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

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants–Appellants.	Appeal 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.	Appeal 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.	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

PLAINTIFFS-APPELLEES' REPLY TO DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION FOR PARTIAL DISMISSAL

John C. Beiers
Paul A. Okada
David A. Silberman
Margaret V. Tides
SAN MATEO COUNTY COUNSEL
400 County Center, 6th Fl.
Redwood City, CA 94063
Tel: (650) 363-4250

Attorneys for County of San Mateo and the People of the State of California

Brian E. Washington
Brian C. Case
MARIN COUNTY COUNSEL
3501 Civic Center Drive, Ste. 275
San Rafael, CA 94903
Tel: (415) 473-6117

Attorneys for County of Marin and the People of the State of California

Jennifer Lyon
Steven E. Boehmer
McDOUGAL, LOVE, BOEHMER, FOLEY, LYON & CANLAS
CITY ATTORNEY FOR CITY OF IMPERIAL BEACH
8100 La Mesa Blvd., Ste. 200
La Mesa, CA 91942
Tel: (619) 440-4444

Attorneys for City of Imperial Beach and the People of the State of California

[*Additional counsel listed on signature page*]

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I. This Motion Should Be Decided Now, Not Referred To The Merits Panel.

Plaintiffs filed this motion to ward off the prospect of Defendants' briefing – and Plaintiffs and the Court having to respond to – a multitude of issues that are outside the Court's appellate jurisdiction under settled circuit precedent. Defendants have now confirmed their intent to brief all seven grounds for removal they asserted below. Their attempts to avoid narrowing the appeal should be rejected.

Defendants first ask that the motion be referred to the merits panel. Opposition 8. That suggestion is unwarranted. Deferring the jurisdictional question would largely defeat the purpose of filing the motion now, which is to preserve the resources of the parties and this Court. Nor is there any reason for delay. The jurisdictional issue is straightforward and easily resolved. Defendants do not deny that if *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), controls this case, at least five of their seven grounds for removal cannot be considered in this appeal. Whether *Patel* applies and remains good law is not a complicated question – Defendants raise only three reasons why *Patel* should not apply, requiring less than four pages. Opposition 15–18.

Nor is the scope of appellate jurisdiction "'intricately bound up in the merits of the appeal.'" Opposition 8 (citation omitted). To the contrary, the jurisdictional question has nothing to do with whether removal was proper under any of the seven

grounds Defendants assert. It turns instead on completely distinct statutory provisions and precedents. *See* Motion 2–4.

To be sure, there is a limited dispute over whether, under *Patel*, the Court would have jurisdiction over just federal officer removal, or also over Defendants' "federal common law" removal claim. Opposition 19–22. But particularly given the extremely high bar Defendants must meet to prevail in that dispute, *see infra* § III, a motions panel can easily resolve that issue as well.

II. *Patel* Is Controlling.

Defendants offer three reasons why *Patel* does not control the scope of this appeal, none persuasive.

First, Defendants point out that *Patel* predates Congress's 2011 amendment to 28 U.S.C. § 1447(d). Opposition 16. They note that although Congress did not actually address the scope of appeal in those amendments (it simply added two words: "1442 or"), courts "presume that Congress acts with awareness of relevant judicial decisions." *Id.* (alteration and internal quotation marks omitted). This actually helps Plaintiffs – in 2011, the courts of appeals uniformly applied *Patel*'s interpretation of Section 1447(d). *See* Motion 14–15; Opposition 9–11. But Defendants insist that Congress would have had in mind, instead, the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). Tellingly, Defendants do not claim that *Yamaha* itself abrogated *Patel*, apparently

acknowledging that *Yamaha* did not "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (stating standard for disregarding prior panel precedent, absent en banc review, based on intervening higher authority).

Instead, Defendants make the more convoluted argument that *Congress* would have understood that *Yamaha*'s treatment of the word "order" in a different statute was incompatible with the uniform circuit precedent represented by *Patel*, such that if Congress agreed with that consensus, it would have said something to that effect in the 2011 amendment. Opposition 16–17.

