Nos. 19-30492, 19-30829

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE PARISH OF PLAQUEMINES,
Plaintiff-Appellee,
v.

THE STATE OF LOUISIANA, EX REL, JEFFREY MARTIN LANDRY, ATTORNEY GENERAL; THE STATE OF LOUISIANA, THROUGH THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES OFFICE OF COASTAL MANAGEMENT AND ITS SECRETARY, THOMAS F. HARRIS,

Intervenors-Appellees,

(caption continued on inside cover)

On Appeal from the United States District Court for the
Eastern District of Louisiana (Feldman, J.) No. 2:18-cv-05217
and the United States District Court for the Western District of Louisiana
(Summerhays, J.) No. 2:18-cv-677

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANT-APPELLANTS' PETITION FOR PANEL REHEARING

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(caption continued)

v.

CHEVRON USA, INCORPORATED, AS SUCCESSOR IN INTEREST TO CHEVRON OIL COMPANY AND THE CALIFORNIA COMPANY; EXXON MOBIL CORPORATION, AS SUCCESSOR IN INTEREST TO EXXON CORPORATION AND HUMBLE OIL AND REFINING COMPANY; CONOCOPHILLIPS COMPANY, AS SUCCESSOR IN INTEREST TO GENERAL AMERICAN OIL COMPANY OF TEXAS, *Defendants-Appellants*,

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Consolidated With 19-30829

PARISH OF CAMERON,
Plaintiff–Appellee,

v.

STATE OF LOUISIANA, EX REL, JEFF LANDRY; STATE OF LOUISIANA, ON BEHALF OF LOUISIANA DEPARTMENT OF NATURAL RESOURCES, ON BEHALF OF OFFICE OF COASTAL MANAGEMENT, ON BEHALF OF THOMAS F. HARRIS,

Intervenors-Appellees,

v.

BP AMERICA PRODUCTION COMPANY; CHEVRON PIPE LINE COMPANY; CHEVRON USA HOLDINGS, INCORPORATED; CHEVRON USA, INCORPORATED; EXXON MOBIL CORPORATION; KERR-MCGEE OIL & GAS ONSHORE, L.P.; SHELL OFFSHORE, INCORPORATED; SHELL OIL COMPANY; SWEPI, LP; TEXAS COMPANY,
Defendants–Appellants.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) The Chamber of Commerce of the United States of America certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a) The National Association of Manufacturers certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION AND STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (the "Chamber") 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 the courts. To that end, the Chamber often files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici,* their counsel, or their members made a monetary contribution for preparation or submission of this brief. Counsel for Plaintiff-Appellees, Intervenor-Appellees, and Defendants-Appellants (other than Riverwood Production Company), have represented that they do not oppose the Chamber's motion. Riverwood Production Company is a nominal defendant. It was never served, has not entered an appearance in this appeal, and is no longer licensed to do business in Louisiana. The NAM joined this brief shortly before filing, and so has not had the opportunity to request the Parties' consent to their joinder in this filing.

Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The Manufacturers' Center for Legal Action – the litigation arm of the NAM – advocates on behalf of the manufacturers in the courts.

Members of the Chamber and the NAM—in a broad array of fields—frequently litigate in federal and state courts, and in so doing they rely on the consistent and clear application of the procedures codified in 28 U.S.C. § 1446, governing the removal of cases from state to federal courts. Where the federal courts' jurisdiction is not clear from the face of a complaint, Section 1446(b)(3) permits defendants to remove a case to federal court within 30 days after receiving "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.* This Circuit has consistently held that to start the 30-day clock for

removal, the information supporting removal under Section 1446(b)(3) "must be '*unequivocally clear and certain ….*'" *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir. 2002) (citation and internal quotation marks omitted).

This case was scheduled for oral argument in early April, but was removed from the calendar around the time the Court ceased in-person oral arguments due to the COVID-19 pandemic. The panel's subsequent August 10, 2020, opinion failed to apply this Circuit's long-standing "unequivocally clear and certain" requirement. The panel concluded that Defendants-Appellants should have ascertained sooner that the case was removable based on an earlier-filed document, without requiring that the earlier document be "unequivocally clear and certain" as to the basis for removal. Slip op. at 6. Whether that document was "unequivocally clear and certain" or not—and *amici* submit it was not—the Court's failure to perform that analysis (and determine whether it was) warrants rehearing and revision of its earlier decision.[2]

[2] Defendant-Appellants have petitioned the court for both panel rehearing and *en banc* consideration.

Left undisturbed, the panel's decision will create uncertainty in all forms of removal, including diversity and removal under the Class Action Fairness Act, to name just two. From this point forward, defendants will have little choice but to file protective removal notices for fear that even equivocal and uncertain statements by Plaintiffs may start the 30-day removal clock. As a consequence, the dockets of courts in this Circuit may become filled with potentially premature removals based upon stray statements, strewn across multiple filings, which when taken together *might* be sufficient to invoke federal jurisdiction. Defendants who do not remove at the first obscure reference that might suggest federal jurisdiction will find themselves unable to exercise their right to remove a case to federal court when later papers make the grounds for removal unequivocally clear and certain.

