No. 19-1330

# United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs-Appellees,

v.

SUNCOR ENERGY (U.S.A.), INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado, No. 1:18-CV-01672-WJM-SKC
(Hon. William J. Martinez)

## BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit business federation. The Chamber has no parent entity, and no publicly held corporation or similarly situated legal entity has 10% or greater ownership in the Chamber.

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## AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 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 often 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 also 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 gas emissions and mitigating the impacts of climate change. An effective climate policy should, therefore, leverage the power of business, maintain U.S. leadership in climate science, embrace technology and innovation, aggressively pursue greater energy efficiency,

promote climate-resilient infrastructure, support trade in U.S. technologies and products, and encourage international cooperation. *See* U.S. Chamber of Commerce, *Climate Change: The Path Forward*, https://tinyurl.com/y38v5gms (last visited Nov. 15, 2019). Governmental policies aimed at achieving these goals should come from the federal government, and in particular Congress and the Executive Branch, not through the courts, much less a patchwork of actions under state common law. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019) (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act), https://tinyurl.com/y49xfg3a.

The Chamber is especially concerned that allowing such state common law actions to proliferate would, as Plaintiffs seem to attempt here, fashion a new tort that marries the broadest elements of public-nuisance and product-liability claims, but with none of the historical limits on those doctrines—especially causation. *See* U.S. Chamber Inst. for Legal Reform, *Waking the Litigation Monster: The Misuse of Public Nuisance* 28–30, 31–34 (Mar. 2019), https://tinyurl.com/y46jrhy7 (*Public Nuisance*). The doctrine of "public nuisance arose to address discrete,

localized problems, not far-reaching policy matters." *Id.* at 31. "In contrast, large-scale societal challenges implicate needs and interests that can be fully addressed and balanced only by the political branches of government." *Id.* And allowing public nuisance claims like Plaintiffs' would impose massive retroactive liability on American businesses for decades-old conduct that was lawful when and where it occurred, even though—by Plaintiffs' own admission—countless other actors across the globe contributed to their alleged harms. If accepted, that theory would apply to other industries, with potentially drastic consequences. *See* U.S. Chamber Inst. for Legal Reform, *Mitigating Municipality Litigation: Scope and Solutions* 9–13, 14–18 (Mar. 2019), https://tinyurl.com/y58gygdm. These concerns underscore why uniform legislative and Executive action, not countless state-law tort suits, are the best solution to the challenges of global climate change. *See id.* at 16; *Public Nuisance* at 32–34.

The Chamber has participated as amicus curiae in many cases about global climate change and the application of state law, including cases pending in the Second, Fourth, and Ninth Circuits raising issues very similar to those presented here. *See Mayor & City Council of*

*Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir. docketed June 18, 2019); *City of Oakland v. BP PLC*, No. 18-16663 (9th Cir. docketed Sept. 4, 2018); *City of New York v. Chevron Corp.*, No. 18-2188 (2d Cir. docketed July 26, 2018); *Cty. of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

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 that was intended to fund preparing or submitting the brief, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

Climate change is a pressing public policy issue with global implications. This appeal, however, turns on more ordinary questions: Did the district court have removal jurisdiction over tort claims related to the effects of climate change, and does this Court have appellate jurisdiction to decide that issue? The answer to both questions is yes. The Chamber thus submits this brief in the hope of assisting the Court in resolving these issues based on the application of settled legal principles.

I. Tort claims alleging harms from the effects of global climate change arise under federal common law. And with good reason: Federal common law governs claims that involve uniquely federal interests or require a uniform rule of decision. Both are true of global climate change, which is by definition a national and international problem requiring a uniform, coordinated federal response. A patchwork of state law tort rules would be ineffective and unadministrable. Such claims therefore arise under federal law and fall within the district courts' original jurisdiction.

This conclusion is unchanged by the fact that Congress has displaced federal common law in this area with the Clean Air Act. That

federal common law governs a particular area necessarily means state law cannot apply there. Adding federal statutory law on top of federal common law does not create a vacuum that state law can fill; it simply means the federal courts are not free to confer remedies in the area Congress has occupied. State law remains excluded.

