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

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF SANTA CRUZ, *et al.*, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria

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

Steven P. Lehotsky
Michael B. Schon
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5948

Peter D. Keisler
C. Frederick Beckner III
Ryan C. Morris
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

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 corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Regulations, and Rules

Legislative Materials and Treaties

Scholarly Authorities

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 regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber 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. Thus, businesses must be part of any productive conversation on how to address global climate change. If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change,

then under our system of government those policies should come from Congress and the Executive Branch, and not through the courts or ad hoc efforts from state and local officials.

The Chamber has participated as amicus curiae in many cases concerning global climate change and the application of state law. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *North Dakota v. Heydinger*, 825 F. 3d 912 (8th Cir. 2016); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

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.

INTRODUCTION AND 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. This Court has so held. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011). 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 necessarily 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. The addition of 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 create causes of action in the area Congress has occupied. State law remains excluded. The alternative rule, apparently embraced by the district court, would illogically mean that federal legislation in an area of uniquely federal concern actually negates federal court jurisdiction. Such a rule would turn fundamental principles of federal jurisdiction on their head.

Underscoring the need for a federal forum and uniform federal treatment, nuisance claims arising from the effects of climate change often will present significant justiciability problems. Such claims necessarily involve weighing and balancing the costs and benefits of fossil fuel extraction and use, not merely for individual parties but essentially for the whole world. There are no judicially discoverable and manageable standards for making such momentous decisions. And attempting to decide such questions would intrude on the authority of the political

branches. The need for a uniform body of law governing whether and when claims touching on uniquely federal issues are justiciable confirms that a federal forum is the correct one.

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 ground for removal 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 prohibition serves to prevent delay in adjudicating the merits of the dispute. 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. This will not encourage "baseless" removal arguments, as Plaintiffs claim; the federal courts have ample tools to deter frivolous or dilatory removal claims.

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 (as here) the entire order under review. There is no basis, as a matter of statutory construction or appellate practice, for a different rule to apply here.

Finally, complete review is necessary to vindicate 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 decision 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, to be inapplicable. The same facts that give rise to a colorable (even if ultimately unavailing) removal argument under these provisions will often implicate other important federal interests, as this case illus-

trates. The need for a federal forum in such cases is best served by reviewing every ground for removal, 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' claims allege injuries from the effects of global climate change and seek relief that would allegedly "abate" those effects. But climate change is a national—indeed, global—issue, which is addressed by federal statutes, international treaties, and federal common law. These claims thus arise under federal law and belong in federal court. What is more, such claims present significant justiciability problems, which underscore the need for uniform federal treatment.

A. Climate Change is a National and International Issue that Requires a Uniform, Federal Rule of Decision.

Global 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. That is why tort claims based on the effects of climate change arise (if at all) under federal common law. This remains true in the presence of a federal statutory regime like the Clean Air Act.

1. While a "federal general common law" no longer exists, *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938), there is still a body of "federal decisional law" that "addresses 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*) (internal quotation marks omitted). This body of "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012)—the very subject of Plaintiffs' claims here.

The crux of Plaintiffs' claims is that Defendants have allegedly contributed to "global greenhouse gas pollution and a concordant increase in the concentration of greenhouse gases … in the Earth's atmosphere." *E.g.*, San Mateo Compl. ¶ 1. Plaintiffs thus seek to hold Defendants responsible for "caus[ing] sea levels to rise." *Id.* ¶ 165. As these allegations make plain, Plaintiffs' claims turn on the effects of *all* "anthropogenic greenhouse gas emissions." *Id.* ¶ 48. Nor could it be otherwise: Because such emissions become "well mixed globally in the atmosphere," 74 Fed.

Reg. 66,496, 66,499 (2009), and because Plaintiffs' claims turn on the effects of decades of accumulation in the air, *see* San Mateo Compl. ¶¶ 55–71, the ultimate issue here is the impact of all greenhouse gas emissions across the globe, by millions (if not billions) of actors across hundreds of nations.

