Nos. 18-15499, 18-15502, 18-15503, 18-16376

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, *Plaintiff-Appellee*, v. CHEVRON CORPORATION, *et al.*, *Defendants-Appellants*	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria
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BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America certifies that it is a non-profit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber believes that global climate change poses a serious long-term challenge that deserves serious solutions. And it believes that businesses, through technology, innovation, and ingenuity, will offer the best options for reducing greenhouse

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[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than the Chamber, its members, or its counsel contributed money intended to fund preparing or submitting the brief.

gas emissions and mitigating the impacts of climate change. Thus, businesses must be part of any productive conversation on how to address global climate change. If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change, then under our system of government those policies should come from Congress and the Executive Branch, not ad hoc decisions by individual state courts.

To that end, the Chamber has participated as amicus curiae in many cases concerning global climate change and the application of state law, including an amicus brief at the panel stage here. See U.S. Chamber of Commerce Br. as Amicus Curiae, Nov. 28, 2018, Dkt. 82; see also*, e.g.*, *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410 (2011); *City of Oakland* v. *BP PLC*, 960 F.3d 570 (9th Cir. 2020); *North Dakota* v. *Heydinger*, 825 F. 3d 912 (8th Cir. 2016); *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

The Chamber has a particular interest in the outcome of the scope-of-review question presented here. Private businesses often serve as federal contractors or work closely with federal agencies and officials, particularly in areas impacting significant national interests and in times of

emergency. Indeed, private businesses often partner with the federal government to provide goods and services the government cannot efficiently provide on its own. If companies are later sued in state court for such activities, they will often remove the litigation to federal court before asserting a variety of federal law defenses, including preemption or the government-contractor defense, see *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). Businesses are also the usual targets of class actions that involve similar removal and scope-of-appeal issues. Businesses therefore have a strong interest in ensuring that cases that are properly removed to federal court stay there.

The panel here followed circuit precedent in *Patel* v. *Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), which holds that appellate review of a remand order under 28 U.S.C. 1447(d) is limited to whether the court properly rejected only one basis for removal, not the entire order. That rule disserves the broader judicial interests in accuracy and efficiency. It pointlessly insulates from reversal a decision properly appealed to this Court that wrongly rejected a valid basis for federal jurisdiction. The Chamber urges the Court to grant rehearing en banc to overrule *Patel* so that businesses do not lose their right to be heard in federal court.

INTRODUCTION

This case warrants en banc review because it implicates a circuit conflict on a recurring question of federal law with significant importance to the business community. Indeed, the panel itself expressed skepticism about *Patel*, but followed it as circuit precedent. The panel explained that, had it been "writing on a clean slate," it might conclude that the Seventh Circuit's conflicting precedent, *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805 (2015), "provides a more persuasive interpretation of § 1447(d) than *Patel*," Op. 23. Under the Seventh Circuit's rule, the panel would have fully considered the propriety of the remand order, rather than merely one facet of its reasoning. This Court should follow the panel's suggestion and grant en banc review. *Patel* is not only contrary to the statutory text, but also undermines important systemic interests, departs from ordinary principles of federal appellate review, and impairs businesses' important removal rights.

1. When a district court remands to state court a case that was removed under 28 U.S.C. 1442 or 1443, this Court has jurisdiction to review the entire remand order, not just the propriety of the specific ground for removal that fits within those provisions. That conclusion follows not only

from text and precedent, as Defendants explain, but also from Section 1447's purposes and appellate procedure in analogous contexts.

Appellate courts exist to correct errors in trial court judgments and orders. An order remanding a federal case back to state court definitively ends the federal court proceeding. The general rule that remand orders are not appealable tolerates some amount of error in order to prevent the corresponding delay an appeal causes, instead allowing the case to proceed forthwith back in state court. But when Congress has already authorized an appeal of a remand order, as under Sections 1442 and 1443, reviewing the entire order comes at little cost (because the appeal has already occurred) and provides significant benefits (vindicating the powerful interest in ensuring that judicial orders are correct and that a case that should be in federal court gets to stay there). This will not encourage "baseless" removal arguments, as Plaintiffs have claimed. Mot. for Partial Dismissal 16, 19. The federal courts have ample tools to deter frivolous or dilatory removal claims, which may explain why there has been no flood of frivolous removal claims in the circuits that allow for complete review.