The district court erred by asking whether Defendants' federal common law arguments established complete preemption. The point here is not that federal law *defeats* Plaintiffs' claims—which is a separate merits question—but that it necessarily *governs* them. That is true even though Plaintiffs framed their claims as state-law claims. Because state law cannot exist in this area, federal law necessarily controls, and the case was properly removed.

II. In a case removed under 28 U.S.C. §§ 1442 or 1443, this Court has jurisdiction to review the entire remand order, not just the specific piece of it that fits within those provisions. That conclusion follows not only from text and precedent (as Defendants explain), but also from § 1447's purposes and appellate procedure in analogous contexts.

Most remand orders are not appealable. That rule prevents delay in adjudicating the merits. But where an appeal is already authorized, as

under §§ 1442 and 1443, some amount of delay is inevitable. In that situation, Congress determined that the marginal added delay from reviewing all grounds for removal is negligible, and is therefore outweighed by the powerful interest in ensuring that judicial orders are correct. Reviewing every ground also furthers judicial restraint by permitting the Court to rest its decision on the clearest, narrowest ground available.

Complete review is also the norm. This Court's usual task is to review the judgment below, not the district court's reasoning. 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. The same rule should apply here.

Finally, complete review vindicates the purposes behind §§ 1442 and 1443. 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. That remains true even where the specific ground for removal under §§ 1442 and 1443 turns out, after appellate review, not to apply. The same facts that support a colorable (even if ultimately unavailing) removal argument under these provisions will often implicate other important federal interests, as this case shows. The need for a federal forum in such cases is best served by reviewing every ground for removal—the entire "order"—to ensure that cases belonging in federal court are heard there.

## ARGUMENT

### I. Federal Courts Have Subject-Matter Jurisdiction over Claims Alleging Harms from Global Climate Change.

Plaintiffs allege injuries from the effects of global climate change and seeks compensatory damages and "remediation and/or abatement of" those effects. App. 193–194 (Am. Compl. ¶¶ 532–534). But climate change is, by definition, a national and international issue that is not amenable to a patchwork of local regulation, much less regulation through countless state-court tort actions. Claims alleging harms from global climate change thus arise under federal common law and support federal jurisdiction. The presence of a federal statutory regime like the Clean Air Act does not change that result. And the fact that federal

common law governs these claims is an independent basis for removal, distinct from any preemption defense.

### A. Tort Claims Related to Ambient Air Pollution Arise under Federal Common Law.

While a "federal general common law" no longer exists, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), "federal decisional law" still governs "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP II*). This body of "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution"—the subject of Plaintiffs' claims here. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 392 (2d Cir. 2009) (*AEP I*) (holding "that the federal common law of nuisance applies" to tort claims alleging that power companies' carbon dioxide emissions contributed to global climate change), *rev'd on other grounds*, 564 U.S. 410 (2011).

The crux of Plaintiffs' claims is that Defendants' "production, promotion, refining, marketing and sale of fossil fuels" have caused or

contributed to "alteration of the climate." App. 73 (Am. Compl. ¶ 2). Plaintiffs thus seek to hold Defendants responsible for "myriad . . . consequences" of climate change, including "more (and more serious) heat waves, wildfires, droughts, and floods." *Id.* (*id.* ¶ 3). These effects have allegedly "harmed Plaintiffs' property and impacted the health, safety and welfare of their residents." *Id.* (*id.* ¶ 4).

As these allegations show, Plaintiffs' claims turn on the effects of "the emission of [greenhouse gases] into the atmosphere" across the globe. App. 102 (*id.* ¶ 123). Nor could it be otherwise. Because such emissions become "well mixed globally in the atmosphere," 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009), and because Plaintiffs' claims turn on the effects of decades of accumulation in the air, *see* App. 102–118 (Am. Compl. ¶¶ 123–196), the ultimate issue here is the effect of all greenhouse gas emissions around the world, by millions (if not billions) of actors across hundreds of nations over many decades.

In this context, federal common law, not state tort law, must govern. "Widespread global dispersal is exactly the type of 'transboundary pollution suit[ ]' to which federal common law should apply. " *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y.