That argument fails. If *Yamaha* was not sufficiently on point to directly abrogate *Patel*, neither was Congress's failure to amend the statute in response to that decision. Indeed, as Plaintiffs have already explained, nothing in *Yamaha* is inconsistent with *Patel*. *See* Motion 20–22. Defendants' principal response is to claim that Plaintiffs "offer no textual basis" for distinguishing *Yamaha*. Opposition 13. But Plaintiffs explained that unlike 28 U.S.C. § 1292(b), which itself authorizes an appeal of an "order," the text of Section 1447(d) simply removes a bar on appellate review of certain remand orders by making them "reviewable" (a word from the text of the provision). Motion 21. That review is authorized instead by 28 U.S.C. § 1291, which provides for appeals of "final decisions." And Defendants

do not deny that the Supreme Court has been clear that just because a statute makes a final "decision" reviewable on appeal does not mean that every issue is open to review on appeal. *See* Motion 17–18, 22.

Defendants' only response is to point out that the specific cases Plaintiffs cite involved the collateral order doctrine. Opposition 13 n.6. That is true, but it misses the point. All the collateral order doctrine does is treat certain decisions as "final" even though the case is still ongoing. By Defendants' logic, the scope of any authorized appeal is dictated the word "decision" in Section 1291, just as the scope of the appeal authorized by Sections 1292(b) and 1447(d) is determined by those provisions' parallel references to an "order." If *Yamaha* dictates that a statute authorizing appeal of an "order" necessarily permits review of every issue decided in the order, it necessarily follows that Section 1291's authorization of an appeal from a final "decision" likewise permits review of every issue decided in that "decision." But the Supreme Court has repeatedly held to the contrary. Motion 17–19.

At the very least, *Yamaha*'s implications for the correctness of *Patel* are not so obvious as to permit this panel to disregard prior circuit precedent without first obtaining en banc review.

Second, Defendants argue that the removal in *Patel* fell within Section 1447(d)'s exception for civil rights cases, while this case falls under the federal

officer removal exception. Opposition 17. Defendants also point out that the argument for civil rights removal in *Patel* was "'objectively' unreasonable," unlike (they say) their federal officer removal argument. *Id.* *But see* Remand Order 5 (Exhibit A to Motion) (calling Defendants' federal officer claim "dubious"). But *Patel*'s holding has nothing to do with either of those features of the case. The Court instead adopted the general legal principle that it "lack[s] jurisdiction to review [a] remand order based on [28 U.S.C.] § 1441" while maintaining jurisdiction over the specific ground for removal falling within Section 1447(d)'s exception. *Patel*, 446 F.3d at 998. Moreover, Defendants do not dispute that the text of the statute makes no relevant distinction regarding the scope of appeals arising from federal officer and civil rights removals. *See* Motion 11–12. And they omit that *Patel* mentioned the objective unreasonableness of the removal in that case only in the context of reviewing an award of attorney's fees under 28 U.S.C. § 1443(1), not in the section of its opinion ruling on jurisdiction. *See* 446 F.3d at 999.

In the end, what Defendants are really suggesting is that the holding of a case may be limited to its facts whenever a subsequent panel thinks the prior case was wrongly decided. Opposition 17–18. But the prior precedent rule cannot be so easily avoided. If Defendants think *Patel* was wrongly decided, their remedy is to seek rehearing en banc – not to interject incoherence into the law.

Third, Defendants say that "the defendants in *Patel* did not argue that review of the entire remand order was authorized by the plain language of section 1447(d)." Opposition 18. But a "panel is not free to disregard the decision of another panel of [its] court simply because [it] think[s] the arguments have been characterized differently or more persuasively by a new litigant." *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013). Defendants say that having a new argument is, however, a reason not to *extend* a prior decision beyond its holding. Opposition 18. But that just begs the question of whether *Patel*'s holding already extends to this case, which it does.

Finally, Defendants betray a lack of confidence in the strength of their federal officer claim by asking the motions panel to prevent the merits panel from considering it. Specifically, they say that if the Court believes that *Patel* controls, it should call for initial rehearing en banc to reconsider that precedent, Opposition 18, even though the issue likely would be moot if Defendants prevailed on federal officer removal before the merits panel. Because this Court's precedents are correct and in accord with the majority view in the circuits, that request is unwarranted (and at the very least premature).

III. Under *Patel*, Review Is Limited To The Federal Officer Removal Claim.

Defendants do not dispute that if *Patel* controls, most of their grounds for removal (*e.g.*, complete preemption, federal enclave status, bankruptcy, etc.) are

beyond this Court's jurisdiction. But they argue that even if *Patel* controls, they should be allowed to proceed with their first removal ground as well as their federal officer removal theory. The first ground claims that, although the complaints unambiguously pled only state law claims, Plaintiffs *really* seek relief under the federal common law, making the claims removable on the basis of federal question jurisdiction under 28 U.S.C. § 1441(a). Notice of Removal ¶¶ 13–21 (Exhibit C to Motion). That "federal common law" argument should be rejected out of hand as well.