2. Complete review is also the norm, from which there is no sound basis to depart here. This Court's usual task is to review the *judgment* below, not merely one aspect of a district court's reasoning. Indeed, even where an interlocutory or limited appeal is authorized for a particular reason, appellate review commonly reaches further: In certified-question cases, in class-action removals, in preliminary injunction appeals, and in collateral order and pendent appellate jurisdiction cases, review extends beyond the specific ground that authorized the appeal, often reaching the entire order under review. There is no sound basis, as a matter of statutory construction or sound appellate practice, for a different rule to apply here.

3. Finally, complete review is important for the nation's business community. Businesses are often defendants in cases subject to removal—and appeal—on federal-officer or class-action grounds. As this case shows, complex-business litigation often implicates multiple grounds for removal, including federal-question or diversity removal. These interlocking pieces of the federal jurisdictional scheme together protect defendants from in-state or anti-federal bias and ensure a federal forum for important national issues that must be decided with a national (not local) perspective. Congress has determined that, in cases implicating the validity of the federal

government's official acts or laws providing for equal civil rights, it is more important that the remand order be correct than that it be quick. Complete review vindicates that fundamental interest, whereas the contrary rule forces appellate courts to blind themselves to erroneous orders for little or no reason. This Court should grant en banc review and overrule *Patel*.

ARGUMENT

I. This Court Should Grant Rehearing En Banc To Enable Full Review Of A Remand Order In Cases Involving Federal-Officer Removal

Section 1447(d) provides that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title," *i.e.*, on federal-officer or civil-rights grounds, "shall be reviewable by appeal or otherwise." 28 U.S.C. 1447(d). When a district court remands a case that was initially "removed pursuant to section 1442 or 1443" and the defendant appeals, the court of appeals shall review the "*order* remanding [the] case." *Id.* (emphasis added). An "order" is a "command, direction, or instruction." *Order*, *Black's Law Dictionary* (11th ed. 2019). What is "reviewable by appeal" is the command that the case be sent back to state court, not merely one aspect of the court's reasoning along the way. See *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Lu Junhong*, 792 F.3d at 811; see also *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d

292, 296 (5th Cir. 2017). To put it another way, Congress permitted review of whether the case must be sent back to state court, not merely whether the district court was mistaken about one reason for not keeping it in federal court.

Defendants' en banc petition persuasively explains that *Patel* is wrong and conflicts with decisions of other circuits. The Chamber writes to underscore that complete review of remand orders (1) advances the interests Congress sought to vindicate in allowing appeal of federal-officer removals, without causing the delays that underlie the general prohibition against remand appeals; (2) is consistent with federal appellate procedure in similar contexts; and (3) is important to the business community.

A. Complete Review Corrects Important Errors In Orders Without Delay Or Encouraging Baseless Removals

The most basic function of an appellate court is to determine whether a "legal error resulted in an erroneous judgment." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). But *Patel* requires an appellate court to ignore errors that resulted in wrongly terminating a federal court proceeding and sending a case back to state court, even when the defendant has a right to a federal forum.

Congress generally prohibited appellate review of remand orders in order "to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute," which the remand order sends back to state court. 14C Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3740 (rev. 4th ed. 2018). "Since the suit must be litigated somewhere, it is usually best to get on with the main event." *Lu Junhong*, 792 F.3d at 813.

The calculus is fundamentally different, however, once Congress has made an exception and authorized appeal of the remand order. At that point, "there is very little to be gained by limiting review." 15A Wright & Miller § 3914.11 (2d ed. 1992). 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 813. Accordingly, Congress determined that in this situation, the benefits of complete review—*i.e.*, ensuring that cases are not wrongfully sent back to state court—outweigh any residual benefit of preventing review to avoid the delay of an appeal.

Plaintiffs contend that reviewing the remand order (rather than just part of its reasoning) will nonetheless cause delay by encouraging baseless

demands for federal-officer or civil-rights removal. But real-world experience has not borne out this concern. The Seventh Circuit has allowed complete review for at least five years, if not longer. See *Lu Junhong*, 792 F.3d at 811 (discussing *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005)). And the Sixth Circuit has allowed it for almost three years. See *Mays*, 871 F.3d 437. Yet there has been no evidence of a flood of frivolous federal-officer removal appeals. See, *e.g.*, U.S. Chamber of Commerce Br. as Amicus Curiae 7-8, *BP P.L.C.* v. *Mayor of Baltimore*, No. 19-1189 (S. Ct. Apr. 30, 2020) (examining appeals in the Sixth and Seventh circuits, and finding "no evidence of a surge in meritless removal arguments").