2018) (alteration in original) (quoting *Kivalina*, 696 F.3d at 855), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018). Air and water do not abide state lines or national boundaries, and the sources and effects of greenhouse gas emissions are not isolated in any one location. "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaint[ ], a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels." *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018), *appeal docketed*, No. 18-16663 (9th Cir. Sept. 4, 2018). That is why the Supreme Court has said that borrowing state law in this context would be "inappropriate," *AEP II*, 564 U.S. at 422, and why other circuits have applied federal common law to such claims, *see Kivalina*, 696 F.3d at 855–56; *AEP I*, 582 F.3d at 364–66. "[A]ir and water in their ambient or interstate aspects" are inherently diffuse and undifferentiated, and thus require "federal common law." *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972).

Moreover, "a uniform and comprehensive" regime already exists for controlling emissions, including greenhouse gases: The Clean Air Act, the EPA regulations it authorizes, and a network of international and interstate agreements and organizations that deal with environmental regulation. *See AEP II*, 564 U.S. at 416–17, 424–25 (describing EPA's greenhouse gas regulation and the applicable Clean Air Act provisions); *see generally* U.N. Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). These multifaceted efforts balance myriad economic, social, geographic, and political factors. They also emphasize coordinated, cooperative action rather than focusing narrowly on a single sector or group of entities. And they reflect priorities and compromises that legislatures and executive agencies are best suited to balance. This regulation is appropriately forward-looking and does not seek to hold companies retroactively liable for lawful activities.

A patchwork of state-law rules adopted in individual tort suits, by contrast, cannot provide a coherent or effective answer to the *global* problem presented by climate change. For one thing, a single State's law cannot redress the effects of a problem caused by countless sources

around the globe. For another, an individual tort case decided under one State's law cannot adequately weigh the immeasurably complex interests and equities implicated by a global issue like this. And these problems are compounded because climate change is caused in part by emissions dating back decades or centuries.

If tort claims on this subject are viable, however, "there is an overriding federal interest in the need for a uniform rule of decision." *Illinois*, 406 U.S. at 105 n.6; *AEP I*, 582 F.3d at 365. At a minimum, a uniform rule is necessary to avoid inconsistent or duplicative obligations on various actors across the Nation, or even the world. The contributors to climate change are scattered across the globe, and any local effects of climate change cannot be isolated to nearby local contributors. Quite the contrary, local effects of climate change reflect contributions by countless actors around the world. Only a uniform rule can ensure consistent obligations.

It is immaterial that Plaintiffs seek to impose liability for Defendants' fossil-fuel production and sales instead of their direct greenhouse gas emissions. App. 73–74 (Am. Compl. ¶¶ 2, 6). Plaintiffs allege no harms from these activities themselves. Rather, Plaintiffs claim

to have been harmed by the global effects of the resulting emissions. *E.g.*, App. 102 (*id.* ¶ 123). These claims thus raise the same issues, and require the same uniform treatment, as suits directly challenging fossil-fuel emissions. *See City of New York*, 325 F. Supp. 3d at 471–72 (holding that claims attacking the "production and sale of fossil fuels" are "ultimately based on the 'transboundary' emission of greenhouse gases").

Likewise, it does not matter that Plaintiffs claim not to seek "to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." App. 195 (Am. Compl. ¶ 542). Plaintiffs also seek "remediation and/or abatement of the hazards" of climate change, App. 194 (*id.* ¶ 534), which were allegedly exacerbated by Defendants' "production, promotion, refining, marketing and sale of fossil fuels," App. 73 (*id.* ¶ 2). It is hard to see how "remediation and/or abatement" of these effects would not impact Defendants' "oil and gas operations or sales."

In any event, Plaintiffs also seek compensatory damages. App. 193–194 (Am. Compl. ¶¶ 532–533). And "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is

designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246–47 (1959); *accord Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). Federal common law governs these claims.

