No. 19-1189

In the Supreme Court of the United States

BP P.L.C., ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent acknowledges that the courts of appeals are divided on the scope of appellate review of remand orders under 28 U.S.C. 1447(d). And respondent does not dispute that this case is a suitable vehicle in which to resolve the circuit conflict on that question—a question that has arisen in every regional circuit and in a wide variety of contexts spanning the full range of civil litigation.

Respondent instead contends only that the circuit conflict does not warrant the Court's review. Respondent is mistaken. There is no reason to believe that the conflict will abate on its own. Five different courts of appeals have recognized the conflict over the last three years alone; two of those courts endorsed petitioner's interpretation of

Section 1447(d), but three others declined to follow it, mostly relying on conclusory holdings in prior circuit precedent. And of the two regional courts of appeals that had not spoken to the question at the time of the petition, one has since adopted respondent's interpretation, and the other is poised to address the question in a currently pending appeal. Given the recent case law supporting petitioner's interpretation and the overwhelming number of circuits that have spoken to the issue, only this Court can realistically resolve the conflict.

Aside from arguing that the Court should leave the conflict in place, respondent devotes a significant portion of its brief to its arguments on the merits. Respondent is free to advance those arguments if the Court grants review. But for now, it suffices to say that respondent offers no compelling reason to depart from the plain language of Section 1447(d) or the Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), which interpreted indistinguishable language in another jurisdictional statute. This case is a compelling candidate for further review, and certiorari should be granted.

A. The Decision Below Implicates A Recognized Conflict Among The Courts Of Appeals

Respondent concedes (Br. in Opp. 9-19) that a circuit conflict exists on the question whether 28 U.S.C. 1447(d) permits appellate review of any issue encompassed in a district court's remand order in a case removed in part under the federal-officer or civil-rights removal statutes. That concession is wise, given the number of courts that have recognized the conflict. See Pet. App. 8a; *Wells Fargo Bank, N.A.* v. *Dey-El*, 788 Fed. Appx. 857, 860 n.2 (3d Cir. 2019); *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 n.3 (5th Cir. 2017); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811-812 (7th Cir. 2015).

Indeed, even since the petition for certiorari was filed, two additional courts of appeals have recognized the circuit conflict. In *County of San Mateo* v. *Chevron Corp.*, 960 F.3d 586 (2020), pet. for reh'g pending, No. 18-15499 (filed July 9, 2020), the Ninth Circuit held that it was bound by prior precedent to review only the defendants' federal-officer ground for removal. See *id.* at 596-597. But the court added that, "[w]ere [it] writing on a clean slate," it might have concluded that the Seventh Circuit's decision in *Lu Junhong*, *supra*, "provides a more persuasive interpretation of [Section] 1447(d)." *Id.* at 597, 598. Similarly, in *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 19-1330, ___ F.3d ___, 2020 WL 3777996 (July 7, 2020), the Tenth Circuit repeatedly acknowledged the "disagreement among the courts of appeals" over the question presented. *Id.* at *4; see *id.* at *4-*5 & n.7, *12, *17. Describing the question as "close," the court ultimately adopted respondent's interpretation. See *id.* at *12, *17.

Despite the widespread recognition of the conflict—and the fact that all but one of the regional circuits have now spoken to the issue in some fashion—respondent contends that the conflict is too "[i]nsubstantial" to warrant review. Br. in Opp. 9. In respondent's view, that is because the Seventh Circuit's decision in *Lu Junhong* is the "sole outlier that offers any reasoning for adopting" petitioners' interpretation of Section 1447(d). *Id.* at 10. "The only cases to have followed *Lu Junhong*," respondent adds, "are inconsistent with their own circuit's case law." *Id.* at 9. Those contentions lack merit.

1. Judge Easterbrook's opinion for the Seventh Circuit in *Lu Junhong* thoroughly explains why the text of Section 1447(d) permits appellate review of all grounds for removal in cases removed in part under the federal-

officer or civil-rights removal statutes. See 792 F.3d at 811-813. Respondent does not dispute that *Lu Junhong* stands for that proposition, but instead contends that no other court has "offer[ed] any reasoning" in support of petitioners' interpretation. Br. in Opp. 10.

That is incorrect. In *Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292 (2017), the Fifth Circuit squarely held that petitioners' interpretation "flows from the text of Section 1447(d)," quoting both the core reasoning in *Lu Junhong* and the conclusion of the leading treatise on federal jurisdiction that appellate review should "extend[] to all possible grounds for removal underlying the remand order." *Id.* at 296 (citations omitted); see 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3914.11, at 706 (2d ed. 2019). And in *Mays* v. *City of Flint*, 871 F.3d 437 (2017), cert. denied, 138 S. Ct. 1557 (2018), the Sixth Circuit also relied on *Lu Junhong* to hold that its appellate jurisdiction under Section 1447(d) "encompasse[d] review of the district court's decision on the alternative ground for removal" based on federal-question jurisdiction. *Id.* at 442. While the Sixth Circuit did not rehash the arguments in support of that interpretation, it was plainly incorporating the Seventh Circuit's reasoning. See *ibid.*; see also *Suncor Energy*, 2020 WL 3777996, at *4 n.7 (noting that the Fifth and Sixth Circuits have "issued opinions following *Lu Junhong*").