That may be a result of the ample deterrents to raising baseless removal arguments. The requirements for removal under Sections 1442 and 1443 are demanding, and "[s]ufficient 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." 15A Wright & Miller § 3914.11; see *Lu Junhong*, 792 F.3d at 813 ("a frivolous removal leads to sanctions"). Section 1447 authorizes the imposition of "just costs and any actual expenses, including attorney fees, incurred as a result of the re-

moval," 28 U.S.C. 1447(c), and a notice of removal must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure," 28 U.S.C. 1446(a); see Fed. R. Civ. P. 11(b)-(c) (authorizing sanctions); 28 U.S.C. 1927 (same). Those tailored protections against frivolous filings are the appropriate way to address the concern, not a blanket jurisdictional rule prohibiting an appellate court from correcting an erroneous order in a case that is already on appeal.

B. Complete Review Is Consistent With Federal Appellate Procedure In Similar Contexts

Reviewing the propriety of the remand order, rather than just part of the district court's reasoning, is also consistent with basic principles of appellate review applicable in similar contexts. Federal appellate courts typically review "judgments, not opinions." *Chevron U.S.A. Inc.*, 467 U.S. at 842; *e.g.*, *Perry* v. *Schwarzenegger*, 630 F.3d 898, 901 (9th Cir. 2011) (per curiam) (affirming "on different grounds from those relied upon by the district court"). By analogy here, the ordinary question is whether the order remanding the case to state court was correct, not whether the district court's reasoning was correct in one particular respect. After all, what matters in the real world is whether the district court properly returned the case to state court, not whether the court said the right words in its opinion.

Limited-scope appeals are thus the exception, not the rule. And even in those cases, the scope of appellate review often extends beyond the specific ground that authorized it. Any other rule would create a "substantial risk of producing an advisory opinion." *Edwardsville Nat'l Bank & Tr. Co.* v. *Marion Labs., Inc.*, 808 F.2d 648, 651 (7th Cir. 1987). "If nothing turns on the answer to the question [authorizing the appeal], it ought not be answered; on the other hand, once the … appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that prompted the appeal." *Id.*

For example, an interlocutory appeal is available if the district court certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. 1292(b). Once the district court has certified the appeal, however, review is not limited to the "controlling question" on which the appeal was predicated; it reaches "any issue fairly included within the certified order." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996); see *Rivera* v. *Nibco, Inc.*, 364 F. 3d 1057, 1063 (9th Cir. 2004) ("Our scope of review is broader than the specific issues the district court has designated for appellate review.").

The same is true for cases removed under the Class Action Fairness Act (CAFA), 28 U.S.C. 1453, which is closely analogous. CAFA provides that, "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. 1453(c)(1). As this Court has explained, a "straightforward" reading of CAFA's text shows that a court of appeals may "consider *any* potential error in the district court's decision, not just a mistake in application of the [CAFA]." *Nevada* v. *Bank of Am. Corp.*, 672 F.3d 661, 673 (9th Cir. 2012) (quoting *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009)) (emphasis added); accord *Brill*, 427 F.3d at 451-452. Section 1453(c)(1)'s reference to "class actions"—like Section 1447(d)'s reference to cases "removed pursuant to section 1442 or 1443"—indicates which orders can be appealed, not how broad the court's review is once the appeal has occurred.

There is no sound basis for interpreting the scope of review of a remand "order" under Section 1447(d) to be narrower than review of a remand "order" under CAFA. Review under CAFA is discretionary, not mandatory, see 28 U.S.C. 1453(c)(1) ("may"), and CAFA encompasses orders

"granting or denying" a remand, not merely orders remanding, *id.* But neither difference sheds any light on the scope of review once the court is reviewing a covered "order." In both contexts, appellate review is of the "order" itself—that is, the appellate court reviews the command sending the case back to state court. These examples show that in similar contexts—indeed, in contexts where businesses are the most frequent defendants seeking a federal forum—Congress has authorized appellate review of the entire order, not merely a specific aspect of the court's reasoning.

Likewise, appellate review of "interlocutory injunction appeals under § 1292(a)(1) ordinarily focuses on the injunction decision itself, but the scope of appeal is not rigidly limited." 16 Wright & Miller § 3921.1 (3d ed. 2012). "[O]ther matters may be inextricably bound up with the decision or may be considered in the wise administration of appellate resources." *Id.*; see, *e.g.*, *Paige* v. *California*, 102 F.3d 1035, 1039 (9th Cir. 1996) (reviewing class-certification decision on preliminary injunction appeal "because effective review of the injunction requires review of the class certification").

