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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

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 where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.

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INTEREST OF THE UNITED STATES

This case concerns the scope of appellate review over orders remanding cases to state courts from which they were removed pursuant to the federal-officer removal statute, 28 U.S.C. 1442, or civil-rights removal statute, 28 U.S.C. 1443. As a frequent litigant, the United States has a significant interest in the application of statutory provisions governing federal appellate jurisdiction, including 28 U.S.C. 1447(d)'s exception for cases removed pursuant to the federal-officer or civil-rights removal statutes. In previous cases raising similar issues, the United States has participated as amicus curiae or through federal parties. See, *e.g.*, *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Osborn* v. *Haley*, 549 U.S. 225 (2007); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996).

STATUTORY PROVISION INVOLVED

Section 1447(d) of Title 28 of the United States Code provides as follows:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. 1447(d).

STATEMENT

1. Since the Judiciary Act of 1789, Congress has allowed defendants to remove to federal court certain actions brought in state court. See ch. 20, § 12, 1 Stat. 79-80. To "effect the removal" of an action to federal court today, a defendant must file "a notice of removal" in the relevant federal district court "containing a short and plain statement of the grounds for removal." 28 U.S.C. 1446(a) and (d).

Congress has provided defendants with a variety of grounds for removal. The general removal statute permits the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C. 1441(a), including cases "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. 1331.

Congress has added specialized removal provisions over the years. For example, the civil-rights removal statute, 28 U.S.C. 1443, authorizes removal by three categories of defendants: (1) those who are "denied or cannot enforce" rights under laws "providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof," 28 U.S.C.

1443(1); (2) federal officers and those acting under them who are sued or prosecuted "[f]or any act under color of authority derived from any law providing for equal rights," 28 U.S.C. 1443(2); and (3) state officers who are sued or prosecuted "for refusing to do any act on the ground that it would be inconsistent with such law," *ibid.*

Most relevant here, the federal-officer removal statute, 28 U.S.C. 1442, authorizes the United States, a federal agency, a federal officer, "or any person acting under" a federal officer to remove a civil action or criminal prosecution that is "for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C. 1442(a)(1). Other portions of Section 1442(a) apply to cases against property holders deriving title from federal officers, officers of federal courts, and officers of either House of Congress. 28 U.S.C. 1442(a)(2)-(4).

When a defendant removes an action under Section 1442(a)(1), the notice of removal must enable the district court to evaluate whether the defendant satisfies three requirements: (1) that it is a federal officer, a federal agency, or a person "acting under" a federal officer, 28 U.S.C. 1442(a)(1); (2) that it has a "colorable" federal defense, *Mesa* v. *California*, 489 U.S. 121, 129, 139 (1989); and (3) that the suit is for "any act under color of such office," 28 U.S.C. 1442(a)(1), because there is "a nexus, a causal connection between the charged conduct and asserted official authority," *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 431 (1999) (citation and internal quotation marks deleted).

2. After a case has been removed, it will generally proceed in federal court. But if the district court determines "at any time before final judgment" that it "lacks subject matter jurisdiction," then "the case shall be remanded" to the state court, which may then "proceed with [the] case." 28 U.S.C. 1447(c). Since 1887, Congress has circumscribed the ability of appellate courts to review remand orders. That year, Congress specified that, if a federal circuit court "shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came," then the "remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Act of Mar. 3, 1887 (1887 Act), ch. 373, § 2, 24 Stat. 553. A similar provision was "apparently inadvertently omitted from the 1948 revision of the Judicial Code." *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 360 (1976) (Rehnquist, J., dissenting). But in 1949, Congress recodified a general bar on appellate review by providing that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d) (Supp. III 1949); see Act of May 24, 1949, ch. 139, § 84(d), 63 Stat. 102.

Congress has, however, created various exceptions to Section 1447(d)'s appellate-review bar. For example, the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, § 5(a), 119 Stat. 12, provides that, "notwithstanding section 1447(d)," when an application to a court of appeals is timely filed, that court "may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." 28 U.S.C.

1453(c)(1); see *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007) (collecting other statutes exempting "particular classes of remand orders from § 1447(d)").

And Congress has exempted two categories of cases in the text of Section 1447(d) itself. In the Civil Rights Act of 1964, it amended Section 1447(d) to create an exception that allows review of a remand order in any case that "was removed pursuant to section 1443" (the civil-rights removal statute). Pub. L. No. 88-352, Tit. IX, § 901, 78 Stat. 266. And in the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, Congress expanded that exception to include any case that "was removed pursuant to section 1442" (the federal-officer removal statute). 28 U.S.C. 1447(d).

3. In 2018, respondent—the local government of the City of Baltimore—filed this lawsuit in Maryland state court against 26 multinational oil and gas companies (21 of which are petitioners here). See Pet. 2; Pet. App. 2a, 5a n.3. Respondent alleges that petitioners' business practices have contributed to global greenhouse-gas emissions, resulting in climate-change-related injuries to the City of Baltimore. Pet. App. 2a-3a. Respondent asserts a variety of nuisance, products-liability, and other claims nominally arising under Maryland law. *Id.* at 3a.

