No. 18-80049

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Related Case No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Related Case No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Related Case No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

PLAINTIFFS' OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b)

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INTRODUCTION AND FACTUAL BACKGROUND

Defendants Chevron Corporation *et al.* ask this Court to exercise its discretion and accept jurisdiction over proposed interlocutory appeals from the district court's April 9, 2018 order (Chhabria, J.) remanding three related cases to California state court. *See* Petition Exh. A. But those same Defendants have already appealed Judge Chhabria's remand order to this Court in appeals as of right under 28 U.S.C. § 1447(d). Those appeals raise the identical issues that Defendants seek to raise in their proposed discretionary appeal under 28 U.S.C. § 1292(b): whether the district court properly granted Plaintiffs' motions to remand for lack of subject matter jurisdiction, and whether any of Defendants' unsuccessful grounds for removal *other than* their assertion of "federal officer" jurisdiction under 28 U.S.C. § 1442 are appealable.

The Court should deny Defendants' Petition for two independent reasons. First, this Court lacks jurisdiction to grant Defendants' request for § 1292(b) certification. Remand orders are not reviewable on appeal except as expressly allowed by § 1447(d). Countless courts, including the Ninth Circuit, have held that certification under § 1292(b) may *not* be used as an end run around that statutory limitation on appellate jurisdiction.

Second, even if this were an open question, Defendants' Petition does not satisfy any of the requirements of § 1292(b). Neither of the two legal issues

Defendants assert can be "controlling," in the sense of determining the outcome of these cases, because those issues are already before this Court in Defendants' prior appeals as of right in Case Nos. 18-15499, 18-15502, and 18-15503, filed on March 27, 2018. Nor do Defendants even try to argue how their proposed additional, duplicative appeal could materially advance the final disposition of these actions (and neither did the district court in its certification order, Petition Exh. B).

Consequently, Defendants' Petition should be denied outright and not referred to the merits panel as Defendants urge. The Petition is meritless. Postponing its denial would cause long-term uncertainties and would require the merits panel to consider unnecessary briefing. Whatever appellate relief Defendants are entitled to obtain from this Court is available through its pending appeals as of right under § 1447(d).

Plaintiffs, three California municipalities, filed these cases in California state court, on their own behalf and on behalf of the People of the State of California, alleging exclusively California-law claims for relief. Defendants, oil and gas companies whose climate change-related activities allegedly violated California tort law, removed the cases to the Northern District of California, where the three cases were related. One of Defendants' grounds for removal—and the only asserted ground whose denial can be appealed under § 1447(d)—is that Plaintiffs' action was "against . . . any officer (or any person acting under that officer) of the United States

. . . for or relating to any act under color of such office." § 1442(a). Defendants supported that allegation with the frivolous explanation that some of them, at some time, had either extracted or sold an undisclosed amount of fossil fuel products under government contracts, which they try to characterize as "acting under" a federal procurement officer for purposes of § 1442 "federal officer" subject matter jurisdiction.

After full briefing and oral argument, the district court rejected every jurisdictional argument Defendants raised, including what Judge Chhabria characterized as their "dubious assertion of federal officer removal," and concluded that Plaintiffs' lawsuits had been "properly filed in state court and improperly removed to federal court." Petition Exh. A at 5. The court then temporarily stayed its remand order to enable Defendants to file their March 27, 2018 appeals as of right under § 1447(d). *Id.* On April 9, 2018, it stayed its remand order pending resolution of those appeals. Petition Exh. B. In that stay order, the court also certified "all the issues addressed by the Court" in its remand order under § 1292(b) "in case it's necessary." *Id.*

For the reasons set forth below, § 1292(b) certification is *not* necessary given the circumstances of this case. Nor is it legally permissible.

ARGUMENT

1. Under 28 U.S.C. § 1447(d), a remand order "is not reviewable on appeal or otherwise."

Appellate review of remand orders is strictly limited by § 1447(d), which states:

> 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.

See also Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638–39 (2009) (§ 1447(d) bars appellate review of remand orders on grounds specified in § 1447(c), e.g., subject matter jurisdiction). Certification of a remand order for interlocutory appeal under § 1292(b) cannot override this express statutory prohibition. *See Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992) (per curiam). Thus, "the strong congressional policies behind section 1447(d)'s bar of appellate review preclude review even of patently erroneous district court decisions." *Id.* at 916; *see also Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1118 (9th Cir. 2002). As the Supreme Court has explained, § 1447(d)

> prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887. . . . If a trial judge purports to remand a case on the ground that it was removed improvidently and without jurisdiction, his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.