### B. Congress's Statutory Displacement of Federal Common Law Does Not Revive State Law.

This conclusion is unchanged by the fact that "the Clean Air Act and the EPA actions it authorizes displace any federal common law" related to greenhouse gas emissions. *AEP II*, 564 U.S. at 424. To be sure, "[w]hen Congress has acted to occupy the entire field, that action displaces any previously available federal common law action." *Kivalina*, 696 F.3d at 857. But state tort law does not spring back to life when federal statutes displace federal common law. That view misunderstands the basic relationship between federal common law and state law. It also conflates the threshold jurisdictional question (does federal common law control?) with the distinct merits question (does federal common law provide a remedy?).

By definition, post-*Erie* federal common law applies only in those "few areas, involving uniquely federal interests," that are "committed by the Constitution and laws of the United States to federal control." *Boyle*

*v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks omitted). In these areas, "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Thus, the conclusion that a particular type of claim "should be resolved by reference to federal common law" implies the "corollary" that "state common law" does not apply in that space. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). That is, "if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). That does not change when *Congress* displaces federal common law with statutory law. The subject remains federal in nature, and these tort claims thus arise under federal law.

The district court, however, relied on *AEP II* to conclude that "whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law." App. 210–211 (quoting *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *appeal docketed*, No. 18-15503 (9th Cir. Mar. 27, 2018)). But as noted above, *AEP II* concluded that applying "the law of a particular State would be inappropriate." 564 U.S. at 422.

And while the Supreme Court declined to address certain state-law claims, those claims "sought relief under . . . *the law of each State where the defendants operate powerplants*." *Id.* at 429 (emphasis added). Thus, the Court at most left open the possibility that "aggrieved individuals [might] bring[] a 'nuisance claim pursuant to the law of the *source* State.'" *Id.* (quoting *Ouellette*, 479 U.S. at 497). That theory has no application here, because Plaintiffs do not challenge emissions from any particular sources in Colorado (or anywhere else). Rather, it alleges harms from cumulative interstate and international emissions.

In all events, the Supreme Court's reservation of an issue that was neither briefed to that Court nor addressed below hardly suggests that the Court was silently abandoning the basic premise of its federal common law doctrine: Where a case implicates uniquely federal interests, "state law cannot be used." *Milwaukee*, 451 U.S. at 313 n.7. Indeed, the state-law claims in *AEP* were voluntarily dismissed on remand. *See* Notice of Dismissal, *Connecticut v. Am. Elec. Power Co.*, No. 1:04-cv-05669-LAP (S.D.N.Y. Dec. 6, 2011), ECF No. 94.

Relying on the Clean Air Act to revive state law claims is also "illogical." *City of New York*, 325 F. Supp. 3d at 474. If a claim is so

connected with federal interests, or so clearly requires a uniform rule of decision, as to arise under federal common law, the federal courts will have original jurisdiction to hear that claim. *See infra* § I.C. But on the district court's view, if Congress adds another layer of federal law in the form of a comprehensive statutory regime, the federal courts will *lose* jurisdiction and the claim will proceed in state court under state law, subject only to a preemption defense. It makes no sense to say that *adding* a federal statutory regime in a uniquely federal area revives state law and deprives the federal courts of jurisdiction. *See City of New York*, 325 F. Supp. 3d at 474. Instead, displacement is properly addressed at the merits stage—*after* the Court has determined that federal jurisdiction exists. "[D]isplacement of a federal common law right of action means displacement of remedies," not of federal *jurisdiction*. *See Kivalina*, 696 F.3d at 857.

### C. Federal Common Law is an Independent Basis for Removal Jurisdiction.

The district court ultimately concluded that removal cannot be "based on the existence of an unplead[ed] federal common law claim," and rejected as "not persuasive" cases from other courts allowing removal

"because the claims arose under or were necessarily governed by federal common law." App. 213–215. That was error.

That Plaintiffs' claims arise under federal common law is an independent basis for removal jurisdiction. Federal common law claims "aris[e] under the 'laws' of the United States within the meaning of § 1331(a)." *Illinois*, 406 U.S. at 99; *accord Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 & n.6 (1985). Those claims are thus removable under § 1441(a). *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997) (holding that "if the cause of action arises under federal common law principles, [removal] jurisdiction may be asserted"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (affirming removal of claims arising under federal common law).

