the fact that [Petitioner] was counsel in federal *qui tam* litigation").

[12] Hereinafter, 28 U.S.C. § 1442(a)(1) is sometimes referred to as the "Federal Officer Removal Statute" or the "FORS."

[13] In *Kolibash v. Committee on Legal Ethics of West Virginia Bar*, 872 F.2d 571, 575 (4th Cir. 1989), the Fourth Circuit held that attorney disciplinary cases are subject to the removal statutes.

[14] It is well-established that a private person seeking to remove a case to federal court under the FORS must satisfy three elements with respect to at least one of the claims in the case: (1) the

With respect to the "acting under" element, Petitioner asserted that a *qui tam* relator and his attorney are a type of government contractor who acts under the Executive in preparing, filing and prosecuting *qui tam* litigation to assist the Government in recovering monetary losses sustained through fraud. *Open. Br.* at 47-55; *Repl. Br.* at 5-11.[15]

"acting under" element; (2) the "federal defense" element; and (3) the "for or relating to" element. *Sawyer v. Foster Wheeler, LLC*, 860 F.3d 249, 254 (4th Cir. 2017). "[R]emoval of the entire case is appropriate so long as a single claim satisfies the [FORS]." *Zeringue v. Crane Co.*, 846 F.3d 785, 794 (5th Cir. 2017).

[15] For the proposition that a *qui tam* relator is a type of government contractor, Petitioner cited *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) ("[T]he FCA's *qui tam* provisions operate as an enforceable unilateral contract.") and *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (Holding relators have Article III standing in *qui tam* cases because the FCA effects a partial contractual assignment of the Government's damages claim). For the proposition that an FCA relator acts under the Executive, Petitioner cited *Brockovich v. Cmty. Med. Ctrs.*, 2007 U.S. Dist. LEXIS 21355 at *16-17 (E.D. Ca. 2007) ("*Qui tam* statutes generally have important procedural safeguards, since they involve "the delegation of some sovereign attributes" from the government to the private citizen . . . the Executive Branch must retain control over a *qui tam* relator to satisfy the Take Care Clause of the United States Constitution . . ."); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) ("The Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator"); and *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989) ("The relator is subject to a host of controls designed to permit the reassertion of executive litigative authority"). For the proposition that an attorney for a *qui tam* relator also functions as a type of government contractor that effectively doubles as an attorney for the Government, Petitioner cited, *inter alia*, *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89 (2d Cir. 2008) (holding that a *qui tam*

With respect to the "federal defense" element, Petitioner asserted he has numerous colorable federal defenses to the Operative Claims. For example, as to Operative Claim No. 1, Petitioner asserted that *Qui Tam* I was not "frivolous," and thus, he has a defense to Respondent's claim, hinging upon a question arising under the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "FCA"). *See Open. Br.* at 56-64; *Repl. Br.* at 15-27. He asserted that the plausibility of the defense is supported by, *inter alia*, the results in the QTI Parallel Criminal Cases, in one of which the Government obtained a monetary judgment for the losses it sustained in 26 of the 27 transactions at issue in *Qui Tam* I. *Id.*[16] Petitioner asserted that the results in the three QTI Parallel Criminal Cases established that the methodology used to identify the transactions at issue in *Qui Tam* I was objectively reasonable. *Id.* With respect to Operative Claim No. 2, Petitioner asserted that *Qui Tam* II was not "frivolous," and thus, he also has a defense to that claim, hinging upon a question arising under the FCA. *Id.* at 64. He asserted that the plausibility of the defense is supported by, *inter alia*, the fact that the Government investigated the transactions at issue in *Qui Tam* II for nearly 2.5 years before making its intervention decision and that the same methodology used to identify the transactions at issue in *Qui Tam* I had also been used to

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relator who is not an attorney cannot prosecute a *qui tam* case because the relator's attorney effectively doubles as an attorney for the Government and only a licensed attorney can represent another in litigation).

[16] It is notable that Respondent has never disputed any of the facts underpinning any of Petitioner's alleged federal defenses. *See generally Resp. Br.* at 23-45.

identify the transactions at issue in *Qui Tam* II. *Id.* at 64-65.