Thermtron Prods. Inc. v. Hermansdorfer, 423 U.S. 336, 343 (1976), *superseded by statute on other grounds*, 28 U.S.C. § 1447(c)) (quotations omitted).

This rule prohibiting use of § 1292(b) to bypass the limits on appellate jurisdiction in the federal removal statutes has been applied uniformly by the Supreme Court,[1] the courts of appeal,[2] and innumerable district courts. That is why Defendants cannot identify a single case granting interlocutory review under

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[1] *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs. Inc.*, 551 U.S. 224, 229–30 (2007) (remand orders based on a lack of subject matter jurisdiction "immunized from review" even where, unlike here, jurisdiction existed at time of removal but was subsequently lost); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) (appeal bar of § 1447(d) applies equally to remands based on the general removal statute, § 1441(a), and to cases removed under other statutory provisions not specifically exempted, including the bankruptcy removal statute); *Briscoe v. Bell*, 432 U.S. 404, 413–14, n.13 (1977) ("Where the order is based on one of the [grounds enumerated in § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand.").

[2] *See, e.g.*, *Krangel*, 968 F.2d at 914–16 (review precluded of remand order based solely on lack of federal jurisdiction, even where remand order involved a previously undecided and important legal question); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1180–81 (9th Cir. 1989) (§ 1447(d) barred review of order remanding due to absence of complete preemption); *In re WTC Disaster Site*, 414 F.3d 352, 369–71 (2d Cir. 2005) (court of appeals lacked § 1292(b) jurisdiction to review remand order that was based on a lack of subject matter jurisdiction); *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 130 (3d Cir. 1998) ("[T]he jurisdictional bar of section 1447(d) trumps the power to grant leave to appeal in section 1292(b)."); *Adkins v. Illinois Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003) (§ 1447(d) is a "one-bite-at-the-apple scheme" that generally prohibits review of remand orders because Congress "wanted to expedite the process of choosing a forum for litigation and to avoid exactly the kind of lengthy proceeding we are having in the present case").

§ 1292(b) of an order remanding a case to state court for lack of subject matter jurisdiction. Remand orders are appealable, if at all, only to limited extent permitted by § 1447(d). Because the District Court's remand order was based on a lack of subject matter jurisdiction, § 1447(d) bars § 1292(b) interlocutory review, and the Court must deny the Petition on this basis alone.

2. Defendants have not met the high bar for § 1292(b) review.

Even assuming, *arguendo*, that Judge Chhabria's remand order may be appealed under § 1292(b)—despite the clear directive of § 1447(d)—Defendants' Petition should still be denied because it does not establish either of the two requirements for interlocutory review. This Court may only accept § 1292(b) certification of a non-final order if: (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Both elements must be satisfied for the Court to have discretion to accept certification. *Krangel*, 968 F.2d at 915. "Because the requirements of § 1292(b) are jurisdictional, if this appeal does not present circumstances satisfying the statutory prerequisites for granting certification, this court cannot allow the appeal." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quotations omitted).

Petitions for interlocutory appeal must be analyzed against "the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases," where allowing an interlocutory appeal would avoid protracted and expensive litigation. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1982); *see also United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959). Thus, "[e]ven when all of [the statutory] factors are present, the court of appeals has discretion to turn down a § 1292(b) appeal" in light of Congress's expressed policy against liberal use of the interlocutory mechanism. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1264 (11th Cir. 2004). "[T]he party pursuing the interlocutory appeal bears the burden of so demonstrating [that both statutory factors are present]." *Krangel*, 968 F.2d at 915 (quotations and citations omitted).

Even if § 1292(b) review were available here, Defendants have failed to establish the requisite statutory elements, because they have been unable to show that their proposed back-up appeal raises one or more "controlling issues of law," and because they have not even argued that another appeal would "materially advance the ultimate termination of the litigation."

a. Defendants have not shown the remand order involves a controlling question of law that would justify a duplicative interlocutory appeal.

The first requirement under § 1292(b) is that the challenged order must raise a "controlling" question of law as to which there is substantial ground for difference

of opinion. A question of law is "controlling" when "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. "[T]his circuit has recognized the congressional directive that section 1292(b) is to be applied sparingly and only in exceptional cases, and that the 'controlling question of law' requirement be interpreted in such a way to implement this policy." *Id.* at 1027.

Defendants do not identify any specific controlling question of law, but gesture toward the "numerous controlling issues" decided by Judge Chhabria in his Remand Order. Petition at 4. Defendants also assert that Judge Chhabria and Judge Alsup (in two similar climate-change cases) reached different conclusions as to the applicability of federal common law to the plaintiffs' state tort claims. *Id.* While Defendants claim this establishes a "substantial ground for difference of opinion" as to the validity of one of their jurisdictional arguments (but, notably, *not* their "federal officer" argument, which did not persuade either judge), Defendants have not explained why this Court's resolution of that issue in a duplicative interlocutory appeal is "controlling" within the meaning of § 1292(b).