In this context, federal common law, not state tort law, must govern. Air and water do not abide state lines or even national boundaries, and the sources and effects of greenhouse gas emissions are not isolated in any one location. As Judge Alsup observed, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, 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-17-6011, 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*, 564 U.S. at 422, and why this Court has applied federal common law to such claims, *Kivalina*, 696 F.3d at 855–56. "When we deal with

air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972).

Moreover, "a uniform and comprehensive" regime already exists for controlling emissions and responding to climate change: The federal 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*, 564 U.S. at 417, 424–25 (describing EPA's "greenhouse gas regulation" and the applicable Clean Air Act provisions); *see generally* U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (entered into force March 21, 1994). These multifaceted efforts balance myriad economic, social, geographic, and political factors across the entire Nation. They also emphasize coordinated, cooperative action rather than focusing narrowly on a single sector or group of entities.

Nor are States excluded from this regime. The Clean Air Act itself is a prime example of cooperative federalism. For example, for pollutants that "endanger public health or welfare," EPA establishes the best system of emission reduction for a source that States in turn implement and

enforce. 42 U.S.C. § 7411(b)(1)(A), (d) (States develop standards of performance for existing sources that reflect what each affected source can achieve with the best system of emission reduction). Within limits, States can also supplement the basic federal mandate. *Id*. § 7416.

These broad-based forms of regulation reflect priorities and compromises that legislatures and executive agencies are better suited to balance. Such regulation is also appropriately forward-looking and does not seek to hold companies retroactively liable for lawful activities.

A patchwork of tort-law rules adopted in individual state-court nuisance actions, by contrast, cannot provide a coherent or effective answer to the *global* problem presented by climate change. For one thing, a single State's judicial system is incapable of redressing the effects of a problem that is 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. Indeed, retroactive tort liability of any kind is ill-suited to address this issue, which is better resolved through federal legislative action in coordination with governments around the world.

To the extent tort claims on this subject are viable, however, "there is an overriding federal interest in the need for a uniform rule of decision." *Milwaukee*, 406 U.S. at 105 n.6. 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 are contributed to by numerous actors around the world. Only a uniform rule can ensure consistent obligations.

2. This analysis 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. *See AEP*, 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 this does not mean that state tort law springs back to life when federal statutes displace federal common law. That view,

which the district court appeared to accept, misunderstands the basic relationship between federal common law and state law.[1]

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" is inapplicable 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.

[1] The district court read *AEP* to suggest "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." But "[n]one of the parties" in *AEP* "addressed the availability of a claim under state nuisance law," and the Court expressly said that applying "the law of a particular State would be inappropriate" in this context. 564 U.S. at 422, 429.

The subject remains federal in nature, and tort claims therein thus arise—if at all—under federal law.

A contrary rule would have bizarre effects. 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. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985). But on the district court's view, if Congress adds an additional 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 an ordinary-preemption defense. It makes no sense to say that the *addition* of a federal statutory regime in a uniquely federal area revives state law and deprives the federal courts of jurisdiction.

B. Tort Claims Related to Climate Change Present Serious Justiciability Problems.

For much the same reasons that federal common law excludes state law in this area, tort claims of any kind arising from the effects of climate change present intractable justiciability problems. Only a federal forum and federal law can supply a uniform rule to decide whether and when claims that implicate these justiciability issues may go forward.

Many claims related to the causes and effects of climate change present political questions that cannot be resolved by courts. That is true for several reasons. For instance, a claim presents a non-justiciable political question if there are no "judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962). A public nuisance claim related to climate change raises this very concern because it turns on whether the defendants have caused an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). "The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997).

A trial judge or jury cannot intelligently apply that standard to gauge an individual defendant's contribution to the effects of global climate change. A public nuisance suit in this context would essentially require a court to determine the "right" amount of emissions, presumably by weighing potential benefits of reduced emissions—even as other de-

veloping countries increase greenhouse gas emissions—against the profound impact on local economic growth and energy costs; considering the availability and costs of alternative fuel sources or new technologies to reduce emissions; and so on.