That remains true even if the plaintiff has tried to frame a federal law claim in state-law terms. To be sure, the well-pleaded complaint rule generally permits a plaintiff to avoid federal law. App. 212 (remand order). But "a plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's

claim is *necessarily* federal." 14C Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3722.1 (rev. 4th ed.) (emphasis added).

That is the case here. Because "state law cannot be used" in this space, *Milwaukee*, 451 U.S. at 313 n.7, Plaintiffs' claims are necessarily federal and "should be resolved by reference to federal common law," *Ouellette*, 479 U.S. at 488. In other words, if "state law is totally displaced by federal common law," whether the complaint purports to allege "purely state law claims" is irrelevant; "the question arises under federal law, and federal question jurisdiction exists." *New SD*, 79 F.3d at 954–55; *see also Sam L. Majors Jewelers*, 117 F.3d at 929 (affirming removal because negligence claim filed in state court against an airline for lost luggage "ar[ose] under federal common law"); *BP*, 2018 WL 1064293, at *5 (holding that the "well-pleaded complaint rule [did] not bar removal" because "the claims necessarily arise under federal common law").

The district court was thus wrong to conclude that "Defendants' federal common law argument could only prevail under the doctrine of complete preemption." App. 217. Although complete preemption rests on the similar concept that federal law "may so completely pre-empt a particular area that any civil complaint . . . is necessarily federal in

character," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987), complete preemption turns on whether a "*federal statute* wholly displaces the state-law cause of action," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (emphasis added). But a claim can arise under federal common law even without a federal statute occupying the field. It flows from the fact that certain claims implicate inherently and uniquely federal interests. Federal common law thus controls "essentially federal matters, even though Congress has not acted affirmatively about the specific question." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947); *see, e.g.*, *Sam L. Majors Jewelers*, 117 F.3d at 925–26 (holding that "jurisdiction [was] not supported by complete preemption" but removal was still proper because the claim arose "under federal common law"). Federal common law is a proper and independent basis for removal here.

## II. This Court May Review the Entirety of a Remand Order in a Case Removed under §§ 1442 or 1443.

This Court may reach the grounds for removal discussed above because the district court issued "an order remanding a case" that was "removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). The entire order is therefore "reviewable by appeal." *Id.* As Defendants explain (at 8–12), statutory text and precedent support that result. The

Chamber writes to underscore that complete review of remand orders in this situation (i) does not implicate the concerns behind the general bar on remand appeals; (ii) accords with federal appellate procedure in similar contexts; and (iii) vindicates the federal interests underlying §§ 1442 and 1443.

Before turning to those issues, the Chamber addresses Plaintiffs' reliance on the unpublished decision in *Sanchez v. Onuska*, 2 F.3d 1160 (10th Cir. 1993) (per curiam) (unpublished order and judgment). *See* Pls.-Appellees' Mot. for Partial Dismissal 5–6. *Sanchez* said that § 1447(d) allows appellate review of remand orders only "[t]o the extent the removal is based upon [§ 1442 or] § 1443," and does not permit review of "the portion of the remand order" addressing other grounds for removal. 2 F.3d 1160, at *1. But unpublished decisions like *Sanchez* "are not precedential," and "may be cited for their persuasive value" only. 10th Cir. R. 32.1(A). And *Sanchez*—which this Court has never cited—has scant persuasive value. The panel did not consider Defendants' textual or precedential arguments or any of the points below, and its decision predated the 2011 amendments to § 1447(d) and the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, which construed

similar language to allow appellate review of the entire order. 516 U.S. 199, 205 (1996). The Court should therefore decline to follow this unpublished disposition.

### A. Complete Review Accords with the Purposes Behind § 1447(d)'s General Ban on Remand Appeals.

Section 1447(d)'s plain language directs that, in a case removed under §§ 1442 or 1443, the entire remand "order" is "reviewable by appeal." *See* Appellants' Br. 8–10. That result also tracks Congress's purpose in prohibiting remand appeals in other cases. "In general, the purpose of the ban on review is to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute" in state court. 14C Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3740 (rev. 4th ed.). "Since the suit must be litigated somewhere, it is usually best to get on with the main event." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015). But "[o]nce an appeal is taken there is very little to be gained by limiting review." 15A Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3914.11 (2d ed.). Since some delay is inevitable, 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. Congress thus determined that in

this situation, the benefit of complete review—*i.e.*, ensuring that the remand order is correct—outweighs any residual benefits of narrowing it.