Two of petitioners removed the case to federal court based on eight different grounds, including the federal-officer removal statute. Pet. App. 4a-5a. For purposes of that statute, they contended that they had been "acting under" federal officers based on the contractual relationships that some of them had with the government over the years, such as an agreement to extract oil and supply fuel for the Navy. *Id.* at 70a (citation omitted).

They also invoked the general removal statute, contending that respondent's claims arise under federal law because, among other things, cross-boundary torts associated with interstate pollution necessarily arise under federal common law, rather than under state law. *Id.* at 43a-44a.

Respondent moved to remand the case for lack of subject-matter jurisdiction. Pet. App. 5a. The district court granted the motion, rejecting each of the asserted grounds for removal, and ordered that the case be remanded to state court. *Id.* at 31a-81a; D. Ct. Doc. 173, at 1 (June 10, 2019).

Petitioners sought a stay of the remand order pending appeal, which the district court denied. Pet. App. 82a-94a. While observing that "removal of this case based on the application of federal law presents a complex and unsettled legal question," *id.* at 87a, the court found that petitioners were unlikely to succeed on appeal because Fourth Circuit precedent would limit appellate review to "the issue of federal officer removal," *id.* at 90a. The court of appeals declined to stay the remand order, *id.* at 95a-96a, as did this Court, J.A. 243.

4. The court of appeals affirmed. Pet. App. 1a-30a. It first determined that it was bound by circuit precedent holding "that when a case is removed on several grounds, appellate courts lack jurisdiction to review any ground other than the one specifically exempted from § 1447(d)'s bar on review." *Id.* at 7a (citing *Noel* v. *McCain*, 538 F.2d 633 (4th Cir. 1976)). The court acknowledged that, since *Noel*, this Court had adopted a contrary approach in the context of 28 U.S.C. 1292(b), which authorizes appeals of certified interlocutory orders involving certain questions. Pet. App. 7a-8a. Specifically, this Court had held that jurisdiction to review

an "order" certified for interlocutory appeal under Section 1292(b) permits the court of appeals to "address any issue fairly included within the certified order." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996). The court of appeals nevertheless declined to apply that "entirely textual" approach when "interpreting the word 'order' under § 1447(d)." Pet. App. 8a-9a. In the court's view, "giving the word 'order' the same meaning in the § 1447(d) context" would be inappropriate because Section 1447(d) "mandate[s] review of issues that are ordinarily unreviewable," whereas Section 1292(b) "only affects the timing of review for otherwise appealable questions." *Id.* at 9a. It therefore held that, in this case, its jurisdiction was limited "to review[ing] the district court's conclusion that removal was improper under the federal officer removal statute." *Id.* at 10a.

The court of appeals then addressed petitioners' contention that removal was proper under the federal-officer removal statute. Pet. App. 10a-30a. While acknowledging that "[t]his is a complex case," *id.* at 19a n.9, the court ultimately concluded that petitioners' three contractual relationships with the federal government over the years were insufficient to justify federal-officer removal, either because petitioners could not establish they had been acting under a federal officer or because the relationships were "insufficiently related to [respondent's] claims." *Id.* at 14a.

Having addressed the only ground for removal that it believed to be within its jurisdiction, the court of appeals "affirm[ed] the district court's order granting [respondent's] motion to remand." Pet. App. 30a.

SUMMARY OF ARGUMENT

A. Although many remand orders are unreviewable, the second clause of 28 U.S.C. 1447(d) specifies that "an order remanding a case" that was "removed" from state court "pursuant to section 1442 or 1443" is "reviewable by appeal or otherwise." There is no dispute that this case was "removed" from state court "pursuant to section 1442." The entire "order" remanding this case—and not just certain parts of the reasoning supporting the remand—is therefore "reviewable by appeal." Neither respondent nor the court of appeals has satisfactorily explained how the statute's reference to "an order remanding a case" can, in the context of a case with multiple asserted grounds of removal, refer only to a "conclusion that removal was improper under the federal officer removal statute." Pet. App. 10a. Nor can such a reading flow from the phrase "pursuant to section 1442 or 1443." That phrase concerns the bases for the case's previous removal, not the scope of the court's remand order, which necessarily rested here on a rejection of all asserted grounds of removal. Finally, the fact that the second clause of Section 1447(d) is an exception is no justification for giving it anything other than a fair reading.

B. That straightforward reading of Section 1447(d) is confirmed by this Court's precedents. This Court has repeatedly held that when a court of appeals reviews an "order" pursuant to other statutes, it may address any issue fairly included within the "order," not just the portion of the order that triggered appellate jurisdiction. See, *e.g.*, *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996). Although the court of appeals thought that "order" should be given a different meaning in Section 1447(d) to prevent appellate courts from

addressing issues that are otherwise unreviewable, Section 1447(d) makes certain orders, not issues, unreviewable. Had the district court denied respondent's remand motion, its legal conclusions on all grounds for removal could have been reviewed on appeal. And lower courts' contrary decisions do not supply a compelling reason for this Court to depart from text and precedent.