Similar principles apply to the review in collateral-order cases. Once the requirements for a collateral-order appeal are satisfied, see *Coopers &*

Lybrand v. *Livesay*, 437 U.S. 463, 468 (1978), courts take a pragmatic approach to the appeal's scope, permitting "review of related matters so long as the record is sufficient to the task and there is no additional interference with trial court proceedings," 15A Wright & Miller § 3911.2; see, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (court of appeals "had jurisdiction to review fully" the district court's relevant orders). And the same rule applies for pendent appellate jurisdiction, where this Court has reviewed otherwise non-appealable issues "inextricably intertwined" with the appealable ones. *Mueller* v. *Auker*, 576 F.3d 979, 990 (9th Cir. 2009). Indeed, there may be "good reasons to undertake review of some matter that would not be independently appealable," especially where there is "a strong relationship between the appealable order and the additional matters swept up into the appeal." 16 Wright & Miller § 3937. Here, for example, the arguments for federal-officer and federal-question jurisdiction overlap considerably, so it is natural to review both together.

In sum, appellate review often extends beyond the particular reason for allowing a party to appeal in the first place. Together, these doctrines show that the position the Defendants urge—which other circuits have adopted, *e.g.*, *Lu Junhong*, 792 F.3d at 811—is consistent with ordinary

appellate-review principles and permits appellate courts to perform their most basic function of correcting erroneous orders. The *Patel* rule, by contrast, is out of step with the statutory text and sound appellate practice, and is damaging to the administration of justice by forcing appellate courts to ignore legal errors and close the federal courthouse doors to defendants that have a right to be there.

C. Complete Review Is Important To The Business Community And Accords With Congressional Policy

Complete review is important to the nation's business community because it ensures that cases implicating important federal interests are fully heard in federal court. Businesses are often the defendants in those cases, and the federal-officer removal issue arises in a wide range of contexts, including aviation, see *Lu Junhong*, 792 F.3d at 807, health-care insurance plan administration, see *Decatur Hosp. Auth.*, 854 F.3d at 294, and oil and gas companies, as here. In all of these contexts, businesses work closely with the federal government, carrying out partnerships to provide goods and services essential to a government's function. See, *e.g.*, 50 U.S.C. 4502(a)(1) (congressional finding that "the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services").

Even when the appellate court determines that federal-officer or civil-rights removal is unavailable, the defendant may still have "a right and privilege secured … by the [C]onstitution and laws of the United States" to have their case heard in federal court. *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892); see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants."). And the justifications for providing a federal forum do not evaporate simply because the federal-officer or civil-rights removal ground is ultimately unavailing.

For example, the Supreme Court has recognized that diversity jurisdiction protects "those who might otherwise suffer from local prejudice against out of state parties." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 85 (2010). And federal-question jurisdiction "protect[s] federal rights" and "provide[s] a forum that could more accurately interpret federal law," *Boys Mkts., Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235, 246 n.13 (1970); see also *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (upholding removal of claims that "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues"). Indeed, courts have noted the overlap between the rationales for

federal-officer removal and "both diversity and federal question jurisdiction": "As with diversity jurisdiction, there is a historic concern about state court bias. As with federal question jurisdiction, there is a desire to have the federal courts decide the federal issues that often arise in cases involving federal officers." *Savoie* v. *Huntington Ingalls, Inc.*, 817 F.3d 457, 460-461 (5th Cir. 2016) (citations omitted), *overruled on other grounds by Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc). Even if federal-officer or civil-rights removal is unavailable in a case, those underlying federal interests may remain present in full force. And complete review of remand orders allows appellate courts to vindicate those interests at little or no cost.

This case is a good example. Defendants identified meritorious grounds for removal that fall outside Section 1442, but which implicate similar federal interests. Those interests remain present, but the panel effectively ignored them by looking at only part of the picture, as per *Patel*. Furthermore, the parties fully briefed and argued the other grounds for removal, so adjudicating them as well would have caused little or no delay. Complete review, by contrast, would avoid a myopic approach to appellate review and prevent cases from being wrongfully returned to state court.

The Chambers' members—like all defendants—are entitled to the safeguards of a federal court when Congress has provided it. And when Congress has already authorized an appeal, it is imperative that federal appellate courts protect those rights as well.

CONCLUSION

The Court should grant the petition for rehearing.

Respectfully submitted,

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July 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed 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 July 20, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Zachary D. Tripp
Zachary D. Tripp

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Ninth Circuit Rule 29-2(c)(2) because, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 3,827 words.

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