These are not determinations that can be made *ad hoc* by applying state tort law in the context of a single suit against some discrete defendants. The questions on which such a claim would turn—What is a permissible amount of emissions for a given enterprise or for aggregate global emissions? Who should bear the costs of limiting emissions? Should developed nations act even if developing nations do not?—are not just complex. They simply have no "right" legal answers. *See AEP*, 564 U.S. at 428 ("[J]udges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."); *California v. Gen. Motors Corp.*, No. C-06-05755, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007) (dismissing nuisance claims because "[t]he Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or

in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe.").

Determining when claims cross over into non-justiciable questions, when the underlying issue already raises national and global issues, warrants the nationwide uniformity that federal courts were designed to provide. It is crucial that federal courts, applying uniform precedent and uniform rules, decide these thorny justiciability issues and determine which climate-change-related claims can go forward and which cannot. This need for uniformity confirms what *AEP* and *Kivalina* already establish: Plaintiffs' claims belong in federal court.

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.*; *see Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1557 (2018); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *see also Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017).

Defendants have explained that § 1447(d)'s text confers jurisdiction to review the entire remand order, that other circuits have so held, and that this rule is consistent with this Court's precedent. Opening Br. 18–26. 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) is consistent with federal appellate procedure in similar contexts; and (iii) vindicates the federal interests underlying §§ 1442 and 1443. Thus, "[r]eview should … be extended to all possible grounds for removal underlying the order." 15A Wright et al., Fed. Prac. & Proc. Juris. § 3914.11 (2d ed.).

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

As Defendants have explained (at 18–21), § 1447(d)'s plain language directs that, in a case removed under §§ 1442 or 1443, the entire remand order is reviewable on appeal. Reviewing the entire order is also consistent with 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 Wright et al., Fed. Prac. & Proc. Juris. § 3740 (4th ed.). "Since the suit must be litigated somewhere, it is

usually best to get on with the main event." *Lu Junhong*, 792 F.3d at 813. But "[o]nce an appeal is taken there is very little to be gained by limiting review." 15A Wright et al., Fed. Prac. & Proc. Juris. § 3914.11 (2d ed.). Since some delay is inevitable, *see id.*, the "marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small," *Lu Junhong*, 792 F.3d at 813. Accordingly, Congress determined that in this situation, the 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 actually simplify matters. Consider, for example, a § 1442 case where federal-officer status 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. *See Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011) ("[T]he cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not

to decide more."). Conversely, if briefing and argument reveal that the federal-officer ground is more clearly meritorious, the Court need not reach the other issues.

Plaintiffs contend, however, that reviewing entire remand orders would encourage defendants to raise "baseless" arguments under §§ 1442 or 1443 to ensure appellate review of their other, "more serious" grounds for removal. Mot. for Partial Dismissal 19. Plaintiffs cannot, however, identify any examples of this happening in the circuits that already allow complete review. Nor does their argument stand up on its own terms. If the other grounds for removal are meritorious, they are less likely to produce an appeal because they should persuade the district court. And if the district court rejects them erroneously, it is hardly unfair to reverse that decision.

In all events, there are ample deterrents to raising "baseless" arguments in federal court. "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 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"). Section 1447 authorizes the

imposition of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal," 28 U.S.C. § 1447(c), and a notice of removal must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure," *id.* § 1446(a); *see* Fed. R. Civ. P. 11(b)–(c) (authorizing sanctions); 28 U.S.C. § 1927 (same). These tools are more than sufficient to deter "baseless" removal arguments without artificially restricting the scope of the appeal-by-right that Congress has expressly authorized.

B. Complete Review is Consistent with Federal Appellate Procedure in Similar Contexts.

Contrary to Plaintiffs' claims (Mot. for Partial Dismissal 17–18), it is far from unusual for an appeal to bring up for review issues beyond the specific question or determination that permitted the appeal in the first place. 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). Thus, this Court's usual task in resolving an appeal is to determine not whether the district court's reasoning is correct, but whether the ultimate judgment is. *E.g.*, *Perry v.*

Schwarzenegger, 630 F.3d 898, 901 (9th Cir. 2011) (per curiam) (affirming the decision below "on different grounds from those relied upon by the district court").