Thus, the panel's decision will undermine the purpose of the removal statute, which this Court has explained is to "encourage prompt, proper removals *and to prevent hasty, improper removals*." *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 610 (5th Cir. 2018) (emphasis added). Indeed, this benefits absolutely no one—not the litigants, who will spend more time filing, defending, and challenging

protective and likely premature removal motions, and certainly not the courts, whose valuable time will be consumed ruling on removal motions which may assert only a tenuous federal nexus but which must now be filed anyway, lest removal rights be lost.

ARGUMENT

I. THE PANEL'S DECISION FAILS TO APPLY THE APPROPRIATE TEST FOR TIMELY REMOVAL IN THIS CIRCUIT.

The federal removal and remand statutes are tools intended to ensure that a case is litigated in the *correct* court, not simply in the court that happens to be most advantageous to the filing or removing party. To that end, Section 1446(b)(3) permits a defendant to remove a case to federal court "upon receipt of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable." This Circuit has rightly held that the 30-day removal window opens only when the information supporting removal is "unequivocally clear and certain" from the face of the filed papers, and not before then. *Bosky,* 288 F.3d at 211. As Petitioners explain in their petitions for panel rehearing and rehearing *en banc*, this Circuit has also held, as a corollary, that a defendant is under "no duty to exercise due diligence in determining whether [a] case is in fact

removable." *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 162 (5th Cir. 1992). *See also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (explaining that defendants need not remove "until they've received a paper that gives them enough information to remove."). Under this Circuit's longstanding precedent, then, the statute requires that "the facts supporting removability be stated *unequivocally*" in the filings in court to start the 30-day clock for removal. *Bosky*, 288 F.3d at 211 (emphasis added).

Respectfully, the panel erred in its application of these principles. It held that Defendant-Appellants should have ascertained that they were being sued for "claims arising during World War II" based on nothing more than the serial numbers of certain wells included an attachment to the Plaintiffs' complaint.[3] Slip. Op. at 5. As Petitioners explain in their Petitions, the list of serial numbers in the attachment did not identify when those wells were drilled, which specific activities were being challenged, or whether the activities being challenged arose from Defendant-Appellants' wartime conduct. *See* Petition for Panel

[3] The panel mistakenly found that the well numbers were first included in a 382-page federal environmental impact statement. In fact, they were first referenced in an attachment to the Complaint.

Reh'g at 1. In short, the basis for federal officer removal was far from "unequivocally clear and certain" from the face of the filed papers as required by this Circuit's precedent.

In holding that Defendant-Appellants should have ascertained the basis for federal removal from a passing reference buried in an exhibit, the panel's decision leaves future litigants to guess about the application of the longstanding "unequivocally clear and certain" test in their cases and in the lurch as to whether they now have an obligation to investigate every possible stray reference to ascertain whether it might somehow allege facts which invoke federal jurisdiction. So long as it is unclear whether the Court continues to abide by *Bosky* and *Chapman*, risk-averse defendants will have to operate on the assumption that it is better to preemptively remove a case to federal court on the merest hint of a federal nexus than to wait for clarity, lest they accidentally lose their right to remove later, when the basis for federal jurisdiction becomes unequivocally clear as the result of a subsequent filing. For their part, plaintiffs with claims that might normally be removed to federal court will be incentivized to draft creatively, using exhibits and documents that provide the barest possible hint of federal jurisdiction, in an effort to start

the 30-day window for removal without actually putting defendants on unequivocal and clear notice that federal jurisdiction truly exists. This kind of gamesmanship is exactly the wasteful regime this Circuit sought to avoid through its carefully crafted rule.

Moreover, the courts in this Circuit will confront protective removal requests from defendants seeking to avoid the potential of waiving removal even where federal jurisdictional bases are not clear based on the papers. This would require spending judicial resources resolving protective removals, and litigants—like the Chamber and the NAM's members, and the plaintiffs too—may be forced unnecessarily to spend time and money litigating multiple rounds of removal notices in the same case.

This Court explained in *Morgan* that *Bosky* "counsels against a rule that would increase 'protective' removals." *Morgan*, 879 F.3d at 612. The panel should heed this Court's prior rulings, vacate the decision, and reaffirm that a paper must be "*unequivocally clear and certain* to start the time limit running for a notice of removal under . . . section 1446(b)." *Bosky*, 288 F.3d at 211. Failure to do so would place an enormous burden on both the business community, which relies on clear and consistent

removal procedures, and on the courts, which will otherwise find themselves confronting an onslaught of likely premature and potentially unnecessary removal proceedings.

CONCLUSION

For the reasons set forth above and in the Defendant-Appellants' briefs, the Court should grant the petition for panel rehearing, hold oral argument as the Court initially planned, and revisit its earlier decision in light of Fifth Circuit precedent.

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Dated: September 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,715 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14 point Century Schoolbook;

(iii) all required privacy redactions have been made;

(iv) the hardcopies submitted to the Clerk are exact copies of the ECF submission; and

(v) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: September 15, 2020

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