With respect to the "for or relating to" element, Petitioner asserted it is clearly satisfied in this case because, as to the Operative Claims, the asserted official authority and the charged conduct are one in the same. *Open. Br.* at 77-78; *Repl. Br.* at 27-28. Namely, the development and filing of the *Qui Tam* Cases in the District Court, something Petitioner and his former client assert they were authorized to do by the FCA. *Id.*

2. Asserted Basis for Removal Under § 1441 and § 1331 (Federal Question Jurisdiction)

Petitioner alternatively asserted a basis for removal under § 1441 and § 1331, namely federal question jurisdiction. First, citing *Grable & Sons Metal Products v. Darue Eng'g. & Mfg.*, 545 U.S. 308 (2005), Petitioner asserted that the Operative Claims hinge upon a substantial question of federal law because the issue of whether or not the *Qui Tam* Cases were "frivolous" (and hence whether MLRPC 3.1 was violated in filing them) hinges purely upon resolution of a question arising under the FCA. *Open. Br.* at 57-58, 79; *Repl. Br.* at 29-30.

Petitioner further argued that, in the first instance, the Operative Claims raise a question of federal law for another reason, and that due to preemption, the state code of professional conduct could not have been violated, as to the Operative Claims, so long as the District Court's own code of professional conduct was not violated. *Open. Br.* at 72-75, 80; *Repl. Br.* at 29-30. This is because neither MLRPC 3.1 nor any other

state rule of professional conduct directly applies to any action (including the filing of the *Qui Tam* Cases) taken by an attorney in the District Court. *Id.* Rather, Petitioner asserted, the District Court's own rules of professional conduct apply and questions arising under those rules are matters of federal law.[17] In sum, Petitioner argued, so long as the District Court's own rules of professional conduct were not violated in the Petitioner's filing of the *Qui Tam* Cases, the Operative Claims necessarily fail because neither MLRPC 3.1 nor any other state rule could have been violated. As such, Petitioner maintained, the Operative Claims hinge upon a substantial question of federal law, and the District Court had jurisdiction to hear those claims pursuant to 28 U.S.C. § 1331. *See Grable*, 545

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[17] Petitioner cited *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 108 (M.D. N.C. 1993) for the proposition that "[This Court in *In re Snyder*, 472 U.S. 634, 645 n. 6 (1985)] has made it clear beyond peradventure that a federal court's decision to admit to practice or discipline an attorney arises from an exercise of that court's inherent power. Furthermore, the standards which arise from exercise of that power must be found in federal law." Petitioner asserted that, although the District Court, through its Local Rule 704, has adopted the MLRPC, this does not necessarily mean that the interpretation or application of any given rule will necessarily be the same in the federal court as it is in the state court. *McCallum*, 149 F.R.D. at 108 ("This Court has adopted a code of conduct in its local rules. Local Rule 505 utilizes the Code of Professional Responsibility promulgated by the Supreme Court of North Carolina. Notwithstanding, this Court must look to federal law in order to interpret and apply those rules. That is, even when a federal court utilizes state ethics rules, it cannot abdicate to the state's view of what constitutes professional conduct . . . ") (internal citation omitted).

U.S. at 308.[18] Petitioner maintained that this case forms one case or controversy as defined in Article III of the United States Constitution, and therefore, that the District Court had supplemental jurisdiction over all of Respondent's remaining claims pursuant to 28 U.S.C. § 1367. *Open. Br.* at 80.

C. The Motion for Remand, the District Court's Orders and the Fourth Circuit Appeal

On September 5, 2017, Respondent filed a motion for remand arguing lack of federal jurisdiction. Over Petitioner's opposition, the District Court granted the motion for remand on September 20, 2017. (App.9a-22a). The District Court rejected both of Petitioner's asserted bases for federal jurisdiction and concluded that it did not have jurisdiction to hear the case. *Id.* Later, on September 20, 2017, Petitioner filed an emergency motion for reconsideration. The District Court denied the motion on September 22, 2017. (App.4a-8a). On September 25, 2017, Petitioner filed a timely notice of appeal seeking review of the District Court's orders by the Fourth Circuit. (App.32a-34a).