Respondent contends that *Decatur Hospital Authority* and *Mays* "do[] not add to the split of authority" because those decisions conflict with prior decisions in the Fifth and Sixth Circuits and thus lack precedential value. Br. in Opp. 15. In light of this Court's decision in *Yamaha*, however, it is uncertain whether the prior decisions in those circuits are controlling; the so-called "first-in-time"

rule typically yields when this Court has issued an intervening decision that is "inconsistent" with the earlier circuit decision. See, *e.g.*, *Brumbach* v. *United States*, 929 F.3d 791, 795 (6th Cir. 2019) (internal quotation marks and citation omitted), cert. denied, 140 S. Ct. 974 (2020). In any event, the critical point for present purposes is that panels of both the Fifth and Sixth Circuits have recently endorsed petitioner's interpretation of Section 1447(d)—belying the notion that *Lu Junhong* is an outlier.

2. It is ironic that respondent seeks to discount the authorities on petitioner's side of the circuit conflict as poorly reasoned. As the Tenth Circuit recently observed in adopting *respondent's* interpretation, the courts that have adopted that interpretation "employed mostly summary analysis." *Suncor Energy*, 2020 WL 3777996, at *4. In fact, in respondent's summary of the decisions on its side of the circuit conflict, the snippets it quotes constitute nearly the entirety of the decisions' reasoning. See Br. in Opp. 11-14. While subsequent panels in those circuits apparently feel bound by those conclusory decisions—unless and until they undertake the arduous en banc process—that is no reason for this Court to deny review; to the contrary, it demonstrates why further review is necessary.

The Ninth Circuit's recent decision in *San Mateo*, *supra*, is illustrative. There, the court faced the question whether Section 1447(d) permitted it to review all grounds for removal, given that the case was removed in part under the federal-officer removal statute. But in *Patel* v. *Del Taco, Inc.*, 446 F.3d 996 (2006), the Ninth Circuit had stated that it "lack[ed] jurisdiction to review [a] remand order" except with respect to a ground for removal expressly enumerated in Section 1447(d). *Id.* at 998. The *Patel* court offered no justification for that conclusion other than an incomplete citation of Section 1447(d). See

ibid. The panel in *San Mateo* nevertheless concluded it was bound by *Patel*—while suggesting that it might have adopted petitioners' interpretation "[w]ere [it] writing on a clean slate." *San Mateo*, 960 F.3d at 597, 598.

3. Respondent conspicuously does not contend that the circuit conflict is likely to resolve itself—nor would such a contention be plausible, given the Seventh Circuit's intentional creation of a split in *Lu Junhong*; its subsequent denial of rehearing en banc in the face of that split; and the subsequent decisions of the Fifth and Sixth Circuits. See Pet. for Reh'g at 4, 7-8, *Lu Junhong*, *supra* (No. 14-1830) (filed July 22, 2015). Respondent also does not contend that further percolation is warranted—nor would such a contention be plausible either. Only one regional circuit has yet to address the question presented, and that circuit is poised to do so in the near future. See *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.). And in light of the Tenth Circuit's recent decision in *Suncor Energy*, there are now decisions with extensive reasoning on each side of the circuit conflict. The Court's resolution of an entrenched circuit conflict on such an important and recurring question of federal jurisdiction is therefore necessary, and there is no legitimate reason for delay.

B. The Decision Below Is Incorrect

Respondent devotes the remainder of its brief in opposition to defending the court of appeals' decision on the merits. See Br. in Opp. 19-31. As petitioners have already explained, the plain language of Section 1447(d) resolves the question presented. It provides that, in cases removed in part under the federal-officer or civil-rights removal statutes, the court of appeals may review the district court's entire remand "order"—not merely the particular grounds for removal that permitted the appeal.

See Pet. 17-20. We make just a few additional points here and leave fuller responses to subsequent merits briefing if certiorari is granted.

1. Respondent contends (Br. in Opp. 20-21) that the plain language of Section 1447(d) supports its interpretation. That is a farfetched contention, and even the Tenth Circuit—the sole circuit to have adopted respondent's position in an opinion with meaningful reasoning—did not agree. It concluded that the text of Section 1447(d) was "ambiguous," in part because of the "clear divergence in the appellate courts on statutory plain meaning." *Suncor Energy*, 2020 WL 3777996, at *12. The court ultimately resolved the ambiguity in respondent's favor only by relying on the purported statutory purpose and other extratextual considerations. See *id.* at *13-*17.

In fact, respondent's only "plain language" argument is not really a plain-language argument at all. Respondent contends that the portion of Section 1447(d) permitting appeals of certain remand orders "must be narrowly construed" because it is an "exception clause[]." Br. in Opp. 21. As this Court has explained, however, "[a] congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception." *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 440 (2002). Indeed, courts "normally have no license to give [statutory] exemption[s] anything but a fair reading." *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (internal quotation marks and citation omitted). Here, the plain language of Section 1447(d) provides that a court of appeals has jurisdiction to review an entire remand "order" when an appeal is permitted—just as the Court determined in *Yamaha*, *supra*,

with respect to interlocutory orders reviewable under 28 U.S.C. 1292(b).

