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

IN THE

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 presiding
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 presiding
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 presiding
COUNTY OF SANTA CRUZ; et al., Plaintiffs-Appellees 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 presiding

MOTION TO STAY THE MANDATE

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 41(d)(1), Defendants-Appellants respectfully move this Court to stay issuance of the mandate pending the filing and disposition of a timely petition for a writ of certiorari with the Supreme Court of the United States. A stay is warranted because Defendants' petition for certiorari will raise a substantial question that has divided the circuits, namely, whether a court of appeals has jurisdiction under 28 U.S.C. § 1447(d) to review the entire remand order in a case removed in part under 28 U.S.C. §§ 1442 or 1443, or whether appellate jurisdiction is limited to those two grounds for removal. At least one such petition for certiorari is currently pending before the Supreme Court and will likely be acted upon at the beginning of the Court's October Term. *See BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (distributed for Conference on Sept. 29, 2020).

Absent a stay, these six cases may be remanded to four different California state courts based on the Court's conclusion that removal was not proper under 28 U.S.C. § 1442, even though the Court has not considered whether removal was proper on any of the other grounds presented in Defendants' notice of removal. That potential harm amply justifies a stay of the mandate. Plaintiffs-Appellees oppose this motion.

BACKGROUND

Plaintiffs filed six separate actions against more than 30 energy companies in California state court, alleging that "the dominant cause of global warming and sea level rise" is worldwide "greenhouse gas pollution," ER216, and that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused approximately 20% of global fossil fuel product-related CO_2 between 1965 and 2015, with contributions currently continuing unabated," ER247. Asserting numerous causes of action under California tort law, including for public and private nuisance, Plaintiffs demand compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. ER292–312.

Defendants removed the actions to the Northern District of California. The notices of removal asserted seven independent grounds for federal jurisdiction, including the federal-officer removal statute, 28 U.S.C. § 1442. ER145–47. Plaintiffs filed a motion to remand, which the district court granted. ER5–6.

The panel dismissed Defendants' appeal in all but one respect. Citing this Court's decision in *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), the panel held that, under 28 U.S.C. § 1447(d), it "ha[d] jurisdiction to review [Defendants'] appeal to the extent the remand order addresses § 1442(a)(1), but [it] lack[ed] jurisdiction to review their appeal from the portions of the remand order considering the . . . other bases for subject-matter jurisdiction." Op. 19. The panel acknowledged

that the Seventh Circuit had reached the opposite conclusion in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015)—and even stated that, "[w]ere [it] writing on a clean slate, [it] might conclude that *Lu Junhong* provides a more persuasive interpretation of § 1447(d) than *Patel*." Op. 23. But the panel found itself "bound by *Patel* until abrogated by intervening higher authority." *Id.*

Defendants filed a petition for rehearing en banc on July 9, 2020. Dkt. 170. On August 4, 2020, the Court denied Defendants' petition. Dkt. 235. Absent a stay, the mandate will issue on August 11, 2020. Fed. R. App. P. 41(b).

ARGUMENT

This Court may stay the mandate when a petition for certiorari "would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(1). "No exceptional circumstances need be shown to justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989).

I. Defendants' Petition Will Present A Substantial Question

Defendants' petition for a writ of certiorari will present the question whether 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442. As this Court and others have acknowledged, there is a conflict among the federal courts of appeals on this important question of appellate jurisdiction. *See*

Op. 19–23; *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020); *Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452, 460 (4th Cir. 2020), *petition for cert. filed*, No. 19-1189 (Mar. 31, 2020). The existence of this conflict alone indicates that there is a considerable likelihood that the Supreme Court will grant certiorari. *See* S. Ct. R. 10(a) ("the reasons the Court considers" in granting review include whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals").

A stay is also warranted because this recurring and important issue has not been specifically addressed by the Supreme Court, and the approach adopted in *Patel* and followed by the panel is in clear tension with the Supreme Court's decision in a closely analogous jurisdictional context. *See* S. Ct. R. 10(c) (noting that review may be proper where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the Supreme Court held that 28 U.S.C. § 1292(b), which confers appellate jurisdiction over "order[s]" certified by the district court for interlocutory review, confers appellate jurisdiction to "address any issue fairly included within the certified order because

it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* at 205. Here, too, the statute in question confers appellate jurisdiction over "*an order* remanding a case to the State court from which it was removed." 28 U.S.C. § 1447(d) (emphasis added). Yet *Patel* held that jurisdiction does *not* extend to the order, but only to specific *issues* addressed *in* the order, contrary to the reasoning in *Yamaha*.

This question is recurring and important. It affects the congressionally conferred rights of litigants to a federal judicial forum, and it has arisen in multiple federal courts of appeals in this year alone. *See BP*, 952 F.3d at 458–61; *Suncor Energy (U.S.A.) Inc.*, 2020 WL 3777996, at *3–17; *see also Rhode Island v. Shell Oil Prods. Co., LLC, et al.*, No. 19-1818 (1st Cir. argument scheduled Sept. 11, 2020).

It is also potentially dispositive in this case. Defendants' lead argument in favor of removal is that Plaintiffs' claims "arise under" federal law because they are necessarily governed by federal common law as a matter of constitutional structure. This argument has substantial support in Supreme Court precedent. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("[I]f federal common law exists, it is because state law cannot be used."); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488

(1987) ("[I]nterstate water pollution is a matter of federal, not state, law."); *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("Environmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'"). And the United States recently filed an amicus brief in support of a pending petition for rehearing and rehearing *en banc* in a closely related case making precisely this point, and emphasizing the importance of this jurisdictional issue. *See* Brief of the United States as *Amicus Curiae* in Support of the Petition for Rehearing, *City of Oakland v. B.P. p.l.c.*, No. 18-16663 (9th Cir.), Dkt. 198 at 4 ("Here, the interstate pollution claims asserted by the Cities arise under federal common law."); *id*. at 5 ("Such claims present important questions relating to constitutional structure, federal statutes, separation of powers, and federalism; it is essential that they be afforded a federal forum.").

As a result, Defendants' petition will present a substantial question, and will not be "filed merely for delay." 9th Cir. R. 41-1.

II. There Is Good Cause To Stay The Mandate

Absent a stay of the mandate, this action may be remanded to state court for further proceedings while the Supreme Court considers whether to grant Defendants'

petition for a writ of certiorari.* If a remand occurs and the panel's decision is ultimately reversed, not only will Defendants have been denied (for months, if not years) the federal forum to which they are entitled, but this Court will have forsworn its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); *see, e.g.*, *Mata v. Lynch*, 576 U.S. 143, 150 (2015).

Moreover, Defendants could be forced to incur substantial burden and expense litigating these six cases in four different state courts, which could entail briefing and resolution of various threshold and dispositive motions as well as potentially extensive discovery. Those harms will be irremediable if the remand is ultimately determined to be improper and further proceedings in federal court are required. The interests of judicial economy would also be served by a stay, as there is no need to recommence proceedings in state court while the question of federal jurisdiction has not yet been finally resolved.

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* In the proceedings below, the district court stayed issuance of the remand orders pending appeal. *See* Nos. 17-cv-4929+ (N.D. Cal.), Dkt. 240; Nos. 18-cv-450+ (N.D. Cal.), Dkt. 142. In Defendants' view, those stays extend through the disposition of a petition for a writ of certiorari by the Supreme Court. Out of an abundance of caution, Defendants are seeking clarification from the district court regarding the scope of the stay orders.

CONCLUSION

This Court should stay issuance of the mandate pending the filing and disposition of a timely petition for writ of certiorari.

Dated: August 10, 2020

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