The parties filed briefs in the Fourth Circuit, and thereafter, on February 5, 2019, a panel of the Fourth Circuit issued an unpublished *per curiam* opinion in this matter. (App.1a-3a). Without any discussion or

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[18] Put another way, Petitioner asserted that he was entitled, in the first instance, to have any claims regarding his conduct in the filing of the *Qui Tam* Cases judged by the District Court. *See Open. Br.* at 80 (citing *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) ("When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct")).

analysis, the panel concluded that the "[Petitioner] failed to meet his burden of establishing that" he satisfied the three elements required for a private person to remove an action under the FORS. (App.2a). Based upon this conclusion, the panel affirmed the District Court's decision with respect to the portion thereof pertaining to the FORS. *Id.* Based upon the conclusion that § 1447(d) barred it from considering the Petitioner's asserted alternative basis for removal (*i.e.*, federal question jurisdiction), the Fourth Court dismissed the remainder of Petitioner's appeal without addressing that issue. (App.2a-3a).[19] On February 19, 2019, Petitioner filed a Petition for Rehearing and Rehearing En Banc, which the Fourth Circuit denied on March 11, 2019. (App.31a).

Petitioner contends that the Fourth Circuit erred in dismissing his appeal in part. Petitioner contends that once review of a remand order has been authorized by 28 U.S.C. § 1447(d), the appellate court has jurisdiction to review the entire remand order and all the legal issues entailed in the decision to remand. As such, Petitioner contends that, rather than limiting its review to any issues surrounding the applicability of the FORS, the Fourth Circuit should have considered the entirety of Petitioner's appeal, and thus, it should have addressed Petitioner's asserted alternative basis for removal (*i.e.*, federal question jurisdiction) and any other issues entailed in the decision to remand.

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[19] It is highly notable that even Respondent did not argue that the Fourth Circuit lacked jurisdiction to hear any portion of Petitioner's appeal. *See generally Resp. Br.* at 23-45.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR SPLIT, AMONG THE CIRCUITS TO HAVE CONSIDERED THE ISSUE, AS TO WHETHER AN APPELLATE COURT MAY REVIEW THE ENTIRE REMAND ORDER (AND ALL THE LEGAL ISSUES ENTAILED THEREIN) IN CASES WHERE REVIEW IS EXPLICITLY AUTHORIZED BY 28 U.S.C. § 1447(d)

Generally, "[t]he policy of Congress opposes interruptions of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the case is removed." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006). As such, "[f]or over a century now, statutes have accordingly limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court." *Id.* (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346-48 (1976)). The current incarnation of the statute limiting appellate review of remand orders is 28 U.S.C. § 1447(d). *Kircher*, 547 U.S. at 640. [20] The bar of § 1447(d) has been held to apply equally to cases removed under the general removal statute and to those removed under other provisions. *Id.* (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995)).

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[20] In *Thermtron Prods.*, this Court held that § 1447(d)'s bar on appellate review of remand orders was limited to remands based on the grounds specified in § 1447(c). Those grounds are a defect in removal procedure or lack of subject matter jurisdiction.

Notwithstanding its general policy, Congress has at times, exempted certain remand "orders" from § 1447(d)'s bar. *Kircher*, 547 U.S. at 641 n. 8. Indeed, as the plain language of § 1447(d) reveals, an example of remand "orders" explicitly exempted from the bar to appellate review are "orders" in cases (such as this) removed pursuant to 28 U.S.C. § 1442. *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 295 (5th Cir. 2017).

Although § 1447(d) explicitly authorizes appellate review of remand "orders" in cases removed pursuant to § 1442, there is controversy over the scope of review that is permissible in such cases. Is the appellate court's review limited to just the portion of the remand order pertaining to § 1442 (and/or other legal issues for which there exists a specific exemption from the § 1447(d) bar) or may the appellate court review the entire remand order and all the legal issues entailed in the decision to remand?

There is a clear split among the circuits regarding this question. Prior to the Fourth Circuit's decision in the case *sub judice*, over the past several years, four circuits had addressed the question.

In *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224 (8th Cir. 2012), the Eighth Circuit addressed the issue. In that case, the plaintiff, Shannon Jacks, on behalf of herself and others similarly situated, sued the defendants in a Missouri state court alleging state law violations in connection with health insurance plans the defendants administered. *Id.* at 1228. Thereafter, the defendants removed the action to federal court asserting three bases for removal: (1) federal officer jurisdiction pursuant to § 1442; (2) the Class

