

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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Plaintiff,

v.

EXXON MOBIL CORP., *et al.*

Defendants.

Civil Action No. 20-1932 (TJK)

**PLAINTIFF DISTRICT OF COLUMBIA’S RESPONSE TO
DEFENDANTS’ RESPONSE REGARDING SUPPLEMENTAL AUTHORITY**

Plaintiff District of Columbia writes in connection with Defendants’ response to Plaintiff’s notice of supplemental authority regarding *City of Annapolis v. BP P.L.C.*, 2022 WL 4548226 (D. Md. Sept. 29, 2022) (“*Annapolis*”). Although styled as a response to *Annapolis*, Defendants’ letter focuses primarily on the Supreme Court’s recent call for the views of the Solicitor General on the pending certiorari petition in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 (“*Boulder*”). Contrary to Defendants’ suggestions, however, this development in the *Boulder* case provides no basis for delaying adjudication of Plaintiff’s Motion to Remand (Dkt. 46).

Defendants engage in pure speculation when they posit that the Solicitor General’s involvement in the *Boulder* petition might increase the chances of certiorari review, which might—in turn—lead to reversal of the Tenth Circuit’s judgment. Even according to Defendants’ outdated law review article, the Supreme Court denies certiorari petitions in about two thirds of cases in which it seeks the views of the United States, and the likelihood of denial increases to about 80

percent when the United States recommends denying certiorari review. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 276, 295 (2009) (analyzing data from 1998 to 2004).

Although Defendants appear to assume that the Solicitor General will recommend granting the *Boulder* petition, that assumption is unfounded. The United States has never taken a position on the cert-worthiness of Defendants' novel federal-common-law theory of removal. *See* U.S. Sup. Ct. R. 10 (outlining the main indicia of a cert-worthy case). Even if it had, the Solicitor General is always free to revisit previous positions taken by the United States as *amicus curiae*. And the Solicitor General has ample reason to recommend certiorari denial in *Boulder* based on the fact that—in the past year alone—five circuits have unanimously rejected Defendants' federal-common-law arguments for removal.

Indeed, even if the United States were to recommend granting certiorari review in *Boulder*, and even if the Supreme Court followed that recommendation (two big “ifs”), those developments would still not justify delaying resolution of Plaintiff's Motion to Remand. Here, as in *Annapolis*, “there is . . . no irreparable injury to Defendants in proceeding with the case.” *Annapolis*, 2022 WL 4548226, at *4. And even “[a]ssuming Defendants successfully petition for certiorari, their track record across the country fails to prove a likelihood of success on the merits sufficient to warrant a stay.” *Id.* As a result, Defendants cannot satisfy the two “most critical” conditions for staying a case. *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 263 F. Supp. 3d 144, 147 (D.D.C. 2017); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301–02 (2014) (Roberts, C.J., in chambers) (denying motion to stay the appellate court's mandate, even though the Supreme Court had already granted certiorari review in the case); *Conkright v. Frommert*, 556

U.S. 1401, 1402–03 (2009) (Ginsburg, J., in chambers) (denying motion to stay the appellate court’s mandate, even though the Supreme Court had called for the Solicitor General’s views on the pending certiorari petition in the case); *Annapolis*, 2022 WL 4548226, at *5 (“A stay of these cases pending resolution in the Supreme Court is therefore unwarranted.”).

Dated: October 18, 2022

Respectfully Submitted,

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