C. The most natural reading of Section 1447(d) is also the one that best furthers the provision's balance among competing interests: avoiding protracted litigation over jurisdictional issues while protecting certain defendants from improper remands. Once any appeal has been allowed, confining the scope of appellate review to conclusions about the federal-officer and civil-rights removal statutes is unlikely to materially expedite proceedings—and may in fact delay them if the court of appeals lacks the flexibility to choose among different dispositive issues. Ensuring that a remand order is not based on legal error is especially important when there are multiple potential grounds of federal jurisdiction and the defendant is in the class of persons entitled to the protections of appellate review.

Nor is a cramped reading of Section 1447(d)'s text justified as an attempt to keep defendants from exploiting weak grounds of federal-officer or civil-rights removal to secure appellate review of more promising grounds of removal. The plain reading of the text appropriately aids defendants with multiple potentially meritorious grounds for removal and aids the judicial system as a whole, by providing appellate courts with a menu of options when reviewing a remand order. In any event, the potential for abuse of the appellate process can and should be addressed by sanctioning litigants

who make bad-faith arguments or by treating wholly insubstantial assertions as insufficient to create appellate jurisdiction. If such measures prove insufficient, the ultimate remedy lies with Congress, the Branch constitutionally authorized to alter the scope or pace of appellate review.

ARGUMENT

A COURT OF APPEALS MAY REVIEW ANY GROUND OF REMOVAL ENCOMPASSED IN AN ORDER REMANDING A CASE THAT WAS REMOVED PURSUANT TO 28 U.S.C. 1442 OR 1443

Once a defendant removes a case pursuant to the federal-officer or civil-rights removal statutes, an order remanding that case can be reviewed under 28 U.S.C. 1447(d). The court of appeals may address any of the grounds of removal rejected in the course of issuing the remand order, not merely the district court's determination that removal was improper under the federal-officer removal statute or the civil-rights removal statute. That conclusion follows from a straightforward reading of the text, it coheres with this Court's precedents, and it furthers the balance struck by Congress in preventing appeals of some but not all remand orders on the basis of how a case was originally removed.

A. When Its Exception Applies, The Text Of Section 1447(d) Permits Review Of The Remand "Order," Not Just The Ground Of Removal That Triggered The Exception

Section 1447(d) provides that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. 1447(d). There is no dispute that this "case" was "removed pursuant to section 1442," among other grounds. See Pet. App. 4a-6a; Br. in Opp. 6-7. Nor is there any disagreement that

the district court's "order" remanding this "case to the State court" is "reviewable by appeal or otherwise." See Pet. App. 6a-10a; Br. in Opp. 20-21. Instead, the question here turns on the meaning of the phrase describing what the court of appeals may review: "an order remanding a case."

1. Because 28 U.S.C. 1447(d) leaves the word "order" undefined, it should "be interpreted as taking [its] ordinary, contemporary, common meaning," *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). As used in "law," the word ordinarily means "any command or direction of a court." *Webster's New International Dictionary of the English Language* 1716 (2d ed. 1942) (capitalization and emphasis omitted). That was so when the bar on appellate review was codified in Section 1447(d) in 1949. *S*ee, *e.g.*, *ibid.*; *Black's Law Dictionary* 1247 (4th ed. 1951) (defining "order" as "a command or direction authoritatively given," and particularly a "direction of a court or judge made or entered in writing, and not included in a judgment") (capitalization and emphasis omitted). And it continued to be so through the 1964 addition and the 2011 expansion of the exception permitting review of remand orders in cases that had been removed under the civil-rights and federal-officer removal statutes. See, *e.g.*, *Black's Law Dictionary* 1270 (10th ed. 2014) ("A written direction or command delivered by a government official, esp. a court or judge."); 10 *The Oxford English Dictionary* 905 (2d ed. 1989) (def. 24.a: "*Law.* A decision of a court or judge, made or entered in writing[.]"); *Webster's Third New International Dictionary* 1588 (1971) (def. 3.d.1: "a command or direction of a court").

Section 1447(d)'s reference to "an order remanding a case" therefore means the district court's command that the case must return to state court. That understanding is consistent with the appellate-review bar on remand orders originally enacted in 1887, which used "order" and "decision" interchangeably, by providing that if a federal circuit court "shall *decide* that the cause was improperly removed, and *order* the same to be remanded to the State court from whence it came," then "no appeal or writ of error from the *decision* of the circuit court so remanding such cause shall be allowed." 1887 Act § 2, 24 Stat. 553 (emphases added).

Here, the "order remanding [the] case," 28 U.S.C. 1447(d), rested on a rejection of each of petitioners' asserted grounds for removal. See Pet. App. 31a-81a; D. Ct. Doc. 173, at 1. Indeed, the district court could not have done otherwise. When, as here, a defendant asserts multiple grounds for removal, a district court cannot remand for lack of subject-matter jurisdiction without assuring itself that none of those grounds provides a basis for jurisdiction. Because "[f]ederal courts have a virtually unflagging obligation to exercise the jurisdiction given," *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citation, ellipsis, and internal quotation marks omitted), a district court that lacks "authority to decline to hear the removed case" cannot "eliminate[] the case from its docket, whether by a remand or by a dismissal," *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 356 (1988). And because the "order remanding [the] case" here was "reviewable by appeal" under 28 U.S.C. 1447(d), the court of appeals had jurisdiction to review any of the district court's determinations concerning petitioners' asserted grounds for removal.