Action Fairness Act (CAFA); and (3) federal question jurisdiction pursuant to 28 U.S.C. § 1441 and § 1331. *Id.* The district court granted a motion by Ms. Jacks to remand the case, and the defendants appealed to the Eighth Circuit, which was confronted with the question regarding the permissible scope of appellate review for a remand order where the review was specifically authorized by § 1447(d). *Id.* at 1228-29. In its opinion, the Court noted that neither side had cited authority or presented a coherent argument regarding the question. *Id.* Nonetheless, ultimately, the Eighth Circuit held that even when § 1447(d) or another statute authorizes review of a remand order, only the issue behind the exception to § 1447(d) is reviewable. *Id.* Based upon that determination, the Court concluded that it had jurisdiction to review issues regarding two of the three asserted bases of removal: § 1442 and the CAFA. *Id.* At the same time, the Court concluded that it lacked jurisdiction to review any issues concerning the defendants third basis of removal: federal question jurisdiction. *Id.*

A few years after *Jacks*, the Seventh Circuit was confronted with the same question in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015). In that case, the plaintiffs, passengers on an Asiana Airlines flight that crashed into a seawall upon attempting to land at SFO International Airport in 2013, filed lawsuits against Boeing in the Illinois state courts contending that the design of various aircraft systems had contributed to the crash. *Id.* at 807. Boeing removed the suits to federal court and asserted two bases of removal: (1) federal officer jurisdiction pursuant to § 1442; and admiralty jurisdiction pursuant to § 1441 and § 1333. *Id.* at 807-08. The U.S. District Court for

the Northern District of Illinois remanded the suits for lack of subject matter jurisdiction, and Boeing appealed to the Seventh Circuit. *Id.* at 808. After reviewing Boeing's argument with regard to § 1442, the Seventh Circuit concluded, as had the lower court, that § 1442 did not support removal. *Id.* at 810. The plaintiffs took the position that, upon reaching the conclusion that § 1442 did not apply, the appeal was done on the purported basis that § 1447(d)'s bar to appellate review precluded the Seventh Circuit from considering Boeing's asserted alternative basis for removal (admiralty jurisdiction). *Id.* at 811. Citing this Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), Boeing argued that once an appeal of an order has been explicitly authorized by statute, the appellate court reviews the whole order and not just particular issues or reasons. *Id.*[21] Applying *Yamaha Motor* and its own earlier precedent in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005),[22] the Seventh Circuit agreed with Boeing and noted in relevant part:

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[21] In *Yamaha Motor*, this Court addressed the permissible scope of review for interlocutory orders certified for appeal pursuant to 28 U.S.C. § 1292(b). 792 F.3d at 811. The statute permits the appellate court to review an interlocutory order if the district court certifies that particular issues meet the statutory requirements. This Court held that once an appeal of such an interlocutory order is accepted, the appellate court reviews the entire "order" rather than just particular issues. *Id.*

[22] In *Brill*, the Seventh Circuit had held that once an appeal of a remand order was authorized by CAFA, it could review the entire remand order and all the legal issues entailed in the decision to remand, including federal question jurisdiction. 792 F.3d at 811. After determining that CAFA did not support removal,

> Section 1447(d) itself authorizes review of the remand order, because the case was removed (in part) pursuant to § 1442 . . . [O]nce an appeal of a remand "order" has been authorized by statute, the court of appeals may consider all of the legal issues entailed in the decision to remand.
>
> . . . [A]nother court of appeals has come to a contrary conclusion. *Jacks v. Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012), holds that, even when a statute authorizes review of a remand order, only the issue behind the exception to § 1447(d) is reviewable; consideration of other issues is blocked by § 1447(d), the court stated. For this proposition, it cited—nothing. *Jacks* did not discuss the significance of the statutory reference to review of an "order." It did not mention *Yamaha Motor*. It did not mention *Brill* . . .
>
> [* * *]
>
> The [Supreme] Court remarked in *Kircher*, [*supra*,] 547 U.S. at 641 n.8, that Congress has on occasion made the rule of § 1447(d) inapplicable to particular "orders"—and for this the Court cited, among other statutes, § 1447(d) itself. We take both Congress and *Kircher* at their word in saying that, if appellate review of an "order" has been authorized, that means review of the "order." Not par-

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the Court went on to conclude that removal had been proper based upon federal question jurisdiction.