Moreover, Congress correctly recognized that in some cases complete review will simplify matters. Consider, for example, a § 1442 case where federal-officer jurisdiction turns on a novel or difficult question of law. If the district court erred in rejecting a more straightforward basis for removal, which does not require delving into novel or difficult legal issues, judicial restraint would favor reversal on that narrower ground. Complete review thus permits appellate courts to avoid grappling with thorny jurisdictional issues unnecessarily. On the other hand, if briefing and argument reveal that the federal-officer ground is more clearly meritorious, the Court need not reach the other issues.[1]

[1] This rule should not encourage defendants to raise frivolous arguments under §§ 1442 or 1443 to ensure appellate review of their other grounds for removal. "Sufficient 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 Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3914.11 (2d ed.); *see Lu Junhong*, 792 F.3d at 813 ("[A] frivolous removal leads to sanctions . . . .").

### B. Complete Review Matches Federal Appellate Procedure in Similar Contexts.

It is not unusual for an appeal to bring up for review issues beyond "the precise decision independently subject to appeal." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50 (1995) (collecting examples). That is true both under statutes that specifically authorize limited-scope appeals—some of which use language echoing § 1447(d)—and under judge-made appellate rules.

The basic principle of federal appellate procedure is "review[ ]" of "judgments, not opinions." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). This Court's usual task is to determine not whether the district court's reasoning is correct, but whether the ultimate judgment is. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). Limited-scope appeals are thus the exception, not the rule. And even then, it is common for the appeal to extend beyond the specific ground that authorized it. Any other rule would create a "substantial risk of producing an advisory opinion": "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." *Edwardsville Nat'l Bank & Tr. Co. v. Marion Labs., Inc.*, 808 F.2d 648, 651 (7th Cir. 1987).

Certified interlocutory appeals under § 1292(b) are a prime example of this principle. The basis for such an appeal is that the district court's "order involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). But once the district court has certified the appeal, "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha*, 516 U.S. at 205.

The same is true for cases removed under the Class Action Fairness Act (CAFA). 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). Because this provision "speaks in terms of the court of appeals accepting an appeal 'from an *order* of a district court granting or denying a motion to remand,'" the appellate court may "consider any potential error in the district court's decision, not just a mistake in application of [CAFA]." *Coffey v. Freeport McMoran Copper & Gold*, 581

F.3d 1240, 1247 (10th Cir. 2009) (per curiam) (quoting § 1453(c)(1) and *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005) (emphasis added)); *accord Parson v. Johnson & Johnson*, 749 F.3d 879, 892–93 (10th Cir. 2014). These examples—involving statutes with language similar to § 1447(d)'s—show that "[w]hen a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review." *Coffey*, 581 F.3d at 1247 (quoting *Brill*, 427 F.3d at 451).

Likewise, "on appeal from a grant or denial of injunctive relief [under § 1292(a)(1)], this court as a matter of law may justifiably, though cautiously, decide other generally nonappealable legal issues." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1352 (10th Cir. 1989); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (holding that the court of appeals "was justified in proceeding to plenary review" "even though the appeal is from the entry of a preliminary injunction"). "[R]eview quite properly extends to all matters inextricably bound up with the remedial decision . . . . Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that

have been sufficiently illuminated to enable decision . . . .” 20 Charles Alan Wright et al., Fed. Prac. & Proc. Deskbook § 109 (2d ed.).

Similar principles apply in the collateral-order and pendent-appellate-jurisdiction contexts. Once the requirements for a collateral order are satisfied, 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 Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3911.2 (2d ed.). “A broader approach may be taken to achieve sensible judicial management of a particular case.” *Id.*; *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 resolution of related issues). So too in pendent-appellate-jurisdiction cases, where this Court may review an “otherwise nonappealable decision” that “is inextricably intertwined with the appealable decision,” or whose resolution “is necessary to ensure meaningful review of the appealable one.” *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1197 (10th Cir. 2010). There are “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 Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3937 (3d ed.).