2. Eschewing that straightforward reading, the court of appeals defined "an order remanding a case" to mean "the district court's conclusion that removal was improper under the federal officer removal statute." Pet. App. 10a. Neither the court below, other courts of appeals, nor respondent has offered a persuasive defense for that construction.

a. The court of appeals made limited efforts to reconcile its limited reading with the actual statutory text. Instead, just as respondent cannot help but describe its view of what is reviewable as only a "part of the remand order," a "portion of the remand order," or an "issue addressed in a remand order," Br. in Opp. 8, 14, 22 (internal quotation marks omitted), the court said that it lacked "jurisdiction to review the *entire* remand order," Pet. App. 7a (emphasis added). The need to add modifiers reinforces that there is no natural way to describe "an order remanding a case" as including only certain parts of the reasoning underlying such an order.

The court of appeals' construction of "order remanding a case" also departs from the "presumption that a given term is used to mean the same thing throughout a statute," which is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). In providing that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," Section 1447(d)'s first clause plainly uses the ordinary understanding of the phrase "order remanding a case" rather than the court of appeals' narrower reading. 28 U.S.C. 1447(d). In the context of the first clause, this Court has explained that a single "'order remanding a case' to state court" "cannot be disaggregated" into reviewable and unreviewable rulings to evade Section

1447(d)'s appellate-review bar. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 646 n.13 (2006) (citation omitted); see *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 235-236 (2007) (rejecting argument that "§ 1447(d) does not preclude review of a district court's merits determinations that precede the remand," because the defendant could "point to no District Court order, separate from the remand, to which it objects"). That is equally true of the second clause: an "order remanding a case" cannot be disaggregated into reviewable and unreviewable rulings to evade Section 1447(d)'s exception.

Had Congress wanted to limit reviewability under Section 1447(d)'s second clause to a particular "question" addressed in a remand order—such as whether "removal was improper under the federal officer removal statute," Pet. App. 10a—it knew how to do so. Other statutes expressly limit the scope of review to specified "questions" rather than an "order" or "decision." For instance, under 38 U.S.C. 7292(b)(1), the Court of Appeals for Veterans Claims may certify a controlling question of law for decision by the Federal Circuit, which "may permit an interlocutory appeal to be taken on that question." And Congress has authorized this Court to review a "question of law" certified by a court of appeals—review that "brings before the Court only the points or questions certified," Stephen M. Shapiro et al., *Supreme Court Practice* § 9.2, at 606 (10th ed. 2013), unless the Court affirmatively chooses to "require the entire record to be sent up for decision of the entire matter in controversy," 28 U.S.C. 1254(2). See *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 994 (2d Cir. 1975) (Friendly, J.) (suggesting that Congress wrote 28 U.S.C. 1292(b) "differently" from Section

1254(2) to avoid the limitations associated with reviewing only specified questions), abrogated on other grounds by *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010).

b. Respondent has contended (Br. in Opp. 21) that the court of appeals' narrow interpretation of Section 1447(d) flows from the phrase "pursuant to Section 1442 or 1443." But that phrase refers to how the case was "removed," and does not modify the reference to the "order remanding" the case to state court. 28 U.S.C. 1447(d). Here, there is no dispute that petitioners "removed" this case "pursuant to section 1442."

Nor does it matter that petitioners asserted multiple grounds for the removal. The Tenth Circuit has suggested that Congress simply did not "contemplate the situation in which removal is done pursuant to [the civil-rights removal statute or federal-officer removal statute] *and* other grounds." *Board of Cnty. Comm'rs* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 805 (2020) (*Suncor*) (citation omitted). But Congress is well aware that a defendant may invoke multiple grounds of removal. Indeed, the general removal statute specifies that an "action otherwise removable *solely on the basis of*" diversity jurisdiction "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. 1441(b)(2) (emphasis added). And there is no reason to think Congress sought to make defendants with civil-rights or federal-officer removal grounds consider forgoing their other potentially meritorious removal grounds simply to preserve their appellate rights.

c. The Tenth Circuit has also concluded that because 28 U.S.C. 1447(d) involves "a scheme whereby a

default rule is subject to an exception," its exception must be "construed narrowly." *Suncor*, 965 F.3d at 805 (citation omitted). But in the absence of a textual indication that a statutory exception should in fact be "construed narrowly," courts "have no license to give the exemption anything but a fair reading." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018).

In any event, Section 1447(d)'s appellate-review bar is itself an exception to ordinary principles of appellate review. In the absence of that bar, the remand order here, which ended all proceedings in federal court, would almost certainly be appealable under 28 U.S.C. 1291.* But no one contends that the appellate-review bar in the first clause of Section 1447(d) should itself be narrowly construed. Just as that appellate-review bar should not be read narrowly to expand a court of appeals' jurisdiction, *Powerex Corp.*, 551 U.S. at 235-238, the exception in Section 1447(d)'s second clause should not be read narrowly to contract that jurisdiction.