The issues Defendants seek to raise in their proposed interlocutory appeal are identical to the issues already raised in their pending appeals (including the issue of which jurisdictional arguments are permissibly included within the scope of an appeal under § 1447(d)). There is no justification for allowing an additional, parallel

interlocutory appeal, whether consolidated with the initial appeals or not, because § 1292(b) cannot expand the scope of the limitations Congress imposed upon the permissible scope of appeal from an order of remand under § 1447(d).

"[A]n order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996), *as amended* (July 5, 1996). No such risk of needless expense or delay exists here. Defendants have already appealed the remand under § 1447(d). Judge Chhabria stayed any action on his remand order pending resolution of those appeals. Petition Exh. B. Consequently, the merits of this litigation will not proceed, either in state court or federal, until Defendants' pending appeals under § 1447(d) are resolved.

b. Defendants make no showing that an interlocutory appeal will materially advance the ultimate termination of this litigation.

Defendants make no effort to show that a § 1292(b) interlocutory appeal will materially advance the termination of the litigation. To meet that requirement, Defendants must demonstrate "that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259. That showing is not possible here, as all of the issues Defendants seek

to raise are already before this Court in Defendants' § 1447(d) appeals as of right.

The parties dispute the permitted scope of an appeal under § 1447(d), particularly because Defendants' assertion of "federal officer" jurisdiction—the trigger for § 1447(d) review of the district court's remand—is dubious at best and arguably frivolous. But that dispute would need to be resolved by this Court whether or not Defendants are allowed to pursue a § 1292(b) appeal, which is why an additional, duplicative appeal could only delay this Court's resolution of the issues, not expedite them.

Defendants do not make *any* argument to the contrary. Neither did the district court. While the district court's grant of certification quoted the statutory language in stating that "resolution by the court of appeals will materially advance the litigation," Petition Exh. B, it did not explain *why* that was so. Nor did it offer any discussion or analysis to justify that conclusion.

This Court has an independent duty to consider the elements of § 1292(b). *United States v. W.R. Grace*, 526 F.3d 499, 522 (9th Cir. 2008) (en banc) (concurrence) ("[O]nce the district judge opens the gate to this court, we exercise complete, undeferential review to determine whether the court properly found that § 1292(b)'s certification requirements were satisfied."). Therefore, it should find that Defendants did not make a sufficient showing that their proposed interlocutory appeal raises any controlling issues or will materially advance the litigation.

3. This Court should neither consolidate Defendants' Petition with the pending appeals nor refer it to the merits panel for those cases.

Perhaps recognizing the impossibility of obtaining § 1292(b) certification without being able to satisfy either statutory element, Defendants ask the Court not to rule on their Petition but instead to refer it to the merits panel assigned to the pending appeals, where the Petition would likely remain unadjudicated for the next 18 months to two years. That request is without justification. The purpose of § 1292(b) is to eliminate delay and uncertainty, not exacerbate them.

Defendants liken their Petition to the petition for review in *Chan Healthcare Group, PS v. Liberty Mutual Fire Insurance Co.*, 844 F.3d 1133 (9th Cir. 2017), which involved a discretionary appeal of a remand under the Class Action Fairness Act (CAFA), which has its own jurisdictional provision authorizing discretionary appeals, 28 U.S.C. § 1453(c)(1). The petition in that case turned on a CAFA-related jurisdictional issue of first impression, which is why it made sense as a matter of judicial efficiency to decide the jurisdictional issue in conjunction with the merits of the attorney fee award for the remand (which had already been briefed). *Id.*

Here, by contrast, the law is well-settled that § 1292(b) review is not available for an order remanding a case to state court for lack of subject matter jurisdiction. Moreover, unlike in *Chan Healthcare Group*, where resolution of the jurisdictional issue on interlocutory appeal could moot the pending merits appeal, here the issue

Defendants present in their Petition—"whether these actions are removable under any or all grounds set forth in Defendants' Notice of Removal," Pet. at 1—is already before this Court in the pending appeals as of right, and the permissible the scope of appellate review necessarily will be determined in those already existing appeals.

CONCLUSION

For the reasons stated, this Court should deny Defendants' Petition for Interlocutory Review.

Dated: April 30, 2018

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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 document has a 14-point typeface and contains 2,824 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Victor M. Sher
VICTOR M. SHER

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document

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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 April 30, 2018. 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/ Victor M. Sher
VICTOR M. SHER