

No. 18-80049

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IN THE  
**United States Court of Appeals for the Ninth Circuit**

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| COUNTY OF SAN MATEO,<br>Plaintiff-Appellee,<br>v.<br>CHEVRON CORPORATION, <i>et al.</i> ,<br>Defendants-Appellants.    | No. 18-80049<br>No. 17-cv-4929-VC<br>N.D. Cal., San Francisco<br>Hon. Vince Chhabria presiding |
| CITY OF IMPERIAL BEACH,<br>Plaintiff-Appellee,<br>v.<br>CHEVRON CORPORATION, <i>et al.</i> ,<br>Defendants-Appellants. | No. 18-80049<br>No. 17-cv-4934-VC<br>N.D. Cal., San Francisco<br>Hon. Vince Chhabria presiding |
| COUNTY OF MARIN,<br>Plaintiff-Appellee,<br>v.<br>CHEVRON CORPORATION, <i>et al.</i> ,<br>Defendants-Appellants.        | No. 18-80049<br>No. 17-cv-4935-VC<br>N.D. Cal., San Francisco<br>Hon. Vince Chhabria presiding |

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DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR  
INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b)

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Defendants' § 1292(b) petition for interlocutory review asked this motions panel to refer the petition to the merits panel that will hear Defendants' § 1291 appeals arising from the same remand order. Nos. 18-15499, 18-15499, and 18-15502. Plaintiffs' opposition confirms that this is the proper course of action.

1. Plaintiffs agree that the merits panel will decide “whether the district court properly granted Plaintiffs’ motions to remand for lack of subject matter jurisdiction.” Opp. at 1. Plaintiffs further agree that “whether these actions are removable under any or all grounds set forth in Defendants’ Notice of Removal . . . is already before this Court in the pending appeals as of right,” and that the “scope of appellate review necessarily will be determined in those already existing appeals.” Opp. at 12 (citation and internal quotation marks omitted)). Referring this petition to the merits panel will allow that panel to decide these important questions after full briefing and oral argument, and will preserve the panel’s flexibility to invoke § 1292(b) jurisdiction “in case it’s necessary.” Pet., Ex. B at 1.

2. The petition is not, as Plaintiffs assert, an “end run” around 28 U.S.C. § 1447(d), which limits the appealability of remand orders. Opp. at 1. Plaintiffs agree that § 1447(d) preserves appellate review over remand orders where, as here, the case was removed on the basis of § 1442, federal officer removal. Opp. at 2–3; *see* 28 U.S.C. § 1447(d) (“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”). Thus, it is undisputed that appellate review is available here.<sup>1</sup> Given that there is thus no threshold jurisdictional bar to granting a § 1292(b) appeal, and the issue of the scope of the appeal will be resolved by the merits panel, the Court should refer the petition to the merits panel.

3. Plaintiffs argue that the issues certified by the district court are not “controlling.” Opp. at 8. But, as Plaintiffs acknowledge, an issue is “controlling” if it “could materially affect the outcome of litigation in the district court.” Opp. at 8 (quoting *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981)). That standard is easily satisfied here, where the issues decided in the remand order are jurisdictional, and where reversal as to *any* of those issues would result in the cases being litigated in federal rather than state court. *See Roberts v. United States*, 498 F.2d 520, 522 (9th Cir. 1974) (resolution of “close jurisdictional question” warranted review under § 1292(b)).

4. Contrary to Plaintiffs’ assertion (at Opp. 2, 11), referring this petition to the merits panel will not result in delay or incremental expense. The issues raised in Defendants’ § 1292(b) petition are—as Plaintiffs agree—“identical” (*id.*

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<sup>1</sup> Although Plaintiffs contend that “Defendants’ assertion of ‘federal officer’ jurisdiction . . . is dubious at best and arguably frivolous” Opp. at 10, the district court concluded that “there is substantial ground for difference of opinion” on this issue—and on all of Defendants’ other grounds for removal. (Pet., Ex. A at 1–2.)

at 8) to the issues raised in Defendants' § 1291 appeals. The merits panel should be allowed to sort out the issues raised by the appeals and the petition in connection with its consideration of the full briefing of the appeals.

For the foregoing reasons, Defendants respectfully ask the Court to consolidate their petition with Nos. 18-15499, 18-15502, and 18-15503 and refer it to the merits panel to which those cases will be assigned.

Dated: May 7, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 5(c) and 32(a), (c)(2) and Ninth Circuit Rules 5-2(b) and 32-3, this brief has a typeface of 14 point and contains 605 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 7, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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