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* See *Quackenbush*, 517 U.S. at 714 ("When a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket."); *id.* at 715 (casting significant doubt on the correctness of the statement in *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 352-353 (1976), that a remand order is not a final judgment and must be reviewed by mandamus); *Thermtron*, 423 U.S. at 360 (Rehnquist, J., dissenting) ("Congress has made all judgments 'remanding a cause to the state court final and conclusive.'") (quoting *In re Pennsylvania Co.*, 137 U.S. 451, 454 (1890)); 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.11, at 839 (2d ed. Supp. 2020) (concluding that, given the doubt already cast on the finality discussion in *Thermtron*, "[a] remand that terminates all proceedings in a federal court is final"); 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.156[3][b], at 107-530 (3d ed. 2020) ("Following *Quackenbush*, a majority of circuits have held that remand orders are final.").

B. This Court's Precedents Strongly Support The Conclusion That Section 1447(d)'s Exception Permits Appellate Review Of The Entire Remand Order

1. This Court's precedents confirm that appellate review under Section 1447(d) is not limited to particular conclusions supporting a remand order that rests on a rejection of multiple grounds of removal. In interpreting other statutes governing appellate jurisdiction, this Court has explained that, when an "order" is appealable, "the appellate court may address any issue fairly included within" that order. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996).

a. In *Yamaha*, the Court construed 28 U.S.C. 1292(b), which authorizes a court of appeals to accept review of an otherwise-unreviewable interlocutory "order" when the district court certifies that it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Based on "the text of § 1292(b)," this Court held that "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. As the Court explained, although the provision is not available at all unless a specific question has been singled out as worthy of interlocutory review, "it is the *order* that is appealable, and not the controlling question identified by the district court." *Ibid.* (citation omitted); see *United States* v. *Stanley*, 483 U.S. 669, 677 (1987) (observing that a "Court of Appeals' jurisdiction" under Section 1292(b) "is not confined to the precise question certified * * * because the statute brings the 'order,' not the question, before the court").

That analysis hardly broke new ground. Since the late nineteenth century, this Court has taken a similar approach to the statute authorizing jurisdiction over appeals of interlocutory orders concerning injunctions, today codified at 28 U.S.C. 1292(a)(1). In *Smith* v. *Vulcan Iron Works*, 165 U.S. 518 (1897), the Court considered Section 1292(a)(1)'s predecessor, which permitted an appeal to be taken from an "interlocutory order or decree granting or continuing [an] injunction." *Id.* at 524 (quoting Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 828). The Court held that the "grammatical construction and natural meaning" of the statutory text permitted "an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction." *Id.* at 525. That approach still controls; a court reviewing an interlocutory injunctive order may address "the issues necessary to determine the propriety of the interlocutory order itself." 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3921.1, at 23 (3d ed. 2012); see *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008) (confirming that in reviewing an interlocutory order concerning an injunction, this Court has "authority" to "address the underlying merits of plaintiffs' claims").

This Court has applied a similar approach to 28 U.S.C. 1253, which authorizes a direct appeal to this Court from "an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Until 1976, such courts were often convened to enable a district court to enjoin a state statute "upon the ground of the unconstitutionality of such statute," 28 U.S.C. 2281 (1970), repealed, Act of Aug. 12, 1976,

Pub. L. No. 94-381, 90 Stat. 1119; see *Shapiro* v. *McManus*, 577 U.S. 39, 40-41 (2015). But even when a constitutional claim was the trigger for a three-judge district court (and hence for this Court's appellate jurisdiction), Section 1253 supplied appellate jurisdiction "over all grounds of attack against the statute," including statutory ones. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 84 (1960) (emphasis omitted); see *Dothard* v. *Rawlinson*, 433 U.S. 321, 324 n.5 (1977) (explaining that the Court had jurisdiction over an appeal from the injunction of "a state law on federal statutory grounds" by "a properly convened three-judge court").

b. This approach to interpreting statutes governing appellate jurisdiction is consistent with the traditional role of an appellate court—namely, to determine whether a "legal error resulted in an erroneous judgment." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) ("The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed."). Under that framework, if a reviewable order rests on a legal defect—even when that defect is separate from the reason the order is reviewable—an appellate court is ordinarily able to address it.

For example, in reviewing an order certified under Section 1292(b), a court of appeals (or this Court) may conclude that it is more appropriate to answer a question different from the one that was certified for interlocutory appeal. In *Yamaha* itself, the district court concluded that any damages the plaintiffs might recover from an accident in United States waters "would be governed exclusively by federal maritime law." 516

U.S. at 204. In light of that conclusion, it proposed that the court of appeals decide whether three types of damages were in fact recoverable under federal maritime law. See *id.* at 203-204. The court of appeals, however, "determined that an anterior issue was pivotal" and held that "state-law remedies" applied, *id.* at 204, and this Court agreed with that determination, see *id.* at 206-216. Had review under Section 1292(b) been limited to "the particular question" in the order rather than "the order itself," *id.* at 205, however, the court of appeals would have been forced either to address a question resting on an incorrect premise or to decline review and subject the parties to further litigation on the basis of the district court's error about an uncertified question.