2. Respondent argues (Br. in Opp. 26-28) that the Court should construe the term "order" in Section 1447(d) differently than in Section 1292(b), based on the different purposes of those statutes. That argument is unavailing. It is true that Section 1447(d) precludes appellate review of certain orders entirely, whereas Section 1292(b), in combination with 28 U.S.C. 1291, merely controls the timing of appellate review of certain orders. And that distinction might be meaningful if Congress had limited appellate jurisdiction under Section 1447(d) for the purpose of insulating remand orders from review to the greatest extent possible.

But there is no evidence that Congress had that objective in mind. To the contrary, Congress appears to have included the bar on appellate review of remand orders to "prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 351 (1976). Respondent does not dispute that, once an appeal is authorized under Section 1447(d), "[t]he 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; see Br. in Opp. 29-31.[1]

Respondent also relies on history, arguing that Congress has barred appellate review of remand orders "for

[1] To be sure, respondent's novel theory of liability makes the case removable on a number of grounds other than the federal-officer removal statute. See Pet. 6; Br. in Opp. 6-7. But that is simply a consequence of respondent's contention that all of petitioners' worldwide production, promotion, and marketing of fossil fuels over many decades violated state law by contributing to global climate change. See Pet. App. 2a-4a.

well over a century" and thus must have intended to authorize only narrow appellate review of federal-officer or civil-rights grounds for removal when it amended Section 1447(d). See Br. in Opp. 22-24. Respondent's conclusion does not follow from its premise. No one disputes the background principle that remand orders were ordinarily unreviewable. But in 1964 and 2011, Congress *departed* from that background principle and authorized appeals under specified circumstances. See Pet. 5. The question here concerns the scope of those statutory departures—a question that cannot be answered simply by saying that such departures are uncommon.

3. Finally, respondent contends (Br. in Opp. 24-26) that Congress effectively ratified respondent's construction of Section 1447(d) when it amended that provision in the Removal Clarification Act to add federal-officer removal. But the meaning of Section 1447(d) was hardly "settled" in respondent's favor in 2011, given this Court's interpretation of the term "order" in *Yamaha*. See *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1386 (2015). In addition, as respondent acknowledges (Br. in Opp. 25-26 n.10), nothing in the legislative history of the Removal Clarification Act addresses the question presented here. All told, there simply is no indication that Congress intended to endorse respondent's interpretation of Section 1447(d) by amending that provision.

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

Respondent makes no attempt to argue that this case is an unsuitable vehicle for resolving the question presented. That is unsurprising: the question was fully briefed by the parties below and passed on by the court of appeals. And as it comes to the Court, this case presents only that question, and it presents it cleanly and squarely.

Respondent oddly criticizes petitioners for not also seeking further review of the court of appeals' holding on the federal-officer ground for removal, noting that other courts have held that similar climate-change cases are not removable on that ground. See Br. in Opp. 4 n.1, 19 & n.9, 31. This case is an attractive vehicle for the Court's review, however, precisely because the court of appeals considered (and rejected) only the federal-officer ground for removal and thus refused to reach petitioner's other compelling grounds for removal. See Pet. 23.

On the importance of the question presented, respondent suggests only that the question does not "arise with sufficient frequency" outside of cases related to climate change. Br. in Opp. 18. As a preliminary matter, even if the question presented were relevant only in the nationwide climate-change litigation, the sheer number of those lawsuits—in addition to the substantial federal interests involved and the "unusual importance" of climate-change-related legal issues, see *Massachusetts* v. *EPA*, 549 U.S. 497, 506 (2007)—would counsel in favor of granting review. But respondent's citation of over twenty cases unrelated to climate change that speak to the question presented belies the claim that the question is somehow limited to the climate-change context. See *id.* at 9-14.

Respondent has nothing to say about the importance of the statutory right of removal to civil defendants—particularly members of the business community that work closely with the federal government. See Pet. 21-22; Chamber Br. 12-15. Nor does respondent dispute that this Court has repeatedly granted certiorari to clarify various aspects of the scope of appellate jurisdiction over remand orders. See Pet. 21. And while there have been numerous decisions recognizing the circuit conflict on the

question presented, the Court has had almost no opportunity to resolve it.[2]

In short, the question presented is undeniably important—not just for climate-change litigation like this case but also for civil litigation more generally. Because the courts of appeals are concededly divided on that question, this Court's review is urgently needed.

[2] Although respondent correctly notes (Br. in Opp. 2) that this Court denied review on the question presented in *Rheinstein* v. *Attorney Grievance Commission*, 140 S. Ct. 226 (2019) (No. 19-140), the decision of the court of appeals in that case was an unpublished *per curiam* summary order; the *pro se* petitioner discussed only a subset of the decisions constituting the circuit conflict at the time; and the petition for certiorari predated the most recent decisions addressing the conflict, including the decision below.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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