> ticular reasons for an order, but the order itself.
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> [* * *]
>
> If we go beyond the text of § 1447(d) to the reasons that led to its enactment, we reach the same conclusion. The Supreme Court has said that § 1447(d) was enacted to prevent appellate delay in determining where litigation will occur. Since the suit must be litigated somewhere, it is usually best to get on with the main event. But once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum. The 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 811-13 (emphasis added; internal citations omitted).[23]

Citing *Lu Junhong* in 2017, the Sixth Circuit followed suit in *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) and concluded that once it had been authorized by § 1447(d) to review a remand order,

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[23] Interestingly, after deciding that it had jurisdiction to review the entirety of the remand order, the Seventh Circuit in *Lu Junhong* went on to review Boeing's second asserted basis of removal (admiralty jurisdiction). *Id.* at 813-18. Upon completing that review, the Court decided that admiralty jurisdiction existed; and therefore, that remand had been improper. *Id.*

it could review the whole order. The Court noted in relevant part, "This timely appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the [defendants] removed the case under 28 U.S.C. § 1442. Our jurisdiction to review the remand order also encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441" (emphasis added).

Also citing *Lu Junhong* in 2017, the Fifth Circuit followed suit in *Decatur Hospital*, *supra*, 854 F.3d at 295, and came to the same conclusion regarding its ability to review the entirety of a remand order that it had been authorized to review by § 1447(d). The Court noted in relevant part, "Like the Seventh Circuit, we take both Congress and *Kircher*[, *supra*, 547 U.S. at 641 n.8] at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons for an order, but the order itself" (emphasis added; internal quotation marks and brackets omitted).

Thereafter, as noted *supra*, in its February 2019 opinion in this case, the Fourth Circuit concluded, as had the Eighth Circuit in *Jacks*, that its jurisdiction to review the remand order extended only to the portion of the order addressing the issue behind the exception to § 1447(d). (App.2a-3a). For that reason, upon deciding that § 1442 did not support removal of this case, the Court did not address the secondary basis of removal asserted by Petitioner (*i.e.*, federal question jurisdiction). *Id.* The Fourth Circuit's decision further exacerbated the already-existing and clear circuit split

and presents a strong reason for this Court to grant certiorari and decide the question presented.[24]

II. FOR THE REASONS STATED BY THE SEVENTH CIRCUIT IN *LU JUNHONG*, THAT DECISION AND THE DECISIONS OF THE SIXTH AND FIFTH CIRCUITS IN *MAYS* AND *DECATUR HOSPITAL*, RESPECTIVELY, WERE CORRECT WHEREAS THE DECISIONS OF THE EIGHTH CIRCUIT IN *JACKS* AND THE FOURTH CIRCUIT IN THIS CASE WERE ERRONEOUS

Lu Junhong and the decisions that followed it, were correct, as they were fully consistent with this Court's precedents as well as the purpose and plain language of § 1447(d). As the Seventh Circuit explained in *Lu Junhong* and as the Fifth Circuit reiterated in *Decatur Hospital*, this Court's decision in *Kircher* recognizes that Congress intended to exempt some remand "orders" from § 1447(d)'s bar. 547 U.S. at 641 n.8. The plain language of § 1447(d) clearly contemplates that the exemption is not for particular reasons or issues associated with a remand "order," but rather the remand "order" itself in any cases removed pursuant to § 1442 or § 1443. This language suggests that Congress intended the appellate courts be able to review the entirety of the "order" and any reasons or issues therein. Interpreting § 1447(d) in this manner is entirely consistent with the manner in which this Court interpreted 28 U.S.C. § 1292(b) in *Yamaha Motor*. Namely, permitting appellate review

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[24] It should be noted that, as of this writing, other than the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, the Petitioner is not aware of any other circuits to have addressed the question presented in this case.

of the entire "order" rather than just particular issues. As the Seventh Circuit noted in *Lu Junhong*, there is no reason to treat orders subject to appellate review, pursuant to § 1447(d), any differently from orders subject to appellate review, pursuant to § 1292(b).

Furthermore, it would not advance the purpose of § 1447(d) to interpret the statute as only permitting review of particular reasons or issues in remand "orders" where review has been explicitly authorized. The purpose of the statute, as was aptly articulated by the Seventh Circuit in *Lu Junhong*, is to prevent delay in determining the forum in which litigation will occur. 792 F.3d at 813. Once appellate review of a remand order has been authorized by Congress, however, limiting the scope of review of such "order" would not significantly prevent any delay because the additional time required to decide an extra issue in a case already pending before the appellate court would be marginal. *Id.* Indeed, the leading treatise on Federal Practice & Procedure recognizes this fact and supports the approach taken by the courts in *Lu Junhong* and the cases that followed it:

> Review should be extended to all possible grounds for removal underlying the order. Once an appeal is taken there is very little to be gained by limiting review; the only plausible concern is that an expanded scope of review will encourage defendants to rely on strained arguments under § 1442 or § 1443 in an effort to support appeal on other grounds. Sufficient sanctions are available to deter frivolous removal arguments that this fear

> should be put aside against the sorry possibility that experience will give it color.