Similarly, in exercising its mandatory jurisdiction under Section 1253 over a direct appeal from an order granting or denying an injunction in a constitutional challenge to an apportionment of legislative districts, 28 U.S.C. 2284(a), this Court may wish to dispose of the appeal on statutory grounds to avoid passing on constitutional questions—even though a statutory challenge alone would not have triggered Section 1253. Cf. *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 191, 193 (1909) (explaining that the Court had jurisdiction "to decide all the questions in the case" involving a constitutional challenge to a state statute and resolving the case "without reference to questions arising under the Federal Constitution").

2. The court of appeals nevertheless concluded that it should not give "the word 'order' the same meaning in the § 1447(d) context" that it has elsewhere. Pet. App. 9a. The reasons for that deviation given by the court and respondent are unpersuasive.

a. The court of appeals reasoned that it should not apply the ordinary meaning of the word "order" to Section 1447(d) because that would "mandate review of issues that are ordinarily unreviewable." Pet. App. 9a. In the court's view, other appellate-review statutes such as Section 1292(b) govern "*when* an appellate court may review a particular question," while Section 1447(d) limits "*which* issues are 'reviewable on appeal or otherwise.'" *Ibid.* The premise of that argument is incorrect.

Section 1447(d) renders certain remand orders, not particular legal issues, unreviewable. Had the district court *denied* the motion to remand, the court of appeals would be able to address all of the asserted grounds of removal at respondent's behest—either through a certified interlocutory order, see *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 146-147 (2007), or upon review of a final judgment, see *Quackenbush*, 517 U.S. at 712. Thus, in *City of Oakland* v. *BP PLC*, 969 F.3d 895 (9th Cir. 2020), the district court denied a motion to remand in a lawsuit filed by the City of Oakland and the City and County of San Francisco, asserting a public-nuisance claim under California law against five of petitioners here. *Id.* at 901-903. The court found that it had federal-question jurisdiction and later granted the defendants' motion to dismiss the complaint. *Ibid.* The plaintiffs appealed, and the Ninth Circuit reviewed the viability of the federal-question ground of removal and remanded to allow the district court to address additional grounds of removal. *Id.* at 903-908, 911.

Of course, when a district court *grants* a motion to remand, the first and second clauses of Section 1447(d) dictate whether the resulting remand order is appealable. But Congress has drawn the line between different cases, and it has divided appealable and nonappealable

orders on the basis of the grounds on which the cases were initially removed from state court. There is nothing in the text suggesting that, in cases with appealable remand orders, Congress further sought to distinguish between reviewable and unreviewable issues.

b. Respondent also contends (Br. in Opp. 24-26) that when Congress added the federal-officer removal statute to the second clause of Section 1447(d) in 2011, it implicitly endorsed the narrower reading of "order" that had previously been applied by some courts of appeals to cases that were removed under the civil-rights removal statute.

This Court, however, has "no warrant to ignore clear statutory language on the ground that other courts have done so," even when they have done so for decades. *Milner* v. *Department of the Navy*, 562 U.S. 562, 576 (2011). And even if the text were open to debate, this Court may presume that Congress adopted a gloss added by lower courts only where the weight of authority is so substantial that Congress "would have surveyed the jurisprudential landscape and necessarily concluded that the courts had already settled the question." *Lightfoot* v. *Cendant Mortg. Corp.*, 137 S. Ct. 553, 564 (2017); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 325 (2012) ("The criterion ought to be whether the uniform weight of authority is significant enough that the bar can justifiably regard the point as settled law."). Here, there is no evidence that the 2011 Congress would have assumed that the narrower reading of "order" would prevail. To the contrary, since at least 1992, a leading treatise had clearly articulated the plain-text argument. Noting that some cases had "held that review is limited to removability under § 1443," the treatise explained

that, because the provision "allows review of the 'order remanding' the case, * * * [r]eview should instead be extended to *all possible grounds for removal*." 15A Wright § 3914.11, at 706 (2d ed. 1992) (emphasis added; footnote omitted). That reading was then bolstered by this Court's 1996 decision in *Yamaha*. See p. 17, *supra*.

"[O]nly the most compelling evidence" should convince this Court "that Congress intended * * * identical language" in provisions addressing related subjects "to have different meanings." *Communications Workers of America* v. *Beck*, 487 U.S. 735, 754 (1988). Such evidence does not exist here.

C. Reading Section 1447(d) To Allow Appellate Review Of The Entire Remand Order Is Consistent With The Policy Balance Struck In That Provision

Reading Section 1447(d)'s second clause as permitting review of remand orders, rather than restricting review to certain conclusions underlying those orders, also furthers that provision's careful policy balance among competing interests.