Defendants acknowledge that Section 1447(d) precludes review of remands based on lack of jurisdiction and that the district court rejected their federal common law removal argument on that ground. Opposition 6, 19. Moreover, "review of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007). Here, the court's characterization is not only colorable, but clearly correct.

Some background is in order. It is settled that state law claims do not support removal under Section 1441(a), even if a defendant has a compelling federal preemption defense. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983). Defendants attempted to avoid that inconvenient rule through a

complicated theory that proceeded in several steps. First, Defendants argued that courts have created a federal common law of interstate pollution, which applies to this case and preempts state law. Notice of Removal ¶¶ 13–15. Second, rather than view the complaints as asserting preempted state law claims (which would not provide a basis for removal), Defendants urged the court to effectively rewrite the complaints to allege federal common law claims (which, happily for the Defendants, would provide a basis for removal). *Id*. ¶¶ 17, 20. But there was a problem: that federal common law does not exist anymore, having been displaced by the Clean Air Act, 42 U.S.C. § 7401 *et seq*. Notice of Removal ¶ 13 (citing *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856–57 (9th Cir. 2012)). Defendants nonetheless persisted, arguing that the court should still view the complaints as asserting federal common law claims – just ones that don't exist and must therefore be immediately dismissed. *Id.* ¶ 21.

The district court unsurprisingly rejected this argument. The court agreed with Defendants that the Clean Air Act displaced any federal common law that might otherwise apply in this context. Remand Order 1–3. But it correctly rejected Defendants' assertion that even after federal common law is displaced, it continues to linger in limbo, transforming state law claims into federal law claims just long enough for them to be dismissed on the ground that the federal common law no longer exists. The court recognized that the far more logical conclusion is that once

federal common law is displaced by a statute, it is simply gone, replaced by the federal statute for *all* purposes, including for deciding when state law is preempted. *Id*. The court explained that in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), after finding federal common law displaced by the Clean Air Act, the Supreme Court "noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve)." Remand Order 2. The district court understood the opinion, therefore, to "reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law." *Id*.

Accordingly, the district court manifestly did *not* accept Defendants' claim that "Plaintiffs' ostensibly state-law causes of action actually arise under federal common law." Opposition 20. It held instead that "federal common law does not govern the plaintiffs' claims" and "does not preclude them from asserting the state law claims in these lawsuits." Remand Order 3.

Defendants cannot seriously contest that having reached these conclusions, the district court properly characterized its decision as based on lack of jurisdiction. After rejecting Defendants' efforts to recast the complaints as alleging federal causes of action, the court was compelled to reject Defendants' assertion of federal question

jurisdiction over a suit with exclusively state law claims. *See Franchise Tax Bd.*, 463 U.S. at 14.

Instead of challenging the district court's *characterization* of its decision, Defendants contest its *correctness*. Specifically, they say that the court should have concluded that the Clean Air Act does not displace the application of federal common law, but instead strips it of all remedies. Opposition 20–22. And that being so, they claim, the court erred in concluding that "federal common law does not govern the plaintiffs' claims." Remand Order 3. It *does* govern Plaintiffs' claims, Defendants insist. It just provides no remedies. But even a federal cause of action that cannot be asserted and provides no remedy, they say, creates a basis for federal jurisdiction and removal. Opposition 20–22.

That is an argument that the district court's jurisdictional ruling was wrong, not that the court mischaracterized the decision. *See, e.g.*, *Powerex*, 551 U.S. at 234 (distinguishing between "misclassifying a ground as subject-matter jurisdiction and misapplying a proper ground of subject-matter jurisdiction"). And the law is clear that "Section 1447(d) precludes review of a district court's jurisdictional decision even if it was clearly wrong." *Hansen v. Blue Cross of Cal.*, 891 F.2d 1384, 1387 (9th Cir. 1989).

Accordingly, this panel can dispose of Defendants' argument on simple grounds: the district court's characterization of its ruling of the "federal common

law" removal ground as jurisdictional was clearly colorable, and review of its correctness is therefore barred by Section 1447(d) and *Patel.*

That said, even if the Court were empowered to decide whether the district court's decision was colorable on the merits, it plainly was. The Supreme Court in *AEP* held that the consequence of Clean Air Act displacement of federal common law is that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of *the federal Act*." 564 U.S. at 429 (emphasis added). In other words, if the Clean Air Act does not preempt Plaintiffs' state law claims, then Plaintiffs are free to pursue them, even if the federal courts had previously concluded that federal common law should provide the exclusive means of redress. That is why the Court remanded the case for consideration of "the availability of a claim under state nuisance law," even though Defendants say it was clear federal common law had displaced any such claims. *Id*.