Lu Junhong, 792 F.3d at 812 (quoting Edward H. Cooper, 15A *Wright & Miller Federal Practice & Procedure* § 3914.11 (2014 rev.)) (emphasis added; internal brackets and ellipses omitted).

In contrast to the approach taken by the courts in *Lu Junhong*, *Mays*, and *Decatur Hosp.*, there do not exist any compelling reasons that particularly support the approach taken by the Eighth Circuit in *Jacks* and the Fourth Circuit in this case–that even when § 1447(d) authorizes review of a remand order, only the issue behind the exception to § 1447(d) is reviewable. *See* 792 F.3d at 812. Both circuits failed to discuss the significance of § 1447(d)'s references to review of an "order." *Id.* They further did not mention *Kircher*, *Yamaha Motor* or any other relevant authorities such as *Brill*. *Id.*

Perhaps even more importantly, the decisions in *Jacks* and this case are not consistent with the plain language or purpose of § 1447(d) and they do not comport with this Court's decisions in *Kircher* and *Yamaha Motor*. They further do not comport with the approach advocated by the leading treatise on the subject. For these reasons, the approach taken by the Eighth Circuit in *Jacks* and the Fourth Circuit in this case is simply wrong. Thus, this Court should grant *certiorari* to correct the Fourth Circuit's error and hold that the right approach is the one taken by the courts in *Lu Junhong*, *Mays*, and *Decatur Hospital*.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING A QUESTION OF EXCEPTIONAL IMPORTANCE THAT WILL RECUR IN THE FUTURE; A UNIFORM INTERPRETATION OF § 1447(d) IS NECESSARY TO ENSURE THAT PARTIES ARE NOT TREATED DIFFERENTLY DEPENDING UPON WHERE THE CASE IS LITIGATED

This case presents a clean vehicle for this Court to decide the question presented and articulate a uniform interpretation of § 1447(d) that is consistent with the plain language of the statute. The material facts are all undisputed: (1) Petitioner removed the case from a state court to federal court; (2) Petitioner asserted two bases for removal: federal officer jurisdiction and federal question jurisdiction; (3) The District Court granted a motion by Respondent and remanded the case; (4) Petitioner appealed the remand order to the Fourth Circuit; (5) The Fourth Circuit, after opining that federal officer jurisdiction did not support removal of the case, dismissed the remainder of Petitioner's appeal on the purported basis that § 1447(d) deprived it of jurisdiction to consider the remaining issues in the remand order; and (6) The majority of circuits to have considered the issue before this case had concluded that once § 1447(d) authorizes appellate review of a remand order, the appellate court reviews the entire "order" and not just particular issues or reasons. No other issues cloud this Court's review of the case.

Because the question presented is the subject of a circuit split and because it inures to the jurisdiction of the courts of appeal to review remand orders specifically exempted from § 1447(d)'s bar on appellate

review, the question is one of exceptional importance. *See e.g.*, Fed. R. App. P. 35(b)(1)(B). Since parties removing cases frequently cite more than one basis of removal (*e.g.*, § 1442 and § 1441/§ 1331), the issue presented by this case will undoubtedly recur in the future. Thus, it is clearly in the public interest for this Court to grant review of this case. *See e.g.*, Comments to Fed. R. App. P. 35 ("Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated . . . ").

In sum, just as this Court took the opportunity in *Yamaha Motors* to articulate a uniform interpretation of § 1292(b) consistent with the statute's plain language,[25] it should take the opportunity in this case to articulate a uniform interpretation of § 1447(d) consistent with the plain language of that statute.[26]

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[25] 516 U.S. at 204-05.

[26] To the extent that this case presents the Court with an opportunity to articulate a uniform interpretation of § 1447(d) consistent with the plain language of the statute, it presents the Court with the chance to revisit and/or further clarify its decision in *Thermtron Prods.*, *supra*, 423 U.S. at 336, a case that many people believe was decided incorrectly because the Court, in that case, adopted an atextual reading of the statute. *See Kakarala v. Wells Fargo Bank, N.A.*, 136 S.Ct. 1153 (2016) (Thomas, J., dissenting from the denial of certiorari).

CONCLUSION

The Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted,

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