1. As this Court has explained, Section 1447(d)'s appellate-review bar "reflects Congress's longstanding 'policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction.'" *Powerex Corp.*, 551 U.S. at 238 (citation omitted). But like any other law, Section 1447(d) does not "pursue[] its purposes at all costs." *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018) (citation omitted). Instead, the provision "specifically excepts" orders remanding particular "actions from its bar," *Kircher*, 547 U.S. at 640 n.7—namely, those cases removed pursuant to the federal-officer and civil-rights removal statutes. For those two categories of cases, which present a particular risk of

state-court prejudice, Congress has determined that the delay associated with an appeal over the question of the propriety of a federal forum is an acceptable price to pay in order to help ensure that a case is not erroneously remanded to state court.

a. By authorizing review of "an order" remanding "a case," rather than "questions" involving the civil-rights or federal-officer removal statutes, Section 1447(d) indicates a desire to protect particular *defendants* from erroneous remands. When the House Judiciary Committee reported the Removal Clarification Act of 2011, it explained that Section 1442 was being added to the second clause of Section 1447(d) in response to concern that "[r]emand orders under § 1447 are reviewable if the suit involves civil rights," but that was not true for "suits involving Federal officers and § 1442." H.R. Rep. No. 17, 112th Cong., 1st Sess. Pt. 1, at 4 (2011). Thus, special treatment was to be accorded to a case that "involves" civil rights or federal officers, without any suggestion that the concern about an erroneous remand in such cases was limited to the proper application of Section 1442 and Section 1443 alone.

b. On the other side of the ledger, once a remand order has been appealed under Section 1447(d)'s second clause, "there is very little to be gained by limiting review" to a particular conclusion in the order. 15A Wright § 3914.11, at 706 (2d ed. 1992). At that point, Congress has already authorized the court of appeals "to take the time necessary to determine the right forum," and "[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* v. *Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015). And where, as here, a court determines

that it is unlikely to reverse the remand order, it can deny a stay motion so that "the case can continue without delay" in state court. *Ibid.*; see Pet. App. 95a-96a.

If anything, permitting appellate review of the entire remand order could expedite the resolution of an appeal under Section 1447(d). As this Court has recognized in other contexts, reading jurisdictional statutes to give "an appellate court * * * jurisdiction to rule on only part of [a] decision" could "needlessly complicate appellate review." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2321 (2018); see *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906) (explaining that if an appellate court "is of [the] opinion that the patent is on its face absolutely void, it would be a waste of time and an unnecessary continuance of litigation to simply enter an order setting aside the injunction and remanding the case for further proceedings"). The same is true here. If an appellate court with jurisdiction to review a remand order concludes that removal is justified for a reason other than the ones set forth in Sections 1442 and 1443, it may reverse the district court on that basis without having to wade into more difficult issues.

c. This case illustrates the potential benefits of applying the traditional approach to appellate review of an "order" that rests on multiple grounds. The question of federal-officer removal may be complex or fact-intensive. Here, the court of appeals devoted over 20 pages of analysis to that question alone. Pet. App. 10a-30a. Acknowledging that "[t]his is a complex case," *id.* at 19a n.9, the court considered a variety of contractual relationships between petitioners and the federal government spanning over 60 years before ultimately concluding that "none of these relationships" justified removal under Section 1442. *Id.* at 14a; see *id.* at 14a-30a.

Courts of appeals should have the option of avoiding that type of lengthy inquiry when there is a more straightforward jurisdictional ground.

In this case, there may well be a valid alternative basis for federal jurisdiction. Petitioners have focused (Br. 37-45) on their contention that respondent's tort claims necessarily arise under federal common law. As the United States explained in an amicus brief filed in *City of Oakland*—another case brought by localities alleging tort claims against fossil-fuel-producing companies in response to climate-change-related injuries—claims may be removable under 28 U.S.C. 1441(a) on the ground that, although nominally couched as state-law claims, they are inherently and necessarily federal in nature. See U.S. Amicus Reh'g Br. at 6-12, *City of Oakland*, *supra* (No. 18-16663).

Under this Court's precedents, state law can be wholly displaced in "matters essentially of federal character," even when "Congress has not acted affirmatively about the specific question." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). In *Standard Oil*, for instance, this Court held that an action by the government to recover medical expenses from a company whose truck had harmed a United States soldier was governed exclusively by federal common law because "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Id.* at 305-306.

As this Court explained in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) (*AEP*), certain cross-boundary tort claims associated with air and water pollution involve a subject that "is meet for federal

law governance." *Id.* at 422. Before the enactment of comprehensive federal environmental statutes such as the Clean Air Act, 42 U.S.C. 7401 *et seq.*, tort claims "brought by one State to abate pollution emanating from another State" arose under federal common law. *AEP*, 564 U.S. at 421 (collecting cases). Where federal common law would govern, it ousts state law: "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).

Although the enactment of "the Clean Air Act displace[d] federal common law" in that area, *AEP*, 564 U.S. at 429, that alone does not mean the door was opened for tort claims based on the common law of an affected State targeting conduct in another State. This Court has said "the only state suits that remain available are those specifically preserved by the Act" in its saving clause—namely, those brought "pursuant to the law of the *source* State." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492, 497 (1987) (applying a nearly identical saving clause under the Clean Water Act, 33 U.S.C. 1251 *et seq.*); see *AEP*, 564 U.S. at 429 (suggesting that *Ouellette*'s analysis would govern state-law claims under the Clean Air Act). Any putative tort claims that seek to apply the law of an affected State to conduct in *another* State, by contrast, continue to arise under "federal, not state, law" for jurisdictional purposes, given their inherently federal nature, *Ouellette*, 479 U.S. at 488—even if such claims may be displaced by the Clean Air Act. See *AEP*, 564 U.S. at 422-423, 429; cf. *Standard Oil*, 332 U.S. at 314 (holding that an action by the government to secure indemnity from

company that injured a United States soldier was inherently federal but federal courts should not impose that indemnity in the absence of action by Congress).