Defendants nonetheless point to language in *AEP* and *Kivalina* to the effect that statutory displacement eliminates the federal "remedy" or "relief." Opposition 20–21. But those statements flow naturally from the fact that the federal statute displaces federal common law *entirely*, including by eliminating the cause of action without which there obviously can be no relief. *See Kivalina*, 696 F.3d at 857 ("Thus, under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.").

Defendants cite other decisions in which plaintiffs themselves elected to plead federal common law claims and courts held that statutory preemption of those claims did not affect the court's jurisdiction. Opposition 21. But the question here is whether a plaintiff who has elected to plead *solely state law claims* must nonetheless be deemed to have raised federal common law claims, giving rise to federal jurisdiction, when no such federal common law exists any more. Defendants' cases have nothing to say about that.

Finally, because the district court properly concluded that Plaintiffs pleaded no federal claims at all, Defendants' discussion of remands based on refusal to exercise supplemental jurisdiction, Opposition 22, has no bearing either.

CONCLUSION

For the foregoing reasons, the Court should dismiss these appeals except to the extent Defendants challenge the district court's rejection of their federal officer removal claims.

Respectfully submitted,

Dated: June 21, 2018

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SAN MATEO

By: *_/s/ John C. Beiers_*

JOHN C. BEIERS, County Counsel
jbeiers@smcgov.org
PAUL A. OKADA, Chief Deputy
pokada@smcgov.org
DAVID A. SILBERMAN, Chief Deputy
dsilberman@smcgov.org
MARGARET V. TIDES, Deputy
mtides@smcgov.org
SAN MATEO COUNTY COUNSEL
400 County Center, 6th Floor
Redwood City, CA 94063
Tel: (650) 363-4250

Attorneys for Plaintiff-Appellee County of San Mateo and the People of the State of California

Dated: June 21, 2018

OFFICE OF THE COUNTY COUNSEL
COUNTY OF MARIN

By: */s/ Brian E. Washington*

BRIAN E. WASHINGTON,
County Counsel
bwashington@marincounty.org
BRIAN C. CASE, Deputy County Counsel
bcase@marincounty.org
MARIN COUNTY COUNSEL
3501 Civic Center Drive, Suite 275
San Rafael, CA 94903
Tel: (415) 473-6117

Attorneys for Plaintiff-Appellee
County of Marin and the People of
the State of California

Dated: June 21, 2018

McDOUGAL, LOVE, BOEHMER,
FOLEY, LYON & CANLAS,
CITY ATTORNEY FOR
CITY OF IMPERIAL BEACH

By: */s/ Jennifer Lyon*

JENNIFER LYON, City Attorney
jlyon@mcdougallove.com
STEVEN E. BOEHMER,
Assistant City Attorney
sboehmer@mcdougallove.com
CITY ATTORNEY FOR
CITY OF IMPERIAL BEACH
8100 La Mesa Boulevard, Suite 200
La Mesa, CA 91942
Tel: (619) 440-4444

Attorneys for Plaintiff-Appellee
City of Imperial Beach and the People of
the State of California

Dated: June 21, 2018

SHER EDLING LLP

/s/ Victor M. Sher
VICTOR M. SHER
vic@sheredling.com
MATTHEW K. EDLING
matt@sheredling.com
KATIE H. JONES
katie@sheredling.com
MARTIN D. QUIÑONES
marty@sheredling.com
SHER EDLING LLP
100 Montgomery Street, Suite 1410
San Francisco, CA 94104
Tel: (628) 231-2500

Dated: June 21, 2018

GOLDSTEIN & RUSSELL, P.C.

/s/ Kevin K. Russell
KEVIN K. RUSSELL
krussell@goldsteinrussell.com
SARAH E. HARRINGTON
sharrington@goldsteinrussell.com
CHARLES H. DAVIS
cdavis@goldsteinrussell.com
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue, Suite 850
Bethesda, MD 20814
Tel: (202) 362-0636

Attorneys for Plaintiffs-Appellees

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Kevin K. Russell

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Kevin K. Russell