In short, in many situations a district court decision is appealable for a particular reason, but the scope of the appeal extends beyond that question. Together, these doctrines show that the position urged by Defendants here—and adopted by other circuits, *e.g.*, *Lu Junhong*, 792 F.3d at 811—is in no way anomalous. Rather, it accords with basic appellate-review principles and permits the Court to rest its decision on the firmest available ground.

### C. Complete Review Serves the Congressional Policy Underlying Appellate Review of Remands in §§ 1442 and 1443 Cases.

Reviewing the entire remand order also ensures that cases involving important federal interests are heard in federal court. In cases that implicate the federal government's official actions (§ 1442) or "equal civil rights" (§ 1443), Congress has determined that the need for a federal forum is strong enough to warrant the added protection of an appeal—even at the cost of potentially delaying litigation in state court. That

remains true where the specific ground for removal under §§ 1442 or 1443 is ultimately unavailing.

Congress first permitted appeals of remand orders for civil rights cases under § 1443. As part of the Civil Rights Act of 1964, Congress concluded that appellate review was needed to ensure a federal forum for these cases and thus added an exception to § 1447(d)'s then-categorical bar against appellate review. *See* H.R. Rep. No. 88-914, at 32 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2408; *New York v. Galamison*, 342 F.2d 255, 259 (2d Cir. 1965) (Friendly, J.). Congress adopted this exception despite the concerns of some legislators that it might allow "dilatory tactics and repeated appeals [to] frustrate the execution of State laws." H.R. Rep. No. 88-914, at 59, 1964 U.S.C.C.A.N. at 2428.

In 2011, Congress extended the same treatment to § 1442. *See* H.R. Rep. No. 112-17, at 4 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 420, 423. Section 1442 allows removal of several classes of cases that directly implicate the validity and propriety of the federal government's official actions, including (as here) a civil action against "any person acting under [a federal] officer . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). This statute's purpose "is to take from State courts

the indefeasible power to hold a Federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their Federal duties." H.R. Rep. No. 112-17, at 3, 2011 U.S.C.C.A.N. at 422. It thus "provide[s] a federal forum for cases where federal officials must raise defenses arising from their official duties" and "protect[s] federal officers from interference by hostile state courts." *Mesa v. California*, 489 U.S. 121, 137 (1989).

As with civil rights cases, Congress decided that removal alone was insufficient. An appeal must be available "to ensure that any individual drawn into a State legal proceeding based on that individual's status as [or under] a Federal officer has the right to remove the proceeding to a U.S. district court for adjudication." H.R. Rep. No. 112-17, at 1, 2011 U.S.C.C.A.N. at 420. This amendment "reflects the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 460 (5th Cir. 2016).

The same concerns that support federal jurisdiction in these cases also counsel in favor of reviewing every ground for removal. If a case

sufficiently implicates federal interests to support a colorable removal argument under § 1442, those interests do not vanish simply because, after appellate review, it turns out the case does not satisfy all of § 1442's sometimes-technical requirements. 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*, 817 F.3d at 460–61 (citations omitted).

This case is a good example. Defendants identified several meritorious grounds for removal, most of which fall outside § 1442 but which implicate similar federal interests. Even if the Court rejected Defendants' federal-officer arguments, those strong federal interests would remain. And they would call for appellate review of Defendants' remaining grounds for removal, lest a case that raises important federal questions be remanded in error.

## CONCLUSION

For these reasons, the Court should review the entirety of the district court's remand order and reverse that order.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

(1) This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,444 words, as determined by the Microsoft Word 2016 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(2) This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter D. Keisler
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## CERTIFICATE OF DIGITAL SUBMISSION

Under 10th Cir. R. 25.3, I certify that:

(1) The foregoing brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5;

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**CERTIFICATE OF SERVICE**

I certify that I caused this document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on November 25, 2019. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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