In rejecting a similar argument in this case, the district court reasoned that removal was foreclosed by the "well-pleaded complaint rule," Pet. App. 44a—the rule that in the absence of diversity jurisdiction, a state-court action involving state-law claims ordinarily may not be removed even when the merits of a federal defense may be the dispositive issue in the litigation. See *Vaden* v. *Discover Bank*, 556 U.S. 49, 59-60 (2009). But this Court has long recognized that when a plaintiff "has 'artfully pleaded' claims" by "'omitting to plead necessary federal questions,'" a court "may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998) (citation omitted). Although the district court suggested that the artful-pleading doctrine is confined to "complete preemption" under federal statutes, Pet. App. 45a, this Court has never limited that doctrine in that manner.

In cases like this one, where defendants have advanced multiple plausible grounds for removal and the court of appeals plainly has jurisdiction over a remand order, there is no reason to blinker the court's field of view. The presence of multiple grounds of removal only increases the likelihood that there is a federal interest in providing a federal forum for the suit. In such circumstances, courts of appeals should not only be able to avail themselves of their customary flexibility to choose among different dispositive issues when reviewing an order that rests on multiple grounds; they should also ensure that a case implicating many potential federal

interests really should be remanded to state court because none of the asserted grounds of removal is valid. Providing that reassurance to the defendants who were able to remove their cases on the grounds specified by Congress is consistent with the policy balance that Congress struck by allowing appellate review in those cases.

2. Respondent contends (Br. in Opp. 29) that Congress could not have intended to allow defendants with "*meritless*" arguments for removal under Section 1442 or Section 1443 to rely on those provisions "as a hook for obtaining appellate review of all other asserted grounds for federal jurisdiction," and respondent further predicts that allowing review of the entire remand order will "inevitably" lead to abuses of the appellate process. Those concerns do not justify a departure from the most natural reading of the statutory text

a. With respect to the first concern, the traditional understanding of "order" will not benefit only those defendants who raise "a baseless civil-rights or federal-officer removal argument to obtain appellate" review. Br. in Opp. 29. As explained above, even when a defendant has a meritorious argument for removal under Section 1442 or Section 1443, it could still be more efficient or otherwise appropriate for the court of appeals to uphold the removal on another ground rejected by the district court. See pp. 23-25, *supra*.

b. Nor is there reason to conclude that broader appellate review of remand orders could create incentives for defendants to make bad-faith or frivolous assertions of federal-officer or civil-rights removal grounds, simply to expand the potential for future appellate review of their alternative grounds for removal. That does not describe this case, as evidenced by the court of

appeals' lengthy discussion of the federal-officer removal statute. Pet. App. 10a-30a. And, more generally, "[s]ufficient sanctions are available to deter frivolous removal arguments" in this area, 15A Wright § 3914.11, at 706 (2d ed. 1992)—including the ability of a remanding court to "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal," 28 U.S.C. 1447(c); see, *e.g.*, Fed. R. Civ. P. 11(b)-(c).

In addition, as petitioners suggest (Br. 36), an assertion of federal-officer or civil-rights removal may be insufficient to sustain the court of appeals' own jurisdiction if that assertion "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction" or "is wholly insubstantial and frivolous." *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). That would be analogous to this Court's conclusion that a wholly insubstantial and frivolous constitutional claim would not trigger a mandatory referral to a three-judge district court under 28 U.S.C. 2284(a). *Shapiro*, 577 U.S. at 45-46.

3. Finally, if experience reveals that the plain-meaning interpretation of Section 1447(d) results in gamesmanship with non-frivolous, but weak, invocations of the federal-officer or civil-rights removal statutes, or that it results in undue delays in appeals of remand orders in certain cases, the solution will lie with "Congress, which—unlike the courts—is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment." *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019).

Congress is charged with defining the extent of, and exceptions to, appellate jurisdiction in the courts of appeals and this Court. See U.S. Const. Art. I, § 8, Cl. 9;

Art. III, § 1; Art. III, § 2, Cl. 2. It could amend Section 1447(d) to adopt respondent's view, limiting appellate review to certain issues supporting a reviewable remand order. Or it could provide for accelerated or discretionary review, as it has done in CAFA with respect to certain orders granting or denying motions to remand in class actions, 28 U.S.C. 1453(c). But until it has done so, the possibility of undesirable consequences is no basis for this Court to adopt the court of appeals' unduly narrow construction of Section 1447(d)'s second clause. "As far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevails over what it ought to have done." *Powerex Corp.*, 551 U.S. at 237-238.

CONCLUSION

The judgment of the court of appeals should be vacated or reversed, and the case remanded for further proceedings.

Respectfully submitted.

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