Cases in which an appeal is limited in scope are thus the exception, not the rule. And even in those cases, 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. 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). Yet, once the district court has certified the appeal, review is not limited to the "controlling question" on which the appeal was predicated; it reaches "any issue fairly included

within the certified order." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); *see Rivera v. Nibco, Inc.*, 364 F. 3d 1057, 1063 (9th Cir. 2004) ("Our scope of review is broader than the specific issues the district court has designated for appellate review.").

The same is true for cases removed under the Class Action Fairness Act (CAFA). CAFA provides that, "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). As this Court has explained, a "straightforward" reading of this language shows that a court of appeals may "consider any potential error in the district court's decision, not just a mistake in application of [CAFA]." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 673 (9th Cir. 2012) (quoting *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009)); *accord Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005). These examples show that in similar contexts, Congress—using language that echoes § 1447(d)'s—has authorized the courts of appeals to consider questions beyond the specific issue that served as the basis for the appeal.

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

Similar principles apply in the collateral-order and pendent-appellate-jurisdiction contexts. Once the requirements for a collateral order are satisfied, *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), the courts take a pragmatic approach to the appeal's scope, permitting "review of related matters so long as the record is sufficient to the task and there is no additional interference with trial court proceedings," 15A Wright et al., Fed. Prac. & Proc. Juris. § 3911.2 (2d ed.); *see, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). "A broader approach may be taken to achieve sensible judicial management of a particular case." 15A Wright et al., Fed. Prac. & Proc. Juris. § 3911.2 (2d ed.). So too in

pendent appellate jurisdiction cases, where this Court has reviewed otherwise non-appealable issues "inextricably intertwined" with the appealable ones. *Mueller v. Auker*, 576 F.3d 979, 990 (9th Cir. 2009). Indeed, there may be "good reasons to undertake review of some matter that would not be independently appealable," especially where there is "a strong relationship between the appealable order and the additional matters swept up into the appeal." 16 Wright et al., Fed. Prac. & Proc. Juris. § 3937 (3d ed.).

In all, there are many situations where 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. Plaintiffs' position, by contrast, is out of step with the weight of precedent and sound appellate practice.

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

Reviewing the entire remand order ensures that cases implicating 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 such cases and thus added an exception to § 1447(d)'s then-categorical bar against appellate review. *See* H.R. Rep. 88-914 (1964), *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 notwithstanding the concerns of some legislators that it might allow "dilatory

tactics and repeated appeals [to] frustrate the execution of State laws." 1964 U.S.C.C.A.N. at 2428.

In 2011, Congress extended the same treatment to § 1442. *See* H.R. Rep. 112-17, at 4 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420, 423. Section 1442 permits 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 a federal officer or "any person acting under that officer … for or relating to any act under color of such office." *See* 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. 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. 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. Where 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. If the Court were to reject Defendants' federal-officer arguments (which it should not do, for the reasons Defendants explain), 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—as explained above—be remanded to state court in error.

What is more, two district judges in this circuit have disagreed about whether claims like these belong in federal court. That situation cries out for appellate review, lest materially identical claims or litigants be treated differently based on the happenstance of the assigned judge. Because the plaintiffs in the *Oakland* case declined to appeal, and because Congress conferred broad appellate jurisdiction in cases removed under § 1442, this case is both the only vehicle for this Court to resolve these issues and a proper one to do so.

CONCLUSION

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

November 28, 2018

Respectfully submitted,

/s/ Peter D. Keisler

Steven P. Lehotsky
Michael B. Schon
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
Tel: (202) 463-5948
Fax: (202) 463-5346

Peter D. Keisler
C. Frederick Beckner III
Ryan C. Morris
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Fax: (202) 736-8711

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 28, 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/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF COMPLIANCE

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

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 5840 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).

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
Peter D. Keisler